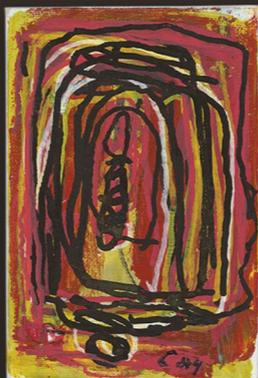


Volume 105 Number 922

International Review

of the Red Cross

Humanitarian debate: Law, policy, action



**Persons with disabilities in
armed conflict**



ICRC

International Review

of the Red Cross

Aim and scope

Established in 1869, the *International Review of the Red Cross* is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the *Review* informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the International Red Cross and Red Crescent Movement in armed conflict and other situations of violence. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Movement.

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EDITORIAL

PERSONS WITH DISABILITIES IN ARMED CONFLICTS: FROM INVISIBILITY TO VISIBILITY

Robert Mardini*

Persons with disabilities comprise 15% of the total population of the world;¹ that is, every three persons out of any given twenty people in the world, and over one billion people in total. This number does not account for those indirectly affected by discrimination, exclusion and barriers that come with disabilities, such as family members and caregivers. Additionally, due to discrimination and stigma, many persons with disabilities and their families often do not report to authorities or humanitarian organizations, and thus this figure is probably much higher, with numbers often estimated as high as 30%.² Armed conflicts increase this number, as many more people acquire new impairments, whether physical, sensory or psychosocial, as a result of military operations.

Persons with pre-existing disabilities face additional challenges and risks once an armed conflict breaks out. Accessing and receiving the basic necessities for survival, such as food, water, sanitation, shelter, healthcare and humanitarian aid, become arduous, if not impossible. In turn, this imperils these individuals' ability to live a dignified life. Fearing for their lives and security, when many are forced to flee their homes, persons with disabilities are often left behind, or simply cannot leave, facing the challenges and barriers exacerbated by military operations.

Urban warfare and the use of explosive weapons with wide-area impact in populated areas leave many affected people with life-long disabilities or severe psychological trauma.³ What remains of healthcare facilities in such environments is often overwhelmed with the sick and wounded, typically with complex injuries.

Persons with disabilities, who already face discrimination and stigma in peacetime, often face even greater harm in armed conflicts – including being directly targeted or indiscriminately attacked. Women and girls with disabilities

* Director-General, International Committee of the Red Cross.

1 World Health Organization and The World Bank, *World Report on Disability*, 2011, p. 29, available at: www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability (all internet references were accessed in November 2022).

2 International Committee of the Red Cross (ICRC), *The ICRC's Vision 2030 on Disability*, 2020, p. 3, available at: www.icrc.org/en/publication/4494-icrcs-vision-2030-disability.

3 Robert Mardini, "'We See Deliberate Attacks on Civilians and Civilian Objects, Causing Untold Suffering.' Briefing to UN Security Council Open Debate on Protection of Civilians", ICRC, 25 May 2022, available at: www.icrc.org/en/document/deliberate-attacks-on-civilians-causing-untold-suffering.

face an increased risk of sexual violence,⁴ while boys and men with disabilities are forcibly recruited or mistakenly targeted as members of parties to the conflict.⁵ Institutions housing or caring for persons with disabilities have been targeted or used as human shields.⁶

International humanitarian law (IHL) has rules governing armed conflicts and the protection of civilians, including, of course, persons with disabilities. The fundamental principles of IHL regulating the conduct of hostilities (distinction, proportionality and precaution) remain important in the protection of persons with disabilities in armed conflicts, including using a disability lens when analysing and respecting these principles. Parties to conflicts must ensure that military operations and attacks effectively distinguish civilians and civilian objects from military objectives. This duty includes avoiding attacking hospitals and institutions that house and care for persons with disabilities. Combatants and fighters must distinguish between fighters and civilians, and must not attack persons with disabilities for not understanding or obeying orders. The proportionality assessment of every attack must take persons with pre-existing disabilities into account, as well as considering the new physical and mental disabilities such attacks may cause. Military commanders must consider that 15% of any given population in an area are persons with disabilities before ordering attacks. Particularly when it comes to the principle of precaution, it is imperative that parties to conflicts consider persons with disabilities and the various disabilities that may exist. As such, advance warnings will only be effective if they can reach all civilians, including persons with disabilities, and be easily understood and implemented. This requires parties to the conflict to use and employ various communication formats to ensure that persons with different types of disabilities may effectively access and understand those warnings, giving them enough time to shelter in safe areas. Ensuring accessibility of the built environment is also key so that civilians with disabilities can find safe shelter, like other civilians without disabilities, and be part of temporary evacuations to flee hostilities. IHL rules designed to provide specific protections for persons with disabilities should always be respected.

In situations of armed conflicts, the Convention on the Rights of Persons with Disabilities (CRPD) plays an important and complementary role to ensure the protection of persons with disabilities and their rights, which is made explicit through the application of Article 11.⁷ The CRPD also provides for interpretation of IHL on the basis of the much-needed shift from the medical model of disability to that of the evolving social and human rights model of disability. This aims to ensure that personhood and autonomy of persons with disabilities are

4 Alice Priddy, *Disability and Armed Conflict*, Geneva Academy Briefing No. 14, April 2019, p. 12, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202014-interactive.pdf.

5 Please see Nicolas Hocq and Nour Assaf, “Voices of Resilience: The Perspective of Persons with Disabilities in Armed Conflict”, in this issue of the *Review*.

6 A. Priddy, above note 4, p. 12.

7 For more on the history and importance of Article 11, please refer to Andrew Begg, “From Invisibility to Positive Legal Protection: The Drafting of Article 11 of the Convention on the Rights of Persons with Disabilities”, in this issue of the *Review*.

duly recognized; that they can participate in measures affecting them so that they are seen and heard; and that their varied experiences are reflected.

In order to meet humanitarian needs wherever they are to be found, without discrimination, the fundamental principle of impartiality requires that persons with disabilities should be specifically accommodated and/or be made a priority during the delivery of humanitarian assistance.⁸ It is known that adverse distinction/discrimination is prohibited in implementing the rules of IHL and in humanitarian action. However, non-adverse distinction based on the specific barriers and needs of persons is justified and even necessary, if it is designed to ensure that persons with disabilities may access relief services on an equal basis with other civilians.⁹ This can be done by ensuring that places where humanitarian aid is provided are accessible to persons with physical disabilities, and that persons with visual, sensory or intellectual disabilities know of, understand and receive humanitarian aid. It also includes measures to ensure the transportation of humanitarian aid to homes or shelters of persons with disabilities who cannot travel to the location where aid is provided. This requires proactive work from humanitarian organizations, donor countries and institutions to identify and collect relevant and accurate data on persons with disabilities affected by armed conflicts.¹⁰ Donor countries and institutions, as well as humanitarian organizations, also have a role to play in ensuring that their policies are disability-inclusive, by including persons with disabilities in decision making.¹¹

In 2020, the International Committee of the Red Cross (ICRC) adopted Vision 2030 on Disability¹² to ensure that our humanitarian services and our employment policies and practices are inclusive, and to promote the inclusion of and provide opportunities for persons with disabilities in conflict-affected areas to achieve their full potential.¹³ Our Vision for 2030 is built upon four very important pillars. The first is to ensure that our programmes and operations are inclusive and accessible to persons with different disabilities, promoting their protection and safety with the utmost respect for their dignity. The second pillar is to deliver and develop targeted physical rehabilitation services, ensuring that these services are of the highest quality, equitably accessible and sustainable to persons with disabilities living in conflict-affected settings. The third pillar is to build an enabling work environment for persons with disabilities by meeting the standards under disability-inclusive human resources practices and policies. The final pillar is to contribute to a legal and policy environment that promotes the

8 ICRC, “How Law Protects Persons with Disabilities in Armed Conflict”, 13 December 2017, p. 4, available at: <https://www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict>.

9 For more on this subject, please refer to Alexander Breitegger, “Increasing Visibility of Persons with Disabilities in Armed Conflict: Implications for Interpreting and Applying IHL”, in this issue of the *Review*.

10 ICRC, above note 8, p. 4.

11 A best practice could be the work of Finland, please see the “Interview with His Excellency Pekka Haavisto: Foreign Minister of Finland”, in this issue of the *Review*.

12 ICRC, above note 2.

13 *Ibid.*, p. 2.

inclusion of persons with disabilities in humanitarian activities provided in conflict-affected settings, as well as their protection and safety.

The ICRC cannot meet its Vision 2030 on Disability alone. Partnerships within the Red Cross and Red Crescent Movement, with organizations of persons with disabilities, the humanitarian sector at large, with local, regional and international organizations and the private sector are crucial to our work towards a disability-inclusive sector.

Additionally, the coordination, collaboration and communication with and among the various partners require additional funding.

As an institution, our main goal is to protect and assist people affected by armed conflicts, and that includes persons with disabilities. This “Persons with disabilities in armed conflict” issue of the *International Review of the Red Cross* is one step towards meeting that goal. As evidenced by the article in this issue by Sonia Crenn and Charlotte Mohr from the ICRC Library,¹⁴ so far, there is a dearth of articles, books or other scholarly writings on the rights and protection of persons with disabilities, and much less still in the realm of armed conflicts. This had created a gap in the legal and policy environment protecting persons with disabilities. This issue of the *Review* is therefore expected, as per the fourth pillar of ICRC’s Vision 2030 on Disability, to contribute to the legal and policy environment promoting the inclusion of persons with disabilities in humanitarian activities, and promoting their protection and safety in armed conflicts and other situations of violence. This issue features around twenty-five articles written by persons with disabilities themselves, academics, scholars and practitioners on various themes related to the protection of persons with disabilities in armed conflicts such as IHL, human rights law, international criminal law, humanitarian action and peace and security. This issue also features interviews with His Royal Highness Prince Mired bin Raad Zeid Al-Hussein, His Excellency Pekka Haavisto – Minister of Foreign Affairs of Finland, and Mr Gerard Quinn – United Nations Special Rapporteur on the Rights of Persons with Disabilities, on the legal protection and inclusion of persons with disabilities. This issue also brings together more than ten persons with disabilities and humanitarian aid professionals from all over the world to share their testimonies and experiences of living in armed conflict and violent settings.¹⁵ Fittingly, this issue starts with these testimonies.

Persons with disabilities are all too often invisible to society, even more so in armed conflicts. Ultimately, it is the ICRC’s desire and goal to help persons with disabilities gain visibility and claim centre stage – not as victims, but as actors and agents of change.

14 Please refer to Sonia Crenn and Charlotte Mohr, “The Protection of Persons with Disabilities in Armed Conflict: An Empty Shelf in an IHL-specialized Library?”, in this issue of the *Review*.

15 N. Hocq and N. Assaf, above note 5.

Voices of resilience: The perspective of persons with disabilities in armed conflict

Nicolas Hocq and Nour Assaf

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Ukraine

Novyi Bug Inclusive Resource Center



The advice, opinions and statements contained in this article are those of the author/s and do not necessarily reflect the views of the ICRC. The ICRC does not necessarily represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided in this article.

Novyi Bug is a town with a population of more than 15,000 residents. It is situated in the Bashtan district of the Mykolaiv region, in Ukraine. The situation in Novyi Bug remains very unpredictable. At the end of May 2022 there were attacks on the town of Novyi Bug and the Mykolaiv region was hit by rockets and missiles. Many civilian infrastructures, including inclusive resource centers, houses and hospital premises were either destroyed or damaged.

The International Committee of the Red Cross (ICRC) met with the Head of Education in Novyi Bug. As Head of Education, our interlocutor seemed preoccupied with the high level of destruction and its impact on children's learning. One of the education facilities' buildings was hit during the hostilities a few months ago which resulted in shattered windows and walls. No one was injured, and all the specialized equipment had been safely stored away.

Children are now receiving individual sessions online, but the Head of Education highlighted the need to support the most vulnerable children with IT devices to enable some form of access to education and communication with teachers. In total, forty-seven children are enrolled in the Center and are receiving services of various specialties. Twenty-six children are highly vulnerable – not only with physical, mental and learning disabilities – but also because they come from disadvantaged backgrounds and their parents have a low financial income. The Head of Education shared his story and the story of the Center:

Novyi Bug Inclusive Resource Center was founded in 2019 and actively began to help children with special educational needs. Specialists of the Center provide services and resolve issues related to education and educational activities. We assess the learning developmental needs of children and, based on their individual needs and their personality, we adjust their education plans accordingly. The goal is to integrate children into society as much as possible.

I was brought here by a great desire to help families where children have special needs. My goal as a manager was to maintain a center where children would be able to receive free and qualified help. Such centers are created with the mission of working for the benefit of children who need support.

The conflict seriously affected my personal life because it divided it into the period “before the war” and “during the war”. But we're hanging on and we will make it because we are not alone. We are united towards a certain goal. In our work with children, we aim to be even more productive and helpful, now more than ever before.

A missile flew near our center on May 29, 2022, damaging the roof, windows and doors. Despite the ongoing challenges, we want to help with even greater strength the children.

I believe that the Ministry of Education is concerned about children with special needs and those with various forms of disabilities, which is why the Inclusive Resource Center was established. It enabled children to study in schools, and to adapt and socialize. All children with special educational needs can learn together with everyone, so that they do not feel different,

oppressed or rejected by society. In my opinion, it is very good that an inclusive form of education is available.

Education is definitely important. Everything starts with children and education: from the kind of person they will grow up into, to who by and how the country is governed. It all depends on education and upbringing.

For me, the most important thing today is for the war to end, for peace to come to Ukraine, and for conflicts between other countries to cease. People should be able to return to their country, to their homes. Children need to see a peaceful life, fall asleep and wake up peacefully. This is my biggest dream. I want to see a beautiful future in a peaceful, independent, prosperous country.

Syria

Iman

Iman is a clinical psychologist. She is Palestinian, and lives in Aleppo, Syria. She has worked in the Aleppo Physical Rehabilitation Program (PRP) since 2019, and provides psychological support to PRP service users, including weapon-wounded. While service users are provided with a prosthesis and go through the rehabilitation process with the physiotherapists, they can also have access to psychological support.

How did the violence/conflict impact your personal life?

During the last ten years, I have both lived and worked in a context affected by the conflict. Conflict has affected everything: my personal, family and social life, my studies, my work. Some moments have been particularly difficult, as when I was under siege for six months, when losing friends and relatives, or when being caught across shooting. I had to postpone my studies because I could not reach the University. Sometimes, I had to drive through long and dangerous roads to reach my work. Now things are a little more secure. But we have been hit by the economic crisis. In addition to the devaluation of the money, we face difficulties to access fuel, electricity, water and other basic needs. But life goes on, and we need to navigate the uncertainty and create new ways to survive and cope.

How do you see that your work impacts the persons you are helping?

I have worked for three years in the Aleppo Physical Rehabilitation Program. Most of the PRP service users that come to the MHPSS [mental health and psychosocial support] service have gone through a traumatic event, leading to the amputation of one or two legs. They are of all ages; the youngest 1-year-old, and the oldest 67. Many of the amputations are conflict-related, for example, shelling, mines or unexploded devices. Also, amputations can be due to complications of diseases due to a lack of access to medical care, such as diabetes.

I facilitate individual, family and group sessions with the service users and/or caretakers. Both service users and caretakers have important mental health and psychosocial needs. But they also have resilience factors, and together we try to identify and strengthen them. I use different techniques, so they can promote their well-being and their daily functionality.

For example, Fatima was the breadwinner of the family. She was an amputee from one leg after she stepped on a mine. Her husband abandoned her with the children. “You are a half woman”, he said. Fatima was overwhelmed. She was feeling guilty, thinking it was her responsibility to have stepped into the mine. She was severely anxious and frustrated. This had an impact on her relationship with her children. She screamed, yelled, and hit them constantly. We had sessions together for eight months, and we found ways to decrease the anxiety, guilt and frustration. For the first time in years, Fatima smiled. We worked on reinforcing her strengths, including her parenting skills. When Fatima felt better, I referred her to vocational training, and then to a micro-economic initiative. Now, she and her children are doing well. She sent me a picture some months ago. She was celebrating a birthday with her children and relatives. She was smiling.

I also work with caretakers, particularly when the service user is a child who has gone through an amputation. Sometimes some parents or caretakers can act over-protecting the child, limiting their autonomy and functionality in many areas of their life. On the other hand, some caretakers can be overwhelmed, and have negative parenting skills, including violence. I remember Mona’s aunt, telling her, “if you do not stop crying, they will cut your other leg”. During the sessions, we discuss with the caretakers how they can promote the child’s strengths and autonomy.

Another important part of my job is the facilitation of group sessions, where patients having similar conditions and ages can support each other. In these sessions, they share common experiences and challenges. They receive and provide pieces of advice from/to each other, knowing the others understand them, as they have gone and are still going through similar experiences. For example, I remember Abdallah, 16 years old. He refused another correction surgery, as he did not want to go again through the painful process. With the support and the advice of his MHPSS group colleagues, he changed his mind. Sometimes, participants continue their support even after the group sessions are finalized. Friendship can be built. For example, Abdallah was visited after his surgery by his MHPSS group colleagues. I also facilitate some groups with caretakers. They also face extremely difficult situations, that affect their mental health. Sharing with other caretakers can be very beneficial.

COVID-19 had a great impact on my work. The PRP was closed for some weeks, and I had to do remote follow-up sessions, supporting the patients through phone calls, while being myself in this confusing situation. Remote support was complex during this time, as patients usually do not have a room at home where they can be alone for one hour, to have private conversations. And not all the patients had phones. Some days, without electricity, it was even impossible for

me to charge my phone and call. It was a release when the COVID-19 prevention measures cooled down, and we could restart the individual and family sessions. But, unfortunately, the group sessions have been suspended for months.

What is your relationship with work?

I consider my work in the PRC [physical rehabilitation centre] highly self-rewarding because I can see the impact of my work on my patients' life. For example, Sana, 3 years old, came to the centre for her first prosthesis. She was terrified, crying, and kicking the physiotherapists. It was her first experience trying to walk with a prosthesis. Until now, she had only crawled on the floor. I supported her and the psychotherapist team, and together we slowly made her get familiar with the device. It was extremely rewarding for the team to see her after some sessions walking.

But, on the other hand, the exposure to people having gone through extremely highly traumatic events also affects me. Sometimes it is difficult to disconnect and leave the patients' stories in the office. Disconnecting and separating personal and professional lives need constant self-awareness and effort.

Do you have anything to add?

Looking back on these three years working in the PRP, I realize how many obstacles the team and I have faced, and how we are trying to overcome them day-to-day: the conflict, the insecurity, the COVID-19, the economic instability. We all have gone through intense and mixed emotions during these years: reward, frustration, excitement, fear, success, sadness, and growth. I am satisfied with myself. And I am particularly proud of the positive impact I have had on each patient I worked with.

South Sudan

Ababiku



A mother of four children, Ababiku, who had an accident in 2020 along a highway, narrated her painful experience after the accident that had left her without one of her arms. Because of this, Ababiku could not complete her ordinary-level education, and stopped her academic journey earlier than she had planned.

I was involved in a serious car accident in 2020 on the road. We were in a small car which carried seven passengers. I was seated in the front seat beside the driver. Unexpectedly, a big truck hit our car. My left arm was cut off by glass and fell off on the spot. Another male passenger's leg was broken too. I did not understand what happened to the other passengers but I and the man whose leg was broken remained unconscious and helpless. People came and helped us. I then found myself in the hospital.

The truck's driver ran away, and he wasn't found till now. Our driver ran his own way too. No justice prevailed and no one claimed responsibility.

There was a need for support from my family, but my husband, father and brother were jobless. This incident had a terrible impact on my life because people mock and disrespect me. I struggle with shame and lack of support for myself and my children. I cannot manage heavy work with one hand, such as collecting firewood. My social life is impacted when I speak with people. Though people sometimes understand me, I am still missing out on collaboration with some friends and colleagues whom I was interacting with before.

When I came to the physical rehabilitation centre, I received something called counselling. After talking, I felt relieved and better than before. I attended group support where I saw people with different disabilities, and I heard different testimonies on how they struggled and coped with their problems. I compared my life with some of them and I found myself better off than some of the patients I met at the centre. I have also benefitted from help to start a small business, so now I know that life must move on as long as I am still alive.

Elisa



Elisa is a mother of five children, but one of them is deceased. Elisa suffers from diabetes. In July 2008, fighting erupted in her residential area. She was hit by a bullet in the chest in her house. She was flown to the closest metropolis to seek medication.

I was shot in the chest when fighting erupted in July 2008. I was taken to a hospital but upon reaching, another fighting started, and the movement was limited and I could not see a doctor. I stayed at home for three months. I was sick with diabetes at the same time and this was getting worse, my right leg was terribly swollen and kept on increasing. After three months, I was taken to the hospital and the doctor said there was no treatment to recover the leg, and the only option was to amputate it because the infection was increasing. My chest was also scanned through X-ray, and the bullet was found deeply hiding in the ribs. The doctor could not do the operation because it was too risky for my life. Until now the bullet has not been removed.

My children and I got support from my mother. My husband has stopped supporting us since 2010. He does not care since I was amputated. I came to the physical rehabilitation centre to get a prosthesis and in that centre, I attended counselling sessions for the first time which helped me a lot to relieve my constant worry, thinking too much, and the sleeplessness I was facing. Before counselling sessions, I was covered by a spirit of shame, people seeing me amputated and me walking with crutches was challenging.

My 19-year-old daughter cannot go to school anymore as she is working in a restaurant to support us. My mother who was supporting us got an eye problem and she cannot do anything now. I was hopeless and worrying about the future of my children but after visiting the centre and talking to people I learned how to manage my stress, identify the symptoms, and take better care of myself, also connecting with other amputees during a group session. I made new friends, I am still in touch with them after leaving the centre.

Benjamin



Benjamin is a 40-year-old man who was injected with the wrong medicine as a child. Since then, he has experienced walking issues and suffers from insecurity due to armed conflict.

I am Benjamin, I am 40-year-old. I contracted disability due to a wrong injection of Chloroquine by a nurse at Wau Teaching Hospital when I was 7 years old. I was sick with Malaria, and taken to the hospital for treatment and that is where I was injected with Chloroquine. The injection swelled and led to paralysis of my left leg. I had a terrifying life during the conflict in

2016 and 2017, and as a disabled person I was totally vulnerable. It was very difficult to move but my family and I survived as we had run to the UN camp for safety. I have experienced a lot of challenges and difficulties in my life such as walking problems, and daily stress due to family socio-economic status until I came across services provided by the ICRC.

I have benefitted from other humanitarian support with food and shelter, but the unique support provided by the ICRC such as crutches were more important to me. I also had a small financial support to start my business, and I was offered counselling. These services were incredible and amazing. From today onward, the most important thing to me is that I was heard. My physical condition will not change but I am in good spirit and because of that I will be an agent of mental health by referring and advising my friends who are suffering psychologically to seek for psychological support from the ICRC like me. This has helped me and is continuing to help me.

Hussein



Hussein is a 26-year-old man who has had struggles since the age of 3 years, when he became paralysed. He was abandoned by his mother and suffered terribly from the war.

My name is Hussein, I am 26-year-old, and I completed the secondary school this year 2022.

My birthplace is 311 km away from the closest metropolis. I developed severe sickness at the age of 3. I was taken to the hospital, but my health could not improve, hence I became paralysed.

When my mother realized that I could no longer walk, she abandoned me. My grandmother (mother of my mother) took care of me and sent me to school until the present day.

In 2016, the war broke out in my town and my grandmother's properties were looted and houses destroyed. My grandmother ran to the closest metropolis leaving me behind in the conflict. It was a very challenging and difficult time for me. I was with no help, no moral support, no strength. I was brought to the closest metropolis by the ICRC team after an outreach visit in 2017 and was given a wheelchair. I found my grandmother there. My first humanitarian support was when the ICRC provided me with free transport and gave me a wheelchair.

The violence and disability have impacted my life badly as I almost died of hunger and of stress of being abandoned and left alone. There was no support from anybody until I was brought to the closest metropolis by the ICRC. Despite being brought here and given a wheelchair, I had been planning to commit suicide because of several reasons; I am very poor, I can't walk, rejected by my mother, and nobody is providing good care to me, especially food. My grandmother is struggling, and I saw myself as a burden to my old grandma. Nobody supported me for school requirements as my grandmother had no financial power.

However, the support of the ICRC has changed my life to an unexpected level. The ICRC supported me with cash money that helped me set up my business. I also got help by getting psychological support every week, where all the stress and bad thinking I have been going through has been discussed and I build on resilience. Also, the ICRC team had been campaigning for my employment as a disabled person, and I was recently appointed as the Secretary-General for Hearing Impairment Association in the city. Now, I am a leader, my business is going on well, I completed my secondary school through ICRC support, and all the stress has totally gone. I learned to manage stress through counselling sessions. I do see my future is now very bright as I am waiting for University admission.

Victoria



Victoria has been disabled since she was a child. She has suffered from bullying and has felt depressed and alone since then. The context of violence has not made it easier for her.

My name is Victoria, I am 21-year-old. I got disabled due to a severe sickness that I had between the age of 6 to 8.

This sickness led to permanent paralysis of my left hand and leg. The violence that erupted in 2016 and 2017 disrupted my life seriously, as well as school. All our properties were looted, and our house was burned down to ashes among others. Throughout my lifetime, I used to isolate myself from other children including my siblings because of my disability. Children used to laugh at me, bully me, and mock me as well as say all disturbing words against me both at home and school.

Because of this, I preferred to stay alone and didn't mix with them. I didn't play with the children though my aunt tried to convince me to stay with my siblings, school children and our neighbour's children, but I would never accept. The only thing that was in my mind was to commit suicide because God didn't like me, otherwise he wouldn't have let me be disabled.

However, I thank God that he brought the ICRC team to help me. The ICRC gave crutches to help me walk and go to school, supported me with money and, most importantly, provided me with psychological support. I shared with the ICRC counsellor how I was being treated by school children, neighbours' children and my siblings, and I also revived the violence in 2016–2017 as I still had memories of it. The ICRC counsellor gave me a lot of emotional support together with my aunt. My aunt used to accompany me to the ICRC for counselling sessions, my aunt participated together with me in some sessions, and she took some words and helped talk to my siblings and neighbours to avoid bullying me. My aunt was very supportive, even at home she was trying her best to provide the counselling herself. Now, I am completely happy! I don't think of suicide again, and I am now living happily and going to school.

All the stress that I have been going through for so long has gone, and everything has been addressed together with the ICRC team. The business that I have set up using the money given to me by the ICRC is now progressing very well, and my sisters and brothers are helping me to grow it further. If it wasn't for ICRC support, my life would have not been the way it is today. I have now gained respect as a complete human being.

Lebanon

Haya Rawi



Haya Rawi works as a disability inclusion advisor with the ICRC in Lebanon. Her role is to ensure the inclusion and participation of persons with disability in society, through societal inclusion programmes which involve sports, socio-economic projects and disability awareness.

Since Haya was born, her impairment (upper limb amputation) has been a motivation and a reminder to be strong and to challenge both herself and society. She studied architecture, and her career led her to the humanitarian field.

When you ask Haya what she enjoys about her work, you immediately hear the enthusiasm in her voice:

Working in this field has helped me accept my own impairment. I feel more empowered and more self-confident when I help and support other people – especially those with disability. I really like to empower other people, by listening to their challenges and stories. You know, sometimes people just want to talk about what they are going through. I feel grateful when they share their story with me.

Haya feels that she learns a lot from persons with disability and is eager to organize many events to encourage their inclusion. Among those events, she and her team have set up various initiatives related to career development, access to nature (e.g. hikes), or sports (e.g. wheelchair basketball).

Recently, Haya has been working with Fatima, who accepted to share her story.

Fatima is a 44-year-old Lebanese woman. She was amputated at upper and lower extremities (leg and hand fingers) when she was young. She remembers: “In 1981, I held a toy while playing in the yard. The toy was a mine; at that time, we were at war with Israel. I was with my mother and brother. My mother was injured, and my brother died. I still remember that moment. I was suffering from severe pain.”

For years, she felt helpless and desperate because of her disability. It affected her relationship with her family and especially her mother. Her mother would always blame her for the accident. Fatima recalls: “I used to speak to the mirror and cry because no one was there to listen to me. I used to stay at home to hide my disability.”

The injury affected her physically, mentally and socially. She felt deprived of things other girls her age could do, like wearing non-medical shoes or clothes, and playing with her friends: “I couldn’t continue my education due to many reasons: the level of the school, the motivation, and the follow-ups from my parents to study, because my mother was injured as well.”

Before she was married, when she met someone, she would try not to move too much to prevent her from showing her disability. But then she met the man who is now her husband: “He is so supportive and always helps me doing some tasks.”

Fatima is now married and has two children and when you ask her what the most important thing for her today is, she answers immediately: “My children. I am dedicating my life to them.” Fatima’s dream is to see her children grow up to be healthy, happy and successful.

Still today, Fatima feels that she can speak more easily with people who have experienced a similar situation: “I prefer to speak about my disability with persons with a disability because we have the same case, and they will understand me.”

When you speak about Fatima with Haya, something comes out clearly. Haya deeply cares about others and feels happy to bring help and support through her work. She recalls that Fatima would hold back on the first day that they met. But as they met again, Haya felt that Fatima would be more and more open about her story. “The communication would improve over time”, says Haya.

Fatima went through the Career Development Program and received some training and support from the Economic Security Department of the ICRC. Haya is hopeful that Fatima will soon open her own business and will be more open to talking with others about her story.

Congo

Centre Nguvu Yetu pour Enfants Sourds et Défavorisés



Kamonyo is the Director of CENYSEED (Nguvu Yetu Centre for the Special Education of Discriminated Deaf Children). He agreed to share the story of his fight for children with disabilities.

I met my wife in Nigeria as a teacher. My wife and I married on July 22, 1988. Beatrice was a teacher at the Institute for the Deaf and Mute in Kinshasa. She was a truly wonderful help in my vocation to create the Hope for the Deaf School in Kisangani, to set up the schools in Lubunga, Mbandaka, Buta and Uvira, and to train the teachers.

She advised me to think of the deaf and other discriminated children such as the deafblind in rural areas, and together we created a school in Rutshuru and then in Masisi. Beatrice always considered these children as her own and educated them

with the same heart. She was called to join the Lord in 2018 and left me to continue the vital work we had started together.

Three years after Beatrice left, I could no longer bear the weight of loneliness. In 2021, I met Apolline whose vocation was to work with the most vulnerable. We got married in September 2021 and at the same time made a commitment to support the deafblind. For the moment, Apolline is pursuing her studies in the United States, while we are continuing the implementation of the school for the deafblind in Goma (North Kivu, Democratic Republic of Congo). Although, Apolline is not deaf, she will master in a short time the sign language, a proof of her love.

We are in the process of organizing an inclusive education. Currently, we have set up two dormitories in our own house and two classrooms. We try to eat what God gives us while we wait for God's help.

The deafblind children come to us mainly from Masisi, Rutshuru, Nyiragongo and Goma. Most of the parents who are victims of the conflicts are impoverished and suffer from the context of insecurity.

The armed conflicts have negatively affected the schools in Masisi and Mweso because teachers, due to lack of salary, have stopped teaching deaf people. In Rutshuru, Masisi and Nyiragongo, children, youth and adults with disabilities are greatly affected by the armed conflicts. Parents are impoverished and unable to provide for themselves, their fields and small livestock are looted, houses are burned down or are in unsanitary conditions.

Blind people are very affected. Some parents live in despair believing that their child will not be able to feed, educate or communicate properly. As such, there are many orphans. A priority and necessity is to build an orphanage to facilitate the reception of these orphans. CENYSESED is an organization that I founded several years ago and that takes care of deaf and deafblind children. They are taken care of until the situation becomes stable in their home area. CENYSESED also aims to provide home-based education to help the community understand disability, deafness, deafblindness, autism and handicap to strengthen a grassroots community intervention.

The school for deaf children in Kiwanja



The school for deaf children in Kiwanja has been caring for more than 150 deaf and disabled children for over more than two months. It is now occupied by rebels. The children should have been back at school in September but as the rebels are still present in the community and in the school, we are organizing ourselves to see how we can help the children. Our current concern is that all the parents of these deaf children are affected by the war, and this will cause a great problem to organize themselves and meet the needs of the children for the start of the school year.

The war has impoverished the parents and prevents them from caring for their children. There are several cases of orphans. The war also prevents the Kiwanja School from having access to funding, and has led to the flight of teachers.

Nyirasafari



We recently had the case of a young deaf woman named Nyirasafari. She is 27 years old and was the victim of armed conflict in the Masisi territory. She was raped several times by armed men and, as a result, became pregnant. She currently lives with her two children, one who is deaf-mute and the other who is deafblind. Following the poor living conditions of people living in rural areas, now the young woman leads a difficult life where she must manage her traumas and at the same time ensure the care for her two children.

The young woman and her two children are now refugees within the organization CENYSED, where they are cared for until the situation returns to normal in their region of origin.

Alexander



Alexander is a deaf boy from the Masisi territory. He was captured by a rebel group recently. Despite his disability and without his will, he has become a soldier of the rebel group. Since the beginning of the year in this region we have recorded the death of two deaf people, who were killed by the rebel groups as they disagreed to join the rebels. Our association, which operates in this territory, gave us the information that the young boy was taken by force, and today we have started the process of withdrawing this boy from this armed group so that he can resume a normal life.

Drawings from Iman's mental health and psychosocial support sessions in Aleppo's physical rehabilitation centre

A world full of monsters



Although the weather is sunny, all doors and windows are closed because we are afraid of the monster!

What would happen if we drew a fence around it to keep us safe?

Nothing would happen. What is the benefit of one fence in a world full of monsters?

Abd, 8 years

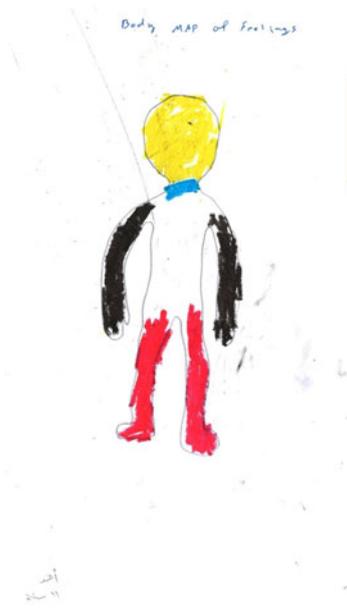
I am perfect



I painted myself this way because my home is the only place where I don't have to hide my amputation, and at the same time, I don't feel like I'm inferior to others.

Maram, 7 years

Body map of feelings



Feeling	Colour	Location	Why?
Joy	Yellow	Face	I can smile
Sadness	Blue	Neck	I am suffocating
Fear	Black	Arms	I can't defend myself
Anger	Red	Legs	Because of pain

Ahmad, 11 years

One step in front of the other



Aya, 6 years

Putting one step in front of the other or climbing a stair is a daily routine for us, but for Aya it was a frightening experience she will avoid. These fears make children feel incapable and limit them from reaching their full potential.

After six MHPSS sessions, Aya is ready to leave her wheelchair, use a prosthesis and face her daily challenges.



Dreams of a Deafblind Person!

Alex Garcia

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Alex Garcia, the “Gaucho”, is one of the most famous Persons with Rare Disease and Deafblind Persons in the world. He is an expert in special education at the Federal University of Santa Maria in the state of Rio Grande do Sul (UFSM/RS). He was the first Deafblind Person and Person with Hydrocephalus and Rare Disease to finish a post-graduate degree at a Brazilian university. He is the founder of the Gaucha Association of Parents and Friends of Deafblind people and people with Multiple Disabilities (AGAPASM).¹ In Brazil, he has conducted pioneering research to find Deafblind people throughout the state of Rio Grande do Sul, where he is considered “the father” of Deafblindness. Since 2004, as a volunteer, he has structured a programme of home care with families of Deafblind people in Brazil. The programme helps with information and educational orientation, with medical and social referrals, with the training of professionals to attend Deafblind people in their original places, adapting these spaces, and also with special programmes in schools. As a writer, he was the first Deafblind Person to write a book about education in Latin America. His book “Deafblindness: Empirical and Scientific” was published in 2008. He was the first Deafblind Person in Brazil and Latin America to participate in a training programme for teachers with total liberty, held in Cuiabá, in the state of Mato Grosso. He was also the first Deafblind Person in Brazil and Latin America to work in a training programme for teachers with total liberty, where he taught two people with disabilities (a young blind educator and a young deaf educator). Alex also writes for the magazine *Reação*. Alex Garcia was the only Deafblind Person in the world to participate in the High-Level Meeting on Disability and Development “The Way

¹ See www.agapasm.com.br (internet reference was accessed in November 2022).

The advice, opinions and statements contained in this article are those of the author/s and do not necessarily reflect the views of the ICRC. The ICRC does not necessarily represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided in this article.

Forward: A Disability-Inclusive Development Agenda Towards 2015 and Beyond” held in 2013 at the United Nations headquarters in New York. Also in 2013 he was the proponent of a public hearing to promote social inclusion of people with Deafblindness – the first hearing to deal with the issue in the history of Brazil. Alex Garcia was one of the winners, in the category “Personalities”, of the Brasil Mais Inclusão Award 2016. Email: agapasm@agapasm.com.br.

* * *

I dream that one day... I will be “less” invisible for Humankind.

I dream that one day... Humankind will recover the patience it has lost.

I dream that one day... Humankind will recover its wisdom and will understand my communication.

I dream that one day... Humankind will be close again as in ancient times.

I dream that one day... Humankind will be free of prejudice and will be able to touch me without any fear.

I dream that one day... I won’t be “just a brick in the wall” anymore, as Pink Floyd said in the song “Another brick in the wall”.

I dream that one day... I won’t need to “drink from the same water fountain” as Carl Jung, one of the founders of modern Psychoanalysis, said.

I dream that one day... Humankind will be able to eliminate the label that deafblindness is the most terrifying condition.

I dream that one day... Humankind will assume that “being alone” doesn’t mean to be abandoned.

I dream that one day... I will sow the “loneliness” that deafblindness imposes us as a possible aim to be enjoyed because we won’t be afraid of ourselves.

I dream that one day... I will change the pre-assumptions concerning my identity and the sentence which is currently repeated “Poor thing, he/she is deafblind” will be left in the past.

I dream that one day... Humankind will see my being and will indeed value my essence as my fight and then will say “Great! He/she is a deafblind person”.

I dream that one day... I will erase the shame from Humankind’s mind as a tool of controlling.

I dream that one day... Humankind will understand and value that all people are a Divine Creations: alike, however, incomplete.

I dream that one day... I will not just “exist” but actually “be”.

I dream that one day... I will learn to be “strong” so that nothing can defeat me.

I dream that one day... I will be “me” so nobody will forget me.

I dream that one day... My dreams will design the future.

I dream that one day... Humankind will be “human”.



Interview with His Royal Highness Prince Mired bin Raad Zeid Al-Hussein of Jordan*

Born in Amman on 11 June 1965, His Royal Highness Prince Mired Raad Zeid Al-Hussein earned his BA degree from Tufts University in 1987 and his MA degree from the Fletcher School of Law and Diplomacy in 1995, with a specialization in international relations/strategic studies. He continued his education at Cambridge University, England, where he received an MPhil in historical studies in 1998. In addition, Prince Mired attended the British Royal Military Academy Sandhurst in 1990 and served for several years in the Jordanian Armed Forces, reaching the rank of Lieutenant Colonel.

Upon leaving the military, Prince Mired decided to continue serving his country by other means, dedicating his life to humanitarian and social causes. He has been the Chairman of the National Committee for Demining and Rehabilitation since 2004, and from November 2007 to November 2008 he was President of the Eighth Meeting of States Parties to the Anti-Personnel Mine Ban Convention. He has also served as the Special Envoy of the Convention since 2009 and has had the honour and privilege of travelling the world advocating for further accession by countries that have not yet acceded to the Convention, as well as calling for the implementation of the Convention's articles by the States that have done so.

Prince Mired is also President of the Hashemite Commission for Disabled Soldiers, a position he has held since 2000. Over the course of the last two decades, the Commission has been able to provide a wide variety of different services, acting as

* Interview conducted by Bruno Demeyere, Editor-in-Chief of the *Review*.

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a support network to all servicemen and servicewomen with disabilities in the Kingdom.

In addition, from 2008 through to 2013, Prince Mired served as Vice-President of the Higher Council for the Affairs of Persons with Disabilities, and in 2014 he was appointed by Royal Decree to serve as its President, succeeding his father, HRH Prince Raad Bin Zeid. In 2017, with the passing of groundbreaking new legislation calling for the rights of persons with disabilities, the Council was renamed as the Higher Council for the Rights of Persons with Disabilities. Prince Mired also served a short stint as President of the Jordanian Paralympic Committee from 2017 to 2018.

On 28 February 2021, in addition to all his aforementioned responsibilities, Prince Mired was appointed by Royal Decree as Chief Chamberlain to His Majesty King Abdullah II Ibn Al-Hussein of Jordan.

Prince Mired is married to HRH Princess Dina Mired. They have three children, Shirin, Rakan and Jafar.

Keywords: persons with disabilities and accessibility, inclusion of persons with disabilities, employment of persons with disabilities, national implementation of the Convention on the Rights of Persons with Disabilities, anti-personnel mines, refugees and internally displaced persons with disabilities, access to aid and rehabilitation services, inclusive education for persons with disabilities, 2025 Global Disability Summit, deinstitutionalization of persons with disabilities.

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Jordan was one of the first States to ratify the Convention on the Rights of Persons with Disabilities [CRPD] in 2008. How does Your Royal Highness, President of the Higher Council for the Rights of Persons with Disabilities as of 2014, engage in favour of the rights of persons with disabilities?¹

The Higher Council for the Rights of Persons with Disabilities is a government entity. It is led by a board of trustees and can include up to twenty-five members. It currently includes twenty-one members: nine of them are persons with disabilities, three of them are relatives of persons with disabilities, eight are experts in various aspects of disability, and then there is myself.

The Council engages with all entities, mostly government, ministries and public entities, to advocate for the right of persons with disabilities, and to raise the capacities of various government entities. The Council also encourages these entities to respect the rights of persons with disabilities, to increase employment among such persons and to make government offices accessible, among other issues.

We work on education, accessibility, deinstitutionalization, employment, inclusive tourism, access to justice, political participation and many other issues. We look at disability from a strategic perspective, which has been a big change, especially since 2017. For many years in Jordan, we were not looking at issues

1 International Disability Alliance, “All Commitments Made by Jordan[’s] Higher Council for the Rights of Persons with Disabilities”, available at: www.internationaldisabilityalliance.org/commitments/stakeholder/jordan-higher-council-rights-persons-disabilities (all internet references were accessed in November 2022).

from a macro and/or strategic perspective. Since 2017, however, we have continuously looked at the big issues and have tried to devise plans and strategies to tackle the issues faced by persons with disabilities.

The Council is also a watchdog, and it is our responsibility to prepare an annual report on the progress – or lack thereof – that has been made. Of course, things are not perfect: we have numerous challenges to deal with and the results can sometimes be mixed. On some issues we are doing well and on others we can do much better. Overall, it's a work in progress and we keep on moving forwards and upwards, which is what is important.

We also engage with the private sector with respect to the rights of persons with disabilities in terms of employment, accessibility etc. This is also a great challenge and there is always room for improvement, but again, we are doing better than before.

Our readers are also interested to know how States incorporate, at the domestic level, treaty commitments undertaken at the international level. Jordan provides a unique example with its Law No. 20 on the Rights of Persons with Disabilities,² adopted in 2017. What did this law intend to achieve, according to you, Your Royal Highness? What was the initial ambition and drive behind this law, and has it accomplished all of its aims?

In 2012/13, a legal committee was created to analyze the law we had for persons with disabilities, as it was considered outdated and not fully compliant with the CRPD.³ The committee was hence mandated to draft a new, progressive law for the rights of persons with disabilities.

This committee did a tremendous job and consulted with all sectors of society such as children, university students, practitioners, academics, experts in disability and NGOs, as well as the public and private sectors. It took about four years to come up with the final draft of the law. During its development, there was a big debate on how ambitious the law should be. My view on the matter was that the law should be ambitious, challenging and progressive. The law was finally legislated in 2017.

Law No. 20 is an ambitious law not only because it provides line ministries and authorities with time-bound specific commitments, but also because it is the first piece of anti-discrimination legislation in the Arab world, whereby violence is defined as a denial or a restriction of a certain right or freedom. So, any discriminatory act made on the grounds of disability – for example, preventing a child from enrolling in a school because he or she is a person with a disability – is rendered an act of violence, per Article 30 of said law. The law also introduces a number of new concepts and definitions that are rights-based.

2 Law No. 20 on the Rights of Persons with Disabilities, 2017, available at: <http://hcd.gov.jo/en/content/law-rights-persons-disabilities-no-20-year-2017>.

3 Convention on the Rights of Persons with Disabilities, UNGA Res. 61/106, 24 January 2007 (entered into force 3 May 2008).

As it is in most countries, the drafting was the easy part. Of course, the implementation is what really matters. Now we are in the implementation phase of the law. We are doing relatively well on most topics such as inclusive education, deinstitutionalization and employment, although it has not been without its challenges with the COVID-19 pandemic.

I am happy and content with the results so far, but of course, I want us to achieve much more. There are many new fields that we have to look at. For example, we are presently investing more and more time and energy in inclusive tourism. Hopefully, in the future we will hit many birds with one stone, as tourism as a whole is our “bread and butter”. It will have a positive impact in terms of visibility, accessibility and employment.

Your Royal Highness is involved as Chairman of the National Committee for Demining and Rehabilitation and President of the Hashemite Commission for Disabled Soldiers. How does Your Royal Highness’ work on anti-personnel mines and disabilities interconnect?⁴

This was my starting point and the area I have been working on for the past twenty-two years. The common denominator between the three entities that I chair⁵ has been disability, and it has been my biggest honour and privilege to serve our civilians and soldiers with disabilities.

Regarding the clearing of landmines and minefields, that has been a resounding success in Jordan. We are considered as one of the success stories in the Ottawa Treaty,⁶ and I am very proud of that. Of course, we do have victims and survivors of landmines, with 55% of them being soldiers and the remaining 45% civilians. It is our responsibility to make sure that they are looked after to the greatest extent possible. We try to have a parallel approach; we work on the structural issues but we also work on providing personalized assistance for civilians and helping to make sure that their rights are respected.

For soldiers with disabilities, the Hashemite Commission makes sure to provide soldiers with disabilities with the best possible assistance and to ensure that they live a dignified life in which they can fulfil their interests and livelihoods.

For me, it is so important that we provide the right assistance to soldiers and civilians, and for them to live a dignified life so that they can fulfil their dreams. That is ultimately what we are aiming for.

Regarding disability amongst displaced populations – Syrian migrants and refugees, and Jordan’s Zaatari Refugee Camp – the statistics that we have from

4 HRH Prince Mired R. Z. Al-Hussein, “Editorial: The Challenge of Managing Mine Action in Jordan”, *Journal of Conventional Weapons Destruction*, Vol. 23, No. 2, 2019, available at: <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=2864&context=cisr-journal>.

5 The National Committee for Demining and Rehabilitation, the Hashemite Commission for Disabled Soldiers and the Higher Council for the Rights of Persons with Disabilities.

6 Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction, UNGA Res. 52/38, 3 December 1997 (entered into force 1 March 1999).

the Office of the UN High Commissioner for Refugees [UNHCR] show that “out of around 664,000 Syrian refugees in Jordan registered with the UNHCR, approximately 26,000 people, or 3.5%, have disabilities”.⁷ In your experience, what are the challenges and the ways to increase opportunities for these individuals?

Regarding the Higher Council for the Rights of Persons with Disabilities, it is our responsibility to ensure that any individual on Jordanian territory is afforded his or her rights within the law. These include the right to education, employment, access to justice, health care and accessibility, among many others.

The question of the delivery of services is more complicated when it comes to Syrian refugees, particularly ensuring that these refugees are afforded these rights, because, especially when it comes to areas such as this, service delivery does not only rest or depend on the quality of the service that is provided, but rather on whether it is accessible to refugees with disabilities or not, and if so, how. In this case, UNHCR has taken the lead in the provision of services, but we do also have several Jordanian development organizations and foundations that provide support. There are a multitude of international NGOs that help fill in the gap as well.

For Palestinian refugees, the United Nations Relief and Works Agency for Palestine Refugees in the Near East plays a very important role and handles many of the rights relating to education and health care.

Whatever we do in Jordan, and as the Higher Council, it's important to us to ensure that all persons with disabilities enjoy the rights afforded to them as per the CRPD and the laws of the country.

Our next question has to do with access to services specifically geared towards addressing the needs of persons with disabilities, in particular aid and rehabilitation services.⁸ What are the biggest challenges, and ways to overcome them, to ensuring the dissemination of information regarding these services? Are persons with disabilities effectively claiming access to these aid and rehabilitation services?

We are a developing country. As such, the services we provide in Jordan are “patchy”, if I may say so, as it all depends on where one resides and the type of disability one may have. In some parts of the country there are more and better services than in others.

This is of course one of the issues we are trying to work on, so that wherever one lives in Jordan, they will receive the necessary assistance and services. But it is difficult and costly, and I wish I had a magic wand in my hand and could

7 Hadeel Al Rawabdeh, “Disabled Syrian Children in Jordan: Exclusion from Education Exacerbates the Difficulties of Asylum”, *Syria Direct*, 13 April 2021, available at: <https://syriadirect.org/disabled-syrian-children-in-jordan-exclusion-from-education-exacerbate-the-difficulties-of-asylum/>.

8 Higher Council for the Rights of Persons with Disabilities, “A Memorandum to Facilitate the Access of Persons with Disabilities to Rehabilitation Services in Health Centres”, 24 August 2021, available at: <https://tinyurl.com/mx5ja8x7>.

immediately change for the better the services that we have in the country. My feeling is that of course things will get better gradually as we work more comprehensively and at a strategic level.

We are also examining the different types of disability, and what services are available for each – the quality of care and the quantity. How do we address the shortfalls and the gaps? For example, when it comes to persons with autism, we need to take a look at the whole sector and how to improve it by ensuring that capacities are continually enhanced and that efforts are sustained and maintained in the long run. The same is true for all the other types of disability. It is a work in progress.

One of the things we are doing is to redo the diagnostic testing of persons with disabilities in Jordan. We have roughly 1.2 million persons with disabilities in Jordan, and we must redo the diagnostic testing of all of them. Then the data collected will be entered into the national database. The reason we are undertaking this huge enterprise is because we came to the conclusion that the diagnostic testing that was previously undertaken was not done to a high enough standard; today our standards and knowledge of diagnostic testing are much more thorough and robust. It is going to take a long time and is a costly venture, but it is important to have the most accurate data available to ensure that all our planning for the future is spot-on and relevant.

Your Royal Highness has worked towards inclusive education; how do you think education can shape and influence the perception of disability among future generations?⁹

Education, in my humble view, is the most important issue. If we don't work on education correctly, we won't get anything right in the future.

It saddens me to say that on this issue, like in most developing countries, only a small percentage of children with disabilities are getting a proper formal education in Jordan. Most children with disabilities are either at home or in day-care centres. It is a big problem for us in Jordan, and it is a situation that is considered unacceptable. We are trying our best to turn it around. We have, in our Law No. 20 on the Rights of Persons with Disabilities, clear and concise articles on inclusive education. In 2020 we launched a national strategy on inclusive education, and we are now in the preparatory phase of the implementation plan. We have been extremely fortunate to receive very generous support from the German government, through the Deutsche Gesellschaft für Internationale Zusammenarbeit [German Agency for International Cooperation], for inclusive education.

Even though we are well on our way, it will still take some time to increase the number of children with disabilities receiving an inclusive education. In Jordan, as in most other developing States, there is stigma and persons with disabilities are

9 “Prince Mired Meets UNESCO Jordan Representative”, *Jordan Times*, 10 August 2021, available at: www.jordantimes.com/news/local/prince-mired-meets-unesco-jordan-representative.

often discriminated against, and as a result there aren't many examples of persons with disabilities with education and skills in the workforce. With more educated persons with disabilities, there will be increased visibility and this will in turn increase their inclusion within society at large.

We want persons with disabilities to be productive taxpayers, and education is key to ensuring that. What worries me is that we, as a world community, are failing children with disabilities in the developing world. How will children with disabilities, who have not received a proper education, be able to compete with others? The gap between those who have and those who have not is getting ever wider and bigger. This is a great concern. I think there needs to be a huge investment and focus on education.

Donor countries and international donor organizations that fund education *must* make their large-scale grants disability-sensitive, in the same way that they are always gender-sensitive. Such incentives will ensure that inclusive education and other rights of persons with disabilities happen at the pace that they ought to. It's not a lost opportunity, and it is something that donor countries and agencies need to look at.

Why is it important to work on changing cultural attitudes and perceptions towards accepting and supporting people with disabilities, and how does Your Highness work towards this?

Primarily, and as I said before, the main concern is education. We need more examples of persons with disabilities who are doing well, are successful, and are flourishing in their lives. This will break all the taboos and many of the barriers that they presently face. Media can also do a lot to shine a light on persons with disabilities and show that they can do anything they wish to, when provided with the opportunity and the right accommodations.

I also think that we need to be more gentle, understanding and empathetic. In Jordan, in the Arabic language, there are many terms that are politically incorrect and which have negative connotations. These terms are often used in the public discourse. We are doing our best to turn this around and educate the public so that these terms are no longer used, for example by having suppressed the use of the expression “not fit for work”.¹⁰

One major development is the amendment that we recently made to the Constitution of the Hashemite Kingdom of Jordan. The language used in two particular articles of the Constitution was deemed “politically incorrect”, as persons with disabilities were referred to in pejorative terms. We worked hard to ensure that the articles were amended. Now, the terminology in our Constitution is compliant with the CRPD. All the other legislations now need to change and

10 Higher Council for the Rights of Persons with Disabilities, “The Supreme Council and the Ministry of Health: Repeal the Phrase ‘Unfit to Work’ for Persons with Disabilities”, 2 May 2021, available at: <https://tinyurl.com/5hd5fjyt>.

adapt the language and terminology to be compliant with what we have in the Constitution.

Do you see any region-specific dynamics, in the Middle East or Arabic-speaking world, both in terms of challenges and opportunities for cooperation – for example, the visit of the Iraqi delegation in August 2021?¹¹

We do have contacts with our neighbouring countries, and we exchange ideas. But as for big initiatives, we haven't had many working relations until now. However, we are very much looking forward to working on this together with them.

We want to work with and consult our neighbours on what we consider to be the major issue, which is the deinstitutionalization of persons with disabilities. In Jordan we have many residential centres and orphanages that house persons with intellectual disabilities, and many of them come from neighbouring countries. We have an article in our Law No. 20 on the Rights of Persons with Disabilities¹² stating that all institutions need to be closed within a period of ten years or be changed to inclusive day-care centres. This is probably going to be the main issue that we will work on with our neighbours.

What has been your experience of advocacy and cooperation on the question of disabilities and inclusion with international organizations and representatives of different countries?

In general, I think that we all need to do a lot more. Persons who have experienced conflict and trauma live extremely difficult lives, no matter where they are. It is hard enough to leave your home and live in another country due to conflict and violence, but with a disability, it is that much harder. As an international community, we need to pay more attention to persons with disabilities fleeing from or living in conflict and violent settings and try to better their lives.

My opinion is that we are not doing enough and there is a lot more that can be done, especially on the psychosocial aspect. Concerning mental health, there is a tremendous need at the moment and there is a big void that needs to be addressed. The international community could be focusing more on that particular area by designing grants and programmes specifically targeting persons with psychosocial disabilities, so that more expertise can be brought into the Kingdom – not only to generate more awareness, but to better organize the sector, providing greater attention through creating a system of care that is equipped with resources, structures and personnel who are fully equipped to serve those with psychosocial disabilities.

11 Higher Council for the Rights of Persons with Disabilities, "Iraqi Delegation Briefed on the Kingdom's Experience in the Field of the Rights of Persons with Disabilities", 1 August 2021, available at: <https://tinyurl.com/54wsm5we>.

12 Law No. 20, above note 2, Art. 27.

Regarding funding and donors, funding should be earmarked to disability just as it is made gender-sensitive. Jordan and many other developing countries receive a handsome amount of support and money from donors, but rarely, if ever, is disability mentioned. If disability is made a component for funding, then the bureaucrats in the developing world will wake up and everyone will talk about this, and this will make a huge, huge difference. In Jordan, I am always in contact with our ministers and those who have been sensitized to disability. Once they have been sensitized to disability, they work on it and push towards the direction of inclusivity and ensuring that the rights of persons with disabilities are respected.

The governments of Germany and Jordan will co-host the third Global Disability Summit in 2025. What will be the priorities for the upcoming summit? Do you have any insights on the priorities that you need to place on the table? Will there be a specific focus on the intersectionality of armed conflict and disability?

I can't say for certain now that there will be a specific emphasis on the intersectionality of armed conflict and disability. Disability is such a broad topic with a variety of specific issues that need to be addressed, so I can't say for now which topics will be highlighted. But the year 2025 will be an important opportunity to highlight the importance of the rights of persons with disabilities: it will be the first time that heads of State and world leaders will come together particularly and only to discuss the issues and rights of persons with disabilities. Therefore, it will be an extremely important avenue for highlighting these issues and if every head of State goes home with even one or two ideas on how to better the lives of persons with disabilities, it will be a tremendous achievement.

I believe that up until now, we have lacked seriousness on this issue. We need to come up with serious and implementable plans. People are waiting, and they are fed up. Many persons with disabilities feel like they are second-class citizens in their own countries; there is no education at the standard they want and deserve, and there is not enough accessibility. Employment, health care and political participation – with a lack of accessible polling stations – are all a problem, not only in Jordan but in many other developing countries.

The Global Disability Summit 2025 will be a great opportunity for Jordan to highlight all the challenges it faces in pushing the disability rights agenda forward within the Kingdom. This is noteworthy because these persistent challenges that exist in Jordan – such as affording children with disabilities an inclusive education, deinstitutionalizing orphanages and residential services, and providing accessibility, employment, political participation and rehabilitation services – are all matters that are relevant and vexing in the vast majority of developing countries.

The central issues are, how can we bridge the gap in the years to come, and how can we allot greater sums of money to make sure that persons with disabilities are afforded their rights?

In terms of building on the work towards the sensitization of the general population, do you see an opportunity in the lead-up to the summit? What do you think it would take for society to make that switch towards including persons with disabilities?

Education is the most important thing. There need to be more children with disabilities in schools and in universities. There need to be more persons with disabilities employed. The increase in visibility of persons with disabilities will normalize disability issues instead of stigmatizing them, and will ultimately increase inclusion. Diversity is part of life, we are all different, and the population will be sensitized to the issue more if we increase the education and visibility of persons with disabilities.

In the lead-up to 2025, it will be important to have champions and to highlight persons with disabilities who are doing tremendously well in their work and lives. But there is also this expectation that persons with disabilities are superheroes and that they should always do exceptionally well despite the challenges they face. Most persons with disabilities are human beings who are doing well or average in their lives, just as are all persons without disabilities. That should be appreciated and respected as well.

The summit will go a long way towards shining a positive light on this, but of course, it's not just the summit that is important, but the follow-ups to make sure that countries do as they promise. One of the issues that is upsetting is the mere talk without concrete changes. When I meet with decision-makers, I hear language that is wonderful, but sometimes nothing happens, or it takes a long time for things to change on the ground. And this is where we need to be more serious. It shouldn't be just idle words – there need to be concrete actions. And this is not just in the developing world, but in the developed world as well.

We need to ensure that we close the gap between the haves and have-nots in the developing world. We need to plan seriously and implement strategies to ensure that persons with disabilities are not stigmatized or discriminated against, and that they receive all their rights.

Do you have a final message that you would like to share with our readers?

I think that when it comes to disability at large, often in the developing world, the excuse is always that there is no money. In my humble view, it's not a question of money but rather a question of priority. Where is disability on the priority ladder? Is it on the ladder at all, and if so, is it at the bottom or the top of the ladder? If disability is on the ladder of national priorities, the availability of funds for persons with disabilities will also be higher.

If it's not a national priority, then we need to work on that. According to the World Health Organization, 15% of the population are persons with disabilities, and in some countries, it is much higher. Family members are indirectly affected and are not included in the 15%, but their needs must also be considered and respected as they are an integral part of the equation.

Therefore, the rights and issues of persons with disabilities need to be made a national priority.

Interview with His Excellency Pekka Haavisto

Foreign Minister of Finland*



HE Pekka Haavisto is the Minister for Foreign Affairs of Finland. He was a Member of Parliament in 1983–95 and was returned to Parliament in 2007. He served as Minister of Development and the Environment in 1995–99, and as Minister for International Development in 2013–14. In 1993–95 and 2018–19, he was Party Leader of the Greens in Finland. He has also served several years as a member of the Helsinki City Council. He stood as a candidate in the presidential election in Finland in 2012 and in 2018.

He has gained wide experience of various areas of foreign policy, for example while chairing the UN Environment Programme Task Forces on environmental impacts of war in the Balkans, Afghanistan, Iraq, Liberia, the Occupied Palestinian Territory and Sudan. He has also worked as the EU Special Representative for Sudan and Darfur, Special Adviser for the UN (ASG) in the Darfur peace process, and Special Representative to the Minister for Foreign Affairs in African crises. In addition, he has served in several positions of trust, including President of the Board of the European Institute of Peace in 2016–19, Chair of the Board of the Finnish Federation of Settlement Houses in 2014–19, and Chair of WWF Finland's Board of Trustees.

Mr Haavisto has worked as Editor-in-Chief of several publications, including Vihreä Lanka magazine. Additionally, he has authored many books, the most

* This interview was conducted by Bruno Demeyere, Editor-in-Chief of the *Review*, and Jillian Rafferty, Managing Editor of the *Review*, on 13 September 2022.

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recent one, Eurooppa raiteilla (Europe on Rails), in 2018. He lives in a registered partnership, and his main interests are books, cycling, wooden boats and cultural backyards.

Keywords: persons with disabilities, inclusion, accessibility, government.



Among the numerous victims of armed conflicts, what explains Finland’s specific focus on persons with disabilities and why do humanitarian actors and States need to focus more on this issue?

When we look at people in the most vulnerable situations during conflicts and natural catastrophes – and even in normal situations – it’s very often persons with disabilities, for obvious reasons. During war and other crises, this vulnerability is exacerbated. It becomes, for example, much more difficult to ensure that persons with disabilities have access to the services they need, including services specific to the crisis scenario. In my work, I have visited many refugee camps where the most basic necessities crucial to health and well-being, such as sanitation and shower facilities, are not planned to be accessible for people with disabilities. With some quite minor changes in the infrastructure, we could offer better living conditions for persons with disabilities in these scenarios, and it’s sad that often we have yet to make those adjustments.

Since the 1980s and 1990s, Finland has had very active domestic movements of persons with disabilities working to improve their own lives and their surroundings. This has really informed our own perspective as a country. It is crucial to remember that persons with disabilities themselves are the best experts on what they need. Far too often, we see situations where we speak over the heads of persons with disabilities – sometimes even physically – or talk about persons with disabilities without their participation or inclusion. Part of Finland’s philosophy, particularly in times of crisis and conflict where people are in vulnerable situations, is to make sure we communicate with and listen to the needs of persons with disabilities.

What is Finland’s philosophy on disability inclusion? How do you include persons with disabilities and their rights?

Our philosophy in Finland has always been to strive for complete inclusion. One clear example of such inclusion is that we avoid developing separate schools for children with disabilities, instead including them in the same classrooms as their peers without disabilities. To achieve that, we proactively plan the school buildings, playgrounds and other facilities to ensure they are accessible for persons with disabilities, and we invest in the capacity of teachers and education systems to be inclusive to persons with disabilities.

To continue with the schools example: in many places, there are special schools for persons with disabilities. This is, of course, better than having no schools or educational facilities at all for those children, but it isn’t an *inclusive*

approach. An inclusive approach ensures that all facilities as well as education systems can accommodate, include and be accessible to persons with and without disabilities.

Similarly, in some countries, there are even particular parts of cities designed specifically for people in wheelchairs or with other types of disabilities. Instead, in our view, we should make the whole infrastructure, the entire city planning, public transit system and vehicles, as well as services, information and communication, available and accessible for persons with disabilities. This doesn't only include persons on wheelchairs, of course – that is just one example. Persons with all kinds of disabilities should be taken into account to ensure an approach based on disability inclusion.

This work is more challenging when you talk about situations of crisis and conflict. In Finland as a whole, and also within the Foreign Ministry specifically, our attitude has been to take the organizations of persons with disabilities on board with our policy and decision-making. This is an important step. In the 1990s, the Finnish Foreign Ministry worked with activists with disabilities to establish a foundation – Abilis-säätiö, or the Abilis Foundation.¹ Abilis, which receives support from the Foreign Ministry, is a development-focused organization that was established by persons with disabilities themselves to help other persons with disabilities in developing countries and in situations of crisis.

I have travelled with these activists to various countries, where we have encountered a belief that persons with disabilities may not be able to work or to earn their own income and livelihood – a belief that is then often proved wrong. For example, I travelled with Abilis to Cambodia, where we saw projects where persons with disabilities had established companies and were the main breadwinners for their immediate and extended families and helped support their communities. Through work like this, Abilis and its partners are helping to fundamentally change the whole idea that persons with disabilities are just cornered somewhere in the house, not contributing. Instead, they are at times actively earning a livelihood to support their whole family. This type of change can and should be made everywhere in the world.

Abilis is one of the forerunners of this kind of thinking in many developing countries.

The 2016 Charter on Inclusion of Persons with Disabilities in Humanitarian Action talks in its second principle about the importance of the participation of persons with disabilities and their organizations in the design and implementation of humanitarian work.² Finland's 2022 Global Disability Summit commitments likewise aim to promote meaningful engagement and participation of persons with disabilities and their representative organizations. Do you think that persons with disabilities and their organizations are being heard and recognized by States, donors and humanitarian organizations?

1 See the Abilis Foundation website, available at: www.abilis.fi/?lang=en.

2 Charter on Inclusion of Persons with Disabilities in Humanitarian Action, 2016, available at: <http://humanitariananddisabilitycharter.org/the-charter/>.

Well, that is a good question. In the case of Finland, our last meeting with civil society organizations was in September 2022, and in that meeting we discussed the role of Finland in the UN Human Rights Council, what line we are taking there, and what our initiatives are. Civil society organizations run by persons with disabilities participate in those consultations with civil society, and they raise the issues that Finland could propose and support in our work at the UN Human Rights Council. All these ideas, suggestions and proposals are very welcome. We have also included persons with disabilities in the official delegations of the Finnish Foreign Ministry. This is also something we want to show and make visible, in the hopes that others will emulate it: we have persons with disabilities on board and they are participants in our delegations.

Resource-wise, the Foreign Ministry has been supporting the work of organizations of persons with disabilities and ensuring their visibility. Some of the most exciting experiences, as I said earlier, have been during country visits, where persons who themselves have a disability are coming to the forefront and running the development projects or taking part in similar activities. It is a massive encouragement for local persons with disabilities, who can see that this is the way to work – that this is something that you can expect from your own society and from your own government.

So far, we have been trying to be a model society in this sense. But of course, when I'm talking about it now, it all sounds very nice and easy. In reality it is not, and plenty of challenges remain. The hard work that persons with disabilities themselves and the civil society organizations have been doing and all the fights to get where we are now need to be appreciated and praised. But we continue to be reminded that we could do better and that their participation could and should be better than what we see today.

Finland appears today as a champion for disability-inclusive policies, strategies and programmes with the aim of influencing its partners. What has your experience been when negotiating with other States on the subject of persons with disabilities?

Well, first, it may be helpful to talk a bit about how Finland's own thinking developed in this area. A particularly important moment came in 1983, when the late disability rights activist Kalle Könkkölä became a member of the Finnish Parliament. But despite Mr Könkkölä's election to the Parliament, the actual Parliament building in Finland was itself not accessible, as it was not possible to pass through the building or into Parliament's main hall while using a wheelchair. So we had to change the architecture of the main Parliament building to provide the necessary accommodation for persons with disabilities. I believe this was an eye-opener for many people, perhaps most of all just by having activists from the movement of persons with disabilities serving in Parliament and themselves raising these issues. That was something that triggered our own thinking and very much improved our own understanding of the situation.

When we raise this issue outside of Finland, I think that often the biggest surprise for many other governments is that we are talking and working together

with persons with disabilities, rather than over their heads or on their behalf. Equally, we don't propose solutions for them, but let them propose what they want, inviting them to be an active part of these processes.

This is, of course, largely a question of mindset and how much you are ready to listen. I believe that is the main difference. I have met many of my colleagues, all around the world, who understand that this topic is important, but to give the voice and the role to persons with disabilities is something that we in Finland have learned to do. Of course, we can always do better, and that is something that we underline in all circumstances.

Many persons with disabilities state that, even in the simplest situations such as when they are on an airplane, the people around them would ask the person sitting *next to* them, "How is this person feeling?" or "What can I do and how can I help or provide support?" – asking the person *next to* them, not the persons with disabilities themselves. And they say, "Hey, I am here. I am sitting here. You can ask me directly." This is the experience of many persons with disabilities in their everyday lives, and it is extrapolated across many sectors. If we can change this, it would already make a big difference.

In 2022, following the Global Disability Summit,³ the Ministry for Foreign Affairs of Finland committed to "promot[ing] rights and meaningful inclusion of persons with disabilities in every stage of the peace processes and peacebuilding".⁴ To what extent can persons with disabilities contribute to peace processes?

I believe this question speaks to an even wider topic: how civil society can be part of the peace process. Very often, we think that it is enough that the peace processes involve those who have held arms, those who fought as parties to a particular conflict. In prioritizing them, we very often overlook civil society organizations, people in refugee camps or the diaspora. Inclusive peace processes can contribute to more sustainable peace. This is also something that we have been trying to address in Finland.

For instance, we have the diaspora from many countries affected by conflicts living in Finland. In these peace processes, we always come back to the diaspora community in Finland and encourage them to see themselves as having certain responsibilities regarding the peace in their countries of origin – and then we strive to support them in taking on a positive role in supporting those peace processes. Many of these diasporas, when they see the policy of inclusion of persons with disability in Finland and are also engaged in those sectors in Finland, develop their own excellent ideas on how to improve the situations of persons with disabilities in their countries of origin, and on the kinds of development cooperation projects that are needed.

In this sense, we do not only send our resources elsewhere, but also try to transmit our philosophy and attitudes regarding the inclusion of persons with

3 Oslo, 16–17 February 2022.

4 2022 Global Disability Summit Commitments, available at: www.globaldisabilitysummit.org/commitments.

disabilities, which have been changing over time. In general, this is a very important component of the peace process that we are happy to support: the development of a society that supports the human rights of each and every person, including women, girls, and persons with disabilities.

The change in attitude is very important. During this government term, we have established a Peace Mediation Centre in our Foreign Ministry, trying to be more active in supporting the peace process and national dialogues. The topic of persons with disabilities is definitely one component that we are trying to bring to the peace processes we are supporting.

In view of all of the above, what are in your opinion the prospects for the coming decade when it comes to disability inclusion in humanitarian action? How do you see investment in persons with disabilities in humanitarian action and by humanitarian actors and donors evolving in the coming year? At a personal level, when it comes to inclusion of persons with disabilities in contexts of armed conflict, what does your ideal world look like?

First, on the question of where things are heading towards, we always hope to mobilize donors that are much larger than Finland. Finland is a very committed donor, but a relatively small one. I notice from time to time that the inclusion of persons with disabilities may not be part of the whole support or development programmes of larger donors. It is therefore important to raise this topic among those larger donors, who certainly have influence.

On that note, I know that often, recipients of funding disapprove of or discourage earmarking of donated money. This is the line of Finland as well. However, we have successfully used earmarking a few times, particularly for the benefit of persons with disabilities. Often, at first, those receiving the earmarked funds are not happy, but at the end of the day, their usual response is that they learned something new when they had to concentrate on how to manage the issues of persons with disabilities in situations of crisis or conflict and had clear funding to do so.

I'll tell a relevant story. Many years ago, I visited different parts of a post-conflict country. Part of that trip included visiting the country's schools, after which we met with the minister of education and asked about the schooling of children with disabilities. The response we received was that they couldn't focus on educational resources for children with disabilities, because even many children without disabilities were not in school or receiving the educational resources they needed. We challenged that, and stated that children with disabilities need the schooling even more than their counterparts without disabilities, because the social barriers they face make it harder for them to survive, and thus they need all the support they can get. At the end of the day, we decided to support the school system in that country – but we also earmarked a portion of the development cooperation funds to be invested into projects to develop the schools with accessibility in mind, to make them accessible to children with disabilities. In the years since, I have learned that this project was successful and was able to help many children with disabilities to go to school. I believe this is a

clear demonstration of the role donors can play in the future, and I hope this kind of targeted donor support will become more common.

In humanitarian funding the question is of course a bit more complex and we are committed to increasing flexible funding. At the same time, we must ensure that all our humanitarian funding contributes to strengthening disability-inclusive humanitarian action.

If we are looking into the future, I believe the most important issue is that of inclusion. I have been discussing this with various governments of conflict-affected and post-conflict countries, as well as with many victims of war, both civilians and soldiers/fighters with disabilities. Often, in these situations, the path they have chosen as the most “rational” and perhaps most readily achievable is to isolate these persons with disabilities into their own compounds or neighbourhoods in the city. Under this type of plan, only those portions of the city are designed to be accessible, where the persons with disabilities are able to move about without obstacles. Furthermore, this kind of segregation of persons with disabilities goes against their right to live in the community equally with others. In Finland, we counter this idea. We say that States should build the entire city and transportation systems in a way that is available and accessible to persons with disabilities, and that States should apply the same inclusive principles elsewhere, including in schools.



Interview with Gerard Quinn

Special Rapporteur on the Rights of Persons with Disabilities*

Gerard Quinn is the United Nations (UN) Special Rapporteur on the rights of persons with disabilities. A graduate of Harvard Law School, he founded and directed the Centre for Disability Law & Policy at the National University of Ireland for many years. He sat as a member of the Council of Europe's treaty body on social rights and served as a civil servant in the European Commission, where he drafted European Union disability policies. He has conducted many large studies for the UN, including a 2002 Study that helped launch the drafting of the UN Convention on the Rights of Persons with Disabilities. He led the delegation of Rehabilitation International during the drafting of the treaty. He has received many lifetime awards for his work on international disability law from the US International Council on Disability, the European Association of Service Providers for Persons with Disabilities and Rehabilitation International. He was conferred with an honorary doctorate for his worldwide disability law work by Lund University in 2022. He has held honorary positions at the National Academy of Legal Studies and Research (NALSAR; Hyderabad, India), Wuhan University (China), Fudan University (Shanghai), University of New South Wales (Sydney), Deakin University (Melbourne), Harvard Law School and Haifa University (Israel). He served on the Council of State in Ireland where he advised the President on constitutional law matters. His hobbies include folk music and storytelling.

* This interview was conducted by Bruno Demeyere, Editor-in-Chief of the *International Review of the Red Cross*, on 23 August 2022.

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Keywords: Disability, rights of persons with disabilities, Convention on the Rights of Persons with Disabilities (CRPD), United Nations, international humanitarian law, visibility, armed conflict.

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1. By way of introduction, could you briefly explain your role and responsibilities as the UN Special Rapporteur on the Rights of Persons with Disabilities? When and why was the mandate established, and how have you approached its implementation?

The Special Rapporteur position was created in the 1990s. I think the timing was significant, as it coincided with the enactment of the American Disabilities Act (ADA), which had a huge ripple effect around the world. It also coincided with a special resolution of the United Nations (UN) General Assembly on equal opportunities for persons with disabilities, which was a non-binding resolution. The Special Rapporteur position was set up around that time to answer to the Commission for Social Development, and the first mandate holder was Swedish: Mr Bengt Lindqvist.¹ The fact that the Special Rapporteur was answerable to the Commission for Social Development somehow tells a lot, as it means it was not really anchored on the human rights side of the house, which only came later once the UN Convention on the Rights of Persons with Disabilities (CRPD)² was adopted in 2006. As such, the Special Rapporteur position switched from the Commission for Social Development to the Human Rights Council. The first person appointed to the new mandate started in 2014, Mrs Catalina Devandas Aguilar³ (2014–2020). I am the second person appointed and I started in 2020, regrettably when COVID began.

The tasks of a special rapporteur are basically threefold.

First, we shine a light on contemporary topics and trigger a debate among States primarily. So, twice a year, we issue thematic reports designed to open debates and conversations at the international level.

Second, we shine a light on country situations. We are required to do at least two “country visits” a year. Conflict and post-conflict situations figure prominently in my country visits. We compile reports which are routinely referred to by treaty bodies and others.

1 For more information, see UN Department of Economic and Social Affairs, “Special Rapporteur 1994–2002: Bengt Lindqvist”, available at: www.un.org/development/desa/disabilities/about-us/history-of-disability-and-the-united-nations/special-rapporteur-1994-2002-bengt-lindqvist.html (all internet references were accessed in September 2022).

2 UN Convention on the Rights of People with Disabilities, Resolution A/RES/61/106, 13 December 2006 (entered into force 3 May 2008), available at: www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities.

3 For more information, see Office of the High Commissioner for Human Rights, “Catalina Devandas Aguilar, Former Special Rapporteur (2014–2020): Special Rapporteur on the Rights of Persons with Disabilities”, available at: www.ohchr.org/en/special-procedures/sr-disability/catalina-devandas-aguilar-former-special-rapporteur-2014-2020.

Third, and less publicly, we engage in “communications” with governments. In other words, we engage with complaints from individuals and groups and try to mediate with governments confidentially.

There is no set menu of what a special rapporteur should do. You put forward your vision of the mandate to an interview panel. My pitch was that I wanted to do three kinds of things. First, I wanted to try to lift disability from (perceived) silos and connect it up to broader challenges facing humanity – and armed conflict was one of those challenges. Second, I wanted to do much more intersectional work. I am particularly interested in the overlap between the rights of older people and the rights of people with disabilities. You may have noticed I combined forces recently with the UN Special Expert on the rights of older people. We organized an expert seminar in Berlin focusing on war as the “raw edge of intersectionality”. We examined the protection of older people as well as people with disabilities during conflicts, especially regarding the conflict in Ukraine. Third, I decided to focus on issues and rights that had long been neglected, such as the right to culture, refugees with disabilities, indigenous persons and disability. In keeping with our work on conflicts, I also said I would do important thematic work on peacebuilding and disability and on the underappreciated role of persons with disabilities in that crucial process. I would also like to place a spotlight on the role of regional organizations around the world, which is an undertapped resource in advancing the goals of the CRPD.

2. The CRPD and the mandate you hold have both led to meaningful advances in the protection of the rights of persons with disabilities – including during armed conflict. How have things changed for those rights, and the respect of those rights, since 2006 and since 2014?

Going back to the ADA of 1990, the message was very simple: people with disabilities count as persons. That message was a profound cultural shift away from treating them as objects to treating them instead as human subjects in their own right. The CRPD projects that simple idea onto the international stage. Also, it adds other things that were absent in the ADA of 1990, including a more developed social programme of change. This is a very profound cultural shift.

The CRPD is almost counterintuitive to how most countries have developed their legislation and policy for decades, if not a century. It upturns many domains of law and policy, where treating people with disabilities as objects had become ingrained. It has had a profound ripple effect across many domains such as education, employment, etc. Working through the implications of this cultural shift is a very necessary task for law reform. I have often called the CRPD one of the biggest law reform projects on the planet.

One field touched by the CRPD is international humanitarian law (IHL). Some fifteen years on from its adoption, the treaty has had a massive, and uneven, effect. There are outlying areas it has yet to reach. IHL is the latest field beginning to be touched by the CRPD.

3. Part of your legacy as Special Rapporteur has been the development of a three-report series on armed conflicts and disability. Each of those reports takes on a distinct slice of the broader theme. How and why did you choose to focus on armed conflicts and disability? How did you decide to break that topic down into three sections – and what will the third report focus on?

Three years ago, when I was contemplating going forward for the position, I was shocked by the statistic of how many hot conflicts were taking place around the world. Therefore, I resolved that one of the big challenges facing humanity in which I wanted to situate the disability debate would be the phenomenon of armed conflict, and it is an example of an outlying field that has followed its own logic for many, many years.

One of my “bibles” that frequently guides me is a famous report by the International Law Commission from 2006/2007,⁴ seeking to reduce fragmentation of international law and seeking greater coherence across treaty regimes. This does not mean viewing one treaty regime as superior to another. Nor does it mean making one regime dependent on another. However, it does involve an intentional search for bridges that connect treaty regimes so that the combined effect advances mutual goals.

I felt that one thematic report on the topic was not enough. The first report⁵ just unzipped the continuum between peace and conflict and asked how visible people with disabilities were at most points along that continuum. The unsurprising conclusion was that persons with disabilities were relatively invisible along most points in the continuum.

The second and latest report,⁶ to be debated by the UN General Assembly in October 2022, looks much more closely at the conjunction between IHL and the UN CRPD and how we might achieve better coherence between the two different legal regimes.

The third report (due in 2023) focuses on the active moral agency of persons with disabilities in helping build peace amid the ruins of post-conflict divided societies. I am passionate about this, especially given my home country (which is Ireland) and the role of persons with disabilities in the peace process in Northern Ireland. Whenever I mention that to other groups of people with disabilities around the world, they instinctively get it and I have the intuition that there is considerable untapped potential in the role of people with disabilities in building a more inclusive society and mending broken societies after conflicts.

4 Study Group of the International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”, 13 April 2006, available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

5 Office of the High Commissioner for Human Rights, “A/76/146: Report on the Rights of Persons with Disabilities in the Context of Armed Conflict”, 19 July 2021, available at: www.ohchr.org/en/documents/thematic-reports/a76146-report-rights-persons-disabilities-context-armed-conflict.

6 Office of the High Commissioner for Human Rights, “A/77/203: Report on the Protection of the Rights of Persons with Disabilities in the Context of Military Operations”, 2 September 2022, available at: www.ohchr.org/en/documents/thematic-reports/a77203-report-protection-rights-persons-disabilities-context-military.

4. Your latest report as Special Rapporteur grows out of a series of extensive, multisectoral, cross-regional consultations, some of which innovatively brought together militaries and organizations of persons with disabilities. Why did you take that approach, and why was that methodology so important in the context of the rights of persons with disabilities, in particular?

First, you must step back and realize that persons with disabilities are explicitly covered by the Fourth Geneva Convention.⁷ However, they have received very little attention compared to other groups.

Our aim is not to impose new legal obligations. They are already there in the text of the treaty. Our goal is to open up a conversation about what those obligations mean in the specific context of persons with disabilities. Through this conversation, our hope was to put flesh on the core thesis of the relative invisibility of persons with disabilities in IHL.

All treaties need to be constantly refreshed by looking at how they pan out in the context of real-life situations. That was not possible without a conversation between military authorities and civil society – a conversation that arguably should have happened decades ago but is welcome to happen now. In a way, the deep logic of Article 11⁸ of the CRPD calls for this.

I think the experiment succeeded in helping us understand how the norms can be better actualized. It gave both sides increased confidence and competence in talking to each other. That is the best way to make treaties have relevance, especially in the context of conflicts.

5. In your latest report, you tackle head-on the co-application of IHL, on one hand, and human rights law, on the other hand, as applied to persons with disabilities during armed conflict. You refer to those fields of law as “complementary, mutually strengthening and reinforcing, and highly pertinent to the protection of persons with disabilities during military operations and their immediate aftermath”. What about those fields of law – and about the rights and needs of persons with disabilities – makes IHL and the CRPD mutually reinforcing and co-applicable?

This goes to the heart of the matter and it is a great question. Herein lies the real “added value” of our second report.⁹

Obviously, the protective norms of IHL have clear resonance for persons with disabilities: I refer to the usual norms, the distinction between military and

7 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), available at: www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf.

8 For Article 11 of the CRPD, see UN Department of Economic and Social Affairs, “Article 11 – Situations of Risk and Humanitarian Emergencies”, available at: www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-11-situations-of-risk-and-humanitarian-emergencies.html.

9 Office of the High Commissioner for Human Rights, above note 6.

civilian objects, the requirement to carry out all feasible precautions, the obligation to preserve essential civilian infrastructure, etc.

On one level, Article 11 of the UN CRPD adds nothing to this mix. It just reaffirms the application of IHL to persons with disabilities during armed conflict.

I think, and we propound this thesis in the second thematic report on armed conflicts, that the CRPD adds three new dimensions which serve to refresh IHL in this context.

First, the CRPD's conception of disability is a million miles away from the medical model of IHL implanted in the Fourth Geneva Convention in 1949. The concept of disability in IHL always had sufficient latitude to evolve – and it should. A better-rounded conception of disability opens our eyes to the accumulated disadvantages of persons with disabilities. This is a big advance on the traditional medical model.

Second, the core message of the CRPD is not static protection. On the contrary, it is a very active conception of personhood, agency and autonomy. The object of protection is thus no longer an object, but a person in the round.

Third, protection extends beyond bodily protection. It encompasses the full expanse of rights under the CRPD. Elements of the right to education, family integration, food, minimum standard of living, etc., may be relevant in the context of conflicts. It pries open the military mind to a broader constellation of factors.

These three points pry open the lens of the traditional focus of IHL. So, the practical question becomes how to translate these into IHL norms and practices.

6. How, then, does the CRPD's human rights approach to disability inform the framing of disability in IHL? What is the practical effect of that reframing – both for those who wage war and for civilians living through it?

First, let us look at those involved in the conflict directly. Returning to the original thesis of (in)visibility, it can be somewhat counterintuitive, since persons with disabilities are explicitly embraced by IHL. However, it is all about revealing the person behind the mask of disability and then working through how you handle that in practice.

In practice, this leads to an operational assumption that 15% of civilians in any theatre of operations will have a disability. Assume that they will be present and modulate your plans accordingly. As such, it is important to anticipate and look ahead. The best way to do that is to develop close relationships with civil society and to talk through the (in)visibility of different groups of persons with disabilities in different theatres of operations.

For civilians, the implications are that we need to develop a better capacity to interact with the military. I think there needs to be more assertions of rights, especially when it comes to military doctrine and operations. Ensure accurate information is provided to enable successful evacuations and warnings. Of course, if that information is not available, that does not excuse the military from failing to take the care to adjust their plans. It also means being aware of what kinds of

evidence and proof are needed to, later, substantiate claims of violations of IHL. This means becoming increasingly knowledgeable about war crimes and what counts as proof.

7. Your first report on armed conflict and disability,¹⁰ which was published in July 2021, focused heavily on the visibility of persons with disabilities along the conflict–peace continuum. Why is visibility such a core question for persons with disabilities? How does the visibility of persons with disabilities affect the application of IHL obligations? And, with visibility in mind, what are the invisible or less-visible harms that persons with disabilities face during armed conflict?

The “invisibility thesis” really is core. One might characterize the CRPD itself as a visibility project, reminding people of the innate personhood and rights of persons with disabilities, regardless of the disability.

I understand how historically peace and security, human rights and development have been sealed off in the UN system from each other. But (in) visibility cuts across all three domains. To be countered in one, it must be countered in all three.

Disability was always emblazoned on the Fourth Geneva Convention (via the so-called “sick and infirmed”). So, the question is: why was the application of the Geneva Convention system to persons with disabilities neglected compared to other groups? This is not a criticism of other groups, but it shows that merely being in the text does not guarantee visibility. The prodding of the CRPD is what gets at visibility.

There are some real-life impacts of this invisibility: the trauma of certain kinds of ordnance on people with psychosocial disabilities is often in orders of magnitude greater than on other people in the community. This kind of information is not usually understood by people who formulate military doctrine. It is about coming to terms with the life cycles and circumstances of persons with disabilities. That is why I call this a visibility project.

As for what the CRPD’s personhood-based perspective means and implies for IHL and the conduct of hostilities, it is a new dimension and it generates added value, which is very important.

One byproduct of the old medical model of disability, as etched into the Fourth Geneva Convention, was a tendency to make judgments for or about the best interests of persons with disabilities in battle, if at all. No real care was taken to find out the life circumstances of persons with disabilities. If you do not know about their life situations, how are you going to responsibly conduct yourself in that situation?

We must make operational assumptions that civilians with disabilities will be there. And then do not make assumptions about their lives. Instead, find out about their lives, engage with, converse, and plan with them. Seek to mitigate the

10 Office of the High Commissioner for Human Rights, above note 5.

effects of your actions. It is all about being more aware, more intentional, and more connected.

8. Last December, you released a report on artificial intelligence (AI) and disability.¹¹ That is a burgeoning issue in IHL and armed conflict, as well, given the increasing incorporation of AI into the tools of war – and States’ ongoing negotiations on regulating autonomy in weapons systems. In your view, what promise and what dangers does AI pose for persons with disabilities in general, and in the context of armed conflict in particular?

AI is one of those grand challenges facing humanity to which I resolved to connect the disability debate when I started the mandate. It is causing a fourth industrial revolution that is resetting the terms of human co-existence, whether it is in the social sphere, the economic sphere, or indeed other spheres. We must keep on top of it to harness its benefits and avoid known discriminatory impacts.

Our report was meant to set the stage for a bigger debate about the balance of risks and opportunities. In doing that, we called attention to algorithms that simply mimic ableist assumptions and therefore replicate disability discrimination – what is generally known as “algorithmic bias”. Meanwhile, as a civilian, you do not even know that these decisions are being made and therefore cannot possibly have a remedy. We called on business developers of AI to adopt a human rights and business approach – and one of the primary principles of the business and human rights approach is a deep dialogue with those who are going to be potentially affected by new technology. We call for much greater conversations and collaboration between business and civil society. In the report, we did not do a deep dive into autonomous weapons systems. However, the general issues that plague AI also carry over into this domain. Perhaps there are other issues, as well.¹²

There is an additional side of this question, beyond the questions of algorithmic bias and ableism: I find intriguing the interface between mind and machine, and whether, at some point in time, the machines become analogous to persons and therefore liable for the action and the injury they cause. That turns on very fascinating questions of personhood as it applies to the future. I actually taught a whole course on this in India (NALSAR).

The area of thinking machines is one that requires much deeper study and research. However, I must concede that we did not do a deep dive into AI, weaponry and IHL in our second report.

11 Office of the High Commissioner for Human Rights, “A/HRC/49/52: Artificial Intelligence and the Rights of Persons with Disabilities – Report of the Special Rapporteur on the Rights of Persons with Disabilities”, 28 December 2021, available at: www.ohchr.org/en/documents/thematic-reports/ahrc4952-artificial-intelligence-and-rights-persons-disabilities-report.

12 See Mariana Díaz Figueroa, Anderson Henao Orozco, Jesús Martínez and Wanda Muñoz, “The Risks of Autonomous Weapons: A Disability Rights Perspective”, in this issue of the *International Review of the Red Cross*, 2023.

9. Across all of these topics, your work – and broader work to make international obligations cohere with one another – grows out of many sources, including the CRPD, IHL, the UN Security Council, the UN Secretary-General’s Annual Report on Civilian Protection, and the UN Disability Inclusion Strategy. To what extent are these many sources harmonized? To what extent could they be better harmonized, and how can we get there?

I think there is a risk of being confused by overlapping instruments and domains, which can give the impression that the legal landscape is more complex and less harmonized than it is in fact. In reality, the lay of the land is simple. We have elegant and time-tested norms in IHL. Disability is explicitly emblazoned on IHL, so disability is not a new or alien imposition.

To be sure, there is a need for coherence among treaty regimes. That coherence is all about how you see bridges tying these regimes together. We already have some help on that front, via Article 11 of the CRPD and its explicit work to link the CRPD and IHL. In my view, if we did not have Article 11, we would be searching for these bridges anyway.

UN Security Council Resolution 2475¹³ makes clear what we already know about visibility on the peace–conflict continuum. The UN Disability and Inclusion Strategy (UNDIS) is the UN’s attempt to step up and lead by example on these issues. Of course, the UN is not doing that because it is, itself, bound by the CRPD: being a treaty, the CRPD does not apply to an international organization like the UN. However, UNDIS is a clear effort to embody the treaty’s principles in the UN’s own work.

The plethora of instruments all cohere around a simple idea: an expanded conception of disability beyond the medical model; and an expanded conception of IHL as informed by CRPD, and especially as informed by people on the ground.

10. What is the most important next step to address the needs and rights of persons with disabilities in the context of armed conflict? In other words, what is next?

Maintaining and developing the conversation is the most important thing – as we did in our consultations in the build-up to our latest report.

It is important to remember that disability is embraced already by IHL, and this is significantly underappreciated. The aim of this work is not to develop a concept of a more “inclusive warfare”. Rather, the aim is to reduce loss of life and limb, to limit the lethality of conflict, to plant the seeds of recovery and to allow persons with disabilities to remain active agents in their own lives, as much as anyone can during armed conflict.

13 UN Security Council, Resolution 2475 (2019), UN Doc. S/RES/2475 (2019), 20 June 2019, available at: <http://unscr.com/en/resolutions/2475>.

11. In your view, what is the role of the International Committee of the Red Cross (ICRC) and the International Red Cross and Red Crescent Movement in the current and future work on these issues?

I can only commend the ICRC for already doing great work. The ICRC and regional groups should continue convenings. It is through these convenings that the old norms of IHL are refreshed by the new breeze of the CRPD and the voices of those that matter most.

Contemporary debates about autonomous weapons systems will bring some of these issues into a very sharp focus – a different meeting point among the different sides to move the dial forward.

12. Any final takeaways?

The main point to get across is this: this work on the rights of persons with disabilities in the context of IHL is not something alien, new, or intended to act as a side constraint. The constraints are already there. We have just only had half of a consciousness of what they mean in the context of the largest minority in the world. Through the work we are doing now, we are belatedly catching up with that. This serves to make international law real and relevant, and all humanity benefits from that.

LIBRARIAN'S PICK

The protection of persons with disabilities in armed conflict: An empty shelf in an IHL-specialized library?

Sonia Crenn and Charlotte Mohr

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Abstract

A window into the history of international humanitarian law scholarship, the ICRC Library's collections capture over 150 years of debates and developments related to the branch of international law that protects those who do not, or no longer, take part in hostilities. Yet, among the 41,000 references in the Library's collections, only a handful of recent publications focus on how this protection applies to persons with disabilities. In this article, two ICRC reference librarians take stock of this gap in their collections and consider its implications.

Keywords: persons with disabilities, international humanitarian law, international disability rights, academic scholarship, library collections.

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ICRC Library

The “Librarian’s Pick” is a regular section of the *Review* in which one of the ICRC librarians picks and writes about their favourite new book of thematic relevance to the edition and relating to international humanitarian law, policy or action, which they recommend to the readers of the journal. In this case, however, the unfortunate reality is that no new book clearly fits the bill. So instead, this “Librarian’s Pick” explores the literature that does exist on disability and IHL and highlights what that literature has achieved – and what is still to be achieved.

The ICRC Library welcomes researchers interested in international humanitarian law (IHL) and the institution’s work throughout the years. Its online catalogue is the gateway to the most recent scholarship on the subject, documents of diplomatic and international conferences, all ICRC publications, rare documents published between the founding of the ICRC and the end of the First World War, and a unique collection of military manuals. The Library Team also publishes research guides in order to help researchers access the full texts of the most relevant and reliable sources in the field of IHL and the ICRC, as well as a comprehensive IHL Bibliography, with three issues every year.

The online catalogue is available at: library.icrc.org. For more information on the research guides, see: blogs.icrc.org/cross-files/category/research-guide. To subscribe to the IHL Bibliography, email library@icrc.org with “IHL Bibliography subscription” in the subject line.

The call for papers for the present issue of the *Review* prompted us, as librarians, to have a closer look at our collections on the protection of persons with disabilities in armed conflicts. To say that the results were meagre would be an understatement: only twelve international humanitarian law (IHL) references, published between 1988 and 2021, half of them in the past three years, are tagged in our library catalogue with the keyword “person with disability”.¹ In fact, this keyword has been used about ten times more often to describe publications related to the International Committee of the Red Cross’s (ICRC) humanitarian operational activities than legal scholarship. This is hardly surprising: the rare authors that have written on the topic systematically mention the lack of pre-existing literature

1 In line with its current acquisition policy, the ICRC Library aims to capture all academic scholarship on IHL published in English and French. It also acquires publications in the other United Nations languages (Arabic, Chinese, Russian and Spanish), and in German and Italian, without striving for exhaustivity, and occasionally in other languages. The remarks made in this contribution are based on the Library’s collections as they stand as of September 2022, and the works discussed herein can be browsed via the Library’s online catalogue at: library.icrc.org (all internet references were accessed in September 2022). Suggestions for any academic publication on the protection of persons with disabilities in armed conflict that the librarians may have missed are most welcome and can be sent to library@icrc.org.

and the pressing need for more research.² This issue’s “Librarian’s Pick” is thus a “Librarian’s Un-Pick” – rather than recommending one of our latest acquisitions to the readers of the *Review*, we’re sharing a “before picture” of our collections on the topic, right as we’re putting up virtual shelves to welcome this issue’s contributions and, hopefully, the growing body of literature that it will inspire.

The adoption of the Convention on the Rights of Persons with Disabilities (CRPD) in 2006 does not seem to have directly led to an uptake in scholarly production on the issue of persons with disabilities in armed conflict, despite the Convention’s explicit mention (Article 11) of its application in armed conflict, which should trigger questions about its co-application alongside IHL rules. While comparisons with other topics may appear misguided, it is still revealing to note that our collections currently include over 220 IHL references on the relatively new subject of autonomous weapons, and a similar amount on the protection of cultural objects in armed conflict.

To date, the most consequential research on the protection of persons with disabilities in armed conflict has been published, in chronological order, in a *Monash University Law Review* article in 2014,³ a chapter by Janet E. Lord in 2016,⁴ a 2018 article by Ivan K. Mugabi,⁵ and last but not least, a comprehensive paper by Alice Priddy in the Academy Briefing series of the Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy) in 2019.⁶ These recent publications address the co-application of the CRPD and IHL rules. They often grapple with the language of IHL treaties, as they argue that it reflects a now outdated medicalized approach to disability, in opposition to the current social model centred on disability rights. Finally, they apply a disability-inclusive perspective to selected IHL provisions.

Eight years after the adoption of the CRPD, Naomi Hart, Mary Crock, Ron McCallum and Ben Saul published the first comprehensive analysis of the protection that it grants to persons with disabilities in situations of armed conflict.⁷ The authors summed up the stakes of the co-application of IHL and the CRPD in compelling terms, as the “intersection between one of the oldest fields of human rights law and one of the newest”.⁸ With a “new wine in old bottles” approach, they looked in turn at the potential implications of the CRPD for IHL rules on protections for the “disabled and infirm”, protections for the sick and wounded, fundamental

2 Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), Geneva, 2019, p. 14; 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 and New York, 2016, p. 155.

3 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.

4 J. E. Lord, above note 2.

5 Ivan K. Mugabi, “An Analysis of the Adequacy of Protection Afforded by the Convention on the Rights of Persons with Disabilities (CRPD) in Situations of Armed Conflict”, *Societies*, Vol. 8, No. 2, 2018.

6 A. Priddy, above note 2.

7 N. Hart *et al.*, above note 3.

8 *Ibid.*, p. 150.

guarantees of humane treatment, restrictions on the use of weapons during armed conflict, and the prohibition on discrimination. In 2016, the volume *Disability, Human Rights and the Limits of Humanitarianism* featured a chapter by Janet E. Lord, currently serving as senior research fellow at the Harvard Law School Project on Disability and adviser to the Special Rapporteur on the Rights of Persons with Disabilities. Her contribution, titled “Persons with Disabilities in International Humanitarian Law: Paternalism, Protectionism or Rights?”,⁹ contrasted the characterization of persons with disabilities in IHL treaties with current rights-based approaches. The author looked at how IHL terminology could be reinterpreted in an inclusive manner, to cover persons with disabilities’ assistance or protection needs beyond medical care. The contrast between the characterization of disability in IHL instruments and in the CRPD also drove Ivan K. Mugabi’s analysis in his 2018 article on the adequacy of the protection afforded by the CRPD in situations of armed conflict.¹⁰ Does the age gap between the two treaty regimes lead to irreconcilable differences, as each was shaped by contemporaneous understandings of disability, or is there a way forward for their union (or rather, co-application)?

In 2019, Alice Priddy concluded a two-year project on disability and armed conflict with a 98-page publication in the Academy Briefing series of the Geneva Academy. Based on field research in five contexts (the Democratic Republic of the Congo, Colombia, Palestine, Ukraine and Vietnam), the briefing opens with a damning but unsurprising observation: States and armed non-State actors are not meeting their obligations under IHL and international human rights law to protect persons with disabilities. Among the root causes of the problem, the author identifies a lack of awareness both of the law and of the disproportionate impact of armed conflict on persons with disabilities. The briefing walks the reader through the application of selected IHL provisions (humane treatment and adverse distinction) in a disability-inclusive manner. It concludes by presenting eight key findings and recommendations, including the need for better data, more attention on the issue, and increased training among IHL practitioners.¹¹

This short overview of the literature available in our library collections makes it clear that interest has remained sporadic, is very much recent, and is spurred by international legal developments outside the realm of – but with implications for – IHL. Prior publications on disability in conflict settings largely focused on the prevention of primary impairment and sidelined the protection of persons with existing impairments. Traditionally, such persons have been “looped in” with other vulnerable groups in the literature. In our library collections, this partly explains why our specific keyword has been little used; rarely are persons with disabilities enough of a focus in a publication to justify it. This lack of specific attention contributes to their invisibility, with important consequences

9 J. E. Lord, above note 2.

10 I. K. Mugabi, above note 5.

11 In 2021, the same author published a shorter “military briefing” on persons with disabilities and armed conflict, to be used as a training tool for armed forces. Alice Priddy, *Military Briefing: Persons with Disabilities and Armed Conflict*, Geneva Academy, Geneva, 2021.

when it comes to texts guiding the interpretation and implementation of the law, such as military manuals.

In line with the ICRC's dual mandate, our library collections cover both IHL and our organization's operational activities. If persons with disabilities have remained largely invisible in IHL scholarship until very recently, what about their inclusion and representation in publications related to the ICRC's humanitarian action? They appear mostly in sources related to the ICRC's rehabilitation activities for persons with physical impairments, a long-standing part of the organization's humanitarian action.¹² Though undeniably of crucial importance, medical assistance only addresses part of the needs of persons with disabilities in armed conflict. The shift away from a medical model to a more inclusive, comprehensive and rights-based approach to disability is apparent in the evolution through time of the ICRC's publications on its rehabilitation services, and has also driven the adoption of a series of institutional or Movement-wide frameworks on disability inclusion in the last decade.¹³ Finally, disability inclusion has implications for the way IHL research is produced and made available. How can barriers to the full participation of persons with disabilities in such research, including the accessibility of the literature itself, be identified and removed?¹⁴

Of course, our collections spanning more than 150 years of humanitarian law and action reflect evolving conceptions of many issues, whether race, gender or disability. That said, the fact that most of the available literature concerned with persons with disabilities focuses on physical rehabilitation and prevention of primary impairment adds to the evidence that important theoretical and legal advancements in international disability rights have yet to fully permeate scholarship in international humanitarian law and action. This is thus a promising area of research, and we look forward to adding to our collections all future publications bridging the gap between IHL and international disability rights.

12 This can be traced back to the end of the Second World War, when the ICRC's medical department cared for former combatants who had become disabled and supported their reintegration into civilian life. 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.

13 The current text of reference is ICRC, *The ICRC's Vision 2030 on Disability*, June 2020, available at: <https://library.icrc.org/library/search/notice?noticeNr=50161>. This text addresses the inclusion of persons with disabilities at all levels in the organization's humanitarian programming.

14 An initiative worth noting in this regard is the Braille transcription of an article in the *Review* by Professor Don Winiecki. See Peter Asaro, "On Banning Autonomous Lethal Systems: Human Rights, Automation and the Dehumanizing of Lethal Decision-Making", *International Review of the Red Cross*, Vol. 94, No. 886, 2012, Braille translation by Don Winiecki available at: <https://peterasaro.org/writing/Asaro-2012-On-banning-LAWS-braille.brf>.

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 Emina Ćerimović 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 Breitetger; 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 Yemeni 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/WHS/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 Breitegger 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.

Increasing visibility of persons with disabilities in armed conflict: Implications for interpreting and applying IHL

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Abstract

While persons with disabilities are protected under existing international humanitarian law (IHL), the specific risks and barriers to which these persons are exposed during armed conflict must be better factored into the interpretation and implementation of these rules. The complementarity between IHL and the Convention on the Rights of Persons with Disabilities (CRPD) may make an important contribution towards a more disability-inclusive implementation of IHL. This article focuses on two major areas addressed by IHL – namely, the conduct of hostilities and detention – against the backdrop of the concept of and agency associated with disability enshrined in the CRPD. This analysis is based on the lived experiences shared by persons with disabilities in consultations co-organized in 2022 by the UN Special Rapporteur on the Rights of Persons with Disabilities,

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the International Committee of the Red Cross, the International Disability Forum, the European Disability Forum and the Diakonia IHL Centre.

Keywords: persons with disabilities, IHL, armed conflict, conduct of hostilities, detention, Convention on the Rights of Persons with Disabilities.



Introduction

Armed conflicts across the world exacerbate pre-existing barriers that persons with disabilities face with regard to access to services and support in many domains, including food, water, shelter, sanitation, health care, education, rehabilitation and transportation.¹ In addition, new barriers may arise from armed conflicts and result in specific risks for persons with disabilities, who are estimated to make up at least 15% of any given population; this percentage is likely to be higher in conflict-affected territories.² Barriers may be physical, such as when essential infrastructure is destroyed, or when there are increased difficulties in reaching such facilities due to long distances, inaccessible routes or terrain, or the loss of assistive devices. But barriers may also be related to flaws in communication, attitudes, or institutions. Communication barriers include a lack of accessible information on evacuation routes, available shelter or other humanitarian relief, or lack of accessible advance warnings. Attitudinal barriers include negative attitudes or misconceptions about persons with disabilities, assumptions that providing specific accommodations for persons with disabilities would be unrealistic or too high a burden in armed conflict, or denial of participation by persons with disabilities in humanitarian activities because of the prejudiced view that persons with disabilities cannot communicate their own wishes and needs or contribute to the design of humanitarian responses. Finally, institutional barriers include a lack of consideration of persons with disabilities in military doctrine, training, planning or conduct of operations, or more generally a lack of quality data on which disability-inclusive strategies or programmes could be based.³

These kinds of barriers result in higher probability of risk or harm for persons with disabilities compared to other civilians or persons *hors de combat* in armed conflict. Reports consistently show that persons with disabilities face

1 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflicts on the 70th Anniversary of the Geneva Conventions*, Geneva, 2019, p. 41.

2 *Protection of Civilians in Armed Conflict: Report of the Secretary-General*, UN Doc. S/2021/423, 3 May 2021, para. 34.

3 ICRC, above note 1, p. 41; 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/> (all internet references were accessed in November 2022); Inter-Agency Standing Committee (IASC), *Guidelines on 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>.

specific risks of being incidentally harmed by attacks because they face greater difficulties than other civilians with regard to fleeing areas where military operations take place or hiding in safe shelter, or because they are left behind by family members or other support persons.⁴ Persons with disabilities, especially children and women with disabilities, are also at a higher risk of violence, including sexual and gender-based violence.⁵ Due to the inaccessibility of humanitarian relief – for instance, water, sanitation, health infrastructure or food distribution – persons with disabilities may face increased health risks or inadequate and undignified living conditions.⁶ This may be the case when persons with disabilities are detained or displaced, and also when they are more generally part of the affected civilian population. Persons with disabilities are disproportionately affected, and at the same time are among the groups of persons most excluded by armed conflict.

International humanitarian law (IHL) provides for a variety of rules which could contribute to avoiding or minimizing conflict-specific harm or inadequate detention conditions. However, persons with disabilities are largely “invisible” in the implementation of rules regarding the general protection of civilians and persons *hors de combat*, and sufficient guidance as to the disability-inclusive implementation of such rules is lacking. The invisibility of persons with disabilities is the most important challenge to untapping the full protective potential of IHL. In particular, there has been no general awareness by parties to armed conflict of the relevance of the general rules on the conduct of hostilities, especially precautions, for avoiding or minimizing the greater risk of incidental harm to persons with disabilities. Similarly, there is room for exploring further what the IHL principles of humane treatment and non-adverse distinction concretely entail for contributing to more accessible detention conditions for detainees with disabilities.

A second group of challenges relates to the terminology and conceptualization associated with the IHL rules which specifically refer to persons with disabilities. The terminology used in the rules of specific protection has fuelled criticism that IHL reflects medical (in terms of only viewing disability through a medical response) and charity (viewing persons with disability as weak and passive victims) approaches to disability. While these are important concerns, they should not be regarded as an insurmountable obstacle to broadening the

4 See e.g. *Protection of Civilians in Armed Conflict*, above note 2; *Protection of Civilians in Armed Conflict: Report of the Secretary-General*, UN Doc. S/2020/366, 6 May 2020, paras 27–28; *Protection of Civilians in Armed Conflict: Report of the Secretary-General*, UN Doc. S/2019/373, 7 May 2019, para. 49.

5 *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/77/203, 20 July 2022, para. 67; *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc A/76/146, 19 July 2021, para. 34.

6 For a comprehensive analysis of barriers as well as existing legal and policy frameworks in humanitarian activities, including across different humanitarian protection and assistance domains, see Janet Lord, *Desk Review on Humanitarian Action Inclusive of Persons with Disabilities*, prepared for the IASC Task Team on Inclusion of Persons with Disabilities in Humanitarian Action, 1 March 2018, available at: <https://interagencystandingcommittee.org/iasc-task-team-inclusion-persons-disabilities-humanitarian-action/documents/desk-review-humanitarian>.

traditional narrow medical and charity models. Moreover, specific protections should be understood against the general rationale of recognizing that within the civilian population enjoying general protection, there are some groups who face specific barriers and risks; thus, these rules are inherently linked to the general protections under IHL.

It is in relation to these challenges that the complementarity between IHL and international human rights law (IHRL) – and especially the Convention on the Rights of Persons with Disabilities (CRPD), for States party to that treaty⁷ – can make a contribution. Efforts to examine this complementarity have only recently become more detailed and systematic against the general backdrop of contributing to a disability-inclusive legal and policy environment in armed conflict among States, humanitarian organizations, human rights actors and academia, together with persons with disabilities and their representative organizations.⁸ The International Committee of the Red Cross (ICRC) has also progressively increased its engagement in this regard, together with other components of the International Red Cross and Red Crescent Movement. In 2020 the ICRC adopted its Vision 2030 on Disability, which is designed to help the organization become more disability-inclusive in its protection and assistance activities for the people that it serves, as an employer, and in its legal and policy work.⁹

The ICRC's efforts to contribute to a disability-inclusive interpretation and implementation of IHL, in complementarity with the CRPD, form part of Vision 2030. Complementarity means that while IHL and CRPD norms may reveal certain differences, they may generally be interpreted with a view to their harmonization.¹⁰ Article 11 of the CRPD provides an explicit legal basis for implementing this complementarity by making a general *renvoi* to international legal obligations of States party to the Convention under international law, including IHL and IHRL, and explicitly stating the Convention's applicability in

7 At the time of writing, the CRPD is one of the most widely ratified universal IHRL treaties, with 185 States Parties.

8 These efforts intensified around and after the World Humanitarian Summit in 2016. For outputs of these broader efforts, see UNSC Res. 2475, 20 June 2019; Charter on Inclusion of Persons with Disabilities in Humanitarian Action, 2016, available at: <https://reliefweb.int/report/world/charter-inclusion-persons-disabilities-humanitarian-action-update-progress-world>. For analysis of the complementarity between IHL and the CRPD more specifically, see *Report of the Special Rapporteur*, 2022, above note 5, paras 7–32; *Report of the Special Rapporteur*, 2021, above note 5; 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 Convention on the Rights of Persons with Disabilities*, UN Doc. A/HRC/31/30, 2016; Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), Geneva, 2019, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2014-interactiv.pdf; Alice Priddy, *Military Briefing: Disability and Armed Conflict*, Geneva Academy Working Paper, Geneva, 2021, available at: www.geneva-academy.ch/joomlatools-files/docman-files/working-papers/Military%20Briefing%20Persons%20with%20Disabilities%20and%20Armed%20Conflict.%20.pdf.

9 ICRC, *The ICRC's Vision 2030 on Disability*, July 2020, available at: www.icrc.org/en/publication/4494-icrcs-vision-2030-disability.

10 ICRC, above note 1, pp. 42–43.

situations of armed conflict.¹¹ This means that IHL's general protections can be interpreted and applied with a view to increasing the visibility of specific risks and barriers faced by persons with disabilities in their diversity by using the contemporary social and human rights model and the active agency of persons with disabilities underlying the CRPD. This approach is indispensable for creating awareness among parties to armed conflicts of these disability-specific risks. The CRPD also contains among its general principles and fundamental obligations that persons with disabilities must be able to participate in and be consulted and actively involved in all decisions concerning them.¹² Participation requires that there must be a procedure through which persons with disabilities themselves can bring their perspectives and experiences to how IHL rules relevant to them should be interpreted and applied. Giving due recognition to the collective voice of persons with disabilities was also a leitmotiv behind the ICRC's joint efforts in 2022 with the UN Special Rapporteur on the Rights of Persons with Disabilities, the International Disability Alliance (IDA), the European Disability Forum (EDF) and the Diakonia IHL Centre to bring persons with disabilities and their representative organizations together with military representatives for a series of joint consultations on civilians with disabilities and military operations in armed conflict.¹³

This article will examine two major areas of IHL – the conduct of hostilities and detention – of particular relevance for persons with disabilities, in an effort to increase the visibility of persons with disabilities in the interpretation and implementation of these general IHL rules. While it aims to make a contribution to the mainstreaming of disability in IHL core areas, in harmony with the CRPD, it cannot provide an exhaustive treatment of this matter.¹⁴

11 The CRPD is the only universal IHRL treaty which has a provision explicitly covering situations of armed conflict, apart from the Convention on the Rights of the Child (Articles 38 and 39) and its Optional Protocol on the Involvement of Children in Armed Conflict, which is sometimes referred to as a hybrid IHL–IHRL treaty. It should also be noted that – unlike, for instance, the International Covenant on Civil and Political Rights – the CRPD does not contain a derogation clause. The general *renvoi* to obligations is without prejudice to general differences in scope of application between IHL and IHRL. This includes the extraterritorial applicability of IHRL and whether and how IHRL applies to non-State armed groups. Complementarity with the CRPD should also not be interpreted to mean new protected groups under IHL. For a specific exploration of the respective general scope of application of IHL and the CRPD, see A. Priddy, 2019, above note 8, pp. 34–46. For the most recent expression of ICRC views on the applicability of IHRL to non-State armed groups, see ICRC, above note 1, p. 54.

12 See Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 24 January 2007 (entered into force 3 May 2008) (CRPD), Arts 3, 4(3).

13 While these consultations were conducted under Chatham House rules, the content of challenges and potential recommendations will be reflected throughout this article. Salient findings from these consultations were also presented in the 2022 report by the UN Special Rapporteur on the Rights of Persons with Disabilities, Mr Gerard Quinn, on the implementation and application of obligations under IHL towards persons with disabilities during the conduct of hostilities. See *Report of the Special Rapporteur*, 2022, above note 5, paras 64–74.

14 Many other areas could be examined in this regard – for instance, IHL rules in relation to displacement, to preventing and clarifying the fate of missing persons, or to humanitarian access. A detailed intersectional analysis of specific barriers and risks between disability, age and gender is equally beyond the scope of this article, as is an analysis of the interlinkages between victim assistance provisions in weapons treaties and the CRPD.

IHL rules on the conduct of hostilities: General protections including for civilians with disabilities

It is perhaps stating the obvious to note that persons with disabilities, especially when they are civilians and unless they directly participate in hostilities, enjoy general protection under the rules on the conduct of hostilities as much as civilians without disabilities. However, while they are generally included as civilians, the challenge is precisely to interpret and implement the IHL principles of distinction, proportionality and precautions in a manner that takes into account the specific risks to civilians with disabilities.

The principle of distinction

The IHL principle of distinction requires that the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants, and correspondingly, attacks must not be directed against civilians, unless and for such time as they directly participate in hostilities.¹⁵ Even for civilians without disabilities, fleeing from an area where hostilities are taking place can be fraught with risk of being subject to attacks while moving. This risk is especially great in dynamic and fluid situations like large-scale population movements.

Persons with disabilities – for instance, those with psychosocial or sensory disabilities – may be at even greater risk where their behaviour is misjudged by combatants as directly participating in hostilities or somehow indicating membership in a non-State armed group, which could in turn lead to direct attacks against them.¹⁶ Against that background, ICRC recommendations to military commanders specifically made for urban warfare are particularly relevant, including that training scenarios and doctrine not only reflect the operational setting and likely conduct of an enemy, but also include realistic civilian presence (by age, gender, disability and number) and activity, the risks civilians face, and their actions and reactions, so as to familiarize and condition troops prior to deployment.¹⁷ Furthermore, all those involved in targeting procedures (both pre-planned and dynamic) should receive comprehensive training and take part in related exercises which include a range of different aspects that help ensure targeting is lawful.¹⁸ One aspect of such training should be the positive identification of targets to verify with reasonable certainty that, for instance, a person to be attacked constitutes a lawful target in accordance with

15 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. 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>.

16 OPD testimonies, joint consultations on persons with disabilities and military operations in armed conflict, May 2022.

17 ICRC, *Reducing Civilian Harm: A Commander's Handbook*, Geneva, 2021, p. 25.

18 *Ibid.*, p. 27.

IHL; such identification is derived through observation and analysis of target characteristics.¹⁹ Training scenarios and doctrine should reflect the reality that persons with sensory, psychosocial or intellectual disabilities may not be able to understand or react to hostilities occurring around them. This specific awareness of potential behaviour by persons with sensory, psychosocial and intellectual disabilities should also feed into the analysis of target characteristics and therefore help to avoid any mistaken presumptions that these people, because of their behaviour, would be targets. To create such specific awareness, the involvement in such trainings of persons with disabilities and organizations of persons with disabilities (OPDs) should be explored.

The principle of proportionality

IHL prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof that would be excessive in relation to the concrete and direct military advantage anticipated.²⁰ It requires military commanders to make that assessment at the planning stage before deciding upon an attack, and to cancel or suspend an attack if it becomes apparent during the attack that it would cause excessive incidental civilian harm.²¹ Key to that proportionality evaluation is the determination of what incidental harm to civilians is foreseeable based on all information from all sources reasonably available to the commander in the circumstances, including military but also civilian sources.²²

Particularly in urban and other populated areas, due to the intermingling of military objectives with civilians and civilian objects, it is critical that the information collected in the planning process does not only focus on target verification, including to rule out mistaken determinations that civilians with disabilities would constitute lawful targets; it should also serve to assess the incidental civilian harm expected to result from the attack.²³ In this assessment, the fact that in many contexts barriers prevent civilians with disabilities from fleeing or being evacuated from areas where hostilities are taking place must be taken into account. Practices such as the assessment of realistic civilian presence, as well as assuming civilian presence in every civilian building unless proved otherwise, would help to take these disability-specific risks of incidental harm into account.²⁴

Incidental civilian harm would not only include incidental loss of civilian life, injury to civilians or destruction to civilian objects but also indirect or reverberating effects, often also known as “second- and third-order”, “knock-on” or “long-term”

19 *Ibid.*, p. 20.

20 AP I, Art. 51(5)(b); ICRC Customary Law Study, above note 15, Rule 14.

21 AP I, Arts 57(2)(a)(iii), 57(2)(b); ICRC Customary Law Study, above note 15, Rules 14, 18, 19.

22 ICRC, *Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas*, Geneva, 2022, pp. 97–98.

23 ICRC, above note 1, p. 18.

24 *Ibid.*

effects. In the ICRC's view, such effects must also be taken into account in the proportionality assessment and in precautions in attack insofar as they are reasonably foreseeable.²⁵ For example, incidental damage to critical civilian infrastructure, such as vital water and electrical facilities and supply networks, will likely entail reverberating effects on other essential services, like health-care services, water distribution, power supply and sanitation, which depend on such infrastructure.²⁶ This in turn may lead to further deaths or disease among civilians. This is especially relevant in urban warfare, where military objectives are intermingled with civilian objects and where critical civilian infrastructure and essential service systems are largely interconnected and interdependent.

What is reasonably foreseeable varies depending on the circumstances of the attack, but patterns of incidental civilian harm can be foreseen based on past experience.²⁷ Foreseeability will be informed and will evolve in particular through analysis of the effects of past attacks, including through the collection of sex-, age- and disability-disaggregated civilian casualty data; studies on the effects of conflicts; better modelling of weapons' effects; better understanding of the infrastructural set-up and interdependency between services; and new technologies to better assess the presence of civilians and the condition or status of infrastructure and service delivery during the conflict.²⁸

In this regard, what has been emphasized by the ICRC for specific gendered impacts of attacks is equally true for disability-specific impacts of attacks; while there is some general understanding of the barriers and risks faced by civilians with disabilities, there is a lack of data on the specific impacts of attacks on such civilians.²⁹ For States party to the CRPD, this more granular analysis of barriers and risks faced by persons with disabilities resulting from specific attacks entails an obligation to collect disaggregated data to guide that analysis.³⁰ By that token, the foreseeability of disability-specific harm could be improved by military decision-makers.

For civilians with disabilities, there could be specific articulations of such reverberating effects of attacks – for instance, where hospitals or rehabilitation centres, which may more often be needed by certain civilians with disabilities than by others, become fully or partly dysfunctional, or where damage to electricity networks affects the operation of assistive or medical devices, such as wheelchairs, scooters, communication devices, dialysis machines, ventilators or oxygen concentrators, which may be vital for the daily functioning of some civilians with disabilities.³¹

25 *Ibid.*, p. 20.

26 ICRC, above note 22, p. 98; ICRC, above note 17, p. 27.

27 ICRC, above note 1, p. 18. See also ICRC, *Gendered Impacts of Armed Conflicts and Implications for the Application of International Humanitarian Law*, Geneva, 2022, p. 16.

28 ICRC, above note 1, p. 18; ICRC, *Gendered Impacts*, above note 27, p. 16.

29 See H. Durham and G. Quinn, above note 3. Regarding the data gap on specific gendered impacts of attacks, see ICRC, *Gendered Impacts*, above note 27, p. 16.

30 CRPD, above note 12, Art. 31.

31 Joint consultations on persons with disabilities and military operations in armed conflict, April and May 2022.

A disability-inclusive analysis of specific attacks may also inform the value assigned to particular civilian uses when confronted with the general challenge of contemporary warfare that many objects are used simultaneously for military and civilian purposes in the assessment of incidental harm.³² For instance, if certain objects, such as bridges, were to be attacked because by their purpose or use they have become military objectives, and the remaining evacuation options for civilians will result in alternative routes over difficult terrain with numerous physical obstacles, this would mean that some civilians, especially those with physical disabilities, will be more likely not to be able to use these routes, and as a consequence, they may have a higher likelihood of being left behind in an area where hostilities are ongoing, with greater risk of being incidentally harmed.³³ If this specific foreseeable harm is omitted from the proportionality assessment, or is not accorded enough priority in that calculus, the fact that the death or injury which may foreseeably result from taking the more difficult route or from staying in the area of hostilities because the evacuation route is not accessible to certain individuals will likely not be considered in the assessment of incidental harm.

While omitting specific foreseeable disability-specific incidental harm confirms the general problem of lack of awareness of disability-specific impacts of the conduct of hostilities, not according priority to such harm where there might be awareness highlights in this specific context the general challenge of inherent value judgements in the application of the principle of proportionality.³⁴

The principle of precaution

In addition to the principles of distinction and proportionality, IHL also imposes the obligation on attackers to take constant care to spare the civilian population in all military operations. Parties must take “all feasible precautions” in attack in order to avoid or at least minimize incidental civilian harm (active precautions), and must protect civilians under their control from the effects of attacks (passive precautions).³⁵ “Feasible” entails what is possible in practice, taking into account all of the humanitarian and military considerations that prevail at the time; this may be dynamic and may evolve with time, including as a result of past practice and lessons learned.³⁶

It is submitted that with this dynamic understanding of evolving information on barriers and risks faced by persons with disabilities, information provided by persons with disabilities themselves, by OPDs and/or by impartial humanitarian organizations should also feed into the considerations on which precautions are based.

32 On this general challenge, particularly in urban warfare, and the ICRC’s legal position, see ICRC, above note 1, p. 19.

33 Joint consultations on persons with disabilities and military operations in armed conflict, April and May 2022.

34 For an exploration of this issue through a gender lens, see ICRC, *Gendered Impacts*, above note 27, p. 16.

35 AP I, Arts 57–58; ICRC Customary Law Study, above note 15, Rules 15–24.

36 ICRC, above note 1, p. 17.

The general obligation to take constant care supplements the basic rule of distinction. It applies to the entire range of military operations and not only for attacks within the meaning of IHL. The term “military operations” encompasses “any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat” or “related to hostilities”.³⁷

The obligation of constant care is an obligation of conduct, to mitigate risk and prevent harm. It applies constantly in the planning or execution of any military operation. As a general rule, the higher the risk for the civilian population in any given military operation, the more will be required in terms of care. The requirement to take constant care extends to every aspect of military operational training, planning and mission execution, and is interpreted by some as demanding that soldiers be trained and directed to instinctively endeavour to mitigate civilian risk in all situations.³⁸

For instance, in troop movements with a view to attacking military objectives in a town or village, there is a high risk that persons with sensory disabilities will be unable to hear the presence of armed forces. In this regard, in certain contexts, deaf persons have been shot from behind and killed because they did not realize that military personnel were advancing and they were wrongly associated with an adversary in an armed conflict.³⁹ What has been observed above regarding positive identification of targets with reasonable certainty is *mutatis mutandis* relevant here – namely, that specific awareness by parties to armed conflict in such situations may contribute to correctly appraising the behaviour of, and thereby avoiding or mitigating harm to, certain civilians with disabilities. In this context, parties to armed conflict should be alert to attempts by persons with sensory disabilities to communicate to them that a person is not a lawful target. For instance, a deaf person might wave their hand, or a piece of cloth, tree branch or handkerchief, to combatants to express this.⁴⁰

Active precautions include those that can be taken in the choice of means and methods of attack with a view to avoiding, or in any event minimizing, incidental civilian harm.⁴¹ Generally, this includes consideration of the timing of attacks in order to choose a moment for attacking military objectives when there are fewer civilians present, such as at night rather than in the middle of the day.⁴² Given that civilians with disabilities face specific difficulties with regard to leaving the vicinity of military objectives for safer spaces, considerations of the timing of attacks are especially relevant; it appears that parties to armed conflict

37 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), p. 680, para. 2191.

38 ICRC, above note 22, p. 102 (with further references).

39 OPD testimony, joint consultations on persons with disabilities and military operations in armed conflict, May 2022.

40 *Ibid.*

41 AP I, Art. 57(2)(a)(ii); ICRC Customary Law Study, above note 15, Rule 17.

42 See ICRC Commentary on the APs, above note 37, p. 682, para. 2200.

have delayed military operations because the military objective was surrounded by civilians, including civilians with disabilities.⁴³

Another active precaution that is particularly relevant for civilians with disabilities is that parties to armed conflicts must give effective advance warnings of attacks that may affect the civilian population, unless the circumstances do not permit.⁴⁴ The effectiveness of a warning should be assessed from the perspective of the civilian population that may be affected. It should reach and be understood by as many civilians as possible who may be affected by the attack, and it should give them time to leave, find shelter or take other measures to protect themselves.⁴⁵ The general planning considerations for commanders for implementing effective advance warnings include varied formats of communication, ensuring that the content of messages is clear and easy to understand, what constitutes sufficient notice for the civilian population to react to the warning, and whether the population is free to react to the warning.⁴⁶

These considerations should be appropriately contextualized in order to render them inclusive for persons with disabilities as part of the civilian population. For instance, issuing such warnings in a disability-inclusive manner requires presenting accessible information in a variety of formats that takes into account the diversity of impairments of persons with disabilities. Radio messages alone will not be heard by persons with hearing impairments, who would need the information to be presented to them in sign language. Leaflets or other exclusively visual forms of warning will not be seen by persons with visual impairments. Complex instructions and warnings, if not simplified, will not be understood by persons with intellectual impairments.⁴⁷ Exploring options to equip parties to armed conflict with certain language competences, such as the local sign language, by relying either on already existing skills within a party to a conflict or on external experts (including civil authorities and OPDs), would help in the diversification of formats of communication and would increase the range of means of communication in a more disability-inclusive manner.⁴⁸

Civilians with disabilities may need more time to leave an area of impending military operations, and this aspect should also be taken into account in informing the decision by attackers as to when a warning should be issued and how much time will be granted to the civilian population until the warning expires.

In terms of passive precautions for defenders, these may include the construction of safe shelters, the withdrawal of the civilian population to safer

43 Testimony by State armed forces, joint consultations on persons with disabilities and military operations in armed conflict, May 2022.

44 AP I, Art. 57(2)(c); ICRC Customary Law Study, above note 15, Rule 20.

45 ICRC, above note 1, p. 17.

46 For planning considerations for issuing effective advance warnings to the civilian population, see ICRC, above note 17, pp. 48–49. On timing aspects in relation to advance warnings, see also Jean-François Quéguiner, “Precautions Under the Law Governing the Conduct of Hostilities”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 808.

47 H. Durham and G. Quinn, above note 3.

48 This was suggested by military representatives participating in the joint consultations on persons with disabilities and military operations in armed conflict, April and May 2022.

places, or temporary evacuations to allow civilians to leave for safer areas by their own free will while military operations are ongoing.⁴⁹ Forcible evacuations, on the other hand, are prohibited as forcible transfers, deportations or displacement, unless they are undertaken for the security of civilians themselves, including that of civilians with disabilities, or are dictated by imperative military necessity.⁵⁰ To ensure that evacuations are not forced or unlawful, they must remain limited to the time required by the circumstances. When those circumstances cease to exist, displaced persons, including displaced persons with disabilities, have a right to voluntary return in safety to their homes or places of habitual residence.⁵¹

Taking passive precautions in a disability-inclusive manner means, for instance, ensuring that safe shelters are physically accessible to wheelchair users or that information on their location is accessible for those with intellectual disabilities. It means giving specific consideration during evacuations to identifying persons with disabilities, ensuring accessible means of transport, allowing for their personal assistants and caretakers to accompany them, and ensuring that they are able to keep assistive devices with them or have access to suitable alternatives in case those devices have been lost or damaged.⁵²

Finally, it must be emphasized that even if civilians are not able to act on an effective advance warning, cannot access safe shelter and cannot be part of temporary evacuations, they continue to benefit from all general protections afforded to civilians, including the principles of distinction, proportionality and precaution.⁵³ This is absolutely crucial for civilians with disabilities in light of their specific barriers to accessing warnings, shelter or evacuation operations, and/or their lack of willingness to leave their habitual homes, especially older civilians with disabilities. As a result of these factors, many will continue to be present in danger zones.

Specific protection of persons with disabilities

A disability-inclusive interpretation and implementation of IHL is also reinforced by specific protections for persons with disabilities as part of civilian populations. These specific protections do not exist in isolation from the general protections for civilians; rather, they are a recognition of the specific risks, including from

49 For examples of precautions against the effects of attacks, see ICRC Customary Law Study, above note 15, commentary on Rule 22, which constitutes customary IHL in both IAC and NIAC. For in-depth planning considerations for military commanders related to evacuations of civilians, see ICRC, above note 17, pp. 55–56.

50 See 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. 49; 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. 17; ICRC Customary Law Study, above note 15, Rule 129.

51 GC IV, Art. 49(2); ICRC Customary Law Study, above note 15, Rule 132; ICRC, above note 1, p. 40.

52 H. Durham and G. Quinn, above note 3.

53 ICRC, above note 1, p. 17; ICRC, above note 22, p. 104.

military operations, faced by certain groups within the civilian population like persons with disabilities, but also older persons, women and children.

The terminology used in provisions of the Geneva Conventions (including Geneva Convention IV (GC IV)) to describe persons with disabilities, like “infirm”,⁵⁴ and the notion that persons with disabilities deserved specific protection because they were thought to be in a state of weakness due to their physical or mental condition, were a product of the social and historical context at the time.⁵⁵ It is well understood today that these terms and concepts, which narrowly focus on the individual condition of the person with disability through a medical perspective and arguably view them as weak and passive victims in need of protection, are certainly outdated in light of contemporary understandings of disability.⁵⁶ Although we can and must move beyond such terms and notions, we must not discard the important recognition already present in the minds of the drafters of the Geneva Conventions that certain groups of civilians, including civilians with disabilities, require specific consideration.⁵⁷

The gist of specific protections under IHL is encapsulated by the obligation that persons with disabilities are entitled to special respect and protection. This obligation, which is enshrined in treaty law applicable to international armed conflicts (IACs) in GC IV and in customary IHL for all types of armed conflict,⁵⁸ requires that parties to armed conflict refrain from attacking, otherwise harming or ill-treating persons with disabilities, and that those parties take active measures to assist and protect such persons from harm. The obligation to “assist and protect” is to be broadly interpreted to cover protection or support from a wide range of harms or dangers. The harms or dangers from which persons with disabilities are to be protected include those arising from hostilities; from violence, exploitation or ill-treatment, both by combatants and by civilians; and

54 See e.g. GC IV, Arts 16–18, 20–22.

55 *Ibid.* “Infirm” means “not physically or mentally strong, especially through age or illness”, and stems from the Latin word *infirmus*, which means weak or not strong. See “Infirm”, *Cambridge Dictionary*, available at: <https://dictionary.cambridge.org/dictionary/english/infirm>. While this term is often closely associated with older persons, the drafting history of GC IV provides evidence that the term was understood to encompass persons with disabilities, especially persons with physical impairments, during the drafting process. See, for instance, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2.B, Federal Political Department, Berne, 1949, p. 471 (the French delegate is quoted as saying that the term “infirm” dealt with the protection of persons with disabilities); Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (1958 Commentary on GC IV), pp. 125 (clarifying that despite the fact that they are not explicitly mentioned, persons with physical impairments would also qualify for specific protection of groups of civilians who could be accommodated in hospitals or safety zones), 146 (mentioning in the context of civilian hospitals that “homes for the blind or the deaf and dumb” could qualify as civilian hospitals, “provided that the inmates are receiving care”).

56 See ICRC, *How Law Protects Persons with Disabilities in Armed Conflict*, Geneva, 2017, available at: www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict.

57 1958 Commentary on GC IV, above note 55, p. 134.

58 GC IV, Art. 16(1); ICRC Customary Law Study, above note 15, Rule 138.

from the risk of exacerbation of an existing impairment or secondary impairment if existing medical services or support become inaccessible.⁵⁹

Therefore, specific protection is applicable to the conduct of hostilities but also when the person concerned is under the control of a party to a conflict.⁶⁰ Further rules address certain aspects of the implementation of this obligation, such as the obligation under GC IV to facilitate steps taken to assist civilians (other than wounded or shipwrecked civilians) in grave danger.⁶¹ The kind of measures to be facilitated would be similar to the feasible precautions taken to protect civilians under the control of parties to armed conflict from the dangers of military operations and may concern, for instance, evacuating persons with disabilities or providing accessible temporary safe shelters.⁶²

From a contemporary perspective, the main challenge is to consider the diversity of impairments of persons with disabilities and the variety of barriers faced by different persons with disabilities, and tailoring measures to address these barriers in the interpretation and implementation of specific protections.

The complementarity between IHL and the obligations of States party to the CRPD assists in this regard. Article 11 of the CRPD is an explicit expression of this complementarity, as it obligates States Parties to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of armed conflict, in accordance with their obligations under international law, including IHL and IHRL. A contemporary interpretation of IHL can be based on the social and human rights model of disability and the evolving concept of disability underlying the CRPD, and includes among persons with disabilities those with physical, psychosocial, intellectual or sensory impairments that – in interaction with various barriers, be they physical, communication, attitudinal or institutional – result in specific risks from military operations and prevent such persons from accessing protections under IHL.

Reading the IHL obligation of “special” respect and protection of persons with disabilities in light of the complementarity with the CRPD presupposes that not only persons with physical disabilities are identified as such but also those with less visible disabilities, including persons with sensory, intellectual or psychosocial disabilities. Identifying the location and diversity of persons with disabilities raises the issue of implementation of the obligation to collect publicly available disability-disaggregated data of sufficient quality under the CRPD as a basis for inclusive interpretation and implementation of specific protections

59 For a similar interpretation of the various dangers or harms covered by the obligation to protect, see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), para. 1361.

60 See e.g. Belgium, *Droit des conflits armés*, 2009, chap. V, p. 3; Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, 2nd ed., 2020, p. 247; Peru, *International Humanitarian Law Manual for the Armed Forces*, 2004, para. 84 (b).

61 GC IV, Art. 16(2).

62 See e.g. Denmark, above note 60, p. 208; Norway, *Manual of the Law of Armed Conflict*, 2013, p. 86, para. 4.54.

under IHL.⁶³ The involvement of civilian actors, including civil authorities, OPDs and impartial humanitarian organizations, may enable parties to armed conflicts to obtain more precise information on persons with disabilities when conducting their military operations and may help to temporarily remedy gaps or errors on data available in a given State. Still, coordination and centralization of the data from various sources will be necessary to ensure that the information is accurate and reliable.⁶⁴

The complementarity between IHL and the CRPD also means that the nature and variety of the barriers faced by diverse persons with disabilities must be effectively addressed by measures other than the provision of medical services. It is important to affirm a broader approach of IHL to persons with disabilities, since IHL has been repeatedly criticized as taking an outdated, medicalized approach to such persons, focusing merely on the person's individual condition (i.e. the impairment) that requires medical treatment.⁶⁵ In particular, as already mentioned, a person with a hearing impairment or a visual impairment will face specific communication barriers, which, if unaddressed, will lead to specific risks of that person not accessing information permitting their protection during hostilities. To address such communication barriers, it is not medical care or a medical competence which is primarily needed, but rather competence in sign language or Braille. To avoid or minimize the risk of wrongful attacks or violence against persons with psychosocial or intellectual disabilities due to misjudging their behaviour, whether in hostilities or in situations where persons with psychosocial or intellectual disabilities come under the control of combatants, it is not mental health services that would address this challenge. Rather, in attacks or troop movements, and in screening operations at military checkpoints or during house-to-house searches, more specific awareness by weapons bearers of potential reactions to their presence by persons with psychosocial or intellectual disabilities should be raised through training, and some basic guidance on appropriate military behaviour when encountering persons with psychosocial or intellectual disabilities should be provided.

The variety of lived experiences of persons with disabilities may also be captured when IHL-specific protections are complemented by the CRPD. For instance, negotiators of the 1949 Geneva Conventions had in mind the scenario of civilians trapped in air raid shelters as a particular example of persons in grave danger requiring the facilitation of specific measures to assist them.⁶⁶ However, the wording of "other persons exposed to grave danger" and the intention of the drafters make it clear that this is to be viewed as a catch-all category aimed at ensuring that the groups of civilians explicitly mentioned would not be

63 CRPD, above note 12, Art. 31.

64 OPD testimony, joint consultations on persons with disabilities and military operations in armed conflict, May 2022.

65 See ICRC, above note 1, p. 42. This criticism is often based on the mention of "disability" in the definition of "wounded and sick" persons who may be in need of medical assistance or care under Article 8(a) of AP I.

66 1958 Commentary on GC IV, above note 55, p. 136.

understood as a restrictive list.⁶⁷ The complementarity with the CRPD, which expressly recognizes the diversity of persons with disabilities in light of their lived experiences, reinforces an interpretation of this provision that covers persons with disabilities or older persons who may not be trapped in shelters but in their homes and who are therefore at grave risk because they cannot or do not intend to flee military operations.⁶⁸

In order for parties to armed conflict to effectively facilitate steps taken to assist civilians with disabilities in grave danger from military operations, operational cooperation and coordination between parties to armed conflict, civil authorities and other actors like OPDs and impartial humanitarian organizations are crucial. Such cooperation and coordination may also render the implementation of feasible precautions for the general protection of civilians more effective, such as evacuations. This reflects the reality that often measures like evacuations will actually be performed by actors other than parties to the armed conflict, and these actors will thereby support parties to armed conflicts in implementing their IHL obligations.⁶⁹

Mechanisms of coordination and cooperation should be put in place in advance before an armed conflict occurs due to the fact that during an armed conflict, the obligation to facilitate steps taken by other actors than a party to a conflict itself are subject to the caveat “as far as military considerations allow”. What is feasible in terms of precautions also hinges upon military considerations besides humanitarian concerns.⁷⁰ Military considerations like ongoing hostilities or the necessity of establishing military positions without revealing them to civilian actors, including those with enemy nationality, may temporarily prevent allowing such stakeholders to access certain areas.⁷¹

A specific way to implement precautions both in attack and against the effects of attack in besieged and encircled areas, as well as the specific protections applicable to groups of civilians provided by GC IV, is to draft local agreements between belligerents in order to allow those groups of civilians, including persons with disabilities, to be evacuated.⁷² Such agreements should cover, generally, details like the number of people to be evacuated, the beginning and duration of any truce to enable the evacuation to proceed, the means of transport, and the route to be taken.⁷³ In order for persons with disabilities to be part of such

67 *Ibid.*

68 H. Durham and G. Quinn, above note 3.

69 That said, parties to armed conflict, including non-State parties, have proceeded with evacuations of civilians with disabilities themselves, such as in one NIAC where one non-State party to the conflict reportedly evacuated civilians with disabilities based on its information on the population in areas under its control, in accordance with its religious values. This was shared in an OPD testimony at the joint consultations on persons with disabilities and military operations in armed conflict, May 2022.

70 GC IV, Art. 16(2).

71 1958 Commentary on GC IV, above note 55, pp. 136–137; see also *Final Record*, above note 55, p. 392.

72 GC IV, Art. 17.

73 1958 Commentary on GC IV, above note 55, p. 139. See also ICRC, above note 17, pp. 55–56, which contains a detailed planning checklist for military commanders as a useful resource for informing the details of evacuation agreements.

evacuations, the specific considerations already elaborated above in relation to feasible precautions should also be included.

IHL and persons with disabilities in the power of a party to a conflict, with specific focus on detainees with disabilities

The preceding section dedicated to specific protections for persons with disabilities under IHL has already mentioned scenarios where persons with disabilities may come within the power of a party to a conflict, including screening operations at checkpoints. Persons may come within the power of a party to a conflict to varying degrees, from scenarios which involve control over individual persons, including movement restrictions or deprivations of liberty, or when persons with disabilities are wounded or sick, to situations where they are part of affected populations in territory controlled by a party to a conflict.

Humane treatment

In all of the aforementioned situations of being in the power of a party to a conflict, persons with disabilities benefit from certain fundamental guarantees; above all, they must be treated humanely, without any adverse distinction.⁷⁴ This obligation is based on respect for a person's physical and mental integrity and their inherent dignity. However, the meaning of humane treatment is not defined under IHL. This omission is deliberate, as the definition is context-specific. Today, the ICRC understands this obligation to require parties to armed conflict to consider an individual's identity, including their age, sex, impairment, and social, cultural, religious or political background. Their past experiences and how these experiences, along with the person's risks or needs, are shaped by environmental factors, notably the socio-cultural, economic and political structures in place, must also be taken into account.⁷⁵ Therefore, the meaning of what constitutes humane treatment is inherently dynamic and subject to changes in society.⁷⁶

Specific acts of ill-treatment

While humane treatment carries an independent meaning, IHL also prohibits specific acts of ill-treatment, such as torture and other cruel, inhumane or degrading treatment or punishment. For evaluating whether specific conduct amounts to prohibited ill-treatment, the specific individual circumstances of the person ill-treated must be taken into account, including their physical or mental condition, their gender, age, social, cultural or religious background, and their

74 Common Art. 3; AP I, Art. 75; AP II, Art. 4.

75 2016 Commentary on GC I, above note 59, para. 553; ICRC, above note 56; ICRC, above note 1, pp. 41–43.

76 See ICRC Customary Law Study, above note 15, commentary on Rule 87.

past experiences, as well as environmental factors such as prevailing social and cultural conditions.⁷⁷

The prohibition against adverse distinction, *de facto* equality and complementarity with CRPD obligations related to accessibility and reasonable accommodation

The obligation of humane treatment must also be considered together with the prohibition against adverse distinction. “Disability” is not explicitly mentioned as a prohibited ground of adverse distinction under IHL, but it is nevertheless encompassed by the prohibition, as adverse distinction based on “any other similar criteria” as those explicitly listed is equally prohibited.⁷⁸ Therefore, the IHL prohibition against adverse distinction can be interpreted as converging with the prohibition against discrimination on the basis of disability which is explicit in the CRPD.⁷⁹

Since only “adverse” distinction is prohibited, measures of differentiation or prioritization which take into account the specific risks faced by persons with disabilities may not only be allowed but may even be required. Thus, non-adverse distinctions may actually be necessary to ensure humane treatment in the different situations in which persons with disabilities may find themselves.⁸⁰

This may require the taking of all feasible measures to remove and prevent the raising of any barriers that persons with disabilities might face in gaining equal access to services or protections provided under IHL compared with other civilians or persons *hors de combat*. When interpreted to include these positive obligations, IHL converges with obligations to advance the *de facto* or substantive equality of persons with disabilities under human rights law, in particular the CRPD.⁸¹

Central to ensuring substantive equality between persons with disabilities and other persons are obligations under the CRPD to ensure accessibility of the physical environment, information, communications and services, as well as the provision of reasonable accommodations in individual cases when needed.⁸² With regard to taking positive appropriate measures related to accessibility, the CRPD

77 See, for instance, ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (2020 Commentary on GC III), para. 465.

78 See common Art. 3; 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; GC IV, Art. 27; AP I, Art. 75; AP II, Art. 2; ICRC Customary Law Study, above note 15, Rule 88; 2020 Commentary on GC III, above note 77, paras 26–27.

79 ICRC, above note 56; CRPD, above note 12, Art. 5(2).

80 See in this sense, see 2020 Commentary on GC III, above note 77, paras 610–616. See also ICRC, *Detention by Non-State Armed Groups: IHL Obligations and NSAG Practices to Implement Them*, Geneva, forthcoming, Rules 1, 4–5 and commentaries thereto.

81 ICRC, above note 1, p. 42; CRPD, above note 12, Art. 5(4).

82 CRPD, above note 12, Arts. 5(3). 9. According to Article 2 of the CRPD, “reasonable accommodations” are “necessary modifications 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”.

explicitly includes the identification and elimination of barriers to accessibility, be they physical, communicative, attitudinal or institutional.⁸³

Screening operations

The inherently dynamic interpretations of humane treatment and the prohibition of adverse distinction under IHL, in harmony with the CRPD, allow for disability-specific contextualizations in a range of situations in which persons with disabilities are in the power of a party to a conflict.⁸⁴ For instance, these considerations allow us to appreciate the importance of assistive devices for respecting the dignity of persons with disabilities whose movement is restricted, such as when they are at checkpoints or detained. If assistive devices that have supported a person's functioning for a long time are damaged, or are confiscated and not returned, the harm to a person's dignity becomes clear when it is understood that, for persons with disabilities, assistive devices are not simply objects but are extensions of their bodies.⁸⁵ In a similar vein, refusing to allow a person with a disability to be accompanied through checkpoint controls by their support person, personal assistant or caretaker could also encroach on that person's dignity.⁸⁶

In screening operations where parties to armed conflict aim to control large population movements, a disability-inclusive implementation of the obligation to treat civilians and persons *hors de combat* humanely and without adverse distinction would emphasize appropriate measures to ensure accessibility to information on the process of such operations.⁸⁷ These measures would go some way to reducing the potential for violent encounters and inappropriate behaviour, including cruel, inhuman or degrading treatment by parties to armed conflicts and their representatives towards persons with disabilities.⁸⁸

Detention conditions

In situations of conflict-related detention, specific conduct and detention conditions which have already been held by the International Criminal Tribunal for the former

83 CRPD, above note 12, Art. 9(1).

84 ICRC, above note 56.

85 OPD testimony, joint consultations on persons with disabilities and military operations, April 2022; CRPD Committee, "General Comment No. 6 on Equality and Non-Discrimination", UN Doc. CRPD/C/GC/6, 2018, paras 24, 31; Amanda Keeling, "Commentary on Article 16: Freedom from Exploitation, Violence and Abuse", in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford University Press, Oxford, 2018, p. 483.

86 OPD testimony, joint consultations on persons with disabilities and military operations, April 2022; A. Priddy, 2019, above note 8, p. 54.

87 ICRC, above note 17, p. 60.

88 However, it has been observed that in such operations little specific consideration has been given to persons with disabilities, among other groups facing specific risks. See Laurent Saugy and Tilman Rodenhäuser, "5 Operational Realities of Detention in Contemporary Armed Conflict", *Humanitarian Law and Policy Blog*, 30 November 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/11/30/5-operational-realities-detention-contemporary-armed-conflict/>.

Yugoslavia (ICTY) to constitute torture or cruel, inhuman or degrading treatment would be specifically relevant for detainees with disabilities. Such conditions include lack of adequate medical attention;⁸⁹ more broadly inhumane living conditions in places of detention with regard to adequate food, water, clothing, medical care, shelter or contacts with the outside world;⁹⁰ and solitary confinement, in view of its strictness, its duration and the objective pursued.⁹¹

The ICTY drew on the case of a detainee with a psychosocial impairment among a group of several others with mental health conditions in determining detention conditions that amount to cruel treatment in violation of Article 3 common to the four Geneva Conventions. It invoked the very restrictive detention environment of the detainee, who had no possibility of taking outdoor walks to relieve his psychological stress, leading him to adopt self-harming behaviour such as cutting off his ear and fingernails. The effects of that environment were exacerbated by the severe lack of food, which provoked extreme hunger, causing the detainee to eat insects when he caught them. Finally, the guards were aware of the existence of a group of detainees with psychosocial impairments but did not take any positive action to accommodate those detainees.⁹² The ICTY relied on these facts to establish the severity of physical and mental consequences suffered by this person with a psychosocial disability necessary for concluding that cruel treatment had been committed.⁹³

Severe beatings and the refusal to urgently transfer a detainee with a hearing impairment to an external hospital outside of a detention camp, whereupon this detainee died, were at the core of another finding of cruel treatment by the ICTY in the context of a non-international armed conflict (NIAC).⁹⁴ However, what received less attention by the judges was the testimony by a witness who believed that the guards beat this detainee even more than other detainees without disabilities. This was allegedly because the guards thought that the detainee was refusing to answer their questions, but in fact his lack of response was due to his hearing impairment and inability to speak, of which they were unaware.⁹⁵ This demonstrates the risk of ill-treatment as a reaction to persons with psychosocial or sensory disabilities when there is a lack of awareness on the part of Detaining Powers faced with such persons within their detainee population.

In another case, severe and repeated beatings which caused a detainee with physical and psychosocial disabilities to lose consciousness numerous times formed the main basis for a determination of cruel treatment, in the same way as repeated

89 ICTY, *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1, Judgment (Trial Chamber), 27 September 2007, para. 517.

90 ICTY, *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, paras 530, 554–558; ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25, Judgment (Trial Chamber), 15 March 2002, paras 128–173.

91 ICTY, *Krnojelac*, above note 90, para. 183.

92 *Ibid.*, para. 148.

93 *Ibid.*, para. 146.

94 *Ibid.*, para. 159.

95 *Ibid.*, Testimony of Witness FWS-111, 27 November 2000, p. 1230, available at: www.icty.org/x/cases/krnojelac/trans/en/001127ed.htm.

beatings constituted cruel treatment for detainees without disabilities. In addition, however, the ICTY also found that the detainee with disabilities was subjected to beatings which specifically targeted his impaired limbs.⁹⁶ Witness testimonies further specified that this detainee had wandered off from the place of detention when going to the toilet, unaware of his surroundings and probably believing he was going home, and that the guards found him, brought him back and thereafter targeted his limbs specifically.⁹⁷

These cases illustrate that general conditions of detention, to which persons without disabilities are also exposed, can have a specific impact on detainees with disabilities. That impact needs to be taken into account when evaluating humane treatment; the specific consequences may include an exacerbation of the impairments of detainees with disabilities. This also underscores the importance of positive measures of accessibility and, where necessary in individual cases, of specific targeted measures of reasonable accommodation, in order to ensure that detainees with disabilities have humane detention conditions, without adverse distinction, and are not exposed to ill-treatment.

In its most recent Commentary on Geneva Convention III (GC III), the ICRC emphasized that support services in camps must be available to all prisoners of war (PoWs), including those with disabilities, and that to ensure equal treatment, the specific needs and risks of individual prisoners must be identified, assessed and provided for. This in turn requires appropriate planning and preparatory measures.⁹⁸

Aspects related to accessibility and reasonable accommodations are also highlighted in the ICRC's interpretations of specific provisions of GC III. For instance, in relation to the obligations related to toilet facilities for the use of all PoWs, day and night, the ICRC stressed that in combination with the requirement of equal treatment under GC III, "accessibility also implies that all prisoners of war, without any adverse distinction, for example based on other factors such as age or disability, have constant and easy access to toilet facilities".⁹⁹ It then shared as an example observed from its own detention visits the fact that some Detaining Powers had made structural adjustments to sanitary facilities in order to accommodate certain PoWs with disabilities, for instance by equipping those facilities with extra stools.¹⁰⁰

Other feasible measures in relation to physical infrastructure may include the construction of ramps, handrails or wider corridors and doorways.¹⁰¹ In relation to medical care and rehabilitation of PoWs, the ICRC emphasized measures of information accessibility for PoWs with visual impairments in order to include diverse communication methods, ranging from Braille to audio and

96 ICTY, *Prosecutor v. Naser Orić*, Case No. IT-03-68, Judgment (Trial Chamber), 30 June 2006, para. 466.

97 *Ibid.*, Testimony of Ilija Ivanovic, 25 January 2005, pp. 4068–4069, available at: www.icty.org/x/cases/oric/trans/en/050125IT.htm.

98 2020 Commentary on GC III, above note 77, paras 26, 28, 29, 1761, 2258.

99 *Ibid.*, para. 2207.

100 *Ibid.*

101 See A. Priddy, 2021, above note 8, p. 13.

large print.¹⁰² Finally, formulations like taking all necessary measures to ensure “adequate premises” and the “necessary equipment” lend themselves to a harmonized reading with obligations related to accessibility and reasonable accommodation under the CRPD; one example of this are the obligations related to the pursuit of intellectual, educational or recreational activities, which also recognize explicitly the individual agency of prisoners, as the “individual preferences” of prisoners must be respected.¹⁰³

Specialized health-care and rehabilitation services are also recognized for PoWs with disabilities in GC III. Article 30(2) of GC III provides that special facilities shall be afforded for the care of prisoners with disabilities, in particular prisoners who are blind, and for their rehabilitation.¹⁰⁴ While the explicit mention of prisoners with visual impairments was included as a result of the specific experience during the Second World War, the prohibition against adverse distinction would preclude giving priority to one group of persons with specific types of impairments over others.¹⁰⁵ On this basis, the ICRC has monitored whether therapies such as physiotherapy, psychotherapy and psychosocial counselling, if necessary for prisoners with disabilities, have been provided so that these prisoners might attain and maintain their optimal physical and mental functioning in interaction with their environments.¹⁰⁶ Geneva Conventions III and IV also contain specific obligations in relation to assistive devices, whereby PoWs and civilian internees must benefit from “any apparatus necessary for their maintenance in good health” free of charge.¹⁰⁷ “Maintenance in good health” would include avoiding the risk of an exacerbation of an already existing impairment of a PoW or civilian internee in the absence of the availability of assistive devices.¹⁰⁸

Similar issues would also arise in NIAC-related detention – for instance, rendering infrastructure providing “safeguards of health and hygiene” accessible to detainees with disabilities.¹⁰⁹ In the context of the provision of food, suggested accessibility measures and reasonable accommodations relevant for certain detainees with disabilities include longer times to eat, support with eating meals, and adapted meals.¹¹⁰ Should it be necessary to evacuate detainees in order to remove them from the danger of military operations, similar considerations to those described above in relation to the rules on the conduct of hostilities pertaining to evacuations would also be relevant here.¹¹¹ As in the case of

102 2020 Commentary on GC III, above note 77, para. 2259.

103 GC III, Art. 38; 2020 Commentary on GC III, above note 77, para. 2471.

104 GC III, Art. 30(2).

105 2020 Commentary on GC III, above note 77, para. 2257; A. Priddy, 2019, above note 8, p. 68.

106 2020 Commentary on GC III, above note 77, para. 2260.

107 GC III, Art. 30(5); GC IV, Art. 91. See also 2020 Commentary on GC III, above note 77, paras 2277–2282.

108 Cf. A. Priddy, 2019, above note 8, p. 68.

109 AP II, Art. 5; ICRC Customary Law Study, above note 15, Rules 121, 138. See also Sandesh Sivakumaran, “Armed Conflict-Related Detention of Particularly Vulnerable Persons: Challenges and Possibilities”, *International Law Studies*, Vol. 94, 2018, p. 53.

110 S. Sivakumaran, above note 109, p. 53.

111 See the discussion on precautions in the conduct of hostilities above; and see S. Sivakumaran, above note 109, p. 53.

detention related to IACs, the importance of the staff of Detaining Powers communicating orders and instructions in an accessible manner has also been highlighted.¹¹²

Furthermore, consultations held by the ICRC with States on strengthening legal protections for persons deprived of their liberty, in particular in NIACs, confirmed the need for specific differentiated measures for detainees with disabilities in order to ensure humane conditions of detention for them. While the operational circumstances of NIAC-related detention may be different, these consultations also stressed the importance of advance planning for implementing specific measures in favour of detainees with disabilities, including the preparation and training of forces to identify and engage with such detainees and consideration of the specific skills necessary to identify, anticipate and address their specific needs.¹¹³

The need for positive measures for ensuring substantive equality, including through reasonable accommodation regarding detention conditions, is also specifically reflected in Article 14(2) of the CRPD on the right to liberty and security, and the interpretation of this provision provided by the CRPD Committee.¹¹⁴ The CRPD Committee and other IHRL bodies and experts have also supported the position that a lack of measures of accessibility and/or reasonable accommodation for persons with disabilities, as well as the exacerbation of their impairments in detention, may amount to prohibited ill-treatment.¹¹⁵

Prevention of arbitrary or unlawful deprivation of liberty of persons with disabilities

Apart from the necessity of ensuring humane treatment, including accessible detention conditions and reasonable accommodations in detention, it is also necessary to ensure that persons with disabilities are not arbitrarily or unlawfully deprived of their liberty in armed conflicts in the first place. In this regard, the challenge already observed in relation to armed forces misinterpreting behaviour, especially by civilians with sensory, psychosocial or intellectual disabilities, has

112 S. Sivakumaran, above note 109, p. 53.

113 See ICRC, Resolution 1, “Strengthening Legal Protection for Victims of Armed Conflicts”, 31st International Conference of the Red Cross and the Red Crescent, 2011, op. para. 3; ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report*, 32IC/15/19.1, 32nd International Conference of the Red Cross and the Red Crescent, 2015, pp. 26, 47.

114 CRPD Committee, *Guidelines on the Interpretation of Article 14 of the CRPD*, 2015, paras 17–18, available at: www.ohchr.org/Documents/HRBodies/CRPD/14thsession/GuidelinesOnArticle14.doc.

115 See CRPD Committee, *X v. Argentina*, Individual Communication No. CRPD C/11/D/8/2012, 18 June 2014, paras 8.4, 8.5; CRPD Committee, *Al Adam v. Saudi Arabia*, Individual Communication No. CRPD C/20/D/38/2016, 24 October 2018, paras 11.2, 11.3; Human Rights Committee, *Hamilton v. Jamaica*, Views on Communication No. 616/1995, CCPR/C/66/D/616/1995, adopted on 28 July 1999, paras 3.1, 8.2; *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/63/175, 28 July 2008, para. 53; European Court of Human Rights, *Bayram v. Turkey*, Appl. No. 7087/12, Judgment, 4 February 2020, paras 51–63.

also led to detention of such persons by armed forces because of the erroneous association with non-State armed groups or interpretation of their conduct as threatening.¹¹⁶

In order to prevent arbitrary or unlawful conflict-related detention, international law requires grounds and procedures established by law. Regarding grounds for conflict-related detention, IHL recognizes that a person may be deprived of their liberty in connection with a criminal process,¹¹⁷ because of their status as a PoW (in IACs only), or as a measure of control to mitigate a security threat posed by the person to an opposing party to the conflict.¹¹⁸

In IACs, PoWs are presumed to represent *per se* a security threat to opposing armed forces under GC III, and Article 21 of GC III reflects the agreement of States that internment on the basis of their status is permitted.¹¹⁹

In contrast, under GC IV, internment of civilians in IACs represents an exceptional measure where the security of the Detaining Power makes it “absolutely necessary”,¹²⁰ or for “imperative reasons of security”.¹²¹ While for NIACs IHL mentions that internment may also occur in such situations, it does not specify the grounds or procedures for internment. Although PoW and combatant status do not exist in NIAC, in the context of the ICRC consultations with States on strengthening legal protection for persons deprived of their liberty there was some debate on whether a factual finding of membership in a non-State armed group would constitute in and of itself a sufficient ground for internment, or whether there must be an individualized determination of a specific imperative threat to security posed by that person to the Detaining Power.¹²²

In any event, non-compliance with military instructions by persons with sensory, psychosocial or intellectual disabilities or the existence of an impairment would not be sufficient to assume that a ground for internment exists, be that PoW status, membership in a non-State armed group or an imperative threat to the security of the Detaining Power.

Combatant membership in State armed forces giving rise to PoW status, as well as membership in non-State armed groups, must be positively verified under IHL and not just lightly presumed. This is evident in IHL rules relating to the determination of PoW status in situations of doubt by a competent tribunal, which would also include situations where a captured person would claim not to have that status, bearing in mind the general implication of internment until the end of active hostilities.¹²³

Further, even if one were to support the view that membership in a non-State armed group is sufficient as a ground for internment, as has been observed

116 OPD testimony, joint consultations on persons with disabilities and military operations in armed conflict, May 2022.

117 See common Art. 3(1)(d); AP I, Art. 75(3); AP II, Art. 6.

118 See GC III, Arts 21 ff.; GC IV, Arts 42, 78.

119 GC III, Art. 21.

120 GC IV, Art. 42.

121 *Ibid.*, Art. 78.

122 ICRC, *Strengthening International Humanitarian Law*, above note 113, p. 28.

123 GC III, Art. 5(2); see also 2020 Commentary on GC III, above note 77, paras 1114, 1121.

in the consultations led by the ICRC with States on strengthening legal protections of persons deprived of their liberty, detention resulting from unverified or mistaken identity may be deemed arbitrary.¹²⁴ This would also be relevant in the case of civilians with disabilities whose conduct is wrongly assumed to be indicative of membership in a non-State armed group or direct participation in hostilities.

Generalized assumptions based on an incorrect understanding of conduct of persons with disabilities or on the existence of a disability as justification for internment and the finding that an imperative threat to security exists would also be arbitrary. This is because of the fact that the determination of such a threat is subject to an individualized assessment, without discrimination.¹²⁵ In this regard, both State military manuals and international jurisprudence clarify that a person's identity or state of belonging to a certain group of persons, including on the basis of nationality, age or political beliefs, are not, on their own, sufficient grounds justifying internment.¹²⁶

It is submitted that the same reasoning should be applied to persons with disabilities, including persons with sensory, psychosocial or intellectual impairments. In this regard, the CRPD absolutely prohibits deprivations of liberty based on the existence of an impairment because such deprivations of liberty have been held to be discriminatory.¹²⁷ Generally, assuming that a person with a disability constitutes an imperative threat to security because that person cannot comply with military instructions would disproportionately and adversely affect persons with certain types of impairments compared to persons without disabilities; it would not take into account the inaccessibility of those instructions and would lead to a wrong conclusion. Such an assumption would therefore be discriminatory. The same would be true where a threat is simply presumed on the basis of an impairment, as this would affect persons with certain impairments specifically and adversely compared to persons without disabilities.

This does not mean that persons with disabilities may never be interned in an armed conflict. They could be interned if the determination of their membership in armed forces or their constituting an imperative threat to security (as a ground justifying the internment) is not based on their disability, directly or indirectly, and is made objectively and on an equal basis for each individual.¹²⁸

124 ICRC, *Strengthening International Humanitarian Law*, above note 113, p. 16.

125 The ICRC upholds this requirement for internment both in IAC and NIAC. This was laid down in the ICRC institutional position entitled "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence". This ICRC position was published as Annex 1 in ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007. See Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", *International Review of the Red Cross*, Vol. 87, No. 858, 2005, pp. 381–382, available at: www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf.

126 ICTY, *Delalic*, above note 90, para. 577; Belgium, above note 60, p. 22; Denmark, above note 60, p. 493, para. 5.2.2; United Kingdom, *The Manual of the Law of Armed Conflict*, 2004, para. 9.3.1.

127 CRPD, above note 12, Art. 14(1)(b); CRPD Committee, above note 114, paras 6–10, 13–15.

128 A. Priddy, 2021, above note 8, p. 70.

In line with the general recognition that the alleged commission of a crime may provide a ground for deprivation of liberty, it is also not precluded that persons with disabilities may be detained on that basis. When the alleged crime has a sufficient nexus to an armed conflict, the treatment of the detainee is governed by IHL.¹²⁹ In any event, procedural safeguards as well as fair trial guarantees constitute a necessary guarantee against arbitrariness of deprivations of liberty and ensure that grounds of internment or the commission of a crime are substantiated in specific cases.

In terms of internment, procedural safeguards include the guarantees found in GC IV and Additional Protocol I (AP I) to prompt access to information about the reasons for internment; the right to have the initial decision to intern reviewed; and the periodic reassessment of the continued necessity to intern.¹³⁰ In the ICRC's view, these and other procedural safeguards should also be applied – as a matter of law and policy – in internment occurring in NIACs.¹³¹

As regards judicial or fair trial guarantees against the arbitrariness of detention for criminal charges related to an armed conflict, these include the right of the accused to be informed of the reasons for their arrest as well as the nature and cause of the alleged offence;¹³² the right to be promptly brought before a judicial authority at the pre-trial stage;¹³³ the right to challenge the lawfulness of detention before a court (*habeas corpus*);¹³⁴ the right to be tried before a regularly constituted, independent and impartial court;¹³⁵ necessary rights and means of defence;¹³⁶ and the right to be advised of one's judicial and other remedies and the time limits within which they may be exercised,¹³⁷ given that convictions for a crime will often carry the imposition of deprivation of liberty as a sentence.

Ensuring that detained persons with disabilities have access, without adverse distinction/discrimination, to the same procedural or fair trial guarantees as detainees without disabilities in armed conflicts may allow for and even

129 For a detailed discussion of the nexus requirement, see Tilman Rodenhäuser, "The Legal Protection of Persons Living under the Control of Non-State Armed Groups", *International Review of the Red Cross*, Vol. 102, No. 915, 2021, pp. 1000–1009.

130 GC IV, Arts 43, 78; AP I, Art. 75(3).

131 J. Pejic, above note 125, p. 381.

132 See e.g. AP II, Art. 6(2); AP I, Art. 75(3–4); 2020 Commentary on GC III, above note 77, para. 685.

133 International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (ICCPR), Art. 9(3); ICRC Customary Law Study, above note 15, commentary on Rule 99. IHL does not contain general rules on the judicial supervision and control of pre-trial detention; however, Article 75(8) of AP I, which is considered customary IHL applicable in all types of armed conflicts, includes a general saving clause according to which the minimum fundamental guarantees may not be construed as "limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law", which includes IHRL. See Jelena Pejic, "The Protective Scope of Common Article 3: More than Meets the Eye", *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 212–214.

134 ICCPR, above note 133, Art. 9(4); ICRC Customary Law Study, above note 15, commentary on Rule 99; J. Pejic, above note 133. In this regard, the right to challenge the lawfulness of detention has been deemed as non-derogable by the Human Rights Committee. See Human Rights Committee, General Comment No. 29, "States of Emergency (Article 4)", UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

135 Common Art. 3(1)(d); GC III, Art. 84(2); AP II, Art. 6(2); AP I, Art. 75(4).

136 GC III, Arts 84(2), 96(4); GC IV, Arts 72(1), 123(1); AP I, Art. 75(4); AP II, Art. 6(2).

137 GC III, Art. 106; GC IV, Art. 73(1); AP I, Art. 75(4); AP II, Art. 6(3).

require specific measures of accessibility or procedural accommodations. One key area in this regard is information accessibility. The initial information provided to a person deprived of their liberty on the reasons for the detention and the nature and cause of the alleged offence must be conveyed in a language that the person understands; thereby, detainees are enabled to challenge the lawfulness of their detention and to exercise any necessary rights and means of defence.¹³⁸ For detainees with disabilities, the necessary accessibility and procedural accommodations should be made to ensure their fair trial guarantees.

Specific issue: Norm conflict between IHL allowing for isolation of prisoners of war and civilian internees with psychosocial or intellectual disabilities versus CRPD prohibition of detention based on impairment

Article 30 of GC III and Article 91 of GC IV provide for “isolation wards” which shall be “set aside” for cases of “mental disease”. These provisions are placed under chapters dealing with the hygiene and medical attention devoted to PoWs and civilian internees respectively. These are restrictions to liberty additional to what would be permissible by the fact that the detainees are combatant members of the armed forces (in the case of PoWs) or are deemed to represent an imperative threat to security to the Detaining Power (in the case of civilian internees in IACs under GC IV).¹³⁹

While there is no definition of what “isolation wards” precisely entail, in its ordinary meaning in a health context, this term usually refers to a specific room or section of a health-care facility “where people with a contagious disease are kept separate from people who are not infected”.¹⁴⁰ As such, this form of further restriction of liberty may be necessary on the basis of containing an overriding risk of infection for other patients (or, in the case of a detention facility, other detainees), and ultimately, an epidemic that could spiral out of control.¹⁴¹ This kind of measure may also be based on other obligations of the Detaining Power related to the prevention of epidemics and the safeguarding of health and hygiene in conflict-related detention.¹⁴² Thus, the character of this additional deprivation of liberty from internment is based strictly on health grounds (medical isolation) and is therefore distinct from additional deprivations of liberty as a penal or disciplinary punishment, including solitary confinement (i.e., detention in a single

138 See AP I, Art. 75(3–4); J. Pejic, above note 125, p. 384. Articles 5, 9, 13 and 14(2) of the CRPD (above note 12), on reasonable accommodations and accessibility, both general and specific, provide further guidance for interpreting IHL procedural safeguards and fair trial rights, including against arbitrary deprivations of liberty, so that detainees with disabilities may effectively enjoy them, without adverse distinction.

139 See 2020 Commentary on GC III, above note 77, para. 2238.

140 See e.g. “Isolation Ward”, *Collins Dictionary*, available at: www.collinsdictionary.com/dictionary/english/isolation-ward.

141 See 2020 Commentary on GC III, above note 77, para. 2240.

142 See GC III, Art. 29; GC IV, Art. 85; AP II, Art. 5; ICRC Customary Law Study, above note 15, Rule 121. With regard to GC III, the predecessor 1929 Geneva Convention on Prisoners of War already contained a similar provision.

cell for very long periods of the day without meaningful human contact)¹⁴³ or any other form of confinement, like close confinement.¹⁴⁴

However, isolation on the ground of “mental disease” is a completely different case, despite it being regulated in the same provision as isolation for contagious diseases. Neither Article 30 of GC III nor Article 91 of GC IV offer a definition of what isolation because of a mental health condition or psychosocial disability means, or the rationale for such isolation. The drafting history shows that “mental disease” was added very late in the negotiations at the 1949 Diplomatic Conference; it was inserted first in the Draft Third Convention upon the proposal of one delegation and then for consistency purposes also in the Draft Fourth Convention, and subsequently adopted with no further discussion.¹⁴⁵

The 1958 Commentary on GC IV Article 91 justified the insertion of “mental disease” as a further ground for isolation; while the Commentary recognized that “segregation may seem somewhat cruel in this case, especially when it is remembered that internment itself may have been the cause of mental affliction (or have aggravated an already disturbed mental condition)”,¹⁴⁶ it asserted that the “crowded living conditions” made such isolation “absolutely necessary in the interests of the internees as a whole”.¹⁴⁷

From this passage in the Commentary, it is not entirely clear what would make isolation absolutely necessary, nor what segregation would precisely consist of; still, it may be discerned that even in 1958, segregation was already seen as harmful for the person with a psychosocial disability. This did not rule out forms of deprivation of liberty similar or equal to solitary or close confinement imposed as a punishment, however, and in this case the interests of the other internees were perceived as overriding the individually harmful impacts of isolation.

This precedence accorded to the interests of other detainees over the individual impact on the detainee with a psychosocial disability suggests that isolation would be based on the presumption that the detainee is perceived to represent a danger to the rest of the camp population. This general presumption has been proven wrong, however, with evidence showing that persons with

143 See 2020 Commentary on GC III, above note 77, para. 3711. This understanding of “solitary confinement” is based on the non-legally binding Rule 44 of the 2015 UN Standard Minimum Rules on the Treatment of Prisoners (Mandela Rules), which define solitary confinement for the purpose of the Rules as “confinement of prisoners for 22 hours or more a day without meaningful human contact”.

144 See 2020 Commentary on GC III, above note 77, paras 2238, 3753–3757. On the necessity of the distinction between medical isolation and confinement as a penal or disciplinary punishment in criminal detention settings, specifically in the COVID-19 context, see Centers for Disease Control and Prevention, “Guidance on Prevention and Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities”, 3 May 2022, available at: www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#Medical_Isolation.

145 See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2.A, Federal Political Department, Berne, 1949, pp. 259, 800, 810, 838.

146 See 1958 Commentary on GC IV, above note 55, p. 399.

147 *Ibid.*

psychosocial disabilities are more likely to be victims of violence than perpetrators of it.¹⁴⁸

Still, this general assumption of dangerousness associated with persons with psychosocial disabilities as a whole is deeply entrenched and constitutes a key attitudinal barrier. When analyzed against the stringent wording of Article 14(1)(b) of the CRPD for States party to the Convention, the absolute prohibition on deprivation of liberty based on an impairment would even be violated if the element of perceived dangerousness were to be invoked as an allegedly objective ground while in fact, it would primarily affect persons with psychosocial (or intellectual) impairments. In light of this, it would constitute prohibited discrimination based on impairment under Article 5 of the CRPD, whatever the form of the additional restriction of deprivation of liberty.¹⁴⁹ Despite this interpretation, some States explicitly reserve the possibility, for instance, of imposing isolation on PoWs or civilian internees with mental health conditions or psychosocial disabilities where this is deemed unavoidable in light of the danger that those persons pose to themselves or to others.¹⁵⁰

Thus, *prima facie*, a norm conflict exists, especially for States party to the CRPD, between Article 30 of GC III and Article 91 of GC IV, on the one hand, allowing for isolation based on mental health conditions or psychosocial disabilities, as retained by some State practice, and Article 14(1)(b) of the CRPD, on the other, absolutely prohibiting any detention based on impairment. However, the IHL provisions must also be interpreted in their context, including fundamental obligations which constitute a reference for understanding these specific provisions, other obligations of the Detaining Power contained in the same provision, and other relevant obligations governing release, repatriation, return to place of residence or accommodation in a neutral country.

As regards fundamental IHL obligations which guide the interpretation of specific provisions, these include the prohibition on adverse distinction, as well as the obligations of humane treatment and related prohibitions on torture and other ill-treatment.¹⁵¹ Firstly, the aforementioned convergence between the IHL prohibition and the explicit prohibition of non-discrimination based on impairment under the CRPD, due to the open-ended list of grounds of adverse distinction under IHL, makes a dynamic interpretation of the prohibition on adverse distinction as encompassing disability-specific deprivations of liberty in

148 *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/HRC/40/54, 11 January 2019, para. 27; S. L. Desmarais *et al.*, “Community Violence Perpetration and Victimization among Adults with Mental Illness”, *American Journal of Public Health*, Vol. 104, No. 12, 2014.

149 See 2020 Commentary on GC III, above note 77, para. 2242; CRPD Committee, above note 114. See also UN Human Rights, above note 8, paras 10, 47, 55; A. Priddy, 2021, above note 8, p. 15.

150 See e.g. New Zealand, *Manual of Armed Forces Law: Law of Armed Conflict*, 2017, para. 12.10.62; United Kingdom, *Joint Doctrine on Captured Persons*, 2015, p. 10-8, para. 1009; United States, *Medical Support to Detainee Operations*, 2007, p. 4-10, para. 4-51, and p. 4-12, para. 4-64. Beyond situations of armed conflict, mental health legislations of many States still provide for deprivation of liberty of persons with disabilities, especially persons with psychosocial or intellectual disabilities, based on the perceived dangerousness to themselves or others, or the necessity of involuntary care or treatment. See, for example, *Report of the Special Rapporteur*, above note 148, para. 15; CRPD Committee, above note 114, paras 6, 13.

151 See e.g. GC III, Arts 13–16; GC IV, Art. 27; ICRC Customary Law Study, above note 15, Rule 88.

armed conflict possible.¹⁵² Secondly, in this context, invoking obligations of humane treatment and related prohibitions – equally amenable to a dynamic understanding – is especially relevant. This is because of the reality that in certain contexts, the ICRC has observed that solitary confinement, at times for prolonged periods, has been used as a disciplinary punishment for actual or perceived non-compliance with disciplinary rules by PoWs or internees with psychosocial disabilities. These detainees would violate such disciplinary rules more easily than other detainees, as their behaviour, an outward manifestation of their psychosocial disabilities, was perceived to be disruptive or dangerous. Where such confinement was imposed, mental health services in detention facilities were often inadequate.¹⁵³ Thus, it appears that in practice, isolation does at times amount to solitary confinement – although perhaps called by a different name.

While solitary confinement, especially where it is prolonged, has been documented to negatively affect the mental health of any person subjected to it, the impact on persons with pre-existing mental health conditions when imposed for any duration is especially severe.¹⁵⁴ It may even amount to cruel, inhuman or degrading treatment or punishment, as it often leads to psychotic symptoms and/or significant functional impairments, self-harm or even suicide.¹⁵⁵ Furthermore, given the fact that it is resorted to where mental health services in detention facilities are inadequate, as well as for prolonged periods, it seems to be imposed not only exceptionally but rather as a result of a general sense of no other options being available.¹⁵⁶

This in turn raises doubts in practice in this context about the implementation of isolation, including solitary confinement, purported to be a last resort with procedural safeguards. This makes a discussion of a Detaining Power's other obligations all the more compelling, as these obligations would

152 See e.g. the 2020 Commentary on GC III, above note 77, para. 1770, which states that the drafters “rightly anticipated a dynamic evolution of the catalogue of prohibited criteria”.

153 See e.g. *ibid.*, para. 2243.

154 This was already recognized at the 1949 Diplomatic Conference. See *Final Record*, above note 145, p. 490 (United Kingdom).

155 See the 1958 Commentary on GC IV, above note 55, p. 399 (with accompanying fn. 91). Human rights experts, such as the UN Special Rapporteur on Torture, are of the view that solitary confinement of any duration imposed on persons with mental health conditions constitutes cruel, inhuman or degrading treatment or punishment: see *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/66/268, 5 August 2011, paras 67–68, 78. See also Article 45(2) of the non-binding Mandela Rules of 2015, which provides that solitary confinement should not be applied to detainees with “mental or physical disabilities” when their condition would be exacerbated by such measures. During ICRC consultations with States on strengthening legal protection for persons deprived of their liberty, the ICRC presented to States a number of provisions for NIACs “drawn from existing international law”, including a prohibition on solitary confinement as a disciplinary punishment for persons with mental disabilities. See ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Thematic Consultation of Government Experts on Conditions of Detention and Particularly Vulnerable Detainees*, 29–31 January 2014, p. 38.

156 See in this regard similar ICRC observations from a study of several Council of Europe criminal detention facilities – while not necessarily from armed conflict settings – in which it was found that solitary confinement or other forms of restrictive detention regimes were anything but exceptional. See ICRC, *Restrictive Regimes in Places of Detention*, Geneva, 2018, p. 12.

point to alternatives which would help to avoid situations where Detaining Powers may perceive the necessity of resorting to isolation, including solitary confinement.

In particular, according to Article 30(1) of GC III and Article 91(1) of GC IV, PoWs and internees shall have the medical attention they require in PoW or internee camps. Medical attention includes appropriate mental health services which respect applicable standards of medical ethics, including the principle of voluntary and informed consent to any medical decision that may affect the individual in question.¹⁵⁷ As the ICRC has observed, counselling and other appropriate therapies such as psychotherapy – when employed to deal with a mental health condition or psychosocial disability rather than just the associated disruptive behaviours – can be effective in decreasing such behaviours and thus avoiding the perceived need for isolation.¹⁵⁸

To implement this obligation, advance planning to secure the availability of appropriate mental health professionals, to identify any mental health and psychosocial needs, and to secure voluntary and informed consent for any mental health intervention may be useful to avoid situations where isolation may be perceived to be necessary.

Both Article 30 of GC III and Article 91 of GC IV, as well as associated provisions, may be interpreted to promote such preparations before actual or perceived emergency situations concerning detainees with psychosocial disabilities arise. In terms of the availability of appropriate mental health professionals, medical professionals with mental health experience should either be available on-site or made available through regular visits to the detention facility.¹⁵⁹ Where the necessary specializations are not available through these means, the two provisions also contemplate transfers for detainees with a medical condition, including a mental health condition, in order to receive the required specialized treatment from external services.¹⁶⁰ Such transfers should only take place where the treatment in the external environment would be more favourable for the detainee concerned in light of their health condition, in accordance with applicable standards of medical ethics.¹⁶¹ In complementarity with the CRPD, this should preclude involuntary transfers to institutions where there would be a risk that the very practices which appropriate mental health services would seek to avoid, including isolation or involuntary treatment of detainees with psychosocial disabilities, would occur.¹⁶²

To identify any mental health and psychosocial needs as early as possible, while not explicitly foreseen by Article 30 of GC III and Article 91 of GC IV, some

157 See 2020 Commentary on GC III, above note 77, para. 2245.

158 *Ibid.*, para. 2246.

159 See *ibid.*, para. 2229.

160 GC III, Art. 30(2); GC IV, Art. 91(2).

161 GC III, Art. 30(2); GC IV, Art. 91(2); see also 2020 Commentary on GC III, above note 77, para. 2249.

162 See Priscilla Denisse Coria Palomino, “A New Understanding of Disability in International Humanitarian Law: Reinterpretation of Article 30 of Geneva Convention II”, *International Review of the Red Cross*, Vol. 104, No. 919, 2022, pp. 1453–1454 (pointing out that if a Detaining Power opts to transfer a person with a psychosocial disability to a psychiatric hospital, the risk of potential IHRL violations committed there must be taken into account).

State practice envisages initial medical examinations of PoWs and/or civilian internees upon their arrival at a detention facility.¹⁶³ During internment, PoWs and civilian internees also have the right to present themselves for medical examinations.¹⁶⁴ Finally, both GC III and GC IV also obligate the Detaining Power to conduct regular medical inspections at least once per month.¹⁶⁵

As with all medical procedures, these medical examinations and inspections are subject to applicable standards of medical ethics and in that regard must be conducted with the voluntary and informed consent of the person subjected to them; in fact, these medical examinations and inspections also present opportunities to obtain either consent or refusal for certain types of treatment in advance.¹⁶⁶ In line with Article 12 of the CRPD, which enshrines the right of persons with disabilities to equal recognition before the law, effective measures should support the exercise of their legal capacity to express their will and preferences in relation to any future medical treatment, including regarding mental health.¹⁶⁷

Other alternatives to isolation because of the existence of a psychosocial disability are release, repatriation, return to place of residence or accommodation in a neutral country on humanitarian grounds. These types of measures are already contemplated by GC III and its Annex I, as well as GC IV.¹⁶⁸ Prisoners with a serious mental health condition that is either of an indeterminate character or will not be successfully treated within one year, or where their continued internment would further undermine their physical or mental health, must be repatriated or accommodated in a neutral country, unless such repatriation is against their will or accommodation in a neutral country would not improve their condition.¹⁶⁹ GC IV contemplates special agreements between the parties to IACs for certain groups of civilian internees for release, repatriation, return to place of residence or accommodation in a neutral country on humanitarian grounds; wounded and sick internees and internees who have been detained for a long time are explicitly listed.¹⁷⁰

In this regard, it has been suggested for PoWs that these IHL obligations should be read in light of obligations under the CRPD and that the scope of the grounds of repatriation or accommodation in a neutral country should be broadened – that these grounds should go beyond an assessment of the severity of an impairment so as to be applicable whenever basic humane conditions of

163 See e.g. Canada, *Prisoner of War Handling Manual*, 2004, p. 3F-9, para. 3F08(6); Japan, Act on the Treatment of Prisoners of War and Other Detainees in Armed Attack Situations, 2004, Art. 31(1); United Kingdom, *Joint Doctrine on Captured Persons*, 2020, p. 88, para. 3-9(b).

164 GC III, Art. 30(4); GC IV, Art. 91(4). These rights also extend to those PoWs or civilian internees who are undergoing disciplinary punishments: see GC III, Art. 98(4); GC IV, Art. 125.

165 GC III, Art. 31; GC IV, Art. 92.

166 See e.g. 2020 Commentary on GC III, above note 77, paras. 1731–1733, 2297–2298.

167 See also CRPD, above note 12, Art. 25(1)(d), which requires States Parties to provide health-care services to persons with disabilities of the same quality as to others, including on the basis of free and informed consent.

168 See e.g. GC III, Arts 109–110 and Annex I; GC IV, Art. 132.

169 GC III, Arts 109–110 and Annex I, Part I, section A.

170 GC IV, Art. 132.

detention, in particular accessibility of health care and rehabilitation, cannot be guaranteed by the Detaining Power. In this sense, repatriation or accommodation in a neutral country should be understood as a specific example of a reasonable accommodation in accordance with the CRPD.¹⁷¹

As opposed to IHL in IAC, IHL in NIAC does not contain an explicit rule which provides for isolation, including solitary confinement, for detainees with mental health conditions or psychosocial disabilities. Therefore, this issue must be resolved with reference to the generally applicable fundamental guarantees already analyzed above, namely humane treatment and the prohibition on adverse distinction, as well as the customary IHL obligation to afford specific respect and protection to persons with disabilities. In fact, in the implementation of these rules, it is interesting to observe that the ICRC has found that certain non-State armed groups in NIAC-related detention have refrained from detaining persons with disabilities in the first place, for humanitarian and/or operational reasons. Moreover, where detentions of persons with disabilities has taken place under their supervision, some non-State armed groups have ordered their members to release detainees as soon as possible after their capture.¹⁷² These few examples indicate that alternatives to deprivations of liberty based on impairment, whether by refraining from deprivations of liberty of persons with disabilities in the first place or through early release based on humanitarian grounds, are not merely theoretical options in conflict-related detention.

Conclusions and recommendations

This article has attempted to provide indications as to what increased visibility of persons with disabilities in the interpretation and implementation of IHL would look like. As this analysis shows, there is no need for legal gymnastics; a broadened understanding of the barriers and risks that persons with disabilities in their diversity face in armed conflict can feed into the implementation of general and specific protections under IHL rules on the conduct of hostilities as well as in the various situations where persons with disabilities may find themselves in the hands of parties to armed conflict. The CRPD provides an important complementary tool to IHL to enrich that understanding through compelling a granular awareness of these barriers and risks and engaging the participation of persons with disabilities as to how their specific situation is factored into the implementation of IHL.

Such granular awareness of the barriers and risks facing persons with disabilities is still lacking among parties to armed conflict. A first step to improving it is to open channels of communication between persons with disabilities, OPDs and parties to armed conflict. This is precisely the value of consultations like the one co-organized in 2022 by the UN Special Rapporteur on

171 See A. Priddy, 2019, above note 8, p. 72; P. D. C. Palomino, above note 162, pp. 1450–1453.

172 ICRC, above note 80, commentary on Rule 5.

the Rights of Persons with Disabilities, the IDA, the EDF, the Diakonia IHL Centre and the ICRC on civilians with disabilities and military operations in armed conflict. For persons with disabilities, this direct communication is an opportunity to make their voices heard in discussions on the implementation of IHL and for parties to armed conflict to learn first-hand from the lived experiences of persons with disabilities affected by their actions, rather than through an intermediary such as a humanitarian organization like the ICRC. The input of persons with disabilities and OPDs should be actively sought in these efforts and treated as an underlying consideration in any of the following recommendations.

The analysis provided in the present article of the IHL principles on the conduct of hostilities, as well as these consultations, have demonstrated that specific sensitization of State armed forces on the specific risks faced by civilians with disabilities, including in those forces' regular IHL training, is necessary to inform a disability-inclusive implementation of IHL. This sensitization may be usefully conducted around specific scenarios. It should cover persons with disabilities in their diversity of impairments, especially impairments that may be less visible, like psychosocial, intellectual or sensory impairments. Indeed, a lack of understanding of the barriers and risks faced by civilians with such disabilities appears to be a significant source of unlawful attacks, violence and detention in this context. Sensitization campaigns and materials (such as videos and radio programmes) for armed forces could assist in this regard.

Specific sensitization is also necessary to inform more inclusive data on the presence, barriers and risks of persons with disabilities, also disaggregated by age and gender. Where data is possessed by OPDs, it should be checked against the data available to governments; hence, there is also a need to centralize this data.

Beyond specific sensitization of State armed forces, the population at large should also be educated on disability. There is still often a lack of understanding of the barriers that persons with disabilities face as well as the diversity of persons with disabilities, which may result in their stigmatization in society. Education should thus instil in the population at large certain values of acceptance and inclusion towards persons with disabilities. This recommendation is consistent with both IHL obligations in relation to dissemination of IHL as widely as possible to the civilian population at large, beyond training of armed forces,¹⁷³ and the CRPD obligations related to awareness-raising, including to raise awareness throughout society regarding persons with disabilities and to combat stereotypes, prejudices and harmful practices affecting them.¹⁷⁴ More broadly, the ICRC has found that while IHL is vital in imposing restraints on behaviour, dissemination of the law combined with its underlying values is most effective, as encouraging individuals to internalize its values through socialization is a more durable way of promoting respect for the law.¹⁷⁵

173 See in particular GC I–IV, Arts 47/48/127/144; AP II, Art. 19; ICRC Customary Law Study, above note 15, Rule 143.

174 CRPD, above note 12, Art. 8.

175 ICRC, *The Roots of Restraint in War*, Geneva, 2018, p. 65.

Disability-inclusive interpretations of IHL should also be included in military manuals on the law of armed conflict. With a few notable exceptions,¹⁷⁶ military manuals do not address persons with disabilities in any significant manner. It is part of the regular work of the ICRC to provide technical assistance to State armed forces when drafting these manuals. When a process of revision of such manuals is under way, consideration should be given to how the specific barriers and risks faced by civilians with disabilities could be integrated therein.

Specific guidance for military behaviour in interactions with persons with disabilities, like those occurring at checkpoints, should be incorporated in standard operating procedures. Such guidance should cover elements like how to communicate with persons with disabilities and how to handle assistive devices which are of crucial importance for such persons.

There should not be a misunderstanding that the content of military doctrine or standard operating procedures must necessarily be very detailed and technical. In fact, it is one of the key attitudinal barriers that to be more disability-inclusive, one would need sophisticated guidance that only very few State armed forces could produce and implement. In fact, simple questions or checklists could be a useful starting point to help avoid unnecessary confrontations between civilians with disabilities and armed forces.

Preparing for operational interactions with persons with disabilities also means exploring options to render within armed forces the necessary competence in accessible forms of communication, such as sign language, available. This could be achieved in a variety of ways apart from relying directly on OPDs (subject to their capacities), including through reliance on staff with such competences from civil governmental departments accompanying or creating specialized departments within armed forces.

Protection and inclusion of civilians with disabilities should also be integrated into sustainable operational coordination mechanisms between the military and OPDs and other civilian actors, as well as between military and civil governmental authorities.

More broadly, given the importance of disability-inclusive data and IHL dissemination, training and education at the national level, the role of domestic implementing legislation, especially on Article 11 of the CRPD, as well as national mechanisms on IHL implementation and on implementation of the CRPD to ensure the necessary coordination at the national level, should be further explored. In this regard, synergies between existing national IHL committees and CRPD governmental focal points and coordination mechanisms,¹⁷⁷ with the active involvement of person with disabilities and their representative organizations, should be sought.

Apart from engaging with State armed forces and State authorities, efforts towards ensuring disability-inclusive IHL implementation should also engage with non-State armed groups. Although non-State armed groups are not legally bound by

176 See Denmark, above note 60; Norway, above note 62.

177 See CRPD, above note 12, Art. 33.

the CRPD, and the applicability of IHRL to them more generally is unsettled, a thematic engagement on IHL and disability could be examined. The ICRC has successfully done so on other themes.¹⁷⁸

The ICRC could further help advance disability-inclusive implementation of IHL at various levels. Firstly, it could co-host further expert meetings like the ones organized on civilians with disabilities and the conduct of hostilities, such as on detention, which could bring together persons with disabilities, military and other experts, and relevant authorities. Secondly, where aspects related to protection and inclusion of persons with disabilities under IHL and/or IHRL are addressed in the framework of broader discussions, for instance on detention, the ICRC should ensure participation by persons with disabilities and their representative organizations.¹⁷⁹ Thirdly, such participation should also be encouraged in mainstream IHL discussions where there is no specific focus on disability, for instance in IHL-related discussions at the International Conferences of the Red Cross and Red Crescent or the Council of Delegates.

Moreover, a disability perspective could be integrated within existing ICRC legal workstreams; this is already occurring, including in the context of work on updating the Commentaries to the Geneva Conventions, on the conduct of hostilities, on weapons issues, on internally displaced persons, and on the missing and their families, to name just a few. Such mainstreaming should be seen not as an additional burden but rather as an opportunity to strengthen legal positions.

More broadly, transversal implementation of the ICRC's Vision 2030 on Disability across different professional backgrounds of ICRC staff and strengthening engagement with OPDs in that process will be crucial for including a disability perspective and changing attitudes towards persons with disabilities throughout the ICRC's protection and assistance work.

178 For instance, on the protection of health care and on detention. See e.g. ICRC Health Care in Danger, *Safeguarding the Provision of Health Care: Operational Practices and Relevant International Humanitarian Law Concerning Armed Groups*, Geneva, 2015; ICRC, above note 80. Furthermore, the interplay between IHL and Islamic law may be of particular relevance for some of these groups: see the article by Ahmed Al-Dawoody and William I. Pons in this issue of the *Review*.

179 For instance, as mentioned, discussions conducted by the ICRC in the past on strengthening legal protection for persons deprived of their liberty included consideration of detention conditions in relation to detainees with disabilities.

From invisibility to positive legal protection: The drafting of Article 11 of the Convention on the Rights of Persons with Disabilities

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Abstract

Initial drafts of the Convention on the Rights of Persons with Disabilities (CRPD) did not include any significant reference to the obligations of States to protect their citizens with disabilities during armed conflict or other emergency situations; international documents dealing with disability up until that point had not considered persons with disabilities as rights holders during armed conflict either. But early in the negotiations for the CRPD, disabled persons' organizations made it clear that they wanted to see the protections of the Convention extend to times of risk, emergency and armed conflict.

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This study focuses on Article 11 of the CRPD. The negotiating history of Article 11 demonstrates that although there were some disagreements over the scope of the article, support for a clear statement of States' obligations during armed conflict and other emergencies was broad-based and came from all regions.

Keywords: Article 11, *travaux préparatoires*, drafting history, situations of risk, persons with disabilities in armed conflict, disability and humanitarian emergency.



Introduction

Legal scholars and disability advocates have documented the invisibility of persons with disabilities in international law for much of the twentieth century. When persons with disabilities were thought of for inclusion in international documents in the first decades of the United Nations (UN), it was as subjects of medical intervention, protection or rehabilitation. Disability was seen as a medical problem that needed to be prevented, or fixed, or ameliorated through health care or charity.¹

Only from the 1980s did things begin to change, as the disability rights movement began to gain traction and persons with disabilities created organizations led by themselves to advocate for their rights. Disabled persons' organizations transformed themselves into human rights advocacy groups and played a major role in the drafting of the Convention on the Rights of Persons with Disabilities (CRPD).

This article focuses on the negotiating history of Article 11 of the CRPD. The first section highlights how early UN documents dealing with disability only saw disability as a consequence of armed conflict, without considering whether people with disabilities should be rights holders in their own right during armed conflict. The following sections describe how thinking began to change as disabled persons' organizations advocated for States to accept that people with disabilities are rights holders not just under international human rights law, but also under international humanitarian law (IHL).

Early UN documents concerning persons with disabilities

The World Programme of Action concerning Disabled Persons

Up until the 1980s, UN documents dealing with disability issues mostly took a medical or social welfare perspective, if they mentioned disability at all. The

1 A summary of this history can be found in Theresia Degener and Andrew Begg, "From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations", in Valentina Della Fina, Rachele Cera and Guiseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham, 2017.

Universal Declaration of Human Rights, for example, refers to disability only as an event or a condition, like unemployment and sickness.² A good illustration of this limited perspective can be seen in a report of the Secretary-General entitled *Social Rehabilitation of the Physically Handicapped*, in which the main subject is medical, occupational and physical therapy, and the provision of services such as prosthetic fitting. The focus of the report is on the service providers, and not on the individuals with disabilities.³

This limited perspective began to change with the designation of 1981 as the International Year of Disabled Persons, and the adoption of the *World Programme of Action concerning Disabled Persons* (World Programme).⁴

The World Programme was largely consistent with that era's focus on disability as a medical issue, with most of the document focused on the prevention of disability and the rehabilitation of disabled persons. The document contained a brief reference to persons with disabilities in the context of armed conflict, but only to mention conflict as a cause of disability. It stated that “[w]ars, and the consequences of wars[,] and other forms of violence, destruction, poverty, hunger epidemics, [and] major shifts in population” were all factors that cause disability.⁵ There was no consideration of whether persons who already had disabilities should be protected during armed conflict, or of their status as civilians or non-combatants. But the Programme did contain a small chapter on human rights, which called on UN organizations, governments and other stakeholders to pay due attention to the human rights of disabled persons.⁶ This opened the door for a broader perspective to emerge.

The Standard Rules

The *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities* (Standard Rules) were adopted by the UN General Assembly in December 1993.⁷ The Rules were significant in that much of the language took a rights-based approach, and specific rules addressed individual economic, social and cultural rights such as equal access to education and health care. A significant criticism, however, was that civil and political rights were absent, and the document overall exhibited the same failings as earlier documents by not fully asserting that persons with disabilities were full citizens and rights holders.

The Standard Rules were also silent about the situation of persons with disabilities in armed conflict and humanitarian emergencies – but while the Rules might have been silent on that issue, the Special Rapporteur mandated to monitor their implementation was not. He attempted to rectify the omission,

2 UNGA Res. A/RES/3/217A, 10 December 1948, Art. 25.

3 *Report of the Secretary General to the Social Commission*, UN Doc. E/CN.5/197, 22 March 1950.

4 UNGA Res. A/RES/37/52, 3 December 1982.

5 *World Programme of Action Concerning Disabled Persons*, UN Doc. A/37/351/Add.1, 15 September 1982, Annex, recommendation 1, para. 40.

6 *Ibid.*, paras 162–169.

7 UNGA Res. A/RES/48/96, 20 December 1993.

reporting in 1999 that he had identified several shortcomings of the Standard Rules. Among those, he noted that “[d]isabled persons in refugee or emergency situations are ... areas that have not been dealt with”.⁸ In 2002 he proposed a supplement to the Standard Rules to address weaknesses and omissions in the text. The proposed supplement read:

35. It has often been recognized that the needs of persons with disabilities are forgotten or neglected in general relief programmes.

36. In cooperation with concerned United Nations agencies such as [the Office of the UN High Commissioner for Refugees] and the United Nations Development Programme ..., States should develop policies and guidelines for the inclusion of support measures with regard to persons with disabilities in emergency situations. Their emergency services should be adequately equipped and prepared to provide medical treatment and support to persons with disabilities and their families.

37. Special attention should be paid to the fact that persons with disabilities are particularly vulnerable to abuse in emergency situations.⁹

The proposed supplement, however, was met with a “relatively low degree of interest” by States,¹⁰ and no action was ever taken on it. By that stage focus had shifted to calls for a legally binding human rights treaty, and those efforts eclipsed the Special Rapporteur’s proposal.

Pre-existing international human rights instruments

Before moving on to look at the negotiating history of the CRPD, it is worth looking at the extent to which the existing body of human rights law addressed situations of armed conflict or humanitarian emergency. Those treaties were all templates for the new Convention.

The International Covenant on Civil and Political Rights

The 1966 International Covenant on Civil and Political Rights (ICCPR) recognizes that situations of “public emergency” will exist, and explicitly sets out provisions allowing a State to derogate from some of the provisions of the Covenant. Article 4(1) states:

8 *Final Report of the Special Rapporteur of the Commission for Social Development on Monitoring the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities on His Second Mission, 1997–2000*, UN Doc. E/CN.5/2000/3, 17 December 1999, Annex, para. 119.

9 *Report of the Special Rapporteur of the Commission for Social Development on Monitoring the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities on His Third Mandate, 2000–2002*, UN Doc. E/CN.5/2002/4, 9 January 2002, Annex, paras 35–37.

10 *Views of Governments on the Proposals Contained in the Report of the Special Rapporteur on Disability*, UN Doc. E/CN.5/2004/4, 26 November 2003, para. 10.

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.¹¹

What is curious about this provision is that the grounds of prohibited discrimination in Article 4 of the ICCPR are more limited than the general guarantee of non-discrimination in Article 2, in which States undertake to respect the rights in the Covenant “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹² While Article 2 does not explicitly include disability, the open-ended nature of its phrasing, including “without distinction of any kind” and the phrase “or other status”, would (or should) prohibit discrimination on the basis of disability. The exclusive nature of the phrasing in Article 4 implies by contrast that some derogations could be made during public emergencies that would otherwise amount to discrimination based on disability.

The UN Human Rights Committee has adopted a General Comment putting clear limits on States’ abilities to derogate human rights protections under Article 4, including that the derogations must be strictly required by the situation and must be as limited as possible.¹³ Nonetheless, not only does the ICCPR fail to offer any positive obligation to protect persons with disabilities during public emergencies, it also provides a potential opening through which their protection could in fact be weakened.

The Convention on the Elimination of All Forms of Discrimination against Women

The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) explicitly includes a list of emergency situations, but only in its preamble, and only to acknowledge that such situations undermine human rights. The preamble outlines that States adopted the CEDAW

[e]mphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

and affirming that

11 International Covenant on Civil and Political Rights, 16 December 1966 (entered into force 23 March 1976) (ICCPR), Art. 4(1).

12 *Ibid.*, Art. 2(1).

13 Human Rights Committee, General Comment No. 29, “States of Emergency (Article 4)”, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women.¹⁴

The CEDAW did not, however, go on to identify any binding obligations in the operative provisions relevant to protecting women from discrimination during any of the emergency situations listed in the preamble.

The Convention on the Rights of the Child

The 1989 Convention on the Rights of the Child (CRC) was the first core human rights treaty prior to the CRPD to include specific protections that apply in situations of armed conflict. Article 38 of the CRC provides that:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.¹⁵

Article 38 was seen by persons with disabilities as directly relevant to their own aspirations, and proved to be the template from which discussions on the CRPD would begin.

The Ad Hoc Committee

In the latter half of the 1990s, disabled persons' organizations became more organized and focused on lobbying for a convention on their rights, and they sought references in UN resolutions for the need for one, and delegations willing

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (entered into force 3 September 1981) (CEDAW), Preamble.

¹⁵ Convention on the Rights of the Child, 20 November 1989 (entered into force 2 September 1990) (CRC), Art. 38.

to advance the cause. In 2001 they found success with Mexico, whose delegation at the UN drafted a resolution creating an Ad Hoc Committee of the General Assembly mandated to look at the issue, and lobbied hard for its adoption.¹⁶

The first session of the Ad Hoc Committee

The first meeting of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Ad Hoc Committee) in August 2002 was marked by a low turnout and a general lack of preparedness. In addition, some delegations had instructions to slow things down by questioning whether a convention was needed, and they made calls for further study. Few delegations had sent experts from their capitals, and most were represented only by their New York-based diplomats. It is fair to say that most delegates had a limited understanding of the experiences of persons with disabilities, and this led to an underwhelming debate.

The UN Secretariat was also unprepared. The Office of the UN High Commissioner for Human Rights had commissioned a thorough study, but it was not yet published, and the Office was only able to distribute a brief executive summary.¹⁷ The Division for Social Policy and Development distributed its own background paper, but it was short and lacked any real analysis. This was most evident in its reference to armed conflict: the paper simply noted that “[d]isability often arises from war and inhuman treatment”.¹⁸ UNICEF made a similar statement at an informal briefing, again noting armed conflict only as a cause of disability.¹⁹ This simplistic view of war as a cause of disability, without any analysis of persons with disabilities as rights holders and subjects of IHL, had not changed since the adoption of the World Programme two decades earlier.

The issue of persons with disabilities in armed conflict was raised by a few delegations during the debate, but only to make essentially the same point. The delegates of Sierra Leone and Croatia both spoke out early in the meeting to urge that a convention be negotiated, noting its relevance to the significant number of their citizens disabled by recent conflicts in their countries.²⁰ Only Nigeria

16 UNGA Res. A/RES/56/168, 19 December 2001.

17 *Note by the Office of the United Nations High Commissioner for Human Rights*, UN Doc. E/CN.4/2002/18/Add.1, 12 February 2002.

18 UN Secretariat, Division for Social Policy and Development, *Human Rights of Persons with Disabilities*, background paper prepared for the Informal Consultative Meetings on International Norms and Standards for Persons with Disabilities, 9 February 2001, distributed as an informal paper during the First Session of the Ad Hoc Committee, 10 July 2002 (on file with author).

19 UNICEF, “Statement on Childhood Disability”, presented by Gulbadan Habibi at the Informal Briefing on the Work of the UN Bodies and Organizations at the Ad Hoc Committee on an International Convention on the Rights of Persons with Disabilities, 6 August 2002 (on file with author).

20 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 1 No. 1, 29 July 2002, and Vol. 1 No. 3, 31 July 2002. The daily summaries were an informal record produced by a coalition of disabled persons’ organizations throughout the negotiations and distributed widely to help interested parties to follow the discussions. While they do not purport to be an accurate verbatim record of the debate, they offer a rich account of it. Most are available in the negotiation archives, accessible at: www.un.org/esa/socdev/enable/rights/adhoccom.htm (all internet references were accessed in September 2022). Where they are not available on that website, they are on file with the author.

suggested a broader perspective, using its statement to draw attention to the fact that the broader challenges facing persons with disabilities were exacerbated during armed conflicts and natural disasters.²¹

While a lack of preparation was the mark of most delegations, Mexico, by contrast, came with a large delegation of experts and submitted as a working paper the text of a draft convention in a bid to kick-start discussions.²² The Mexican draft was a very solid document – it is broadly consistent in terms of scope and style to the final Convention – but in the context of a negotiation where there was not yet a commonality of purpose and direction, it was not warmly received. The fact that it had been pulled together by invited experts in a meeting that was not open to all meant that it suffered from a legitimacy deficit, and the draft was largely ignored by delegates who were not yet ready to begin negotiating. Nonetheless, it set an important template as the first text on the table.

In terms of the situation of persons with disabilities in humanitarian emergencies, the Mexican draft suffered from the same flaw as all documents that preceded it. The only reference to the situation of persons with disabilities in situations of armed conflict was in the preamble. As with previous references, armed conflict was mentioned merely as part of a list of conditions that contributed to the cause of disability, along with accidents, violence, extreme poverty and others.²³

The second session of the Ad Hoc Committee

Nearly a year later, in June 2003, the debate at the second session of the Ad Hoc Committee was much more focused. Delegates largely accepted that a legally binding treaty was needed, and the discussion was focused on the type of instrument that was most suitable. The meeting was also significantly better attended, not only with more States present, but with many more being represented by capital-based experts. Many of those experts were persons with disabilities, and the number of disabled persons' organizations represented also increased.

This is important not just because it signified that governments were starting to take the process seriously, but it also meant that the debate became more substantive and less political. This aspect was tested early in the second meeting, in a debate over which elements should be included in a future draft. The New York-based Palestinian delegate attributed the large number of newly acquired disabilities in Palestine to indiscriminate firing by Israeli armed forces. The delegate argued that the Convention must address the suffering of persons

21 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 1, No. 7, 6 August 2002.

22 *Report of the Meeting of Experts on the Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities (Mexico City, 11–14 June 2002)*, UN Doc. A/57/212, 15 July 2002.

23 *Ibid.*, preambular para. 1.

who live under especially difficult circumstances including armed conflict and foreign occupation, noting that these are both major causes of disability.²⁴

In any other UN meeting, this would have triggered a familiar reaction, with endorsements from other Arab States criticizing Israel and repeating the call for inclusion of a reference to foreign occupation. These would be followed by statements by Israel and the United States (and sometimes others) rejecting a reference to one single element of IHL on the basis that it was unbalanced, and objecting to the singling out of one State for criticism. What would not feature in such an exchange would be any debate on the substance of the elements of IHL relevant to the issue at hand, and the document under discussion would risk becoming politicized and subject to a vote, undermining its credibility.

The advantage of having delegations dominated by capital-based experts, many of whom came from government agencies dealing with disabilities and not foreign ministries, is that few of those delegates had that playbook. Israel's statement the next day focused mainly on the country's experience with its domestic measures to protect persons with disabilities, and the positive impact that an international treaty could have at the domestic level. The delegate concluded by noting the number of citizens killed or disabled in terrorist attacks by Palestinian groups, but pleaded for the meeting to remain focused on the promotion of the rights and dignity of persons with disabilities rather than political debates.²⁵

In other circumstances this exchange of views could have thrown sand into the gears and the meeting would have wasted a lot of time with back-and-forth criticisms. But disabled persons' organizations had made it clear that they had limited patience for New York-based delegates bringing extraneous political fights into the negotiations, and that the focus of discussions should be on their own lived experience.²⁶ Both the Palestinian and Israeli delegates appeared to read the room and get the message, and no other delegation jumped into the debate to raise the issue again at that meeting.

By contrast, one of a series of outcome documents submitted from regional meetings that had been held in advance was the Beirut Declaration. It was adopted by the Arab Regional Conference on Norms and Standards related to Development and the Rights of Persons with Disabilities in May 2003, and it did not pull any punches. Its first recommendation stated:

Those present at the Conference condemned the Israeli occupation and all forms of oppression and armed conflict in the occupied Arab territories, on

24 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 2, No. 3, 18 June 2003.

25 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 2, No. 4, 19 June 2003.

26 This message was conveyed not just by disabled persons' organizations but also by persons with disabilities on national delegations. A good discussion of the emergence of an international advocacy network of disabled persons' organizations with the legitimacy and authority to speak for themselves can be found in Janet Lord, *International Disability Rights: Challenging Traditional Theory in the Emergence of a New Transnational Advocacy Network*, paper presented to the Annual Meeting of the International Studies Association, Portland, OR, 26 February–1 March 2003 (on file with author).

the grounds that they obstruct the goals of sustainable development and increase the number of disabled persons.²⁷

This document did not have any impact on the meeting, however, because it was completely overlooked. The detailed report commissioned by the Office of the UN High Commissioner for Human Rights, which was more than 300 pages long, had finally been published, and its in-depth analysis became the focus of attention. There was also a growing number of regional and national documents being submitted – so many, in fact, that the Secretariat did not attempt to print them, and they were instead published on a dedicated website and distributed in the room only on CD-ROM. This electronic distribution was an innovation that was perhaps a bit ahead of its time; June 2003 was the era of flip phones and 2 G telecoms technology, wireless internet had not yet been installed in UN meeting rooms, and mobile phone reception in the basement where negotiations took place was not reliable. UN negotiations were on the cusp of becoming digital, but at that point documents not distributed in the room on paper failed to gain any attention.

A review of the various papers that had been submitted before the meeting does, however, show a noticeable trend beginning to emerge for a recognition that persons with disabilities faced additional risks during armed conflicts and humanitarian emergencies. This included, for example, a regional meeting of African national human rights institutions (NHRIs) in June 2003, which proposed that “[t]he Convention should recognize the vulnerability of persons with disabilities in situations of crisis such as conflict and natural disasters”.²⁸ The European Union (EU) submitted a conference room paper with elements for the Convention, noting that the preamble should “[e]xpress concern that the situation of persons with disabilities is often exacerbated in situations of poverty and armed conflict”.²⁹ The Economic Commission for Latin America and the Caribbean stressed that the Convention should address the situations of persons with disabilities as members of other groups, including civilians in armed conflicts or humanitarian emergencies.³⁰ Although not submitting a proposal *per se*, the European Disability Forum submitted a statement that included a criticism of humanitarian organizations for devoting very little time and resources to the subject of disability.³¹

27 *Beirut Declaration and Recommendations on the Elaboration of a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, UN Doc. A/AC.265/2003/CRP/12, 29 May 2003, para. 4.

28 *Regional Workshop on Promoting the Rights of Persons with Disabilities: Towards a New UN Convention – Final Declaration*, Kampala, 5–6 June 2003, para. 30 (on file with author).

29 *European Union Elements for an International Convention*, UN Doc. A/AC.265/2003/CRP.13/Add.2, July 2003.

30 *Views Submitted by Governments, Intergovernmental Organizations and United Nations Bodies Concerning a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc. A/AC.265/2003/4, 6 May 2003, para. 55.

31 *European Disability Forum, The EDF Contribution to the Second Ad Hoc Committee to consider proposals for a United Nations Convention to Protect and Promote the Rights of Persons with Disabilities*, Brussels, May 2003 (on file with author).

The Working Group and the first draft

The Working Group was created by the Ad Hoc Committee at the end of its second meeting as a mechanism to pull together a first draft to be the basis for negotiations. Although Mexico had already submitted a draft at the first meeting and Venezuela submitted its own at the second meeting, these were not seen as viable starting points because they had not emerged from open processes. Disabled persons' organizations had repeated their mantra "Nothing about us without us" from early in the process, and it was clear that a negotiating text needed to emerge from a process that included them. So the Working Group was formed, with twenty-seven member States, twelve disabled persons' organizations and one NHRI.³²

When the Working Group met in January 2004, it had before it an impressive amount of documentation. In addition to the Mexican and Venezuelan drafts, additional drafts had also been submitted by China, the EU and India. The chair of the Ad Hoc Committee submitted his own draft, and a regional meeting of NHRIs in Bangkok had also submitted one. On top of that, there were many position papers submitted by disabled persons' organizations and national delegations.³³

The preambular section

Of the various drafts that the Working Group had on the table, the Indian draft and the chair's draft did not contain any mention of persons with disabilities in situations of risk or armed conflict at all. Several other drafts included mention of armed conflict, but only in terms of it as a cause of disability. The preamble of the Venezuelan draft, for example, expressed concern that "extreme poverty, marginalisation, social exclusion, war and underdevelopment" contributed to disability.³⁴ An almost identical preambular paragraph was included in the Bangkok draft submitted by Asia-Pacific NHRIs.³⁵ Both of these paragraphs were near-duplicates of the earlier Mexican text, with only minor modifications. The Chinese draft took things a step further by bringing the idea into the operative section as part of an obligation on States to "promote [the] overall improvement of [the] status of persons with disabilities". The article required States to

32 *Report of the Working Group to the Ad Hoc Committee*, UN Doc. A/AC.265/2004/WG.1, 27 January 2004, para. 1.

33 These proposals were not issued as official UN documents, but were listed in paragraph 7 of the report of the Working Group (*ibid.*), issued in an informal compilation at the meeting in hard copy and on CD-ROM, and made available on the UN Enable website. Some, but not all, are available in the archives of the negotiations (see above note 20). Where they are not available, they are on file with the author.

34 *Letter Dated 18 June 2003 from the Deputy Permanent Representative of Venezuela to the United Nations Addressed to the Secretary of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc. A/AC.265/2003/WP.1, 18 June 2003, Annex, preambular para. (n).

35 *Bangkok Draft: Proposed Elements of a Comprehensive and Integral International Convention to Promote and Protect the Rights of Persons with Disabilities*, Bangkok, 14–17 October 2003, preambular para. (i), available at: www.un.org/esa/socdev/enable/rights/bangkokdraft.htm.

“eliminate causes leading to or aggravating disabilities”, including armed conflict in a long list of causes.³⁶

All those drafts still only viewed armed conflict as a cause of disability. None of them met the expectations of the disabled persons’ organizations on the Working Group, who made it clear that they were not interested in discussing causes of disability. This point was made during a larger debate over whether the Convention should address the prevention of disability. Many persons with disabilities found the idea of prevention inherently problematic. For some, the promotion of health, well-being and the prevention of disability were all well and good, but they were relevant to the broader population. In their view the Convention needed to focus on protecting the rights of people who already had disabilities.³⁷

Consequently, the various proposed preambular paragraphs that referenced causes of disability were not taken into the Working Group draft. The idea of prevention was relegated to the draft article on the right to health, where it was restricted to the prevention of secondary disabilities.

The Working Group had received, on the other hand, one proposal that took a broader view, and that was in the draft submitted by the EU. It contained a preambular paragraph that recognized armed conflict as a situation where people with disabilities were at particular risk. It expressed concern “that barriers to the full and equal enjoyment of human rights by persons with disabilities are exacerbated in situations of poverty and armed conflict”.³⁸

That idea found general support, and it was included in the Working Group draft, albeit in a different formulation.³⁹ The preambular paragraph included by Working Group in its draft noted that States were “[c]oncerned that situations of armed conflict have especially devastating consequences for the human rights of persons with disabilities”.⁴⁰

The operative section

When the discussions began on specific rights for the operative section of the Convention, a proposal emerged out of the debates on the right to life and the

36 *Convention on Rights of Persons with Disabilities: A Proposed Draft Text by China*, Art. 13(5), available at: www.un.org/esa/socdev/enable/rights/wgcontrib-china.htm.

37 A New Zealand position paper summed up the point well. It read: “Social and economic development activities that help prevent impairment are targeted at, and assist, whole populations. New Zealand believes, therefore, that such activities are more appropriately addressed within the context of more general instruments. A convention on the rights of persons with disabilities should focus on its unique role to promote and protect the rights of those who require special consideration in order to enjoy their rights and freedoms.” *New Zealand’s View on a Convention on the Rights of Disabled People: A Proposed Draft Text by New Zealand*, 28 November 2003, para. 12, available at: www.un.org/esa/socdev/enable/rights/wgcontrib-NewZealand.htm.

38 *EU Proposal for the Text of an International Convention on the Full and Equal Enjoyment of all Human Rights and Fundamental Freedoms by Persons with Disabilities*, Preamble, available at: www.un.org/esa/socdev/enable/rights/wgcontrib-EU.htm.

39 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 7, 13 January 2004.

40 *Report of the Working Group to the Ad Hoc Committee*, UN Doc. A/AC.265/2004/WG.1, 27 January 2004, Annex, preambular para. (p).

right to be free from torture that there should be a statement on the “vulnerabilities” of persons with disabilities.⁴¹ Sweden disagreed that people with disabilities should be considered vulnerable, and called for a more positive statement instead. The World Federation of the Deaf agreed, adding that the proposal “would add stigma that we don’t need”. Germany suggested instead using the words “at risk”.

The debate on this point ultimately became muddled, however. Some disabled persons’ organizations regarded forced medical intervention as tantamount to torture, with the health sector being the most likely source of abuse. The debate became focused on forced institutionalization, and it was unclear whether the issue should be dealt with as part of the right to be free from torture, or the right to liberty and security of the person, or in the right to health itself.⁴²

These inchoate ideas emerged a little more clearly during the debates on two other rights, where the concept of “risk” would emerge again. First, in discussions on the right to privacy, Germany suggested adding in an explicit reference to sexual violence, because women with disabilities were at particularly high risk.⁴³ This proposal arose from a discussion of privacy in group homes and institutions. It was noted, however, that the CRC had a separate article dedicated to protecting children from sexual exploitation and abuse.⁴⁴ Second, during the debate on children with disabilities, the Landmine Survivors Network asserted that the article should acknowledge that children with disabilities are disproportionately vulnerable to physical, sexual and emotional abuse. In addition, in countries lacking a formal government or experiencing armed conflict, children with disabilities are particularly vulnerable, and this must be recognized.⁴⁵

From these proposals it is possible to see that delegations were describing an intersectional risk. The fact of disability *per se* can raise the risk of violence and abuse, and in addition, particular situations can disproportionately raise the risk for people with disabilities. It is worth noting that in this respect no previous UN human rights treaty had included an article on general situations of risk, so in this respect delegates were proposing to push the human rights treaty language beyond where it had previously gone.

Later in the debate, the Landmine Survivors Network was the first to suggest a specific article on the situation of persons with disabilities in armed conflict. The delegate noted that persons with disabilities are typically the last to be evacuated in conflict situations, and when they are evacuated their rights are seldom addressed in centres for refugees and internally displaced persons. The delegate drew attention to Article 38 of the CRC, and made a proposal that was essentially a direct copy of paragraphs 1 and 4 of that Article, replacing the reference to children with a reference to disability:⁴⁶

41 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 2, 6 January 2004.

42 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 3, 7 January 2004.

43 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 4, 8 January 2004.

44 CRC, above note 15, Art. 34.

45 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 5, 9 January 2004.

46 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 7, 13 January 2004, and Vol. 3, No. 9, 15 January 2004.

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts.

2. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure that the rights of persons with disabilities who are affected by an armed conflict are guaranteed.⁴⁷

It is unlikely that this wording would have been accepted unchanged because the obligations on States in the second paragraph were stricter than in their previous iteration in the CRC. The Landmine Survivors Network proposal changed the obligation from “ensure protection and care” to “ensure ... rights ... are guaranteed”. It is reasonable to assume that the reason for this change is that “protection and care” has paternalistic connotations of the old medical model of disability, and refocusing the wording on “rights” was consistent with the aims of the negotiations. But it is doubtful that States would have accepted such a strict obligation to “guarantee” the rights of persons with disabilities during an armed conflict when they had not done so previously for other groups.

In the end, however, the Working Group had no time to look at adding additional articles, much less consider specific drafting, and the proposal was not debated in detail. While some supported the idea of a separate article, some suggested instead that the right to life included the right to survive. This assertion was not accepted by others, and Ireland and Canada strongly objected to extending the article, arguing that it should be kept short and succinct. But with Thailand recalling that persons with disabilities had been included in the Holocaust, it was clear that many delegations viewed the two issues of the protection of life and protection during armed conflict as being very closely bound together.⁴⁸

The debate concluded with the issue being included as a footnote to the article on the right to life. The footnote read:

In the context of the discussion on this draft Article, some members of the Working Group suggested that the Convention should contain a separate draft article on the protection of the rights of persons with disabilities in armed conflict, similar to the approach taken in Article 38(4) of the Convention on the Rights of the Child. It was also suggested that such an article could deal more broadly with the protection of the rights of groups at particular risk.⁴⁹

The first reading

The Ad Hoc Committee met for its third session a few months later in May 2004 for the first reading of the Working Group draft. It was the first opportunity for all

47 Intervention by Adnan Al Aboudi, Landmine Survivors Network, 13 January 2004. Written copy with proposed language provided to the Working Group coordinator (on file with author).

48 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 3, No. 9, 15 January 2004.

49 *Report of the Working Group to the Ad Hoc Committee*, above note 40, Art. 8.

States to comment on the text, and interest in the process (and the number of delegates attending) continued to increase.

When discussion began on the article on the right to life, it was clear that there was a lot of support for including a reference to the need for States to protect people with disabilities during armed conflict – but there were divergent views on its placement. Jordan’s proposal was the most succinct, adding to the existing text a reference to IHL so that the article would read:

States Parties reaffirm the inherent right to life of all persons with disabilities, and shall take all necessary measures to ensure its effective enjoyment by them[, in particular, in situations of armed conflicts and natural disasters, in accordance with international law, human rights, refugee and international humanitarian law].⁵⁰

While this proposal was succinct, most voices in the room did not want to alter the wording of the right to life language, preferring to keep it closely matched to the corresponding provision in the ICCPR.

Yemen suggested adding a second paragraph instead, with a proposal that expanded Article 38 of the CRC to explicitly cover persons with disabilities who are refugees or are internally displaced:

States Parties shall, in accordance to their obligations in the context of international law and the Universal Declaration of [H]uman [R]ights and international treaties and conventions for the protection of civilians from armed conflicts, take all necessary measures to guarantee the protection and care for persons with disabilities that are affected by armed conflicts or are refugees or are internally displaced persons.⁵¹

Uganda proposed an alternative variation:

In accordance with their obligations under international humanitarian law to protect civilian populations in armed conflicts and risk situations, States Parties shall take all feasible measures to ensure the protection and care of all persons with disabilities who are affected by armed conflicts.⁵²

It is worth noting that these two proposals contained different standards of obligation on States. Yemen’s proposal obliged States to “take all necessary measures”, whereas Uganda’s used “all feasible measures”. The latter is the wording used in Article 38 of the CRC. Paragraph 2 of Article 38 was itself largely based on Article 77 of Additional Protocol I to the Geneva Conventions

50 *Report of the Third Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UN Doc. A/AC.265/2004/5, 9 June 2004, Annex II, Art. 8. The square brackets indicate the addition proposed by Jordan.

51 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 4, No. 2, 25 May 2004.

52 *Ibid.*

(AP I), which also obliges States to take “all feasible measures” to prevent the participation of children in armed conflict.⁵³

The International Committee of the Red Cross (ICRC) Commentary on Article 77 notes that the original draft of AP I read “take all necessary measures”, but this encountered opposition because governments did not wish to adopt unconditional obligations. It was changed during the negotiations to the “weaker” formulation.⁵⁴ It is worth noting, however, that the assertion that one formulation is weaker than the other is not necessarily borne out by the corresponding commentary on the meaning of “feasible measures” with respect to Articles 57 and 58 of AP I, which also relate to the protection of civilians.⁵⁵ Delegates negotiating those articles appear to have anticipated quite a high standard of obligation on parties to an armed conflict.⁵⁶ These nuances, however, were not debated during the first reading of the disabilities convention, so it is not possible to determine how delegations viewed the difference, or if they were aware of the ICRC Commentaries.

Responding to the proposed additions to the article on the right to life, several delegations objected to any addition at all, preferring to keep the language focused and succinct. The EU stated that it had agreed to the text “after a very difficult discussion” and that it did not support any addition. Columbia, Norway and South Africa agreed.⁵⁷

Going in another direction, Costa Rica repeated earlier calls in the Working Group to separate out the idea of situations of risk into an entirely new article addressing situations of armed conflict, natural disasters and extreme poverty.⁵⁸ This position was supported by Japan, Lebanon, Kenya, Save the Children International and the Landmine Survivors Network, which suggested expanding it to also include persons with disabilities in rural or remote locations, or in scattered populations.

When the Ad Hoc Committee returned to the debate the following day, the Arab Group had clearly caucused after the previous meeting, and Yemen returned to its own proposal to add a final phrase on behalf of the Arab Group, proposing that the phrase “and under foreign occupation” be appended to the end of its earlier proposal. This is the version that was entered into the report of the meeting.⁵⁹

Later in the meeting, Arab Group delegations also proposed adding a reference to foreign occupation to the preambular paragraph dealing with armed conflict, so at the end of the first reading of the text, two references to foreign occupation existed in the text in square brackets.⁶⁰

53 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. 77.

54 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 900.

55 AP I, Arts 57, 58.

56 Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 54, pp. 681, 692.

57 Ad Hoc Committee, above note 51.

58 *Ibid.*

59 *Report of the Third Session of the Ad Hoc Committee*, above note 50.

60 *Ibid.*, preambular para. (p).

The second reading

The first reading had been completed in two weeks because there were no substantive negotiations – it was simply an opportunity for delegations to make proposals. The second reading proceeded much more slowly, spread out over three meetings in August 2004 and January and August 2005. The task of the Ad Hoc Committee during that reading was to refine and reduce the large numbers of overlapping proposals made during the first reading.

The Ad Hoc Committee reached the article on the right to life at its meeting in January 2005. Views in favour of adding a reference to persons with disabilities in situations of risk were still more or less evenly split. Some delegations supported a new article, some thought situations of risk or armed conflict belonged in a second paragraph in the article on the right to life, and some thought the mention of armed conflict in the preamble was enough, wanting nothing further.

Ambassador Don MacKay of New Zealand, acting as the coordinator of the negotiations, took the initiative to propose a new article as a compromise, splitting out situations of risk and leaving the article on the right to life short and focused. In his report he noted that the new article “would cover the broader obligation of States parties to preserve the safety of persons with disabilities”. He proposed the following wording:

States parties recognize that in situations of risk to the general population persons with disabilities are especially vulnerable and shall take all feasible measures for their protection.⁶¹

The report of the meeting also noted that the phrase “all feasible measures” came from Article 38(4) of the CRC.⁶²

The coordinator’s draft text made no attempt to include any specific situations of risk, and it left the proposed article very general in nature. The report, however, noted that “[t]here was a divergence of views on whether the wording of the draft article ... should be further elaborated to include specific instances of situations of risk”.⁶³

During the debate, several delegations had proposed the inclusion of specific situations. These included both natural and man-made disasters, including foreign occupation and conflict (Yemen, supported by Libya, Palestine, Iran and Bahrain); exile, foreign occupation and conflict (Syria); times of natural and man-made risk (India, with a similar formulation proposed by Thailand); and all man-made disasters (South Africa). Jamaica illustrated the need to include the issue of disability by describing how its national policy on early warning for natural disasters disadvantaged people with disabilities because communications

61 *Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its Fifth session*, UN Doc. A/AC.265/2005/2, 23 February 2005, Annex II, para. 12.

62 *Ibid.*, para. 13.

63 *Ibid.*, para. 14.

were not accessible.⁶⁴ Whether or not any or all of these ideas should be included was left for further discussion at a later meeting.

The third reading

The operative section

In between the sixth and seventh sessions of the Ad Hoc Committee, the New Zealand ambassador, now chair of the Committee, prepared a new working text based on the debates in the Committee up to that point, drawing out the broad areas of agreement and highlighting the key issues that remained. This chair's text became the basis of work when the Committee met for its seventh session in January 2006.

The chair's text was accompanied by a covering letter, in which the chair provided a commentary to explain the drafting that had been used. The draft included a separate article on situations of risk, as he had proposed during the second reading (now Article 11 following a re-ordering of the text). Introducing the article, the chair wrote:

You will recall the discussion relating to the need for the protection of persons with disabilities in situations of risk to the general population. I hope that the language that I proposed at the fifth session ... drawing on article 38(4) of the Convention on the Rights of the Child, which is replicated in the new text, can quite quickly provide a basis for consensus.⁶⁵

The new Article 11 was included entirely in square brackets, indicating that its inclusion was not yet agreed.

The International Disability Caucus issued a position paper prior to the meeting indicating that while it accepted the new article, the text needed two amendments. First, it proposed replacing the word "vulnerable" with "neglected", objecting to the negative connotations of the former. During the debate, the Caucus noted that the use of the word "vulnerable" may have been appropriate in Article 38(4) of the CRC with respect to children, but that it was not appropriate with respect to adults with disabilities.⁶⁶ The written explanation accompanying the amendment noted that the purpose of the article was to

remind States Parties, that in natural disasters, wars, armed conflicts and other situations of risk, persons with disabilities are often forgotten and left behind. ...

64 Summary notes of the discussion prepared by the Secretariat for the chair, 24 January 2005 (on file with author).

65 *Letter Dated 7 October 2005 from the Chairman to All Members of the Committee*, UN Doc. A/AC.265/2006/1, 14 October 2005, para. 51.

66 Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 8, No. 2, 17 January 2006.

The word “vulnerable” does not really reflect the situation of “being forgotten or left behind”. The word “neglected” is, unfortunately, much closer to reality.⁶⁷

To take this perspective into account, the chair proposed changing the language “persons with disabilities are especially vulnerable” to “persons with disabilities are a group in especially vulnerable circumstances”. This would indicate that vulnerability was inherent to the situation, rather than to the members of the group. He noted that this nuance reflected an underlying theme of the Convention, and asked delegates to reflect further on it.⁶⁸

The Caucus’s second proposed amendment was to replace the phrase “shall take all feasible measures for their protection” with “shall take all feasible measures for the protection of their human rights, according to international law”. This proposal took the obligation in the article away from a somewhat vague and general obligation to “protect” persons with disabilities, which was based on the language of the CRC, and towards a more specific obligation to protect their rights. The language used was similar to the earlier proposal from the Landmine Survivors Network in the Working Group.

The written explanation made it clear that the Caucus was still concerned with possible paternalistic interpretations of disability, and it wanted to ensure that the text was focused on legal rights. The Caucus argued that “[r]eference to international laws, such as the Geneva Conventions, is necessary” to make it clear that protection from disability is not the issue.⁶⁹ Speaking to this point in the debate, the Caucus argued that in situations of risk, all people were vulnerable, and people with disabilities are often in no greater position of vulnerability than anyone else. What the text needed to say is that IHL protects persons with disabilities on an equal basis to others.⁷⁰

The points made by States in the debate were somewhat simpler. Palestine restated its wish to include specific situations of risk, including armed conflict and foreign occupation, arguing that a general reference to situations of risk was not clear.⁷¹ This position was endorsed by Yemen, Syria, Libya and Qatar. Other States, including New Zealand, Australia, Japan, the United States, Israel, Russia and El Salvador, argued that keeping the article general, without specifying any particular situations, would give it broader and more general applicability.⁷² El

67 International Disability Caucus, *Chairman’s Text as Amended by the International Disability Caucus*, 9 January 2006, Art. 11, available at: www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7idcchairamend1.doc.

68 *Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its Seventh Session*, UN Doc. A/AC.265/2006/2, 13 February 2006, Annex II, Art. 11.

69 International Disability Caucus, above note 67.

70 Ad Hoc Committee, above note 66.

71 On this, Palestine may well have had a good point. No other UN human rights treaty had included the term “situations of risk” previously, and its inclusion in the draft had emerged from the debates of the lived experience of persons with disabilities. It is reasonable to argue, therefore, that providing specific examples would indeed help to clarify a new phrase that had not up until that point appeared in international human rights law.

72 Ad Hoc Committee, above note 66.

Salvador argued that if there were to be a list, it would feel obliged to add its own priorities, such as persons with disabilities facing HIV/AIDS.

Qatar's intervention was perhaps a bit more helpful, and went beyond the simplistic "list/no list" debate. Like the International Disability Caucus, Qatar suggested adding a specific reference to the Geneva Conventions. Iran also nudged the debate in a helpful direction by suggesting that the Ad Hoc Committee should consider the preambular paragraph and Article 11 together.

Canada, for its part, noted that there were no comparable provisions in other human rights treaties, and on that basis the text should contain language indicating that the obligations on States were to protect persons with disabilities on an equal basis to others. On that point it agreed with the International Disability Caucus. But the chair pointed out that this proposal was complicated because persons with disabilities may in fact have additional needs in emergency situations that would not be a factor for people without disabilities. Following this note of caution, Canada's proposal was not taken any further.

The final report of the meeting concluded with the article being retained in the working text but without square brackets, indicating that its inclusion was generally accepted, but with the inclusion in square brackets of a placeholder for a list of specific situations of risk. At the end of the third reading, Article 11 read:

States Parties recognize that in situations of risk to the general population[, including situations of ...] persons with disabilities are a group in especially vulnerable circumstances and shall take all feasible measures for their protection.⁷³

The preambular section

The preamble had been largely skipped over during the second reading, and the Ad Hoc Committee only turned to it towards the end of the third reading. With respect to the paragraph referencing armed conflict, the chair's text under discussion was the same language that had been used in the Working Group draft, and it had remained in the working text unchanged, without the proposed addition of a reference to foreign occupation having been added.

The debate over the paragraph took a familiar path. Bosnia got in first with a written proposal that was submitted prior to the meeting, adding a reference to obligations under IHL. The proposed paragraph read:

Concerned that situations of armed conflict have especially devastating consequences for the human rights of persons with disabilities, [NEW: and reaffirming that in such situations parties to armed conflict must abide by their obligations under international humanitarian law,]⁷⁴

This language was destined never to be accepted, because by referencing specific legal obligations it was language that belonged in an operative article and not the preamble.

⁷³ *Report of the Ad Hoc Committee*, above note 68.

⁷⁴ "Contribution by Governments: Bosnia and Herzegovina", available at: www.un.org/esa/socdev/enable/rights/ahc7bh.htm.

But it was consistent with Qatar's call for a reference to the Geneva Conventions to be included in Article 11, and helped to nudge the idea along that the preambular paragraph and Article 11 would ultimately be considered together as a package.

The Bosnian proposal was supported by Serbia, Croatia, Iran, Jordan and the International Disability Caucus. It was opposed, however, by Canada, and the United States expressed caution about the interface between human rights law and IHL, stating that it needed further study. Japan also reserved its position.⁷⁵ The debate was otherwise largely repetitive of the debate on Article 11, with many of the same points being made.⁷⁶

Noting that all the proposals for the preambular paragraph had come up in the context of Article 11, the chair suggested that the issue be referred to informal consultations. Those consultations were carried out hurriedly in the margins, and resulted in a new paragraph that added in the idea of natural disasters, but with language that was clumsy and had not been a part of the discussions up until that point. Nevertheless, it was adopted into the working text in the report of the meeting. The paragraph read:

Concerned that situations of armed conflict and the occurrence of natural disasters have considerably increased the experience of disability in war-stricken and disaster-prone countries, as well as having especially devastating consequences for the human rights of persons with disabilities,⁷⁷

The final reading

Common purpose falters

The eighth and final meeting of the Ad Hoc Committee was scheduled for August 2006. Progress during the second and third readings had been quite remarkable – discussions had been collegial and non-political, and the overall atmosphere was one of common purpose. Hopes were high that all remaining issues could be concluded at the eighth session, but there were fears that if this did not happen, momentum would stall and positions would entrench.

The Committee had a difficult task ahead of it. Several complex issues remained to be concluded where positions were still quite far apart, including how to ensure protection of legal capacity; ending or restricting forced interventions; how to guarantee accessibility and equal access to health and education; and the monitoring provisions of the Convention.

Not on the priority list for disabled persons' organizations were the references to armed conflict and foreign occupation, which had always been a

⁷⁵ It is interesting to note that this was the first and last time in the debate that any delegation had made an explicit reference to the interface between the two bodies of law.

⁷⁶ Ad Hoc Committee, *Daily Summary of Discussions*, Vol. 8, No. 14, 2 February 2006.

⁷⁷ *Report of the Ad Hoc Committee*, above note 68, preambular para. (s).

second- or third-tier priority for them.⁷⁸ Article 11 had been left until the end with the other difficult issues, because compromise on references to foreign occupation in UN negotiations, if it is to be found at all, generally comes at the very end of a process and only when every delegation is prepared to accept everything else in the text.

The will to find a compromise took a serious blow just weeks before the meeting, with the outbreak of conflict between Israel and Hezbollah forces in southern Lebanon in July 2006. Tensions ran high and immediately cast a pall of doubt over the proceedings. New York-based delegates worried about a possible hardening of Arab Group positions, and Mexico's delegates expressed fear to the chair that at least one delegation had informed them that it planned to "make trouble".

In addition, the general agreement on the working text adopted at the end of the previous session appeared to be on shaky foundations anyway. Prior to the meeting, the International Disability Caucus released its own version of the working text with its preferred amendments. It reopened the same debate on Article 11 from the previous session, and its preferred text for the preambular paragraph deleted the reference to natural disasters that had only just been added, and re-proposed the text on IHL obligations. The Caucus's preferred text read:

Concerned that situations of armed conflict have especially devastating consequences for the human rights of persons with disabilities, and reaffirming that in such situations parties to armed conflict must abide by their obligations under international humanitarian law,⁷⁹

In its amendment to Article 11, the Caucus suggested language that demonstrated that it was still not happy with the reference to vulnerability, despite the earlier attempts to improve it, and it was deleted from their preferred text. Seeking a solution on specific references to IHL obligations, the Caucus suggested instead the innovative compromise of referring to "major or complex humanitarian emergency". Its preferred text read:

States Parties shall, in situations of major or complex humanitarian emergency, take all feasible measures for the protection of the rights of persons with disability and guarantee their rights on an equal basis with others.⁸⁰

The explanatory text accompanying the proposal noted that these were terms with clear definitions set by the Inter-Agency Standing Committee, a UN senior officials' coordinating body responsible for humanitarian issues. "Complex emergency", for example, was defined partly as a "humanitarian crisis ... where there is a total or

78 For example, a resolution of the International Disability Caucus Steering Committee Meeting in Madrid, dated 8 July 2006 (on file with author), set out the priorities of the Caucus for the final session of the negotiations, and this issue was not on the list.

79 *Working Text as Amended by the International Disability Caucus*, 18 August 2006, preambular para. (s), available at: www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8idcwam18augf.doc.

80 *Ibid.*, Art. 11.

considerable breakdown in authority resulting from internal or international conflict”. But while this may have been an innovative attempt to refer to IHL obligations via a roundabout route, it was perhaps a bit naive. Firstly, the definitions cited were more relevant to the coordination of humanitarian assistance and did not purport to identify legal obligations. Secondly (and most importantly), States tend to be loath to accept definitions drafted by UN officials, preferring to negotiate definitions between themselves. The proposal therefore sank without a trace.

With the conflict in the Middle East still under way when the meeting started, Arab delegations had hardened their positions. The Arab Group again proposed the addition of “foreign occupation” into the preambular paragraph.⁸¹ For Article 11 the Arab Group went further, circulating a letter as a formal document with an entirely new proposal, with the focus squarely on foreign occupation:

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 safety and protection of persons with disabilities under foreign occupation and that institutions which provide them with care and rehabilitation are not targeted or placed in danger.⁸²

The EU sought to go in the other direction, requesting that the article be pared down to a succinct statement of principle:

In situations of risk to the general population, States Parties shall take all feasible measures for the protection of persons with disabilities.⁸³

It was quite clear during the first week of the meeting that positions on the wording of both the preambular section and Article 11 were moving apart, and statements were becoming heated, threatening to derail progress being made on other outstanding issues. Sudan raised the stakes by taking the floor in the plenary to challenge the chair’s impartiality on the issue,⁸⁴ and with time running out in the second week of the meeting it began to block the adoption of any further articles until progress was made on Article 11.

81 *Compilation of Proposals Received from Government Delegations Electronically by Friday 18 August 2006, Midnight*, working document compiled by the Secretariat for the chair (on file with author).

82 *Letter Dated 10 August 2006 from the Deputy Permanent Representative of the Sudan to the United Nations Addressed to the Secretariat*, UN Doc. A/AC.265/2006/3, 15 August 2006.

83 *Points and Proposals the EU Will Take Up in the Plenary*, 18 August 2006, working EU document shared with the chair (on file with author).

84 This was a provocative move designed to raise the stakes and increase pressure on delegations. There were no real doubts about the chair’s impartiality, and Ambassador MacKay was known in New York as one of the most neutral and skilled chairs available. He was widely credited for keeping the negotiations focused and on track, and lauded among the disability community for ensuring that disabled persons’ organizations had equal opportunities to speak.

The compromise package and the final text

The New Zealand delegation had not voiced much of an opinion on these questions up until this point, but it had invested considerable diplomatic efforts in securing a credible outcome to the negotiations, and came to the meeting with specific instructions from the New Zealand government. Those instructions were to try to prevent references to foreign occupation from politicizing the negotiations and holding up the conclusion of the Convention.

The delegation's negotiating brief instructed it to find a way to secure a reference to foreign occupation in the preamble, and avoid it in Article 11, as the core of a compromise package. It suggested that the delegation hold back initially but then seek an appropriate time to suggest replacing the preambular paragraph entirely with one from the preamble of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict. That paragraph included a reference to foreign occupation, and it was already agreed language from a human rights treaty. It read:

Bearing in mind that conditions of peace and security based on full respect of the purposes and principles contained in the Charter and observance of applicable human rights instruments are indispensable for the full protection of children, in particular during armed conflict and foreign occupation,⁸⁵

The New Zealand delegation approached Sudan and Finland, as chairs of their respective groups, to propose that language as the core of a deal between the Arab Group and the EU, and requested that those two parties negotiate bilaterally to narrow their differences.

The overall package pulled together by Sudan and Finland was based on that idea. By defaulting to previously used language for the preamble, it increased the chance of achieving a quick consensus in the short time remaining, and it allowed them to focus their efforts on getting to a common position on Article 11.

In the final days of the meeting, the compromise on Article 11 took shape. The Arab States agreed to drop their insistence on a second reference to foreign occupation, and the EU agreed to drop its insistence on a succinct and streamlined text. This allowed the other outstanding suggestions to be brought in, including a reference to IHL, but also the wider references to situations of risk and natural disasters, both of which still had a lot of support in the room. Article 11 was also reordered to mirror the structure of Article 38(4) of the CRC (again, to use previously agreed language as closely as possible), and the reference to vulnerability was dropped, bringing the International Disability Caucus on board.

The final text of Article 11 to emerge from the corridor discussions was considerably different from the working text at the beginning of the meeting:

⁸⁵ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000 (entered into force 12 February 2002), Preamble.

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.⁸⁶

At the last minute, the obligation on States was changed from a requirement to take “all feasible measures” to a requirement to take “all necessary measures”. Sudan insisted on this change, asserting that “all necessary measures” was the stronger obligation. Finland attempted to retain “all feasible measures” in order to ensure consistency with the CRC and the use of the term “feasible measures” in Articles 57 and 58 of AP I.⁸⁷ Had the ICRC’s excellent smartphone application containing the Geneva Conventions, the Additional Protocols and the ICRC Commentaries been available at the time, it would have been easy for the delegates to look up the commentary on the use of that phrase in Articles 57 and 58. If they had done so, they would have seen that the ICRC regarded “feasible measures” to be a high standard⁸⁸ – but in the absence of that information, the delegates acted on the belief that they were strengthening the obligation, agreeing to sacrifice consistency for that purpose.

Once the compromise wording was agreed between the Arab Group and the EU, the remaining holdout was the United States, which was still not prepared to accept any reference to foreign occupation. US participation in the negotiations, particularly the latter half, had been engaged, constructive and helpful. At a point when the relationship between the United States and the multilateral system was elsewhere coming under strain, New Zealand delegates privately leaned hard on their US counterparts to persuade Washington to find a way to preserve the goodwill they had earned, and to avoid blocking the adoption of a human rights treaty that Washington saw as partly inspired by the 1990 Americans with Disabilities Act.

Raising the pressure on the Americans a little more, New Zealand further stressed that Israel’s engagement throughout the negotiations had also been informed, constructive, and well received by all the other delegations. Israel had kept a studiously low profile on Article 11, but in many other places it had made an important contribution to the Convention, as had Arab Group delegations, with both sides respectfully engaging with each other’s points, free of politics or rancour. The American delegates were urged to stress to Washington that the disabilities negotiations were the one bright spot in the UN human rights agenda

86 *Interim Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its Eighth Session*, UN Doc. A/AC.265/2006/4, 1 September 2006, Annex II, Art. 11. The “the” in square brackets above was not in the adopted text and does not appear in the report from the meeting, but it was added in later during technical revisions before the final adoption by the General Assembly in December 2006. It is included here for clarity.

87 References to these articles from AP I are scribbled on handwritten notes attached to the draft from that meeting, along with a question mark as to which was the stronger obligation (on file with author).

88 Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 56.

where Israeli positions were being welcomed, and that this was the wrong time to object to a delicate compromise.

On the final afternoon of the negotiations the United States indicated privately that it could accept the package, but Washington still needed a formal record that it disapproved of the inclusion of the reference to foreign occupation. A deal was quickly arranged in which the United States would call a vote from the floor on the specific phrase “and foreign occupation”, calling for its deletion. Expecting to lose that vote, the United States would then join consensus on the entire text, allowing the preambular paragraph and the Convention to be adopted without a vote.

This arrangement held, and the Ad Hoc Committee approved the inclusion of the reference to foreign occupation by 102 votes to five, with eight abstentions – the only vote that was taken during the entire process.⁸⁹ Article 11 was adopted by consensus a few minutes later.

Conclusions

Despite the drastic last-minute changes to Article 11, its final formulation is a solid outcome. It is largely consistent with its predecessor in the CRC, but expands its scope to cover a wider range of issues of relevance to persons with disabilities. Where the CRC refers only to obligations under IHL, the CRPD expands this to refer also to international law generally and international human rights law specifically. This expansion makes logical and legal sense given that the obligations apply in the CRC to children affected by an armed conflict, but in the CRPD they apply more broadly to persons with disabilities in a range of situations of risk, including armed conflict, humanitarian emergencies and natural disasters. The applicable legal obligations could therefore be humanitarian or human rights-based, depending on the situation.

The restriction on States’ ability to derogate from the protections of the ICCPR “provided that such measures are not inconsistent with their other obligations under international law”⁹⁰ now needs to be read together with Article 11.⁹¹ States Parties’ obligations under international law now explicitly extend to protecting persons with disabilities in any scenario where Article 4 of the Covenant could be invoked.

The drafting of Article 11 nearly tripped up the entire negotiations, but its inclusion in the text is an important acknowledgement that States have legal obligations to persons with disabilities under both international human rights law and IHL, even in times of a public emergency which threatens the life of the nation.

89 *Interim Report of the Ad Hoc Committee*, above note 86, para. 11. Voting against the phrase were Australia, Canada, Israel, Japan and the United States. Abstaining were Cameroon, Côte d’Ivoire, Gabon, Kenya, Niger, Nigeria, the Republic of Korea and Serbia. Every other delegation voted in favour.

90 ICCPR, above note 11, Art. 4(1).

91 It is worth noting that it is doubtful that delegates consciously considered the implications of the effect Article 11 would have on Article 4 of the ICCPR.

The protection of women and girls with disabilities in armed conflict: Adopting a gender-, age- and disability-inclusive approach to select IHL provisions

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Abstract

The Convention on the Rights of Persons with Disabilities has brought about a major shift in our understanding of and approach to disability, not least in terms of its implications for other frameworks of international law. Yet, considerations with regard to disability in the context of international humanitarian law (IHL) remain the exception, meaning that persons with disabilities in practice often do not benefit from the same degree of protection as others who find themselves in situations of armed conflict. These shortcomings can be further exacerbated by an interplay between impairment and other individual characteristics such as gender and age, resulting in at times exceptional disadvantages faced by women and girls

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with disabilities. The present article therefore aims to propose ways in which our modern-day understanding of disability may inform the interpretation and application of IHL, as well as to showcase how the interaction between disability and other characteristics such as gender and age will shape said interpretation and application.

Keywords: disability, gender, age, interpretation of IHL, inclusive approach, intersectionality.

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Introduction

According to the World Health Organization’s (WHO) 2011 *World Report on Disability*, 15% of the world’s population is living with some form of disability.¹ Despite this evident prevalence of impairment around the world, persons with disabilities have long been subjected to continuous stigmatization, discrimination, and grave abuses of their fundamental human rights owing to outdated stereotypes, harmful practices and a general lack of awareness. Only recently, with the paradigm shift in how we view and approach disability brought about by the adoption of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD),² has the international community begun to pay dedicated attention to how disability may impact all aspects of life – including the enjoyment of fundamental guarantees of international law.

Yet, fourteen years after the CRPD’s inception, there is much work left to be done in order to ensure equal access to these guarantees for persons with disabilities. With the adoption of the CRPD, it has become necessary to re-examine the existing framework of international law through the lens of disability, to understand the implications of different types of impairment when it comes to the interpretation and application of these frameworks, and to keep in mind that disability or impairment is not an isolated characteristic – rather, it stands in relation to other factors such as gender and age, which, separately or in their interplay with one another, may equally impact a person’s individual experience. The present paper therefore aims to examine whether and how a disability-, gender- and age-inclusive approach to certain fundamental norms of international humanitarian law (IHL) could be adopted, and to showcase how

1 WHO, *World Report on Disability*, 14 December 2011, p. 27, available at: www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability (all internet references were accessed in October 2022).

2 Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 24 January 2007 (entered into force 3 May 2008) (CRPD). On the paradigm shift, see Office of the UN High Commissioner for Human Rights (UN Human Rights), “Statement by Louise Arbour, UN High Commissioner for Human Rights”, 5 December 2006, available at: www2.ohchr.org/english/issues/disability/docs/statementhdec06.doc.

such an approach may serve as a basis to inform the interpretation and application of other more specific guarantees stipulated by this framework.

The impact of armed conflict on women and girls with disabilities

Armed conflicts around the world have a devastating impact on everyone involved, but particularly on those already subjected to pre-existing inequalities. It therefore comes as no surprise that in recent years, the growing disability rights discourse has also shone a spotlight on the precarious circumstances faced by persons with disabilities who find themselves in situations of armed conflict, as they are among those most disproportionately affected by it.³ Such extreme circumstances contribute to the exacerbation of difficulties that these individuals already experience in peacetime, placing them at increased risk of acute harm⁴ and exposing them to gross violations of their human rights as well as their protections afforded by IHL.⁵ Despite growing awareness, persons with disabilities thus remain the “forgotten victims” of armed conflicts,⁶ as their rights are often considered a niche issue.⁷ For example, persons with disabilities often get left behind when others flee to safety or are forced to put their lives in the hands of others,⁸ and as a result, they are more likely to sustain serious injury, while also being exposed to disproportionate risk killings and at times even deliberate targeting.⁹ During the 2014 Gaza conflict, for instance, the Israeli Defense Forces advised “individuals with limited mobility” to “prepare themselves

3 UNSC Res. 2475, 20 June 2019, p. 1; CRPD Committee, “Statement on Disability Inclusion for the World Humanitarian Summit”, September 2015, p. 1, available at: www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDStatements.aspx.

4 See CRPD Committee, above note 3, p. 2.

5 During the 2011 earthquake and following tsunami in Japan, the death rate for persons with disabilities was double that of the general population: see UN Economic and Social Council (ECOSOC), *Panel Discussion on Disaster Resilience and Disability: Ensuring Equality and Inclusion: Report*, 10 October 2013, p. 10, available at: www.un.org/development/desa/disabilities/resources/panel-discussion-on-disaster-resilience-and-disability-ensuring-equality-and-inclusion-10-october-2013.html. See also *Report of the Fourth World Conference on Women*, UN Doc. A/CONF.177/20/Add.1, 17 October 1995 (Beijing Declaration), para. 131; Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights, April 2019, pp. 12–13.

6 CRPD Committee, “Persons with Disabilities ‘Forgotten Victims’ of Syria’s Conflict – UN Committee”, 17 September 2013, available at: <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13736&LangID=E>.

7 A. Priddy, above note 5, p. 14.

8 CRPD Committee, above note 3, p. 2; *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, paras 1286–1288; Peter Beaumont, “Disabled Palestinians Unable to Escape Israeli Air Strike”, *The Guardian*, 12 July 2014, available at: www.theguardian.com/world/2014/jul/12/disabled-palestinians-unable-escape-israeli-air-strike. See also A. Priddy, above note 5, p. 12.

9 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/14/24/Add.2, 31 May 2010, para. 74. See also CRPD Committee, *Observaciones Finales Sobre el Informe Inicial de Colombia*, UN Doc. CRPD/C/COL/CO/1, 30 September 2016, para. 24: the Committee found that in at least ten cases, persons with disabilities had been targeted and killed in extrajudicial executions (“ejecutadas extrajudicialmente”) in what it found to be so-called “false positive killings”, with the victim’s bodies later falsely presented as those of “guerrilleros” (FARC-EP fighters).

to be carried by others” if they were otherwise unable to reach the nearest shelter in time;¹⁰ a report published the following year by Israel’s Ministry of Foreign Affairs found that the conflict had been “especially difficult for the elderly and disabled populations, who struggled to seek shelter in the short time available between the sounding of warning sirens and the explosions from the rocket and mortar attacks”, and that more than a quarter of civilians injured over the course of the conflict were above the age of 65.¹¹

Barriers encountered by persons with disabilities when attempting to flee the effects of hostilities furthermore range from lack of access to basic services or localities to the loss of assistive devices, becoming separated from friends and family, and having to leave behind familiar environments.¹² The CRPD Committee noted in 2013, for example, that persons with disabilities who had fled the armed conflict in Syria were “disproportionately at risk of being neglected, excluded or even abused because of their impairment and traumas”, and that women and children with disabilities were particularly at risk of such mistreatment.¹³

Indeed, these already dire conditions are further exacerbated where persons with disabilities face additional disadvantages stemming from multiple, intersectional discrimination based on other characteristics such as gender and age. Women and children in general have long been recognized as being among those most adversely affected by armed conflicts,¹⁴ an already vulnerable position that is further amplified by the presence of disability. Consequently, women and girls with disabilities have been found to be especially affected by violations of both IHL and their human rights,¹⁵ including a disproportionately high risk of being exposed to sexual and other gender-based violence.¹⁶ A recent example of this can be found in

10 See Israeli Ministry of Foreign Affairs, *The 2014 Gaza Conflict 7 July–26 August 2014: Factual and Legal Aspects*, May 2015, para. 205 fn. 359, available at: <https://mfa.gov.il/protectiveedge/documents/2014gazaconflictfullreport.pdf>.

11 *Ibid.*, para. 205.

12 *Ibid.* See also A. Priddy, above note 5, p. 12; International Committee of the Red Cross (ICRC) Advisory Service, “IHL and Persons with Disabilities”, legal fact sheet, 4 October 2017, p. 1, available at: www.icrc.org/en/document/ihl-and-persons-disabilities.

13 CRPD Committee, above note 6.

14 UNSC Res. 1325, 31 October 2000, p. 1.

15 Beijing Declaration, above note 5, para. 131; CRC Committee, General Comment No. 9, “The Rights of Children with Disabilities”, UN Doc. CRC/C/GC/9, 27 February 2007, para. 8. While General Comment No. 9 does not expressly mention armed conflict, it does refer to “indigenous girls with disabilities” and “children with disabilities living in rural areas”. Girls with disabilities living in areas affected by armed conflict will often be in an equally if not more vulnerable position based on the interplay between their age, gender and impairment and the dangerous environment they are living in.

16 CRPD Committee, above note 3, pp. 3 ff.; ICRC Advisory Service, above note 12, p. 1; *Report of the Special Rapporteur on Violence against Women on Her Mission to the Occupied Palestinian Territory*, UN Doc. A/HRC/35/30/Add.2, 8 June 2017, para. 43. See also Elisabeth Jean Wood, “Conflict-Related Sexual Violence and the Policy Implications of Recent Research”, *International Review of the Red Cross*, Vol. 96, No. 894, 2014, in particular pp. 427 ff.; Beijing Declaration, above note 5, paras 131, 135, 114–116 (stating that “grave violations of the human rights of women”, occurring particularly in times of armed conflict, include murder, torture, systematic rape, forced pregnancy and forced abortion, and that “female children and women with disabilities” are particularly at risk); UNICEF, *Children with Disabilities in Armed Conflict: Discussion Paper*, November 2018, pp. 8 ff., available at: www.unicef.org/media/126116/file/Children-with-Disabilities-in-Situations-of-Armed-Conflict-Discussion-Paper.pdf; *Conflict-*

the reports on the precarious situation of children with disabilities living in Ukraine, which emerged soon after the outbreak of the country's international armed conflict with Russia.¹⁷ Issues include grave shortcomings in the care of institutionalized children (not least due to a lack of appropriately trained staff), children being sent back from such institutions to communities which are unable to ensure their proper care, and the forced displacement of children from one institution to the next without providing information on their whereabouts to their families.¹⁸

Gender, age and disability in IHL

IHL has long recognized and taken into account the particular risks faced by women and girls in situations of armed conflict – however, the same cannot be said for disability. While the disability rights discourse spawned by the adoption of the CRPD has had a significant impact on other instruments of the international human rights framework, IHL has so far remained largely uninfluenced by the rights that the Convention enshrines, which in turn has left persons with disabilities exposed to disproportionate risks such as those mentioned above. For women and girls with disabilities in particular, the lack of a disability-inclusive approach to IHL provisions means that the major impact of the interplay between their gender, age and impairment is yet to be recognized when it comes to their equal enjoyment of IHL guarantees.

The social model and human rights based-approach of the CRPD

In order to understand why IHL needs to be re-examined through a disability lens, it is first necessary to understand why and how the approach to disability as stipulated by the CRPD has been so groundbreaking. Prior to the adoption of the Convention, persons with disabilities were largely viewed either as having a medical defect in need of fixing (the so-called medical model), or as passive victims of their impairment in need of pity and charity (the so-called charity model). Both approaches inherently viewed persons with disabilities as “less than”, thus contributing to their stigmatization, marginalization and discrimination by

Related Sexual Violence: Report of the Secretary General, UN Doc. S/2019/280, 29 March 2019, paras 11 ff., especially paras 17, 18.

17 See, for example, Fergal Keane, “Chaos, Upheaval and Exhaustion for Ukraine’s Disabled Children”, *BBC News*, 8 March 2022; Ivana Kottasová and Yulia Kesaieva, “Escaping the Horror in Ukraine is Not an Option for Many Disabled Children and Their Families”, *CNN*, 12 March 2022.

18 See, for example, CRPD Committee, “Chapter on the Situation of Persons with Disabilities in Ukraine and in Countries Where They Have Fled after 24 February 2022, as a Result of the Aggression against Ukraine by the Russian Federation – to Be Included in 27th Session Report”, paras 16(a), 27, available at: www.ohchr.org/sites/default/files/documents/hrbodies/crpd/statements/2022-09-09/Situation-of-persons-with-disabilitie-in-Ukraine-in-CRPD-27th-session-Report.docx; UNICEF, “Ukraine War Response: Children with Disabilities”, 10 June 2022, available at: www.unicef.org/emergencies/ukraine-war-response-children-disabilities; UN Human Rights, “Ukraine: UN Experts Sound Alarm on Situation of Children with Disabilities”, press release, 11 August 2022, available at: www.ohchr.org/en/press-releases/2022/08/ukraine-un-experts-sound-alarm-situation-children-disabilities.

reducing them to their impairment and considering their lives as less worthy of living.

The social model and human rights-based approach enshrined in the CRPD mark a significant shift away from these paternalistic and discriminatory models. The social model, on the one hand, recognizes that it is not impairment as such but the *interaction* between impairment and various physical, attitudinal, environmental and societal barriers which hinders the full and active participation of persons with disabilities in society,¹⁹ meaning that the duty to overcome disabling barriers is placed on society rather than on the individual.²⁰ The human rights-based approach, on the other hand, forms the normative basis for the response to disability:²¹ it emphasizes the inherent dignity of every human being and stipulates that no characteristic, including impairment, may prevent a person from being a full and equal rights holder, while also demanding that the multidimensional and intersectional discriminations faced by persons with disabilities be addressed (see further below).

The seismic shift in our understanding of and approach to disability thus lies in the recognition of disability as the result of an interaction between a person's impairment and an often non-responsive environment. Following this understanding, the major barriers still faced by person with disabilities when accessing rights and guarantees supposedly afforded to every human being – or, in the case of IHL, all persons protected under the respective conventions – can only be addressed if the social model and human rights-based approach enshrined in the CRPD are incorporated and reflected throughout the entire framework of international law.

The interplay between disability, gender and age: Multiple and intersectional discrimination against women and girls with disabilities

Another major achievement of the CRPD has been the recognition of the intrinsic interplay between disability and a person's other individual characteristics, which at times may result in multiple and intersecting forms of discrimination based on the combination of overlapping, immutable and systemic factors.²² Multiple and

19 Article 1(2) of the CRPD describes persons with disabilities as “those 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” (emphasis added). See also CRPD, above note 2, preambular para. (e), Art. 1; Emily Kakoullis and Yoshikazu Ikehara “Art. 1: Purpose”, in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford University Press, Oxford, 2018, p. 54.

20 Rosemary Kayess and Philip French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities”, *Human Rights Law Review*, Vol. 8, No. 1, 2008, p. 6.

21 Theresia Degener, “A New Human Rights Model in Disability”, in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham, 2017, p. 20.

22 Roxanne Mykitiuk and Ena Chadha, “Art. 6: Women with Disabilities”, in I. Bantekas, M. A. Stein and D. Anastasiou (eds), above note 19, p. 184; CRPD Committee, General Comment No. 3, “Article 6: Women and Girls with Disabilities”, UN Doc. CRPD/C/GC/3, 2 September 2016, para. 2. See also Ad Hoc Committee on the CRPD, *Daily Summary of Discussions at the Sixth Session*, 2 August 2005, available at: www.un.org/esa/socdev/enable/rights/ahc6sum2aug.htm; WHO, above note 1, p. 8.

intersectional discrimination in this sense refer to situations where discrimination against a person is based on two or more grounds, thus compounding or aggravating that discrimination, and where several grounds of discrimination – such as disability, gender and age²³ – operate and interact with each other at the same time in an inseparable manner.

Women and girls with disabilities are, for example, exposed to a heightened risk of sexual violence when compared to other groups of people,²⁴ and girls with disabilities in particular face additional barriers owing not only to their gender and impairment but also to their young age.²⁵ The at times exceptional disadvantages resulting from this interplay had been addressed before, but were mostly an afterthought, failing to address *both* gender and disability.²⁶ The CRPD finally explicitly acknowledges that women and girls with disabilities routinely experience such multiple and intersecting forms of discrimination,²⁷ while also emphasizing the need to continuously incorporate a gender- and age-sensitive perspective into the Convention's implementation.²⁸ Aside from other provisions throughout the CRPD,²⁹ this approach is most notably reflected in Articles 6 and 7 of the Convention: by dedicating individual provisions to the respective protection of women and children with disabilities, the Convention affirms that they are entitled to the full enjoyment of human rights on an equal basis with others,³⁰ while also expressly demanding a gender- and age-sensitive approach to disability³¹ (including by directly referencing the Convention on the Rights of the Child (CRC)³²).

23 CRPD Committee, General Comment No. 3, above note 22, para. 4. See also CEDAW Committee, "General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women", UN Doc. CEDAW/C/2010/47/GC.2, 19 October 2010, para. 18; CEDAW Committee, "General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19", UN Doc. CEDAW/C/GC/35, 14 July 2017, para. 12. These committees expressly mention gender, age and disability as grounds for multiple, intersectional discrimination.

24 Swantje Köbsell, "Gendering Disability: Behinderung, Geschlecht und Körper", in Jutta Jacob, Swantje Köbsell and Eske Wollrad (eds), *Gendering Disability: Intersektionale Aspekte von Behinderung und Geschlecht*, Transcript, Bielefeld, 2010, p. 21.

25 Beijing Declaration, above note 5, paras 32, 270, 278; CRC Committee, above note 15, paras 8, 10. The CRC Committee expressly states that "girls with disabilities are often more vulnerable to discrimination due to gender discrimination" and requires States Parties to take "the necessary measures, and when needed extra measures, in order to ensure that they are well protected, have access to all services and are fully included in society" (CRC Committee, above note 15, para. 10).

26 CRPD Committee, General Comment No. 3, above note 22, para. 3. See also "Chapter I: Matters Brought to the Attention of State Parties: General Recommendations: General Recommendation No. 18: Disabled Women", in *Report of the Committee on the Elimination of Discrimination against Women, UN GAOR 46th Session*, UN Supp No. 38, Doc. A/46/38, 1992; Beijing Declaration, above note 5, paras 60, 81, 82, 106, 109, 114–116, 124, 126, 175, 178, 206, 232, 233; "Chapter I.A.: General Recommendation 24: Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women: Women and Health", in *Report of the Committee on the Elimination of all Forms of Discrimination against Women, UN GAOR 21st Session*, Supp No. 38, UN Doc. A/54/38/Rev.1, 1999, paras 6, 24, 25.

27 CRPD, above note 2, preambular paras (p), (q). See also Rachele Cera, "Preamble", in V. Della Fina, R. Cera and G. Palmisano (eds), above note 21, p. 85; Beijing Declaration, above note 5, para. 32.

28 CRPD, above note 2, preambular para. (s).

29 *Ibid.*, Arts 8(b), 16(2), 16(5), 18(2), 23(1)(c), 23(3–5), 24, 25(a).

30 *Ibid.*, preambular paras (d), (r).

31 R. Mykitiuk and E. Chadha, above note 22, p. 171.

32 CRPD, above note 2, preambular para. (r).

The CRPD as an interpretative tool for IHL

At the time of drafting the 1949 Geneva Conventions and their two Additional Protocols, a disability rights discourse had not yet developed within the international community.³³ This is evident in the outdated, often discriminatory medical and charity approaches which IHL generally adopts towards disability:³⁴ most notably, persons with disabilities are still widely assumed to qualify as “wounded” or “sick”, thus falling within the personal scope of application of Geneva Conventions I and II.³⁵ This assumption is problematic, to say the least. By far not all persons with disabilities will qualify as “wounded” and/or “sick” within the meaning of IHL,³⁶ and where they do, summarizing their protection simply as that afforded to the wounded and sick would also run counter to the social model and human rights-based approach enshrined in the CRPD. What can already be determined is therefore that the outdated approach to disability seemingly reflected by IHL has been superseded by this new framework.³⁷

33 A. Priddy, above note 5, p. 52.

34 See, for example, Rule 138 of the ICRC Customary Law Study, which speaks of the “disabled”; Article 17 of Geneva Convention IV, referring to “the infirm”; and Article 30 of Geneva Convention III, referring to “cases of ... mental disease” and “the blind”. 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 138, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>; 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. 17; 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. 30.

35 See, for example, ICRC Advisory Service, above note 12, p. 2, which dedicates an entire section to the protection of the “wounded and sick”; or ICRC, “Disability”, *How Does Law Protect in War?*, available at: <https://casebook.icrc.org/glossary/disability>, where a large part of the IHL provisions that are listed in relation to persons with disabilities are those referring to the “wounded”, “sick” and “infirm”. See also A. Priddy, above note 5, p. 56.

36 ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017, paras 1380–1382, available at: <https://ihl-databases.icrc.org/ihl/full/GCII-commentary>. Even though the ICRC adopts a broad interpretation of the terms “wounded” and “sick”, which goes beyond the ordinary (medical) meaning of these terms, it is made clear throughout the interpretation of these terms that *being in need of medical care* is the decisive criterion to qualify for the corresponding protections. By far not all persons with disabilities are in need of medical care however, meaning that in practice this approach would not only reflect outdated views on disability but would also fail to include many persons with disabilities altogether. See also A. Priddy, above note 5, pp. 56 ff; 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.

37 *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: Report of the United Nations High Commissioner of Human Rights*, UN Doc. A/HRC/31/30, 30 November 2015, para. 3. See also ICRC, “How Law Protects Persons with Disabilities in Armed Conflict”, 13 December 2017, p. 7, available at: www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict: “Such terminology should not be taken to imply that under contemporary interpretation of IHL persons with disabilities are seen as mere objects of pity or passive victims in need of protection rather than agents of their own destiny.” And see A. Priddy, above note 5, pp. 52–53, pointing out that “language matters” since “it can feed and reinforce negative and discriminatory attitudes”.

This does not mean, however, that there is no room for IHL to take into account basic principles set forth in the CRPD. On the contrary, the core purpose of IHL is to ensure respect for elementary considerations of humanity and the human dignity of *all* persons. Its remarkable flexibility and ability to take into account new developments and changes in society thus provides ample opportunity for the adoption of a disability-inclusive perspective which also pays due regard to the interplay between other factors that inform a person's individual experience. In a broader sense, the principle of humanity permeating the whole body of IHL³⁸ already requires – albeit implicitly and indirectly – that persons with disabilities be afforded equal protection and respect. The basis for adopting such a disability-inclusive perspective can furthermore be found within the framework itself: Rule 138 of the International Committee of the Red Cross's (ICRC) Customary Law Study expressly states that the “disabled and infirm affected by armed conflict are entitled to special respect and protection”. Despite the outdated medical approach that has led to the inclusion of this rule,³⁹ it still provides a viable basis for determining what “special protection and respect” will entail for persons with disabilities⁴⁰ in the context of armed conflicts.

Finally, Article 11 of the CRPD likewise supports the view that the Convention can and should serve to inform the interpretation and application of IHL norms. In essence, this provision affirms that the rights of persons with disabilities continue to apply during armed conflict alongside IHL,⁴¹ and that they cannot be suspended or derogated from in situations of humanitarian emergencies.⁴² It should be emphasized that the extent to which the CRPD *directly* applies to an armed conflict will be context-dependent⁴³ and is not the subject of this paper. Rather, the direct reference to IHL also allows for the CRPD

38 Giovanni Distefano and Etienne Henry, “Final Provisions, Including the Martens Clause”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 184.

39 ICRC Customary Law Study, above note 34, pp. 490–491: persons with disabilities are lumped together with the “infirm”, and multiple references are made to their protection as the “wounded” or “sick”. See also Jean-Marie Henckaerts and Louise Doswald Beck (eds), *Customary International Humanitarian Law*, Vol. 2: *Practice*, Part 2, Cambridge University Press, Cambridge, 2005, pp. 3146–3151, which includes similarly outdated references, particularly in citing various military manuals which thoroughly reflect the medical and charity approaches.

40 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2016, p. 136; ICRC Advisory Service, above note 12, pp. 1–2. In the general context of IHL, the duty to “respect” denotes a duty to refrain from attack, abuse or any other act likely to cause danger or injury, while the duty to “protect”, on the other hand, implies a positive obligation to shield the person in question from harm and to proactively safeguard their rights in the form of help and support.

41 A. Priddy, above note 5, pp. 34–35.

42 ICRC Advisory Service, above note 12, p. 1; CRPD Committee, above note 3, p. 1. See also Article 38 of the CRC, which is the only other international human rights law instrument expressly affirming its applicability in armed conflict. Convention on the Rights of the Child, 20 November 1989 (entered into force 2 September 1990) (CRC), Art. 38.

43 See A. Priddy, above note 5, pp. 34 ff., 44 ff., 76, for a detailed analysis of the direct applicability of the CRPD to situations of armed conflict, alongside IHL. Factors that may determine its applicability include, but are not limited to, the extent to which a State party to the conflict exercises effective control over the territory in question, and for how long it has exercised such control.

to serve to inform, elaborate and contextualize the scope and content of IHL provisions with a view to better taking disability into account.

A disability-, gender- and age-inclusive approach to selected IHL norms

The provisions chosen below are all of a fundamental nature, meaning that they will apply to all situations of armed conflict and will be binding to all parties involved⁴⁴ by way of customary IHL. This choice has been deliberate in that it serves to demonstrate that considerations regarding disability, as well as its interplay with characteristics such as age or gender, are equally fundamental as they will impact the very nature of a person's individual situation.

Before addressing individual provisions, it is important to note in this context that the gender identities of persons with disabilities can be as diverse as those among the general population. Assuming otherwise would deny persons with disabilities a fundamental aspect of their identity beyond their impairment, which in turn would run contrary to the ideas at the very basis of disability rights. It is therefore the view of the author that, in order to avoid marginalization and stigmatization of persons with non-cisgender identities, these considerations should always be made based on the *individual gender identity* of the person in question, as opposed to the biological sex assigned to them at birth.

The principle of humane treatment

Most prominently enshrined in Article 3 common to the four Geneva Conventions,⁴⁵ the principle of humane treatment is arguably the most fundamental IHL provision for the purposes of this paper. It serves to safeguard the inherent dignity of all human beings against any type of abuse and can thereby provide a basis for other, more specific guarantees.

Disability as a factor shaping the meaning and content of “humane treatment”

Common Article 3 states that “persons taking no active part in the hostilities ... shall *in all circumstances* be *treated humanely*”.⁴⁶ The absolute nature of this provision leaves no doubt that no reasons or circumstances can possibly justify

44 In other words, they will apply to both international armed conflicts and non-international armed conflicts, while also being binding for both States and armed non-State actors (i.e. armed groups).

45 See also ICRC Customary Law Study, above note 34, Rule 87; GC III, Art. 13; GC IV, Art. 27; 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. 75; 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.

46 Emphasis added. While the wording of other, similar provisions is slightly different, they share the same two essential elements of “treated humanely” and “in all circumstances” or “at all times”.

treatment that falls outside the “minimum standard” of being humane,⁴⁷ while the exact meaning of the term “humane treatment” itself is to be determined on a case-by-case basis. Such considerations must *inter alia* take into account subjective factors including a person’s state of health, age or gender.⁴⁸ While at first glance one may feel inclined to summarize disability under considerations made with regard to a person’s state of health, such an approach would not only fall short of recognizing impairment as going beyond a purely medical condition, but could itself result in inhuman treatment.⁴⁹ Rather than being summarized in this manner, an assessment in line with our current understanding of disability would thus seem to require that it be taken into account as a criterion of its own.

It is here that the CRPD can provide additional guidance by informing and elaborating on the meaning of “humane treatment” for persons with disabilities; following the social model and human rights-based approach, considerations such as their specific physical and mental condition⁵⁰ and existing physical or environmental barriers will have to play an important part in shaping the content and meaning of the term, as will the question of how their individual experience is impacted by the presence of impairment.⁵¹ In other words, treatment that would not usually be considered to constitute a violation of this principle may nevertheless amount to inhuman or otherwise prohibited treatment when directed towards a person with an impairment.⁵²

Common Article 3⁵³ also lists a number of explicit prohibitions which provide further substance to the fundamental guarantees offered to persons with

47 See 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), paras 595–600, available at: <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>.

48 Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1960 (1960 Commentary on GC I), p. 53; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), para. 553, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>; ICRC Commentary on GC III, above note 47, para. 587; A. Priddy, above note 5, p. 54.

49 By way of example, the principle of humane treatment may in fact imply having to *refrain* from medical intervention if the person in question does not consent to it, even if such an intervention would generally be considered appropriate and would objectively have a chance of improving their physical or mental condition.

50 See ICRC Commentary on GC III, above note 47, para. 587.

51 A. Priddy, above note 5, p. 54; ICRC Advisory Service, above note 12, p. 2.

52 See for example Human Rights Committee (HRC), *Hamilton v. Jamaica*, Communication No. 616/1995, UN Doc. CCPR/C/66/D/616/1995, 6 January 1995, paras 3.1, 8.2: the Committee held that the conditions of detention of a prisoner who was paralyzed from the waist down had violated his “right to be treated with humanity and with respect for the inherent dignity of the human person” and specifically referred to the difficulties he encountered *as a disabled person*. These difficulties included having to pay other inmates to empty his slop bucket, and having to be carried by them in order to leave his cell. See also European Court of Human Rights (ECtHR), *Price v. United Kingdom*, Case No. 33394/96, Judgment (Third Section), 10 July 2001, in particular paras 28, 30: the Court found that the conditions of detention amounted to degrading treatment in the case of a woman with a severe mobility impairment, as she was “unable to go to the toilet or keep clean without the greatest of difficulty”; she was subjected to “extremely humiliating treatment”, with male officers having to assist in lifting her on and off the toilet; and the temperatures in her cell were “dangerously cold”. See also N. Hart *et al.*, above note 36, p. 165; A. Priddy, above note 5, p. 54.

53 See also ICRC Customary Law Study, above note 34, Rules 87–105.

disabilities in the armed conflict setting. These notably include the prohibitions against cruel and otherwise inhuman treatment; outrages upon personal dignity, in particular humiliating and degrading treatment;⁵⁴ and any other “serious attack on human dignity”.⁵⁵ Whether or not a specific treatment violates these prohibitions must again be determined on a case-by-case basis,⁵⁶ *inter alia* taking into account the physical, mental and moral effects of the act on the victim, as well as the latter’s personal circumstances such as their age and sex.⁵⁷ Additionally, a treatment must meet the threshold(s) of causing “serious mental or physical suffering”⁵⁸ or “serious humiliation or degradation”⁵⁹ to the victim.

The reference to human dignity and the inclusion of subjective factors in the assessment allow for a parallel to be drawn between these provisions and the CRPD.⁶⁰ The CRPD can thus provide further authoritative guidance on their interpretation from a disability-inclusive point of view,⁶¹ in that assessing the level of suffering or pain caused by a specific treatment will require taking into account the existence of a disability.⁶² In some cases, a person’s impairment will therefore result in a specific act constituting ill-treatment, even if it would not usually cross this threshold, as its impact from a disability point of view will cause serious mental or physical suffering to the individual.

As stated above, these considerations are fundamental in that they will have to be taken into account throughout the interpretation and application of all IHL provisions. In practice, this will for example require a Detaining Power to factor in disability when deciding on a punishment for a prisoner of war (PoW) who

54 Common Arts 3(1)(a), 3(1)(c). See also AP I, Arts 75(2)(a)(ii), 75(2)(b); AP II, Arts 4(2)(a), 4(2)(e); ICRC Customary Law Study, above note 34, Rule 90.

55 See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 551; ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 April 2008, paras 126 (“treatment which ... constitutes a serious attack upon human dignity”), 132 (act or omission “which would be generally considered to ... be a serious attack on human dignity”). See also ICTY, *Prosecutor v. Zejnil Delalić et al.*, *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos IT-96-23-T, IT-96-23/1-T, Judgment (Trial Chamber), 22 February 2001, para. 514.

56 ICTY, *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005, para. 232. See also ICTY, *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para. 369; Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: United States of America*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 13. As stated in the ICRC Commentary on GC III, above note 47, para. 658, the suffering caused may be of either a physical or mental nature, so long as it reaches a certain threshold.

57 ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment (Trial Chamber), 15 March 2002, para. 131; ICTY, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment (Trial Chamber), 25 June 1999, para. 56; ICTY, *Kunarac*, above note 55, para. 504.

58 See ICTY, *Delalić*, above note 55, para. 551; ICTY, *Haradinaj*, above note 55, para. 126.

59 See ICTY, *Kunarac*, above note 55, para. 514.

60 See, in particular, CRPD Article 15, stipulating the protection of persons with disabilities against cruel, inhuman or degrading treatment or punishment on an equal basis with others; Article 16, explicitly prohibiting all forms of violence, abuse and exploitation of persons with disabilities; and Article 17, aimed at the protection of their physical and mental integrity.

61 See *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/63/175, 28 July 2008, para. 44.

62 *Ibid.*, para. 47; see also ECtHR, *Nasri v. France*, Case No. 19465/92, Judgment (Court Chamber), 13 July 1995, paras 47, 48.

has committed an offence. Article 89(1)(4) of Geneva Convention III (GC III) generally allows for confinement to be used as a disciplinary punishment; such confinement can take different forms, most notably close confinement (uninterrupted detention in closed quarters, possibly together with other detainees) or solitary confinement (uninterrupted detention in closed quarters without any meaningful human contact).⁶³ However, in a reiteration of the general principle of humane treatment, the provision itself limits the applicability of confinement by prohibiting disciplinary punishments that are inhuman, brutal or dangerous to the health of a PoW.⁶⁴ The Detaining Power is therefore required to take into account the individual circumstances of the PoW in question⁶⁵ and how these are likely to influence his or her experience. Here, too, limiting the impact of disability to considerations made regarding the health of a prisoner would fall dramatically short of our current understanding of disability, although in this case such considerations should not be discarded altogether – where confinement would, for example, result in the denial of access to basic services required by a person’s specific impairment (such as therapy sessions or medication), another form of punishment should be chosen. However, the considerations made by the Detaining Power should also include whether or not confinement would be inhuman or brutal *as a result of impairment*: this would for example be the case if the PoW in question has a psychosocial impairment that would greatly increase the stress of being separated from other detainees with whom they have formed a personal relationship, if the nature of their impairment would expose them to a heightened risk of abuse by guards or by others detained in the same quarters, or if the confinement facility would not be equipped to accommodate the needs of a PoW with a mobility impairment. In sum, while certain forms of confinement would generally be permissible under IHL, they could nevertheless amount to inhuman treatment for PoWs with a disability.⁶⁶

“Humane treatment” taking into account disability, gender and age

The recognition that women and girls with disabilities may find themselves in particularly vulnerable situations means that, when considering the impact a certain treatment has on them, their gender, age and individual impairment will all constitute significant factors in determining whether or not said treatment meets the minimum standards of being humane.⁶⁷ Furthermore, the assessment

63 See ICRC Commentary on GC III, above note 47, paras 3754, 3756. It should be noted that due to the detrimental effects on a person’s mental and physical health, acceptance of solitary confinement as a permissible form of punishment has significantly decreased in recent years, both in theory and practice. See further below for further considerations regarding solitary confinement of PoWs with disabilities.

64 GC III, Art. 89(3).

65 ICRC Commentary on GC III, above note 47, para. 3761.

66 See further below regarding solitary confinement of women and girls with disabilities in particular.

67 ICTY, *Krnjelac*, above note 57, para. 131; 1960 Commentary on GC I, above note 48, p. 53; 2016 Commentary on GC I, above note 48, para. 553; ICRC Commentary on GC III, above note 47, para. 587; A. Priddy, above note 5, p. 54.

will have to include not only these characteristics as separate elements, but also the interaction between them. Certain types of ill-treatment may for example exacerbate the negative effects that an impairment has on the person's health. If that person is also of young age, these effects may in turn have long-term negative consequences for their development, meaning that the overall impact of the treatment in question would have to be considered much more severe than if it had been directed towards a child without an impairment, or an adult with an impairment.

The same is true for acts explicitly prohibited by common Article 3. Whether or not the treatment of an individual has breached the threshold of being cruel, inhuman or an outrage upon their human dignity will in no small part be influenced by their gender and age and by the presence of any impairment, as well as the interaction between these factors and how this may shape their experience. In other words, treatment that would generally be considered humane may nevertheless amount to inhuman treatment if the person in question holds two or more of these characteristics – i.e., young age, female gender, impairment – and/or where these characteristics interact with one another in such a way as to compound or aggravate the physical or mental effects that has on them.

Finally, the CRPD also expressly invokes the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the CRC, putting them in direct relation to the CRPD⁶⁸ and, by extension, to the relevant provisions of IHL. Both of these instruments will therefore provide valuable additional guidance alongside the CRPD when applying the principle of humane treatment to circumstances involving women and girls with disabilities.⁶⁹

Coming back to the previous example, the gender of the PoW in question would have to further influence the Detaining Power's assessment: a female PoW with a mobility impairment may for example not be held in confinement in a facility where the female showers are not accessible to her. This will be the case even if one or more showers intended for use by male PoWs are accessible, as the female PoW may not lawfully be obliged to use those instead – doing so could expose her to humiliation by leaving her no choice but to strip naked in front of male detainees and guards, and would even place her at increased risk of sexual or other assault.⁷⁰ If there are no alternative facilities available that could accommodate her needs, it would have to be concluded that confinement will in no case be a suitable measure for her.⁷¹

To further illustrate the interplay between gender, impairment and age, consider the scenario of an evacuation of a child during armed conflict. It may be

68 CRPD, above note 2, preambular paras (d), (r).

69 See, in particular, CRC, above note 42, Arts 23, 37. See also CRC Committee, above note 15, paras 5, 7: the CRC Committee has adopted an approach that reflects the social model and human rights-based approach enshrined in the CRPD.

70 To reiterate what has been stated above, “female” and “male” in this context should be understood as referring to a PoW's *own* gender identity. Where this identity does not fall into a binary definition, in the author's view the deciding factor should be which facilities the person in question feels more comfortable using.

71 See further below regarding solitary confinement of women and girls with disabilities in particular.

permissible to separate a child from his or her parents for a limited amount of time during evacuation procedures, but if the child has a disability, separation from their primary caregivers, even if only for a short period of time, may have a compounded impact on their well-being, to the point of causing them severe psychological distress. Additionally, placing the child in the care of persons unfamiliar with their impairment – be it of a physical, mental or other nature – risks exposing them to various types of physical harm. If the child is also a girl, the party to the conflict undertaking the evacuation will furthermore have to keep in mind the increased risk of sexual abuse (and other types of gender-based violence) faced by girls with disabilities, which, if they occur in this or any other context, will constitute a violation of the prohibition on cruel, inhuman or degrading treatment. In sum, the combined characteristics of impairment, age and gender in a case like this would lead to the conclusion that this particular girl must not be separated from her parents, as doing so would be a violation of common Article 3 – even if the law at face value would not seem to contradict such a procedure.

The prohibition on adverse distinction

The lack of awareness about the impact that disability has on a person's full and equal enjoyment of their fundamental rights continues to result in discrimination against persons with disabilities in all areas of life – both directly, through less favourable treatment based on impairment, and indirectly, through equal treatment where differential treatment would be necessary in order to ensure substantive equality.⁷² In situations of armed conflict, this lack of awareness and the persisting negative attitudes towards disability mean that IHL provisions, designed to minimize the impact of armed conflicts on *all* people affected by them, are not being applied in a disability-inclusive manner⁷³, which in turn can result in a severe discrepancy between the protections that persons with disabilities *should* enjoy, and those which they actually enjoy.

Conversely, the principle of humane treatment offers fundamental guarantees and protections to all persons affected by any armed conflict. Its absolute character is reinforced by the prohibition on adverse distinction,⁷⁴ which aims to ensure that the fundamental guarantees of IHL are applied in a truly – that is to say, substantively – equal manner to everyone affected by armed conflict. Like the principle of humane treatment itself, the prohibition on adverse distinction therefore holds particular significance for persons with disabilities. It allows for a closer examination of how impairment may prevent the enjoyment of

72 See also A. Priddy, above note 5, pp. 29, 32: this concept, also referred to as substantive equality, recognizes that differential treatment may in fact be necessary in order to redress existing inequalities. The counterpart to substantive equality, on the other hand, known as formal equality, requires that everyone be treated the same, regardless of individual circumstances. In practice, formal equality will often result in discrimination, as it fails to take into account the existing inequalities resulting from individual circumstances such as impairment. For persons with disabilities, formal equality can be particularly dangerous because it allows deliberate discrimination to masquerade as indifference.

73 See A. Priddy, above note 5, p. 74.

74 ICRC Commentary on GC III, above note 47, para. 604.

and/or access to IHL guarantees for persons with disabilities, and what measures are needed in order to eliminate such barriers.

Disability as grounds for prohibited adverse distinction

Again most prominently enshrined in common Article 3,⁷⁵ the prohibition on adverse distinction aims to ensure that all protected persons receive the same standard of treatment⁷⁶ by requiring that all persons be “treated humanely, *without any adverse distinction*” (emphasis added). It is equally as fundamental and universal as the principle of humane treatment, meaning that it is never lawful to undertake such a distinction, regardless of the normative context.⁷⁷

The human rights law equivalent to the prohibition on adverse distinction is the principle of non-discrimination,⁷⁸ which, due to its interconnectedness with human dignity and equality, is equally considered to be a cornerstone of all human rights treaties.⁷⁹ The CRPD is no exception, its core lying in the prohibition of discrimination against persons with disabilities in all areas of life.⁸⁰ Again referred to throughout the CRPD,⁸¹ the principle of non-discrimination is expressly enshrined in Article 5, while Article 2 defines discrimination within the meaning of the Convention as

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Going back to IHL, some provisions list various criteria on which adverse distinction might be based.⁸² None of these lists include disability, but as is evident from the inclusion of phrases such as “or any other similar criteria”, none of them constitute an exhaustive list.⁸³ On the contrary, adverse distinction founded on other grounds will be equally prohibited, unless it results from the application of the Geneva Conventions.⁸⁴ When read in line with the CRPD, the term “or any other similar criteria” must thus necessarily be understood to also include disability as grounds for prohibited adverse distinction. A complementary

75 See also GC III, Art. 16; GC IV, Art. 27(3); AP I, Art. 75(1); AP II, Art. 4(1); ICRC Customary Law Study, above note 34, Rule 88. Each of these provisions uses slightly different phrasing, but they all stipulate the same principle.

76 Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1960 (ICRC Commentary on GC IV), p. 206.

77 See J. Henckaerts and L. Doswald-Beck (eds), above note 39, p. 309.

78 *Ibid.*

79 CRPD Committee, “General Comment No. 6 (2018) on Equality and Non-Discrimination”, UN Doc. CRPD/C/GC/6, 26 April 2018, paras 4, 5.

80 Markus Schefer and Caroline Hess-Klein, *Behindertengleichstellungsrecht*, Stämpfli, Bern, 2014, p. 8.

81 See, for example, CRPD, above note 2, Preamble, Arts 3(b), 4(1), 6(1), 23(1), 24(1), 25, 27, 28, 29.

82 Common Article 3 expressly lists race, colour, religion, faith, sex, birth and wealth.

83 ICRC Commentary on GC IV, above note 76, p. 206.

84 *Ibid.*; ICRC Commentary on GC III, above note 47, para. 605.

approach to IHL requires that its guarantees be applied equally to persons with disabilities,⁸⁵ that these guarantees be made accessible to such persons, and that disability within the sense of the CRPD – including environmental and other barriers – be taken into account when assessing compliance with the prohibition on adverse distinction.

The prohibition on adverse distinction, reasonable accommodation, and equal access

Having established that all IHL protections must apply equally to persons with disabilities by virtue of the prohibition on adverse distinction,⁸⁶ we must then consider the question of how “equal application” is to be understood. In general, IHL only prohibits *adverse* distinction, which, according to the ICRC, is “[a]ny form of differentiation that is not justified by substantively different situations and needs”.⁸⁷ It logically follows that differential treatment which is justified by the substantively different situations and needs of protected persons will not only be lawful, but may even be required if serving the purpose of realizing a person’s humane treatment.⁸⁸ Similarly, the fact that *any* adverse distinction is prohibited allows for the conclusion that both direct and indirect discrimination must be considered unlawful under IHL – it is not only differential treatment that singles out certain persons based on unlawful criteria which must be considered to constitute adverse distinction, but also “seemingly neutral measures that have the effect of adversely affecting” those persons.⁸⁹ Other IHL provisions elaborate on this notion: Article 16 of GC III, for example, explicitly states that “privileged treatment” may be accorded to persons by reason of, *inter alia*, their state of health, age and/or sex, whereas Article 27(3) of Geneva Convention IV (GC IV) stipulates the obligation of equal treatment “without prejudice to the provisions relating to ... state of health, age and sex”.

In other words, where differential treatment is necessary in order to address existing inequalities, the prohibition on adverse distinction not only permits it, but in fact requires it. When these inequalities result from an impairment, the CRPD can provide further clarity on what such differential treatment may entail.

Aside from prohibiting all discrimination on the basis of disability, CRPD Article 5 also requires States Parties to provide *reasonable accommodation* in order to eliminate discriminations.⁹⁰ Reasonable accommodation is defined by CRPD

85 A. Priddy, above note 5, p. 55; Priscilla Denisse Coria Palomino, “A New Understanding of Disability in International Humanitarian Law: Reinterpretation of Article 30 of Geneva Convention III”, *International Review of the Red Cross*, Vol. 104, No. 919, 2022, p. 1444. See also CRPD Committee, above note 79, para. 43: the Committee has indeed confirmed States Parties’ obligations to ensure non-discrimination in situations of armed conflict. Crucially, it also did so in direct reference to their IHL obligations (“... based also on obligations *in international humanitarian law*” (emphasis added)).

86 A. Priddy, above note 5, p. 55.

87 ICRC Commentary on GC III, above note 47, para. 603; see also para. 605.

88 See, for example, ICRC Commentary on GC IV, above note 76, p. 206; A. Priddy, above note 5, p. 55.

89 ICRC Commentary on GC III, above note 47, para. 609.

90 CRPD, above note 2, Arts 5(2), 5(3).

Article 2 as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment of exercise on an equal basis with others of all human rights and fundamental freedoms”⁹¹. Finally, both Article 2 and Article 5 of the CRPD recognize the denial of reasonable accommodation as a form of discrimination against persons with disabilities.⁹²

Both IHL and the CRPD thus recognize that it is not only the “classic”, direct form of discrimination in the form of *differential* treatment that constitutes unlawful discrimination, but also *equal* treatment at face value which fails to accommodate the needs of persons with disabilities and effectively results in the same denial of equal enjoyment of rights.⁹³ Both bodies of law therefore adopt the same approach of demanding differential treatment where it is necessary in order to ensure substantive equality. Considering CRPD Article 5 as complementary to the prohibition on adverse distinction, it notably includes the requirement to provide reasonable accommodation to persons with disabilities in cases where equal treatment at face value would result in them being denied equal protection. Wherever direct or indirect policy or treatment results in adverse distinction based on impairment, the absolute nature of this prohibition requires that the responsible party take all necessary measures to correct the situation – including reasonable accommodation, taking into account the specific needs resulting from a person’s impairment.

Another key principle of the CRPD that can be of significance in this regard is the right to equal access, also referred to as “accessibility”. Stipulated by Article 9 of the CRPD, this is another essential precondition to the effective and equal enjoyment of human rights by persons with disabilities⁹⁴ and requires States Parties to “take appropriate measures to ensure persons with disabilities access, on an equal basis with others”, to a wide range of aspects of life. The denial of access, just like the denial of reasonable accommodation, constitutes a discriminatory act.⁹⁵ Failure to ensure equal access (including failure to provide reasonable accommodation) to IHL protections may amount to discrimination on the basis of disability and a violation of associated rights and protections.⁹⁶ Unlike reasonable accommodation, which only applies *ex nunc* and to the extent that it does not cause an “undue burden”, the duty to implement accessibility

91 *Ibid.*, Art. 2(4).

92 *Ibid.*, Arts 2(3), 5(3).

93 ECtHR, *Thlimmenos v. Greece*, Case No. 34369/97, Judgment (Grand Chamber), 6 April 2000, para. 44: the ECtHR noted that the right not to be discriminated against is also violated “when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different” (emphasis added). See also Report of the Office of the UN High Commissioner for Human Rights: *Equality and Non-Discrimination under Article 5 of the Convention on the Rights of Persons with Disabilities*, UN Doc. A/HRC/34/26, 9 December 2016, para. 28; R. Kayess and P. French, above note 20, p. 27; A. Priddy, above note 5, p. 31.

94 A. Priddy, above note 5, p. 33.

95 CRPD Committee, General Comment No. 2, “Article 9: Accessibility”, UN Doc. CRPD/C/GC/2, 22 May 2014, para. 13.

96 See, for example, HRC, *Hamilton*, above note 52, paras 3.1, 8.2; A. Priddy, above note 5, p. 74.

applies *ex ante* and is unconditional:⁹⁷ persons with disabilities must have “equal access to all services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity”.⁹⁸

By way of example, Article 41 of GC III obliges parties to a conflict to post the text of the Convention in PoW camps “at places where all may read them”. The wording of the provision makes it clear that every PoW must be able to access the text, a conclusion that is further supported by the object and purpose of the provision, which is to ensure that all PoWs can acquaint themselves with the contents of the Convention and their rights contained therein.⁹⁹ A person with a vision impairment, however, may not be able to access written materials on an equal basis with other detainees. While this person would not have been singled out for adverse distinction in such a scenario, the fact that the texts were posted in a manner inaccessible to them would nevertheless result in discrimination regarding their equal enjoyment of this guarantee. CRPD Article 9(1)(b) notably also requires that information, communication and other services, including emergency services, be made accessible to persons with disabilities.¹⁰⁰ When read in light of CRPD Article 5(4), the requirement to ensure equal access for persons with disabilities therefore obliges the Detaining Power to provide them with reasonable accommodation, for example by supplying the text of GC III in Braille, sign language or audio format.¹⁰¹

The prohibition on adverse distinction and the interplay between disability, gender and age

As laid out above, individuals do not experience discrimination as members of a homogenous group, but as individuals with multidimensional layers of identities, statuses and lived circumstances.¹⁰² This means that women and girls with disabilities can and will experience discrimination not only based on their impairment, but also based on their gender, their age and, most importantly, the interaction between these individual characteristics in a particular situation. As stipulated throughout the CRPD, and expressly stated in Articles 6 and 7, including a gender- and age-sensitive perspective is especially important when implementing the principle of non-discrimination for persons with disabilities.

Aside from the CRPD, the principle of non-discrimination¹⁰³ is also stipulated *inter alia* by Article 2 of the CRC relating to children, and by Article 2 of the CEDAW relating to women. The CEDAW does not make explicit references to disability, but it is invoked multiple times throughout the CRPD, most notably in Article 6, which expressly prohibits discrimination against

97 A. Priddy, above note 5, p. 34.

98 CRPD Committee, above note 95, para. 13.

99 ICRC Commentary on GC III, above note 47, para. 2504.

100 See also CRPD, above note 2, Art. 21; CRC, above note 42, Art. 13.

101 ICRC Commentary on GC III, above note 47, para. 2259; WHO, above note 1, p. 74.

102 CRPD Committee, above note 79, para. 16.

103 *Ibid.*

women with disabilities. It logically follows that States Parties' obligations stipulated by CEDAW Article 2 will have to factor into the interpretation and application of CRPD Article 6 as well, including the obligation to effectively protect women against any act of discrimination and to refrain from engaging in any act or practice of discrimination against women. When read in line with CRPD Article 6, these obligations will include any form of discrimination resulting from the interplay between a woman's gender and her impairment.

Article 2 of the CRC, on the other hand, does explicitly list "disability" as grounds for prohibited discrimination against children in the equal enjoyment of their human rights, and requires States Parties to prevent all forms of discrimination against children on the grounds of disability,¹⁰⁴ an obligation that is reinforced and further elaborated on by Article 23 of the CRC. The latter obliges States Parties to, *inter alia*, recognize the right of children with disabilities to special care and to encourage the extension of assistance appropriate to the child's impairment and the circumstances of his or her caregivers,¹⁰⁵ designed to ensure his or her access to the fullest possible social integration.¹⁰⁶ Moreover, the CRC Committee has specifically recognized that girls with disabilities may be more vulnerable to discrimination due to their gender, requiring States Parties to take "the necessary measures, and when needed extra measures, in order to ensure that they are well protected, have access to all services and are fully included in society".¹⁰⁷

Both the CEDAW and the CRC therefore provide additional guidance on the rights of women and girls with disabilities as stipulated by the CRPD. Having drawn the parallel between the principle of non-discrimination and the prohibition on adverse distinction, it follows that the same must be true when it comes to the interpretation and application of IHL: a complementary approach to IHL – which takes into account the provisions of the CRPD, the CEDAW and the CRC – demands that disability, gender and age also constitute grounds for adverse distinction in the application of IHL rules. All IHL protections afforded to protected persons under the respective conventions must be applied equally to women and girls with disabilities,¹⁰⁸ and States Parties will be required to provide reasonable accommodation and ensure accessibility wherever necessary in order not to adversely distinguish between women and girls with disabilities and those who do not share these same characteristics. In other words, the particular needs of women and girls with disabilities will have to be considered throughout the interpretation and application of IHL provisions, taking into account their impairment, gender and age as well as the interaction between these characteristics.

Coming back to the example above regarding the evacuation of children, refraining from separating a girl with a disability from her parents for the purpose of evacuation would not constitute adverse distinction, but would rather

104 CRC Committee, above note 15, para. 8.

105 CRPD, above note 2, Art. 23(2).

106 *Ibid.*, Art. 23(3).

107 CRC Committee, above note 15, paras 8, 10.

108 A. Priddy, above note 5, p. 55.

be an accommodation necessary to ensure that she will not be subjected to inhuman treatment of any kind. On the other hand, whether or not said accommodation is reasonable will depend on a variety of factors. In a specific situation, one could, for example, argue that refraining from evacuating the child would pose a severe risk to her life. It would however be misguided to then simply assume that she may be separated from her family in order to be evacuated. If she must be evacuated, reasonable accommodation may also be provided by allowing her primary caregiver to join her on the evacuation; the party responsible will, wherever possible, be required to grant such an exception. In other words, all potential avenues to provide reasonable accommodation must be considered, and where such accommodation cannot be provided, an assessment must be made as to which procedure best reflects the best interests of the child. In a scenario such as that described above, separating a girl with a disability from her family in order to evacuate her would only seem permissible if there is an imminent risk to her life, if there is no alternative (such as another wave of evacuations scheduled soon after), and if substantial reasons do not allow her primary caregiver to join her. Even if a separation cannot be avoided, the party responsible will be required to take all necessary steps to ensure that it does not result in a violation of the principle of humane treatment: this includes making sure that the separation does not last longer than is absolutely necessary, that special care will be taken to protect the girl from any type of gender-based violence or other mistreatment, and that during the separation her basic needs are met, for example by designating a caregiver who is familiar with her impairment.

Other IHL provisions of relevance to women and girls with disabilities

Other provisions contained in the Geneva Conventions and their Additional Protocols can provide a more concrete idea of how such a gender-, age- and disability-sensitive approach to the principle of humane treatment and the prohibition on adverse distinction could manifest in practice. Any rules of the CRPD, the CEDAW and the CRC which may be relevant to a particular situation can also provide additional clarity on the application of these provisions to women and girls with disabilities in particular.

Sexual and other gender-based violence

Based on the general safeguards provided by the principle of humane treatment and the prohibition on certain types of ill-treatment, IHL also affords special protection to women and children. Among these special protections are safeguards against sexual violence, defined by international jurisprudence as “any act of a sexual nature committed against any person under circumstances which are coercive”.¹⁰⁹ Rule 93 of the ICRC Customary Law Study explicitly prohibits rape and other

¹⁰⁹ International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Chamber I), 2 September 1998, para. 688.

forms of sexual violence, and similar provisions can be found throughout other IHL instruments.¹¹⁰ Aside from these explicit prohibitions, sexual violence is also considered to constitute inhuman treatment, including cruel and other inhuman or degrading treatment and torture, as well as outrages upon personal dignity.¹¹¹ It should be mentioned at this stage that sexual violence during armed conflicts does not only affect women and girls, but men and boys as well, and that the approach IHL takes in protecting women has increasingly been criticized as outdated.¹¹² Nevertheless, these provisions do serve to protect women and girls with disabilities in particular, who as mentioned above are often at risk of being disproportionately affected by acts of sexual violence both in peacetime and in times of armed conflict.¹¹³

Multiple provisions within the CRPD provide a further context on these norms with regard to disability. Article 15 requires States Parties to take effective measures to prevent the torture or cruel, inhuman or degrading treatment or punishment of persons with disabilities, while Article 16 stipulates their obligation to take all appropriate measures to protect persons with disabilities from all forms of exploitation, violence and abuse. Crucially, Article 16 also explicitly refers to the gender-based aspects of such abuse¹¹⁴ and requires the provision of gender- and age-sensitive assistance and support for persons with disabilities, their families and their caregivers in order to prevent such ill-treatment, as well as the age-, gender- and disability-sensitiveness of protection services¹¹⁵ and the adoption of women- and

110 See, for example, GC IV, Art. 27(2); AP I, Arts 75(2)(b), 76(1); AP II, Art. 4(2)(e): some of these norms explicitly list other forms of sexual violence such as enforced prostitution and “any other forms of indecent assault”.

111 ICTR, *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Judgment (Trial Chamber II), 12 September 2006, para. 528; ICTR, *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgment (Trial Chamber I), 18 December 2008, para. 2254; Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgment (Trial Chamber II), 18 May 2012, para. 432; ICTY, *Delalić*, above note 55, para. 495; *Report by the Special Rapporteur on Torture*, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119; CEDAW Committee, General Recommendation No. 35, above note 23, para. 16.

112 According to critics, the characterization of sexual violence as a particularly heinous act within IHL seems to be based more on a violation of the “honour” of women as opposed to the severe physical and psychological damage it causes. See, for example, Valerie Oosterveld, “Feminist Debates on Civilian Women and International Humanitarian Law”, *Windsor Yearbook of Access to Justice*, Vol. 27, No. 2, 2009, p. 392; Helen Durham and Katie O’Byrne, “The Dialogue of Gender Difference: Gender Perspectives on International Humanitarian Law”, *International Review of the Red Cross*, Vol. 92, No. 877, 2010, pp. 47–51; Charlotte Lindsey, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, ICRC, Geneva, 2001, p. 29, available at: <https://shop.icrc.org/women-facing-war-pdf-en>.

113 *Thematic Study on the Issue of Violence against Women and Girls and Disability*, UN Doc. A/HRC/20/5, 30 March 2012, paras 21–22, 26; CEDAW Committee, General Recommendation No. 35, above note 23, para. 14; CRC Committee, General Comment No. 13, “The Right of the Child to Freedom from All Forms of Violence”, UN Doc. CRC/C/GC/13, 18 April 2011, paras 16, 19, 23, 29, 72; Beijing Declaration, above note 5, para. 116. See also C. Lindsey, above note 112, pp. 29–30. The present article avoids referring to women and girls with disabilities as “particularly vulnerable” whenever possible, as the use of such language risks perpetuating negative, untrue stereotypes about women—with or without disabilities—being passive, weak and objects of paternalistic protection, as opposed to being active agents of their own destiny.

114 CRPD, above note 2, Art. 16(1).

115 *Ibid.*, Art. 16(2).

child-focused legislation and policies to ensure proper investigation and prosecution of such abuse.¹¹⁶ Finally, Article 17 of the CRPD protects the physical and mental integrity of persons with disabilities. According to Articles 1 and 2 of the CEDAW, gender-based violence against women is a form of discrimination which impairs or nullifies their full enjoyment of human rights and fundamental freedoms, and which States Parties must therefore take all appropriate measures to prevent and eliminate.¹¹⁷

When read in light of these provisions, the protections that IHL affords to women against sexual violence should be interpreted as obliging parties to an armed conflict to ensure that women are under all circumstances protected against sexual violence, whether perpetrated by their own agents or by others,¹¹⁸ and that the increased risks they face due to multiple, intersectional discrimination must be taken into account. Their particular situation will require dedicated attention and the adoption of specific measures aimed at their protection, in order to ensure that they can benefit from these IHL guarantees on an equal basis with others.

Girls furthermore benefit from additional protection through certain IHL provisions dedicated specifically to children. Article 24 of GC IV, Article 77 of Additional Protocol I (AP I), Article 4(3) of Additional Protocol II (AP II) and Rule 135 of the ICRC Customary Law Study are among the provisions which require that they be protected against any form of indecent assault. These protections are reinforced by the CRC. Article 19 of the CRC requires States Parties to take all appropriate measures to protect children from all forms of physical or mental violence and explicitly also refers to sexual abuse. Article 34 explicitly requires States Parties to protect children against all forms of sexual exploitation and sexual abuse, while Article 37(a) generally prohibits torture or other cruel, inhuman or degrading treatment or punishment of children. When read in relation to one another and within the context of Article 23 of the CRC, these norms equally oblige States Parties to take all appropriate measures to protect children, in particular girls and all children with disabilities, against all forms of physical or mental violence, torture or any other form of cruel, inhuman or degrading treatment.¹¹⁹ IHL, the CRPD and the CRC thus all require that all appropriate measures be taken to protect children from all forms of sexual abuse and torture or other cruel, inhuman or degrading treatment.¹²⁰

Sexual and other gender-based violence during armed conflict can take many forms, as indicated by the phrasing “and any other forms of indecent assault” used by various IHL provisions. Women and girls with disabilities in an armed conflict setting are disproportionately subjected to this array of acts that constitute sexual violence,¹²¹ some of which shall be discussed in more detail here.

116 *Ibid.*, Art. 16(5).

117 “Chapter I: General Recommendations and Suggestions: General Recommendation No. 19: Violence against Women”, in *Report of the Committee on the Elimination of Discrimination against Women, UN GAOR 47th Session, Supp No. 38, UN Doc. A/47/38, 1993*, paras 1, 6, 7, 8, 10.

118 *Thematic Study*, above note 113, para. 11.

119 CRC Committee, above note 113, paras 19–22, 25, 26, 38–44.

120 *Ibid.*

121 Beijing Declaration, above note 5, para. 116.

It goes without saying that, as per the considerations above, women and girls with disabilities must be protected against rape and sexual abuse to the maximum extent possible, and that wherever necessary, additional measures must be put in place to ensure that their gender, impairment and age does not expose them to a risk higher than that faced by their peers who do not share one or more of these characteristics. Moreover, these characteristics will impact the qualification of certain acts as rape. As per Article 7 of the Rome Statute of the International Criminal Court, sexual violence includes situations where the perpetrator takes advantage of a person's inability to give genuine consent.¹²² The inability to give consent may be based on a person's age (meaning that sexual acts performed on girls below the age of consent, with or without disabilities, will always constitute rape), but may also stem from other circumstances, such as certain types of psychosocial or psychological impairments.

Aside from rape, a particularly gruesome form of sexual violence is rooted in a deep disregard for the sexual and reproductive health rights of women and girls with disabilities. Forced sterilization, forced pregnancy, forced abortion, forced or coercive use of contraceptives and other similar treatment all constitute sexual violence disproportionately directed against them, with a long, disturbing history during armed conflicts.¹²³ These practices constitute grave violations of IHL itself, regardless of who they are perpetrated against. When directed against women and girls with disabilities, the view that they constitute cruel or inhuman treatment in violation of common Article 3, as well as a violation of the prohibition on sexual and other gender-based violence against women and girls,¹²⁴ is reinforced by various human rights provisions.

Forced pregnancy of women or girls with disabilities infringes upon their right to freely and responsibly decide on the number and spacing of children they may have and to access family planning methods, as stipulated by Article 23(b) of the CRPD and Articles 12 and 16(e) of the CEDAW respectively, among others. The CEDAW and CRPD Committees have consequently held that access of women with disabilities to safe and legal abortion constitutes a prerequisite for their freedom from discrimination, torture and ill-treatment, while also making it clear that they are protected against forced abortion, contraception and sterilization against their will or without their informed consent.¹²⁵ Article 24 of the CRC, which states that no child must be deprived of access to medical services necessary to acquire or maintain their highest attainable standard of health and requires that States Parties provide the necessary medical assistance and care to all children, further reinforces this perspective, especially when

122 ICC, *Elements of Crimes*, 2011, p. 8, in particular fn. 16.

123 See, for example, Constitutional Court of Colombia, *Prohibición de Anticoncepción Quirúrgica a Menores de Edad en Condición de Discapacidad*, Case No. C-131/14, Judgment, 11 March 2014.

124 Regarding forced sterilization, see, for example, Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Peru*, UN Doc. CAT/C/PER/CO/4, 25 July 2006, para. 23.

125 CEDAW Committee and CRPD Committee, "Guaranteeing Sexual and Reproductive Health Rights for All Women, in Particular Women with Disabilities", joint statement, 29 August 2018, p. 1. See also CRPD, above note 2, Art. 25(d).

considering the risks associated with child and teenage pregnancy. Forced sterilization, a particularly common practice in the context of disability even in peacetime, is explicitly prohibited by CRPD Article 23(c) and also constitutes physical violence against children prohibited by CRC Article 19,¹²⁶ as well as a violation of the reproductive health rights of women stipulated in CEDAW Article 16.¹²⁷

Women and girls with disabilities deprived of their liberty

Persons deprived of their liberty in the context of an armed conflict can find themselves particularly vulnerable to abuse, due to the near absolute power that the Detaining Party exercises over them. They may also face barriers in their access to essential services provided to fellow detainees, which is especially significant when considering that existing disabilities may be particularly prevalent in places such as PoW camps due to the effects of armed hostilities.¹²⁸ Women and girls with disabilities are exposed to a wide range of mistreatment in such cases due to their particular circumstances, but they also benefit from a variety of specific guarantees which, when approached from a disability-inclusive perspective, can serve to ensure their humane treatment equal to other detainees.

A good basis for ensuring the humane, equal treatment of women and girls with disabilities deprived of their liberty is GC III Article 14, which requires that women be treated with all regard due to their sex. When taking into account the prohibition on adverse distinction, it is the author's view that Article 14 should be understood as obliging the Detaining Power to ensure that women and girls with disabilities in particular are entitled to equal protection not only when compared to male detainees, but also in relation to their fellow female detainees. GC III Article 16, furthermore, explicitly allows for differential treatment based on characteristics such as age and sex; as per the previous considerations, this non-exhaustive list¹²⁹ also includes disability. While GC IV does not include parallel provisions for civilian internees, it flows from the considerations discussed in the above sections that the principle of humane treatment and the prohibition on adverse distinction (as stipulated by GC IV Article 27) effectively carry the same implications when it comes to the treatment and protection of female internees with disabilities. Here, too, the CRPD, CEDAW and CRC provide valuable additional input on shaping the meaning and content of provisions intended for the protection of such detainees, as the interaction

126 CRC Committee, above note 113, para. 23(a).

127 CEDAW Committee, General Recommendation No. 19, "Violence against Women", 1992, para. 22, available at: www.refworld.org/docid/52d920c54.html.

128 See ICRC Commentary on GC III, above note 47, para. 2257: this will not necessarily be the case, but certain types of impairments may be particularly prevalent among PoWs as a result of their direct participation in hostilities. Such impairments could include physical injuries like missing limbs, sensory disabilities like the full or partial loss of eyesight, or psychosocial impairments stemming from trauma associated with their experiences.

129 ICRC Commentary on GC III, above note 47, para. 1751.

between their impairment, gender and age may otherwise result in significant, unlawful disadvantages.

GC III Article 14 has been interpreted to include the adoption of measures to protect female PoWs from sexual assault, and to ensure that they have access to appropriate, gender-specific health care,¹³⁰ which can be of particular relevance in the case of female PoWs with an impairment. Measures to protect such detainees against sexual assault may include additional training of camp guards and administrators on the specific protection needs of women and girls with disabilities: aside from improving general awareness, this could entail sensibility training for staff members on how to ensure that certain activities, such as maintenance of personal hygiene or execution of disciplinary punishments, are handled in such a way as to retain the PoW's dignity; education on specific risks faced by female and/or underage PoWs with disabilities in certain situations and how these can be mitigated; the designation of properly trained personnel to engage in individual conversations with detainees (where appropriate) in order to identify potential issues; or dedicated training of staff members on how to spot signs of abuse, particularly in PoWs whose impairment impacts their communication abilities.

Where sexual assault has taken place and has resulted in pregnancy, the availability of reproductive health-care services¹³¹ – either at the place of detention itself or at a health-care facility within reasonable distance from it – constitutes another measure necessary to comply with GC III Article 14; these services must furthermore be accessible to female PoWs with disabilities. Both GC III Article 30 and GC IV Article 91 would seem to support this view, as they oblige the Detaining Power to ensure that detainees receive the medical attention they require,¹³² when read in line with the relevant human rights instruments, medical care within this sense would necessarily include reproductive care as well. Consequently, services available and accessible to women and girls with disabilities should include pregnancy and maternal care as well as access to safe abortion, the provision of accessible information in order for the woman or girl in question to make an informed decision on the services she wishes to use, and the presence of medical staff trained to provide these services in accordance with the law – namely, based on the free and informed consent of the female PoW, while also taking into account her impairment and gender (and in some cases her age) not only during but also before and after the administration of treatment.

130 *Ibid.*, para. 1684.

131 See also GC III Article 30 and GC IV Article 91 regarding medical attention.

132 With regard to GC III Article 30 and GC IV Article 91, see also A. Priddy, above note 5, pp. 69 ff. It is important to point out that these articles – namely, Article 30(1) of GC III and Article 91(2) of GC IV – also foresee isolation wards for persons with mental impairments. This reflects an outdated medical approach to disability in assuming that persons with psychological or psychosocial impairments can be a danger to themselves or others; furthermore, the isolation of a person based on their impairment would be in violation of various provisions contained within the CRPD (*inter alia* Article 14), the CRC, and IHL provisions such as the prohibition on adverse distinction. The author therefore shares the view that these respective provisions should be considered to have been superseded by newer international standards, and are thus no longer applicable.

Other than the physical safety of and relevant medical care for female PoWs, Articles 14 and 16 of GC III also apply to all aspects of the organization of a camp and to the overall conditions of internment,¹³³ while civilian detainees benefit from the same protections based on the principles stipulated in Article 27 of GC IV. Together, these provisions form a solid basis to allow for the assumption that places of detention should, to the maximum extent feasible, be constructed and administered in a manner that pays due regard to the specific needs of women and girls with disabilities wherever possible, and that the treatment of individual detainees must take into account their gender, age and impairment as well as the interaction between these individual characteristics.

Regarding the conditions of detention, the minimum standards of hygiene and health referred to in GC III Article 22 and GC IV Article 85 respectively should thus be applied in a manner that conforms to the adequate standard of living for persons with disabilities as stipulated by Article 28 of the CRPD, as well as the requirement of accessibility set forth in Article 9 of the CRPD, the gender- and age-sensitive approach referenced throughout the CRPD, and the requirements in connection with adequate standards of living for children contained in Article 27 of the CRC. Aimed at ensuring a reasonable level of personal hygiene,¹³⁴ the scope of GC III Article 22 and GC IV Article 85 would then include making available hygiene facilities that are accessible to persons with a wide range of disabilities, including (but certainly not limited to) showers and toilets which can independently be accessed and used by persons with mobility impairments. Both articles furthermore require separate facilities for the exclusive use of women,¹³⁵ meaning that in order to fulfil its obligations under IHL and the relevant human rights instruments, the Detaining Power will have to ensure that women and girls with disabilities are provided with accessible sanitary facilities which they do not have to share with men, including men with disabilities. Shared facilities may expose them to a heightened risk of sexual assault and other violations of their dignity and right to privacy as stipulated by both IHL and the CRPD.¹³⁶ This argument, however, should in no way be misconstrued as denying persons with disabilities and non-cisgender identities access to bathroom facilities that correspond to their individual gender identity. Ensuring the dignity of persons with disabilities should, in the author's view, also entail the recognition of their gender identity and the implications associated with it – including the prevention of discrimination based on gender identity under the veil of disability rights, or misguided interpretations of gender within the context of disability.

Given the realities on the ground, it would furthermore seem necessary to point out that *independent* access to and use of these facilities is a key component of all measures aimed at eliminating barriers faced by persons with disabilities, in places of detention and elsewhere. It unfortunately continues to be a common

133 ICRC Commentary on GC III, above note 47, para. 1687.

134 *Ibid.*, para. 2213.

135 *Ibid.*, paras 1687, 2215.

136 See CRPD, above note 2, Arts 3(a), 22; ICRC Commentary on GC III, above note 47, para. 1687.

occurrence that persons with disabilities are expected to rely on the assistance of others for their participation in daily life or activities, even if they would be perfectly capable of such participation without help if the necessary accommodation were provided. Accessibility that depends on the goodwill of third parties is not accessibility within the meaning of the CRPD – in fact, it is in and of itself a discriminatory act in violation of the Convention¹³⁷ and will often result in inhuman or degrading treatment of the person with a disability, and thus a violation of IHL. In the present context, such violations could for example take the form of exposing women and girls with disabilities to inadequate personal hygiene standards if the necessary facilities are not made accessible to them, or humiliating or even harmful procedures such as being washed by an untrained person of the opposite gender.

For girls with disabilities deprived of their liberty, Articles 27 and 37(c) of the CRC provide additional safeguards aimed at ensuring their well-being. An adequate standard of living for them will include an environment which, to the extent possible and feasible within the context of detention or internment, promotes or at least does not hinder their development, and they should be housed in a manner that pays due regard to their best interests. Article 37(c) in this sense requires that they be housed separately from adults, unless it is in the girl's best interest not to do so. Considerations in this regard may become relevant if, for example, her primary caregivers are detained with her, in which case it could be argued that it would be in her best interest to remain with them. Given that she would then potentially be housed with other adults,¹³⁸ it will in turn become necessary to ensure that measures are in place designed to protect her against abuse by the latter to the maximum extent possible. On the other hand, where a girl with a disability is not detained in the same facility as her parents or other primary caregivers, all available steps should be taken to ensure that she is separated from interned adults and that she has access to care provided by persons trained in working with children with disabilities.

The personal characteristics of female detainees with an impairment will have to be considered throughout the application of Geneva Conventions III and IV. While these instruments will often require the provision of reasonable accommodation in order to ensure accessibility and compliance with the prohibition on adverse distinction, in some cases they will also imply differential treatment. Aside from favourable measures, this may take the form of abstaining from certain treatment: GC III Article 49, for example, generally allows for the labour of PoWs to be utilized, but it also clearly states that the PoW's age, sex and physical aptitude are among the factors that need to be considered when assigning work. In combination with CRC Article 32, which protects children against performing any work that is harmful to their health or development, such considerations would most likely result in the conclusion that an underage girl with a disability must not be assigned work while she is detained, so as not to

137 CRPD, above note 2, Art. 9. See also CRPD Committee, above note 95, para. 13.

138 See also GC IV, Art. 82.

subject her to treatment that would be considered inhuman or otherwise in violation of either framework.

In terms of disciplinary action, GC III Article 88(2) prohibits punishment of female PoWs that is more severe than that of a female member of the armed forces of the Detaining Power who is being dealt with for a similar offence. When advocating for an age- and disability-inclusive approach to IHL, this provision should not be taken at face value. It is not only the punishment as such, meaning its form and modalities, but also the severity and impact that it has on the PoW in question which will determine whether or not it can be seen as equal to that of a female member of the armed forces of the Detaining Power.¹³⁹ As laid out above in the context of the principle of humane treatment, punishment that would usually be considered appropriate and in line with safeguards provided by IHL may amount to cruel, inhuman or degrading punishment if the female PoW in question has an impairment and/or is of a young age, as these characteristics will significantly influence her individual circumstances, including the effects said punishment has on her. Consequently, the effects of the same punishment will be more severe on her than they would be on a female member of the armed forces of the Detaining Power who does not have a disability and/or is not of a young age, meaning that in order to comply with the safeguards provided by GC III Article 88(2), she would have to be given a different punishment that does not disproportionately affect her, likely one that is less severe in its form and modalities.

Regarding the choice of disciplinary measures as already discussed above in the context of GC III Article 89,¹⁴⁰ GC IV Article 119 equally states that disciplinary penalties must in no case be inhuman, brutal or dangerous for the health of the internees and that the latter's age and sex are among the factors to be considered when making this assessment. As with GC III Article 88 and common Article 3, disability will have to constitute an additional factor in determining whether or not a particular disciplinary penalty will amount to inhuman or brutal treatment, or be dangerous for the internee's health. This will necessarily also include the detainee's mental health, which would for example make solitary confinement out of the question in the case of women and girls with psychosocial or other impairments due to which the deprivation of social contacts or external stimuli would result in severe psychological distress. There is a significant body of evidence to indicate that isolating any individual, even for a relatively short period of time, "can cause serious psychological and sometimes physiological harm, with symptoms including anxiety and depression, insomnia, hypertension, extreme paranoia, perceptual distortions and psychosis".¹⁴¹ The effects are particularly harmful in cases of persons who have a pre-existing psychosocial or

139 See ICRC Commentary on GC III, above note 47, para. 3733. When assessing the severity of a particular punishment, regard must be paid to considerations such as age, gender and background of the PoW.

140 See above regarding disciplinary punishment in the context of humane treatment.

141 Amnesty International, *Entombed: Isolation in the US Federal Prison System*, 16 July 2014, p. 31, available at: www.amnestyusa.org/reports/entombed-isolation-in-the-us-federal-prison-system/.

intellectual disability.¹⁴² The former UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment has similarly concluded that “solitary confinement often results in severe exacerbation of a previously existing medical condition”,¹⁴³ While the *UN Standard Minimum Rules for the Treatment of Prisoners* (as amended on 5 November 2015 by the General Assembly and readopted as the Mandela Rules) provide that “the imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures”.¹⁴⁴ The imposition of solitary confinement of any duration on persons with psychosocial or intellectual impairments will thus amount to cruel, inhuman or degrading treatment, more so if its effects would be further exacerbated by the young age of the person in question. This view is further supported by Article 37 (c) of the CRC, which requires that children deprived of their liberty shall be treated humanely and with respect for their inherent dignity.

Similar considerations will also have to be made with regards to Article 82 of GC IV, which allows for the temporary separation of interned children from their parents for reasons of employment, health or the enforcement of penal or disciplinary sanctions. As in cases of evacuation, the separation of children with disabilities from their parents, who will likely be their primary caregivers in this scenario, should be avoided to the maximum extent possible, even if it is just of a temporary nature. Penal or disciplinary measures in particular should be adjusted accordingly, so as to be enforceable without separating the internee from his or her child with a disability.

In sum, women and girls with disabilities deprived of their liberty must benefit from the same protection as other detainees, including specific protections for female detainees, and they must benefit from them to the same extent as others. They must be able to independently access and use facilities, including hygiene facilities, in the place of detention. Wherever feasible, reasonable accommodation must be provided in order to ensure their humane and equal treatment, their protection against any type of abuse, and an adequate standard of living. Reasonable accommodation in this sense can be provided in the form of accessible sanitation facilities separated by gender (with access based on the person’s own gender identity), the presence of specially trained staff, or the adjustment of (or refraining from) penal or disciplinary measures taking into account their individual circumstances. Lastly, where the humane and equal treatment of women and girls with disabilities cannot be guaranteed by the Detaining Power – be it due to a lack of resources or awareness, or other

142 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *21st General Report of the CPT*, 10 November 2011, paras 53 ff.; Stuart Grassian, “Psychiatric Effects of Solitary Confinement”, *Washington University Journal of Law & Policy*, Vol. 22, 2006, p. 382.

143 In reaching this conclusion, the Special Rapporteur used the Istanbul Statement on the Use and Effects of Solitary Confinement’s definition of solitary confinement as the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day.

144 *UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)*, UN Doc. A/RES/70/175, 8 January 2016, Rule 45.2.

circumstances – repatriation on the basis of disability should be considered as another form of reasonable accommodation.¹⁴⁵

Conclusion

As the above examples have shown, the flexibility of IHL and its shared nucleus of common characteristics with the CRPD allow ample room for considerations of disability to factor into the interpretation and application of IHL provisions. The same is true when it comes to the interplay between disability and other individual characteristics such as gender or age, in which case instruments like the CEDAW and the CRC will provide valuable, additional guidance on the scope, meaning and content of the IHL provision in question.

Said interplay will constitute a significant factor in the interpretation and application of fundamental IHL guarantees, most notably the principle of humane treatment and the prohibition on adverse distinction, which in turn can serve as a basis for the interpretation and application of other, more specific provisions. In this regard, the provisions considered above are but a small fraction of the norms with significance for persons with disabilities, and there is a long road ahead before a thoroughly disability-inclusive approach to IHL can take hold. Lastly, the interpretation of any body of law only becomes meaningful once it is put into practice: the arguably more significant challenge will thus be to ensure that disability-, gender- and age-inclusive considerations are applied by parties to armed conflicts in different settings. Only then will women and girls with disabilities be able to benefit from equal access to protection under IHL – access that is long overdue.

145 See A. Priddy, above note 5, pp. 72–73. See also CRPD Committee, *Concluding Observations on the Initial Report of Mongolia*, UN Doc. CRPD/C/MNG/CO/1, 13 May 2016, para. 25: the Committee confirmed the application of reasonable accommodation in the context of detention by recommending “the application of reasonable accommodation in prisons in order not to aggravate incarceration conditions for persons with disabilities”.

At risk and overlooked: Children with disabilities and armed conflict

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Abstract

In armed conflicts and crises, children with disabilities face serious threats to their lives and safety, including those related to their inability to flee attacks, risk of abandonment, lack of access to assistive devices, lack of access to basic services and denial of education as well as experiences of stigma, abuse, psychological harm and poverty. Children with disabilities experience multiple and intersecting forms of human rights violations based on their disability and age. Since 2015, Human Rights Watch has documented the impact of armed conflict on children with disabilities in Afghanistan, Cameroon, the Central African Republic, the Gaza Strip in the Occupied Palestinian Territory, South Sudan, Syria and Yemen. While international human rights specifically call for the protection of children with disabilities in situations of armed conflict, the United Nations, governments, parties to the conflict and humanitarian actors have long neglected their specific rights and needs. There is an urgent need for the United Nations and governments to increase efforts to protect children with disabilities as part of their international commitments to protect all children impacted by hostilities. Their attention and investment in those most at risk of violence during armed conflicts will in turn enhance protection measures for everyone.

Keywords: Children with disabilities, armed conflict, United Nations, international human rights law, international humanitarian law.

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Introduction: War and children with disabilities

War affects all children in countless ways. Their very lives and bodily integrity are at risk; their experiences are shaped by constant fear and terror; their attachments are frequently disrupted due to loss of family members and other adult protection; they might lose years of education, be displaced without a safe place to call home, experience hunger, lose access to health care or proper hygiene and worry about further losses and disruptions to their lives.¹ All of this can lead to long-lasting mental health impacts.²

For children with disabilities, all these impacts are multiplied. They are at higher risk when their communities are attacked not only because of their young age but also because of their disability. They may be less able to flee attacks, especially if there is no one to help them or if they have limited or no access to assistive devices. They may be left behind: their families sometimes face a split-second decision, either flee with those children who can more easily escape or remain behind to support them.³

Children with disabilities struggle not only to access the basic necessities required by all children, such as food and shelter, but also the vital services and items they need because of their disability, such as early intervention services (designed to identify and support children with developmental conditions and disabilities), therapies or assistive devices.⁴

Children with disabilities also face increased barriers to accessing public schools and educational services provided by humanitarian organizations. For children with physical disabilities, barriers can include inaccessible roads, inaccessible school facilities and a lack of assistive devices. For children with sensory, intellectual and psychosocial disabilities, barriers can include stigma and a lack of both trained teachers and inclusive curricula.⁵

1 Joanna Santa Barbara, “Impact of War on Children and Imperative to End War”, *Croatian Medical Journal*, Vol. 47, No. 6, 2006; see, also, Save the Children, “What is the Impact of Conflict on Children?”, available at: www.savethechildren.org/us/charity-stories/impact-of-syria-conflict-children-mental-health (all internet references were accessed in October 2022).

2 See, for example, Save the Children, *ibid.* See, also, Deborah Smith, “Children in the Heat of War”, *Monitor on Psychology*, Vol. 32, No. 8, 2001.

3 See, for example, Human Rights Watch, “Cameroon: People with Disabilities Caught in Crisis”, 5 August 2019, available at: www.hrw.org/news/2019/08/05/cameroon-people-disabilities-caught-crisis; Human Rights Watch, “Central African Republic: People with Disabilities Left Behind”, 28 April 2015, available at: www.hrw.org/news/2015/04/28/central-african-republic-people-disabilities-left-behind; Human Rights Watch, “Central African Republic: People with Disabilities at High Risk”, 21 June 2017, available at: www.hrw.org/news/2017/06/21/central-african-republic-people-disabilities-high-risk; Human Rights Watch, “‘It Was Really Hard to Protect Myself’: Impact of the Armed Conflict in Syria on Children with Disabilities”, 8 September 2022, available at: www.hrw.org/report/2022/09/08/it-was-really-hard-protect-myself/impact-armed-conflict-syria-children.

4 See, for example, Human Rights Watch, “‘It Was Really Hard to Protect Myself’: Impact of the Armed Conflict in Syria on Children with Disabilities”, *ibid.*

5 *Ibid.*, pp. 37–41. See, also, Human Rights Watch, “UN: High Risk in Conflicts for Children with Disabilities”, 2 February 2022, available at: www.hrw.org/news/2022/02/02/un-high-risk-conflicts-children-disabilities.

Although the mental health of all children is negatively affected by armed conflict, the impact is aggravated for children with disabilities who fear abandonment, have concerns about how their situation may put family members at risk, are confronted by chronic lack of access to education and mental health services, and who face social stigma.⁶

While there are no accurate figures on how many children with disabilities are affected by war, 15% of the world's population, or one billion people, has a disability, with a higher percentage in developing countries.⁷ These figures usually increase in armed conflicts and crises. For example, approximately 28% of Syria's current population is estimated to have a disability, a proportion that is nearly double the global average.⁸

This article will focus on the rights of children with disabilities impacted by armed conflict and take an intersectional approach by examining issues related to both children and disability rights.

The paper begins by analysing the international human rights framework that protects the rights of children with disabilities through two key treaties, namely, the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC), and how these treaties interact with international humanitarian law (IHL). It aims to answer what specific protections IHL affords to children with disabilities, its limitations, and what further developments are needed to align it with the rights and needs of children with disabilities.

From the start, it is worth noting that Article 11 of the CRPD specifies States' obligations under IHL to ensure the protection and safety of people with disabilities in situations of risk, including armed conflict, humanitarian emergencies and natural disasters. Article 11 reinforces the importance of applying a rights-based, disability-inclusive lens to IHL.

Next, this article overviews the main rights violations that children with disabilities experience in armed conflicts and humanitarian emergencies. It examines their difficulties in fleeing attacks, their risk of abandonment, and how the breakdown in services, education and community support networks has disproportionately impacted children with disabilities, including through stigma and abuse, and the ongoing trauma and psychological distress during and after armed conflicts. It relies on human rights reporting to describe the realities of armed conflicts and the way they affect children with disabilities. In the spirit of

6 Human Rights Watch, "It Was Really Hard to Protect Myself: Impact of the Armed Conflict in Syria on Children with Disabilities", above note 3, pp. 28–31; Human Rights Watch, "UN: High Risk in Conflicts for Children with Disabilities", *ibid.* See, also, United Nations Children's Fund (UNICEF), "Mental Health and Psychosocial Support in Emergencies", as updated 3 September 2020, available at: www.unicef.org/protection/mental-health-psychosocial-support-in-emergencies.

7 The World Bank, "Disability Inclusion", 14 April 2022, available at: www.worldbank.org/en/topic/disability.

8 United Nations Humanitarian Needs Assessment Programme (HNAP) Syria, "Disability in Syria: Investigation on the Intersectional Impacts of Gender, Age and a Decade of Conflict on Persons with Disabilities", p. 4, available at: www.hi-deutschland-projekte.de/lnob/wp-content/uploads/sites/2/2021/09/hnap-disability-in-syria-investigation-on-intersectional-impacts-2021.pdf.

“Nothing about us without us”, this article uses accounts from child victims and their families to elucidate their experiences.

The article will also examine the United Nations (UN) monitoring mechanism and explore possible gaps in their coverage of violations against children with disabilities as well as in the inclusion of children with disabilities in wider commitments to protect children impacted by armed conflicts.

Finally, the article urges the establishment of better rights’ protections, well-being and empowerment of children with disabilities affected by war. It concludes by providing concrete recommendations to the UN, governments, academics, non-governmental organizations including humanitarian actors, and donors.

Legal protections for children with disabilities in armed conflict

Both IHL and international human rights law protect the rights of children with disabilities in armed conflict. Customary IHL applies to all parties to a conflict, both State and non-State actors, and protects civilians in times of armed conflicts. International human rights law applies at all times, meaning that States are obliged to respect, protect and fulfil human rights including in times of armed conflict.⁹ The CRC explicitly reminds States of their obligations to ensure the safety and care of children affected by armed conflict, and the CRPD reinforces and specifies States’ obligations under IHL to ensure the protection and safety of people with disabilities in situations of armed conflicts.

International human rights law

The CRC applies to all children, including children with disabilities, and guarantees their rights to survival; to develop to their fullest potential; to be protected from harmful influences, abuse and exploitation; and to participate fully in family and social life. It also makes specific reference to children with disabilities, outlining the principle of non-discrimination and the special efforts that States Parties should make to realize the rights of children with disabilities.¹⁰

In situations of armed conflict, the CRC directs States Parties to “undertake to respect and ensure respect of rules of international humanitarian law which are relevant to the child and ensure protection and care of children who are affected by the armed conflict”.¹¹ This first and foremost applies to the general protection of

9 For more, see UN Human Rights, Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict*, New York and Geneva, 2011, available at: https://globalprotectioncluster.org/old/_assets/files/tools_and_guidance/human_rights_protection/OHCHR_Int_Legal_Protection_HR_Armed_Conflict_2011-EN.pdf.

10 Convention on the Rights of the Child (CRC), General Assembly Resolution 44/25, Annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), 20 November 1989 (entered into force 2 September 1990), Arts 2 and 23.

11 *Ibid.*, Arts 38(1) and 38(4).

civilians not taking part in hostilities, particularly their protection against attacks and their rights to life and humane treatment.¹²

The CRPD affirms the rights of people with disabilities to equality and non-discrimination; freedom from exploitation, violence and abuse; health, education and adequate standard of living and social protection.¹³ Article 11 affirms the convention's application in situations of risks, including armed conflicts, and calls for States Parties to take "all necessary measures to ensure protection and safety of people with disabilities in situations of risk", including armed conflicts, in accordance with their obligations under IHL and international human rights law.¹⁴ Article 7 specifically enshrines the rights of children with disabilities on an equal basis with other children.

States must apply the human rights law provisions to which they have acceded within their own territory. In the case of occupation, an occupying power must apply the human rights law provisions to which the occupied country has acceded within the occupied territory.¹⁵ In all circumstances, States must comply with applicable customary international law.

International humanitarian law

IHL provides general protection for children as members of the civilian population, including the basic principles of humane treatment, respect of life and physical and moral integrity, and prohibition of coercion, corporal punishment, torture, collective penalties and reprisals.¹⁶ Under the principle of distinction, parties to the conflict must at all times distinguish between military and civilian targets, and civilians may never be the deliberate target of attack.¹⁷

Specific protections laid out in Article 77 of Additional Protocol I aim to protect children from any indecent assaults and obligate the parties to the conflict to provide children with the care and aid they require "because of their age or for any other reason".¹⁸ Other elements of the Geneva Conventions and their

12 See, for example, International Criminal Court Statute, Article 8(2)(e)(i) which sets out that "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities" is a war crime in non-international armed conflicts.

13 UN Convention on the Rights of Persons with Disabilities (CRPD), General Assembly Resolution 61/106, Annex I, UN GAOR, 61st Session, Supp. (No. 49) at 65, UN Doc. A/61/49 (2006), 13 December 2006 (entered into force 3 May 2008), Arts 7, 11 and 25.

14 *Ibid.*, Art. 11.

15 Noam Lubell, "Human Rights Obligations in Military Occupation", *International Review of the Red Cross*, Vol. 94, No. 885, 2012, p. 319.

16 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).

17 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. 52.

18 AP I, Art. 77. For more, see ICRC, Commentary of 1987, Protection of Children, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=8E174BC1926F72FAC12563CD00436C73#:~:text=Children%20shall%20be%20protected%20against%20any%20form%20of%20indecent%20assault.>

Additional Protocols address the evacuation of children, their right to medical care, and other protections against hostilities.¹⁹

IHL also requires parties to the conflict to give effective advance warning prior to an attack that may affect a civilian population.²⁰ The Office of the UN High Commissioner for Human Rights (OHCHR) said that the obligation to give effective advance warnings “may be achieved by different means of communication, including audio, written, visual and alternative means, while respecting diversity”.²¹ The OHCHR went on to say that the failure to comply with the obligation of an effective warning “in an accessible and inclusive manner amounts to discrimination on the basis of disability”.²² To be effective, a warning should, where possible, allow sufficient time to maximize the opportunity for civilians, especially those with disabilities, to act between the warning and the attack.²³

Integrating disability inclusion into protections during armed conflicts

Various UN human rights bodies have stressed the importance of disability inclusion in interpretations of IHL and in service provision.

In 2015, the OHCHR published a thematic report on the rights of people with disabilities under Article 11 of the CRPD that emphasized the need to mainstream disability inclusion into all aspects of humanitarian emergencies, including armed conflicts.²⁴ The report noted the complementary and mutually reinforcing nature of international human rights law and IHL. It also stated that IHL had “been codified under previously dominant understandings of disability, notably the medical model ... and reflects a paternalistic approach to persons with disabilities”.²⁵ The OHCHR recommends that IHL should be read using a rights-based approach to disability in order to “lead to substantive changes in policy and practice” to protect people with disabilities in situations of risk and humanitarian emergencies.²⁶

In its General Comment No. 6, the UN Committee on the Rights of Persons with Disabilities recognized that persons with disabilities are subjected to higher

19 For more, see Denise Plattner, “Protection of Children in International Humanitarian Law”, *International Review of the Red Cross*, Vol. 24, No. 240, 1984.

20 The obligation to give effective advance warning prior to an attack which may affect the civilian population is a rule of customary international law. It is codified in AP I, Art. 57(2)(c).

21 UN Human Rights Council, Report of the Office of the United Nations 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, 30 November 2015, para. 42, available at: www.ohchr.org/en/calls-for-input/report-rights-persons-disabilities-under-article-11-crpd-relating-situations-risk.

22 *Ibid.*

23 Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009, para. 530. See also Alice Priddy, *Disability and Armed Conflict*, Geneva Academy Briefing No. 14, April 2019, pp. 63–4, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2014-interactif.pdf.

24 UN Human Rights Council, above note 21.

25 *Ibid.*, para. 3.

26 *Ibid.*, para. 4.

level of discrimination compared to others in situations of risks and humanitarian emergencies, and called on States Parties to ensure the principle of non-discrimination in situations of risk and humanitarian emergencies, “based also on obligations in international humanitarian law”.²⁷

In March 2021, the Secretariat of the Conference of States Parties to the CRPD transmitted a note that similarly to the OHCHR mentioned that IHL employs an outdated medical model of disability and called for a more systemic rights-based approach to disability in armed conflict and other humanitarian emergencies.²⁸ It also recognized that children with disabilities face “multiple forms of discrimination”, owing to the intersection of disability and age, and are at greater risk of experiencing violence and abuse and of being excluded from humanitarian support, services and education.²⁹

In July 2021, the UN Special Rapporteur on the Rights of Persons with Disabilities issued his first report, which focused on the rights of people with disabilities in armed conflicts and called on States and militaries to “develop specific protections for persons with disabilities during the conduct of hostilities” and undertake “disability-inclusive programming” in humanitarian action.³⁰ The report also highlighted the lack of visibility and inclusion of people with disabilities across the “peace–conflict continuum”, particularly with respect to conflict prevention, peace-building and reconciliation.³¹

The Security Council also acted in 2019 by adopting Resolution 2475 on the disproportionate impact of armed conflict on people with disabilities.³² It calls for greater protection, better assistance and inclusion during armed conflict and the meaningful participation of people with disabilities in conflict prevention, reconciliation, reconstruction and peacebuilding. It specifically mandates the UN Secretary-General to include relevant information and data on people with disabilities in the UN’s thematic and geographic reports and briefings as well as highlights the need for ongoing dialogue between organizations of people with disabilities and the Security Council.³³ Unfortunately, the resolution only mentions children with disabilities in the context of their specific needs in accessing assistance.³⁴

27 UN Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6*, 26 April 2018, para. 43, available at: www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no6-equality-and-non-discrimination.

28 Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Protecting the Rights of Persons with Disabilities in Armed Conflict and Humanitarian Emergencies, UN Doc. CRPD/CSP/2021/2, 30 March 2021, paras 6 and 11, available at: <https://digitallibrary.un.org/record/3921479>.

29 *Ibid.*, paras 17, 26 and 33.

30 *Ibid.*, para. 95; and UN General Assembly, Report of the Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, Rights of Persons with Disabilities, UN Doc. A/76/146, 19 July 2021, paras 88 and 95, available at: <https://undocs.org/en/A/76/146>.

31 Report of the Special Rapporteur on the Rights of Persons with Disabilities, *ibid.*, para. 7.

32 UN Security Council, Resolution 2475 (2019), UN Doc. S/RES/2475 (2019), 20 June 2019, available at: [https://undocs.org/s/res/2475\(2019\)](https://undocs.org/s/res/2475(2019)).

33 *Ibid.*, paras 9 and 10.

34 *Ibid.*, para. 4.

Violations and challenges experienced by children with disabilities

This section describes children with disabilities' difficulties in fleeing attacks, their risk of abandonment, and how the breakdown in services, poverty, as well as a lack of access to health care, assistive devices, humanitarian aid and education have disproportionately impacted them during armed conflicts. It also presents the obstacles of stigma and abuse, which are often exacerbated during armed conflicts.

Difficulties in fleeing attacks

Situations of armed conflict and crises often force people to flee to escape violence. When their communities are attacked, people with disabilities have a higher risk of being harmed.³⁵ They may be less able to flee, especially in the absence of advance warning or access to assistive devices.³⁶ Since 2015, Human Rights Watch has documented the difficulties and violations faced by people with disabilities during attacks in Afghanistan, Cameroon, the Central African Republic, Colombia, Israel/Palestine, South Sudan, Syria and Yemen. In 2019, Amnesty International reported that people with physical disabilities in Yemen experienced difficulties fleeing attacks without access to wheelchairs, crutches or other assistive devices and had to depend heavily on their families or friends to escape to safety.³⁷

A 2022 Human Rights Watch report found that children with disabilities in Syria encountered similar challenges and that a key challenge for escaping hostilities is the absence of assistive devices such as wheelchairs, prostheses, crutches and hearing aids.³⁸ The following are examples of experiences of Syrian children with disabilities that demonstrate the hardships of children with disabilities in fleeing more generally.

Human Rights Watch interviewed Thara J., 18 years old, who lost her left leg in a barrel bomb attack in Idlib when she was aged 13 years. Since then, Thara has lived through dozens of airstrikes and shelling attacks, all without any advance warning. Thara frequently did not try to escape because it was hard for her to run with crutches and, if people assisted her, they would become easy targets during airstrikes. She said, "I wanted to avoid exposing other people to that risk."³⁹

Attacks, especially without sufficient advance warning, sometimes force families to make a difficult split-second decision to flee with those who can

35 Human Rights Watch, "Persons with Disabilities in the Context of Armed Conflict: Submission to the UN Special Rapporteur on the Rights of Persons with Disabilities", 8 June 2021, available at: www.hrw.org/news/2021/06/08/persons-disabilities-context-armed-conflict.

36 See, for example, Human Rights Watch, "Cameroon: People with Disabilities Caught in Crisis", above note 3; Human Rights Watch, "Central African Republic: People with Disabilities Left Behind", above note 3; Human Rights Watch, "Central African Republic: People with Disabilities at High Risk", above note 3; Human Rights Watch, "'It Was Really Hard to Protect Myself': Impact of the Armed Conflict in Syria on Children with Disabilities", above note 3.

37 Amnesty International, "Yemen: Excluded: Living with Disabilities in Yemen's Armed Conflict", 3 December 2019, pp. 16–17, available at: www.amnesty.org/en/documents/MDE31/1383/2019/en/.

38 Human Rights Watch, "'It Was Really Hard to Protect Myself': Impact of the Armed Conflict in Syria on Children with Disabilities", above note 3, p. 11.

39 *Ibid.*, p. 12.

escape easily or remain behind to provide support. In Syria, this has increased the risk of people with disabilities, as well as older people, being separated from their families and caregivers.⁴⁰

These findings are extremely applicable to children with disabilities, who often must rely on family members or others to carry or support them to escape. While children with physical disabilities share similar experiences as Thara J., children with a sensory, developmental or intellectual disability may not know about or understand what is happening during attacks without family support. Ahmed, father of Shahd, an 11-year-old girl who is deaf, told Human Rights Watch that he and his wife fear for Shahd's safety because she cannot hear airstrikes or shelling where they live in Idlib governorate, Syria. Instead, he and his wife watch her closely and physically grab her to bring her to the shelter if they hear an attack.⁴¹

Reem, a 13-year-old girl who has cerebral palsy, was internally displaced with her family in northeast Syria, when her father told Human Rights Watch about several incidents in which they had to flee attacks, including airstrikes and missile strikes, and the family's struggles because Reem does not have a functioning wheelchair.⁴²

Osman recalled one time when their neighbour's house was hit and he carried both Reem, aged 11 years at the time, and her then-2-year-old brother while his wife took care of their other three children. His brother eventually found a wheelbarrow, which Osman then used to push for 9 km to get Reem and her brother to safety.⁴³

In April 2019, Nujeen Mustafa, a disability rights activist from Syria, shared her personal experiences before the UN Security Council as a child with a disability fleeing attacks.⁴⁴ Nujeen described living in Aleppo during attacks and how often her mother would carry her to the bathroom to hide since it would have been hard to carry Nujeen down five flights of stairs to get to shelter. Like Human Rights Watch's interviewee Thara J., Nujeen expressed that "Every day, I feared that I could be the reason that my family was one or two seconds too late."⁴⁵ Nujeen, like the children included in Human Rights Watch's 2022 report on Syrian children with disabilities, did not have a wheelchair. She said, "many people with disabilities cannot depend on their

40 UN Office for the Coordination of Humanitarian Affairs (OCHA), "2021 Humanitarian Needs Overview: Syrian Arab Republic", March 2021, p. 57, available at: <https://reliefweb.int/report/syrian-arab-republic/2021-humanitarian-needs-overview-syrian-arab-republic-march-2021-enar>.

41 Human Rights Watch, "'It Was Really Hard to Protect Myself': Impact of the Armed Conflict in Syria on Children with Disabilities", above note 3.

42 *Ibid.*, p. 14.

43 *Ibid.*

44 Human Rights Watch, "'You Can and Should Do More to Ensure People with Disabilities Are Included in All Aspects of Your Work – We Can't Wait Any Longer': Statement by Ms. Nujeen Mustafa During the United Nations Security Council Briefing on the Humanitarian Situation in Syria on April 24, 2019", 25 April 2019, available at: www.hrw.org/news/2019/04/25/you-can-and-should-do-more-ensure-people-disabilities-are-included-all-aspects-your.

45 *Ibid.*

families to help them reach safety. Often, because their family members have been killed or have already left.”⁴⁶

Risk of abandonment during attacks

During panicked flight, children with disabilities are sometimes left behind. Human Rights Watch has documented various instances where family members were forced to leave their children with disabilities behind in order to flee safely. The following are global examples of families with children with disabilities who were abandoned during attacks.

Human Rights Watch documented that a 5-year-old blind boy was left in his house in the South-West region, Cameroon, when soldiers arrived in the village in January 2019.⁴⁷ His father had left him with his older brother, aged 11 years, to go to the farm before the attack. He said, “The military invaded the community, and my 11-year-old boy ran away, leaving the child alone. The child attempted to run, but he fell in a pit toilet. Luckily, he was still alive when we found him.”⁴⁸

In 2015, Human Rights Watch interviewed Hamamatou, 13 years old, from southwestern Central African Republic, who had polio and needed assistance to walk. When armed fighters attacked her community, her brother carried her on his back until he became too tired. “I told him, ‘Souleymane, put me down and save yourself,’” she said. “He said he would come back for me if they didn’t kill him.” However, she did not see him again.⁴⁹

The uncle of Omar, a 10-year-old Syrian boy with intellectual disabilities, described one time when Omar was mistakenly left behind during an airstrike:

Once, early in the morning, around 8 a.m., we have just had breakfast when a jet flew over our houses. When this happens, we usually run to a small cave, about 10 meters from the house. We all ran to the cave, and then we realized Omar was not with us. His parents ran back to the house to fetch him, and just a few seconds later their house was struck by a missile, completely destroying it.⁵⁰

Similarly, Ahmed A., an 18-year-old man with physical disability in southeast Syria, recounted being left behind by his friends during an airstrike:

It was really hard for me to protect myself like everyone else was. One time, I was out with my friends when airstrikes started, and everyone was just thinking of themselves, everyone started running, and I was left alone. I could only walk very slowly to find a place to hide.⁵¹

46 *Ibid.*

47 Human Rights Watch, “Cameroon: People with Disabilities Caught in Crisis”, above note 3.

48 *Ibid.*

49 Human Rights Watch, “Central African Republic: People with Disabilities Left Behind”, above note 3.

50 Human Rights Watch, “‘It Was Really Hard to Protect Myself’: Impact of the Armed Conflict in Syria on Children with Disabilities”, above note 3, p. 15.

51 *Ibid.*, p. 16.

Disproportionate impacts of the breakdown of basic services and poverty

Children with disabilities, especially if displaced, can face serious obstacles to meeting basic needs such as food, sanitation, health care, electricity, education, community and social services, including early intervention services. The lack of access to nutrition, health care, early intervention programmes, assistive devices and rehabilitation can exacerbate existing disabilities and create new ones.

When Human Rights Watch interviewed Mamadou, a 14-year-old child with physical disabilities in the Central African Republic, in 2015, he weighed less than 8 kg and had an acute pulmonary infection that he had developed from inhaling dust while crawling on the ground because prior untreated injuries that he sustained while fleeing an attack left him unable to support himself even with a cane.⁵² His father said that Mamadou's health deteriorated also because there was little food available. Dozens of people in the same camp, including children with disabilities, had died from malnutrition, respiratory illnesses and other diseases. People with disabilities disproportionately suffered due to inaccessible sanitation facilities and food distribution sites.⁵³

The 2022 UN Humanitarian Needs Overview, drawing on surveys conducted in Syria, estimated that one in four Syrian children are experiencing insufficient growth and are at risk of acquiring a disability due to a lack of access to proper nutrition.⁵⁴ It also found that households with a person with disability are more likely to be food insecure: 60% compared to 51% for households not reporting members with disability.⁵⁵

Poverty is yet another issue that disproportionately affects children with disabilities and their families, who are more likely than others to experience poverty and social exclusion according to the United Nations Children's Fund (UNICEF).⁵⁶ Armed conflict and displacement further exacerbates poverty levels.⁵⁷ Human Rights Watch's research over the years has repeatedly uncovered accounts of children with disabilities and their families caught up in armed conflict who had lost homes, assets, income, livelihoods and assistive devices and were living in inadequate conditions, including tents, and in at-risk areas. For example, Human Rights Watch documented how families of children with disabilities in Syria struggled to provide basic necessities for their children,

52 Human Rights Watch, "Central African Republic: People with Disabilities Left Behind", above note 3.

53 *Ibid.*

54 OCHA, "2022 Humanitarian Needs Overview: Syrian Arab Republic", February 2022, p. 77, available at: <https://reliefweb.int/report/syrian-arab-republic/2022-humanitarian-needs-overview-syrian-arab-republic-february-2022>.

55 *Ibid.*, p. 73.

56 UNICEF, *Combating the Costs of Exclusion for Children with Disabilities and Their Families*, New York, 2021, available at: www.unicef.org/media/96421/file/Combating%20the%20Costs%20of%20Exclusionfor%20for%20Children%20with%20Disabilities%20and%20their%20Families.%20%20%20%20%20%20%20.pdf.

57 Zoe Marks, "Poverty and Conflict", GSDRC Knowledge Services Professional Development Reading Pack No. 52, October 2016, available at: https://gsdrc.org/wp-content/uploads/2016/11/Poverty-and-conflict_RP.pdf.

including food, health care, adequate housing, assistive devices, medication, therapies, nappies and transportation fees to access certain service centres.⁵⁸

International human rights oblige governments to respect, protect and fulfill the right to an “adequate standard of living”, which includes the rights to housing, food and health.⁵⁹ The principle of non-discrimination and equality in enjoyment of human rights is a foundation of international human rights law and includes a prohibition against discrimination on the basis of disability.⁶⁰

The CRPD emphasizes that people with disabilities have a right to an adequate standard of living for themselves and their families, “including food, clothing and housing, and to the continuous improvement of living conditions”.⁶¹ The CRPD obliges States to take steps to safeguard and promote the realization of equal access to water services and to appropriate and affordable services, devices, and other forms of assistance that are needed because of a disability as well as access to social protection and poverty-reduction programmes. These programmes are especially important for women and girls.⁶²

Governments, including those impacted by armed conflict, have a duty to progressively realize these rights over time.⁶³ Even recognizing that limited resources and capacity may mean that economic, social and cultural rights are realized over time rather than instantaneously, a lack of resources cannot justify inaction or indefinite postponement to ensure these rights.⁶⁴ States must demonstrate that they are making every effort to improve the enjoyment of these rights. Attempting to address people’s needs in a discriminatory manner or to impose unnecessary barriers on ensuring that everyone has access to, at the very least, minimum levels of rights, would itself violate governments’ core obligations.⁶⁵

58 Human Rights Watch, “‘It Was Really Hard to Protect Myself’: Impact of the Armed Conflict in Syria on Children with Disabilities”, above note 3, pp. 18–24.

59 International Covenant on Economic, Social and Cultural Rights (ICESCR), General Assembly Resolution 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

60 The principle of non-discrimination has become part of customary international law and is binding on all States. It is included in human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the ICESCR. The CRC is the first human rights treaty to explicitly prohibit discrimination against children on the basis of disability. The CRPD reinforces the principles of equality and non-discrimination in Article 5.

61 CRPD, above note 13, Art. 28.

62 *Ibid.*

63 The International Covenant on Economic, Social, and Cultural Rights requires States to “take steps” to the maximum of their available resources to progressively achieve the full realization of economic, social and cultural rights. The Covenant also requires States to guarantee these rights without discrimination. For more, see OHCHR, *Frequently Asked Questions on Economic, Social, and Cultural Rights, Fact Sheet No. 33*, pp. 13–14, available at: www.ohchr.org/sites/default/files/Documents/Issues/ESCR/FAQ_on_ESCR-en.pdf; CRPD, above note 13, Arts 4 and 28.

64 *Ibid.*

65 *Ibid.* Also relevant are the CRPD, above note 13, Arts 5 and 28, and the CRC, above note 10, Art. 2.

Lack of access to health care

Children with disabilities are especially affected when health care and other social services infrastructure deteriorates, as illustrated by human rights and humanitarian research in Afghanistan, the Gaza Strip in the Occupied Palestinian Territory, Syria and Yemen. For example, parents of Syrian children with disabilities told Human Rights Watch about several obstacles – including lack of nearby health care facilities and the cost of accessing existing care – to accessing health care, medication, early intervention services, rehabilitation and other services, including those that might have helped their children and prevented them from developing further disabilities.⁶⁶

Yemen is another situation of armed conflict that different non-governmental organizations have reported on for several years. In 2015, Human Rights Watch reported that increased prices of medications and the denial of humanitarian assistance were serious concerns for Yemenis with disabilities.⁶⁷ When the medication needed by Hanan, a 4-year-old girl with cerebral palsy and epilepsy in Yemen, became unaffordable, she stopped taking it. Without her medication, which reduced the frequency of her seizures to once every two weeks, Hanan experiences two seizures every day.⁶⁸

Four years later, Amnesty International found similar barriers in accessing health care for Yemenis with disabilities, including the unaffordability of health care services and medication.⁶⁹ Amnesty International highlighted evidence from parents of children with disabilities who went to great lengths to ensure access to health care for their child with a disability.⁷⁰ A mother of a 3-year-old with epilepsy and spinal muscular atrophy said she sold the family's furniture to afford treatment for her daughter. "I would sell my kidney and buy her a year's worth of [epilepsy and atrophy] medication," the mother said.⁷¹

In 2020, Humanity & Inclusion, an international non-governmental organization providing support to people with disabilities, reported that conflict-related deterioration of infrastructure, health care and other services in Yemen, including because of the use of explosive weapons in areas with civilian populations, disproportionately impacted people with disabilities.⁷² They found that 86% of people with disabilities surveyed had experienced problems getting

66 Human Rights Watch, "It Was Really Hard to Protect Myself: Impact of the Armed Conflict in Syria on Children with Disabilities", above note 3, p. 25.

67 Human Rights Watch, "People with Disabilities at Added Risk in War, Displacement", 3 December 2015, available at: www.hrw.org/news/2015/12/03/people-disabilities-added-risk-war-displacement.

68 *Ibid.*

69 Amnesty International, above note 37, p. 26.

70 *Ibid.*

71 *Ibid.*

72 Humanity & Inclusion, *Death Sentence to Civilians: The Long-Term Impact of Explosive Weapons in Populated Areas in Yemen*, May 2020, p. 18, available at: www.humanity-inclusion.org.uk/sn_uploads/document/2020-05_Report-YEMEN-Explosive-Weapons-Death-Sentence-to-Civilians_EN_Web.pdf.

services due to physical barriers, lack of security, and economic and social discrimination.⁷³

In a July 2020 address to the UN Security Council, Raja Abdullah Almasabi, a disability rights activist from Yemen, said: “Denial of humanitarian access has created chronic health conditions, especially among children, such as malnutrition. This is one of the primary reasons why many children in Yemen have acquired a disability.”⁷⁴ Yemen is emblematic of an armed conflict that has been the subject of human rights- and humanitarian-related advocacy to no avail, underscoring the urgent need for decision-makers to immediately consider available information and develop solutions to ensure access to health care, especially in prolonged armed conflicts.

In the Occupied Palestinian Territory, Israeli restrictions limiting access to electricity in Gaza have impacted people with disabilities in particular ways. Human Rights Watch recorded information about an 11-year-old girl with cerebral palsy and an intellectual disability who uses an electricity-powered nebulizer when she has trouble breathing. The lack of electricity puts the girl’s health at risk.⁷⁵

There may be a gender dimension in access as well, particularly in countries with high levels of gender inequality. For instance, in Afghanistan, a lack of female health workers and female trained professionals has resulted in limited access to rehabilitative services for girls with disabilities.⁷⁶ Girls with disabilities also experience gender-specific discrimination and stigma in addition to disability-related ones which in turn further impact their access to health care.⁷⁷

Access to health care and early identification and intervention programmes are necessary to improve the health and development of all children, especially children with developmental conditions and disabilities.⁷⁸ When children with developmental conditions and disabilities cannot access health care, rehabilitation and early intervention programmes, their conditions may become more complex or they may acquire further disabilities. The early and timely identification of children with developmental conditions and disabilities and consequent

73 *Ibid.*

74 Human Rights Watch, “Statement by Raja Abdullah Almasabi to the UN Security Council, July 28, 2020: ‘We Must Have a Seat at the Table’”, 4 August 2020, available at: www.hrw.org/news/2020/08/04/statement-raja-abdullah-almasabi-un-security-council-july-28-2020.

75 Human Rights Watch, “Gaza: Israeli Restrictions Harm People with Disabilities”, 3 December 2020, available at: www.hrw.org/news/2020/12/03/gaza-israeli-restrictions-harm-people-disabilities.

76 Human Rights Watch, “*Disability is Not Weakness: Discrimination and Barriers Facing Women and Girls with Disabilities in Afghanistan*”, 2020, p. 17, available at: www.hrw.org/sites/default/files/report_pdf/afghanistan0420_web_0.pdf.

77 *Ibid.*

78 World Health Organization (WHO) and UNICEF, “Early Childhood Development and Disability: A Discussion Paper”, 2012, available at: https://apps.who.int/iris/bitstream/handle/10665/75355/9789241504065_eng.pdf;jsessionid=A53A7653B58390E5A25F1A6A0BA80CBD?sequence=1. See, also, UN Committee on the Rights of the Child, General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, UN Doc. CRC/C/GC/7/Rev.1, 20 September 2006, paras 6(e) and 36(d), available at: www.refworld.org/docid/460bc5a62.html. According to the Committee on the Rights of the Child, a young child’s earliest years are the foundation for their health and development across the life course and early childhood is the period during which disabilities are usually identified and the impact on children’s well-being and development recognized.

intervention can help children's development and provide their families with the necessary skills and knowledge to ensure their development and to pursue appropriate services throughout their childhood and adolescence.⁷⁹

International human rights law requires States to respect, protect and fulfill the right to health, including specific obligations for children with disabilities.⁸⁰ Under the CRC and CRPD, children with disabilities have the same rights as other children, including to health and nutrition. Children with disabilities are also entitled to appropriate specialist assistance, including support for their parents or other caregivers.⁸¹ According to the UN Committee on the Rights of the Child, States Parties should pay particular attention to ensure access to services to the “most vulnerable groups of young children and who are at risk of discrimination, including children with disabilities”.⁸²

Lack of access to assistive devices

In situations of armed conflict, children with physical and sensory disabilities often cannot obtain adequate prosthetic or assistive devices or replace them as they grow. Other times, as shown by research in Cameroon in 2019, people with disabilities lose everything to destruction or looting, including their assistive devices, accessible homes and livelihoods, rendering all aspects of their lives more difficult.⁸³

Inappropriate prosthetics have hindered the independence and development of children. According to UNICEF, children in Gaza whose limbs were amputated have had difficulty getting and replacing prosthetic and assistive devices as they grow.⁸⁴ Israeli import restrictions, shortfalls in the provision of necessary devices by the local authorities and aid groups and a local lack of expertise on repairing damaged devices all limit the availability of assistive devices.⁸⁵ Human Rights Watch documented how the lack of prosthetics affected the mobility, emotional well-being and independence of children in Syria as well. The ability of children in need of prosthetics and other assistive devices to flee armed attacks and to access schools and play with other children is also impacted.⁸⁶

Assistive devices positively contribute to a child's independence and development by promoting social inclusion and facilitating access to other rights.⁸⁷ They can greatly improve a child's health, access to education and access to other services. A child who is equipped with a prosthetic and can use it, even

79 UNICEF, *Early Moments Matter for Every Child*, September 2017, available at: www.unicef.org/media/48886/file/UNICEF_Early_Moments_Matter_for_Every_Child-ENG.pdf.

80 ICESCR, above note 59, Art. 12.

81 UN Committee on the Rights of the Child, General Comment No. 7, above note 78.

82 *Ibid.*

83 Human Rights Watch, “Cameroon: People with Disabilities Caught in Crisis”, above note 3.

84 Human Rights Watch, above note 75.

85 *Ibid.*

86 Human Rights Watch, “‘It Was Really Hard to Protect Myself’: Impact of the Armed Conflict in Syria on Children with Disabilities”, above note 3, pp. 33–6.

87 Jackie Casey, Laura McKeown, Rachael McDonald and Suzanne Martin, “Wheelchairs for Children Under 12 with Physical Impairments”, *Cochrane Database Systematic Reviews*, No. 2, 2017.

for a limited time, is ostensibly healthier and better able to take steps to access a replacement, including by travel, than one who never receives one at all.

Under the CRPD, States Parties shall take effective measures to ensure personal mobility, including by facilitating access to assistive technology and by promoting the availability, knowledge and use of assistive devices and technologies.⁸⁸

Lack of access to humanitarian aid

People with disabilities, including children, affected by armed conflict are often overlooked in access to humanitarian assistance.⁸⁹ According to Human Rights Watch's research, this neglect can be attributed to a lack of awareness, inaccessibility, stigma and discrimination or to a lack of capacity and expertise of humanitarian personnel, among other factors.⁹⁰ This section presents several examples from armed conflicts around the world to demonstrate the global challenges faced by children with disabilities due to their inability to access humanitarian aid.

Staggering numbers and proportions of people with disabilities in need of assistance do not receive the aid that they need. In 2019 in Cameroon, only nine of the forty-five displaced persons interviewed for a Human Rights Watch report had received humanitarian assistance.⁹¹ In Syria, the latest Office for the Coordination of Humanitarian Affairs (OCHA) assessment found that 4.2 million people with disabilities are in need of humanitarian assistance.⁹²

In 2015 and 2017, displaced people with disabilities in the Central African Republic, particularly those without family members, went hungry because the often chaotic and disorganized food distributions sites prevented their access to food.⁹³ In addition, due to a lack of ramps, bars and other forms of support, many camp residents with disabilities were forced to crawl to access water and sanitation services, such as latrines and showers, which exposed them to health risks.⁹⁴

While humanitarian organizations struggle to provide assistance to those in need, people with disabilities in Syria "face systematic challenges in accessing humanitarian relief on an equal basis with others", including a lack of accessible information about available humanitarian relief.⁹⁵ Human Rights Watch's recent report confirms these findings by documenting that children with disabilities

88 CRPD, above note 13, Art. 20.

89 See, for example, Human Rights Watch, "Cameroon: People with Disabilities Caught in Crisis", above note 3; Human Rights Watch, "South Sudan: People with Disabilities, Older People Face Danger", 31 May 2017, available at: www.hrw.org/news/2017/05/31/south-sudan-people-disabilities-older-people-face-danger; Human Rights Watch, "Central African Republic: People with Disabilities at High Risk", above note 3; Human Rights Watch, above note 76.

90 *Ibid.*

91 Human Rights Watch, "Cameroon: People with Disabilities Caught in Crisis", above note 3.

92 OCHA, above note 54, pp. 7 and 24.

93 Human Rights Watch, "Central African Republic: People with Disabilities Left Behind", above note 3; Human Rights Watch, "Central African Republic: People with Disabilities at High Risk", above note 3.

94 *Ibid.*

95 OCHA, above note 40, pp. 62–3.

cannot access humanitarian programmes in Syria on an equal basis with others because programmes do not take into account their rights and needs when designing and delivering programming; in some cases, programming explicitly excludes them.⁹⁶

International human rights law prohibits discrimination and according to the UN Committee on the Rights of the Child, discrimination against children with disabilities can reduce their survival prospects and quality of life.⁹⁷ Children with disabilities and their families have equal rights to access humanitarian assistance, which should be provided in an accessible manner. In 2018, the Committee on the Rights of Persons with Disabilities reinforced this by calling on States Parties to ensure the principle of non-discrimination in all programmes and actions, including “to ensure that humanitarian aid relief if distributed in an accessible, non-discriminatory way”.⁹⁸ In 2019, the Inter-Agency Standing Committee (IASC), the highest-level humanitarian coordination forum of the UN system, developed the “Guidelines on Inclusion of Persons with Disabilities in Humanitarian Action”. These Guidelines set out actions for humanitarians to effectively identify and respond to the needs and rights of persons with disabilities.⁹⁹

Lack of access to education

Children with disabilities are at a higher risk of being unable to reach a school and being left out of formal education and educational services provided by humanitarian organizations. Barriers for children with disabilities include inaccessible roads, inaccessible school facilities, poverty, lack of assistive devices, lack of inclusive curricula and trained teachers, and social stigma.

In Afghanistan, an estimated 80% of girls with disabilities, compared with 60% of other girls,¹⁰⁰ are not enrolled in schools, and resistance from schools to accommodating children with disabilities – including by, for example, building ramps – is a major factor in children’s failure to attend school.¹⁰¹ Other factors include long distances from schools, lack of accessible transportation, and cost.¹⁰²

96 Human Rights Watch, “‘It Was Really Hard to Protect Myself’: Impact of the Armed Conflict in Syria on Children with Disabilities”, above note 3, p. 54.

97 UN Committee on the Rights of the Child, General Comment No. 7, above note 78, para. 11(b)(ii).

98 UN Committee on the Rights of Persons with Disabilities, General Comment No. 6, above note 27, para. 46.

99 IASC Task Team on Inclusion of Persons with Disabilities in Humanitarian Action, *Guidelines: Inclusion of People with Disabilities in Humanitarian Action*, IASC, July 2019, available at: <https://interagencystandingcommittee.org/iasc-task-team-inclusion-persons-disabilities-humanitarian-action/documents/iasc-guidelines>.

100 According to UNICEF, 60% of girls are out of school in Afghanistan. See UNICEF, “Afghanistan: Education”, available at: www.unicef.org/afghanistan/education.

101 Community Centre for the Disabled, *Assessing Participation of Persons with Disabilities in Past Three Elections in Afghanistan*, 2013, p. 11, available at: https://eaccess.s3.amazonaws.com/media/attachments/resources_mainresource/564/Afghanistan_Assessing_Participation_2013.pdf. See, also, UNICEF, *Disability-Inclusive Education Practices in Afghanistan*, August 2021, p. 14, available at: www.unicef.org/rosa/media/16981/file/Country%20Profile%20-%20Afghanistan.pdf. Human Rights Watch, above note 76, pp. 13–16.

102 *Ibid.*

In 2015, in the Central African Republic, very few children with disabilities were enrolled in schools in internally displaced persons camps.¹⁰³ The school in one of the camps visited by Human Rights Watch had 3797 children enrolled. Of these, only fourteen had disabilities, a figure that does not reflect the proportion of children with disabilities. School staff reported that some parents hesitated to send their children with physical disabilities to school out of fear that they would be unable to flee an attack.¹⁰⁴ This latter point is just one example of how different risks compound the extent to which children with disabilities can enjoy their rights and develop to their fullest potential.

The unequal lack of access to education for children with disabilities is also seen in Syria. According to the 2022 UN Humanitarian Needs Overview on Syria, 50% of children with reported health conditions, injury or disability reported attending school, compared to 84% of other children.¹⁰⁵ Human Rights Watch's recent report on Syria confirmed that children with disabilities have very limited access to both formal education and informal education offered by humanitarian organizations.¹⁰⁶

OCHA primarily attributes the exclusion of children with disabilities from education in Syria to economic constraints, limited education facilities that can provide inclusive education, a lack of accessibility to and within schools, a lack of assistive devices, insufficient investment in learning facilities, a lack of trained teachers or inclusive curricula, and social stigma.¹⁰⁷ There is also a limited number of early childhood education centres.¹⁰⁸ Human Rights Watch corroborated these findings and documented that two humanitarian organizations providing informal education programmes to children in Syria turned away children with hearing, visual or intellectual disabilities. They believed that non-governmental organizations that are solely focusing on providing services to people with disabilities were better suited to educating children with disabilities.¹⁰⁹

All of the above obstacles are exacerbated, if not created, by attacks on schools, which further complicate the situation of children with disabilities. In 2018, UNICEF reported that attacks on schools “can reverse progress on inclusion, pushing previously included children with disabilities into domestic isolation or exploitative work”.¹¹⁰ An October 2021 UN Security Council resolution strongly condemned attacks on schools and said that governments

103 Human Rights Watch, “Central African Republic: People with Disabilities Left Behind”, above note 3.

104 *Ibid.*

105 OCHA, above note 54, p. 36

106 Human Rights Watch, “‘It Was Really Hard to Protect Myself’: Impact of the Armed Conflict in Syria on Children with Disabilities”, above note 3, p. 37.

107 OCHA, above note 40, pp. 31 and 69.

108 *Ibid.*, p. 69. See, also, OCHA, above note 54, p. 68.

109 Human Rights Watch, “‘It Was Really Hard to Protect Myself’: Impact of the Armed Conflict in Syria on Children with Disabilities”, above note 3, p. 55.

110 UNICEF, *Children with Disabilities in Situations of Armed Conflict: Discussion Paper*, November 2018, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Children_with_disabilities_in_situations_of_armed_conflict.pdf.

should ensure education for children with disabilities “on an equal basis provided in the context of armed conflict”.¹¹¹

Governments have an obligation under international human rights law to respect, protect and fulfill the right to education of all children, including children with disabilities who should have access to inclusive education and be provided with reasonable accommodation, if needed.¹¹²

A situation of armed conflict, in which many schools are destroyed or damaged and teachers are left to provide education with limited support and with little to no training, children with disabilities may need to wait years to have equal access to education. The longer they remain out of school, the less likely they are to finish their education and the more likely they are to experience poverty and exclusion in adulthood.¹¹³ Denial of the right to education can have a lifelong impact on the enjoyment of other rights, including political, social and cultural rights.¹¹⁴

Stigma and abuse

Children with disabilities often face stigma and abuse on the basis of their disability. Armed conflict exacerbates this stigma further, resulting in extreme practices, including physical and verbal abuse.

At the age of 13 years, Hamamatou, a polio survivor in the Central African Republic, was carried by her brother until he grew too tired and had to leave her. When fighters found Hamamatou two weeks later, they said, “We have found an animal. Let’s finish it off.” Another fighter intervened to save her life.¹¹⁵

According to OCHA, children with disabilities in Syria are “often at heightened risk of forms of violence, abuse, neglect or exploitation. Many are struggling against marginalization, stigma and discrimination.”¹¹⁶ Human Rights Watch’s 2022 research in Syria uncovered incidents of stigma and discrimination against children with disabilities, including physical and verbal abuse and threats.¹¹⁷ Ghaith, a 13-year-old boy with a visual disability from Syria who faced bullying at school and in the local mosque, said he hoped people would stop bullying others, including people with visual disabilities.¹¹⁸

111 UN Security Council, Resolution 2601 (2021), UN Doc. S/RES/2601 (2021), 29 October 2021, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/313/76/PDF/N2131376.pdf?OpenElement>.

112 CRC, above note 10, Arts 28(1) and 29(1); CRPD, above note 13, Art. 24.

113 According to the World Bank, people with disabilities are more likely to experience adverse socio-economic outcomes and inadequate access to education increases their risk of poverty. See the World Bank, above note 7.

114 The Global Partnership for Education Secretariat, “Children with Disabilities Face the Longest Road to Education”, 3 December 2016, available at: www.globalpartnership.org/blog/children-disabilities-face-longest-road-education.

115 Human Rights Watch, “Central African Republic: People with Disabilities Left Behind”, above note 3.

116 OCHA, above note 40, p. 57.

117 Human Rights Watch, “‘It Was Really Hard to Protect Myself’: Impact of the Armed Conflict in Syria on Children with Disabilities”, above note 3, p. 48.

118 E. Ćerimović, above note 41.

Stigma reinforces and justifies discrimination and can lead to an entire group being disadvantaged, excluded and abused.¹¹⁹ Stigma does not only lead to discrimination, but can also lead to a range of other human rights violations, including exclusion from education, health, humanitarian aid, and other opportunities or services.¹²⁰

Long-term consequences of armed conflict

According to the World Bank, all children living in conflict and crisis zones are at high risk of depression, anxiety and other mental health conditions.¹²¹ A lack of access to support, mental health and psychosocial support services, and education exacerbates the impact of conflict on the mental health of all children, including children with disabilities.¹²² These global findings are reflected in Human Rights Watch interviews in multiple countries, which described the emotional toll of hostilities on children with disabilities. Children and families interviewed reported signs of psychological distress in children, such as anxiety, sadness, extreme agitation or frequent trouble sleeping.

In Cameroon's North-West region, a secondary school teacher said that children with disabilities "suffered more than others" after armed separatists attacked and "were particularly traumatized by the violence they witnessed".¹²³

Shahd, an 11-year-old Syrian girl with a hearing disability, was more profoundly impacted by the sudden attacks and fleeing than her five siblings. Her father said that, unlike her siblings, "whenever there is something unexpected, even if someone rushes into the house, she starts to cry".¹²⁴

119 UN General Assembly, Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, Stigma and the Realization of the Human Rights to Water and Sanitation, UN Doc. A/HRC/21/42, 2 July 2012, para. 3, available at: www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-42_en.pdf.

120 WHO, "Disability: The Convention on the Rights of Persons with Disabilities – Why is the Convention on the Rights of Persons with Disabilities Important?", 1 December 2020, available at: www.who.int/news-room/questions-and-answers/item/why-is-the-convention-on-the-rights-of-persons-with-disabilities-important.

121 Patricio V. Marquez, "Mental Health Services in Situations of Conflict, Fragility and Violence: What To Do?", *World Bank Blogs*, 1 November 2016, available at: <https://blogs.worldbank.org/health/mental-health-services-situations-conflict-fragility-and-violence-what-do>.

122 Rochelle L. Frounfelker *et al.*, "Living Through War: Mental Health of Children and Youth in Conflict-Affected Areas", *International Review of the Red Cross*, Vol. 101, No. 911, 2019; UNICEF, "Operational Guidelines on Community Based Mental Health and Psychosocial Support in Humanitarian Settings: Three-Tiered Support for Children and Families (Field Test Version)", August 2018, available at: www.unicef.org/media/52171/file; UNICEF, above note 110; M. J. D. Jordans and W. A. Tol, "Mental Health and Psychosocial Support for Children in Areas of Armed Conflict: Call for a Systems Approach", *British Journal of Psychiatry International*, Vol. 12, No. 3, 2015.

123 Human Rights Watch, "'They are Destroying Our Future': Armed Separatist Attacks on Students, Teachers, and Schools in Cameroon's Anglophone Regions", 16 December 2021, p. 108, available at: www.hrw.org/report/2021/12/16/they-are-destroying-our-future/armed-separatist-attacks-students-teachers-and.

124 Human Rights Watch, "'It Was Really Hard to Protect Myself': Impact of the Armed Conflict in Syria on Children with Disabilities", above note 3, p. 30. For more details about Shahd's story, see E. Ćerimović, above note 41.

In the Central African Republic, Suleiman, a 17-year-old boy with an intellectual and physical disability, was fleeing when he saw his uncle being brutally killed. Suleiman said: “My uncle’s death in front of my eyes continues to scare me. ... When I sleep, I have nightmares that bring back the images of the events I lived. I haven’t spoken to anyone about it.”

In 2019, a father of three in South Sudan said that one of his daughters became traumatized after seeing the dead bodies of her aunt and cousins in December 2013 as they fled an attack. Her father described her behavioural changes, which reflect the aforementioned World Bank findings:

Before the war, she was OK. But then, she started to insult everyone and run away from home for many days at a time. At the hospital, they didn’t know what she has but they gave her Phenorbitone (used to treat anxiety symptoms). Now, she can’t even go to school here. Otherwise, she gets into fights with other children or just runs away, and there is no fence around the school to keep her in there.¹²⁵

In all the examples described above, mental health and psychosocial support services were either lacking, generally not inclusive of, or inaccessible to, children with disabilities.

As part of their right to health and to development, all children, including children with disabilities, have the right to enjoy the highest attainable standard of mental health and, as needed, access to psychosocial services.¹²⁶ Counselling and other mental health services during armed conflicts are mostly offered by humanitarian organizations, and they should be human rights respecting, equitably distributed, inclusive of, and accessible to all children with disabilities.¹²⁷

125 Human Rights Watch, “South Sudan: People with Disabilities, Older People Face Danger”, above note 89.

126 UN General Assembly, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Dainius Puras, Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, UN Doc. A/70/213, 30 July 2015, paras 40, 57 and 109, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/238/25/PDF/N1523825.pdf?OpenElement>.

127 See IASC, “IASC Guidelines on Mental Health and Psychosocial Support in Emergency Settings, 2007”, 1 June 2007, available at: <https://interagencystandingcommittee.org/iasc-task-force-mental-health-and-psychosocial-support-emergency-settings/iasc-guidelines-mental-health-and-psychosocial-support-emergency-settings-2007>; and IASC Task Team on Inclusion of Persons with Disabilities in Humanitarian Action, above note 99. See, also, UN General Assembly, Human Rights Council, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Dainius Puras, Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, UN Doc. A/HRC/44/48, 15 April 2020, para 47, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/094/45/PDF/G2009445.pdf?OpenElement>; and UN General Assembly, Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Dainius Puras, Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, UN Doc. A/73/216, 27 July 2018, paras 15 and 57, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/234/88/PDF/N1823488.pdf?OpenElement>.

Gaps in UN efforts to protect children with disabilities during armed conflict

In 1996, the UN General Assembly requested the appointment of a special representative for children and armed conflict,¹²⁸ and in 1999, the UN Security Council adopted Resolution 1261, the first resolution to acknowledge that the protection of children during armed conflicts is an international peace and security concern.¹²⁹ Resolution 1261 identified grave violations affecting children in situations of armed conflict, including killing and “maiming”, recruitment and use of children, rape or other sexual violence, abduction, and attacks on schools or hospitals. Subsequent resolutions on children and armed conflict added denial of humanitarian access as the sixth grave violation. In 2005, Security Council Resolution 1612 established the Monitoring and Reporting Mechanism, which has the ultimate goal of ending and preventing the six grave violations against children.¹³⁰

Since the establishment of the grave violations, multiple Security Council resolutions have asked the UN Secretary-General to report on these abuses. Unfortunately, although children with disabilities are impacted by all six grave violations, they remain largely excluded by UN discussions and documents on this topic.

Despite twelve resolutions on children and armed conflict and Resolution 2475 (2019) on the disproportionate impact of armed conflict on people with disabilities, the UN Secretary-General’s thematic and country reports and briefings, including the annual reports on children and armed conflict, rarely mention children with disabilities. This reflects a serious shortcoming in UN efforts to protect all children impacted by conflict.

While all the UN Secretary-General’s annual reports on children and armed conflict include data on children who have been “maimed”, or acquired a permanent injury that could lead to a disability, the reports do not elaborate on their rights as children with disabilities or include other information on the impact of armed conflicts on children with pre-existing or acquired disabilities.¹³¹

A January 2022 report by the UN special representative of the Secretary-General for Children and Armed Conflict found that twenty-five years of UN action on children and armed conflict have overwhelmingly excluded children

128 For more, see Office of the Special Representative of the Secretary-General for Children and Armed Conflict, “About the Mandate”, available at: <https://childrenandarmedconflict.un.org/about-the-mandate/>.

129 UN Security Council, Resolution 1261 (1999), UN Doc. S/RES/1261 (1999), 30 August 1999, available at: www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20SRES%201261.pdf.

130 UN Security Council, Resolution 1612 (2005), UN Doc. S/RES/1612 (2005), 26 July 2005, available at: www.un.org/ruleoflaw/files/SecurityCouncilResolution1612_en.pdf.

131 In February 2021, Human Rights Watch published a report calling on the UN to consider using another term to refer to violations against children that result in serious injury other than “maiming”. Although “maiming” is a term used in IHL, it is not consistent with the CRPD and can be stigmatizing to people with disabilities. See Human Rights Watch, “UN: High Risk in Conflicts for Children with Disabilities”, above note 5.

with disabilities.¹³² Nearly half (42%) of country task forces on monitoring and reporting believed that children with disabilities were not given sufficient space in the implementation of the children and armed conflict mandate.¹³³ This report identified the following as needed areas of improvement regarding children with disabilities: better data, capacity-building for actors, raising awareness, resource mobilization and targeted response.¹³⁴

The way forward

The massive impact of armed conflict on children with disabilities has highlighted the need for the UN and governments to commit serious attention and resources to mitigate this issue. Although various UN agencies have started to engage in a more inclusive humanitarian response, much more needs to be done.

Inclusion

UN entities, including the UN Secretary-General and the Security Council, should ensure the full inclusion of children with disabilities in their work. Meaningful inclusion entails considering not only the number of children who have been “maimed”, but also the impacts on the rights of all children with disabilities, including those who have been physically injured, those who have experienced mental health harms, and children with pre-existing disabilities. This will promote inclusive humanitarian responses and better respect and protection of the rights and needs of children with disabilities.

Protection

The protection of children with disabilities is essential to the comprehensive protection of all children affected by armed conflict. The UN, governments and humanitarian actors should promote a more concerted and coordinated protection response in wars by paying extra attention to the rights and situational needs of children with disabilities, including their right to be safe and protected, right to education, and access to humanitarian assistance, health care, assistive devices, and mental health and psychosocial support services.

132 UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Study on the Evolution of the Children and Armed Conflict Mandate 1996–2021*, January 2022, available at: <https://childrenandarmedconflict.un.org/wp-content/uploads/2022/01/Study-on-the-evolution-of-the-Children-and-Armed-Conflict-mandate-1996-2021.pdf>.

133 *Ibid.*, p. 52.

134 *Ibid.*

Disaggregated data collection

There is growing recognition of the need for data. The various UN monitoring and reporting mechanisms should step up efforts to gather evidence about the risks faced by children with disabilities. Without effective monitoring and reporting, the full impact of armed conflicts on children with disabilities will remain unclear, which in turn will cause protection efforts, including humanitarian responses, to potentially miss or underserve a substantial marginalized group with particular needs. Effective monitoring and reporting should include being cognizant of the experiences of children with diverse disabilities during attacks, evacuations and internal or external displacement as well as factoring these experiences into targeted protocols, rules, peace processes and approaches in civilian protection.

Humanitarian assistance

Both donors and humanitarian actors must take deliberate and proactive measures to ensure that children with different types of disabilities are systematically included in all humanitarian responses. Children with disabilities require improved humanitarian coordination and assistance, including health care services, access to assistive devices, and education, that is provided in an equitable and inclusive manner, in line with human rights standards, consistent with Security Council Resolution 2475 and IASC Guidelines. Organizations providing humanitarian assistance should ensure their staff receives training to guarantee inclusion.

Targeted humanitarian assistance

Donors and humanitarian organizations should provide targeted, rights-respecting and disability-led responses to the rights and needs of children with disabilities, including health care, rehabilitation services, early intervention programmes, education, access to assistive devices, mental health and psychosocial support services and education. Assistance should also include programming to address long-term mental health impacts and trauma.

Consultations

Organizations of people with disabilities and children with disabilities should be engaged and included in all discussions and decision-making concerning people with disabilities in armed conflict in the spirit of “Nothing about us without us”.

Modern interpretation of IHL

As the world is shifting away from the medicalized, paternalistic model of disability, IHL should be interpreted using a rights-based approach to ensure the inclusion of people with disabilities in humanitarian efforts. This rights-based approach, which

would incorporate non-discrimination and intersectional understandings, would also specifically improve the inclusion of children with disabilities. Finally, although “maiming” is a term used in IHL, it is not consistent with the CRPD and can be stigmatizing to people with disabilities. Consultation with organizations of people with disabilities is crucial in identifying alternative language.

“Impossible”: Some challenges of implementing international law in the area of humanitarian affairs for persons with disabilities

Mar Maltez

Mar Maltez has extensive experience working in human rights and humanitarian affairs with both public international and non-governmental organizations, and the private sector. Holding degrees in management, international law and psychology, she has particular expertise around the rights of children and other vulnerable persons. As a person living with a disability, she also has insights into the challenges faced by persons with disabilities, both as a member of staff within and as a recipient of humanitarian relief efforts.

Abstract

Persons with disabilities are entitled to certain protections under international law, including in the context of armed conflict. These individuals are especially vulnerable in a crisis situation. Too often, when emergency humanitarian relief is provided, these protections are afforded inadequately or not at all, due to personal prejudice, lack of resources or training, or because there is no systemic requirement

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to do so. This paper uses a narrative-based approach to illustrate typical lived experiences of persons with disabilities both as workers in the area of humanitarian relief, and recipients thereof. It illustrates the challenges and inadequacies of a system that fails to recognize the rights that should be provided to those with physical and/or neurodevelopmental differences. It highlights the discrepancy between legal rights and actual provision of service and the different needs of those with disabilities in the circumstance of armed conflict. The article points to specific areas of failure, and the need for an inclusive approach in programming.

Keywords: Persons with disabilities, specific needs, humanitarian relief efforts, child protection in emergencies, international law, dignity, equity.

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Author's note

By sharing our experience as practitioner, with different needs than the average, we wish to promote dialogue and inspire critical thinking. We will not generalize disabilities, for each case is their own, but rather peruse through specific cases and derive from those. Disability, as a label, is a conceptualization we do not wish to address at this point. Instead, the focus will be on the fact that disability might not translate to impairment, but it can certainly heighten vulnerabilities which, in a humanitarian context, will need different attention.

“Impossible” is stripped of traditional conformities and intends to appeal to curious minds so that innovative solutions in the area of humanitarian affairs can be achieved. Written with heart, as it takes passion to implement law to concrete cases, especially in volatile and complex contexts, it is, nonetheless, guided by reason and pragmatism. The title plays with misconceptions towards disability and is adapted from one of the scenarios here represented.

Aiming to present a dynamic contribution to the *International Review of the Red Cross*, it approaches the *perception* of people with different needs, explores *action* in humanitarian settings, recommends some good practices, as well as possible solutions, and shares lessons learned. It is presented as a fictional case-study based on combined different real-life situations drawn from the author's experience, correlating international law principles with actual challenges faced in implementation. It is not an exhaustive piece, as disabilities are diverse and have different levels of complexity. Each individual case intends to illustrate a broader issue.

This presentation will, hopefully, allow readers to draw from their own experience and knowledge to provide the optimal solution to the scenario, contributing to the discussion and, ultimately, to a positive pragmatic approach when in the field.

Introduction

The following intends to stimulate thought and promote debate by giving a personal perspective to what being a person with a disability, in a humanitarian context, can mean. Considering the practical challenges faced in implementing legal frameworks and the barriers of operationalization, we intend to contribute to the dialogue and the effectiveness of an inclusive approach,¹ focusing on humanitarian urgent relief and assistance, and persons with congenital disabilities² or pre-existing different-needs (we will not elaborate on disabilities as consequences of armed conflict).

The article presents its reasoning as testimonies, through the lenses of persons with disabilities, in context-specific situations – inviting the reader to follow the stories of several characters. These represent real people and the stories, actual events and contexts experienced. It evolves in two parallel axes, considering the author’s background and challenges witnessed or experienced in Hiveland,³ a fictional region of four countries, depicting a space where events took place.

The geographical representation of west Apolegma, east Ballan, south Reef and north Doto serves the purpose of illustrating the nature of conflict, the movement of people and the scope of application of different legal frameworks. Hiveland is the scenario for the lives of 40-year-old Amelia, humanitarian affairs officer, specialized in protection; of Enow, 14 years old, who was born deaf and lost his leg when he was 12 years; of Ting, 17 years old, blind from birth; and of the siblings Malaika, aged 15, younger sister of 17-year-old Moon, who has an undiagnosed autistic syndrome disorder (ASD) and Down syndrome. Their names have been changed and their stories adapted to fit the current format.

Reef’s protracted armed confrontations between the ethnic groups Coral and Cowry, and their strife with the elected Government had contributed significantly to the instability and insecurity of the region. Cowries were organized, well-funded and had effective control of southwest Reef’s territory, giving them access to multiple supplies. Corals were scattered in the north and regularly ventured in aggressive incursions into neighbouring Ballan, (mis)appropriating its resources to support their fight. Reef’s northwest border was shared with Apolegma, a thriving country, considered neutral and often asked to mediate negotiations and host regional summit meetings. The

- 1 See the Charter on Inclusion of Persons with Disabilities in Humanitarian Action, May 2016, available at: <https://humanitariananddisabilitycharter.org/> (all internet references were accessed in September 2022); and United Nations (UN) Security Council, Resolution 2475 (2019), UN Doc. S/RES/2475 (2019), 20 June 2019, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/186/60/PDF/N1918660.pdf?OpenElement>.
- 2 The World Health Organization defines “congenital anomalies” as being “structural or functional anomalies that occur during intrauterine life”; see World Health Organization, “Congenital Anomalies”, available at: www.who.int/health-topics/congenital-anomalies#tab=tab_1.
- 3 Geography and places are fictional, randomly chosen from the maritime world, to correspond to letters of the Latin alphabet.

internal conflict affected, especially, Ballan that was constantly on high alert and had to strategize defensive military operations.

Apolegma and Ballan shared a border between them and both welcomed people fleeing the conflict. The countries established accompanied-migration-routes and Apolegma had a border temporary transit centre, the Tuna Centre. Doto, to their north, hosted the only refugee camp in the region, Orca Camp. The three countries' official policies had a strong component of child protection and support of children on the move.

Amelia is the common thread throughout the narrative, as she and a multidisciplinary team accompany the children traversing to safety, when conflict escalates and transforms. Each chapter follows the individual journey of our characters and represents a stage of the emergency response. The following is a way of presenting a serious and complex issue in a personalized and narrative way.

Chapter I: “War, as a thing only fit for beasts, and yet not practised by any kind of beasts so constantly as by man, they regard with utter loathing”⁴

Of law and war

War is not civilized.

This simple truth has helped Amelia go through her professional life with some inner balance, while realizing limits to the effectiveness of international law.

People have relinquished their own violence in order to live collectively. Repossessing their violence to fight is negating civilization. War is not civilized. However, the rule of law establishes duty-norms, those participating in war shall abide by, and grants “equal and inalienable rights” for “all members of the human family”⁵ – simple truths that need to coexist in highly complex scenarios.

In armed conflict, we need to be aware that, despite theoretically being granted the same protection rights, not all civilians are equal; not all civilians in need of protection have the same needs. When designing and programming a humanitarian response to armed conflict, we must consider the discriminatory impact hostilities have on civilians and people *hors de combat* and be conscious of the diversity of the civilian population and the heightened risks for those more vulnerable. People with specific-needs “shall be the object of particular protection and respect”.⁶

It is the systematic acknowledgement of this diversity that will enable an effective protection of the principle of human dignity, outlined under the Geneva

4 G. C. Richards, *More's Utopia Translated into Modern English*, Basil Blackwell, Oxford, 1923, p. 94, of warfare.

5 UN General Assembly, The Universal Declaration of Human Rights, New York, 10 December 1948, preamble.

6 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), Art. 16, ¶1.

Conventions. An inclusive approach in programming will improve operationalization and reduce vulnerability risks. Universally accessible humanitarian action does not necessarily translate to equal access to relief and protection but rather to a context-specific equitable one. The requirement of adequate specific patterns of protection of persons with disabilities, in armed conflict, derives from their heightened vulnerability to adverse contexts. A rapid adjustment of Standards to context-specific needs is crucial in implementing legal frameworks to complex and volatile scenarios. The design of an inclusive humanitarian response⁷ plan does not need to be exhaustive but requires those designing it to be sensitive to the possibility of specific-vulnerabilities, especially, if there is no disaggregated data available when assessing humanitarian needs. It is impractical to include all eventual needs for protection and assistance but there is an absolute necessity to be prepared to rapidly adapt the approach, and that has to be reflected in the design so it can be operationalized.

The diversity among those with disabilities is widely varied and so is the terminology. The fifth paragraph of the preamble in the Convention on the Rights of Persons with Disabilities (CRPD) recognizes “that disability is an evolving concept and 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”.⁸ It is important to navigate disability language, both in legal and psychosocial contexts. To update legal terminology, we would need to keep doing it as often as circumstances, social perceptions and warfare evolve. As practitioners, we believe in the spirit of the law and advocate for interpreting available legal frameworks with contemporary perspectives. In this article, while for consistency purposes we use *persons with disabilities*, we chose to use the term *people with different-needs* or *specific-needs* to conceptualize human beings with their own identity and particular characteristics – individuals that are constantly adapting to the environment around them, an environment that is not adequate to their needs. We believe this to be a value-neutral choice in wording and reiterate that we are sharing a personal argument and presenting personal experiences. Using value-neutral terms is important in communicating about the subject, but, more importantly, is to refer to people that have a disability in a way they would prefer. Objectifying is not right, nor is it to tell others how they should identify themselves. The choice of words in the stories shared have, in consideration of this, employed the terms used by the people depicted.

7 Inter-Agency Standing Committee (IASC), “IASC Guidelines on Inclusion of Persons with Disabilities in Humanitarian Action”, July 2019, available at: <https://interagencystandingcommittee.org/iasc-guidelines-on-inclusion-of-persons-with-disabilities-in-humanitarian-action-2019>.

8 UN General Assembly, Convention on the Rights of Persons with Disabilities (CRPD), UN Doc. A/RES/61/106, 24 January 2007, preamble, para. (e)

Chapter II: “Had I known you were impaired, I wouldn’t have allowed them to hire you”

Institutional barriers, stereotypes and misconceptions

Amelia had been newly hired by an international organization, Isopod, as humanitarian officer after going through the recruitment process like all other candidates. Although she did not have to, she mentioned in her application that she had a disability and specified that she would need reasonable accommodation.⁹

Diversity and inclusion must be a reality and not only a theoretical well-intended directive included in policies. The adoption of a disability-related human-resources strategy enables organizations and employees with specific-needs to actively find adequate solutions for optimal performance of professional duties and clarifies responsibilities. A healthy, supportive and respectful work environment mitigates other barriers, such as physical (like geographical) and circumstantial (such as security measures and guidelines), and allows professional staff with specific-needs to better accomplish results.

Amelia was asked to lead a donor’s meeting – not because she was the humanitarian coordinator officer for the protection cluster, but because funding would be more likely if the plea came from a “handicapped”. Whale Foundation was an informed donor who understood the challenges and complexities of Isopod’s programme. Humanitarian donors’ awareness is, indeed, crucial – funding can be scarce and often insufficient to address the heightened and uncertain challenges of an emergency. Objectification of persons with disabilities in the workplace is still a reality. There is a tendency to perceive someone with specific-needs not as a competent professional but as a poster-hire for funding or someone fit to fill the required quotas.

The balance between disability-value and respect for the individual must be achieved. People must be treated with dignity, independently of their physical, mental or health condition. And their reality should, indeed, be valued. Humanitarian action and civilian protection can only be inclusive if implemented and operationalized without prejudice or preconceived ideas and notions. Mainstreaming disability-related issues, throughout the emergency process, will promote compliance with international standards and other regulations, reduce stigma and misperceptions, and contribute to the efficiency of implementation and the achievement of positive results.

Isopod operated in all four countries of Hiveland with various programmes. One of Amelia’s responsibilities was to coordinate the design and implementation of a more inclusive child protection regional strategy, considering education and child

9 The UN CRPD defines “reasonable accommodation” as the “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”. CRPD, above note 8, Art. 2, ¶4. For more on disability in the workplace, see International Labour Organization, “Resource Guide on Disability”, available at: www.ilo.org/inform/online-information-resources/resource-guides/disability/lang--en/index.htm.

protection in emergencies. Among other aspects, a comprehensive protection programme, containing an inclusive education and adequate emergency preparedness, was set in motion, in Apolegma through Eel School, in south Ballan with Fin School and Fugu School to the north, and Goby School in Reef. Alongside an inclusive curriculum, all schools had an emergency contingency plan, adapted to the specific needs of students attending.

Involved in the different stages of the process, from planning to implementation, were several stakeholders. Some local and regional entities and organizations regarding disability, such as specialized government or official bodies, the regional confederation of organizations of persons with disabilities, organizations representing families of persons with disabilities that are not able to advocate for themselves, associations for the protection of childhood and youth with active inclusive programmes and specific-disability groups. There were members of the schools, representatives of the students, and members from the boards of education of the different countries. Also involved were non-governmental organizations, security forces, local and regional authorities, security officers and different committees and units from the international agencies present in the region. An architecture and civil engineering company was consulted to address physical barriers and a disability focal person in Reef’s armed forces was appointed. An inter-agency memorandum of understanding (MoU) regarding the gathering and sharing of specific disaggregated data was signed and facilitated both the joint design of the plan and its implementation.

The *ad hoc* donor’s meeting with Whale Foundation resulted in the funding of a comprehensive budget that would allow the feasibility of the operation. Responding to a needs-specific emergency requires sufficient funds to mitigate barriers arising from the heightened vulnerability of children with disabilities. A transparent and fluid communication with donors is an added value when operating in volatile environments, even more so when responding to an emergency with unpredictable variables. Specialized psychological first aid, adapted transport for evacuation, communication tools, appropriate educational material, technical aid equipment, adequate water, sanitation and hygiene (WASH)¹⁰ and health measures, and accessible services, were all part of Isopod’s disability-focused humanitarian relief strategy.

Chapter III: “Load them onto the lorry, load them on to the lorry!!”

Challenges in urgent humanitarian relief operations

Enow was born deaf and he never considered himself to have a disability. Nor did his community see him as a *disabled child*. He lived in Ballan’s south border village Lamprey, with his mother and older brother. His father was Coral and

10 For more on WASH, see UNICEF, Water, Sanitation and Hygiene (WASH), available at: www.unicef.org/wash.

succumbed in battle when the lads were very young. Communication was natural within the family and their community. Enow used non-formal sign language, written or drawn notes, images, and facial and body expressions. He was a happy lad, very resourceful and athletic.

When he was 12 years old, he lost his leg because he could not hear the warnings of his mother who was outside cooking, when an unidentified armed group attacked the village. He was unable to run to safety and was injured when the house collapsed on him. Children with sensorial or intellectual disabilities face the additional challenge of not perceiving threats and dangerous situations, even if there is a previous warning.

Enow now understands he has an impairment: having to move around with technical aids, he needs to compartmentalize two basic daily tasks: walking and expressing himself. He was offered different types of equipment but feels more comfortable using the one he has, an improvised “crutch” made for him by his uncle – a flawless crafted orthosis-like wood support that enabled Enow to walk swiftly and even do sports. We should always ask and never assume what is best for persons with specific-needs. After the attack on Lamprey, Enow left to attend nearby Fin School. He wanted to be a farmer.

The situation was worsening as border armed movements were in place. Reef’s Goby School and Ballan’s Fin and Fugu schools were being evacuated to Eel School, in neighbouring neutral Apolegma, as a precautionary measure. The operation, led by the Regional Body for Child Protection, was being coordinated on the ground by Amelia. She would also accompany operations in Ballan.

As the man in uniform¹¹ shouted outside Fin School, Enow could not hear him but inferred, from body language, an aggressive posture and this did not inspire confidence nor was it reassuring of a journey to safety. The perception of security forces and law enforcement differs, and this should be considered when interacting with vulnerable people and, more so, with children in humanitarian relief operations.

Amelia understood the man in uniform’s reaction to an unexpected situation. A disability focal person had been appointed in Reef’s armed forces and nowhere else. Ballan’s man in uniform was being confronted with an unusual emergency to which he probably had not been prepared or trained for. Technical training is essential but just as crucial is to be psychologically prepared, as individual and professional, to be part of this context-specific humanitarian action. He was not able to realize that the children themselves had organized their own evacuation, according to their needs and were orderly(ish) getting into the assigned transports, despite the many challenges that this task presented.

In addition to introducing disability-related specifications to *jus in bello* principles, civil and military coordination/cooperation (CIMIC), and humanitarian military intervention (HMI) should be able to adequately interact with persons with disabilities. Not only should warfare be conducted with recognition of the

¹¹ It is not relevant to the argument to identify this character. The man represents every organized formal armed force.

diversity of the civilian population that must be protected, but the security and armed forces involved in humanitarian affairs or peacekeeping missions must also be aware of the possibility of having to interact with these differences.

Evacuation is tense and can be difficult, especially in the context of armed conflict. Isopod schools’ emergency plan was the result of a collaborative work and multisectoral approach.¹² Despite the holistic design and programming, when implementing the plan, conditions had changed and adjustments had to be made. Reef’s internal conflict had escalated and was overflowing into Ballan. Ballan’s armed forces established several area defenses in the south and west borders. Fin and Fugu students could no longer be evacuated through the Tuna transit centre as initially planned. Evacuation routes and safety corridors had, hence, to be renegotiated taking into consideration also the students’ specific needs. Orca Refugee Camp, in Doto country, would temporarily host them and the journey further north would require other arrangements and logistics. To safely endure a longer trip, different transport had to be procured and safeguarding escorts also had to be renegotiated. Physical and mental health, sanitation and hygiene measures, and food and non-food items had to be re-adapted, especially in respect of girls. Families and other support systems were kept updated and informed of the well-being of their children.

Chapter IV: “You don’t need to shout, I am blind, not deaf”

Dignity in humanitarian assistance

Ting was born blind and did not have any mental visual references. As such, she interpreted her environment with intellectual representations and was very keen to adapt to new places, people and experiences. Ting had a curious mind, she loved sciences, excelled at mathematics and was a bright student at Fugu School.

At Orca Refugee Camp, in the turmoil of arrival, she accidentally got separated from the Fugu group and was *deposited*¹³ in a space with other “disabled persons”. She was never asked anything, nor who she was or where she was from. No one ever addressed her directly. Other people just assumed she belonged there.

When Amelia located her, Ting was disoriented, but even more appalled with the way that camp officials treated her. Reunited with Isopod’s other children, she was apologized to, very loudly *so she could understand* the official’s regret.

Perception of dignity is the result of our own cognitive processes. The unique experiences of each of us, as individuals, will determine how human

12 For a multisectoral approach, see UN Office for Disaster Risk Reduction, *Sendai Framework for Disaster Risk Reduction 2015–2030*, 18 March 2015, Arts 7, 19(g), 32 and 36(a)(iii), available at: www.undrr.org/publication/sendai-framework-disaster-risk-reduction-2015-2030.

13 We opted not to alter the exact wording used by Ting for we felt it would disrespect the feeling she was expressing.

dignity is perceived – ours and the dignity of others. Respect for dignity, in this particular situation, encompasses communication and not acting like the person is not there. It is how you are considered, rather than what or how much is being provided to you, that dignifies you as a person, as a human being. For children with different-needs to be present in the moment, within the limits of their own capacities, it is paramount they are informed about the process, their surroundings, their rights and their options. The psychosocial effect of ill-communication, and the dismissal of the individual, can have devastating consequences.

Despite official camp planning, Orca was, in fact, not equipped for such an influx of people in transit and, less so, children with disabilities. Among others, child-friendly spaces were not prepared for different needs as, for example, sensorial overload and physical access were not taken into consideration. WASH and health facilities in the refugee camp did not consider intersecting elements such as gender, disability, or cultural or religious traditions. The *Community feedback and complaints mechanism* was not accessible to Ting, nor the available educational programme.

Chapter V: “This is torture, I am possible! I will not let them take him away”

Context-specific approach and positive discrimination

Malaika and Moon lived in Krill, a small village in northeast Ballan, since their parents’ death. She would take him with her to school and he would sit curiously with the other children, always smiling. When their grandmother fell severely ill, family tracing produced no results for other relatives. They were referred to Isopod’s protection programme as result of the inter-agencies’ cooperation and disaggregated data collection and sharing agreement. The two siblings were to integrate into the group at Orca Refugee Camp and would be relocated with the others in Apolegma’s Eel School.

They were separated from each other after arriving at Orca. Malaika, placed in a *safe haven* structure for girls, was desperate for news about her older brother. Moon was left in registration, despite the fact that boys are also at risk for sexual violence and abuse, particularly if their vulnerability is heightened by disability or they are unaccompanied or separated from their families. Moon had completely lost sense of his environment as he was overwhelmed with everything new. His comorbidity implied some deficit in reciprocal social interaction and required stability and familiarity of his surroundings. It is vital to maintain a certain consistency or some elements of consistency amid the havoc, to avoid further psycho-emotional distress. Travelling from Krill to Orca, Malaika was by his side, but the fact that he was separated from his only remaining reference, and left alone in an unfamiliar place with strange people, led to a shut down.

When Amelia was called to formalize Isopod’s guardianship of the siblings, she clarified that Malaika was Moon’s caregiver and that they only had each other. Keeping them together was essential, as a family unit in need of specific protection. In Orca Refugee Camp they would have to be separated according to age- and gender-appropriate protection guidelines for unaccompanied minors, but in cases like that of the M siblings, the risk assessment of possible liabilities should always be considered. There needs to be equity especially when protecting children with intellectual, cognitive and psychosocial disabilities. We must aim for a balance when implementing corresponding safeguarding protocols and practise a context-specific approach whenever there are multiple and intersecting factors.

Malaika reported that she felt that she was being tortured when a camp officer was trying to enforce the guidelines. This reiterates the importance of the principle “do not assume, ask”. Operational and attitudinal barriers also affect children’s support systems. The imposition of a standard without due assessment was being translated into a declaration of ineptitude. Despite her protests and fair arguments, it was assumed that Malaika could not care for Moon and his needs. It was impossible for her to care for her older brother and he would be better accommodated elsewhere. The deep impact of this lack of consideration was inhumane, cruel and uncompassionate.

An additional level of complexity to this case was the fact that Moon would soon be turning the age of 18 years, and risked that, no longer being considered a child, he would fall through the cracks of protection frameworks. Amelia was able to negotiate an exception and guarantee adequate temporary accommodation for the siblings. However, she felt these specific cases should not constitute an exception but fall into a possible scenario of positive discrimination, already predicted in the design of the humanitarian relief operation.

Chapter VI: “*They don’t see me*”

Child-focused conflict analysis

After their sojourn in Orca Refugee Camp, Amelia and the team reached Apolegma with the children. Eel School was prepared and was going to host Isopod’s other students from Fin, Fugu and Goby schools, for an undetermined period of time.

Reef’s Goby School was located in a Cowry-controlled area and although there were students from other ethnicities, the majority were Cowries and some of them had taken part in hostilities. Isopod’s intervention in Goby had to be negotiated with two of the main parties involved in the conflict: Cowry *de facto* authorities and Reef’s elected government. It was authorized by the latter, and justified nationally by the immediate need to protect Reef’s children from the deteriorating situation and to prevent them from continuing being recruited into the conflict. There was an in-house reconciliation project, part of the wider national disarmament, demobilization and reintegration (DDR)

programme,¹⁴ funded by the same donor, Whale Foundation, targeting children associated with armed forces and armed groups. Goby School was *prima facie* a civilian object. Nonetheless, an agreement was celebrated between the three key actors, the Government, the Cowries and the Corals, to guarantee a safety zone for the school and an accessible humanitarian corridor. This allowed the children to reach Apolegma safely and without major incidents.

A senior Whale officer was to visit Eel School. A concept note for a special reception was written by the unit in charge of welcoming and accompanying the Foundation's representative: girls would greet the donor with singing and there was to be a football match played by the lads with physical disabilities. Funding for the activity was approved by the unit's project manager. However, the children were not asked if they wanted to or knew how to sing, nor were they consulted about playing a sport that they had never played before. Gender bias assumptions and disregard for cultural and religious values are not acceptable.

One of the teams would be comprised of young men with acquired physical disabilities (injuries resulting from the armed conflict) who had been through a process of physical rehabilitation in Reef's Goby School. In spite of the effort to physically rehabilitate these lads, there was not a parallel psychosocial healing process. Tension was high as some of the team members were formerly part of an armed group, responsible for the land mines that caused the injuries of several others. Aggravating this volatile imposed scenario was the fact that the opposing team was mainly composed of Corals, including Enow, who refused to play and suggested that the Fin group performed some traditional dances.

There had been no child-focused conflict analysis, or any assessment of the psychosocial effect of the physical consequences of armed conflict. The unit responsible for the event could not see past the children's disabilities. The awareness training for Isopod's professionals had failed. The unit was unable to distinguish and, consequentially, respect different religious, ethnic and cultural groups within the student body.

Humanitarian accountability as a concept has been evolving and constantly adapting to new emergencies. Isopod's policy determined a balance between powers, as its action was to be accountable to governments, donors and other higher parties, in the same measure as it would be to communities and beneficiaries. There was to be a shift in that balance whenever there was a conflict of interests that might hinder the best interest of the children – especially those most vulnerable.

Deep changes in perception are still needed: people must be treated with dignity, independently of their physical, mental or health condition. Humanitarian action and protection of civilians in armed conflicts can only be inclusive if implemented and operationalized without prejudice or preconceived ideas and notions.

14 For more on DDR, visit the UN Disarmament, Demobilization and Reintegration Resource Centre, "Integrated DDR Standards", available at: www.unddr.org/.

Personal note

Ting went back to Ballan and is currently a mathematics teacher at Fugu School.

Malaika and Moon were resettled in another country. Malaika became a doctor and Moon goes to his own school and has regained his smile.

Enow was shot dead on his way home from school. His brother cares for their mother and attends to the small family farm.

This is for all of them, and all the others, *who are possible*.

PERSONS WITH DISABILITIES

Protecting disabled people during armed conflict in North Kivu: Challenges and perspectives

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Abstract

This study analyses the situation of persons with disabilities caught up in armed conflict in the Democratic Republic of the Congo, in particular in North Kivu Province. The study goes beyond the few statistics available – which show the vulnerability of persons with disabilities during humanitarian crises – to identify the obstacles to taking persons with disabilities into account in humanitarian action in North Kivu. As a result, the study provides practical recommendations to overcome these obstacles, fill in the gaps in humanitarian action and improve the situation of persons with disabilities by ensuring efficient and effective protection in times of armed conflict.

Keywords: Humanitarian action, armed conflict, disability, inclusion, protection, Democratic Republic of the Congo.

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Introduction

In 2019, around 12.8 million people (nearly 13% of the estimated population), of which 5.6 million are under 18 years old, needed humanitarian assistance and protection in the Democratic Republic of the Congo (DRC).¹ Armed conflicts are largely responsible for this humanitarian crisis, particularly in the eastern part of the country, and disproportionately affect women, children and persons with disabilities. Persons with disabilities² already endure serious violations of their rights in times of peace, but the situation becomes even more complex in a humanitarian crisis, such as an armed conflict. According to Humanity and Inclusion, a non-governmental organization previously known as Handicap International, “during humanitarian crises, the rate of disability is high. Around ten million of the displaced population in the world are disabled.”³ In addition, according to Humanity and Inclusion’s field surveys, 75% of persons with disabilities say they have difficulties in accessing humanitarian services and 92% of humanitarian actors think that they do not properly take persons with disabilities into account in their humanitarian work.⁴ Moreover, 78% of humanitarian actors do not collect data on disability and 79% do not have a separate budget for including persons with disabilities in humanitarian programmes.⁵ As a result, the authors have decided to analyse how persons with disabilities living in North Kivu Province, DRC, are protected during armed conflict under international humanitarian law.

This study draws on current national, regional and international legal instruments, as well as interviews held in September 2020 and between May and December 2021. The authors refer in particular to Article 11 of the Convention on the Rights of Persons with Disabilities (2006), which states:

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.⁶

- 1 United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), *Plan de réponse humanitaire 2017–2019: République démocratique du Congo*, UNOCHA, December 2018, p. 6, available at: <https://reliefweb.int/report/democratic-republic-congo/r-publique-d-mocratique-du-congo-plan-de-r-ponse-humanitaire-2017-0> (all internet references were accessed in October 2022).
- 2 According to Article 1 of Convention on the Rights of Persons with Disabilities, New York, 13 December 2006 (entered into force 3 May 2008), disabled people are people “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”.
- 3 Humanity and Inclusion, *Le processus HNO/HRP: La nécessité de prendre en compte les personnes handicapées dans l’action humanitaire*, Power Point presentation, unpublished, August 2019.
- 4 Humanity and Inclusion, *Présentation au Sommet Humanitaire*, Humanity and Inclusion, Istanbul, 2016.
- 5 Humanity and Inclusion, *Analyse des barrières d’accès et de participation des personnes handicapées à la réponse humanitaire en RDC*, Humanity and Inclusion, Kinshasa, June 2020.
- 6 Convention on the Rights of Persons with Disabilities, above note 2, Art. 11

The authors also drew inspiration from other instruments of international humanitarian law that protect “people who are not, or are no longer, participating in hostilities” and which, therefore, apply to persons with disabilities: the Kampala Convention (2009), which is the most important treaty in terms of protecting persons with disabilities in Africa (including persons with disabilities that have been displaced as a result of armed conflict);⁷ the Sphère standards;⁸ the Inter-Agency Standing Committee guidelines;⁹ the Universal Declaration of Human Rights;¹⁰ and international treaties that set out guidelines and other necessary foundations for protecting persons with disabilities, although their implementation remains a problem, in particular in the context of armed conflict in North Kivu.

The study is divided into three parts: the first part presents the situation of persons with disabilities in armed conflict in North Kivu; the second identifies the hurdles to ensuring that persons with disabilities are taken into account in the protection of victims in armed conflict in North Kivu; the third sets out some recommendations to take persons with disabilities effectively into account in humanitarian action for the armed conflict in North Kivu.

The situation of persons with disabilities during armed conflict in North Kivu

Alongside women and children, persons with disabilities are the hardest hit by armed conflicts. In North Kivu, they are heavily exposed to the effects of these conflicts, and many more become disabled as a result of armed conflict and traffic accidents. The authors spoke to several organizations, some of which were disabled people’s organizations (DPOs), including l’Organisation Féminine de la Recherche pour le Développement Intégral (OFERDI), l’Action de Charité pour l’Intégration et le Développement (ACID) Les Kapitula, and the Synergie des Associations des Personnes Handicapées (SYAPH). The information presented below was collected from the interviews conducted in relation to North Kivu between January 2019 and December 2021.

Many persons with disabilities died because they were not able to flee, unlike able-bodied people. An OFERDI representative said:

7 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Kampala, 23 October 2009 (entered into force 6 December 2012), available at: www.unhcr.org/uk/about-us/background/4ae9bede9/african-union-convention-protection-assistance-internally-displaced-persons.html.

8 Sphère, *Le manuel Sphère: La Charte humanitaire et les Standards minimum de l’intervention humanitaire*, 4th ed., Sphère, Geneva, 2018.

9 Inter-Agency Standing Committee (IASC), *IASC Guidelines, Inclusion of Persons with Disabilities in Humanitarian Action*, 2019, 19 November 2019, available at: <https://interagencystandingcommittee.org/iasc-guidelines-on-inclusion-of-persons-with-disabilities-in-humanitarian-action-2019>.

10 United Nations General Assembly, Universal Declaration of Human Rights, Paris, 10 December 1948.

When the shooting starts, people panic and run in all directions. It is everyone for themselves and no one has the time or the strength to take care of a person with disability. When attackers overrun an area, those who stay in their homes (particularly persons with disabilities, the elderly and the sick) are killed. If they aren't killed by weapons or fire, they die of hunger, stuck in the house with no way of getting something to drink or to eat because the other members of their family and community have fled the violence. Others try to get away with their loved ones but end up abandoned along the way because they can't keep up with the others. On top of harassment of all sorts, they are also insulted and discriminated against.¹¹

This situation is an everyday experience not only in Masisi Territory, but also in other areas of North Kivu.

There are worrying cases of persons with disabilities being attacked and raped in North Kivu, although cases are rarely reported to the authorities (for fear of reprisals, the weakness or almost complete lack of systems for managing complaints, local customs, impunity, ignorance, the difficulty of bringing charges by people who are, for example, partially sighted or mute, etc.). “Some die as a result, others catch diseases or have unwanted pregnancies, yet others are left traumatized and without any help,” said an ACID Les Kapitula representative.¹² A representative of civil society stated:

In Bambo and Tongo, in Rutshuru Territory, for example, men are subjected to forced labour, and others are sexually abused by armed men, while trying to get to their fields. Women and girls are turned into instruments for sexual gratification by the heads of armed groups, who take them out to the bush and, if they try to escape, kill them. Once persons with disabilities have been abused by weapon bearers, they are abandoned and have no choice but to go back home, despite all the risks that that entails.¹³

According to a SYAPH representative:

Even when they try to make ends meet and to provide for their and their families' livelihoods and find how to meet their own needs in times of peace (through income-generating activities), persons with disabilities are left empty-handed in the aftermath of armed conflicts. ... Their property, houses and tools are stolen and/or set on fire, all the activities and initiatives wiped out.¹⁴

As both representatives of ACID Les Kapitula and SYAPH mentioned, the income-generating activities they carry out on behalf of persons with disabilities have been

11 Anonymous interview with an OFERDI representative, a DPO active in Kitshanga/Mweso, Masisi Territory, North Kivu, November 2021.

12 Anonymous interview with an ACID Les Kapitula representative, a DPO active in Kiwanja, Rutshuru Territory, North Kivu, November 2021.

13 Anonymous interview with a representative of civil society in Bambo/Rutshuru, May 2021.

14 Anonymous interview with a SYAPH representative, a platform for DPOs in Goma, North Kivu, November 2021.

destroyed several times in the armed conflicts, making their members yet more vulnerable. For example, pigs and goats raised by OFERDI were stolen by attackers in Kitshanga in 2020. In addition, a public secretariat set up by SYAPH in Goma had its equipment stolen by bandits.

In interviews carried out for this study, the authors have heard several statements that bore witness to the situation of persons with disabilities in armed conflict in North Kivu. Here are two:

When the shooting starts, we often don't know in which direction it's coming from. So, people start running in every direction, but all with the same idea of plunging into the bush to hide out of sight. For more than 17 years, I've been wheelchair-bound. I can't go anywhere without my wheelchair. When people run off into the bush, I can't follow them because I can't find any way through the bush in my wheelchair. Plus, it's often night-time, so it's hard to see and check where you're going. And in such a situation, everybody wants to be quick to run away. Even my wife and children abandon me and run away, though I don't hold it against them.¹⁵

We're used to it, especially me. When they start shooting, I just pray to God that he'll save my soul, because I can't run away. My family already knows that after a few rounds have been shot, even the people from the village will start looting the houses of those who've fled. So, they ask me every time to stay in the house, given that in my state I can't run away. (I'm blind, I can't see anything with either of my eyes.) If I hear anyone come near the house, I shout out, and if it's a thief, they run off. So, when the shooting starts, I'm the guardian of the house and the goods. In my family's eyes, they're more valuable than I am.¹⁶

Challenges to protecting persons with disabilities during the armed conflict in North Kivu

Protecting persons with disabilities during the armed conflicts in North Kivu faces several challenges in general, which become even tougher when the individual needs of each person with disability is taken into account. Here are some of the key challenges that the authors have identified.

Communities', States' and humanitarian actors' ignorance about inclusion and the lack of awareness of the rights of persons with disabilities

A defender of disabled people's human rights, Théophile Shukuru, has said:

15 Anonymous interview with a person with reduced mobility, Bambo/Rutshuru, November 2021.

16 Anonymous interview with a visually impaired person, Mangina/Beni, November 2021.

Many people think that protecting persons with disabilities is an act of charity, done out of pity for them; they are unaware that there are not only general but also specific legal instruments that guarantee the protection of persons with disabilities both in situations of peace and during humanitarian crises (such as armed conflicts).¹⁷

On the basis of its field surveys, Oversee Advising Group (OAG) states:

The quantitative data indicates a low awareness of the legal framework (40% of actors said they knew about the legal framework). Some actors also state that they do not know the legal framework very well, but that is not indispensable for fulfilling their role.¹⁸

The use of tools, policies and strategies that exclude persons with disabilities

Although efforts are beginning to be made by the Protection Cluster¹⁹ to take persons with disabilities into account in humanitarian action, many humanitarian actors use tools, policies and strategies that do not consider the specific needs of persons with disabilities during operations designed to protect victims of armed conflict in North Kivu. For example, before 2019 identification and distribution cards, used to select beneficiaries, excluded disability almost entirely. Partially as a result, persons with disabilities are forgotten during most activities. Humanity and Inclusion found that “47 per cent of actors believed that disability is taken into account in policy and strategy documents, 29 per cent thought that these documents do not take disability into account, and 24 per cent did not know”.²⁰ Furthermore:

in general, persons with disabilities are not taken into consideration in humanitarian strategies and putting them in the category of vulnerable people or people with specific needs is not likely to lead to their specific needs being taken into consideration, and hence becoming a risk to championing their rights. This leads *de facto* to risks of discrimination and exclusion.²¹

17 Théophile Shukuru, defender of disabled people’s human rights, interview on raising awareness of the Convention on the Rights of Persons with Disabilities, Goma, December 2021.

18 OAG, *Prise en compte des Personnes Handicapées dans la réponse humanitaire en RDC : Enquête CAP multisectorielle couplée avec les Questions du Washington Group*, Humanity and Inclusion, Kinshasa, October 2021, pp. 21–7, available at: <https://reliefweb.int/report/democratic-republic-congo/prise-en-compte-des-personnes-handicap-es-dans-la-r-ponse>.

19 The Protection Cluster, led by the United Nations High Commissioner for Refugees (UNHCR) in North Kivu, coordinates the protection response of humanitarian actors. The co-lead is the Norwegian Refugee Council. It holds a meeting once a month and provides technical guidance on taking protection into account in humanitarian operations. See Protection Cluster, *Orientations du Cluster Protection au Nord-Kivu*, PowerPoint presentation, Goma, February 2021, slides 5–15.

20 Humanity and Inclusion, above note 5, p. 21.

21 *Ibid.*, p. 28.

The lack of data on disability and the lack of indicators specifically linked to disability

The United Nations found that the “lack of disability-related data, including qualitative and disaggregated data, is one of the major barriers to the accurate assessment of disability inclusion in the development and humanitarian contexts”.²² Humanity and Inclusion’s studies confirm this, underlining that “humanitarian and state actors alike recognize that there are no statistics on persons with disabilities”.²³ Censuses are not carried out by government authorities, and even humanitarian actors rarely pass on data on people they have identified as disabled. DPOs do not themselves know how many persons with disabilities there are in the areas they cover. This applies in particular to North Kivu, and to the DRC in general, where there are almost no data on disability. Data on disability are generally not collected (even the tools used are not suitable for this) and “many actors justify this by stating they do not have the time or the budget given how urgent the operation is”.²⁴

The absence of data makes it difficult to make decisions about how to protect persons with disabilities

One of the people the authors interviewed said:

The state does not have the means to carry out a census – it’s too expensive. The state needs to turn to its international partners. Some protection actors ask us for the disaggregated data as we are the ones who centralize data collection; but we can’t provide the data as even we don’t have them. So, without the statistics, they cannot take disability into account.²⁵

Persons with disabilities and DPOs are not involved

Humanitarian and State actors who involve persons with disabilities and DPOs in activities to protect victims of armed conflict (identifying beneficiaries, awareness-raising, training, etc.) are rare. In addition, DPOs do not regularly seek contact with humanitarian actors or State actors to ask for support. DPOs keep their distance because every time they request meetings from non-governmental organizations, they are rebuffed. They are neglected, and humanitarian actors think that DPOs only approach them to beg.²⁶ Humanitarian actors acknowledge the “lack of inclusion of persons with disabilities at the stage of the conception of

22 United Nations, United Nations Disability Inclusion Strategy, available at: www.un.org/en/content/disabilitystrategy/assets/documentation/UN_Disability_Inclusion_Strategy_english.pdf.

23 Humanity and Inclusion, above note 5, p. 28.

24 Statement by a humanitarian actor while drawing up the Humanitarian Response Plan in the DRC, UNOCHA, Goma, June 2020.

25 Anonymous interview with an official at the Institut National de la Statistique, Goma, November 2021.

26 Statement by DPO representative in North Kivu while drawing up Humanitarian Response Plan in the DRC, UNOCHA, Goma, June 2020.

projects, which thereby excludes them from the programming stage and hence the activities”.²⁷ This is one of the barriers preventing persons with disabilities from getting access to humanitarian action in the DRC.

The non-inclusive nature of budgets in relation to disability (budgets do not take specific needs of persons with disabilities into account)

During activities to protect victims of armed conflict in North Kivu, several actors do not take the specific needs of persons with disabilities into account. Budgets do not cover disability and are less flexible; as a result, persons with disabilities find it hard to access humanitarian aid. For example, during distribution of essential items, most humanitarian actors do not take specific needs into account when putting kits together and do not take any measures to transport the kits from the place of distribution to the home of persons with disabilities. In this regard, OAG states that “actors also mention budgetary issues”²⁸ as obstacles to the inclusion of persons with disabilities.

The inaccessibility of infrastructure and means of communication (offices, media, etc.)

In its surveys, OAG states that only 30% of actors state that their programmes and information are accessible.²⁹ In relation to armed conflict in North Kivu, information is mainly transmitted by radio or is carried by word of mouth after awareness-raising sessions, but this does not take into account the specific needs of persons with disabilities who may be partially deaf or visually impaired. Moreover, during awareness-raising sessions or distributions, sites are often inaccessible and not in line with the needs of persons with disabilities. In addition, most offices and other kinds of infrastructure used by humanitarian and State actors are inaccessible: for example, there are too many stairs, which hinders access for people with reduced mobility. Access to sanitary facilities is even more complicated, both in humanitarian and State actors’ offices and sites where displaced people are located. When persons with disabilities try to use these facilities, they are exposed to greater risks (falling, fractures, infection, etc.). World Vision draws attention to water, sanitation and hygiene practices in schools that do not generally meet accessibility standards (classes and latrines).³⁰ The United Nations Office for the Coordination of Humanitarian Affairs, meanwhile, recognizes that the buildings housing its offices in Goma, North Kivu, are not accessible (in particular, there are many stairs and no ramps) and that they need to adapt them to make them so.³¹

27 OAG, above note 18, p. 23.

28 *Ibid.*

29 *Ibid.*, p. 27.

30 *Ibid.*, p. 24.

31 Statement by UNOCHA official while drawing up Humanitarian Response Plan in the DRC, Goma, June 2020.

These situations require transformative action to ensure the inclusion of persons with disabilities in the protection of victims of armed conflict in North Kivu.

For inclusive humanitarian action in armed conflict in North Kivu

The challenges to protecting persons with disabilities during armed conflict in North Kivu no doubt have solutions. To achieve them, all those involved (the DRC's government – who are first and foremost responsible for protecting all individuals within the country's borders – members of armed groups, humanitarian actors, who support the government as partners, the community in general, and disabled people and DPOs) need to show goodwill and to uphold their duties under Article 11 of the Convention on the Rights of Persons with Disabilities. In this regard, the authors make several recommendations.

Raise the awareness of the local population and community leaders regarding the inclusion of persons with disabilities

In North Kivu, it is important that humanitarian actors (in particular via the Protection Cluster) and State actors (via technical services such as the Division of Social Affairs) raise awareness of the communities regarding respect for the rights of persons with disabilities and their protection. At the same time, they must work on building solidarity among communities in order to protect persons with disabilities in armed conflicts.

Strengthen the capacities of humanitarian and State actors and DPOs to include persons with disabilities in humanitarian action, in particular during humanitarian crises like armed conflicts

As Humanity and Inclusion reported:

State and humanitarian actors in the DRC are not sufficiently aware of persons with disabilities and consequently of their specific needs, and therefore cannot make reasonable changes and adapt their response. For the most part, they have little awareness and knowledge of disability, which prevents them from having a positive view of persons with disabilities. Awareness-raising and capacity strengthening projects are therefore needed in order to make humanitarian actors see persons with disabilities in the appropriate light, in line with the recommendations of the Convention on the Rights of Persons with Disabilities.³²

Make tools, policies and strategies inclusive

All the various policies, plans, strategies, etc. should include ideas on disability from the onset; otherwise, disability will not be taken into account in practice.

³² Humanity and Inclusion, above note 5, p. 17.

Systematically disaggregate data by age, sex and disability

Disaggregating data by disability (in reports, on identification, distribution and follow-up cards, etc.) will attract the attention of actors and, as a result, enable actors to put in place inclusive activities. Efforts have been made to disaggregate data by age and sex; the same can, therefore, be done for disability.

Involve persons with disabilities and DPOs directly and at all stages of the operation

Persons with disabilities are experts when it comes to what they need. They should not be side-lined but rather systematically involved in determining what their needs are. Some humanitarian actors think that persons with disabilities are invisible. The authors, however, believe that this attitude reveals a lack of determination and of engagement with inclusion; persons with disabilities are found among different categories of people (men, women, boys, girls, the elderly, etc.). In addition, there are more and more groups of persons with disabilities forming associations, which represents a step forward for accessibility. However, DPOs need stronger technical, operational and financial capacities to reach their objectives, hence their need for support from humanitarian and State actors. It is also important to mention that persons with disabilities and DPOs have to try harder to reach out to humanitarian and State actors (in particular, by taking part in humanitarian coordination meetings, registering with State technical services, etc.) in order to boost their inclusion in humanitarian action.

Put in place inclusive budgets

To meet the costs of making adjustments and adapting facilities to be more disability-friendly, between 2 and 7% of the overall budget needs to be set aside.³³ If this is budgeted in from the beginning, a lack of funds will no longer be an obstacle to including persons with disabilities in humanitarian action. Even if no persons with disabilities are identified among the beneficiaries in the needs assessments (which is very rare), the relatively low cost of inclusion should always be budgeted for. After all, “disability can hit anybody at any moment, as we are all potentially persons with disabilities”.³⁴

33 Age and Disability Consortium, *Humanitarian Inclusion Standards for Older People and People with Disabilities*, CBM International, HelpAge International and Handicap International, Bensheim, London and Lyon, 2018, available at: <https://reliefweb.int/report/world/humanitarian-inclusion-standards-older-people-and-people-disabilities>; and Light for the World, *Resource Book on Disability Inclusion*, 2017, p. 36, available at: www.light-for-the-world.org/publications/resource-book-on-disability-inclusion/.

34 Humanity and Inclusion, “Messages de sensibilisation sur le handicap et l’inclusion”, unpublished, Goma, June 2020.

Create indicators to monitor how persons with disabilities are being taken into account in the prevention and response to crises

Indicators ensure that disabled people are taken into account in humanitarian response; for example, the number of people affected by the response, the number of adjustments made, etc.

Make reasonable adjustments

It is important to adapt inaccessible facilities by making reasonable adjustments. This could entail, for example, installing ramps, guardrails and handrails, optimizing space, and translating important texts into sign language or Braille.

Turn to inclusion specialists

In emergency operations, such as the armed conflict in North Kivu, humanitarian actors should request the support of technical inclusion specialists (e.g. Humanity and Inclusion's technical advisers) or hire permanent staff or consultants who are experts in inclusion in order to ensure that inclusive humanitarian action is put in place.

Diversify the means of communication to take into account the different types of disability

To avoid every form of exclusion and discrimination, humanitarian actors need to diversify the means of communication that they use. For example, for awareness-raising campaigns, sign-language interpreters and various communication methods should be used (images, sounds, posters, body language, hand gestures, etc.).

Conclusion

As shown above, persons with disabilities are especially vulnerable in the armed conflict in North Kivu. Although they face many difficulties in times of peace (discrimination, violence, sexual and economic exploitation and abuse), these difficulties are made worse in times of war, which has been the case for several decades in North Kivu. In addition to being victims of armed conflict, persons with disabilities have specific needs that require particular attention on the part of protection actors. Since they are not, or are no longer, taking part in hostilities, persons with disabilities have a right to special protection under various national, regional and international legal instruments, in particular international humanitarian law, the Convention on the Rights of Persons with Disabilities and the Kampala Convention (2009).

Most of the lacunae and challenges identified in taking persons with disabilities into account in the protection of victims of armed conflict are interlinked – and are in addition to ignorance, a lack of political will and a lack of flexibility on the part of protection actors. Providing assistance to victims of armed conflict is essential for saving lives. However, it is also essential to ensure that assistance is accessible, upholds human dignity and is adapted to the specific needs of beneficiaries. The authors hope that the recommendations set out in this study will effectively and efficiently take persons with disabilities into account for protection work on behalf of victims of armed conflict. All actors should take these recommendations as their own to ensure inclusive humanitarian action.

As this study did not and could not aim to cover all the complexities of disability and vulnerability in humanitarian crises (such as armed conflict), it remains open to further investigation. Contributions by other researchers would ensure that the gaps left by this study were filled, and thereby help improve the quality of the protection of persons with disabilities caught up in armed conflict in North Kivu and around the world.

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.

The origins and influence of victim assistance: Contributions of the Mine Ban Treaty, Convention on the Rights of Persons with Disabilities and Convention on Cluster Munitions

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Abstract

The establishment of victim assistance as a core element of humanitarian disarmament emerged from three treaties: the 1997 Mine Ban Treaty (MBT), the 2006 Convention on the Rights of Persons with Disabilities (CRPD) and the 2008 Convention on Cluster Munitions (CCM). The MBT introduced the concept of victim assistance, and the CRPD created a framework of human rights that influenced its evolution. Drawing on its predecessors, the CCM made victim assistance a robust and rights-based legal obligation. This article analyses the negotiating history and content of the treaties to show how victim assistance evolved, particularly in the areas of inclusion and human rights. It examines the treaties' implementation, which reveals that while the CRPD set standards for victim assistance, the MBT and CCM's victim assistance programmes have benefitted persons with disabilities in practice. Finally, it offers lessons from the MBT, CRPD and CCM for implementation and interpretation of victim assistance obligations under the 2017 Treaty on the Prohibition of Nuclear Weapons. The article concludes that the three treaties have collectively established assisting victims as a feature of disarmament law, helped persons with disabilities realize their rights, and laid the groundwork for adapting victim assistance to new challenges.

Keywords: Disarmament, victim assistance, Mine Ban Treaty, Convention on Cluster Munitions, Convention on the Rights of Persons with Disabilities, Treaty on the Prohibition of Nuclear Weapons.

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Introduction

The establishment of victim assistance as a core element of humanitarian disarmament can be credited to a trio of treaties adopted at the turn of the twenty-first century. The 1997 Mine Ban Treaty (MBT) introduced the concept.¹ The 2006 Convention on the Rights of Persons with Disabilities (CRPD) created a framework of human rights that influenced its evolution.² The 2008 Convention on Cluster Munitions (CCM) made victim assistance a robust and rights-based legal obligation.³ These instruments have improved the lives of landmine and cluster munition victims and persons with disabilities and informed the addition of victim assistance provisions to nuclear weapons law.

This article traces the history, implementation and influence of these three treaties with regard to victim assistance. In the first part, analysis of the instruments' history and content shows how victim assistance became increasingly inclusive and rights based. In the second part, discussion of implementation reveals that while the

1 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997 (entered into force 1 March 1999) (Mine Ban Treaty).

2 Convention on the Rights of Persons with Disabilities, New York, 13 December 2006 (entered into force 3 May 2008).

3 Convention on Cluster Munitions, Dublin, 30 May 2008 (entered into force 1 August 2010).

CRPD has set standards for victim assistance, the MBT and CCM's victim assistance programmes have benefitted persons with disabilities in practice. The third part draws lessons from the MBT, the CRPD and the CCM for implementation and interpretation of victim assistance obligations under the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW).⁴ The article concludes that the three treaties have collectively established assisting victims as a feature of disarmament law, helped persons with disabilities realize their rights, and laid the groundwork for adapting victim assistance to new challenges.

History and content

The processes behind and provisions of the MBT, the CRPD and the CCM illuminate the evolution of victim assistance. They show an increased attention to inclusion and the emergence of a rights-based approach to assisting victims. The MBT's novel humanitarian emphasis encouraged civil society and survivor participation and introduced victim assistance to disarmament. The CRPD was spearheaded by organizations of persons with disabilities and represented the first international legal framework for disability rights. Merging the developments of the previous instruments, the CCM established dramatically enhanced human rights-based victim assistance obligations, negotiated by and for cluster munition victims.

Mine Ban Treaty

The MBT marked a turning point in disarmament law. While previous weapons treaties were driven by national security concerns, the MBT adopted a humanitarian approach to disarmament. It was the first in a line of treaties with the primary goal "to prevent and remediate arms-inflicted human suffering and environmental harm through the establishment and implementation of norms".⁵ As part of this shift, the MBT, in its process and substance, contributed two innovations that would benefit those affected by landmines. It recognized the importance of including civil society and affected individuals in decision-making, and it became the first disarmament treaty with a victim assistance provision.

Civil society and survivor inclusion

Civil society and survivors drove the Ottawa Process that created the MBT, and their involvement led to the adoption of a victim assistance provision in the final text. The

4 Treaty on the Prohibition of Nuclear Weapons, New York, 7 July 2017 (entered into force 22 January 2021).

5 Humanitarian Disarmament, "About Humanitarian Disarmament", available at: <https://humanitarianandisarmament.org/about/> (all internet references were accessed in September 2022). See, generally, Bonnie Docherty, "Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament Law", *Austrian Review of International and European Law*, Vol. 15, 2010.

International Campaign to Ban Landmines (ICBL), a global civil society coalition founded in 1992, highlighted the humanitarian impacts of landmines and pushed for a new instrument banning them. It became a critical actor in the negotiations, which took place outside of the United Nations (UN) and thus could have more inclusive rules of procedure. The ICBL, including landmine survivors, also held meetings parallel with the diplomatic conferences. The two types of convenings reinforced each other and promoted a strong partnership of States and civil society that achieved the treaty in 1997.⁶ The ICBL and its coordinator, Jody Williams, received the Nobel Peace Prize for their efforts.

Landmine survivors, including those with disabilities, played a key role in the treaty negotiations, and advocated strongly for a victim assistance obligation, although they faced indifference or opposition to the inclusion of these provisions from some States and civil society members. In 1996, two landmine survivors – Jerry White and Kenneth Rutherford – founded the Landmine Survivors Network to ensure that survivors were fairly represented in the ICBL and that their demands were included in the campaign’s messaging.⁷ Rutherford described the often uphill battle to incorporate assistance for victims on the agenda and in the treaty and to treat landmine survivors not as “poor victims” and “poster children” for the humanitarian harm of landmines, but as equals and human beings with agency.⁸

As the Ottawa Process unfolded, the Landmine Survivors Network consistently pressed for provisions on victim assistance through direct lobbying with governments, advocacy stunts and press conferences.⁹ A February 1997 civil society conference in Mozambique released a declaration calling for assistance for survivors.¹⁰ The first draft treaty text presented in Brussels in June 1997 excluded such a provision, but non-governmental organizations (NGOs), including the Landmine Survivors Network, Handicap International, Medico International and the Jesuit Refugee Service, pushed back and issued a strongly worded statement. By the end of that conference, they had secured support from South Africa and the International Committee of the Red Cross (ICRC) that a landmine ban treaty must include victim assistance.¹¹ Other allies joined over the months that followed, and at the time of the treaty’s adoption, victim assistance was a recognized element of both the ICBL’s platform and the treaty text.

The MBT acknowledges the importance of inclusion in the preamble of its final text. Specifically, it recognizes the efforts “undertaken by the International Red

6 Kenneth R. Rutherford, *Disarming States: The International Movement to Ban Landmines*, Praeger Security International, Santa Barbara, CA, 2010, pp. 91–105.

7 Jerry White and Ken Rutherford, “The Role of the Landmine Survivors Network”, in Maxwell A. Cameron, Robert J. Lawson and Brian W. Tomlin (eds), *To Walk Without Fear: The Global Movement to Ban Landmines*, Oxford University Press, Toronto, 1998, pp. 99–117.

8 K. R. Rutherford, above note 6, p. 66; J. White and K. Rutherford, above note 7, p. 105.

9 J. White and K. Rutherford, above note 7.

10 University of Pennsylvania – African Studies Center, “Final Declaration of the 4th International NGO Conference on Landmines: Toward a Mine Free Southern Africa”, Maputo, Mozambique, 25–8 February 1997, available at: www.africa.upenn.edu/Urgent_Action/apic_32197.html.

11 J. White and K. Rutherford, above note 7, p. 111.

Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organizations around the world”.¹²

Documents produced at the MBT’s review conferences have reinforced and expanded on the principle of inclusivity, although, at least in the early years, advocates had to maintain pressure to preserve victim assistance’s place on the treaty’s agenda.¹³ In Action 38 of the Nairobi Action Plan, adopted at the First Review Conference in 2004, States Parties commit to “[e]nsure effective integration of mine victims in the work of the Convention, inter alia, by encouraging States Parties and organizations to include victims on their delegations.”¹⁴ Action 39 calls for ensuring the effective contribution of “health, rehabilitation and social services professionals and officials”, and encourages their inclusion on State delegations.¹⁵

This culture of inclusion has also embraced the principle of non-discrimination, which is a prerequisite for inclusion. The 2009 Cartagena Review Conference Final Report, for example, states that: “victim assistance efforts should promote the development of services, infrastructure, and policies to address the rights and needs of all women, girls, boys and men with disabilities, regardless of the cause of the disability”.¹⁶

Introduction of victim assistance

The MBT’s humanitarian purpose, along with its inclusive process, led to the introduction of disarmament’s first victim assistance provisions. According to the preamble, the treaty’s goal is to “end the suffering and casualties caused by anti-personnel mines”.¹⁷ Negotiators recognized that a comprehensive response to this suffering necessitated not only preventing future use but also addressing the harm that had already occurred.¹⁸

12 Mine Ban Treaty, above note 1, preamble.

13 Interview with Janet E. Lord, Senior Fellow, Harvard Law School Project on Disability, and formerly with the Landmine Survivors Network, online, August 2022 (on file with the authors).

14 First Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines on Their Destruction, “Nairobi Action Plan 2005–2009”, 29 November–3 December 2004, Action 38, available at: www.icbl.org/media/933290/Nairobi-Action-Plan-2005.pdf (Nairobi Action Plan).

15 *Ibid.*, Action 39.

16 Second Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Final Report, UN Doc. APLC/CONF/2009/9, 17 June 2010, para. 100 (Cartagena Final Report). See, also, First Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines on Their Destruction, Final Report, UN Doc. APLC/CONF/2004/5, 9 February 2005, para. 68 (Nairobi Final Report) (calling for the “non-discrimination of victims”).

17 Mine Ban Treaty, above note 1, preamble.

18 South African Ambassador Jacob Selebi, who served as president of the final negotiations, stated that including provisions for victim assistance as well as clearance obligations were “central to the comprehensiveness of the treaty”. Jacob S. Selebi, “Foreword by Ambassador Jacob S. Selebi, South Africa”, in Louis Maresca and Stuart Maslen (eds), *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1999*, Cambridge University Press, Cambridge, 2000, p. xxii.

The MBT includes two references to victim assistance. The preamble expresses States Parties' desire "to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims".¹⁹ Article 6(3) requires States Parties "in a position to do so ... [to] provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs".²⁰ The provision is important for introducing the concept of victim assistance to disarmament and for addressing both medical and socio-economic needs. Nevertheless, the operative provision applies only to States Parties "in a position to do so", and lacks details about how to implement it.²¹ In addition, the term "victim assistance", which continues to be used, is disempowering and not reflective of a rights-based approach.

Subsequent treaty documents helped to expand the understanding of victim assistance under the MBT. The Nairobi Action Plan broadened the scope of victim assistance to encompass psychological care, specified that it should address age and gender considerations, and established institutional guidelines, such as those regarding data collection and monitoring of progress. The Nairobi Action Plan also commits States to ensure that rehabilitation and other services are provided to "all persons with disabilities".²² The Nairobi Final Report explicitly referenced human rights, stating that "States Parties have come to recognize that victim assistance is more than just a medical or rehabilitation issue – it is also a human rights issue."²³

Convention on the Rights of Persons with Disabilities

The CRPD opened for signature a decade after the MBT. Its provisions are directed at all persons with disabilities, not just victims of specific weapons. They also cover a wider range of rights. Nevertheless, the CRPD's history and content are relevant to the evolution of victim assistance. The CRPD's negotiations elevated the bar for including civil society organizations. The final treaty articulated rights applicable to those affected by arms that can inform the provision of victim assistance.

Inclusion of civil society and persons with disabilities

Like the MBT, the CRPD was significantly influenced by those most affected by its provisions. An international disability rights movement led by persons with disabilities gathered momentum in the late 1990s. The International Disability Alliance, a network of organizations of persons with disabilities founded in 1999, established the International Disability Caucus (IDC), which would be

19 Mine Ban Treaty, above note 1, preamble.

20 *Ibid.*, Art. 6(3).

21 *Ibid.*

22 Nairobi Action Plan, above note 14, Action 33.

23 Nairobi Final Report, above note 16, para. 68.

instrumental in the negotiation of the CRPD.²⁴ States began the process to create the CRPD in 2001 when they adopted a UN General Assembly resolution, introduced by Mexico. The resolution established an *ad hoc* committee to consider proposals for a convention to “promote and protect the rights and dignity of persons with disabilities”.²⁵

Between the first and second *ad hoc* meetings in 2002 and 2003, the IDC built support and issued recommendations for a treaty.²⁶ By the end of the second *ad hoc* committee, New Zealand proposed and the committee agreed to create a working group of States and twelve representatives of disability organizations to develop the draft text—a revolutionary decision from an inclusivity perspective.²⁷ At the third *ad hoc* committee meeting, the chair suggested closing discussions to all civil society, including disability organizations; however, there was significant pushback from States and civil society, and the meetings remained open.²⁸ The IDC intervened throughout the process on substantive issues ranging from defining disability to outlawing compulsory treatment of persons with disabilities.²⁹

Many landmine survivors and their representative organizations participated in the CRPD negotiations and lobbied for provisions associated with victim assistance. For example, they advocated for peer support as a measure to support independence and inclusion. The concept had emerged from efforts to reintegrate landmine survivors into society, an MBT obligation, and the CRPD references peer support in Article 26 on Habilitation and Rehabilitation. Landmine survivor advocates also encouraged the disability rights community to consider international humanitarian law and include Article 11 on Situations of Risk and Humanitarian Emergencies, which encompasses situations of armed conflict.³⁰

The final text of the CRPD established inclusion as a key principle. Article 3 states that one of its general principles is “[f]ull and effective participation and inclusion in society.”³¹ Article 4 highlights the importance of inclusion, declaring: “States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative

24 The International Disability Alliance, “History”, available at: www.internationaldisabilityalliance.org/content/history.

25 UN General Assembly, Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, UN Doc. A/RES/56/168, 19 December 2001, para. 1.

26 Rosemary Kayess and Phillip French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities”, *Human Rights Law Review*, Vol. 8, No. 1, 2008, p. 16. For example, see Disabled Peoples’ International, “Position Paper Regarding a New International Human Rights Convention for Disabled People”, 25 February 2003, available at: www.un.org/esa/socdev/enable/rights/contrib-dpi.htm.

27 Theresia Degener and Andrew Begg, “From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations”, in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham, 2017, p. 19.

28 *Ibid.*, p. 22.

29 R. Kayess and P. French, above note 26, pp. 20–33.

30 Interview with Janet E. Lord, above note 13.

31 Convention on the Rights of Persons with Disabilities, above note 2, Art. 3.

organizations”, during implementation of the CRPD and other decision-making processes relevant for persons with disabilities.³²

The CRPD lists non-discrimination as a general principle, and it appears in the preamble and several specific operative articles, including those addressing women and children with disabilities.³³ Article 5 on Equality and Non-Discrimination, for example, “prohibit[s] all discrimination on the basis of disability and guarantee[s] to persons with disabilities equal and effective legal protection against discrimination on all grounds”.³⁴ The principle of non-discrimination is essential to ensuring persons with disabilities are included in society and can enjoy their human rights.

Codification of a rights-based approach

The final text of the CRPD codified a rights-based approach to disability.³⁵ It contrasted with earlier international instruments that adopted a medical model, regarding disability as a “an impairment that need[ed] to be treated, cured, fixed, or rehabilitated”. Under that model, persons with disabilities required “shelter and welfare”.³⁶ The CRPD, by contrast, represented what the chair of the *ad hoc* committee referred to as a “paradigm shift”.³⁷ The UN High Commissioner for Human Rights explained that the convention “reject[ed] the ‘view of persons with disabilities as objects of charity, medical treatment and social protection’ and as affirming persons with disability as ‘subjects of rights, able to claim those rights as active members of society’”.³⁸

The CRPD enumerates a range of human rights and applies them to the disability context. It encompasses civil and political rights, including the right to life, the right to access to information, and the right to participate in political and public life. It also highlights economic, social and cultural rights, such as the rights to education, health and work. These rights are also relevant for victim assistance because they apply to those affected by arms as well as persons with disabilities.

Convention on Cluster Munitions

Victim assistance in the next humanitarian disarmament treaty, the CCM, drew significantly from the MBT and its action plans as well as the CRPD.³⁹ Following

32 *Ibid.*, Art. 4. In addition, Article 33(3) mandates that “[c]ivil society, in particular persons with disabilities and their representative organizations shall be involved and participate fully” in the process of monitoring the convention’s implementation. *Ibid.*, Art. 33(3).

33 *Ibid.*, Arts 6 and 7.

34 *Ibid.*, Art. 5.

35 R. Kayess and P. French, above note 26, p. 3.

36 Theresia Degener, “A New Human Rights Model of Disability”, in V. Della Fina *et al.* (eds), above note 27, p. 42.

37 R. Kayess and P. French, above note 26, p. 3.

38 *Ibid.*

39 Convention on Cluster Munitions, above note 3, Art. 2(1).

the MBT's humanitarian disarmament lead, the CCM was driven by civil society and survivor pressure and included victim assistance provisions. At the same time, it modified the content of those provisions based on the human rights principles of the CRPD. In the end, it merged the precedent of its predecessors to ensure a highly inclusive process and strong, detailed and legally binding victim assistance obligations.

Heightened inclusion of civil society and survivors

The Oslo Process that produced the CCM saw a heightened role for civil society and survivors in a disarmament forum. The Cluster Munition Coalition (CMC) was a key player throughout the negotiations of the convention, building support for its humanitarian provisions, and enjoying the direct access to the negotiations that the IDC had secured.⁴⁰ Hundreds of campaigners attended the Oslo Process meetings, and the Coalition was able to participate directly in negotiations.⁴¹ The CMC played an essential role both inside the negotiating room and outside of it. Inside, civil society representatives enjoyed nearly equal speaking rights with States and intervened on substantive proposals. Outside the room, Coalition advocates lobbied diplomats, provided research and materials in support of their proposals, encouraged their governments to participate in conferences and conducted grassroots advocacy.⁴² Although some States called to close parts of the final negotiations to civil society, as in the case of the CRPD, they did not prevail. Ultimately, States voiced appreciation of the civil society's contributions to achievement of the final convention.⁴³

Cluster munition survivors, including the Ban Advocates group coordinated by Handicap International, were particularly active, presenting testimonies and intervening substantively. Spokespersons included Branislav Kapetanović, a former Serbian military deminer, who lost all his limbs during a clearance accident, and Soraj Ghulam Habib, an Afghan boy who was so gravely injured by an unexploded submunition that doctors initially advised his father not to try to save him.⁴⁴ Some commentators have credited the expansion of victim assistance in the CCM to the increased participation of survivors:

40 Markus Reiterer and Tirza Leibowitz, "Article 5: Victim Assistance", in Gro Nystuen and Stuart Casey-Maslen (eds), *The Convention on Cluster Munitions: A Commentary*, Oxford University Press, Oxford, October 2010, p. 328.

41 Bonnie Docherty, "Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Law", *Human Rights Quarterly*, Vol. 31, No. 4, 2009, p. 941.

42 Human Rights Watch, *Meeting the Challenge: Protecting Civilians through the Convention on Cluster Munitions*, November 2010, pp. 122–4, available at: www.hrw.org/sites/default/files/reports/armsclusters1110webwcover.pdf.

43 See, for example, Closing Statement by the United Kingdom to the Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 30 May 2008 (thanking the CMC despite the "vigorous discussions" they had had); Statement by New Zealand to the Convention on Cluster Munitions Signing Conference, Oslo, 3 December 2008 (welcoming the role of civil society and stating, "The constructive relationship we have built demonstrates what is achievable when we work together.").

44 Human Rights Watch, above note 42, p. 123.

A contributing factor to this upward movement was the role that civil society played alongside negotiating States ... The participation of Ban Advocates, campaigning for the ban and for victim assistance from first-hand experience of the devastating effects of cluster munitions, helped bring the issue to the fore and garner almost universal support.⁴⁵

The final text captures the importance of inclusion. The preamble, like that of the MBT, acknowledges the role of civil society and other non-State actors, recognizing the efforts to end civilian suffering “undertaken by the UN, the International Committee of the Red Cross, the Cluster Munition Coalition and numerous other non-governmental organisations around the world”.⁴⁶ The CCM goes beyond the MBT, however, by making inclusion a forward-looking obligation. Mirroring the CRPD’s Article 4, Article 5 of the CCM requires States Parties to “[c]losely consult with and actively involve cluster munition victims and their representative organisations.”⁴⁷

The CCM’s emphasis on non-discrimination bolsters its inclusiveness. The preamble notes that the CRPD requires States Parties to ensure the rights of persons with disabilities “without discrimination of any kind on the basis of disability” and further includes the resolve to “avoid discrimination among victims of various types of weapons”.⁴⁸ Within the text of the CCM, Article 5(2)(e) requires that States Parties “[n]ot discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs.”⁴⁹

Robust and rights-based victim assistance

The Oslo Process that produced the CCM not only stressed the importance of inclusivity but also dramatically advanced the law of victim assistance. Unlike with the MBT, drafters considered victim assistance an essential element of the convention from the beginning, thanks in large part to the timing and players involved. The final convention codified a detailed obligation that reflected the evolution in MBT policy, the influence of the CRPD, and Oslo Process innovations.

Prioritization of victim assistance. The Oslo Process prioritized victim assistance from the beginning. At its opening conference in 2007, held two months after the adoption of the CRPD, States adopted the Oslo Declaration, committing States to conclude a treaty by the following year that consisted of not only prohibitions but also remedial measures, including victim assistance.⁵⁰ The first discussion text of

45 M. Reiterer and T. Leibowitz, above note 40, p. 330.

46 Convention on Cluster Munitions, above note 3, preamble.

47 *Ibid.*, Art. 5(2)(f).

48 *Ibid.*, preamble.

49 *Ibid.*, Art. 5(2)(e).

50 Oslo Conference on Cluster Munitions, “Declaration”, 22–3 February 2007, available at: www.clusterconvention.org/files/oslo/Oslo-Declaration-final-23-February-2007.pdf.

the treaty produced for the Lima Conference in May 2007 already included an article on victim assistance, which drew on that in the MBT but added human rights language probably influenced by the CRPD.⁵¹ Subsequent conferences, in Vienna (December 2007), Wellington (February 2008) and Dublin (May 2008), expanded and enhanced those provisions significantly and referenced the CRPD and its rights-based framework.⁵²

The timing of the process and the common actors both contributed to the emphasis on victim assistance. The CMC launched its civil society campaign in 2003, as *ad hoc* committee meetings began work on a disability rights convention. The CRPD itself was adopted in December 2006, just two months before the start of the Oslo Process. Energy for a rights-based approach carried over into the cluster munition treaty negotiations.

The presence of many of the same players also elevated the issue of victim assistance. A number of organizations that had advocated for the landmine ban and some who had worked on the CRPD participated in the Oslo Process.⁵³ For example, the Landmine Survivors Network and its co-founder Kenneth Rutherford, who had participated in the Ottawa Process and the CRPD negotiations, led the CMC's work on victim assistance during the Oslo Process.⁵⁴ The Oslo Process's core group of States (Austria, the Holy See, Ireland, Mexico, New Zealand, Norway and Peru) similarly included many of the same States involved in the MBT and the CRPD negotiations.⁵⁵ Mexico, a member of the core group of States advancing the MBT and CCM, also was the State to that introduced the 2001 UN General Assembly resolution creating an *ad hoc* committee to kickstart the CRPD process.⁵⁶ New Zealand Ambassador Don MacKay, who chaired the CRPD working group to negotiate the first draft text, as well as later *ad hoc* committee meetings, chaired and prepared a draft text for the CCM's 2008 Wellington conference.

Influence of the MBT and the Nairobi Action Plan. The final text of the CCM represents a combination of MBT and CRPD precedent and Oslo Process innovation. While the convention dramatically expanded and strengthened the limited obligation

51 M. Reiterer and T. Leibowitz, above note 40, p. 338.

52 B. Docherty, above note 41, pp. 949–52.

53 John Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won*, UN Institute for Disarmament Research (UNIDIR), 14 December 2009, p. 52, available at: www.unidir.org/publication/unacceptable-harm-history-how-treaty-ban-cluster-munitions-was-won. Initial organizations included Mines Action Canada, Human Rights Watch, Austrian Aid for Mine Victims, the Belgian and French wings of Handicap International, International Physicians for the Prevention of Nuclear War (Russia), Landmine Action, the Nepalese Campaign to Ban Landmines, Pax Christi Netherlands, the Landmine Struggle Unit, and the Mennonite Central Committee.

54 Bonnie Docherty, “Completing the Package: The Development and Significance of Positive Obligations in Humanitarian Law”, in Treasa Dunworth and Anna Hood (eds), *Disarmament Law: Reviewing the Field*, Routledge, Abingdon, 2021, p. 64; R. Kayess and P. French, above note 26.

55 Virgil Wiebe, John Borrie and Declan Smyth, “Introduction”, in Gro Nystuen and Stuart Casey-Maslen, above note 40, pp. 18–19.

56 UN General Assembly, Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, UN Doc. A/RES/56/168, 19 December 2001.

in the MBT, its content drew heavily on the non-binding but well-established and detailed norms of the MBT's 2004 Nairobi Action Plan.

First, the CCM creates a framework of shared responsibility. Like the MBT, it requires all States Parties in a position to do so to provide international cooperation and assistance to assist victims. Article 5 of the CCM goes a step further, however, and obliges affected States Parties to take the lead in assisting victims within their territory.⁵⁷ The convention makes this division of responsibility legally binding, but the Nairobi Action Plan had already articulated it. It said, "Keeping this promise [to rehabilitate and reintegrate victims] is a crucial responsibility of all States Parties, *though first and foremost of those whose citizens suffer the tragedy of mine incidents.*"⁵⁸ The action plan then enumerates actions that affected States will take, including providing a range of assistance, adopting legal and policy frameworks, and collecting relevant data.⁵⁹

Second, the CCM follows its predecessors' approach to defining the character of assistance. Article 5(1) says that States Parties must provide "medical care, rehabilitation and psychological support, as well as provide for [victims'] social and economic inclusion".⁶⁰ The MBT contains most of these elements, and the Nairobi Action Plan, in Action 31, adds psychological support to the list.⁶¹ The CCM also follows the action plan in specifying that victim assistance should be "age- and gender-sensitive".⁶²

Third, the cluster munition treaty draws on the Nairobi Action Plan's commitments related to implementation of victim assistance programmes. Both include provisions on collecting data on victims and developing national laws and policies.⁶³ In addition, the novel reporting obligations for victim assistance established in the CCM's Article 7(1)(k) reflect Nairobi Action Plan Action 37, which called for States Parties to "monitor and promote progress in the achievement of victim assistance goals".⁶⁴

Influence of the CRPD. Given that the CRPD's provisions are relevant to victims of landmines and cluster munitions, they significantly influenced the development of the CCM.⁶⁵ According to Kenneth Rutherford, who was involved with the negotiation of all three treaties:

The significant differences between the Ottawa Convention [Mine Ban Treaty] and Convention on Cluster Munitions are due in large part to the existence of the Convention on the Rights of Persons with Disabilities, which represents

57 Convention on Cluster Munitions, above note 3, Art. 5.

58 Nairobi Action Plan, above note 14, para. 5 (emphasis added).

59 *Ibid.*, Actions 29–35.

60 Convention on Cluster Munitions, above note 3, Art. 5(1).

61 Mine Ban Treaty, above note 1; Nairobi Action Plan, above note 14, Action 31.

62 Nairobi Action Plan, above note 14, Action 35; Convention on Cluster Munitions, above note 3, Art. 5(1).

63 Nairobi Action Plan, above note 14, Actions 34 and 35; Convention on Cluster Munitions, above note 3, Arts 5(1) and (2)(b).

64 Nairobi Action Plan, above note 14, Action 37; Convention on Cluster Munitions, above note 3, Art. 7(1)(k).

65 M. Reiterer and T. Leibowitz, above note 40, p. 334.

another dot in the line connecting weapons treaties and human rights. It had a profound effect on the understanding of victim assistance because it outlined a rights-based approach to disability, which provides a much more progressive, holistic view than previously existed.⁶⁶

The Nairobi Action Plan had enumerated many steps of victim assistance and recognized the need to “address the needs and fundamental human rights of mine victims” as one of its actions,⁶⁷ but the CRPD offered a roadmap for binding and more nuanced rights-based victim assistance provisions.

The final text of the CCM, in addition to incorporating provisions from the Nairobi Action Plan, largely reflected the CRPD’s human rights lens. The CCM stresses the importance of the rights-based approach to victim assistance in the preamble with five dedicated paragraphs. The first, for example, expresses States Parties’ determination to “ensure the full realization of the rights of all cluster munition victims and recognis[es] their inherent dignity”.⁶⁸

The CRPD’s influence is also evident in the CCM’s operative provisions. Article 5 of the CCM requires victim assistance to be provided “in accordance with applicable international humanitarian and *human rights law*”;⁶⁹ the latter body of law is an implicit reference to the CRPD.⁷⁰ More specifically, while the MBT and the Nairobi Action Plan call for “socio-economic reintegration”, Article 5 refers to “social and economic inclusion” to reflect the “accepted rights-based terminology used” in the CRPD.⁷¹ Commentators involved in the negotiations explained:

While integration connotes a division between society—the “integrator”—and a survivor whose challenge it is to reintegrate, inclusion lends itself better to the idea that society should be structured in a way which is inclusive of all its members.⁷²

In addition, CCM Article 2(1) defines victim to include those who have suffered not only physical or psychological injury but also “economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions”.⁷³ This broad definition has some similarities to the CRPD’s definition of “discrimination on the basis of disability”, which includes anything that has “the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights”.⁷⁴

66 Kenneth Rutherford, Nerina Čevra and Tracey Begley, “Connecting the Dots: The Ottawa Convention and the CCM”, *The Journal of ERW and Mine Action*, Winter 2008/9, p. 44, available at: <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1560&context=cisr-journal>.

67 Nairobi Action Plan, above note 14, Action 33.

68 Convention on Cluster Munitions, above note 3, preamble.

69 *Ibid.*, Art. 5 (emphasis added).

70 B. Docherty, above note 41, p. 951; Convention on Cluster Munitions, above note 3, Art. 5.

71 M. Reiterer and T. Leibowitz, above note 40, p. 360; Nairobi Action Plan, above note 14, Action 32.

72 M. Reiterer and T. Leibowitz, above note 40, p. 360.

73 Convention on Cluster Munitions, above note 3, Art. 2(1).

74 Convention on the Rights of Persons with Disabilities, above note 2, Art. 2.

CCM Article 5 also drew on the CRPD to strengthen the general principles and institutional framework of victim assistance. As discussed above, it borrows heavily from the CRPD's provisions on inclusion and non-discrimination. On a more practical note, the requirement in CCM Article 5(2)(g) to designate a focal point to coordinate implementation of victim assistance parallels that in CRPD Article 33(1) to appoint a focal point for national implementation in general.⁷⁵

While some CCM provisions may have had sources in both the Nairobi Action Plan and the CRPD, the latter bolstered the case for making them legally binding obligations. For example, the references to gender- and age-sensitive assistance, collecting data and conducting needs assessments probably came more directly from the Nairobi Action Plan, but they also appear and are legally codified in a different context under the CRPD. Several CRPD provisions, including Articles 6 and 7 on the rights of women and children with disabilities, address issues of age and gender sensitivity, and Article 31 deals with statistics and data collection.⁷⁶ This precedent is significant, given that the CCM broke new ground in disarmament law by making these detailed victim assistance provisions binding.⁷⁷

CCM innovations. The CCM text not only effectively merged and adapted the precedent found in the Nairobi Action Plan and the CRPD but also introduced new elements of victim assistance. These innovations included several provisions related to implementation. For example, Article 5(2)(c) obliges affected States Parties to develop national plans with budgets and timelines.⁷⁸ Article 5(2)(d) requires them to “[t]ake steps to mobilise national and international resources.”⁷⁹ Article 5(2)(h) calls for incorporating guidelines and good practices in the area of victim assistance.⁸⁰ These provisions seek to ensure implementation of the newly codified policies and principles for assisting victims.

Implementation

The links among the MBT, CCM and CRPD did not end with their negotiations. The rights set out in the CRPD correspond to elements of disarmament's victim assistance, including medical care and rehabilitation, measures to promote economic and social inclusion, and gender and age sensitivity. The treaties also share steps for implementation, such as collecting data, designating focal points, establishing budgets and national plans, reporting and consulting with

75 Convention on Cluster Munitions, above note 3, Art. 5(2)(g); Convention on the Rights of Persons with Disabilities, above note 2, Art. 33(1).

76 Convention on the Rights of Persons with Disabilities, above note 2, Arts 6, 7 and 31.

77 B. Docherty, above note 41, p. 956.

78 Convention on Cluster Munitions, above note 3, Art. 5(2)(c).

79 *Ibid.*, Art. 5(2)(d).

80 *Ibid.*, Art. 5.

survivors.⁸¹ Most affected States Parties of the landmine and cluster munition treaties have joined the CRPD. All affected MBT States Parties, except Eritrea and Tajikistan, and all affected States Parties under the CCM, except Lebanon, are also States Parties to the CRPD.⁸²

As a result of the overlapping obligations and States Parties, the implementation of these instruments has often been intertwined. It can be difficult to prove definitively the direction of influence, but an examination of MBT and CCM review conference documents and civil society monitors indicates patterns. In general, although work remains to be done, the CRPD has contributed standards for implementation, and the MBT and CCM's victim assistance programmes have advanced the inclusion and rights of persons with disabilities in practice. The treaties' victim assistance and disability rights regimes have reinforced each other's mechanisms for implementation.

Standard setting

The CRPD has influenced the implementation of victim assistance by creating standards for principles and programming to follow, even if they have not always been fully met. While the Nairobi Action Plan had already laid out many relevant concepts, the Final Report of the MBT's 2009 Review Conference in Cartagena, the first review conference after the adoption of the CRPD, credited the CRPD with "provid[ing] a standard by which to measure victim assistance efforts".⁸³ According to the report, the CRPD elaborated on the meaning of inclusivity, "record[ing] what is required to promote the full and effective participation and inclusion of mine survivors in the social, cultural, economic and political life of their communities". The CRPD also offered guidelines for the responsibilities to survivors and their families and for the nature of assistance. It presented "a more systematic, sustainable, gender sensitive and human rights based approach by bringing victim assistance into the broader context of policy and planning for persons with disabilities more generally".⁸⁴

Experts on victim assistance under the CCM expressed similar views of the CRPD. In a 2010 Oxford University Press commentary, an Austrian diplomat and a civil society delegate, both of whom had been involved in the CCM negotiations, described the CRPD as "an especially appropriate framework through which to implement victim assistance".⁸⁵ They noted that the convention "represent[ed] the human rights standard pertaining to persons with disabilities, which include cluster munition survivors, and contain[ed] an 'explicit social development

81 Survivor Corps, *Connecting the Dots: Victim Assistance and Human Rights*, December 2008, p. 31, available at: <https://reliefweb.int/report/world/connecting-dots-victim-assistance-and-human-rights>.

82 United Nations Office of the High Commissioner for Human Rights, "Status of Ratification", available at: <https://indicators.ohchr.org/>.

83 Cartagena Final Report, above note 16, para. 165.

84 *Ibid.*

85 M. Reiterer and T. Leibowitz, above note 40, p. 368.

dimension”.⁸⁶ Although the outcome documents of the CCM’s 2010 First Meeting of States Parties did not address the CRPD’s standards in depth, they are referenced in the convention itself.

In recognition of the CRPD’s standards as well as the need for efficiency, the outcome documents of both the MBT and the CCM called for integrating victim assistance into disability programming. The Final Report of the Cartagena Review Conference explained:

When plans for the disability sector already exist, the focus has been on ensuring that mine survivors have access to the services and benefits enshrined within those plans and that the relevant ministries are aware of their States’ obligations under the Convention.⁸⁷

The CCM’s First Meeting of States Parties in 2010 in Vientiane took a similar approach. Action 23 of the Vientiane Action Plan committed States Parties to either integrate their implementation of victim assistance with existing CRPD coordination mechanisms, or establish a new mechanism involving cluster munition victims and disability rights experts within one year of the treaty’s entry into force.⁸⁸

While there has been less explicit attention to the standards set by the CRPD in recent meetings, there is an ongoing emphasis on coordinating efforts. For example, Action 34 of the 2019 Oslo Action Plan, adopted at the MBT’s Fourth Review Conference, calls on States to address mine victims’ needs “through national policy and legal frameworks relating to disability” and specifies that those frameworks be “in line with the relevant provisions of” the CRPD.⁸⁹ The most recent CCM Action Plan, adopted by States Parties in Lausanne in 2021, commits States Parties to ensure that broader national plans and frameworks addressing disability and human rights “address the needs and rights of cluster munition victims and are in line with the Convention on the Rights of Persons with Disabilities”.⁹⁰ As victim assistance principles and programmes advance, the documents include less rhetoric about the CRPD as the sole bar against which to judge them, but still call for victim assistance to be consistent with the standards of the disability rights convention.

Despite the recognition of the CRPD’s value as a standard for victim assistance, some have argued that victim assistance programmes should do more to

⁸⁶ *Ibid.*

⁸⁷ Cartagena Final Report, above note 16, para. 107.

⁸⁸ Convention on Cluster Munitions, First Meeting of States Parties, Final Document, UN Doc. CCM/MSP/2010/5, 31 January 2010, Action 23, available at: www.clusterconvention.org/vientiane-action-plan/ (Vientiane Action Plan).

⁸⁹ Fourth Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Final Document: Oslo Action Plan, UN Doc. APLC/CONF/2019/5/Add.1, 22 January 2020, Action 34 (Oslo Action Plan).

⁹⁰ Second Review Conference of States Parties to the Conference on Cluster Munitions, Final Report of the Second Review Conference: Lausanne Action Plan, UN Doc. CCM/CONF/2021/6, 6 October 2021, Action 32 (Lausanne Action Plan).

achieve it. The UN Mine Action Service released the first edition of its International Mine Action Standards on victim assistance only in September 2021, and it has been criticized by some from the disability rights community for not adequately reflecting CRPD standards.⁹¹ The UN Special Rapporteur on the Rights of Persons with Disabilities recommended to the UN General Assembly in 2022 that the UN:

Strengthen the capacity of the Mine Action Service ... to better reflect the principles of the Convention on the Rights of Persons with Disabilities in its work on victim assistance, including its work as Chair of the International Mine Action Standards Review Board.⁹²

Janet Lord, a disability rights expert who represented the Landmine Survivors Network during the CPRD negotiations, described several ways in which victim assistance programmes could better reflect the principles of the CRPD. For example, they could more meaningfully include survivors, hire persons with disabilities, improve accessibility and adopt a broader understanding of rehabilitation.⁹³

Practical impacts

When the three treaties were initially examined as a package, commentators focused on the CRPD as a boon to victim assistance. In practice, however, much of the influence has gone the other way. Examples from review conference outcome documents and civil society monitors reveal that actions to fulfil victim assistance under the MBT and CCM have helped advance implementation of many articles of the CRPD. Victim assistance programmes in particular have enhanced the inclusion and the rights of persons with disabilities.

Inclusion

Inclusivity played a major role in the origins of the victim assistance provisions in the MBT and CCM, and it has continued to be a priority in the implementation phase. In this context, States Parties have called for inclusion of all persons with disabilities, not only landmine and cluster munition survivors. The Cartagena Action Plan, for example, explicitly commits States Parties to include persons with disabilities in addition to landmine survivors “in all relevant convention related activities”.⁹⁴ Likewise, CCM States Parties committed in the action plan issued at their first meeting in Vientiane to include cluster munition survivors

91 UN Mine Action Service, “Victim Assistance in Mine Action”, 1st ed., International Mine Action Standard 13.10, September 2021, available at: www.mineactionstandards.org/fileadmin/user_upload/IMAS_13.10_Ed1_04.pdf.

92 UN General Assembly, Report of the Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, UN Doc. A/77/203, 20 July 2022.

93 Interview with Janet E. Lord, above note 13.

94 Second Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Final Report: Cartagena Action Plan, UN Doc. APLC/CONF/2009/9, 17 June 2010, Action 29 (Cartagena Action Plan).

and representatives of disabled persons on their delegations in all activities related to the convention.⁹⁵ At the same meeting, survivors issued a declaration with recommendations that included a call for States to accede to the CRPD and not to discriminate against either cluster munition victims or other persons with disabilities.⁹⁶

States Parties' actions have reflected progress toward implementing these commitments to inclusion. The CCM's First Review Conference in 2015 reported that "all seven States Parties with victim assistance coordination structures in place have involved survivors or their representative organisations in victim assistance or disability coordination mechanisms".⁹⁷ Providing updates on their progress on victim assistance in the 2019 Oslo Review Conference Final Report, Afghanistan, Bosnia and Herzegovina, Cambodia, Colombia, El Salvador, Iraq, Mozambique, Peru, Senegal, Serbia and Sudan reported increased participation of mine survivors and other persons with disabilities in victim assistance and disability programmes.⁹⁸ Such measures help States fulfil their CRPD obligation to "closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations" in law and policy-making.⁹⁹

As part of their efforts to promote inclusion, States have taken steps to raise awareness of issues related to victim assistances and disability rights. Public and expert discussions about implementation of victim assistance have dedicated time and consideration to coordinating efforts with the disability sector and explaining rights provided under the CRPD.¹⁰⁰ Victim assistance workshops held in Managua and Bangkok in 2009 included sessions on the CRPD.¹⁰¹ More recently, the 2019 Oslo Review Conference Final Report noted that a number of national stakeholder dialogues, including in Iraq, South Sudan and Uganda, aimed to "strengthen the national response to victim assistance and raise awareness of the rights of persons with disabilities, including mine survivors".¹⁰² While not specifically required by victim assistance law, these steps accord with Article 8 of the CRPD, which requires States Parties to "adopt immediate, effective and appropriate measures, [*inter alia*], [t]o raise awareness ... regarding persons with

95 Vientiane Action Plan, above note 88, Action 31.

96 Convention on Cluster Munitions, First Meeting of States Parties, Survivors' Declaration, UN Doc. CCM/MSP/2010/MISC.2, 11 November 2010.

97 First Review Conference of States Parties to the Convention on Cluster Munitions, Review of the Vientiane Action Plan, UN Doc. CCM/CONF/2015/3, 12 May 2015, para. 64.

98 Fourth Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Final Document, UN Doc. APLC/CONF/2019/5, 22 January 2020, p. 35, para. 57 (Oslo Final Report).

99 Convention on the Rights of Persons with Disabilities, above note 2, Art. 4(3).

100 Cartagena Final Report, above note 16, paras 110 and 161.

101 The Cartagena Summit on a Mine-Free World, "Managua Programme for Victim Assistance Experts", 24–26 February 2009, available at: www.cartagenasummit.org/regional-workshops/managua-workshop/programme-for-victim-assistance-experts/; The Cartagena Summit on a Mine-Free World, "Bangkok Programme for Victim Assistance Experts", 1–3 April 2009, available at: www.cartagenasummit.org/regional-workshops/bangkok-workshop/programme-for-victim-assistance-experts/.

102 Oslo Final Report, above note 98, para. 61.

disabilities, and to foster respect for the rights and dignity of persons with disabilities”.¹⁰³

Advancement of the rights of persons with disabilities

Implementation of victim assistance obligations have advanced the rights of not only landmine and cluster munition victims but also of other persons with disabilities. Provision of healthcare can benefit anyone who experiences the medical challenges that landmine and cluster munition survivors do. For example, at the 2009 Cartagena Review Conference, Sudan reported that more than twenty-five victim assistance-related projects helped 1500 landmine survivors and persons with disabilities.¹⁰⁴ At the same meeting, Japan stated that it had partnered with Laos to provide, as part of its obligations under the MBT, a wheelchair workshop service that benefitted landmine survivors and other persons with disabilities in need of wheelchairs.¹⁰⁵ The 2021 *Cluster Munition Monitor* reported training programmes for healthcare workers in Chad on rehabilitation and disability, which contributed to the referral of survivors and other persons with disabilities to rehabilitation centres.¹⁰⁶ The ICRC likewise reported to the 2020 CCM Review Conference that it “continues to assist all persons with disabilities, including victims of mines, cluster munitions and explosive remnants of war through its Physical Rehabilitation Programme”.¹⁰⁷ These programmes relate to several rights under the CRPD. They help “ensure personal mobility with the greatest possible independence” (Article 20), promote “enjoyment of the highest attainable standard of health without discrimination on the basis of disability” (Article 25) and strengthen “habilitation and rehabilitation services and programmes” (Article 26).¹⁰⁸

Victim assistance programmes promote socio-economic inclusion, including through vocational and financial assistance programmes that have also served other persons with disabilities. According to the 2021 *Landmine Monitor*, a project led by Humanity & Inclusion in Chad trained mine/explosive remnants-of-war victims and persons with disabilities to “restart income-generating

103 Convention on the Rights of Persons with Disabilities, above note 2, Art. 8(1)(a).

104 The Cartagena Summit on a Mine-Free World: the Second Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, “Statement from Sudan”, 30 November 2009, available at: www.cartagenasummit.org/fileadmin/APMBC-RC2/monday/2RC-Item9a-30Nov2009-Sudan.pdf.

105 The Cartagena Summit on a Mine-Free World: The Second Review Conference of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, “Statement from Japan”, 30 November 2009, available at: www.cartagenasummit.org/fileadmin/APMBC-RC2/monday/2RC-Item9a-30Nov2009-Japan-en.pdf.

106 International Campaign to Ban Landmines–Cluster Munition Coalition, *Cluster Munition Monitor 2021*, September 2021, p. 74, available at: www.the-monitor.org/media/3299952/Cluster-Munition-Monitor-2021_web_Sept2021.pdf.

107 ICRC, “Second Review Conference of the Convention on Cluster Munitions, Geneva, 25–27 November 2020: International Committee of the Red Cross Statement on Victim Assistance”, available at: www.clusterconvention.org/wp-content/uploads/2020/11/CCM-2RC-ICRC-statement-Victim-assistance-updated-version-2-December-2020.pdf.

108 Convention on the Rights of Persons with Disabilities, above note 2, Arts 20, 25 and 26.

activities and to undertake technical and vocational training”.¹⁰⁹ The Democratic Republic of the Congo instituted job training in the coffee industry for mine survivors.¹¹⁰ Such programmes promote the CRPD’s “right of persons of disabilities to work, on an equal basis with others” (Article 17) as well as the right to “adequate standard of living for [persons with disabilities] and their families” (Article 18).¹¹¹

Mechanisms for implementation

Ensuring that the CRPD’s standards are upheld and that victim assistance practice is effective requires sound mechanisms for implementation. In this area, the victim assistance and disability rights regimes have had a largely symbiotic relationship. States have addressed disability concerns as part of their funding for victim assistance under the MBT or CCM; in turn, financial aid granted under the CRPD has recognized the needs of arms victims.¹¹² In addition, the efforts to integrate victim assistance and disability rights programmes at the State level have led to national plans for one that incorporate elements of the other.¹¹³ Finally, at the global level, the disarmament treaties’ robust system of international meetings and regular reporting have provided opportunities to monitor and advance the rights of persons with disabilities, while the CPRD’s treaty body, albeit to a lesser degree, has made recommendations that can inspire benefits for landmine and cluster munition survivors.¹¹⁴ Such ongoing interactions among these three treaties not only enhance implementation but also show their continued relevance as precedent for new instruments.

Lessons learned for the Treaty on the Prohibition of Nuclear Weapons

The TPNW, adopted at the UN in 2017, is the most recent in the line of humanitarian disarmament treaties to include provisions on victim assistance.¹¹⁵

109 International Campaign to Ban Landmines–Cluster Munition Coalition, *Landmine Monitor 2021*, November 2021, p. 82, available at: www.the-monitor.org/media/3318354/Landmine-Monitor-2021-Web.pdf.

110 *Ibid.*

111 Convention on the Rights of Persons with Disabilities, above note 2, Arts 17 and 18.

112 See, for example, Handicap International, *Guide on an Integrated Approach to Victim Assistance: By States For States*, p. 5, available at: www.clusterconvention.org/files/publications/Guidance-on-an-Integrated-Approach-to-Victim-Assistance.pdf; Landmine and Cluster Munition Monitor, *Frameworks for Victim Assistance: Monitor Key Findings and Observations*, December 2013, pp. 15–16, available at: http://the-monitor.org/media/131747/Frameworks_VA-December-2013.pdf.

113 See, for example, Second Review Conference of States Parties to the Convention on Cluster Munitions, Review Document of the Dubrovnik Action Plan, UN Doc. CCM/CONF/2020/13, 1 October 2020, paras 68–9.

114 See, for example, Oslo Final Report, above note 98, p. 59; Landmine and Cluster Munition Monitor, above note 112, p. 16, describing the success of the “Accessible Tumbes” programme in Peru.

115 Treaty on the Prohibition of Nuclear Weapons, above note 4, Arts 6–7.

The TPNW continued the practice of civil society and survivor inclusion and advanced the human rights-based approach to assistance in previous treaties. As States begin to operationalize the TPNW's provisions after its First Meeting of States Parties in June 2022, they can learn lessons from other treaties about the implementation and interpretation of victim assistance obligations and how to adapt them to the nuclear weapons context.

History and content of the TPNW

Inclusion

As was the case with the MBT, the CRPD and the CCM, civil society and affected individuals played a central role in the push for a nuclear weapons ban treaty, its negotiations and its adoption.¹¹⁶ The International Campaign to Abolish Nuclear Weapons (ICAN) brought hundreds of campaigners, including survivors, to the governmental conferences on the humanitarian impacts of nuclear weapons in Oslo, Nayarit and Vienna that preceded the treaty negotiations.¹¹⁷ During the negotiations themselves, civil society participated actively through working papers, statements, side events and lobbying, even though they were excluded from some sessions where the final text was debated.¹¹⁸ The president of the negotiations also organized interactive panels in which civil society experts made formal presentation and fielded questions from diplomats about specific topics.¹¹⁹ ICAN was awarded the Nobel Peace Prize in 2017 for its efforts to achieve the treaty. Setsuko Thurlow, a leader in the campaign and a survivor of the atomic bombing of Hiroshima, accepted the award alongside ICAN Executive Director Beatrice Fihn.

The TPNW itself acknowledges the importance of civil society and victim inclusion in two places. The preamble recognizes the efforts of “the International Red Cross and Red Crescent Movement, other international and regional organizations, non-governmental organizations, religious leaders, parliamentarians, academics and the hibakusha” (victims of nuclear weapons use) in calling for the elimination of nuclear weapons.¹²⁰ In its operative part, the TPNW obliges States Parties to invite “relevant non-governmental organizations” as well as international organizations to attend treaty meetings as observers.¹²¹

116 Rebecca Davis Gibbons, “The Humanitarian Turn in Nuclear Disarmament and the Treaty on the Prohibition of Nuclear Weapons”, *The Nonproliferation Review*, Vol. 25, No. 1–2, 2018.

117 *Ibid.*; see, for example, Karipbek Kuyukov, “Speech by Karipbek Kuyukov, the ATOM Project Ambassador, at the International Conference on the Humanitarian Consequences of Nuclear Weapons”, Oslo, 4–5 March 2013, available at: www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum_kuyukov.pdf.

118 Ray Acheson, *Banning the Bomb, Smashing the Patriarchy*, Rowman and Littlefield Publishers, New York, 2021, pp. 223–58. Statements included an indigenous statement: “Indigenous Statement to the U.N. Nuclear Weapons Ban Treaty Negotiations”, UN General Assembly, June 2017, available at: <https://icanw.org.au/wp-content/uploads/Indigenous-Statement-June-2017.pdf>.

119 R. Acheson, above note 118, p. 228.

120 Treaty on the Prohibition of Nuclear Weapons, above note 4, preamble.

121 *Ibid.*, Art. 8(5).

Although the treaty does not explicitly address inclusion in its victim assistance provision, it does require assistance to be provided “without discrimination”, which implies an inclusive approach.¹²²

Human rights-based approach

The push for the TPNW followed a revolutionary approach to governing nuclear weapons that sought to respond to the weapons’ humanitarian consequences and was grounded in humanitarian disarmament precedent.¹²³ Unlike with the CCM, victim assistance provisions were not considered at the start of the negotiations. Civil society representatives, who had worked on the landmine and cluster munition treaties, however, advocated for their inclusion, relying on those models to make their case.¹²⁴

The final result, expressed in TPNW Article 6(1), borrows significantly from the CCM, although it does not include as many details of implementation. Article 6(1) obliges States Parties with affected individuals under their jurisdiction to provide “medical care, rehabilitation and psychological support” and “provide for [affected individuals’] social and economic inclusion”.¹²⁵ Assistance must be provided “in accordance with applicable international humanitarian and human rights law” and should be “without discrimination” and “age- and gender-sensitive”.¹²⁶ Article 7, much of which also closely parallels the CCM, spreads the burden of victim assistance. It requires all States Parties “in a position to do so” to “provide technical, material and financial assistance” to States affected by nuclear weapons use and testing.¹²⁷ Article 7(6) obliges States Parties that have used or tested nuclear weapons to provide adequate assistance to affected States Parties.¹²⁸

Lessons learned

The MBT, CRPD and CCM not only influenced the process and provisions of victim assistance under the TPNW but can also inform the implementation and interpretation of the new treaty. TPNW Article 6(1) draws heavily on Article 5(1) of the CCM, making the latter a logical model for moving forward. In addition, Article 6(1) specifies that assistance should be provided “in accordance with

¹²² *Ibid.*, Art. 6(1).

¹²³ Bonnie Docherty, “A ‘Light for All Humanity’: The Treaty on the Prohibition of Nuclear Weapons and the Progress of Humanitarian Disarmament”, in Joseph A. Camilleri, Michael Hamel-Green and Fumihiko Yoshida (eds), *The 2017 Nuclear Ban Treaty: A New Path to Nuclear Disarmament*, Routledge, Abingdon, 2019, pp. 35–6.

¹²⁴ Matthew Breay Bolton and Elizabeth Minor, “The Agency of International Humanitarian Disarmament Law: The Case of Advocacy for Positive Obligations in the Treaty on the Prohibition of Nuclear Weapons”, in Matthew Breay Bolton, Sarah Njeri and Taylor Benjamin-Britton (eds), *Global Activism and Humanitarian Disarmament*, Palgrave Macmillan, Cham, 2020.

¹²⁵ Treaty on the Prohibition of Nuclear Weapons, above note 4, Art. 6(1).

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, Art. 7.

¹²⁸ *Ibid.*, Art. 7(6).

applicable international humanitarian and human rights law”, which encompasses the CRPD.¹²⁹ Collectively these treaties can guide implementation of two elements of victim assistance – inclusion and an implementation framework – that are not referenced in the TPNW; their value is already evident in the TPNW’s recently adopted first action plan. The treaties can also help interpret components of the TPNW’s obligations that are explicitly articulated.

Implementation

The disarmament and disability treaties set a standard for inclusivity that TPNW States Parties should follow when implementing their victim assistance obligations. Both the CCM and CRPD require States Parties to “closely consult with and actively involve” affected individuals and their representative organizations.¹³⁰ Other stakeholders, including but not limited to civil society and international organizations, should also be included in the victim assistance process. Such meaningful consultation should take place at all stages of the victim assistance process including assessment, service delivery and monitoring. It should further allow affected communities and other stakeholders to have equal speaking rights with States in international treaty meetings, including during the opening, closing and substantive sessions of meetings of States Parties and review conferences, as well as during intersessional meetings. An inclusive approach to victim assistance is consistent with other parts of the TPNW, notably its preamble and Article 8(5) on inviting non-State actors to treaty meetings.¹³¹

The Vienna Action Plan, adopted at the TPNW’s First Meeting of States Parties in June 2022, follows the lead of the earlier treaties with regard to inclusion. The plan, which elaborates on how the TPNW, including its victim assistance obligations, should be implemented, emerged from a process that incorporated the input of States, international organizations and civil society. Drawing on CCM and CRPD language, the Vienna Action Plan commits States Parties to “closely consult with, actively involve, and disseminate information to, affected communities at all stages” of the victim assistance and to uphold the principles of inclusivity, non-discrimination transparency and accessibility.¹³² The action plan thus represents an important first step toward inclusivity in implementation.

The CCM in particular offers guidance for establishing a framework for implementing victim assistance. States Parties to the TPNW can look to the CCM’s Article 5(2) for practical steps for operationalizing victim assistance. For example, States Parties should assess the problem; develop a national plan, with timeline and budget; designate a focal point; and adopt relevant laws and policies.

¹²⁹ *Ibid.*, Art. 6(1).

¹³⁰ Convention on Cluster Munitions, above note 3, Art. 5(2)(f); Convention on the Rights of Persons with Disabilities, above note 2, Art. 4(3).

¹³¹ Treaty on the Prohibition of Nuclear Weapons, above note 4, preamble and Art. 8(5).

¹³² First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons: Vienna Action Plan, UN Doc. TPNW/MSP/2022/6*, 21 July 2022, Actions 19 and 25 (Vienna Action Plan).

The influence of the CCM has already been seen in the TPNW's Vienna Action Plan, which includes commitments on all of these points.¹³³ The next step will be to turn those words on paper into actions on the ground.

Interpretation and adaptation

The earlier treaties also offer lessons for interpreting the TPNW's obligations. The CCM, like the TPNW, describes victim assistance broadly. It requires States Parties to provide "medical care, rehabilitation and psychological support" and measures to promote "social and economic inclusion".¹³⁴ The policies and principles of victim assistance under the CCM, as well as the MBT, which follows the same approach, can, therefore, offer TPNW States Parties models for understanding these terms.

The CRPD can help adapt these models, which were designed for victims of explosive weapons, to those harmed by nuclear weapons. The needs of those affected by nuclear weapons use or testing often differ significantly from victims of landmines and cluster munitions, given the distinct harm caused by radiation exposure and its intergenerational impact. The CRPD's rights apply to a wider group of persons with disabilities and could inform the provision of assistance under the TPNW. For example, States Parties' reports on their efforts to implement the CRPD's Article 25 (health) or Article 26 (habilitation and rehabilitation) may provide recommendations for meeting the health needs of nuclear weapons victims.¹³⁵ In its 2016 CRPD report, Kazakhstan, the site of Soviet nuclear weapons testing and a TPNW State Party, noted its provision of "early testing ... performed for congenital conditions, neonatal surgery and medical care for patients with cancer" and the entitlement of persons with disabilities to "expensive diagnostic examinations", as part of its Article 25 implementation.¹³⁶ While these services are open to all people, many of them, such as regular health screenings and cancer treatments, may be particularly relevant for those affected by nuclear weapons use and testing.

The TPNW's predecessors can influence understanding of how assistance is delivered. Viewing the TPNW's requirement that victim assistance be provided "without discrimination" in light of earlier treaties can have a significant impact on its interpretation. In isolation, that phrase sounds like it refers exclusively to the commonly cited grounds of discrimination, such as race, sex and religion, enumerated in the International Covenant on Civil and Political Rights.¹³⁷ While these grounds are important and applicable, the disarmament and disability treaties offer additional interpretations of the phrase. Between the CCM and the

¹³³ *Ibid.*, Actions 21, 22 and 31.

¹³⁴ Convention on Cluster Munitions, above note 3, Art. 5(1).

¹³⁵ Convention on the Rights of Persons with Disabilities, above note 2, Arts 25 and 26.

¹³⁶ Committee on the Rights of Persons with Disabilities, Initial Report Submitted by Kazakhstan under Article 35 of the Convention, Due in 2017, UN Doc. CRPD/C/KAZ/1, 21 February 2019, p. 33, paras 351 and 353.

¹³⁷ International Covenant on Civil and Political Rights, New York, 16 December 1966 (entered into force 23 March 1976), Art. 2(1).

CRPD, three other prohibited types of discrimination can be identified: discrimination against victims (i.e. based on their disability or affected status); among victims; or between victims and other persons with disabilities.¹³⁸

The treaties, in particular the CRPD, bolster understanding of how to provide age- and gender-sensitive assistance to nuclear weapons victims. The requirement for such sensitivity is particularly pertinent in the TPNW, given the disproportionate impact of ionizing radiation on women and girls acknowledged within the treaty's preamble. While the CCM includes a similar reference to age- and gender-sensitive assistance, the CRPD has separate articles (6 and 7, respectively) elaborating on the rights for women and children with disabilities.¹³⁹ Under CRPD Article 6, several States have reported establishing targeted programmes for women with disabilities. Laos created the Lao Disabled Women's Development Centre to provide vocational training for women with disabilities, and Austria formed the Health Forum for Girls and Women with Disabilities.¹⁴⁰ Particularly relevant for the TPNW, Kazakhstan has offered longer paid maternity leave for women who live in the nuclear radiation exposure zone (twenty-four weeks instead of eighteen weeks).¹⁴¹ In addition, a number of States have reported disaggregating their data on persons with disabilities by gender and age under CRPD Article 31.¹⁴²

Finally, the disarmament and disability instruments offer lessons on who qualifies for victim assistance. The TPNW's articles on victim assistance and international cooperation and assistance use two phrases to refer to victims of nuclear weapons: "individuals ... who are affected by the use or testing of nuclear weapons" in Article 6(1); and "victims of the use or testing of nuclear weapons or other nuclear explosive devices" in Article 7(4).¹⁴³ The treaty does not elaborate on the meaning of either term, however, in contrast to the CCM and CRPD, which define cluster munition victims and persons with disabilities, respectively. TPNW States Parties could draw from the latter treaties as they consider the scope of victim assistance.

138 Convention on Cluster Munitions, above note 3, Art. 5(2); Convention on the Rights of Persons with Disabilities, above note 2, Arts 2 and 4; Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, 26 April 2018.

139 See, also, Committee on the Rights of Persons with Disabilities, General Comment No. 3 (2016) on Women and Girls with Disabilities, UN Doc. CRPD/C/GC/3, 25 November 2016.

140 Committee on the Rights of Persons with Disabilities, Initial Report Submitted by the Lao People's Democratic Republic under Article 35 of the Convention, Due in 2011, UN Doc. CRPD/C/LAO/1, 6 October 2017; Committee on the Rights of Persons with Disabilities, Implementation of the Convention on the Rights of Persons with Disabilities: Initial Reports Submitted by States Parties under Article 35 of the Convention: Austria, UN Doc. CRPD/C/AUT/1, 10 October 2011.

141 Committee on the Rights of Persons with Disabilities, above note 136.

142 For example, see Mexico's report, which reported conducting the National Survey of Children and Women of 2015 on women and children with disabilities, or New Zealand's report which also notes its gender- and age-disaggregated data collection. Committee on the Rights of Persons with Disabilities, Combined Second and Third Periodic Reports Submitted by Mexico under Article 35 of the Convention, Due in 2018, UN Doc. CRPD/C/MEX/2-3, 19 July 2018; Committee on the Rights of Persons with Disabilities, Implementation of the Convention on Rights of Persons with Disabilities: Initial Reports Submitted by States Parties under Article 35 of the Convention: New Zealand, UN Doc. CRPD/C/NZL/1, 31 March 2011.

143 Treaty on the Prohibition of Nuclear Weapons, above note 4, Arts 6(1) and 7(4).

In particular, the TPNW could follow its predecessors' rights-based approach, discussed in the first section, to interpreting the term "victim". Understanding victims of nuclear weapons as those whose rights are impaired by the harm caused by the use or testing of nuclear weapons would help overcome some of the challenges posed by the scientific uncertainty associated with a health-based approach. It can be difficult to prove causality when a disease emerges years after exposure and may be multifactorial. In addition, harm from nuclear weapons extends beyond physical health effects. Under a rights-based approach, programmes could also consider providing assistance to affected families and communities as is required by the CCM and is done in practice under the MBT.¹⁴⁴

Conclusion

At a disability rights conference in 2011, Norwegian Minister of Foreign Affairs Jonas Gahr Støre recognized the groundbreaking role of the three treaties discussed in this article. He said, "The major steps forward that were taken through the Mine Ban and Cluster Munitions conventions, as well as the Convention on the Rights of Persons with Disabilities, have created an international norm, making victim assistance a human rights issue." Støre also saw that the instruments' influence could extend beyond their adoption and implementation. Understanding their broader potential, he said, "We should be led by these examples – by these conventions."¹⁴⁵

The MBT, CRPD and CCM have already shaped the content of the TPNW's victim assistance obligation, and they offer valuable lessons for operationalizing it. The TPNW may in turn add to the victim assistance canon, facilitating its application to weapons of mass destruction and toxic remnants of war. Victim assistance evolved over its first decade, and it has demonstrated the ability to continue to do so. In the future, its inclusive, rights-based approach can be further strengthened and adapted to improve protections for those affected by the means or methods of war.

144 Convention on Cluster Munitions, above note 3, Art. 2(1); Nairobi Action Plan, above note 14, para. 5.
145 Jonas Gahr Støre, "Introductory Remarks at 'Reaching the Most Vulnerable'", Conference on Disability in Conflicts and Emergencies, Oslo, 30 May 2011, available at: www.regjeringen.no/no/dokumentarkiv/stoltenberg-ii/ud/taler-og-artikler/2011/introduksjon_vulnerable/id645110/.

The risks of autonomous weapons: An analysis centred on the rights of persons with disabilities

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Abstract

Autonomous weapons systems have been the subject of heated debate since 2010, when Philip Alston, then Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, brought the issue to the international spotlight in his interim report to the United Nations (UN) General Assembly 65th Session. Alston affirmed that “automated technologies are becoming increasingly sophisticated, and artificial intelligence reasoning and decision-making abilities are actively being researched and receive significant funding. States’ militaries and defence industry developers are working to develop ‘fully autonomous capability’, such that technological advances in artificial intelligence will enable unmanned aerial vehicles to make and execute complex decisions, including the identification of human targets and the ability to kill them.”¹ Later, in 2013, Christof Heyns, who was Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions at the time, published a report that elaborated further on the issues raised by what he called “lethal autonomous robotics”.² Following a recommendation by Advisory Board on Disarmament Matters at the UN General Assembly 68th Session, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, as amended on 21 December 2021, started discussing autonomous weapons systems in 2014. Then, the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (GGE on LAWS)³ was created in 2016 to focus on this issue.⁴ While the group has

1 Philip Alston, *Interim Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/65/321, 23 August 2010, para. 28, available at: <https://digitallibrary.un.org/record/690463?ln=en> (all internet references were accessed in October 2022).

2 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/23/47, 9 April 2013, pp. 1–3, 5, available at: www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47_en.pdf.

3 It is important to note that while the mandate of the GGE on LAWS relates to “lethal” autonomous weapons systems, throughout this article we use the term “autonomous weapons” or “autonomous weapons systems” recognizing that, as the ICRC has explained, lethality is not an inherent property of a weapon, but depends on the weapon and the context of its use. For details, see International Committee of the Red Cross (ICRC), “CCW Meeting of Experts on Autonomous Systems: Session on Technical Issues”, 14 May 2014, available at: [https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Informal_Meeting_of_Experts_\(2014\)/ICRC%2BLAWS%2B2014%2Btechnical%2Baspects.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Informal_Meeting_of_Experts_(2014)/ICRC%2BLAWS%2B2014%2Btechnical%2Baspects.pdf).

kept meeting since then, no clear steps have been taken yet towards a normative framework on autonomous weapons as of September 2022.

In all these years, persons with disabilities – including conflict survivors – have not been included in discussions, nor has the disability perspective been reflected in international debate on autonomous weapons. Only recently has there been any effort to consider the rights of persons with disabilities when examining ethical questions related to artificial intelligence (AI). In this article, we will examine how and why autonomous weapons have a disproportionate impact on persons with disabilities, because of the discrimination that results from a combination of factors such as bias in AI, bias in the military and the police, barriers to justice and humanitarian assistance in situations of armed conflict, and the lack of consultation and participation of persons with disabilities and their representative organizations on issues related to autonomy in weapons systems.

Keywords: Disability, human rights, autonomous weapons, artificial intelligence.

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Introduction

According to the International Committee of the Red Cross (ICRC),

[a]utonomous weapon systems select and apply force to targets without human intervention. After initial activation or launch by a person, an autonomous weapon system self-initiates or triggers a strike in response to information from the environment received through sensors and on the basis of a generalized ‘target profile’. This means that the user does not choose, or even know, the specific target(s) and the precise timing and/or location of the resulting application(s) of force.⁵

The development and possible use of autonomous weapons has caused serious concern among various sectors of civil society (led by the Campaign to Stop Killer Robots), the ICRC, States committed to international humanitarian law (IHL) and human rights, academia, the scientific community, faith leaders, tech workers and others. These concerns result from different angles of analysis, including ethics, humanitarian perspectives, international security, technology and of course IHL and international human rights law.⁶ While some efforts have been made to

4 Timothy McFarland, “The Status of Autonomous Weapon Systems under International Humanitarian Law”, PhD thesis, Melbourne Law School, University of Melbourne, April 2017, available at: <https://rest.netune-prod.its.unimelb.edu.au/server/api/core/bitstreams/f1a35baf-3656-5627-bd81-b7d1862e5f02/content>.

5 ICRC, *ICRC Position on Autonomous Weapon Systems*, May 2021, p. 2, available at: <https://shop.icrc.org/icrc-position-on-autonomous-weapon-systems-pdf-en.html>.

6 See, for example, *ibid.*; Article 36, “Targeting People”, November 2019, available at: <https://article36.org/wp-content/uploads/2019/11/targeting-people.pdf>; Anna Turek and Richard Moyes, “Sensor-Based Targeting Systems: An Option for Regulation”, Article 36, November 2021, available at: <https://>

examine the disproportionate impact of these weapons on marginalized populations⁷ and in the global South,⁸ only recently has any consideration been given to the disproportionate effect they would have on people with disabilities.⁹

Indeed, in his 2021 report on the rights of persons with disabilities in armed conflict, the UN Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, stated that “[t]he future of warfare, which may increasingly rely on autonomous weapons systems driven by artificial intelligence and machine-learning, would seem to exponentially compound [the] difficulties” faced by persons with disabilities in situations of armed conflict.¹⁰ Quinn clearly identified autonomous weapons systems as additional risks for persons with disabilities in situation of conflict, since they would significantly compound the difficulties that persons with disabilities already face due to the collapse of essential and support services, and to the lack of an inclusive humanitarian response. A few months later, Quinn further detailed this problem in his report on artificial intelligence (AI), stating that

the deployment and use of fully autonomous weapons systems, like other artificial intelligence systems, raises concerns as to the ability of weaponry directed by artificial intelligence to discriminate between combatants and non-combatants, and make the nuanced determination as to whether an assistive device qualifies a person with disabilities as a threat.¹¹

article36.org/wp-content/uploads/2022/01/Sensor-based-targeting.pdf; Vincent Boulanin, Laura Bruun and Netta Goussac, *Autonomous Weapon Systems and International Humanitarian Law: Identifying Limits and the Required Type and Degree of Human-Machine Interaction*, Stockholm International Peace Research Institute, June 2021, available at: www.sipri.org/sites/default/files/2021-06/2106_aws_and_ihl_0.pdf; Human Rights Watch, *Heed the Call: A Moral and Legal Imperative to Ban Killer Robots*, August 2018, available at: www.hrw.org/report/2018/08/21/heed-call/moral-and-legal-imperative-ban-killer-robots.

7 See, for example, Hayley Ramsay-Jones, *Racism and Fully Autonomous Weapons*, submission to the UN Special Rapporteur regarding the thematic report on new information technologies, 29 January 2020, available at: <https://bit.ly/3G2hfdS>; Marissa Conway, *Smashing the Patriarchy: The Feminist Case Against Killer Robots*, Centre for Feminist Foreign Policy, London, August 2020, available at: <https://bit.ly/38GwLPJ>; Republic of Costa Rica, Republic of Panama, Republic of Peru, Republic of the Philippines, Republic of Sierra Leone and Eastern Republic of Uruguay, Joint Working Paper, available at: <https://documents.unoda.org/wp-content/uploads/2021/06/Costa-Rica-Panama-Peru-the-Philippines-Sierra-Leone-and-Uruguay.pdf>.

8 See, for instance, Ray Acheson, “Editorial: Multilateralism vs. Consensus in the Quest for a Mandate”, *CCW Report*, Vol. 9, No. 12, 2021, p. 2, available at: <https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2021/RevCon/reports/CCWR9.12.pdf>; Wanda Muñoz and Mariana Díaz, *The Risks of Autonomous Weapons: An Intersectional Analysis*, SEHLAC, 2021, available at: <https://bit.ly/3vh7fZb>.

9 See, for instance, Gerard Quinn, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/HRC/49/52, 28 December 2021, available at: www.ohchr.org/en/documents/thematic-reports/ahrc4952-artificial-intelligence-and-rights-persons-disabilities-report; Wanda Muñoz Jaime and Mariana Díaz Figueroa, “Armas autónomas: La Inaceptable reproducción de sistemas de opresión en tecnología militar”, in Aleida Fernández, Clara Duarte and Dora Inés Munévar (eds), *Discapacidad, conflicto armado y construcción de paz*, Universidad Nacional de Colombia, Centro Editorial Facultad de Medicina, Bogotá, March 2021, available at: <https://repositorio.unal.edu.co/handle/unal/79707>.

10 Gerard Quinn, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/76/146, 19 July 2021, p. 9, available at: <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/76/146&Lang=E>.

11 G. Quinn, above note 9, p. 13.

In this article we will examine what effects autonomous weapons would have on people with disabilities, based on an analysis of the discriminatory factors and barriers that such individuals already encounter. As we shall see, the possible use of such weapons must be considered not in isolation, but in the context of the structural discrimination that exists in various sectors and contexts related to autonomous weapons.

It is important to note that although the article focuses on persons with disabilities, the text adopts an intersectional¹² approach that looks at how different identities and characteristics can result in “multiple discrimination” as defined by the Committee on the Rights of Persons with Disabilities: “a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination”.¹³

When analyzing autonomous weapons and their possible impact on persons with disabilities, it is fundamental to look at the wider contexts in which these weapons are being developed and would be used. As we will see, accepting autonomous weapons as legitimate means of warfare would mean reproducing and amplifying, exponentially, the existing biases in our societies against marginalized groups – risking the right to life and dignity – and rendering access to justice for victims even more difficult. As Acherson affirms, “autonomous weapon systems are not just material technologies. While they are that, they also need to be understood within the wider context of power and violence.”¹⁴

To examine the possible impact of autonomous weapons on persons with disabilities, we shall start by showing how existing bias in applications of AI in the civilian sector has meant that negative effects – when they occur – have a much greater impact on historically marginalized populations than on the population in general. As a group of twenty researchers in AI and emerging technologies has pointed out, “[d]esigned in an unequal society, these systems can be used to reproduce those inequalities. Built with an emphasis on efficiency rather than dignity, they can do irreparable harm.”¹⁵ In the case of autonomous weapons, this “harm” means nothing less than a threat to the right to life, with the resulting damage being death and injury. Autonomous weapons could have the same impact as other weapons, but as we shall see, their effects would be compounded by a disproportionate impact on people with disabilities and other historically marginalized groups. The first section of the article provides examples of bias based mostly on race, gender and the intersection between the two,

12 For more on intersectionality, see Association for Women’s Rights in Development, *Intersectionality: A Tool for Gender and Economic Justice*, Women’s Rights and Economic Change No. 9, August 2004, available at: www.intergroupresources.com/rc/Intersectionality%20-%20a%20Tool%20for%20Gender%20&%20Economic%20Justice.pdf.

13 Convention on the Rights of Persons with Disabilities, UN Doc. CRPD/C/GC/6, 26 April 2018 (CRPD), p. 5, available at: <https://digitallibrary.un.org/record/1626976?ln=en#record-files-collapse-header>.

14 Ray Acherson, *Autonomous Weapons and Patriarchy*, Women’s International League for Peace and Freedom, 2020, p. 4, available at: <https://reachingcriticalwill.org/images/documents/Publications/aws-and-patriarchy.pdf>.

15 Paola Ricaurte *et al.*, “AI Decolonial Manifesto”, 2021, available at: <https://manifesto.ai/index.html>.

because disability and persons with disabilities have, for the most part, been excluded from the discussions on AI and AI bias.¹⁶

Secondly, we shall present a number of examples that show how the armed forces and the police have conducted operations that have had specific and disproportionate effects on people with disabilities and have led both to the deaths and to serious injuries. We will provide examples that demonstrate how persons with disabilities and with other intersecting identities and characteristics that have been historically marginalized are at a greater risk than the rest of the population, compounding the bias in AI.

Thirdly, we shall examine how remote warfare is already having a distinct impact on affected populations, what difficulties persons with disabilities face during conflicts, and the barriers to accessing justice and reparations. We will then analyze how autonomous weapons would compound the existing barriers and the disproportionate impact that persons with disabilities already face in armed conflict.

Finally, in the fourth section we shall see that failing to include and consult representative organizations of persons with disabilities during discussions on autonomous weapons, at the level of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Conventional Weapons, CCW) and at the national level, excludes their perspectives and experience. This *de facto* discrimination, compounded by the exclusion of persons with disabilities from the development of AI,¹⁷ is an example of the extent to which persons with disabilities are being denied an opportunity to contribute their experience and expertise and to share their concerns on all issues and in all areas, as is their right. In forums where decisions are taken on the legality of weapons, the arguments of militarized States continue to dominate the agenda, rather than the perspectives of those who suffer the most consequences: persons with disabilities and other groups that are historically most excluded. Were we to act from a human security perspective, those groups would most assuredly take centre stage, as they suffer disproportionately from the ravages of conflict.

Debates of this importance to humanity should not be taken without fully incorporating the perspectives of persons with disabilities. With this article, we hope to contribute to making this important gap visible, and to narrowing it.

Bias in AI and its relationship with the risks of autonomous weapons

The impact of bias in AI

We should start by recognizing that AI systems have had positive impacts in societies, especially when they have been deployed and implemented with due

16 Meredith Whittaker *et al.*, “Disability, Bias, and AI”, AI Now Institute, November 2019, p. 8, available at: <https://ainowinstitute.org/disabilitybiasai-2019.pdf>.

17 *Ibid.*

regard for participation, human rights, accessibility and gender equality. This is still far from being the norm, but when it happens, AI can contribute to social welfare and in particular to achieving sustainable development objectives.¹⁸ The Special Rapporteur on the Rights of Persons with Disabilities has stated that the appropriate and responsible use of AI can promote progress regarding the rights of persons with disabilities in several areas, including employment, independence and education.¹⁹

However, the same report pointed out that “artificial intelligence also poses acute challenges to the enjoyment of human rights. While many of those risks are shared with other groups, some are unique to persons with disabilities, or [those persons may] carry differentiated and disproportionate risks”.²⁰ Examples include use of AI by police, for crime prevention, in job interviews, when assessing eligibility for social protection programmes, in determining access to training, and in humanitarian situations, including armed conflict settings – especially with regard to autonomous weapons.

The UN Educational, Scientific and Cultural Organization (UNESCO) and its member States make a similar point in the *Recommendation on the Ethics of Artificial Intelligence* (the Recommendation) adopted in 2021. The Recommendation recognizes that AI systems carry new risks because of their potential to “reproduce and reinforce existing biases, and thus to exacerbate already existing forms of discrimination, prejudice and stereotyping”. Furthermore, the Recommendation affirms that “AI technologies ... raise fundamental ethical concerns, for instance regarding the biases they can embed and exacerbate, potentially resulting in discrimination, inequality, digital divides, exclusion and threat to cultural, social and biological diversity and social or economic divides”.²¹

Such risks and the negative impacts of AI have been widely documented nationally and internationally. Understanding these challenges is extremely relevant to the analysis of autonomous weapons systems because these are the kinds of problems that could be reproduced by the use of AI and emerging technologies in the military sector. For instance, a groundbreaking study by Buolamwini and Gebru in 2018 examined three commercial facial analysis algorithms and data sets and found that all classifiers performed best for lighter-skinned individuals and males, whereas they performed worst for darker-skinned females. While the maximum error rate of recognition for lighter-skinned males was 0.8%, the error rate was up to 34.7% for darker-skinned females.²² This is

18 For more on positive impacts of AI and areas for future work, see Future Society and Global Partnership on AI, *Areas for Future Action in the Responsible AI Ecosystem*, December 2020, available at: <https://gpai.ai/projects/responsible-ai/areas-for-future-action-in-responsible-ai.pdf>.

19 G. Quinn, above note 9.

20 *Ibid.*, p. 4.

21 UNESCO, *Recommendation on the Ethics of Artificial Intelligence*, p. 4, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000380455>.

22 Joy Buolamwini and Timnit Gebru, “Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification”, *Proceedings of Machine Learning Research*, Vol. 81, 2018, available at: www.media.mit.edu/publications/gender-shades-intersectional-accuracy-disparities-in-commercial-gender-classification/. Regarding AI and gender and racial bias, see also Shalini Kantanya, “Coded Bias”, Algorithmic Justice League,

just an example of error rate gaps on the basis of gender and skin colour in AI applications; let us imagine what this “error rate gap” would mean in the case of autonomous weapons systems, and who would be the most affected. As Whittaker *et al.* point out, AI systems, often marketed as making more objective decisions, have repeatedly produced biased and erroneous outputs – and “even when AI works as the designers intended, these systems are too often used in ways that serve the interests of those who already possess structural power, at the expense of those who don’t”.²³

The absence of diversity throughout the life cycle of AI is clearly one cause of this bias. It is important to remember that most AI is created, designed and implemented by people who have grown up in societies that constantly reproduce systems which create inequalities in access to rights and opportunities, such as patriarchy, colonialism, racism, heteronormativity, cisnormativity and ableism.²⁴ Ableism is of particular relevance for this analysis, as defined by the Special Rapporteur on the Rights of Persons with Disabilities in 2019:

a value system that considers certain typical characteristics of the body and mind as essential for living a life of value, [as it is based] on strict standards of appearance, functioning and behaviour Ableism leads to social prejudice, discrimination against and oppression of persons with disabilities, as it informs legislation, policies, and practices.²⁵

AI applications reproduce and amplify those prejudices. Indeed, as Whittaker *et al.* note,

[i]n modeling the world through data, AI systems necessarily produce and reflect a normative vision of the world. ... Versions of normalcy reflected in the cultures and logics of corporate and academic tech environments are encoded in data and design and amplified through AI systems.²⁶

Bias has already had a negative effect in different sectors, such as employment, education, social protection, health, justice and the right to live in dignity.²⁷ What emerges from these examples is a pattern of marginalized populations repeatedly

available at: www.ajl.org/spotlight-documentary-coded-bias. For more on how AI decision-making can lead to discrimination, and for examples in specific sectors, see Frederick Zuiderveen Borgesius, *Discrimination, Artificial Intelligence, and Algorithmic Decision-Making*, Council of Europe, 2018, available at: <https://rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73>.

23 M. Whittaker *et al.*, above note 16, p. 7.

24 To learn more about systems of oppression, multiple discrimination and structural inequalities, see, for example, Egale, “Terms and Definitions: Systems of Oppression and Privilege”, available at: <https://egale.ca/awareness/systems-of-oppression-and-privilege-terms/>. On disability, multiple discrimination and intersectionality, see CRPD, above note 13.

25 Catalina Devandas-Aguilar, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/HRC/43/41, 17 December 2019, p. 3, available at: <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/43/41&Lang=E>.

26 M. Whittaker *et al.*, above note 16.

27 For examples and further information concerning possible bias in autonomous weapons, see SEHLAC, *Autonomous Weapons Systems: An Analysis from Human Rights, Humanitarian and Ethical Artificial Intelligence Perspectives*, 2021, available at: <https://bit.ly/3lMC8l5>.

facing the negative consequences of using AI and emerging technologies, coupled with a lack of legislation that serves to hamper accountability, remedy and reparations.

Furthermore, the failure to include and recognize the diversity of the population in the criteria for the design and implementation of AI means that the priorities of marginalized groups are not reflected in the objectives and needs for the use of such systems, precisely because these groups are not consulted in decision-making about what it is or is not acceptable to delegate to AI, and whether or not it is necessary to legislate in this area.

When considering bias in autonomous weapons, we must therefore remember that they are not developed in a neutral context. On the contrary, they should be considered as both the cause and the consequence of a social, economic and technological system that constantly reproduces stereotypes, bias, discrimination and disproportionate negative consequences for marginalized groups – and for the global South in general.

The possible impact of AI bias in autonomous weapons

Let us recall that the protection of the rights of persons with disabilities is clearly codified in international law.²⁸ IHL refers to the general protection of civilians, including persons with disabilities, during international armed conflicts.²⁹ Article 16 of Geneva Convention IV entitles the “wounded”, “sick” and “infirm” to be treated as “objects of particular protection” during such conflicts. Article 27 of the same treaty states that all protected persons shall be treated with the same consideration “without any adverse distinction based, in particular, on race, religion or political opinion”, and the Special Rapporteur on the Rights of Persons with Disabilities has stated that “[t]his prohibition of adverse distinction (discrimination) is capacious enough to encompass disability”.³⁰ Additionally, Additional Protocol I to the Geneva Conventions, in its Article 8, recognizes that “‘wounded’ and ‘sick’ means persons, whether military or civilians, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility”.³¹ Finally, as we consider that autonomous weapons would be a risk in international and non-international armed conflicts alike, it is also relevant to recall that protection

28 For a comprehensive review of the rights of persons with disabilities in the context of IHL, see ICRC, “IHL and Persons with Disabilities”, legal fact sheet, 4 October 2017, available at: www.icrc.org/en/document/ihl-and-persons-disabilities. Also see the articles by Janet Lord and Alex Breitegger in this issue of the *Review*.

29 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), Arts 16, 27, available at: <https://ihl-databases.icrc.org/ihl/INTRO/380>.

30 G. Quinn, above note 10, p. 13.

31 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), available at: <https://ihl-databases.icrc.org/ihl/WebART/470-750013?OpenDocument>.

of civilians – including persons with disabilities – is guaranteed by the rules of customary IHL.³²

On the other hand, international human rights law, under Article 11 of the Convention on the Rights of Persons with Disabilities, requires States Parties to take “all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters”.³³

Given this legal framework, we need to ask ourselves: will increasing the autonomy of weapons systems enhance States’ compliance with their existing legal obligations, or will such weapons constitute yet another obstacle to the exercise of those rights? As autonomous weapons have never been used on a large scale (and let us hope they never will be), the related bias has not been documented, but we believe it would be intellectually dishonest to claim that the same bias which has been thoroughly documented in the civilian sector, in different regions and contexts, would not apply to military applications and situations of conflict. Vanina Martínez, a researcher at Argentina’s National Council for Scientific and Technical Research and the University of Buenos Aires, highlights two distinct aspects of the bias that could be found in these weapons: that linked to different groups of the population (as mentioned in the previous section), stemming from the use of data that reflects existing prejudices; and that linked to the context, in the sense that AI systems can only be based on part of the real world and cannot take account of every possible scenario, especially in the unpredictable situation of an armed conflict.³⁴

As mentioned above, the issue of how these weapons would affect persons with disabilities was raised in 2021 by the Special Rapporteur on the Rights of Persons with Disabilities, who specifically questioned the ability of weaponry directed by AI to “make the nuanced determination”, for instance, “as to whether an assistive device qualifies a person with disabilities as a threat”.³⁵ Given that persons with disabilities constantly face ableism, as has been defined above, it is highly probable that those same prejudices would be reflected in autonomous weapons, which would certainly not take account of the following considerations:³⁶

- A person may use a wheelchair, walking stick, walker or crutches to move around, making their speed, height, and ability to react and move different from that of the rest of the population.
- Not everyone communicates orally. It is impossible for a person who is deaf or hard of hearing to comply with an audible command or warning, or simply to

32 ICRC, “Conflictos internos u otras situaciones de violencia: ¿Cuál es la diferencia para las víctimas?”, 10 December 2012, available at: www.icrc.org/es/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm.

33 CRPD, above note 13, Art. 11.

34 Arthur Holland Michel, “Known Unknowns: Data Issues and Military Autonomous Systems”, GGE on LAWS, 10 August 2021, available at: <https://unidir.org/events/known-unknowns-data-issues-and-military-autonomous-systems>.

35 G. Quinn, above note 9, p. 13.

36 W. Muñoz Jaime and M. Díaz Figueroa, above note 9.

look for refuge when the sounds of an attack can be the first sign of danger for others.

- Blind persons and those with a visual impairment cannot make use of visual cues which may be given by autonomous weapons systems. They face barriers to mobility, concealment or even life-saving measures in the event of an attack, and would possibly need someone to explain the presence of autonomous weapons and/or what could be required of them in order to be safe in those weapons' presence. Additionally, persons with daltonism may misinterpret light signals from such weapons or related systems.
- Not everyone perceives or understands the world in the same way. For a person with an intellectual impairment, certain orders will be difficult to understand or obey. This condition may lead to additional stress when in the presence of an attack by autonomous weapons and thereby lead to greater trauma than that which would be experienced by the rest of the population.
- People with psychosocial impairments might exhibit “unexpected” behaviour that autonomous weapons could be unable to process (such as lack of response, shouting or unexpected movements) or that such weapons might interpret as a risk, causing them to identify the person as a target.
- Facial, iris or fingerprint recognition may not identify persons with characteristics such as eye deviation, inability to keep the head straight, or various skin conditions.³⁷
- Devices or processes that currently use fingerprints are already causing situations of exclusion, since they are designed on the assumption that all persons have hands, fingers, fingerprints, and equal mobility in their arms and hands. For certain persons outside what is considered “the norm”, including persons with spasticity, taking fingerprints is practically impossible.
- Similar issues exist with voice recognition: there are persons who do not communicate orally, who may require more time to express themselves or answer questions, or whose words may not come out as clearly as expected or comply with the required tonality to be considered “valid”.³⁸

These issues can become more complex when they occur simultaneously in persons with multiple disabilities, or when multiple systems that create inequality interact in an intersectional manner. For instance, in the case of an indigenous woman with a hearing impairment, AI applications in general – including those possibly embedded in autonomous weapons – would be incapable of processing the fact that she needs to communicate by signing, and to do so in her native language. As Moisés Vinacudo, an indigenous leader from the Murui Muina community in Colombia, explains:

37 Such problems with facial and iris recognition are currently present in electronic devices with such features.

38 The authors have heard first-hand accounts of persons with disabilities who have been denied the ability to open a bank account because of the impossibility of taking their fingerprints or other biometric data, including voice recognition.

As inanimate machines, autonomous weapons cannot understand or respect the value of life. Even though they might have the power to end life, they would not have the ability to understand what such a loss means nor what kind of impact this would have on the identities and realities of our communities.³⁹

It is important to note, as well, that these issues cannot be solved simply by including persons with disabilities in data sets. Whittaker *et al.* write:

The category of “disability” complicates past classifications, and thus perturbs calls to simply include persons with disabilities in datasets, which are constructed around rigid models of categorization, however many categories they might include. ... [T]he way in which “disability” resists fitting into neat arrangements points to bigger questions about how other identity categories, such as race, sexual orientation, and gender, are (mis)treated as essential, fixed classifications in the logics of AI systems.⁴⁰

Now, some readers may say that human beings also have those biases and reproduce them. While this is true, it must not be accepted as an excuse to *also* allow machines to reproduce, perpetuate and escalate such biases, and to do so in weapons, where what is at risk is the right to life. Furthermore, humans who reproduce these biases can be held accountable, but lack of accountability, as we will see in the next sections, remains one of the major challenges relating both to AI systems and to the military today. As Ricaurte points out, autonomous weapons intersect the two historically patriarchal systems of technology and the military, thus amplifying the negative impact not only on women, but also on marginalized populations.⁴¹

Given the problems set out in this article, it is clearly essential that persons with disabilities and those belonging to historically marginalized groups participate both in AI development and in discussion forums concerning autonomous weapons. Their perspective and their analysis are essential if we are to avoid reproducing the systems of oppression that they face. This requires ensuring accessibility, funding for their participation and reasonable adjustments, which are desperately lacking. The case of autonomous weapons is representative, as even though the right to life and well-being of these individuals is at stake, they are not included in or invited to national or international debates.

To conclude this section, we would like to raise the issue that even when “ethical” perspectives on autonomous weapons systems are discussed, the debates generally do not include persons with disabilities or from other marginalized groups, and rarely include persons from the global South. Nevertheless, there is

39 SEHLAC and Colombian Campaign to Ban Landmines, “Moises Vinacudo, de la @COL_SIN_MINAS nos habla sobre cómo las #armasautónomas pueden tener un impacto desproporcionado y diferenciado en las comunidades #indígenas”, *Twitter*, 7 September 2021, available at: <https://tinyurl.com/577hmp6>.

40 M. Whittaker *et al.*, above note 16.

41 Paola Ricaurte, speaking at the panel on “Los riesgos de las armas autónomas y el rol de la comunidad científica” (“The Risks of Autonomous Weapons and the Role of the Scientific Community”), Reunión Internacional de Inteligencia Artificial, 27 August 2021.

no one sole set of ethics. It is necessary to include in this debate ethical perspectives from different geographical regions and groups, including persons with disabilities, conflict victims, feminist organizations and others. To date, discussions regarding the ethics of autonomous weapons have continued to highlight and centre the voices of defence, diplomacy, the private sector and academia, which, for the most part, do not represent the views of persons with disabilities and other marginalized groups. No debate on the ethics of autonomous weapons can be considered serious if the voices of those who risk being most affected are not heard.

Military and police violence against persons with disabilities as a precedent relevant to the development of autonomous weapons

We have now seen how bias in AI and emerging technologies has a disproportionate effect on marginalized groups. This bias both reflects and reinforces discrimination.

Persons with disabilities, in particular, continue to suffer multiple types of discrimination, including a higher risk of death, which increases disproportionately for persons with disabilities during situations of disaster, conflict and armed violence.⁴² In this section, we provide examples of military and police violence against persons with disabilities in different contexts, to show how bias from these institutions already impacts such persons disproportionately. Autonomous weapons would compound this violence through the bias in AI explained in the previous section.

Military violence against persons with disabilities

Persons with disabilities face specific and disproportionate risks in military operations; here we will share a few cases to illustrate this.

Let us start with an emblematic Colombian case. In a report on extrajudicial executions (known as “false positives”) committed by army personnel during Colombia’s internal armed conflict, Bustamante reports that

[t]he worst form of this war crime was against persons with intellectual disabilities, whose condition was deliberately abused to facilitate the army’s criminal actions. Lies were used to ‘conscript’ and execute them. They were seen as spoils of war, a means of obtaining perverse benefits.⁴³

42 See, for example, UNSC Res. 2475, 20 June 2019, available at: [https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=s/res/2475\(2019\)&Lang=E](https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=s/res/2475(2019)&Lang=E); United Nations Office for Disaster Risk Reduction, *Living with Disability and Disasters: UNISDR 2013 Survey on Living with Disabilities and Disasters – Key Findings*, 2014, available at: www.unisdr.org/2014/iddr/documents/2013DisabilitySurveyReport_030714.pdf.

43 Juliana Bustamante, “¿Qué les pasó en la guerra a las personas con discapacidad?”, *El Espectador*, 31 May 2019 (authors’ translation), available at: www.elespectador.com/colombia-20/analistas/que-les-paso-en-la-guerra-a-las-personas-con-discapacidad-articulo/.

A study on disability and armed conflict in Colombia by the Universidad de los Andes found that persons with disabilities killed in these executions included deaf persons, persons with intellectual disabilities, bipolar persons, persons living with epilepsy and persons living with osteoporosis.⁴⁴ The Special Jurisdiction for Peace, created to judge crimes during Colombia's armed conflict, states that a staggering 6,402 killings could have been "illegitimate deaths presented as persons killed in combat by agents of the State".⁴⁵ The percentage of persons with disabilities is not mentioned, pointing to the lack of disaggregated data that is an additional difficulty in identifying human rights violations faced by persons with disabilities. By 2021, only eleven persons had been recognized as "penally responsible for war crimes" in Colombia.⁴⁶

A second case involves the disproportionate impact of conflict on persons with disabilities in Gaza. According to a report by Disability Representative Bodies Network, twenty-three persons with disabilities died and approximately fifty were injured during the Israeli operation Protective Edge.⁴⁷ The report affirms that one of the contributing factors was that warnings of bombings communicated by telephone or in the form of flyers dropped from aircraft and drones did not reach persons with disabilities to the same degree as persons without.

Thirdly, in its report on persons with disabilities during conflict, Human Rights Watch records the case of a 43-year-old man from northeast Cameroon with intellectual and hearing impairments who died when soldiers from the Rapid Intervention Battalion shot him because he did not answer their questions.⁴⁸ Many more such cases doubtlessly go undocumented in various theatres of conflict, as a result of the lack of transparency and accountability regarding military operations and the lack of identification of persons with disabilities as such, coupled with a failure to disaggregate casualties by disability. Nonetheless, these examples certainly point to specific risks faced by persons with disabilities during military operations.

44 Program of Action for Equality and Social Inclusion, *Discapacidad y conflicto armado en Colombia: En busca de un relato ausente*, Bogotá, 2020, available at: https://paiis.uniandes.edu.co/wp-content/uploads/web_Discapacidad-y-conflicto-armado-en-Colombia-en-busca-de-un-relato-ausente.pdf.

45 Special Jurisdiction for Peace, "Principales estadísticas", 11 February 2022, available at: www.jep.gov.co/jepcifras/JEP%20en%20cifras%20-%20febrero%2011%20de%202022.pdf#search=6402.

46 Special Jurisdiction for Peace, "JEP imputa crímenes de guerra y de lesa humanidad a un general, 6 oficiales y 3 suboficiales del ejército, y a un tercero civil, por 'falsos positivos' en Catatumbo", 2021, available at: www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-imputa-cr%C3%ADmenes-de-guerra-y-de-lesa-humanidad-a-10-militares-y-un-civil-por-%27falsos-positivos%27-en-Catatumbo.aspx.

47 A. Hussein Abdel Rahman Hammad, *The Suffering of Persons with Disabilities from the Violations of Israeli Occupation Forces during the Operation Protective Edge*, 2014, available at: www.map.org.uk/downloads/thesuf1.pdf.

48 Human Rights Watch, "Persons with Disabilities in the Context of Armed Conflict: Submission to the UN Special Rapporteur on the Rights of Persons with Disabilities", 8 June 2021, available at: www.hrw.org/news/2021/06/08/persons-disabilities-context-armed-conflict.

Policy brutality against persons with disabilities

In addition to the use of violence by military forces, addressing police violence in the context of discussions on autonomous weapons is important because such weapons could find their way into the arsenals of police forces, which could increase human rights violations. As Wareham puts it, “[f]ully autonomous weapons systems need to be prohibited in all circumstances, including in armed conflict, law enforcement, and border control”.⁴⁹ The potential use of autonomous weapons in border control is another issue that, although outside of the scope of this article, should be of concern.⁵⁰

While discussions on autonomous weapons have so far been examined as they relate to situations governed by IHL, it is possible that if these weapons were to be developed, they would soon find their way into police arsenals. This has been the case with other weapons originally designed as military weapons that are now used by police.⁵¹ Although the discussions on the legality of autonomous weapons systems at the Convention on Conventional Weapons are held in the context of IHL, for civil society the possible use of autonomous weapons in policing is of equal concern, as is the risk of such weapons making their way into the hands of illegal or non-State armed groups; these are both topics which would require further research.

For the moment, we shall mention only a few cases of how police brutality targets persons with disabilities, knowing that – as with similar cases related to the armed forces – there must be many more undocumented cases, forgotten by history and by justice, owing to the lack of transparency and accountability among many of these organizations. The following examples aim to show how, as in the military, human decision-making in policing is already biased against persons with disabilities, and such bias could be reflected in, and compounded by, the use of autonomous weapons.

According to a report by David M. Perry and Lawrence Carter-Long published by the Ruderman Family Foundation (a US organization for persons with disabilities), persons with disabilities make up between 30% and 50% of all individuals killed by police,⁵² based on an analysis of police brutality in the United States between 2013 and 2015. The combination of skin colour and disability places some at higher risk – Haben Girma, a lawyer and activist who is

49 Mary Wareham, “Don’t Arm Robots in Policing”, Human Rights Watch, 24 March 2021, available at: www.hrw.org/news/2021/03/24/dont-arm-robots-policing.

50 See, for instance, Joe Sabala, “Israel Deploys Semi-Autonomous Machine Gun Robot to Gaza Border”, *Defense Post*, 1 July 2021, available at: www.thedefensepost.com/2021/07/01/israel-machine-gun-robot-gaza-border/.

51 See, for instance, Marvin Mack, “How America’s State Police Got Military Weapons”, *Insider*, 28 April 2021, available at: www.businessinsider.com/how-did-local-police-acquire-surplus-military-weapons-2020-8.

52 David M. Perry and Lawrence Carter-Long, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability: A Media Study (2013–2015) and Overview*, Ruderman Family Foundation, March 2016, available at: https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf.

black and deaf-blind, says, “Someone might be yelling for me to do something and I don’t hear. And then they assume that I’m a threat.”⁵³

While cases of police brutality and use of excessive force against persons with disabilities have been recorded in the United States, that country does not, of course, have a monopoly on such practices. *AP News* reported in June 2021 that an autistic Palestinian man had been shot dead by Israeli police in Jerusalem allegedly because he did not respond as expected when they approached him. He was on his way to an educational institution when the incident occurred.⁵⁴ There must be many more cases around the world that have not been documented, especially those involving assaults on the physical or psychological well-being of deaf persons and those with intellectual and psychosocial impairments by police officers who expect immediate and standardized responses.

Why is it important to be aware of these instances of military and police violence with a disproportionate impact on persons with disabilities when we talk about autonomous weapons? Because delegating the critical functions of a weapon to autonomous systems – which would have tech-related biases – in the hands of organizations that already disproportionately kill persons with disabilities could only result in additional and specific risks for this group.

The intersection between military violence, police brutality and technological bias in a context of structural discrimination

War sets in motion certain political calculations and assumptions about which lives are worth preserving and which are not, about which lives are worth mourning and which are not, and about which are worth living and which are not. According to the US philosopher Judith Butler, in wars and situations influenced by war, “the apprehension of precariousness leads to a heightening of violence, an insight into the physical vulnerability of some set of others that incites the desire to destroy them”.⁵⁵

As pointed out by the Latin American Network of Persons with Disabilities and Survivors of Antipersonnel Mines and Explosive Remnants of War (RED-LAT)⁵⁶ in 2021,⁵⁷ the logic and dynamics of armed conflict exacerbate the strategies of control, domination, and militarization of life, as well as of bodies, community fabrics and the symbolic universes of individuals and communities.

53 Abigail Abrams, “Black, Disabled and at Risk: The Overlooked Problem of Police Violence against Americans with Disabilities”, *Time*, 25 June 2020, available at: <https://time.com/5857438/police-violence-black-disabled/>.

54 Ilan Ben Zion, “Officer May Face Charges in Killing of Autistic Palestinian”, *AP News*, 21 October 2020, available at: <https://tinyurl.com/4vc6xswp>.

55 Judith Butler, *Frames of War: When Is Life Grievable?*, Verso, London and New York, 2009, p. 2.

56 Fore more on the purpose and work of RED-LAT, see RED-LAT, *Declaración de la Red Latinoamericana de Personas con Discapacidad y Sobrevivientes de Accidentes por Minas Antipersonal y Restos Explosivos de Guerra*, Bogotá, Colombia, 17 November 2017, available at: www.cud.unlp.edu.ar/uploads/docs/declaracion_bogota_red_de_sobrevivientes_de_map_reg_y_pcd.pdf.

57 RED-LAT and Humanity & Inclusion, *Aportes de la RED-LAT Red Latinoamericana de Sobrevivientes de Minas Antipersonal, Restos Explosivos de Guerra y otras Personas con Discapacidad a la reducción de la violencia en la región de América Latina*, July 2021, available at: <https://tinyurl.com/3s6f97dp>.

They also intensify violence against historically stigmatized people and groups, such as the Afro-descendant population, the LGBTQ+ community, indigenous peoples, ethnic groups, religious communities, peasant populations, women and girls, young people and persons with disabilities. RED-LAT states that “such identity dimensions end up becoming places of intersection of inequality, discrimination, displacement and exclusion, insofar as their conditions of precariousness are ontologically anchored to the body”.⁵⁸

From this perspective, use of excessive force by the military and police brutality may be attributed, at least in part, to individual, institutional and systemic prejudice against certain groups. It is no coincidence that the victims of police brutality and excessive military force in many countries are migrants, Afro-descendants, indigenous peoples, members of the LGBTQ+ community, women, activists, young people and persons with disabilities. Would not the criteria or algorithms on the basis of which autonomous weapons would make an attack reproduce and amplify human bias? Is it not likely that to an autonomous weapon, certain bodies, faces or reactions will appear more dangerous than others, based on social prejudices of which we already have examples both in the actions of certain military and police forces, and in AI applications?

Let us take a moment to draw a parallel with the issue of violence against girls and women in Latin America. According to the Inter-American Court of Human Rights, such violence is “rooted in concepts of the inferiority and subordination of women”.⁵⁹ The Committee on the Elimination of Discrimination against Women has also stated that gender-based violence, including killings, kidnappings and disappearances, should be seen not as a series of isolated or sporadic cases, but as the result of a structural situation, of social and cultural phenomena based on a culture of gender-based violence and discrimination.⁶⁰

Our analysis takes a similar approach: we are calling for autonomous weapons to be examined not in isolation, but rather in light of the systemic discrimination experienced by persons with disabilities and marginalized groups, especially during armed conflict. It is essential to recognize this context, in order to understand that any “mistakes” that such weapons may make will not be isolated cases, but will rather be the results of this conjunction of situations of structural discrimination that have, and will continue to have, a disproportionate effect on persons with disabilities and other marginalized groups, time and time again. We must not allow this. As an international community, we have the moral obligation to create new international legislation on these weapons, before they start to take lives on the basis of power asymmetries, ableism and other

58 *Ibid.*, p. 11 (authors’ translation).

59 Inter-American Court of Human Rights, *Cuadernillo de jurisprudencia de la Corte Interamericana de Derechos Humanos*, No. 4, 2018, p. 9 (authors’ translation), available at: www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo4.pdf.

60 *Ibid.*

discriminatory systems such as racism, colonialism, heteronormativity and patriarchy.⁶¹

The consequences of remote warfare and the barriers faced by persons with disabilities in conflict situations as a context for autonomous weapons

While autonomous weapons have not yet been used on a large scale, the need for a legal instrument has become even more urgent given that the autonomy of weapons is increasing at breakneck speed.⁶² At the same, we are already witnessing the impacts of remote war in a context where persons with disabilities are already disproportionately impacted and face enormous barriers in situations of conflict. Let us examine this last point in more detail.

The impact of remote warfare

Some countries claim that it would be premature to negotiate a legally binding instrument on autonomous weapons because we do not yet know what consequences such weapons would have. While these weapons have (fortunately) not yet been used on a large scale, we can nonetheless analyze the current impact of remote warfare and draw some well-informed conclusions.

In the pages that follow, we will be using the concept of “remote warfare” as defined by the Centre for Global Challenges: “Remote warfare is a form of military intervention characterised by a shift away from boots on the ground and towards light-footprint military operations.”⁶³ According to Watson and McKay, “remote warfare refers to an approach used by states to counter threats at a distance. ...

61 To learn more about these systems, see the references cited in note 24. On heteronormativity, see European Institute for Gender Equality, “Heteronormativity”, available at: <https://eige.europa.eu/thesaurus/terms/1237>; Stephen Wood, “Heteronormativity”, *Eldis*, available at: <https://www.eldis.org/keyissues/heteronormativity>. On patriarchy and autonomous weapons systems, see Ray Acheson, “Feminist Perspectives on Autonomous Weapon Systems”, *Reaching Critical Will*, 2020, available at: www.reachingcriticalwill.org/resources/publications-and-research/publications/14975-feminist-perspectives-on-autonomous-weapon-systems; M. Conway, above note 7. On colonialism (and specifically its link to AI) and current efforts on “decolonial AI”, see Katharine Miller, *The Movement to Decolonize AI: Centering Dignity Over Dependency*, Stanford University, Human-Centered Artificial Intelligence, 21 March 2022, available at: <https://hai.stanford.edu/news/movement-decolonize-ai-centering-dignity-over-dependency>. On violence and discrimination based on sexual orientation and gender identity, see Alon Margalit, “Still a Blind Spot: The Protection of LGBT Persons during Armed Conflict and Other Situations of Violence”, *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018, available at: www.corteidh.or.cr/tablas/r39345.pdf.

62 See, for example, Daan Kayser, *Increasing Autonomy in Weapons Systems: 10 Examples that Can Inform Thinking*, Automated Decision Research Project of Stop Killer Robots, in conjunction with PAX, December 2021, available at: <https://bit.ly/3uJdRA4>; Zachary Kallenborn, “Russia May Have Used a Killer Robot in Ukraine. Now What?”, *Bulletin of the Atomic Scientists*, 15 March 15, available at: <https://thebulletin.org/2022/03/russia-may-have-used-a-killer-robot-in-ukraine-now-what/>.

63 Centre for Global Challenges, “The Intimacies of Remote Warfare”, Utrecht University, available at: www.uu.nl/en/organisation/centre-for-global-challenges/projects/the-intimacies-of-remote-warfare.

‘[R]emoteness’ comes from a country’s military being one step removed from the frontline fighting.’⁶⁴

While the concept of remote war refers to a wider context, weapons with increasing autonomy are already used in remote warfare. As in earlier sections, we will share some examples of the impact of remote warfare to illustrate our point.

Let us examine first the human cost of the remote war in Yemen, as documented by Shibani and Molyneux.⁶⁵ According to the survivors of such attacks, the unpredictable and frequent appearance of drones is affecting the mental health of the population: people are already living in permanent fear of being attacked at any moment and are in a state of constant frustration and apathy that has driven some people to suicide. Not knowing when or where an attack will occur, or who the target will be, is having different effects on different groups, and those effects are aggravated for persons with intersecting marginalized identities and characteristics. For instance, the effects on mental health have been more severe in the case of young people. Mothers report that their young children are suffering from insomnia, depression, anxiety and fear. Children are no longer attending school for fear of attacks or are attending only because their families force them to do so. Women have reported that the incidence of miscarriage has increased owing to the stress of constantly feeling under threat.⁶⁶ While the experience of persons with disabilities is not specifically documented by Shibani and Molyneux (precisely because of the lack of a disability perspective on these and other issues), we can assume that remote war is at least as traumatic – and probably more traumatic – for these persons than for the rest of the population, particularly for persons with intellectual or psychosocial impairments, and persons with disabilities that also belong to other groups which face specific challenges, such as young persons, women and children.⁶⁷

Were the weapons used in these attacks fully autonomous? We cannot know. Nevertheless, the above-cited research demonstrates that an increase in

64 Abigail Watson and Alasdair McKay, “Remote Warfare: A Critical Introduction”, in Alasdair McKay, Abigail Watson and Megan Karlshøj-Pedersen (eds), *Remote Warfare: Interdisciplinary Perspectives*, E-International Relations, Bristol, 2021, p. 7, available at: www.e-ir.info/publication/remote-warfare-interdisciplinary-perspectives/, citing Emily Knowles and Abigail Watson, *Remote Warfare: Lessons Learned from Contemporary Theatres*, Oxford Research Group Remote Warfare Programme, June 2018, available at: www.researchgate.net/publication/327070322_Remote_Warfare_Lessons_Learned_from_Contemporary_Theatres.

65 Baraa Shibani and Camilla Molyneux, “The Human Cost of Remote Warfare in Yemen”, in A. McKay, A. Watson and M. Karlshøj-Pedersen (eds), above note 64.

66 *Ibid.*

67 For more on persons with psychosocial disabilities in war-affected settings, see Hanna Kienzler, Suzan Mitwalli and Meryem Cicek, “The Experience of People with Psychosocial Disabilities of Living Independently and Being Included in the Community in War-Affected Settings: A Review of the Literature”, *International Journal of Law and Psychiatry*, Vol. 81, March–April 2022, available at: www.sciencedirect.com/science/article/pii/S0160252721000935?via%3Dihub. For more on women and girls with disabilities in crises and conflicts, see Brigitte Rohwerder, “Women and Girls with Disabilities in Conflict and Crises”, K4D Helpdesk Report, 16 January 2017, available at: <https://gsdrc.org/wp-content/uploads/2017/10/032-Women-and-girls-with-disabilities-in-crisis-and-conflict.pdf>. On deaf persons in armed conflict, see World Federation of the Deaf, “Guidelines for the Protection and Safety of Deaf People in Armed Conflicts”, available at: <https://wfdeaf.org/news/resources/guidelines-for-the-protection-and-safety-of-deaf-people-in-armed-conflicts-2/>.

distance – in terms of both time and space – between perpetrator and victim has a demonstrable and specific effect on victims, including harm to the mental health of affected populations. This is compounded by the fact that, in conflict settings, mental health services and support services for persons with disabilities – where they existed in the first place – are quickly broken down. It is therefore probable that the impact of autonomous weapons on mental health would be at least as severe as that of ongoing remote warfare. We have to consider these elements – we must not allow States to act as if they do not know what the consequences of the use of autonomous weapons will be.

Indeed, we believe the argument that negotiating a legally binding instrument on autonomous weapons would be premature (as claimed by Australia, South Korea, the United States, the United Kingdom and Russia, among others⁶⁸) to be erroneous. It is perfectly possible to deduce the impact that such weapons would have from the known consequences of remote warfare. As Demmers says, “the term ‘remote warfare’ in itself sounds very clean and very controlled and distanced. ... [W]ar has perhaps become distanced and sanitized for some, but remains brutal and intimate and physical to those at the receiving end of it.”⁶⁹

The impact of humanitarian crises and the lack of access to justice for persons with disabilities

The negative impact of remote warfare is compounded by two factors: the barriers faced by persons with disabilities in accessing humanitarian assistance and the barriers faced by victims of unlawful attacks in accessing justice and reparation mechanisms.

Firstly, we must remember that persons with disabilities face physical, attitudinal, legal, economic, communication and other types of barriers in every context. These barriers are exacerbated by, and their impact is even more severe in, humanitarian, conflict and post-conflict situations. In a study by Handicap International, 54% of respondents with disabilities said they had experienced a direct physical impact, sometimes causing new impairments. 27% reported that they had been psychologically, physically or sexually abused, and 38% had suffered negative effects on their mental health. Three quarters of persons with disabilities reported that they did not have adequate access to basic assistance such as water, shelter, food and health due to conflict.⁷⁰ Furthermore, according to an investigation by the Geneva Academy of International Humanitarian Law

68 Human Rights Watch, *Stopping Killer Robots: Country Positions on Banning Fully Autonomous Weapons and Retaining Human Control*, 2020, available at: www.hrw.org/sites/default/files/media_2021/04/arms0820_web_1.pdf.

69 Jolle Demmers, speaking on “Saferworld’s Warpod, Episode 8: Remote Warfare: Interdisciplinary Perspectives”, Saferworld, available at: www.saferworld.org.uk/multimedia/saferworldas-warpod-episode-8-remote-warfare-interdisciplinary-perspectives.

70 Handicap International, *Disability in Humanitarian Contexts: Views from Affected People and Field Organisations*, Lyon, 2015, p. 4, available at: www.un.org/disabilities/documents/WHSDisability-in-humanitarian-contexts-HI.pdf.

and Human Rights (Geneva Academy), persons with disabilities living in conflict zones are at higher risk of being institutionalized or being victims of selective killings, and may be used as human shields. Women and girls with disabilities face a heightened risk of sexual and gender-based violence.⁷¹ The situation is particularly complex in rural and remote areas, which already have less access to services in general, particularly for indigenous groups.

Let us now examine the situation in another key area, that of access to justice – in particular, accountability, the right to remedy and obtaining reparations. According to Docherty,

a variety of legal obstacles make it likely that humans associated with the use or production of these weapons – notably operators and commanders, programmers, and manufacturers – would escape liability for the suffering caused by fully autonomous weapons. Neither criminal law nor civil law guarantees adequate accountability for individuals directly or indirectly involved in the use of fully autonomous weapons.⁷²

This is one of the great difficulties regarding accountability and access to justice, and one faced by all potential victims of these weapons.

Now let us consider the specific situation of persons with disabilities. According to the Geneva Academy, persons with disabilities are systematically denied access to justice when they have been victims of violations of IHL, and no attention is paid to ensuring that victims of conflict with disabilities are able to access and participate in judicial processes.⁷³

Let us examine this aspect – which is serious enough in itself – in light of what we are already seeing with remote warfare, through a specific example. In 2021, the US Air Force killed ten civilians in Kabul, including seven children and an aid worker.⁷⁴ What were the consequences? The Pentagon announced that the military personnel involved would not be disciplined.⁷⁵ The inspector-general of the US Air Force said an “honest mistake” had occurred as a result of errors of execution and communication problems,⁷⁶ while the Pentagon stated that it was looking at the possibility of making “condolence payments” to surviving family

71 Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy, Geneva, April 2019, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202014-interactif.pdf.

72 Bonnie Docherty, *Mind the Gap: The Lack of Accountability for Killer Robots*, Human Rights Watch, August 2015, available at: www.hrw.org/report/2015/04/09/mind-gap/lack-accountability-killer-robots.

73 A. Priddy, above note 71.

74 Siddhartha Roy and Richard Minter, “Taliban Kill Squad Hunting Down Afghans – Using US Biometric Data”, *New York Post*, 27 August 2021, available at: <https://nypost.com/2021/08/27/taliban-kill-squad-hunting-afghans-with-americas-biometric-data/>; Eric Schmitt, “No U.S. Troops Will Be Punished for Deadly Kabul Strike, Pentagon Chief Decides”, *New York Times*, 13 December 2021, available at: www.nytimes.com/2021/12/13/us/politics/afghanistan-drone-strike.html.

75 María Antonia Sánchez Vallejo, “El Pentágono reconoce como un ‘trágico error’ el ataque con dron que mató a diez civiles durante la evacuación de Kabul”, *El País*, 17 September 2021, available at: <https://elpais.com/internacional/2021-09-17/el-pentagono-reconoce-como-un-tragico-error-el-ataque-con-dron-que-mato-a-diez-civiles-durante-la-evacuacion-de-kabul.html>.

76 “US Will not Punish Troops for Deadly Kabul Drone Attack”, *Al Jazeera*, 13 December 2021, available at: www.aljazeera.com/news/2021/12/13/us-will-not-punish-troops-over-deadly-kabul-drone-attack-reports.

members.⁷⁷ Those family members are still waiting and continue to demand justice.⁷⁸ There are many more examples of such mistakes, and justice remains an illusion for the majority of victims.

What does all this tell us? It tells us that autonomous weapons would be developed and used in a context in which it is already the exception, rather than the norm, that victims are able to access justice – and this situation is even worse in the case of persons with disabilities. The characteristics of autonomous weapons, including those related to predictability and understandability,⁷⁹ would render accountability, remedy, reparations and, more generally, access to justice even more difficult for persons with disabilities – one of the groups hardest hit by conflict, with the greatest difficulties in obtaining justice. As Boulanin, Bruun and Goussac affirm, “autonomy opens up the possibility for IHL provisions to be exercised by a complex web of human and artificial agents, based on automated processes and in expanded and more complex geographical and temporal circumstances”, raising concerns that IHL violations cannot be “satisfactorily attributed, discerned, or scrutinized and, as a result, an individual or state responsible for an IHL violation is not held to account or punished for it”.⁸⁰ This concern would apply to any victim, but systemic discrimination would make it even worse for persons with disabilities.

This lack of accountability does not pertain exclusively to the use of AI and emerging technologies in the military sector. As Stauffer points out, the growing reliance on big-data analytics and algorithms to assist in, or even replace, predictive decision-making by humans “could come at profound cost in the years ahead by causing us to lose faith in our own ability to discern the truth and assign responsibility for bad decisions. Without someone to hold accountable, it is nearly impossible to vindicate human rights.”⁸¹ Access to justice would be even more difficult if these technologies were used in weapons. As Docherty says in her analysis of the “accountability gap”, the obstacles to assigning responsibility would prevent those responsible from being held legally and morally accountable for unlawful killings and other harms.⁸²

We believe it is essential to consider these different angles of analysis when discussing autonomous weapons systems. This will allow us to understand the

77 “Condolence payments” was the term used by the US authorities. See Gibran Naiyyar Peshiman, “Afghan Family Decimated by US Drone Strike Awaits Justice from Washington”, *Reuters*, 10 November 2021, available at: www.reuters.com/world/asia-pacific/afghan-family-decimated-by-us-drone-strike-awaits-justice-washington-2021-11-10/.

78 G. N. Peshiman, above note 77.

79 For more on the technical characteristics of autonomous weapons systems, see Arthur Holland Michel, *The Black Box, Unlocked: Predictability and Understandability in Military AI*, United Nations Institute for Disarmament Research, 2020, available at: <https://undir.org/sites/default/files/2020-09/BlackBoxUnlocked.pdf>; Anna Turek and Richard Moyes, *Autonomy in Weapons: “Explicability” as a Way to Secure Accountability*, Article 36, December 2020, available at: <https://article36.org/wp-content/uploads/2020/12/Explicability-and-accountability.pdf>.

80 V. Boulanin, L. Bruun and N. Goussac, above note 6, p. 40.

81 Brian Stauffer, “Can Algorithms Save Us from Human Error? Human Judgment and Responsibility in the Age of Technology”, Human Rights Watch, 2019, available at: www.hrw.org/world-report/2019/country-chapters/global-1.

82 B. Docherty, above note 72.

broader context in which such weapons would be used and developed, and to render visible how and why they would have a specific impact on the lives of persons with disabilities, exacerbating the already disproportionate impact of conflict on their human rights.

The exclusion of persons with disabilities from current debate on autonomous weapons

The Convention on the Rights of Persons with Disabilities, in its Article 4(3), clearly requires States Parties to closely consult with and actively involve persons with disabilities in decision-making processes, particularly through their representative organizations. We shall now look at why the exclusion of persons with disabilities in current discussions on autonomous weapons is of concern and results in continued disregard for the rights and perspectives of persons with disabilities, exacerbating their exclusion and their inability to influence decisions that will affect them disproportionately.

The contribution of persons with disabilities to the processes of humanitarian disarmament

Matters related to the military and the type and use of different weapons are usually considered to be of interest mainly to the armed forces, politicians and, in international forums, the diplomatic corps. As a result, disarmament and arms control have been discussed in these forums without most countries giving due weight to the experience, feelings and thinking of civil society organizations, in particular those of persons with disabilities, including survivors of indiscriminate weapons. Such weapons include anti-personnel mines and cluster munitions, the devastating effects of which still affect thousands of people, and nuclear weapons, which threaten the existence of the human race.

Working on the basis of their experience, civil society organizations including persons with disabilities have made technical contributions to the processes that resulted in the adoption and entry into force of several international instruments governing humanitarian disarmament, arms control and non proliferation. Their inputs and actions contributed to the adoptions of the treaties that prohibit the manufacture, use, stockpiling, export and import of anti-personnel mines⁸³ and cluster munitions⁸⁴ for States Parties, and that require them to destroy their stockpiles. States Parties are also obliged to provide assistance to the victims of these weapons. More recently, a treaty has been

83 The text of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction is available at: www.apminebanconvention.org/en/the-convention/history-and-text/.

84 The text of the Convention on Cluster Munitions is available at: www.clusterconvention.org/convention-text/.

adopted to prohibit the use of nuclear weapons, again with the participation and contributions of survivors of these horrific weapons.⁸⁵

The role of persons with disabilities, particularly survivors, in the negotiations that led to the adoption and entry into force of these instruments is perfectly clear for those who were part of those processes.⁸⁶ In the case of the negotiations on the Convention on Cluster Munitions, for instance, Borrie affirms that survivors had an “especially powerful effect on even the most hardened and cynical delegates”.⁸⁷ According to Human Rights Watch, “[s]urvivors not only provided heart-wrenching testimony that moved participants, but also skillfully lobbied for and gave interventions on specific legal provisions, such as a victim assistance obligation⁸⁸ and an absolute ban”.⁸⁹

As part of civil society, organizations of survivors of anti-personnel mines, cluster munitions and nuclear weapons⁹⁰ – many of whom are persons with disabilities – have been an essential part of the processes that led to these important developments in IHL. Through their experience and knowledge, they demonstrated to the international community that such weapons should never have existed because of their indiscriminate effects on civilian populations.⁹¹ This led the international community to reflect on and take a more comprehensive

85 The text of the Treaty on the Prohibition of Nuclear Weapons is available at: https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf.

86 On survivors’ participation in the processes that led to the ban on anti-personnel mines, see, for instance, Jerry White and Ken Rutherford, “The Role of the Landmine Survivors Network”, in Maxwell A. Cameron, Tobert J. Lawson and Brian W. Tomlin (eds), *To Walk without Fear: The Global Movement to Ban Landmines*, Oxford University Press, Toronto, 1998.

87 John Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won*, United Nations Institute for Disarmament Research, 2009, p. xviii, available at: www.unidir.org/sites/default/files/publication/pdfs/unacceptable-harm-a-history-of-how-the-treaty-to-ban-cluster-munitions-was-won-en-258.pdf.

88 For more on victim assistance in the context of the Convention on Cluster Munitions, see Convention on Cluster Munitions, “Victim Assistance”, 2022, available at: www.clusterconvention.org/victim-assistance/; Reiterer Markus, “Assisting Cluster Munition Victims: A New International Standard”, *Journal of ERW and Mine Action*, Vol. 15, No. 1, 2001, available at: <https://commons.lib.jmu.edu/cisr-journal/vol15/iss1/15>.

89 Human Rights Watch, *Meeting the Challenge: Protecting Civilians through the Convention on Cluster Munitions*, November 2010, available at: www.hrw.org/sites/default/files/reports/armsclusters1110webcover.pdf.

90 These organizations include the Afghan Landmine Survivors’ Organization, available at: <http://afghanlandminesurvivors.org/en/>; RED-LAT, available at: www.facebook.com/people/Red-Latinoamericana-de-Sobrevivientes-de-Map-Reg-y-Pcd/100066805080563/; the Fundación Red de Sobrevivientes y Personas con Discapacidad, El Salvador, available at: <https://reddesobrevivientes.org>; and the World Nuclear Survivors Forum 2021, available at: <https://nuclearsurvivors.org>. For survivor networks around the world, see: <https://survivornetworks.wordpress.com/networks/>.

91 Their activities included awareness-raising and advocacy on the impact of these weapons on men, women, girls and boys in affected communities, based on lived experience; advocacy activities at different levels to inform and encourage ministries of foreign affairs to negotiate a strong treaty text; promotion of national and regional conferences to discuss the human rights and economic impact of such weapons; awareness-raising among the general population regarding the negative impact of these weapons and the need for governments to negotiate prohibition treaties and ratify them; contributions to victim assistance and risk awareness in affected communities; and advocacy based on this field experience. In addition, during the Oslo Process, survivors’ contributions were fundamental to developing the article on victim assistance and the inclusion of victim assistance as a cross-cutting matter throughout the Convention on Cluster Munitions. This list is based on the lived experience of Jesús Martínez in the Ottawa and Oslo Processes, and the experience of Wanda Muñoz Jaime in the Oslo Process.

approach to addressing the unacceptable impact of these weapons and to address these issues from a humanitarian and human rights perspective.

So, on the one hand, persons with disabilities have the right to participate and bring their concerns and perspectives forward, and on the other, their contributions are fundamental because they bring different perspectives. Yet, their perspectives are still excluded from the discussions on autonomous weapons, particularly at the CCW.

The exclusion of persons with disabilities from discussions concerning autonomous weapons

As of September 2022, the CCW meetings which address the risks of autonomy in weaponry have not included interventions by, contributions from, or the participation of representative organizations of persons with disabilities (including those of survivors of different weapons), despite these persons having the right to have their perspectives considered, as explained in the previous section.

Now, some may argue that the case of autonomous weapons systems is different from that of anti-personnel mines, cluster munitions or nuclear weapons, since in those three cases there were already victims of such weapons when the prohibition treaties were negotiated. While this is true, the experience, priorities and needs of persons with disabilities and survivors of conflict is always relevant, on all topics and in all sectors, and such persons have the human right to be consulted. This is even more pressing in the case of autonomous weapons, since such weapons would probably have a disproportionate impact on persons with disabilities, for the reasons presented in the preceding sections.

Persons with disabilities have a right to participate in all these processes and to contribute to debates on what is acceptable and legal during war, such as those taking place on autonomous weapons systems at the CCW. Their experience would be extremely useful in current debates concerning new-generation weapons that might fail to recognize the characteristics of people who fall outside (wrongly) standardized human and social frameworks.

Apart from the fact that they have the right to be present, there are three other main reasons why organizations of persons with disabilities should be included in all debates on autonomous weapons. Firstly, these weapons could have a disproportionate impact among persons with disabilities. Such weapons, in fact, can be deemed indiscriminate on account of the biases they incorporate and their inability to identify the features of persons with disabilities and other marginalized groups. In other words, they may be indiscriminate by nature – as is the case with anti-personnel mines and cluster munitions – and disproportionately affect persons with disabilities.

Secondly, persons with disabilities and other marginalized groups, particularly those in the global South and those that are currently experiencing conflict, would probably be the first to suffer the effects of autonomous weapons. The perspectives of the people at risk need to be at the centre of the discussions, not the interests of military powers. We must recognize that there is an

asymmetry in the impact of autonomous weapons on different populations. It is easy – and even self-serving – to assert that new legally binding rules on autonomous weapons are not necessary when one knows that one’s country would not be the place where such weapons would, at least in principle, be tested and used,⁹² or when one does not belong to any of the marginalized groups that would be most affected.

Thirdly, it is essential to include organizations of persons with disabilities in discussions on autonomous weapons so that humanitarian and disability perspectives are incorporated more systematically. However, at least since 2019, not a single organization of persons with disabilities has made an intervention at the CCW, and we have found no evidence of their being included in consultations at the national level. All of this is extremely concerning.

International debates show that, in general, States still have no real interest in listening to persons with disabilities. Most fail to include both persons with disabilities and representatives of organizations of persons with disabilities in their own delegations, and to include them in national consultations on different issues, including autonomous weapons and AI. Let us say it clearly: this is not only a question of “improving” the data sets to include disability, it is a question of ensuring that persons with disabilities participate in the forums where the acceptability of specific uses of these technologies is discussed, where the decisions on the need for new international instruments are taken. By failing to ensure participation of and consultation with organizations of persons with disabilities, States miss out on an opportunity to include broad perspectives derived from the experiences of this population.

The main objective of the international community should be to strengthen efforts to ensure greater protection for civilians, in particular marginalized groups such as persons with disabilities. We must not wait until we have hundreds or thousands of casualties to adopt new international law on autonomous weapons systems, as was the case with other weapons – on the contrary, we must take urgent action in response to the risks that have already been identified. States have the moral imperative and the responsibility to launch, urgently, an effective negotiation process for an instrument on autonomous weapons systems. After the discussions in the framework of the CCW in the past two years, including its Review Conference, it seems impossible that such an instrument will be achieved in that forum.

Conclusions

In this article we have shown that persons with disabilities would be disproportionately affected by the use of autonomous weapons because of the systemic discrimination and barriers they continue to face in various areas. This discrimination would be replicated and exacerbated by autonomous weapons, with appalling and unacceptable consequences that would threaten the right to

92 R. Acheson, above note 8.

life itself. Indeed, we believe that analyzing the logic and dynamics of war goes beyond simply describing its forms and the ways in which it unfolds. To fully understand its impact, we must analyze the disproportionate impact of war and certain weapons on persons with disabilities and other marginalized groups; the contexts in which such weapons are developed and would be used; and the systemic discriminations that still permeate our societies.

The factors that reproduce and reinforce discrimination against persons with disabilities include biases in data and decision-making related to AI, violence by military and police forces, and lack of equal access to humanitarian aid and to justice and reparation mechanisms. Such discrimination is equally reflected in the debates on autonomous weapons, where there is a lack of encouragement of and support for the participation of organizations representing persons with disabilities, both at the national and international levels.

However, we need to take a much broader view of this topic. Considering it acceptable, ethical, legitimate and legal to delegate life-and-death decisions to autonomous systems – a serious issue in itself – would have major implications for our relationship with technology. If we believe that the right to life can be delegated to autonomous technology, why should we not also delegate the right to social protection, employment, health or justice to such systems? We must ask ourselves who stands to win and to lose as a result of these decisions, and of the lack of action and legislation in this area.

We must also remember that the face of another person reveals to us their suffering, their fragility. Faces have the power to generate moral imperatives, to awaken our common sense, our emotions. What happens to responsibility, compassion, empathy, shame, a sense of injustice and humanity itself, if we use autonomous weapons?

Autonomous weapons do not benefit the majority of nations, nor the majority of populations. On the contrary, as Bengio notes, autonomous weapons can be seen as an example of AI functioning as “a tool that can be used by those in power to keep that power, and to increase it”.⁹³ As investments in AI for autonomy in weapons systems increase, from a civil society standpoint, we would like to see investments of this magnitude directed towards sectors that really contribute to ensuring human security and combating inequality: inclusive education, universal social protection, accessible health services, access to justice, response to gender-based violence, gender equality and climate justice.

As of September 2022,⁹⁴ eighty-three States have called for a legally binding instrument on these weapons. The ICRC itself has reiterated that “new legally binding rules on autonomous weapons are urgently needed”,⁹⁵ joining civil

93 Davide Castelvecchi, “AI Pioneer: ‘The Dangers of Abuse Are Very Real’”, *Nature*, 4 April 2019, available at: www.nature.com/articles/d41586-019-00505-2.

94 Automated Decision Research, “State Positions”, available at: https://automatedresearch.org/state-positions/?_state_position_negotiation=yes.

95 ICRC, “Autonomous Weapons: The ICRC Calls on States to Take Steps towards Treaty Negotiations”, 8 August 2022, available at: www.icrc.org/en/document/autonomous-weapons-icrc-calls-states-towards-treaty-negotiations.

society and many other stakeholders in this call. Yet, the CCW has still not taken any concrete steps towards this goal. We therefore urge countries that are truly committed to human rights, the protection of civilians and IHL to initiate a process in some other forum, where a treaty that guarantees meaningful human control over the use of force, through prohibitions and regulations, can be negotiated in good faith. Such a process must truly place the ethical, humanitarian and human rights concerns evoked in this article at its centre and must include the views and contributions of persons with disabilities and other marginalized groups.

Autonomy in the critical functions of weapons systems is on the rise, and inaction is not neutral: it benefits those who are currently developing these weapons. Every day that passes without a legally binding instrument on autonomous weapons is another day that normalizes and enables their development and future use. How much longer are we going to wait? Who will be responsible for the future victims of autonomous weapons resulting from inaction on the part of the international community?

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 IHRL 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.

Article 12 of the Protocol on the Rights of Persons with Disabilities in Africa: A critical analysis

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Abstract

This contribution analyses Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (the Protocol). It examines the purpose, scope and contribution of this Article to the legal protection of persons with disabilities in armed conflict and its implementation. The analysis is divided into four parts. The first part will start by identifying and analysing the background to this provision, which provides specific protection to persons with disabilities in armed conflict. The second part will examine Article 12 in the light of other similar regional instruments and of the protection challenges that persons with disabilities face during conflict. This will highlight the specific nature of the Article's provisions, together with its shortcomings and its progressive aspects. Part three will look at the interaction between Article 12 and equivalent rules of international humanitarian law, and how Article 12 contributes to the development of legal protection for persons with disabilities in armed conflict. Finally, the fourth part will examine the challenges to

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the implementation of Article 12. It will also propose ways of overcoming those challenges and hence of enabling Article 12 to have its intended effect.

Keywords: Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, persons with disabilities, African Union, international humanitarian law, international human rights law, implementation.

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Introduction

Under Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, States must:

- a) Take specific measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, forced displacements, humanitarian emergencies and natural disasters;
- b) Ensure that persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre and post-conflict reconstruction and rehabilitation.¹

The provisions of Article 12 apply specifically to situations of crisis, including armed conflict. They confer special protection on persons with disabilities who are suffering from the consequences of such situations, in the form of obligations imposed upon States. The present article provides an in-depth analysis of this provision and its application to situations of armed conflict. Specifically, this contribution will analyse the purpose and scope of Article 12. It will also analyse the contribution of that article to the legal protection of persons with disabilities in armed conflict and the challenges to its implementation. The analysis is divided into four parts.

The first will examine the reasons why a specific article setting out special protection for persons with disabilities who are suffering the effects of armed conflict was included in the Protocol on the Rights of Persons with Disabilities in Africa. It shall show that this was motivated by the desire of the African Union (AU) to improve the situation of persons with disabilities in armed conflict, in accordance with the AU's aim of promoting and protecting human rights.²

The second section will examine the position of Article 12 within the AU's legal framework protecting the victims of armed conflict. On the basis of a critical analysis, it will first show that Article 12 is somewhat brief, providing less protection

1 African Union (AU), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, 29 January 2018, Art. 12, available at: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (all internet references were accessed in October 2022).

2 See Constitutive Act of the African Union, 2158 UNTS 3, 11 July 2000 (entered into force 26 May 2001), available at: <https://au.int/en/constitutive-act>. Article 3(h) states that one of the objectives of the AU is to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments".

than equivalent provisions of humanitarian law contained in earlier regional instruments protecting other categories of vulnerable person. It will then argue that a systematic reading of Article 12 in conjunction with other regional instruments would nonetheless make it possible to overcome the shortcomings of this article, and thereby to provide adequate protection for persons with disabilities in armed conflicts in Africa.

Part three shall look at the interaction between Article 12 and the provisions of international humanitarian law (IHL) regarding the protection of persons with disabilities. It shall put forward two arguments. Firstly, Article 12 contributes to the development of the way in which disability is perceived, and to the definition of the term “persons with disabilities” in IHL. Secondly, Article 12 strengthens protection for persons with disabilities in armed conflict. Furthermore, Article 12, read in conjunction with the other relevant provisions of the Protocol, is consistent with IHL and does not call into question the coherence or integrity of that branch of law – and still less its universality.

Finally, the fourth part will consider the implementation of Article 12. It will identify the main factors that explain why very few States have so far ratified the Protocol containing this article, and will suggest ways of promoting its ratification. This section will also demonstrate the need to produce a “general comment” on Article 12 and to strengthen the capacity and coordination of national and regional mechanisms in order to achieve the objectives of that article.

The rationale for Article 12

Armed conflicts remain a major social issue in Africa, even if their number has fallen over the years.³ Persons with disabilities are among the hardest hit. Indeed, although there are no precise figures on the number of persons with disabilities affected by armed conflict in Africa,⁴ there is no doubt that these persons are one of the main vulnerable groups suffering the consequences of armed conflict to a disproportionate degree – precisely because of their disabilities.⁵ They encounter a

3 According to the database *The Rule of Law in Armed Conflict* (RULAC), no fewer than twenty armed conflicts are currently taking place in Africa. See Geneva Academy/RULAC, “Conflicts”, available at: www.rulac.org/browse/conflicts.

4 The World Health Organization estimates that 15% of the world’s population is living with a disability, and that this percentage increases in crises, including armed conflicts. African countries experiencing conflict are no exception. For details, see World Health Organization, *Disability and Health*, 24 November 2021, available at: www.who.int/news-room/fact-sheets/detail/disability-and-health; Overseas Advising Group, Fonds humanitaire en République Démocratique du Congo and Handicap International, *Prise en compte des Personnes Handicapées dans la réponse humanitaire en RDC : Enquête CAP multisectorielle couplée avec les Questions du Washington Group, Rapport de synthèse, ReliefWeb*, 1 October 2021, available at: <https://reliefweb.int/report/democratic-republic-congo/prise-en-compte-des-personnes-handicap-es-dans-la-r-ponse>; Human Rights Watch, “South Sudan: People with Disabilities, Older People Face Danger”, 31 May 2017, available at: www.hrw.org/news/2017/05/31/south-sudan-people-disabilities-older-people-face-danger.

5 International Committee of the Red Cross (ICRC), “Violence in Congo’s Kasai Region Even Harder on Disabled People”, 1 December 2017, available at: www.icrc.org/en/document/violence-congos-kasai-region-even-harder-disabled-people.

range of protection challenges. In fact, the violence generated by armed conflict creates a multitude of risks, including targeted attacks on individuals, the presence of landmines and unexploded ordnance, disruption of food and water supplies and medical services, exposure to weather conditions and other types of trauma that can create or exacerbate psychosocial difficulties and disabilities.⁶ Indiscriminate attacks and the use of explosive weapons in populated areas have even more disastrous consequences for persons with disabilities, who are often unable to flee the fighting.⁷ Persons who are blind or visually impaired do not always have someone to help them flee. The same applies to persons with reduced mobility.⁸ Persons with a hearing, developmental or intellectual disability are often unable to hear, know or understand what is going on during an attack. This may result in them being exposed to the worst of the violence, because they cannot keep up when it is time to escape. Their families cannot always wait for them or flee with them.⁹ In addition, fleeing to an unknown destination may be dangerous for them. In Cameroon, for example, persons with disabilities often remain in their villages even during an attack, because of the risks inherent in fleeing to inaccessible terrain and of hindering their families' or neighbours' attempts to escape.¹⁰ For those of them who succeed in fleeing armed conflict,¹¹ displacement is also a complicating factor that presents multiple threats to their physical and mental health and well-being, exacerbating their existing disabilities or causing secondary disability.¹² In fact, persons with disabilities are sometimes marginalized and denied basic services. Refugee and internally displaced person camps and settlements do not always have formal, comprehensive and inclusive procedures for identifying persons with disabilities and therefore cannot provide them with protection and essential services, such as shelter and medical care that

6 Janet E. Lord, *Desk Review on Humanitarian Action Inclusive of Persons with Disabilities*, Inter-Agency Standing Committee (IASC), 1 March 2018, available at: <https://interagencystandingcommittee.org/iasc-task-team-inclusion-persons-disabilities-humanitarian-action/documents/desk-review-humanitarian>.

7 *Ibid.*

8 See ICRC, above note 5, which points out that people with reduced mobility were the hardest hit by violence in Kasai Region, Democratic Republic of the Congo.

9 *Ibid.*

10 Human Rights Watch, "Cameroon: Make Humanitarian Response More Inclusive", 10 December 2019, available at: www.hrw.org/news/2019/12/10/cameroon-make-humanitarian-response-more-inclusive.

11 It is estimated that 9.3 million persons with disabilities have been forced to flee their homes, many of them because of armed conflict. The majority of them are in Africa, which has the highest percentages of refugees and internally displaced persons in the world. For details, see Human Rights Watch, "UN: War's Impact on People with Disabilities", 3 December 2018, available at: www.hrw.org/news/2018/12/03/un-wars-impact-people-disabilities; Internal Displacement Monitoring Centre, *Global Report on Internal Displacement 2020*, April 2020, pp. 1–26, available at: www.internal-displacement.org/global-report/grid2020/.

12 See United Nations (UN) General Assembly, World Programme of Action Concerning Disabled Persons, Report of the Secretary-General, UN Doc. A/37/351, 15 September 1982, Annex, Section VIII, Recommendation 1 (IV), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N82/238/48/PDF/N8223848.pdf?OpenElement>; and Corrigendum, UN Doc. A/37/351/Add.1/Corr.1, 22 October 1982, available at: <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/37/351/Add.1/Corr.1&Lang=E>.

are accessible and appropriate to their needs.¹³ In Cameroon, the Central African Republic and South Sudan, persons with disabilities who have managed to reach internally displaced person or refugee camps often encounter barriers to obtaining food and medical care, and to using sanitary facilities.¹⁴

Besides, children with disabilities, women with disabilities and elderly persons with disabilities are exposed to disproportionate risk and may become even more vulnerable. Those of them living in communal accommodation, in hostels or psychiatric institutions form easy targets and may be used as human shields or taken hostage.¹⁵ Children with disabilities may have their education disrupted, have no access to humanitarian aid and services and suffer lasting psychological harm. Conflict can worsen poverty for them and their families, affecting their ability to meet basic needs, let alone get assistive devices or rehabilitation.¹⁶ Women and girls with disabilities are exposed to sexual violence and rape and, consequently, to sexually transmitted infections.¹⁷ Their vulnerability to sexual violence, rape and sexually transmitted infections is aggravated by the belief that sex with persons with disabilities will cure AIDS – presumably an even more twisted version of the so-called “virgin cure” that is grounded on the common misconception that persons with disabilities are not sexually active and therefore have to be virgins.¹⁸

Given the consequences of armed conflict for persons with disabilities, it was important for the AU – in line with its objective of promoting and protecting human rights – to provide specific and adequate protection for persons with disabilities during armed conflict. Reflections in this regard began in the late 1990s, leading to the proclamation of the period 1999–2009 as the African Decade for Persons with Disabilities.¹⁹ This was a regional initiative to further equalization of opportunities as well as to promote and protect the human rights of persons with disabilities.²⁰ Then, in 2003, the AU officially requested its Member States to adopt a protocol that would provide adequate protection for

13 UN Office of the High Commissioner for Human Rights, “Migrants and Refugees with Disabilities Must be Priority in New Global Compact on Migration – UN Experts”, Press Release, 12 April 2017, available at: www.ohchr.org/en/press-releases/2017/04/migrants-and-refugees-disabilities-must-be-priority-new-global-compact; Human Rights Watch, *One Billion Forgotten: Protecting the Human Rights of Persons with Disabilities*, 2011, pp. 11–12, available at: www.hrw.org/sites/default/files/related_material/2014%20disabilities_program_low.pdf.

14 Human Rights Watch, above note 11.

15 *Ibid.*

16 Human Rights Watch, “UN: High Risk in Conflicts for Children with Disabilities”, 2 February 2022, available at: www.hrw.org/news/2022/02/02/un-high-risk-conflicts-children-disabilities.

17 Serges Alain Djoyou Kamga, “A Call for a Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa”, *African Journal of International and Comparative Law*, Vol. 21, No. 2, p. 222.

18 *Ibid.*

19 See OAU Secretary, General Report CM/2112 (LXX), adopted by the 23rd session of the Labour and Social Affairs Commission meeting in Algiers, Algeria, 12–13 April 2000, and endorsed by the 72nd session of the OAU Council of Ministers and 36th Assembly of Heads of State and Government, respectively, meeting in Lomé, Togo, 6–8 July 2000, Decision CM/Dec.535 (LXXII) Rev.1.

20 *Ibid.* For further details, see also UN Enable, *African Decade of Disabled Persons (2000–2009)*, 2003, available at: www.un.org/esa/socdev/enable/disafriacadecade.htm#_edn50.

persons with disabilities. This took place at the first Organisation of African Unity (OAU) Ministerial Conference on Human Rights,²¹ which resulted in the Kigali Declaration.²² Noting the plight of persons with disabilities in Africa,²³ the participants at the Ministerial Conference called on Member States to “develop a Protocol on the protection of the rights of persons with disabilities and the elderly”.²⁴ In 2009, in response to that call, the African Commission on Human and Peoples’ Rights (ACHPR) set up a Working Group on the Rights of Older Persons and People with Disabilities.²⁵ The mandate of the Working Group included drafting a concept paper to serve as a basis for a draft protocol on persons with disabilities.²⁶ In accordance with that mandate, the Working Group submitted a draft protocol on the rights of persons with disabilities in November 2009, for consideration and adoption by the political bodies of the AU. This was the “Accra Draft”.²⁷ However, that draft encountered severe criticism from disability rights organizations, academic circles and national human rights organizations. Those bodies argued that the draft did not pay adequate attention to the socio-economic rights of persons with disabilities, did not cover the questions of albinism and disability, was silent on the effects of harmful traditional practices and did not underline the double discrimination suffered by women with disabilities.²⁸ They maintained that these flaws were due to the fact that the drafting of the protocol had not been preceded by an adequate process of conceptual and analytical reflection involving them.²⁹ In response to this criticism, the ACHPR enlarged the Working Group by appointing three additional experts on issues related to persons with disabilities and elderly people.³⁰ Following a series of consultations involving the relevant bodies, and bearing in mind the concerns that African States had expressed during drafting of

21 This conference took place in Kigali, Rwanda, on 8 May 2003.

22 AU, Kigali Declaration, 8 May 2003, available at: www.achpr.org/legalinstruments/detail?id=39.

23 *Ibid.*, para. 19.

24 *Ibid.*, para. 20.

25 African Commission on Human and Peoples’ Rights (ACHPR), Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa – ACHPR/Res.143(XXXV)09, 27 May 2009, para. (a), available at: www.achpr.org/sessions/resolutions?id=228.

26 *Ibid.*, para. (a) i–iii.

27 See, for example, S. A. D. Kamga, above note 17, pp. 223–4.

28 *Ibid.*, p. 224.

29 *Ibid.*; Japhet Biegong, “The Promotion and Protection of Disability Rights in the African Human Rights system”, in Ilze Grobbelaar-du Plessis and Tobias van Reenen (eds), *Aspects of Disability Law in Africa*, Pretoria University Law Press, Pretoria, 2011, available at: www.pulp.up.ac.za/edited-collections/aspects-of-disability-law-in-africa; Juliet Mureriwa, “Some Reflections on the Draft African Disability Protocol and Socio-Economic Justice for Persons with Disabilities”, *Economic and Social Rights Review*, Vol. 12, No. 3, 2011, p. 3; Hélène Combrinck and Lawrence M. Mute, “Developments Regarding Disability Rights During 2013: The African Charter and African Commission on Human and Peoples’ Rights”, *African Disability Rights Yearbook*, Vol. 2, 2014, p. 313.

30 ACHPR, Resolution to Increase Members of the Working Group on Older Persons and People with Disabilities in Africa – ACHPR/Res.170(XLVIII)10, 24 November 2010, available at: www.achpr.org/sessions/resolutions?id=344.

the Convention on the Rights of Persons with Disabilities (CRPD),³¹ the expanded Working Group drafted a technical document, in the form of a concept note, to serve as the basis for producing a new draft protocol on the rights of persons with disabilities.³² It contained a list of protection topics and issues that a future protocol should cover. A draft protocol was produced on the basis of that document in 2014.³³ Proposals for modification were collected from various bodies, leading to the Protocol on the Rights of Persons with Disabilities in Africa.³⁴

The publicly available May 2012 version of the concept note did not mention the protection of persons with disabilities in armed conflict as a topic to include in the draft Protocol. However, the report of the Working Group chairperson, produced in October (four months later), contained a point indicating that this topic had been included in a later version of the concept note or had at least been taken into account during discussions concerning the Protocol. In that report, Working Group chairperson Commissioner Yeung Kam John Yeung Sik Yuen stated:

The Working Group finds that there is a need for an African specific Protocol on the Rights of Persons with Disabilities. Almost 80 per cent of persons with disabilities live in developing countries. In Africa a growing number of persons are added to the list of persons with disabilities due to different socio-economic factors, including the *consequences of war*, poverty, diseases, ageing, malnutrition, natural calamities and disasters and accidents.³⁵

This statement indicates that the effect of armed conflict on persons with disabilities was among the reasons for producing the Protocol and, in particular, for including an article aimed at improving their plight in such situations. It is important to stress that the African community had already addressed the protection of persons with disabilities in armed conflict when drafting the CRPD. Starting in 2003, at the regional workshop to formulate proposals for the CRPD, national African human rights organizations and civil society bodies had expressly recommended the inclusion in the CRPD of a provision related to the protection of the rights of persons with disabilities in armed conflict. The final declaration produced at the conclusion of this work stated that “the Convention should recognize the vulnerability of persons with disabilities in situations of crisis such as conflict and

31 Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3, 6 December 2006 (entered into force 3 May 2008), available at: www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html.

32 Lawrence Mute, *Concept on the List of Issues to Guide Preparation of a Protocol on the Rights of Persons with Disabilities in Africa, Revised Draft as of 3 May 2012*, available at: <https://blindsa.org.za/wp-content/uploads/2018/02/IDEA-PAPER-ON-THE-LIST-OF-ISSUES-TO-GUIDE-PREPARATION-OF-A-PROTOCOL-ON-T...doc>.

33 ACHPR, “Comments Invited on Draft Protocol on the Rights of Persons with Disabilities in Africa”, March 2014, available at: www.achpr.org/news/viewdetail?id=129.

34 *Ibid.*

35 Yeung Kam John Yeung Sik Yuen, *Report of the Chairperson of the Working Group on The Rights of Older Persons and People with Disabilities in Africa*, Yamoussoukro, Côte d’Ivoire, October 2012, available at: www.achpr.org/public/Document/file/English/activty_report_older_persons_eng.pdf (emphasis added).

natural disasters”.³⁶ The African States took this recommendation into account and promoted it widely in drafting the CRPD. For example, the African group recommended that the following general provision be included in the Convention:

[...] States Parties undertake to:

establish credible and effective structures to oversee implementation and monitoring; to ensure a barrier free society through the establishment of an effective enabling environment; to provide particular protection and support for persons with disabilities who are vulnerable on account of situations such as *conflict* and natural disasters or because of their status as children, women and persons living with HIV/AIDS.³⁷

The protection of persons with disabilities in armed conflict had clearly been a constant concern for the African States. It was this concern that motivated the inclusion of Article 12 in the Protocol. By doing so, the AU was putting into practice its commitment to promote and protect human rights. This commitment is not restricted to particular circumstances. It is relevant at all times, including during armed conflict. Furthermore, the guarantees of treatment referred to in the expression “human rights” are not limited to those set out in international human rights law.³⁸ They also include guarantees related to humanitarian law, i.e. those guarantees intended to address the problems that arise during armed conflict. This interpretation is based on the fact that, in addition to the Protocol on the Rights of Persons with Disabilities, many other AU human rights instruments contain provisions of humanitarian law, i.e. provisions specifically applicable to situations of armed conflict. These include the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Protocol on the Rights of Women),³⁹ the African Charter on the Rights

36 Secretariat of African National Institutions, *Regional Workshop on Promoting the Rights of People with Disabilities: Towards a New UN Convention – Final Declaration*, Munyonyo-Kampala, Uganda, 6 June 2003, para. 30, available at: www.un.org/esa/socdev/enable/rights/contrib-uganda.htm.

37 UN Enable, Ad Hoc Committee, *Proposed Modifications by Governments, Seventh Session*, 2005, Art. 4, para. 6, available at: www.un.org/esa/socdev/enable/rights/ahc7african.htm (emphasis added). See also, for other examples of contributions from Africa regarding this topic, Kenya, *Position of Kenya on Draft Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 10 January 2006 and 7 October 2005, available at: www.un.org/esa/socdev/enable/rights/ahc7kenya.htm. It is also worth mentioning the addition of the words “in particular during armed conflicts and foreign occupation” to the end of para. (u) of the preamble to the CRPD at the initiative of the Arab Group, of which several African States are members. For details regarding that contribution, see Ad Hoc Committee on Convention on Persons with Disabilities, “Ad Hoc Committee Agrees on New UN Convention to Protect Disabled Persons’ Rights”, Press Release, UN Doc. SOC/4716, 28 August 2006, available at: <https://unis.unvienna.org/unis/en/pressrels/2006/soc4716.html>. For further details on this subject, see Arlene S. Kanter, “The Promise and Challenge of the United Nations Convention on the Right of Persons with Disabilities”, *Syracuse Journal of International Law and Commerce*, Vol. 34, 2007, pp. 300–1.

38 ICRC, “Quelle différence y a-t-il entre le droit humanitaire et le droit des droits de l’homme?”, 1 January 2004, available at: www.icrc.org/fr/doc/resources/documents/misc/5qlbu7.htm.

39 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 11 July 2003 (entered into force 25 November 2005), Art. 11, available at: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>.

and Welfare of the Child (African Charter on the Rights of the Child),⁴⁰ the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)⁴¹ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons).⁴² As emphasized in the various reports on governance in Africa produced by the AU,⁴³ these instruments – which contain provisions specifically applicable in armed conflict – were drafted with the objective of promoting and protecting human rights as set out in the Constitutive Act of the AU. In the case of the Protocol on the Rights of Persons with Disabilities, it was therefore a matter of continuity for the AU to provide specific protection for these categories of persons, as had been done in other legal instruments for other particularly vulnerable categories of person. The protection of persons with disabilities conferred by the Protocol would have been incomplete if the issue of protecting them during armed conflict had not been taken into account.

The position of Article 12 within the AU's legal framework protecting the victims of armed conflict

By comparison with other regional provisions protecting especially vulnerable people in armed conflict, Article 12 is very brief and contains very little protection in itself. However, its deficiencies are compensated for by other regional rules enacted previously.

Article 12 contains fewer protections than other regional human rights instruments

Article 12 is the shortest article related to the protection of vulnerable people in any AU instrument. It is also the shortest of all the substantive articles in the same Protocol. It consists of just one paragraph, divided into two sub-paragraphs. In turn, each sub-paragraph consists of a single sentence, scarcely three lines in

40 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/153/Rev2, July 1990 (entered into force 29 November 1999), Arts 22 and 23, available at: <https://au.int/en/treaties/african-charter-rights-and-welfare-child>.

41 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 52 ILM 400, 23 October 2009 (entered into force 6 December 2012), Arts 4, 7, etc., available at: <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>.

42 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons, 31 January 2016, Art. 12, available at: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons>.

43 See African Peer Review Mechanism, *The Africa Governance Report: Promoting African Union Shared Values*, January 2019, p. 25, available at: <https://au.int/en/documents/20190118/africa-governance-report-promoting-african-union-shared-values>; *The Africa Governance Report: Promoting African Union Shared Values*, December 2019, p. 27, available at: <https://au.int/en/documents/20191218/africa-governance-report-promoting-african-union-shared-values>.

length. Article 11 of the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa contains four substantive paragraphs. Article 10 of the same protocol contains two further paragraphs addressing the protection of women in conflict. Articles 22 and 23 of the African Charter on the Rights and Welfare of the Child, which address the protection of children in conflict, contain two and three more paragraphs, respectively, than Article 12 of the Protocol on the Rights of Persons with Disabilities. The Kampala Convention contains several articles devoted to the protection of people displaced within their countries as a result of armed conflict.⁴⁴

Article 12 is also the least explicit and least comprehensive in the protection it provides of all the provisions in the same protocol and elsewhere related to other categories of particularly vulnerable person. Unlike the other regional provisions protecting especially vulnerable people in armed conflict, Article 12 does not have a counterpart in the preamble setting out the reasons for its adoption. It is somewhat surprising that the preamble to the Protocol does not reflect the many challenges to the protection of persons with disabilities in armed conflict. And yet, several African States were involved in drafting paragraph 4 of the preamble to the CRPD.⁴⁵ That paragraph recalls the plight of persons with disabilities in armed conflict and can be linked to Article 11 of the CRPD, concerning the protection of persons with disabilities in armed conflict. As the *travaux préparatoires* of the Protocol are not publicly available, it is difficult to establish the reason for omitting all mention of persons with disabilities in armed conflict from the preamble. It is also impossible to establish whether such wording appeared in an earlier draft of the Protocol but was later removed. The 2014 draft on the ACHPR website, which precedes the final version, makes no reference to armed conflict in its preamble.⁴⁶ Mentioning armed conflict in the preamble, as do other similar AU instruments and the CRPD, would have provided an additional means of interpreting Article 12.⁴⁷ As it is, the preamble does not help us interpret Article 12 or assess that article in depth, especially as regards IHL.

Besides, with the exception of “situations of risk”, none of the terms used in Article 12 are defined in Article 1 of the Protocol. That article contains a long list of definitions, but the terms “protection”, “safety”, “consult” and “participate”, which lie at the heart of Article 12, are absent. They are therefore left open to interpretation. This could lead to divergent interpretations, preventing harmonious application of Article 12.

44 See, in particular, Kampala Convention, Arts 3–7.

45 For details, see above note 37.

46 ACHPR, above note 33.

47 Regarding the value of a preamble in interpreting a treaty, see, *inter alia*, Quôc Dinh Nguyễn, Patrick Daillier and Alain Pellet, *Droit international public*, 7th ed., L.G.D.J., Paris, 2002, p. 131; Mustafa Kamil Yasseen, “L’interprétation des traités d’après la Convention de Vienne sur le droit des traités”, in *Recueil des cours de l’Académie de droit international*, Vol. 51, 1976; Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en, Art. 31, which begins “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *preamble* and annexes: [...]” (emphasis added).

Furthermore, Article 12 contains only two specific protective measures. Firstly, it requires States to “take specific measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict”. Secondly, it requires them to “ensure that persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre and post-conflict reconstruction and rehabilitation”. We shall return to the interpretation and analysis of the provisions of Article 12 later in the present contribution. However, we should point out at this stage that the regional instruments mentioned above provide greater protection for the vulnerable people to whom they apply. They are more generous in terms of specific protective measures.

Moreover, Article 12 makes no reference to IHL, or to any obligation to “respect and ensure respect for” that branch of law. This is unfortunate, considering the fact that IHL is the legal framework applicable to some situations that Article 12 sets out to address. Here again, there is a considerable difference between this Protocol and the human rights instruments that preceded it. In addition to a number of specific IHL provisions, the African Charter on the Rights of the Child, the Protocol on the Rights of Women and the Kampala Convention all contain numerous references to IHL and its provisions. These references to and reaffirmations of existing IHL are very important. They are not stylistic flourishes or empty phrases. On the contrary, they bear witness to the commitment of the AU and its Member States to the fundamental provisions of IHL. It would have been useful to reaffirm certain provisions of IHL regarding persons with disabilities in Article 12, to not only reiterate Africa’s commitment to pre-existing IHL, but also to emphasize that Article 12 is a continuation of a pre-existing regime for the protection of people in armed conflict.

The first paragraph of Article 12 requires States to “take specific measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict”, but without saying what specific measures should be taken or even providing an indicative list of such measures.

The second paragraph, on the participation of persons with disabilities in post-conflict reconstruction, is no more explicit than the first. For instance, it does not contain an indicative list of the measures that States could take to ensure the participation of persons with disabilities in post-conflict reconstruction. As the *travaux préparatoires* of Article 12 are not publicly available, it is difficult to establish the reasons that motivated the drafters to formulate such a brief article. They might have been motivated by a concern not to be too extensive and not to use a rigid or very specific formulation that would have left little room for evolutionary interpretation or of which the interpretation would have created controversy. Such reasons have frequently been put forward in other contexts.⁴⁸ Be

48 The ICRC commentary on Article 1 indicates, for instance, that the drafters of the four Geneva Conventions had agreed to adopt a very general formulation as regards the general obligation to “ensure respect for” IHL. This comment shows that the very general formulation used admits of a broad, evolutive interpretation of this provision. In particular, it allows the introduction of an external dimension to the obligation to ensure respect for the Conventions, i.e. the obligation on the States to

that as it may, the drafters could have expanded Article 12 by referring to armed conflict in the preamble to the Protocol and by setting out broader, more detailed and non-exhaustive provisions addressing the specific protection problems faced by persons with disabilities in Africa. Such provisions would have been far from useless. They would have been an excellent means of addressing any gaps in universal IHL, or could have added detail and specific types of protection that universal IHL does not contain.

Instruments providing protection of a general nature already exist, and protect all victims of armed conflict, including persons with disabilities. This is especially the case with the Fourth Geneva Convention and Additional Protocol I.⁴⁹ The purpose of specific instruments, such as the Protocol on the Rights of Persons with Disabilities in Africa, is to extend this general protection by adding protection that addresses the vulnerability and difficulties to which people are exposed in particular situations. Indeed, this would appear to be the aim of Article 66 of the African Charter on Human and Peoples' Rights, from which the Protocol on the Rights of Persons with Disabilities in Africa draws its legal justification. This article stipulates that "Special protocols or agreements may, if necessary, supplement the provisions of the present Charter." Commenting on this provision, Kobila rightly points out that it is fundamentally a progressive stipulation, which contains the means of taking into account developments likely to enhance the African regional mechanism for the promotion and protection of human rights.⁵⁰ The abuses and difficulties faced by persons with disabilities in armed conflict in Africa were widely documented long before drafting of the Protocol on the Rights of Persons with Disabilities was completed.⁵¹ This being so, the drafters of the Protocol on the Rights of Persons with Disabilities in Africa could have included more specific provisions protecting

ensure respect for the Conventions not only by their own populations, but also by others. See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Cambridge University Press, Cambridge, 2016, paras 155–7, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>.

49 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); 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).

50 James Mouangue Kobila, "Article 66", in Maurice Kamto (ed.), *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme : Commentaire article par article*, Bruylant, Brussels, 2011, pp. 1981–2.

51 See, for example, Tami Tamashiro, *Impact of Conflict on Children's Health and Disability*, UNESCO, 2010, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000190712>. See the *travaux préparatoires* of the CRPD, in particular the discussion regarding protection of persons with disabilities during armed conflict. On this topic, see, *inter alia*, UN Enable, *Daily Summary related to Draft Article 8: Right to Life*, prepared by Landmine Survivors Network, Vol. 3, No. 7, 13 January 2004, available at: www.un.org/esa/socdev/enable/rights/wgsuma8.htm; UN Human Rights Commission, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, submitted in accordance with Commission Resolution 2002/31, paras 59, 65 and 67, UN Doc. E/CN.4/2003/58, 13 February 2003, available at: <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=E/CN.4/2003/58&Lang=E>; Thomas Plümper and Eric Neumayer, "The Unequal Burden of War: The Effect of Armed Conflict on the Gender Gap in Life Expectancy", *International Organization*, Vol. 60, No. 3, 2006, pp. 723–4.

persons with disabilities against such specific violations, while of course including more general provisions to prevent any restrictive interpretation. This would have provided a means of condemning some of these violations. That is the approach taken in many instruments that have a general field of personal application, such as the Fourth Geneva Convention, Article 27, paragraph 2, and Additional Protocol I, Article 76, paragraph 1 which provide for detailed and specific protection measures for women. It has been argued that those provisions were included in response to certain practices and some of the worst abuses suffered by countless women of all ages during the Second World War – rape in occupied territories, forced prostitution, mutilation and many other kinds of brutality.⁵²

Article 12 applies equally to international armed conflict and to non-international armed conflict. Neither this article nor any other in the Protocol contains any provision restricting application to a specific type of armed conflict. However, the words “States Parties” in the formulation of the obligations does indicate that these provisions are only binding on States. This is rather unfortunate, given that non-State armed groups are among the main protagonists of non-international armed conflict and the large number of violations of the rights of persons with disabilities that such groups commit.⁵³ The fact that Article 12 makes no mention of the requirement for these groups to accord certain fundamental guarantees to persons with disabilities is no doubt intentional, and probably stems from a desire on the part of the drafters to avoid the risk of any reference to non-State armed groups being interpreted as some kind of legal recognition, or of such provisions being used to attack the sovereignty and territorial integrity of a State. Yet, ensuring effective protection for persons with disabilities requires one to recognize that the vast majority of armed conflicts on the African continent are non-international armed conflicts to which such groups are party, and that it is therefore equally important to reaffirm their international obligations to protect persons with disabilities. If Article 12(a) had reaffirmed – even in generic form – the obligations that also apply to armed groups, that would not have constituted legitimization of those groups, as the protection of persons with disabilities in a non-international armed conflict is a responsibility that falls equally on States and armed groups. The drafters of Article 12 could have at least reiterated the duty of armed groups to respect persons with disabilities during armed conflict, while at the same time making it clear that provisions regarding armed groups had no bearing on their legal status.⁵⁴

52 See, for example, Claude Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Dordrecht, 1987, pp. 916–17, para. 3152; Françoise Krill, “La protection de la femme dans le droit international humanitaire”, *Revue Internationale de la Croix-Rouge*, Vol. 67, No. 756, 1985, p. 347.

53 The vast majority of armed conflicts in progress on the African continent in which atrocities are committed against civilians – including people with disabilities – are non-international in nature. For further details, see RULAC, above note 3. For some examples of violations committed against persons with disabilities, see, for example, Human Rights Watch, “Central African Republic: People With Disabilities Left Behind”, 28 April 2015, available at: www.hrw.org/news/2015/04/28/central-african-republic-people-disabilities-left-behind; Human Rights Watch, above note 4.

54 See Article 3(4) common to the four Geneva Conventions.

Complementarity between Article 12 and other regional provisions of humanitarian law

Despite the gaps described above, one should emphasize that Article 12 is not the only legal framework that specifically addresses the protection of persons with disabilities in armed conflict. AU instruments include several other provisions that complement the legal framework created by Article 12. These include the African Charter on the Rights and Welfare of the Child, of which Article 22 reads as follows:

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.
2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situation of internal armed conflicts, tension and strife.

The provisions do not in any way restrict their application to a specific category of child. One can therefore argue that they apply to all children affected by armed conflict, including children with disabilities. This interpretation is supported by the General Comment on Article 22 of the African Charter on the Rights and Welfare of the Child: *Children in Situations of Conflict*, of which the purpose is to facilitate implementation of Article 22. This General Comment contains references to persons with disabilities, indicating that the scope of Article 22 extends to these categories of vulnerable child.⁵⁵ Paragraph 65 of this General Comment stipulates that:

[...] the protection against torture or cruel, inhuman and degrading treatment should be interpreted to include rape and sexual violence [...] Emphasis has to be placed on incidences where the child who has suffered the abuse is suffering from a disability.

Likewise, the provisions of Article 11 of the Protocol on the Rights of Women that protect women in armed conflict also apply to women with disabilities. Again, this article does not restrict its own scope of application.

Furthermore, the Kampala Convention, in its provisions concerning armed conflicts,⁵⁶ specifically stipulates that States Parties must “[p]rovide special protection for and assistance to internally displaced persons with special needs,

55 African Committee of Experts on the Rights and Welfare of the Child (ACRWC), *General Comment on Article 22 of the African Charter on the Rights and Welfare of the Child: Children in Situations of Conflict*, September 2020, paras 32 and 65.

56 For an analysis of these provisions, see Steve Tiwa Fomekong, “Reflections on Humanitarian Law Dimensions of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa”, *African Yearbook on International Humanitarian Law*, Vol. 2020, No. 1, 2020.

including separated and unaccompanied children, female heads of households, expectant mothers, mothers with young children, the elderly, and *persons with disabilities* or with communicable diseases”.⁵⁷ The Kampala Convention therefore provides specific protection for displaced persons with disabilities. Furthermore, Article 7, paragraph 5 of the Convention prohibits members of armed groups from:

- a) Carrying out arbitrary displacement;
- b) Hampering the provision of protection and assistance to internally displaced persons under any circumstances;
- c) Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family;
- d) Restricting the freedom of movement of internally displaced persons within and outside their areas of residence;
- e) Recruiting children or requiring or permitting them to take part in hostilities under any circumstances;
- f) Forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children;
- g) Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons.

These provisions applicable to armed groups protect all persons displaced as a result of armed conflict, including those with disabilities. Furthermore, while they apply only to persons with disabilities who have suffered forced displacement as a result of conflict, those provisions do partially compensate for the absence of any reference to the obligations of armed groups in Article 12.

In addition to these legally binding instruments, the AU’s legal framework includes numerous soft law provisions that reaffirm the duties of both States and armed groups to respect and protect civilians during armed conflict. For instance, the Common African Position on Humanitarian Effectiveness stipulates that:

The protection and assistance of vulnerable groups, specifically women, children, the elderly and *persons with disabilities* in humanitarian crises situations need to be at the centre of the humanitarian action. Humanitarian assistance should pay particular attention to their specific needs.⁵⁸

Likewise, the African Union Policy Guideline on the Role of the African Standby Force in Humanitarian Action and Natural Disaster Support incorporates the concepts of a gender dimension and the needs of vulnerable people. It stipulates that “all activities must take into account the gender dimension of humanitarian action; and also include vulnerable persons such as the elderly and persons with

⁵⁷ Kampala Convention, Art. 9.2(c) (emphasis added).

⁵⁸ AU, *Common African Position on Humanitarian Effectiveness*, 2016, available at: www.tralac.org/images/docs/9719/common-african-position-cap-on-humanitarian-effectiveness-may-2016.pdf (emphasis added).

disabilities considerations”.⁵⁹ Taken together, these rules complement and strengthen those set out in Article 12 regarding persons with disabilities in armed conflict.

Interaction between Article 12 and the provisions of IHL regarding the protection of persons with disabilities

Persons with disabilities are protected by IHL. In addition to the general protection afforded to persons not or no longer taking part in hostilities,⁶⁰ they also benefit from certain specific safeguards set out in the small number of provisions contained in the main instruments of IHL.⁶¹ In addition, certain arms treaties contain specific guarantees regarding assistance to persons who have become disabled as a result of the weapons that these treaties regulate.⁶²

Article 12 strengthens the protection that IHL offers persons with disabilities. The terms used in that article, and the definition of “persons with disabilities” it contains also contribute to developments in the perception of disability and the definition of “persons with disabilities”.

Developments in the perception of disability and the definition of “persons with disabilities”

A survey of IHL provisions providing specific guarantees regarding persons with disabilities reveals that they are referred to using such terms as “the infirm”,⁶³ “cases of mental disease”⁶⁴ or “the blind”.⁶⁵ This terminology originates in the socio-historical context obtained when the Geneva Conventions and their Additional Protocols were written. Today they are seen as outdated and as

59 AU, *African Union Policy Guideline on the Role of the African Standby Force in Humanitarian Action and Natural Disaster Support*, 2016, available at: www.peaceau.org/uploads/01-asf-in-hands-guidelines.pdf.

60 For a brief outline of the general protection to which such persons are entitled, see, for example, Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, April 2019, pp. 57–73, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202014-interactif.pdf. See also ICRC, “How Law Protects Persons with Disabilities in Armed Conflict”, 13 December 2017, available at: www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict.

61 See, for example, GC IV, Art. 30; and AP I, Arts 17 and 70. For an overview of this special protection, see, for example, A. Priddy, *ibid.*; and ICRC, *ibid.*

62 See, for example, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 211, 18 September 1997 (entered into force 1 March 1999), Art. 6, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&clang=_en; Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V), 1342 UNTS 137, 28 November 2003 (entered into force 12 November 2006), Art. 8, para. 2, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-2-d&chapter=26&clang=_en.

63 GC IV, Art. 17.

64 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 30.

65 *Ibid.*

presenting a less than positive image of persons with disabilities. As Priddy points out in *Disability and Armed Conflict*,

such language is now recognized as not being in conformity with a person's human dignity and, therefore, the human rights-based approach. Instead, when using language related to disability, the person should come before the impairment, as it is not the impairment that defines them.⁶⁶

One should not underestimate the impact of terminology on persons with disabilities. It can feed and reinforce negative and discriminatory attitudes.⁶⁷

Following in the footsteps of the CRPD, the Protocol departs from the terminology that the main IHL treaties use when referring to persons with disabilities. It simply refers to them as “persons with disabilities”, whom it defines as persons who have “physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others”.⁶⁸ The Protocol is thus a continuation of efforts to promote, through language and other means, a more positive image of persons with disabilities in all circumstances, including in times of armed conflict. It aims to promote a contemporary and evolving interpretation of the terms used in the Geneva Conventions and their Additional Protocols. In the words of Priddy, therefore, “terminology such as ‘the infirm’ should be read as ‘a person with a disability’, ‘cases of mental disease’ should be read as ‘persons with psychosocial or intellectual disabilities’ and ‘the blind’ as ‘persons with visual impairments’”.

IHL defines persons with disabilities primarily in terms of medical needs.⁶⁹ The definition of “persons with disabilities” in the Protocol goes beyond persons whose disability requires special and urgent medical attention to encompass those with a disability requiring other forms of assistance and protection. This includes persons with hearing disabilities who are unable to follow radio messages, persons with reduced mobility and those with intellectual disabilities who are unable to follow complex instructions,⁷⁰ for example in the distribution of humanitarian assistance or in warnings of an impending attack. This definition makes it possible to enlarge the circle of people eligible for specific protection during armed conflict on the grounds of disability. It also contributes to raising awareness and understanding on disability. Consequently, the broad definition of “persons with disabilities” in the Protocol could be interpreted as an obligation to address the specific needs faced by everyone with a disability (as far as possible), not just those whose disability means that they need immediate medical

66 See A. Priddy, above note 60, p. 53.

67 *Ibid.*

68 AU, Protocol on the Rights of Persons with Disabilities in Africa, above note 1, Art. 1.

69 See A. Priddy, above note 60, p. 19. See also Janet E. Lord, “Persons with Disabilities in International Humanitarian Law”, in Michael Gill and Cathy J. Schlund-Vials (eds), *Disability, Human Rights and the Limits of Humanitarianism*, Routledge, London, 2015, p. 160.

70 See, also, J. Lord, *ibid.*, p. 160.

assistance. In other words, the diversity of persons with disabilities should be taken into account as much as possible in the provision of humanitarian protection and assistance. The Protocol sets out a number of measures that make it possible to achieve this aim.

The strengthening of special protection for persons with disabilities

Article 12 complements and strengthens IHL provisions. As the safety and protection of persons with disabilities during armed conflict are guaranteed by the general rules of IHL, this Article could be understood to imply that States must interpret and apply these general provisions of IHL in such a way as to address the specific needs of persons with disabilities. In that sense, it helps to clarify IHL and to facilitate its application in a manner that takes account of the protection and assistance needs of persons with disabilities. The implementation of such a provision would imply, *inter alia*, that such realistic measures must be taken as ensuring that warnings of an impending attack⁷¹ are easily accessible to persons with visual or hearing impairments. This could include, where possible, distributing leaflets in Braille, or ensuring that the transmission of such warnings on television is accompanied by a translation into sign language. This would help ensure that the principle of precaution is observed in a manner that takes account of the specific needs of persons with disabilities. As regards the distribution of humanitarian aid, this would involve, for instance, giving priority to persons who, because of their disability, cannot queue for long periods to receive basic necessities.

However, in order to ensure that the needs of persons with disabilities are adequately addressed, it is important to ensure at the outset that members of the armed forces, armed groups, humanitarian professionals and even populations are adequately trained and sensitized regarding the rights of persons with disabilities, and on the specific challenges they face during armed conflict. To achieve this, it is essential to consult persons with disabilities themselves. This is specifically provided for in Article 12(b) of the Protocol, which requires States to “ensure that persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre and post-conflict reconstruction and rehabilitation”.⁷² This provision is progressive and important in a number of ways. It is part of the international community’s efforts to ensure the full and effective participation of persons with disabilities in all aspects of society. This started in 2006 with the CRDP, which enshrines the principles of inclusion and participation.⁷³ It continued in 2015 with the 2030 Agenda for Sustainable Development and the Sendai Framework for Action on Disaster Risk Reduction, which affirm the principle that no one should be left behind and call

71 The obligation to give advance warning of attacks that may affect the civilian population is set out in AP I, Art. 57.2(c), for instance.

72 AU, Protocol on the Rights of Persons with Disabilities in Africa, above note 1, Art. 12(b).

73 CRPD, Art. 19.

for the participation of all citizens, in all segments of society.⁷⁴ The World Humanitarian Summit 2016 and the resulting Charter on Inclusion of Persons with Disabilities in Humanitarian Action reaffirm these principles. In this Charter, States and other actors undertake to empower persons with disabilities and promote universally accessible response, recovery, rehabilitation and reconstruction.⁷⁵ Article 12(b) therefore reflects Africa's willingness to sustain this global political commitment and lead efforts to move towards its effectiveness.

Moreover, this provision is innovative in that it is the first international legal provision that explicitly requires States to consult and ensure the participation of persons with disabilities in all aspects of the planning, implementation and monitoring of post-conflict reconstruction and rehabilitation. The CRDP, in particular its Article 11 on situations of risk and humanitarian emergencies, makes no such specific provision. Nor is there a similar provision in the Charter on Inclusion of Persons with Disabilities in Humanitarian Action. While the Charter does recognize the need to take account of the potential of persons with disabilities, it is not as explicit as Article 12(b). Moreover, unlike Article 12(b), which is a binding provision, the corresponding provisions of the Charter are non-binding.

Furthermore, Article 12(b) is not limited to the weakness or vulnerability of persons with disabilities. It also recognizes their abilities, their potential and their aptitude to contribute to post-conflict reconstruction and development. This provision, which is not found in any international legal instrument, makes persons with disabilities not just objects of pity or passive victims in need of protection and assistance, but actors in improving their own situation.⁷⁶ To better understand the specific protection and assistance needs of persons with disabilities in times of conflict and to provide adequate solutions, it is essential to consult and involve them through their representative organizations at all levels of humanitarian assistance.⁷⁷

Paragraph (b) establishes the need to ensure the participation of persons with disabilities in two specific areas: reconstruction and rehabilitation. These two areas lie at the heart of AU post-conflict reconstruction policy. According to the *African Post-Conflict Reconstruction Policy Framework*, reconstruction is “the long term process of rebuilding the political, security, social and economic

74 See UN, *The Sustainable Development Agenda*, available at: www.un.org/sustainabledevelopment/development-agenda/; UN Office for Disaster Risk Reduction, *Sendai Framework for Disaster Risk Reduction 2015–2030*, available at: www.preventionweb.net/sendai-framework/sendai-framework-for-disaster-risk-reduction.

75 The resulting Charter on Inclusion of Persons with Disabilities in Humanitarian Action reaffirms these principles. See, for example, para. 1.6 of the Charter, available at: <https://humanitariandisabilitycharter.org/>.

76 This formulation is partly taken from ICRC, above note 60, p. 7.

77 See also Women's Refugee Commission, *Disability Inclusion: Translating Policy into Practice in Humanitarian Action*, 18 February 2014, available at: www.womensrefugeecommission.org/research-resources/disability-inclusion-translating-policy-into-practice-in-humanitarian-action/; UNICEF, *Including Children with Disabilities in Humanitarian Action*, 2017, available at: https://resourcecentre.savethechildren.net/pdf/unicef_wash_english.pdf; IASC, *Guidelines: Inclusion of Persons with Disabilities in Humanitarian Action*, July 2019, available at: www.coordinationsud.org/wp-content/uploads/IASC-Guidelines-on-the-Inclusion-of-Persons-with-Disabilities-in-Humanitarian-Action-2019.pdf.

dimensions of a society emerging from conflict by addressing the root causes of the conflict”.⁷⁸ The same document defines rehabilitation as “action aimed at reconstructing and rehabilitating infrastructure that can save or support livelihoods. It overlaps with emergency relief and is typically targeted for achievement within the first two years after the conflict has ended.”⁷⁹ In essence, it is a set of measures that aim to stabilize a post-conflict society to prevent it from relapsing into conflict. According to David and Schmitt:

The end of a conflict does not always mean the beginning of peace. Infrastructure is often shattered, many people have been forcibly displaced and abused in various ways, confidence in public institutions is at a low ebb and the economy needs to be rebuilt. Without reform and support, societies and States may continue to suffer the consequences of armed violence for a long time. The challenge – and the difficulty – of post-conflict reconstruction and rehabilitation is to stabilize a society so that it does not slip back into conflict.⁸⁰

Measures that can be taken include reform of public institutions and the security sector, the drafting of a new constitution and the implementation of compensatory or restorative justice measures.⁸¹ Article 12(b) requires that “persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre- and post-conflict reconstruction and rehabilitation”. They must therefore be involved at all stages of the process and must not be left behind under any circumstances. It is essential that persons with disabilities participate in reconstruction and rehabilitation. Changes in political and institutional culture are among the most difficult aspects of any societal transformation, requiring changes in behaviour, expectations and norms.⁸² These kinds of societal change require long-term strategies involving broad segments of society, including persons with disabilities who, as observers agree, have significant capabilities.⁸³ Both the literature and case studies suggest that participatory or representative reconstruction processes can provide a forum for negotiating solutions to the divisive issues that led to the violence, can play a reconciliatory and healing role through social dialogue and can support sustainable peace by forging a consensual vision for the future of the

78 NEPAD, *African Post-Conflict Reconstruction Policy Framework*, June 2005, available at: <https://sarpn.org/documents/d0001357/index.php>.

79 *Ibid.*

80 Charles-Philippe David and Olivier Schmitt, “La reconstruction post-conflit”, in *La Guerre et la paix : Approches et enjeux de la sécurité et de la stratégie*, Presses de Sciences Po, Paris, 2020, p. 401.

81 *Ibid.*, pp. 401 ff.

82 *Ibid.*, p. 401.

83 *Ibid.*, p. 403. Stephanie Ortoleva, “Women with Disabilities: The Forgotten Peace Builders”, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 33, 2010; Pearl Praise Gottschalk, “How Are We in This World Now? Examining the Experiences of Persons Disabled by War in the Peace Processes of Sierra Leone”, Master’s Dissertation, University of Victoria, 2007, available at: <https://dspace.library.uvic.ca/handle/1828/299?show=full>; World Institute on Disability, *The Involvement of Persons with Disabilities in Conflict Resolution and Peacebuilding Efforts: Inclusion of Persons with Disabilities (PWD) as Part of the Solution in the Post-Conflict Arena*, August 2014, available at: www.usip.org/sites/default/files/WID_Disability_Inclusive_Peacebuilding_Process%20.pdf.

State.⁸⁴ In particular, David and Schmitt argue that broad consultations that included all segments of society, including persons with disabilities, led to public support for the constitutions of Kenya, Rwanda, South Africa and Uganda.⁸⁵ By contrast, in Nigeria for example, the constitutional process undertaken after a crisis was rejected because it was insufficiently participatory.⁸⁶

While this provision is important and progressive, it does have some flaws. It requires and recognizes the participation of persons with disabilities in reconstruction and rehabilitation efforts, but makes no reference to their participation in humanitarian operations, or in humanitarian action for victims of armed conflict. In view of the fact that this provision deals with situations of risk, it is somewhat surprising that it only mentions participation in efforts to escape from the situation and makes no mention of efforts to manage the situation itself. As the *travaux préparatoires* of this specific provision are not publicly available, it is difficult to understand why the drafters did not specifically include the obligation to ensure the participation of persons with disabilities in efforts to assist those affected. However, this is not a fatal flaw. The right or duty of solidarity towards those in need is anchored in AU law.⁸⁷ Such a prerogative or duty is essentially grounded in African traditions and in the modes of social organization in traditional and contemporary Africa. These are based on a communal structure⁸⁸ and impose a set of obligations on each individual, not only to their community in general, but also to each member of that community.⁸⁹ It may deduce that this duty of solidarity towards others requires each individual to do whatever they can to help those affected by an armed conflict. This customary duty of solidarity is reflected in various AU legal instruments, in particular African regional human rights instruments, which are unique in that they explicitly impose duties on all individuals, including persons with disabilities.⁹⁰ It is also clearly expressed in the African Youth Charter, which stipulates that States must “Mobilise youth for [...] bringing help to refugees and

84 C.-P. David and O. Schmitt, above note 80, p. 403.

85 *Ibid.*, pp. 401–3.

86 *Ibid.*, p. 403. Vivien Hart, “Constitution-Making and the Transformation of Conflict”, *Peace & Change*, Vol. 26, No. 2, 2001.

87 For details in this regard, see Steve Tiwa Fomekong, “La contribution de l’Union africaine au droit international humanitaire”, Thèse de doctorat, Université Laval, Québec, 2020, pp. 137–40; Mohammed Abdelwahab Bekhechi, “Article 27 §1”, in M. Kamto (ed.), above note 50, pp. 681–5.

88 See Fatsah Ougergouz, *La Charte africaine des droits de l’homme et des peuples : Une approche juridique des droits de l’homme entre tradition et modernité*, 1st ed., Collection : Publications de l’Institut universitaire de hautes études internationales, Presses Universitaires de France, Geneva and Paris, 1993, pp. 8 ff and 233–54.

89 See, *inter alia*, *ibid.*, p. 233; Mutoy Mubiala, *Le Système régional africain de protection des droits de l’homme*, Collection Organisation internationale et relations internationales, Bruylant, Brussels, 2005, pp. 5–8 and 34–5; Michel-Cyr Djiena Wembou and Daouda Fall, *Droit international humanitaire : Théorie générale et réalités africaines*, Collection Logiques Juridiques, L’Harmattan, Paris, 2000, pp. 303 ff; Kéba M’Baye, “Human Rights in Africa”, in Karel Vasak (ed.), *The International Dimensions of Human Rights*, Vol. 2, UNESCO, Paris, 1982, p. 589.

90 Regarding this particularity of the African Charter on Human and Peoples’ Rights, see, *inter alia*, F. Ougergouz, above note 88, pp. 233–54; Kéba M’Baye, *Les droits de l’homme en Afrique*, Editions A. Pedone, Paris, 1992, pp. 49 ff; Alain Didier Olinga, “Article 29, alinéas 2 à 8”, in M. Kamto (ed.), above note 50, pp. 738–48.

war victims”.⁹¹ It is worth noting that the word “youth” in this provision is not defined in any way that might limit its scope. It can therefore be argued that it is equally applicable to young persons with disabilities. This provision, although it relates primarily to young people, i.e. those between the ages of 15 and 35 years,⁹² supports, reinforces and informs the customary obligation/prerogative of solidarity towards victims of conflict that exists among African civilian populations. Furthermore, by interpreting the Protocol in a systematic manner, it can be argued that it implicitly enshrines the right of persons with disabilities to participate in humanitarian work through Article 3(c), which stipulates that the provisions of the Protocol – and hence also those of Article 12 – must be interpreted and applied in accordance with, *inter alia*, the principle of “full and effective participation and inclusion in society”. This provision is broadly formulated to include all aspects of society, including humanitarian activities. Moreover, the interpretation suggested here would be in line with the Charter on Inclusion of Persons with Disabilities in Humanitarian Action, which encourages the full and effective participation of persons with disabilities in humanitarian programmes.⁹³

Also, Article 12(b) requires States to ensure that persons with disabilities are consulted and participate in all aspects of planning, implementation and monitoring of pre- and post-conflict reconstruction and rehabilitation. As noted above, reconstruction and rehabilitation are measures undertaken in the aftermath of armed conflict, not beforehand. Did the drafters of the Protocol also want to explicitly recognize and enshrine the right of persons with disabilities to participate in measures to prevent the outbreak of conflict, or to prevent existing disputes from escalating into conflict, and to limit the progression of conflict when it does occur? One is tempted to reply in the affirmative, given that one of the basic objectives of the AU is to promote peace, security and stability on the African continent.⁹⁴ Some commentators describe this mandate as “the *raison d’être* of the organization”.⁹⁵ Furthermore, some of the AU instruments that preceded the Protocol also enshrine the right of certain categories of person, including persons with disabilities, to participate in peace efforts and the prevention of armed conflict. This is the case for Article 10 of the Protocol on the Rights of Women and Article 17 of the African Youth Charter. That could be used to interpret Article 12(b) as enshrining the right of persons with disabilities to participate in efforts to prevent armed conflict.

The Protocol contains a safeguard clause regarding protective measures under international law for persons with disabilities, including IHL. Article 36,

91 African Youth Charter, 2 July 2006 (entered into force 8 August 2009), Art. 17(f), available at: <https://au.int/fr/treaties/african-youth-charter>.

92 See *ibid.*, preamble, para. 23.

93 See Charter on Inclusion of Persons with Disabilities in Humanitarian Action, above note 75, para. 1.2.

94 Constitutive Act of the African Union, above note 2, Art. 3(f).

95 Ademola Abass and Mashood A. Baderin, “Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union”, *Netherlands International Law Review*, Vol. 49, No. 1, 2002, p. 5.

paragraph 1, stipulates that “No provision in this Protocol shall be interpreted as derogating from the principles and values contained in other relevant instruments for the realisation of the rights of Persons with Disabilities in Africa.” And “no provision” obviously includes Article 12. It can therefore be deduced that in the event of a conflict of rules or interpretation that would alter or diminish the protection offered by the main universal IHL instruments, the regional norm should always be set aside in favour of the international norm. Moreover, no provisions in the Protocol are contrary to IHL rules protecting persons with disabilities. This means that none of its provisions endanger the integrity of universal IHL treaties. Article 12 is therefore complementary to the international standards and only aims to strengthen the protection that those standards provide for persons with disabilities in armed conflict.

The challenges to implementation of Article 12

The following discussion attempts to identify the main challenges to the rapid ratification of the Protocol containing Article 12 and formulates some possible means of overcoming them. It also looks at measures to promote compliance with Article 12.

Promoting ratification of the Protocol on the Rights of Persons with Disabilities in Africa

It is widely recognized that a treaty, no matter how relevant, is nothing more than a piece of paper if the provisions it contains are not implemented by those responsible for them. “A legal norm is alive and its history does not end after its birth.”⁹⁶ Once it has been adopted, it must be implemented if its aims and objectives are to be achieved.

Although it was adopted on 29 January 2018, the Protocol on the Rights of Persons with Disabilities in Africa has not yet entered into force. Article 38, paragraph 1 of the Protocol stipulates that it will enter into force following ratification by fifteen States. However, as of 28 March 2022 – more than two years after it was adopted – the Protocol had only been ratified by three States.⁹⁷ Until it enters into force, the provisions of the Protocol – including those of Article 12 – will not be binding. At the current rate of ratification, it will take many years before it starts to have effect. It has taken four years for three States to ratify the Protocol. If ratification continues at that speed, it might take another sixteen years to gather the twelve ratifications needed in order for the Protocol to

⁹⁶ Loïc Robert, “La contribution de l’Union européenne au droit international des droits de l’homme”, Thesis, Université Jean Moulin Lyon 3, 2014, p. 10 (our translation).

⁹⁷ AU, *List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa*, 28 March 2022, available at: https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESaEUtm_RIGHTS_ON_THE_RI_.pdf.

come into force. This would mean it coming into force in 2038, a delay of twenty years. That is very slow. In the meantime, persons with disabilities will continue to suffer the consequences of armed conflict, without enjoying the protection they are entitled to under Article 12. This is not an isolated case, and it comes as no surprise. Many AU instruments have taken a decade to come into force. However, the African States were quick to ratify the CRPD. It was signed by sixteen States on the day of its adoption, and when it entered into force it had been ratified by six.⁹⁸ To date, fifty-one African States out of fifty-four have ratified it.⁹⁹

So why do the African nations prefer the universal Convention to the regional Protocol? The reasons for ratifying an international treaty – or not – are not always clear.¹⁰⁰ States rarely give their reasons. Nevertheless, a number of clues can be used to identify the main reasons why States have been slow to ratify this protocol.

A State will only ratify a treaty if it will be to their advantage in economic, political or other ways, or if a more powerful State or group of States can pressure it into doing so, e.g. through offering advantages or rewards, or by imposing economic or military sanctions for failure to ratify.¹⁰¹ AU Member States are sometimes more inclined to ratify United Nations (UN) treaties than the equivalent AU instruments that cover virtually the same topics.¹⁰² A State may wish to appear cooperative internationally for political reasons, or to cultivate a certain international reputation – to be popular with other States. Where there is both a regional and an international treaty on the same subject, a State may decide to ratify only one, to avoid taking on additional legal obligations. This might go some way towards explaining why a number of States party to the CRPD have not yet ratified the Protocol on the Rights of Persons with Disabilities in Africa. Ratification of the Protocol may also be delayed by other factors. These may include lack of political will, lack of capacity and means to ensure effective and efficient implementation of the obligations under the Protocol, delays in parliamentary committees considering and passing legislation authorizing their plenipotentiaries to ratify the Protocol, political instability resulting in changes of government or frequent ministerial reshuffles that delay domestic implementation of pre-ratification measures, political and even ideological differences within cohabitation governments or the non-existence of parliamentary bodies following unconstitutional political changes.¹⁰³

98 For details, see UN Treaty Collection, Status of Convention on the Rights of Persons with Disabilities, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=en.

99 *Ibid.*

100 Srinii Sitaraman, *State Participation in International Treaty Regimes*, Ashgate Publishing Company, Abingdon, 2009, p. 5.

101 See Andrew Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press, Oxford, 2008, pp. 119–81; Robert O. Keohane, “Realism, Neorealism and the Study of World Politics”, in Robert O. Keohane (ed.), *Neorealism and its Critics*, Columbia University Press, New York, 1986, pp. 7–8.

102 See also Tiyanjana Maluwa, “Ratification of African Union Treaties by Member States: Law, Policy and Practice”, *Melbourne Journal of International Law*, Vol. 13, No. 2, 2012, p. 12.

103 See also AU, Introductory Note of the Chairperson of the Commission to the Annual Report on the Activities of the African Union and its Organs, AU Doc. EX.CL/1061(XXXII), 2018, p. 40, available at:

To achieve the aims of Article 12, it will be necessary to encourage ratification of the Protocol. Three solutions are proposed. Firstly, the AU should pass resolutions, decisions and policies encouraging States to ratify the Protocol. The AU has already done this in the past.¹⁰⁴ Progress with ratification of AU treaties remains slow, indicating that this approach has had limited success. However, if the Assembly of Heads of State and Government, the Executive Council and the Pan-African Parliament were each to pass a resolution urgently calling on Member States to ratify the Protocol on the Rights of Persons with Disabilities and adequately monitor the implementation of these resolutions, this could do something to get things moving.

To ensure implementation of initiatives and decisions, the AU Assembly sometimes selects heads of State and government to act as AU champions to publicize these initiatives and decisions at continental and international levels, and to garner the necessary support to ensure their implementation by all Member States.¹⁰⁵ To ensure the effective dissemination and implementation of the resolutions suggested here, the AU would do well to appoint the President of Kenya as its champion. Kenya is one of three States to have ratified the Protocol on the Rights of Persons with Disabilities in Africa.¹⁰⁶ Kenya also played a leading role in the CRDP negotiations.¹⁰⁷ This State has also taken some steps to include specific provisions related to persons with disabilities in its national legislation, including its Constitution.¹⁰⁸ Kenya would therefore enjoy a degree of legitimacy in promoting the implementation of resolutions encouraging ratification of the Protocol.

Secondly, drafting a model law for implementation of the Protocol could also serve to promote it and encourage ratification. The difficulty of taking national implementation measures often delays ratification of a treaty. Implementing this Protocol will require States to enact legislation and undertake other organizational measures. For instance, Article 4 of the Protocol, and Article 34, paragraph 2, require States to enact national legislation for the

https://archives.au.int/bitstream/handle/123456789/8422/EX%20CL%201061%20XXXII%20INTR_E.pdf?sequence=2&isAllowed=y.

104 See, for example, AU Executive Council, Fourteenth Ordinary Session, Decision on the Status of Signature and Ratification of OAU/AU Treaties and the Harmonization of Ratification Procedures, AU Doc. EX.CL/Dec.459(XIV), January 2009; and Decision on the AU 2009 Calendar of Meetings, Doc. EX.CL/453(XIV), AU Doc. EX.CL/458(XIV), January 2009, both available at: <https://au.int/en/decisions-42>; AU Executive Council, Twenty-first Ordinary Session, Decision on the Status of Signature and Ratification of OAU/AU Treaties, Doc. EX.CL/728(XXI), AU Doc. EX.CL/Dec.705(XXI), July 2012, available at: https://au.int/sites/default/files/decisions/9652-ex_cl_dec_696-725_xxi_e_final.pdf; Report on the Status of OAU/AU Treaties (as at 11 July 2012), AU Doc. EX.CL/728(XXI), July 2012, available at: www.peaceau.org/en/resource/91-organ-executive-council.

105 African Union Commission and New Zealand Ministry of Foreign Affairs and Trade/Manatū Aorere, *African Union Handbook 2020*, 7th ed., Addis Ababa, 2020, p. 38, available at: <https://au.int/en/handbook>.

106 Kenya ratified the Protocol on 15 November 2021. See AU, above note 97.

107 See, for example, UN Enable, Ad Hoc Committee, above note 37; *Position of Kenya*, above note 37.

108 For details, see, *inter alia*, Lorenzo Wakefield and Nkatha Murungi, “Domesticating International Standards of Education for Children with Intellectual Disabilities: A Case Study of Kenya and South Africa”, in I. Grobbelaar-du Plessis and T. van Reenen (eds), above note 29; C.-P. David and O. Schmitt, above note 80, pp. 403 ff.

implementation of the obligations that it sets out, establish or designate national mechanisms to coordinate and monitor the implementation of the rights of persons with disabilities and render their courts competent to sanction breaches of the Convention. However, States may lack the competence and capacity to develop and implement such measures. These problems delay the ratification of certain treaties. Ratification campaigns conducted by non-governmental organizations in Africa have revealed that some parliaments are reluctant to authorize the ratification of certain treaties “due to misconceptions, or a lack of appreciation of the legal and political importance of the treaty, arising from the failure or inability of the bureaucrats in the relevant government department to provide the necessary technical advice”.¹⁰⁹ The drafting of a model law by the African Union’s African Commission on International Law, which States could use to draft domestic legislative and institutional measures to implement the Protocol, and in particular Article 12, could help to overcome such difficulties. This in turn could encourage States to ratify the Protocol. The AU has already produced model laws for treaties, including the African Model Anti-Terrorism Law¹¹⁰ and the Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa.¹¹¹ The AU should, therefore, continue such efforts and draft other African model laws with regard to implementation of the Protocol on the Rights of Persons with Disabilities, in particular Article 12.

Thirdly, civil society can play a role in encouraging States to ratify the Protocol. This is particularly true of disability rights organizations, academia and national human rights organizations. These bodies could alert governments to the importance of ratifying the Protocol, e.g. by organizing workshops and issuing declarations on issues related to persons with disabilities. Civil society organizations could also run advocacy campaigns for ratification of the Protocol. These could use various media channels and social media. In short, the aim would be to exploit all the possibilities offered by the new information and communication technologies to promote ratification of the Protocol. It is worth noting the exceptional efforts of the Centre for Human Rights at the University of Pretoria. During 2022, the Centre has held a number of events such as webinars on ratification of the Protocol.¹¹² It has also published numerous calls for ratification on Twitter. One of their recent tweets: “The African Disability

109 See Tiyanjana Maluwa, “Beyond Rhetoric: Commitment to and Ratification of African Human Rights and Human Rights-Related Treaties”, in Tiyanjana Maluwa (ed.), *Law, Politics and Rights: Essays in Memory of Kader Asmal*, Martinus Nijhoff Publishers, Leiden and Boston, 2013, p. 83.

110 For details, see AU, The African Model Anti-Terrorism Law, 8 December 2015, available at: www.peaceau.org/en/article/the-african-model-anti-terrorism-law-1.

111 AU, Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa, April 2018, adopted by the Assembly of the African Union at its 30th Ordinary Session, 22–29 January 2018, Addis Ababa, Ethiopia, available at: www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=5aeb398e4.

112 See, for example, Centre for Human Rights, #RatifyADRP: Call on African Leaders to Ratify the African Disability Rights Protocol, available at: www.chr.up.ac.za/ratifyadrp-about; Centre for Human Rights, Webinar Invitation: Ratification of the African Disability Rights Protocol, 7 July 2022, available at: www.chr.up.ac.za/latest-news/3095-webinar-invitation-ratification-of-the-african-disability-rights-protocol.

Protocol complements the African Charter and addresses harmful practices affecting persons with disabilities. AU Member States are encouraged to ratify this instrument so as fully address harmful practises against persons with disabilities. #RatifyADRP”.¹¹³ This is an example for other African civil society organizations to follow.

Promoting compliance with Article 12

Once the Protocol enters into force, the AU should promote and widely publicize the protective measures provided for in Article 12 and monitor its implementation. In armed conflict – and in particular in the conduct of hostilities (targeting and the selection of methods and means of warfare) – States and non-State armed groups do not always comply with their obligations under IHL and international human rights law to protect persons with disabilities.¹¹⁴ As Priddy points out, this is due in part to ignorance of the legal framework protecting persons with disabilities and lack of international pressure to comply.¹¹⁵ This highlights the importance of publicizing the measures that Article 12 requires, and encouraging compliance with them.

The ACHPR, which is the main implementing body of the Protocol, should play a major role in this regard.¹¹⁶ Article 34, paragraph 1 of the Protocol stipulates that:

States Parties shall ensure the implementation of this Protocol, and shall indicate in their periodic reports submitted to the African Commission in accordance with Article 62 of the African Charter, the legislative and other measures undertaken for the full realisation of the rights recognized in this Protocol.

Clearly, this includes those set out in Article 12. Under Article 62 to which this provision refers, the ACHPR is the body competent to receive and analyse these reports. It can therefore be argued that the African Commission has the mandate to interpret and monitor compliance with the provisions of Article 12.¹¹⁷ These reports must be submitted every two years once the Protocol enters into force for the country concerned.¹¹⁸

The African Committee of Experts on the Rights and Welfare of the Child does not have as explicit a mandate to monitor compliance with Article 12. However, under its mandate to promote and protect the rights of the child,¹¹⁹ it could play an important role in promoting and monitoring the rights of persons

113 See the Centre’s tweet of 5 July 2022, available at: https://twitter.com/CHR_HumanRights/status/1544275455758503937.

114 See A. Priddy, above note 60.

115 *Ibid.*, p. 6.

116 AU, Protocol on the Rights of Persons with Disabilities in Africa, above note 1, Art. 34.

117 *Ibid.*, Art. 34, paras 3 and 4.

118 *Ibid.*

119 African Charter on the Rights and Welfare of the Child, Art. 43.

with disabilities in armed conflict. In so doing, it would be acting in accordance with Article 22 of the African Charter on the Rights and Welfare of the Child which, as mentioned above, also protects children during armed conflict. That Committee has already addressed the monitoring of implementation of Article 22 in the context of the review of implementation reports submitted to it by certain States, in particular States involved in armed conflict.¹²⁰ However, the information that States provided in these reports did not include measures taken to ensure the protection of persons with disabilities in armed conflict. Nor did the questions posed by the Committee to these States when reviewing these reports address the protection of children with disabilities.¹²¹ This could indicate that the Committee's work does not yet take sufficient account of the situation of children with disabilities in areas affected by armed conflict. The African Committee of Experts should therefore encourage States to include measures taken to ensure the promotion of the rights and protection of children with disabilities in armed conflict in their reporting of measures undertaken to implement Article 22.

The African Court on Human and Peoples' Rights could also play a major role in the implementation of Article 12. Article 34, paragraph 5 of the Protocol states: "[in] accordance with Articles 5 and 34(6) of the Protocol Establishing the African Court, the African Court on Human and Peoples' Rights shall have the mandate to hear disputes arising from the application or implementation of this Protocol." That clearly includes matters relating to Article 12. It would therefore be competent to apply the Protocol, including Article 12. However, for the Court to rule on compliance with this provision, it is essential that competent persons and entities who consider that there has been a violation of the protections it provides refer the matter to the Court. The African Court on Human and Peoples' Rights does not have the power of self-referral. Hence it is important to step up dissemination and promotion of Article 12, so that people are aware of the protection due to them under this article and can bring cases before the competent authorities if they feel that these protections have been violated.

Furthermore, in order to increase knowledge of Article 12 and promote compliance with it, a general comment on this article should be produced and widely disseminated. This would follow the example of the African Committee of Experts on the Rights and Welfare of the Child, which in 2021 produced a general

120 This applies in particular to Uganda and Sudan. See Ministry of Gender, Labour and Social Development of Uganda, *Implementation of the African Charter on the Rights and Welfare of the Child in Uganda, 2007, Initial Report Submitted by Uganda to the African Committee of Experts on the Rights and Welfare of the Child*, November 2007; The National Council for Child Welfare of The Republic of the Sudan, *Sudan's Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child, 2010, Initial Report Submitted by Sudan to the African Committee of Experts on the Rights and Welfare of the Child*, November 2010.

121 See the reports in above note 120. See also, respectively, the concluding observations of the Committee on these reports: ACRWC, *Recommendations and Observations sent to the Government of the Republic of Uganda by the African Committee of Experts on the Rights and Welfare of the Child on the Initial Implementation Report of the African Charter of the Rights and Welfare of the Child*, 2010; ACRWC, *Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of the Sudan on the Initial Report on Implementation of the African Charter on the Rights and Welfare of the Child*, 2013.

comment on Article 22 of the eponymous Charter on the protection of children in armed conflict. Drafting of this general comment should be undertaken by the Working Group, under the guidance of the ACHPR. The aim of the general comment would be to help States fulfil their obligations under Article 12. It would contain a detailed explanation of the provisions set out in the article and practical advice on effective implementation. This would help to increase awareness of Article 12 and improve knowledge of the protection it provides. Ultimately, this would make the provision easier to understand and implement. The general comment could also facilitate incorporation of the guarantees and protections in these provisions into national legislation, military manuals and the policies and practices of governments, national courts and other bodies.

Conclusion

The aim of this contribution was to analyse Article 12 of the Protocol on the Rights of Persons with Disabilities in Africa, examining its purpose, its scope, its contribution to the legal protection of persons with disabilities in armed conflict and its implementation. It reveals that the drafting of Article 12 must have been motivated by a desire to improve the precarious situation of persons with disabilities in armed conflict in Africa. Brief though they are, the provisions of Article 12 complement the universal rules of IHL, enabling that body of law to offer solutions commensurate with the humanitarian problems faced by persons with disabilities in armed conflict. Full compliance with and effective implementation of this article would therefore improve the situation of persons with disabilities in armed conflict. There is therefore an urgent need to accelerate ratification of this article and to promote compliance with it. This means that African States that have not yet ratified the Protocol on the Rights of Persons with Disabilities should take the necessary steps to accede to it as soon as possible. States should also take the necessary steps to incorporate the provisions of the Protocol, including those relating to Article 12, into their national legislations. Similarly, as required by the Protocol, States must submit regular reports to the ACHPR and the African Peer Review Mechanism on measures taken to give effect to the provisions of Article 12, thereby improving the situation of persons with disabilities in armed conflict. This is fundamental to the exchange of good practice in this area, the identification of challenges to the implementation of Article 12 and the identification of solutions to overcome them. Finally, it is important that the protections set out in Article 12 be promoted and disseminated as widely as possible on the African continent. Knowledge of these protections could promote respect for them.

Protection of persons with disabilities in armed conflict under international humanitarian law and Islamic law

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Abstract

Article 11 of the Convention on the Rights of Persons with Disabilities requires that the rights and protections of the Convention not be derogated or suspended during “situations of risk, including situations of armed conflict”. Even so, persons with disabilities are still often the group most disproportionately impacted by armed

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conflict. This reality is not due to a failing of international humanitarian law to protect and consider persons with disabilities; rather, it is due to a failure to mainstream disability into the application of and approach to existing protection frameworks. Impactful mainstreaming of disability necessitates the inclusion of all relevant mutually reinforcing legal frameworks and traditions. By examining four main areas – military operations, evacuation, humanitarian assistance, and long-term assistance and services – this paper argues that the protection of persons with disabilities in armed conflict, and specifically within Muslim contexts, will be enhanced through the inclusion and consideration of Islamic law.

Keywords: IHL, Islamic law, disability, rights of persons with disabilities, protection of persons with disabilities, armed conflict, protection of civilians, CRPD.



Introduction

The Convention on the Rights of Persons with Disabilities (CRPD)¹ heralded a “paradigm shift” in the way the international community approaches and understands disability.² Eschewing the charity and medical models, which viewed persons with disabilities as lesser, defective, incapable and deserving of pity, the CRPD recognizes such persons as rights holders. Rather than the individual’s impairment, it is the environmental, social, attitudinal and policy barriers created by a society’s biases and prejudices towards persons with disabilities that need to be altered to allow for the full enjoyment of their rights, privileges and protections. The CRPD affirms that disability is part of human diversity and that like gender, age, race, religion and sexual orientation, among others, disability is an aspect of an individual’s identity. These aspects of an individual’s identity can and do intersect with each other to create complex forms of discrimination that form multifaceted barriers to the full enjoyment of a person’s rights.

Persons with disabilities consistently face certain risks and challenges during armed conflict, regardless of the geographic location or type of conflict. Inability to flee, abandonment, lack of accessible advance warnings, and inaccessible evacuation processes and shelters can all leave persons with disabilities at heightened risk of direct harm and death from hostilities. Those who manage to escape the fighting face barriers in accessing both short- and long-term humanitarian assistance and aid. Armed conflict also often exacerbates pre-existing impairments and leads to the emergence of secondary impairments, particularly for children with disabilities and people with psychosocial and intellectual disabilities. The loss of or damage to

1 Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 24 January 2007 (entered into force 3 May 2008) (CRPD).

2 Louise Arbour, statement to the UN General Assembly Ad Hoc Committee on the Convention on the Rights of Persons with Disabilities, 8th Session, New York, 5 December 2006.

assistive devices – common during armed conflict – amplifies existing barriers to accessing essential services. Moreover, the rate of disability in conflict-affected populations is much higher and includes individuals with newly acquired impairments, who face these risks and challenges without previous experience or understanding of inherent barriers.³

Armed conflict undoubtedly creates new barriers for persons with disabilities, but it also amplifies those barriers and inequities already existing within a society, leading to heightened risk of harm and death.⁴ Unlike other human rights treaties, the CRPD's Article 11 directs that the Convention be applicable alongside international humanitarian law (IHL) during armed conflict. States party to the CRPD, therefore, maintain an explicit obligation of non-discrimination by ensuring specific inclusion of persons with disabilities within their protection of civilians frameworks and the provision of access to basic needs such as food, water, shelter and sanitation.⁵ The United Nations (UN) Security Council has reinforced this interpretation of Article 11 in Security Council Resolution 2475, which urges Member States 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”.⁶ Notably, the UN Special Rapporteur on the Rights of Persons with Disabilities, in a report submitted to the UN General Assembly, noted the relevance of the CRPD across the entire peace continuum and specifically called for States to reframe their protection of civilians strategies to explicitly protect persons with disabilities.⁷

To appropriately protect persons with disabilities during armed conflict does not require the creation of new IHL rules, but instead calls for the inclusive application of the existing rules. The complementarity between IHL and the CRPD during armed conflict is clearly established by Article 11 of the CRPD and recognized by the International Committee of the Red Cross (ICRC).⁸ Although not directly referenced within IHL, persons with disabilities are protected and their specific needs considered by the existing IHL rules, albeit using outdated medical and charity model language. In particular, the concept of adverse distinction, prohibiting negative treatment of individuals based on a personal characteristic, necessarily includes persons with disabilities. Further, IHL recognizes that specific respect and protection is owed for “the disabled”, thereby

3 William Pons, “The Hidden Harm: Acquired Disability during Conflict”, Center for Civilians in Conflict, 1 August 2017, available at: <https://civiliansinconflict.org/blog/hidden-harm-acquired-disability-conflict/> (all internet references were accessed in September 2022).

4 *Protection of Civilians in Armed Conflict: Report of the Secretary-General*, UN Doc. S/2019/373, 7 May 2019, para. 49.

5 Committee on the Rights of Persons with Disabilities, “General Comment No. 6 (2018) on Equality and Non-Discrimination”, UN Doc. CRPD/C/GC/6, 26 April 2018, para. 43.

6 UNSC Res. 2475, 20 June 2019.

7 *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/76/146, 19 July 2021, para. 88.

8 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.

signalling a requirement to consider and address the barriers faced by persons with disabilities in armed conflict.⁹ Taken together, the IHL prohibition against adverse distinction and allowance for specific respect and protection can be seen as directly corresponding to the requirements of non-discrimination and reasonable accommodation found in the CRPD.

Islamic law has developed rules that regulate the rights and duties of different members of society, the relationship between the Islamic government and its citizens, and relations with other States. Situations of vulnerability and hardship are reflected in the development of Islamic obligations, as the fulfilment of Islamic obligations is conditioned upon the ability to fulfil them.¹⁰ Thus, Islamic law reflects both permanent and temporary disabilities. For example, a person travelling for a minimum of a certain distance is eligible for an exemption of certain religious obligations, such as the Friday congregational prayer, and is allowed to break fasting during Ramadan (the fasting can be redone at a later date). In other words, every single individual can experience a situation of permanent or temporary impairment and can therefore be exempt from some Islamic religious obligations and legal duties, thereby embodying the concept of reasonable accommodation.¹¹

Islamic legal provisions regarding persons with disabilities exist in many chapters of Islamic law books,¹² but not under one single chapter, nor dealt with under one term that encompasses all persons with disabilities.¹³ There are several terms used in classical Islamic law books that refer to various kinds of physical, intellectual and mental impairments. At present, there is a growing interest among Islamic scholars in disability studies, and many have called for the creation of a branch of Islamic law on persons with disabilities.¹⁴

Islamic law's influence on modern armed conflict cannot be overlooked, particularly because most conflicts take place in Muslim-majority contexts and a sizeable number of these conflicts involve non-State armed groups (NSAGs) that use Islamic law as their source of reference. Early Islamic sources have dealt with the topic of disability via a variety of scholarly disciplines, including the theological, legal, ethical, physical, medical and historical.¹⁵ Whilst stereotypes

9 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), Rule 138, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

10 See Qur'an 2:286, which states: "Allah does not lay a responsibility on anyone beyond his capacity." On the rights of persons with mental disabilities, see Muhammad Fawzy Hasan 'Abdel-Hay, "Mental Disability in Islamic Jurisprudence from a Moral Perspective", *Journal of Faculty of Languages and Translation*, Vol. 15, No. 2, 2018.

11 See Mohammed Ghaly, "Disability in the Islamic Tradition", *Religion Compass*, Vol. 10, No. 6, 2016, p. 153.

12 *Ibid.*, pp. 155, 156.

13 Vardit Rispler-Chaim, *Disability in Islamic Law*, Springer, Dordrecht, 2007, p. 3; M. Ghaly, above note 11, p. 151.

14 M. Ghaly, above note 11, p. 149.

15 See *ibid.*, p. 149. On the physical and spiritual treatment of persons with disabilities in Islam, see Mohammed Ghaly, "Physical and Spiritual Treatment of Disability in Islam: Perspectives of Early and Modern Jurists", *Journal of Religion, Disability and Health*, Vol. 12, No. 2, 2008.

and biases towards persons with disabilities continue to cause further challenges to persons with disabilities in addition to those created by armed conflict, Islamic law remains a central framework that can positively impact societal attitudes towards persons with disabilities in Muslim contexts.¹⁶ This is affirmed by Vardit Rispler-Chaim in her book *Disability in Islamic Law*, in which she suggests that the treatment of persons with disabilities under Islamic law is important in Muslim contexts, despite the fact that it may not necessarily reflect or “provide an accurate picture of the social attitudes to the disabled at all points in time and at all geographic locations [in Muslim contexts]”.¹⁷

Nonetheless, Islamic law may contribute to efforts that aim at impactful mainstreaming of disability into humanitarian responses and the protection of persons with disabilities in armed conflict in Muslim contexts. This potential contribution is an important issue that still needs attention from modern Islamic jurists as well as humanitarian organizations working on the protection of persons with disabilities in armed conflict in Muslim contexts. Accordingly, as this paper examines the requirements of IHL in relation to persons with disabilities during military operations, evacuations, humanitarian assistance and long-term assistance and services, it will also discuss the related Islamic law, in an effort to provide recommendations to enhance the protection of persons with disabilities in armed conflict in Muslim contexts.

Protection for persons with disabilities during military operations

Despite the protections afforded to persons with disabilities in armed conflict under both IHL and Islamic law, the reality on the ground for these marginalized people is vastly different. Marcus Skinner notes that according to the World Health Organization’s (WHO) 2011 *World Report on Disability*, “15.3% of the world’s population has a moderate or severe disability and ... this proportion is likely to increase to 18–20% in conflict-affected populations”.¹⁸ Frequent discrimination and neglect, coupled with large percentages of persons with disabilities in war-stricken Muslim-majority contexts, are indicative of the need to better respect these protections. For example, after more than four decades of war, Afghanistan has one of the largest populations of persons with visual impairments and physical, mental and psychological disabilities *per capita* in the world.¹⁹ The authors of this paper have noticed that there are discrepancies in the statistics collected by different entities regarding percentages of persons with disabilities;²⁰

16 See V. Rispler-Chaim, above note 13, p. 17; M. Ghaly, above note 15, p. 106.

17 V. Rispler-Chaim, above note 13, p. 94.

18 Marcus Skinner, “The Impact of Displacement on Disabled, Injured and Older Syrian Refugees”, *Forced Migration Review*, No. 47, September 2014, p. 39.

19 Human Rights Watch, *Disability is not Weakness: Discrimination and Barriers Facing Women and Girls with Disabilities in Afghanistan*, 28 April 2020, available at: <https://hrw.org/node/341205>.

20 According data published by the Palestinian Central Bureau of Statistics (PCBS) in December 2019, about 93,000 members (2.1%) of the Palestinian population have a disability, and about one fifth of these are children under the age of 18. However, WHO estimates that 15% of every population comprises

while the ongoing efforts to collect data on persons with disabilities are encouraging, the information gained remains incomplete because such data collection processes around the world are in the early stages and often the innovative aspects of the CRPD are not captured by general data collection.²¹ With increasingly disconcerting reports that adults and children with disabilities are being used as suicide bombers²² and that facilities for persons with disabilities have been hit during hostilities, among other examples, collection of comprehensive data on persons with disabilities and the barriers and risks they face during armed conflict is essential.²³

Recognition of reality and the need to ensure sufficient protection of civilians and civilian objects in order to mitigate the impact of conflict is a cornerstone of IHL. Prior to and during the conduct of hostilities, IHL requires that parties to a conflict distinguish between civilians and military targets and take all feasible precautions to minimize injury to civilians, incidental loss of civilian life and damage to civilian objects during military operations.²⁴ The realities of warfare are such, however, that even when all precautions are taken, unintentional harm to civilians occurs. Yet the harm suffered by the civilian population is not uniform, as conflict inevitably amplifies existing inequalities and vulnerabilities, with persons with disabilities often being the segment of the population most severely impacted.²⁵

This disparity in harm suffered stems not from a deficiency in the IHL rules regarding the conduct of hostilities, but instead from a lack of consideration of the fact that very often, persons with disabilities are unable to flee combat zones or access warnings of an impending attack, and are often abandoned or left behind by their families. Articles 5, 10, and 17 of the CRPD require that persons with disabilities are ensured equal protection under the law, particularly including the protection of their physical and mental integrity, and importantly, their right to life.²⁶ The direct application of the CRPD and its complementary role with IHL

persons with disabilities, and in conflict zones this figure rises to 20%. Moreover, according to a report by the UN Relief and Works Agency (UNRWA), about 25% of the population above the age of 12 in Syria are individuals with disabilities, including Palestinian refugees, and this higher prevalence is connected with the ongoing conflict. See PCBS, untitled data sheet, 3 December 2019, available at: www.pcbs.gov.ps/portals/_pcbs/PressRelease/Press_En_3-12-2019-dis-en.pdf; WHO, *World Report on Disability*, 2011, available at: www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability; UNRWA, *Disability Inclusion Annual Report 2020*, 2020, available at: www.unrwa.org/resources/reports/disability-inclusion-annual-report-2020.

21 See *Statistics and Data Collection under Article 31 of the Convention on the Rights of Persons with Disabilities: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/49/60, 28 December 2021, available at: www.ohchr.org/sites/default/files/2022-06/G2139630-Accessible.pdf.

22 Cassandra Clifford, “The Continued Rise of the Child Suicide Bomber”, 13 February 2008, available at: <https://foreignpolicyblogs.com/2008/02/13/the-continued-rise-of-the-child-suicide-bomber/>.

23 Human Rights Watch, “Yemen: Houthi Endangered School for Blind”, 13 January 2016, available at: www.hrw.org/news/2016/01/14/yemen-houthi-endangered-school-for-blind.

24 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 75 UNTS 135, 8 June 1977 (entered into force 7 December 1979) (AP I), Arts 48, 51, 52, 57, 58.

25 *Protection of Civilians in Armed Conflict*, above note 4, para. 49.

26 CRPD, above note 1, Arts 5, 10, 17.

means that before military operations are conducted, there needs to be understanding and consideration of where persons with disabilities live, how they go about their daily lives, how they may react in the context of an attack, and the challenges they will likely face.

For example, people with visual impairments may require support from others to flee an impending attack, and persons with auditory impairments often cannot hear announcements or instructions related to a military operation. Persons with intellectual disabilities have difficulty understanding complex evacuation instructions, warnings of impending attacks, or what is occurring during a military operation. As a result of the violence of military operations, individuals with psychosocial impairments often have their mental health conditions exacerbated. Additionally, owing to stigma and bias, persons with disabilities are often the subject of violence and targeted killings by parties to the conflict.²⁷ Appropriate application of a disability-sensitive analysis to the rules of engagement, standard operating procedures and targeting assessments must reflect the reality of persons with disabilities.

Islamic law makes it abundantly clear that fighting on the battlefield must be directed only against enemy combatants²⁸ – civilians and non-combatants must not be intentionally harmed during hostilities. Qur'an 5:32 stresses the sanctity of human life as follows: "Whoso kills a human soul not in retaliation for [killing another] human soul or [commits] destruction in the land, it is as if he kills the entire humanity; and whoso saves a human soul, it is as if he saves the entire humanity." The protection of life (*hifz al-nafs*) is the first of the five ultimate objectives of Islamic law (*maqāṣid al-sharī'ah*), along with the protection of religion, intellect, progeny and property.²⁹ Article 2(a) of the Cairo Declaration on Human Rights in Islam, adopted by foreign ministers of the Organization of Islamic Cooperation in 1990, affirms the right to life, stating that "life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to safeguard this right against any violation, and it is prohibited to take away life except for a shari'ah prescribed reason." Article 3(a) adds: "In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children. The wounded and the sick shall have the right to medical treatment."³⁰ This protection against the killing of non-belligerents and right to medical treatment includes persons with disabilities, although they are not explicitly listed.

To minimize harm to the civilian population, civilians and civilian objects, classical Islamic law prohibits the use of certain medieval and indiscriminate means

27 Human Rights Watch, "Persons with Disabilities in the Context of Armed Conflict: Submission to the UN Special Rapporteur on the Rights of Persons with Disabilities", 8 June 2021, available at: www.hrw.org/news/2021/06/08/persons-disabilities-context-armed-conflict.

28 Qur'an 2:190.

29 On the ultimate objectives of Islamic law, see, for example, Felicitas Opwis, "Maqāṣid al-Shari'ah", in Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan (eds), *Routledge Handbook of Islamic Law*, Routledge, London and New York, 2019.

30 Cairo Declaration on Human Rights in Islam, 5 August 1990, available at: www.refworld.org/docid/3ae6b3822c.html.

and methods of warfare, except in cases of imperative military necessity. Nuanced deliberations took place among classical Muslim jurists about the permissibility of shooting mangonels or weapons tipped with fire, poison or oil, as well as the permissibility of engaging in hostilities during the night or shooting at a human shield.³¹ In short, the Islamic jurists who permit the use of these medieval indiscriminate means and methods of warfare grounded their opinions on military necessity. The underlying premise here is that persons with disabilities are included in this general protection for civilians and non-combatants – but the general protection afforded to civilians is not sufficient for persons with disabilities, and both IHL and Islamic law, as discussed below, require that additional attention be paid to ensure that sufficient protection of persons with disabilities is included in the analysis of proportionality, distinction and precautions.

Classical Islamic law books³² contain references to various categories of civilians who must not be intentionally harmed during hostilities. These include persons with disabilities – for example, the blind, *al-majnūn* (a person with psychosocial disability), *al-zzamnā* (the incapacitated) and *al-shaykh al-kabīr/al-shaykh al-fānī* (the aged – namely, one who is physically unable to fight because of age). *Al-zzamnā* is an archaic Arabic word “meaning those with chronic diseases and permanent disabilities. A *zamin* is a decrepit man in *zamana* (a state of deterioration), i.e. disability.”³³ However, concerning persons with temporary intellectual disability, Abū Ḥanīfah (d. 767), the eponymous founder of the Ḥanafī school of law, notes that such persons can be targeted only when they are not in this temporary state.³⁴ While the language is reflective of the time period, it is clear that Islamic law thinks deeply about persons with disabilities and the

31 See, for example, Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York, 2011, pp. 116–119, 122–126; Ahmed Al-Dawoody, “Islamic Law and International Humanitarian Law: An Introduction to the Main Principles”, *International Review of the Red Cross*, Vol. 99, No. 3, 2017, pp. 1004–1007; Sohail Hashmi, “Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation”, in Sohail H. Hashmi and Steven P. Lee (eds), *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*, Cambridge University Press, Cambridge, 2004, pp. 328–329; Najib al-Armanāzī, *Al-Shar’ al-Dawliyyah-Islām*, 2nd ed., Riad El-Rayyes Books, London, 1990 (first published 1930), p. 124; ‘Alī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sultāniyyah wa al-Wilāyāt al-Dīniyyah*, ed. Aḥmad Mubārak al-Baghdādī, Maktabah Dār ibn Qutaybah, Kuwait, 1989, p. 57; Ibrāhīm ibn ‘Alī ibn Yūsuf al-Shirāzī, *Al-Muḥadhdhab: Fī Fiqh al-Imām al-Shāfi’ī*, ed. Zakariyyā ‘Imīrat, Vol. 3, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1995, p. 278.

32 See, for example, Muḥammad ibn Idrīs al-Shāfi’ī, *Al-Umm*, 2nd ed., Vol. 4, Dār al-Ma’rifah, Beirut, 1973, p. 240; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar al-Kabīr*, ed. Ṣalāḥ al-Dīn al-Munjid, Vol. 4, Ma’had al-Makhtūṭāt, Cairo, p. 1415; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar*, ed. Majid Khadduri, Al-Dār al-Muttaḥidah, Beirut, 1975, p. 249; Mālik ibn Anas, *Al-Mudawwanah al-Kubrā*, Vol. 3, Dār Ṣādir, Beirut, pp. 6–7; Aḥmad ibn Idrīs al-Qarāfi, *Al-Dhakhīrah*, ed. Muḥammad Būkhūzah, Vol. 3, Dār al-Gharb al-Islāmī, Beirut, 1994, pp. 397–401; Muḥammad al-Ghazālī, *Al-Waṣīṭ fī al-Madhdhab*, Vol. 7, ed. Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmīr, Dār al-Salām, Cairo, 1997, p. 19; Muwaffaq al-Dīn ‘Abd Allāh ibn Aḥmad ibn Qudāmah, *Al-Kāfi fī Fiqh al-Imām Aḥmad Ibn Ḥanbal*, ed. Muḥammad Fāris and Mus’ad ‘Abd al-Ḥamid al-Sa’danī, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2004, Vol. 4, p. 125.

33 V. Rispler-Chaim, above note 13, p. 124. The most commonly used modern Arabic word for a person with disability is *mu’awwaq* (plural *mu’awwaqin*). For a number of euphemisms used in modern Arabic to refer to persons with disabilities, see M. Ghaly, above note 11, p. 151.

34 A. Al-Dawoody, *The Islamic Law of War*, above note 31, p. 114.

dangers armed conflict poses to them, and that the protections it provides are robust.

Most of the classical Islamic jurists agree that aged persons can be targeted if they enter the battlefield to support the enemy in planning war operations. This is based on the case of the killing of Durayd ibn al-Ṣūmah, one of the most experienced and renowned warriors of the pre-Islamic and early Islamic eras, who allegedly fought in more than 100 battles. Ibn al-Ṣūmah had a physical disability – he could not walk to the battlefield – and was brought onto the battlefield to support the Muslims’ enemies in planning the operations for the battle of Ḥunayn in 630, even though he was over 100 years of age at the time.³⁵ Although the few examples listed above indicate that there was a conscious recognition among classical Muslim jurists of the need to protect persons with disabilities in armed conflicts under Islamic law, the case of ibn al-Ṣūmah demonstrates a recognition that persons with disabilities can and do directly participate in hostilities, thereby losing their protection against direct attack that they would otherwise be afforded as civilians.

Moreover, under Islamic law, persons with a visual impairment or mental or physical disabilities are exempt from the duty to participate in war.³⁶ Examples given by classical Muslim jurists for persons with disabilities exempt from the duty to participate in war include *al-’a’ma* (the blind), *al-’a’raj* (the lame) and *al-marīḍ* (the sick). This exception is based on the inability to take part in fighting, and this is why ibn Qudāmah (d. 1223) states that light sickness, such as a headache or toothache, and small degrees of lameness that do not prevent a person from walking or mounting an animal are not enough grounds for exemption from the duty to participate in war.³⁷ The exemption for persons with disabilities to participate in war makes them civilians who then cannot be targeted in conflict.

However, Islamic sources also record that ‘Amr ibn al-Jamūḥ, one of the chiefs of the tribe of Banū Salamah, and an old man with a partially lame leg, was eager to join the fighting in the battle of Badr in March 624, and that the Prophet Muhammad rejected his participation as he was exempt from this duty. But in the following year, ibn al-Jamūḥ insisted on joining the fighting in the Battle of Uḥūd in March 625, along with his three sons. Understandably, his sons were against their father’s wish, given that he was excused from the duty to fight. Ibn al-Jamūḥ expressed his wish to the Prophet Muhammad, who then told the sons to let their father have his wish.³⁸ This incident demonstrates that persons

35 See *ibid.*, p. 114; A. Al-Dawoody, “Islamic Law and International Humanitarian Law”, above note 31, p. 1004; Muḥammad ibn ‘Alī ibn Muḥammad al-Shawkānī, *Nayl al-Awṭār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akhbār*, Vol. 8, Dār al-Jil, Beirut, 1973, p. 73.

36 V. Rispler-Chaim, above note 31, pp. 41–45.

37 See Muwaffaq al-Dīn ‘Abd Allah ibn Aḥmad ibn Muḥammad ibn Qudāmah, *Al-Mughnī*, ed. ‘Abd Allah ibn ‘Abd al-Muḥsin al-Turkī and ‘Abd al-Fattāḥ Muḥammad al-Ḥilu, 3rd ed., Vol. 13, Dār ‘Ālam al-Kutub, Riyadh, 1997, p. 9.

38 ‘Abd Allah ibn al-Mubārak, *Al-Jihād*, ed. Nazīḥ Ḥammād, Al-Dār al-Tūnissiyah, Tunis, 1972, p. 69; Muḥammad ibn ‘Umar al-Wāqidi, *Kitāb al-Maghāzī*, ed. Marsden Jones, 3rd ed., Vol. 1, Dār al-‘Ālam, Beirut, 1989, pp. 164–165.

with disabilities have a recognized right to non-discrimination, effective participation and inclusion in Islamic society. It shows that while Islam does provide an exemption to military service for persons with disabilities, there are precedents and a recognition and acknowledgement that persons with disabilities can and do participate in armed conflict and will be treated as any other combatant.

Protection for persons with disabilities during evacuations

Evacuations of civilians from areas of active hostilities, although necessary to ensure safety, are often difficult ordeals for civilians wishing to flee. In areas at risk of attack, IHL obligates parties to a conflict to conclude agreements to prioritize evacuation of persons with disabilities – albeit through the use of outdated language to describe disability.³⁹ IHL also requires that extra protection and consideration be given to persons with disabilities owing to the fact that armed conflict places them in highly vulnerable situations, although again relying on outdated language.⁴⁰ These obligations mean that special protection, assistance and attention must be given to ensure that the evacuation routes and safe passages are accessible to persons with disabilities.

Consulting the CRPD adds details to and guidance on the IHL obligations by providing parameters on the concrete process of how to ensure accessibility to and inclusion of persons with disabilities. Articles 9 and 21 of the CRPD require that States take “appropriate measures” to guarantee that persons with disabilities have equal access to “the physical environment, to transportation, to information and communications ... and to other facilities and services open or provided to the public”, and to ensure that “information intended for the general public” is provided in an accessible format.⁴¹ Although not overly prescriptive, the requirements of the CRPD are easily transposed to the development of accessible evacuation processes that allow for full compliance with the above-mentioned IHL obligation. Even so, the on-the-ground reality is that persons with disabilities remain mostly invisible and forgotten during evacuation procedures, which is in large part due to a significant dearth of disaggregated data on persons with disabilities and their needs generally, but also specifically during evacuations.

For example, persons with disabilities must frequently abandon their technical aids and assistive devices in order to use evacuation procedures that have not accounted for the need to transport mobility devices (such as wheelchairs, scooters and crutches). Information on the location and process for evacuation is not communicated in accessible formats and thereby never reaches persons with sensory impairments or intellectual disabilities. For those who do evacuate, their assistive devices and technical aids are often damaged or

39 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. 17.

40 *Ibid.*, Art. 16.

41 CRPD, above note 1, Arts 9, 21.

destroyed, further amplifying new and existing barriers. Very often, persons with disabilities decide to remain or are abandoned by family members or caretakers in the path of an impending attack because of inaccessible evacuations.⁴² Compliance with IHL obligations requires that authorities identify, consider and account for the needs of persons with disabilities and provide the necessary assistance required for them to access safe and inclusive evacuation procedures.

Interestingly, there were conscious and intrinsic choices made to ensure the safety of all civilians, obviously including persons with disabilities, by the conflicting parties in some of the earliest battles in Islamic history. These fighters chose to engage in hostilities outside of towns and populated areas. The prime examples here are the Battles of Badr in March 624, which took place near a well of the same name in the desert between Mecca and Medina, and the Battle of Uḥud in March 625, which took place near the mountain of Uhud.

Evacuations of the injured and the dead from these battlefields during the Prophet's lifetime, by women, are documented in the Hadith (reported sayings, deeds and tacit approvals of the Prophet Muhammad) collections and *Sīrah* (biographies of the Prophet Muhammad) literature. Part of the role of Muslim women in these earliest battles included "repatriating the injured and dead bodies [from the battlefield in the desert] back to Medina".⁴³

Under Islamic law, *amān* (quarter, safe passage) must be given if requested in any form by enemy belligerents. The Islamic jurists explain that the rationale of *amān* is *ḥaḥn al-dam* (prevention of bloodshed, protection of life). Accordingly, evacuations and safe passage to persons with disabilities are *a fortiori* obligations on Muslims. Negligence or failing to evacuate persons with disabilities (assuming the ability to do so) will be tantamount to endangering the lives and safety of those persons. One of the Islamic legal maxims states: *Mā lā yatim al-wājib ilā bih fahowa wājib* (Whatever is necessary to fulfil an obligation is an obligation in itself). In this case, the protection of the lives of persons with disabilities is an obligation, and to fulfil those persons' protection and safety during armed conflicts, evacuations become an obligation. Furthermore, in order to fulfil the obligation of the protection of the lives of persons with disabilities, information about the location of persons with disabilities and their respective needs must be prepared, and communication about the evacuation process must be shared in accessible ways. The fulfilment of this obligation is the responsibility of both the State authorities and the Muslim community.

There is no record known to the present authors of disaggregated data on persons with disabilities and their needs and barriers in Muslim-majority contexts that are collected for the purpose of evacuations during armed conflict. In many Muslim-majority States, due to tribal affiliations, extended family ties and the

42 Human Rights Watch, "South Sudan: People with Disabilities, Older People Face Danger: UN, Aid Agencies Should Improve Response to These Groups", 31 May 2017, available at: www.hrw.org/news/2017/05/31/south-sudan-people-disabilities-older-people-face-danger.

43 Ahmed Al-Dawoody, "Management of the Dead from the Islamic Law and International Humanitarian Law Perspectives: Considerations for Humanitarian Forensics", *International Review of the Red Cross*, Vol. 99, No. 2, 2017, pp. 672–673.

Islamic obligation of taking care of one's neighbours, persons with disabilities and their specific needs will be informally known to many members of the community. Apart from State authorities, civil society and NSAGs who control territories may have disaggregated data on persons with disabilities and their specific needs in Muslim-majority contexts that are collected for medical and social support purposes. Therefore, in addition to State authorities and the military, community leaders can be in a good position to facilitate both the identification and evacuation of persons with disabilities. Such cultural and traditional elements should be invoked to enhance the special protection and assistance afforded to persons with disabilities in armed conflict in Muslim-majority contexts.

Persons with disabilities are often abandoned or left behind by their own families during armed conflict (and in particular during evacuations), and parties to a conflict should therefore make agreements to give priority during evacuations to persons with disabilities.

The Islamic law part of this paper is particularly relevant to two categories of Muslims. The first category is Islamic NSAGs, which use Islamic law as their only source of reference and are not willing to abide by, or engage with, any other legal systems or frameworks. The second category is the Muslim-majority States and Muslim non-State actors who abide by Islamic law and at the same time acknowledge IHL obligations and are willing to respect them. Those actors that fall into the second category are obligated to respect IHL and make such agreements not only from the perspective of international law, but also from the perspective of Islamic law. *Pacta sunt servanda* is an Islamic principle enshrined in many Qur'anic texts (Qur'an 5:1, 16:91–94) and the Hadith of the Prophet Muhammad.⁴⁴ Under Islamic law, all treaties that Muslims lawfully enter into are binding except provisions that blatantly contradict the tenets of Islamic law,⁴⁵ which is not the case when it comes to IHL.⁴⁶ In order to ensure that agreements are made to give priority during evacuations to persons with disabilities, invoking Islamic legal and ethical arguments will be indispensable in the case of the first category and will constitute another layer of conviction in the case of the second category.

As for the conclusion of agreements, it is useful to invoke evidence from early Islamic history, which is replete with examples of agreements concluded

44 On the Islamic principle of *pacta sunt servanda*, see, for example, Hans Wehberg, "Pacta Sunt Servanda", *American Journal of International Law*, Vol. 53, No. 4, 1959, p. 775; Syed Sharifuddin Pirzada, "Islam and International Law", in Altaf Gauhar (ed.), *The Challenge of Islam*, Islamic Council of Europe, London, 1978, pp. 210–215; C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, Macmillan, Basingstoke, 1988, pp. 132–133; Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study*, Graham & Trotman, London, 1994, pp. 12–13; Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the "Clash of Civilizations" in the New World Order*, Hart Publishing, Oxford, 2005, p. 46; Emilia Justyna Powell and Sara McLaughlin "The International Court of Justice and the World's Three Legal Systems", *Journal of Politics*, Vol. 69, No. 2, 2007, pp. 400–401.

45 Ramin Moschtoghi, "Relation between International Law, Islamic Law and Constitutional Law of the Islamic Republic of Iran – A Multilayer System of Conflict", *Max Planck Yearbook of United Nations Law*, Vol. 13, No. 1, 2009, p. 420.

46 Niaz A. Shah, "Foreword", in Muhammad-Basheer A. Ismail, *Islamic Law and Transnational Diplomatic Law: A Quest for Complementarity in Divergent Legal Theories*, Palgrave Macmillan, London, 2016, p. xi.

during armed conflict between the Prophet Muhammad and the adversary to ensure, for example, the transfer of dead bodies, the release of detainees, and armistice. Harm to persons with disabilities as a result of failure to evacuate them while having the ability to do so can entail legal responsibility in this world, to be decided by the *qāḍī* (judge) in a court that applies Islamic law, and/or a divine punishment in the Hereafter. Additionally, Islamic ethical and traditional values, codes of honour and chivalry dictate protection and assistance to those in highly vulnerable situations, such as persons with disabilities. These Islamic legal, ethical and traditional values will be more likely to be adhered to by Muslims who use Islamic law as a/the source of reference that regulates their behaviour. However, this does not mean that the average practicing Muslim will be educated or knowledgeable about the rules under discussion in this paper regarding the protection of persons with disabilities, let alone the current challenges that leave them in such highly vulnerable situations.

Humanitarian aid for persons with disabilities

Humanitarian aid and assistance is vital for civilians displaced and affected by armed conflict. Given its importance, IHL recognizes that civilians have a right to receive humanitarian aid.⁴⁷ Parties to a conflict, therefore, must allow for and assist in the rapid and unobstructed delivery of that aid (food and water, medicine, medical equipment etc.), without adverse distinction, to civilians in need.⁴⁸ IHL also requires that parties to a conflict provide particularized treatment to individuals in need of specific humanitarian aid and services within the territory they control, again without adverse distinction.⁴⁹ This obliges parties to a conflict and humanitarian organizations to have health-care and other essential services address the needs of persons with disabilities, to provide information about assistance in accessible formats, to ensure that shelters, displacement camps and sanitation facilities are suitable for use by persons with disabilities, and to have humanitarian distribution locations made accessible. However, persons with disabilities continue to systematically struggle to meet their basic needs because of a failure to identify such persons through data collection and to consider the barriers they face in accessing aid, and a lack of targeted aid and support programming to address their specific needs.⁵⁰

For example, UN agencies have started to collect data on persons with disabilities displaced by armed conflict, but the approach lacks sufficient detail to fully account for the diversity of disability and the associated needs. Distribution

47 GC IV, Art. 23.

48 Common Art. 3.

49 AP I, Art. 70.

50 Human Rights Watch, *Leave No One Behind: Persons with Disabilities in Humanitarian Emergencies*, 19 May 2016, available at: www.hrw.org/news/2016/05/19/leave-no-one-behind; Amnesty International, *Excluded: Living with Disabilities in Yemen's Armed Conflict*, 3 December 2019, available at: www.amnesty.org/en/documents/MDE31/1383/2019/en/.

of humanitarian aid as such does not prioritize persons with disabilities, leaving them with inconsistent access to food, medicine and hygiene kits. Latrines and showers lack accommodations needed to allow persons with disabilities to access them, requiring in many cases that they crawl or rely on family members to take them. Inadequate health care and in particular mental health support combine to have a deleterious effect on an individual's existing impairment and raise their risk of obtaining a secondary impairment.⁵¹

When persons with disabilities do manage to flee to relative safety, they continue to be marginalized and forgotten – a reality in stark contrast to the fact that the majority of efforts to protect persons with disabilities in armed conflict focuses on the delivery of humanitarian aid. This gap between aspiration and reality when it comes to disability-inclusive humanitarian assistance can and must be bridged by referring to the corresponding CRPD obligations and guidance from the Inter-Agency Standing Committee (IASC). Articles 19, 21 and 26 of the CRPD direct States to ensure that persons with disabilities have equal access to “services and facilities” that are “responsive to their needs”, that information is provided to the general public in an accessible format, and that there is availability of “assistive devices and technologies, designed for persons with disabilities”.⁵² Providing practical advice, the IASC *Guidelines on the Inclusion of Persons with Disabilities in Humanitarian Action* emphasize the need to use a twin-track approach that includes, first, inclusive mainstream humanitarian programming (i.e., including persons with disabilities in whole-of-population programmes) and second, targeted interventions that specifically address the needs, risks and barriers faced by persons with disabilities.⁵³ Implementation of this twin-track approach requires – as does the CRPD – that persons with disabilities and their representative organizations be directly involved at all stages of the development, planning and implementation of humanitarian aid programming. To comply with IHL therefore requires States, humanitarian actors, donors and parties to a conflict to adjust their approach to humanitarian assistance to consider and include persons with disabilities as part of the overall population, but also to create particular programming to address their needs directly.

Humanitarian aid is an important part of Islamic faith,⁵⁴ law and culture. *Zakah* (also spelled *zakat*, compulsory alms giving) is one of the five pillars of Islam, in the sense that it is not left to the free choice of Muslims but is a core Islamic obligation⁵⁵ if its conditions are met. *Zakah* is to be spent in alleviating the suffering and satisfying the needs of individuals and society. Unlike *ṣadaqah*

51 Amnesty International, *Excluded: Living with Disabilities in Yemen's Armed Conflict*, 3 December 2019, available at: <https://www.amnesty.org/en/documents/mde31/1383/2019/en/>.

52 CRPD, above note 1, Arts 18, 21, 26.

53 IASC, *Guidelines: Inclusion of Persons with Disabilities in Humanitarian Action*, 19 November 2019, available at: <https://interagencystandingcommittee.org/iasc-guidelines-on-inclusion-of-persons-with-disabilities-in-humanitarian-action-2019>.

54 Jamal Krafess, “The Influence of the Muslim Religion in Humanitarian Aid”, *International Review of the Red Cross*, Vol. 87, No. 858, 2015, p. 327.

55 *Ibid.*, pp. 327, 335–337.

(optional charity), *zakah* has specific rules and regulations: for example, Muslims who possess a certain minimum amount of wealth must pay certain percentages of that wealth.⁵⁶ *Zakah* “is one of the largest forms of wealth transfer to the poor and needy in existence”, and its annual potential size was estimated “between US \$200 billion and US\$1 trillion, according to Obaidullah and Shirazi in 2015 and the World Bank and IDBG [Islamic Development Bank Group] in 2016”.⁵⁷

Zakah is indeed “a revolutionary concept with the potential to ease the suffering of [hundreds of] millions around the world”;⁵⁸ however, it is of paramount importance to stress here that the discussion of the Islamic short and long forms of humanitarian aid and assistance addressed in this paper – namely, *zakah*, *şadaqah* and *waqf* (endowments, trusts) – does not mean a return to the charity or medical models of disability. Indeed, on the one hand, these three forms can be used for charity purposes (i.e., to take care of someone who cannot care for themselves), but on the other – and here lies the intended meaning of the use of these forms – they can be also used to empower those people to support themselves, as in the example given from Indonesia below. Moreover, these forms of support or assistance can be given to the State or other entities for furthering society and/or supporting any laudable objective for the community at large, such as supporting the army financially, supporting cancer research, or activities that aim at the protection of the environment. In any case, consultation and engagement with persons with disabilities and their representative organizations should take place during the planning and use of such forms of humanitarian aid and assistance, and should be done in a manner that is not inconsistent with the CRPD.

In the Muslim-majority context, *zakah* and *şadaqah* are usually paid from the Muslim payees directly to the individual beneficiaries or local charities and entities concerned. In the West, the Muslim payees usually either pay *zakah* and *şadaqah* to local charities or transfer it to beneficiaries and charities in Muslim-majority contexts. Muslims may not necessarily be aware of how their *zakah* and *şadaqah* can be used for humanitarian aid and assistance for civilians displaced and affected by the atrocities of armed conflict; hence, if humanitarian needs and assistance are identified and made known to Islamic institutions and Muslim individuals and philanthropists, these individuals and organizations may be motivated to direct their *zakah* and *şadaqah* to easing the suffering of civilians displaced and affected by armed conflict. *Zakah* or *şadaqah* can be used for

56 *Zakah* is levied on specific categories of wealth, and is to be given to specific categories of recipients if the minimum amount of wealth is reached. A minimum of fixed rates that vary depending on the category of wealth must be paid: for example, 2.5% must be paid if the minimum amount of wealth has been in possession of the *zakah* payee for a lunar year, and 10% must be paid on agricultural income on naturally irrigated areas but 5% on artificially irrigated areas. See, for example, Timur Kuran, “Property”, *Encyclopedia of Islam and the Muslim World*, ed. Richard C. Martin, Macmillan Reference USA, New York, 2004, p. 553; J. Krafess, above note 54, p. 335.

57 Aamir A. Rehman and Francine Pickup, “Zakat for the SDGs”, 7 September 2018, available at: www.undp.org/blog/zakat-sdgs.

58 Islamic Relief, “Why Is Zakat Important?”, available at: www.islamic-relief.org.uk/about-us/what-we-do/zakat/why-is-zakat-important/.

providing humanitarian aid such as food, water, medicine and medical equipment for those displaced and affected by armed conflict in general, and also for shelters, displacement camps and sanitation facilities that are accessible to persons with disabilities in particular.

The main issue here is that IHL's requirement of the provision of humanitarian aid and services without adverse distinction to civilians in need may be in contradiction with an interpretation of *zakah* which states that it should be paid to Muslim beneficiaries. In fact, the fourth category of the eight eligible recipients of *zakah*, which refers *inter alia* to new Muslim converts, also includes (or for some, used to include) non-Muslims: the eight categories are (1) the poor, (2) the needy, (3) those who administer *zakah*, (4) those whose hearts are to be reconciled,⁵⁹ (5) for freeing slaves, (6) debtors, (7) for the cause of God, and (8) the stranded.⁶⁰ But *ṣadaqah* can be given to both Muslims and non-Muslims.

Even in the case of Muslim payees of *zakah* who would like to restrict its recipients to Muslims, adverse distinction in the distribution of humanitarian aid is sometimes not practically possible. For example, if *zakah* funds are given by a Muslim for building a hospital or for providing humanitarian aid such as food, water, medicine, assistive devices or medical equipment, the religious identity of the patients and recipients of humanitarian aid in the context of armed conflict cannot be usually known. Furthermore, it would be un-Islamic to contribute to human suffering by preventing humanitarian aid due to the fact of a recipient belonging to a different religion. The Dar al-Ifta of Egypt issued a fatwa answering positively the following question: "Can I give Zakah money to a hospital where patients are both Muslims and non Muslims?" However, the fatwa adds that under Islamic law, it will be mandatory to give from *ṣadaqah* (optional charity) to non-Muslims in order to fulfil their needs if no means are available.⁶¹

The use of Islamic finance models in the non-faith-based humanitarian sector is a relatively new issue for both international organizations and Muslim jurists, and the latter are confronted with new questions that they need to respond to from Islamic legal perspectives. It is worth referring here to the Office of the UN High Commissioner for Refugees' (UNHCR) pioneering project, the Refugee Zakat Fund. UNHCR assesses that refugees and internally displaced persons (IDPs) are eligible to receive *zakah*.⁶² This project reflects flexibility, pragmatism and innovation in the provision of funding to refugees, using alternative sources for funding while following a 100% *zakah* distribution policy.

59 This category refers to "persons who have recently been brought to Islam, or whose commitment to the faith and community needs to be reinforced, and individuals who can be prevented from harming the community, or who can benefit and defend the community". There is a disagreement among Islamic jurists as to whether this category is eligible to receive *zakah* after the death of the Prophet: see Yūsuf al-Qaradāwī, *Fiqh Al-Zakah: A Comprehensive Study of Zakah Regulations and Philosophy in Light of the Qur'an and the Sunnah*, trans. Monzer Kahf, Islamic Books Trust, Kuala Lumpur, 2011, pp. 379–408.

60 Qur'an 9:60.

61 Dar al-Ifta al-Missriyyah, "Can I Give Zakah Money to a Hospital Where Patients Are Both Muslims and Non Muslims?", available at: www.dar-alifta.org/Foreign/ViewFatwa.aspx?ID=6391.

62 See the UNHCR Refugee Zakat Fund website, available at: <https://zakah.unhcr.org/en>.

The Refugee Zakat Fund has up to now received sixteen fatwas from more than ten Islamic institutions and individuals globally, endorsing UNHCR as a legitimate recipient of *zakah* funds.⁶³ These fatwas are issued by State fatwa institutions, muftis and Islamic world-leading scholars, Islamic international organizations, and international Islamic legal institutions, based both in Muslim-majority States and in the West. These include the Organization of Islamic Cooperation's International Islamic Fiqh Academy and the Muslim World League, both based in Saudi Arabia; the International Shariah Research Academy, based in Malaysia; the Senior Scholars' Council of Morocco; the Islamic Affairs and Charitable Activities Department of Dubai and the Tabah Foundation, both based in the United Arab Emirates (UAE); and Al-Azhar Islamic Research Academy and the Dar al-Ifta al-Missriyyah, both based in Egypt; as well as fatwas by the ex-mufti of Egypt, Dr Ali Gomaa, and the Mauritanian scholar Sheikh Abdullah bin Bayya, based in the UAE.⁶⁴

The Refugee Zakat Fund has launched an application on iOS and Android called GiveZakat that allows users to calculate the amount of their *zakah* and track their donation until it reaches the refugees and IDPs (beneficiaries). Such uses of modern digital technology are essential in responding to humanitarian needs and facilitating humanitarian aid. The creation of a similar application for humanitarian actors that collects disaggregated data on the location of persons with disabilities, the diversity of their disabilities and their specific needs could help, for example, in providing tailored accessible advance warnings of impending attacks, information about evacuation routes and safe passages that are accessible to persons with disabilities, and the numbers and quantities of specific services, medical equipment and assistive devices needed. In this way, technology could help ensure that persons with disabilities are not invisible and forgotten during evacuations. This is just an example to stress that the use of technology and social media is inevitable for States and even non-State actors, militaries and humanitarian organizations in their response to the needs of persons with disabilities during armed conflict in general and evacuations in particular.

Technology can be a powerful tool for advancing the protection and rights of persons with disabilities, but caution must be taken as it also raises a number of risks. Artificial intelligence and machine-learning technologies are being used to address the needs of refugees and IDPs, prevent human trafficking and combat child labour. However, the use of non-inclusive data sets that do not consider or account for persons with disabilities – owing to the inherent cultural, religious and societal biases and prejudices of software developers – will inevitably further increase the discrimination, marginalization and harm faced by persons with disabilities during humanitarian emergencies.⁶⁵ Overcoming this and other risks

63 See the UNHCR Refugee Zakat Fund “Fatawa” webpage, available at: <https://zakat.unhcr.org/blog/en/fatawa>.

64 *Ibid.*

65 *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/HRC/49/52, 28 December 2021.

requires consultation and engagement with persons with disabilities and their representative organizations in the development and implementation of such technology.

Long-term assistance and services for persons with disabilities

As conflicts take on a more protracted nature, adjustments need to be undertaken to appropriately address the long-term impact on the civilian population. IHL requires that if and when civilians are transferred or evacuated, the party to the conflict undertaking such actions must – to the extent possible – ensure that conditions of shelter, hygiene, health, safety and nutrition are satisfactory to the needs of the individuals involved.⁶⁶ What is considered to be satisfactory has been interpreted to rely on the specific needs of the individual, eschewing a one-size-fits-all approach.⁶⁷ This means that persons with disabilities must be given equal access to long-term assistance and services like medical care, socio-economic programmes, rehabilitation, education and psychological support that are tailored to their needs.

As we have seen, however, this is rarely the case in practice when authorities or humanitarian organizations provide short- and long-term assistance beyond the initial emergency, as persons with disabilities and their needs remain mostly unconsidered and invisible. Lack of comprehensive data on disability within humanitarian and development organizations makes implementation, monitoring and evaluation of inclusive long-term assistance and development programming difficult and means that the needs of persons with disabilities can never be sufficiently addressed. For example, children with disabilities are regularly denied access to education, and even when education is available, the lack of assistive devices and staff trained to provide education to such children makes access nearly impossible.⁶⁸

Lack of recognition of the diversity of disability and deficiency in the understanding of their long-term support needs often leaves persons with disabilities in highly vulnerable situations even after they have escaped active conflict zones. In instances of longer-term assistance, Articles 24, 25, 26 and 28 of the CRPD provide sufficient guidance by requiring that persons with disabilities be given access to education and health services “including health-related rehabilitation” and “adequate food, clothing and housing”, without discrimination and on an equal basis with others.⁶⁹ The practical goal at this stage is to ensure that individuals are able to begin re-stabilizing their lives, and this reality requires a disability-inclusive approach regarding medical care, socio-economic programmes, rehabilitation, education and psychological support to

66 GC IV, Art. 49.

67 ICRC Customary Law Study, above note 9, Rule 13.

68 Human Rights Watch, *Central African Republic: People with Disabilities Left Behind*, 28 April 2015, available at: www.hrw.org/news/2015/04/28/central-african-republic-people-disabilities-left-behind.

69 CRPD, above note 1, Arts 24, 25, 26, 28.

overcome not simply the new barriers imposed by armed conflict but also many of the barriers that existed in peacetime.

It is also worth noting that in the context of long-term assistance, many of the challenges regarding access are directly related to reinforced stereotypes and biases towards persons with disabilities due to lack of awareness, sensitization and training among staff. Many donor States and organizations that provide the funding for development programming within these protracted conflict settings lack a disability-inclusive approach requirement within their grant application selection criteria. Article 32 of the CRPD notes that States, through “partnership with relevant international and regional organizations” and specifically with organizations of persons with disabilities (OPDs), must ensure that their international cooperation efforts, “including international development programmes, [are] inclusive of and accessible to persons with disabilities”.⁷⁰ This obligation means that States must require the inclusion of a disability perspective as part of their international development grant-making and programming; it also directly mandates engagement with OPDs in order to overcome built-in exclusion and ensure complete accessibility.

Disability is a form of human diversity and is usually a permanent or prolonged condition, although it can be short-term and temporary in nature. Therefore, a disability-inclusive approach that considers long-term assistance and the specific needs of persons with disabilities is a must for responding to those needs both during armed conflict and in peacetime. At present, the world is a long way from achieving this objective in peacetime, let alone during armed conflict, with all the challenges, risks and impairments that are exacerbated by it. The disability-inclusive approach should be institutionalized and systematized by both State authorities and all relevant organizations and actors.

In Muslim contexts, it will be useful to partner with local, regional and international OPDs. These partnerships will facilitate and expedite cooperation in responding to the specific needs of persons with disabilities during armed conflict. Moreover, partnerships with academic and research institutions focusing on disability inclusion that can identify local challenges, biases and risks for persons with disabilities and suggest policy recommendations to address them are essential. It will also be helpful to use the Islamic system of *waqf* (endowments, trusts), which can immensely contribute to permanent or long-term assistance and services for persons with disabilities. Jamal Krafess writes:

In addition to emergency aid and other assistance, the Muslim religion also encourages humanitarian acts which will bring about lasting change in people’s lives. There are numerous hadiths on this subject, in one of which, according to Aicha (the Prophet’s wife), the Prophet says: “the good work which God likes the best is the one which lasts, even if it is small...” In another hadith he affirms the continuity of the reward even after death:

70 *Ibid.*, Art. 32.

“When a man dies his works stop bringing him a reward with the exception of three actions: continuous charity ...”⁷¹

The Islamic law of *waqf* is based not on the Qur’an but on the concept of continuous charity mentioned in this Hadith.⁷² *Waqf* is therefore called a *ṣadaqah jāriyah* (a continuous/recurring charity) because its benefit for the beneficiaries is designed to be permanent, long-term, stable and irrevocable. In fact, “[s]everal scholars of Islamic law have suggested that Islamic influence was prominent in the development of the English trust”.⁷³ There are two types of *waqf*, whereby Muslims can permanently endow property for any laudable objective related to (1) private/family (*waqf ahli*) or (2) public/religious (*waqf khayri*) dimensions. *Waqf* “was commonly used to endow mosques, colleges, hospitals, and other charitable institutions, and a complex body of law emerged to govern the creation and administration of these trusts”.⁷⁴ According to Haitam Suleiman,

Muslim society relied profoundly on the *waqf* for the provision of education at all levels, as well as cultural services, such as libraries and lecturing, scientific research in all material and religious sciences and health care, including the provision of services of a physician, hospital services and medicines. The evidence points to the substantial economic significance of the *waqf* system, and lies in the variety of services provided by the *waqf*. Therefore, because the *waqf* supported many economic sectors the evolution of Islamic civilisation is incomprehensible without taking account of [it].⁷⁵

Unlike *zakah*, *waqf* is voluntary and its beneficiaries can be Muslims and non-Muslims. Simply put, a person can donate a property or a (part of a) revenue from a property permanently for specific beneficiaries or goals. For example, a person can permanently donate a building or the revenue from a property or piece of land for research in disability studies, medical care or assistive devices, education of children with disabilities, or socio-economic programmes for persons with disabilities.

71 J. Krafess, above note 54, p. 334.

72 Haitam Suleiman, “The Islamic Trust *Waqf*: A Stagnant or Reviving Legal Institution?”, *Electronic Journal of Islamic and Middle Eastern Law*, Vol. 4, 2016, p. 30.

73 Monica M. Gaudiosi, “Influence of the Islamic Law of *Waqf* on the Development of the Trust in England: The Case of Merton College”, *University of Pennsylvania Law Review*, Vol. 136, 1988, p. 1232.

74 *Ibid.*, p. 1234. See also H. Suleiman, above note 72, p. 32.

75 H. Suleiman, above note 72, p. 32. Other examples of “projects financed by *waqf* have been very diverse, covering social, humanitarian, cultural and economic domains. They have included the sinking of wells, the construction of water fountains, the construction of homes for the poor unable to pay rent, free hostels and hotels for travellers, the maintenance of bridges and roads, the organization of funerals for the poor, the upkeep of cemeteries, help for the blind, the handicapped and the imprisoned, the financing of weddings for the unmarried poor, the construction and maintenance of orphanages, food centres serving free meals, the construction and maintenance of mosques, and the provision of milk for children. ... In the health sector, *waqf* allowed for huge innovations such as mobile hospitals which moved from village to village, as well as emergency teams in places where large meetings were held. There were fifty hospitals in the Cordoba region of Andalusia alone. The hospitals offered diverse services, for instance surgery, ophthalmology, traumatology and psychiatry.” See J. Krafess, above note 54, p. 338.

The system of *waqf* links Muslim individuals to the needs of their societies and motivates them to become positive and active participants in the service of bringing about welfare in society and responding to the needs of citizens. The system of *waqf* has contributed to the welfare of society throughout Islamic history, and as an indication of its current significance and the huge amount of wealth involved, there are ministries called the Ministry of Endowments and Religious Affairs in Muslim-majority States such as Oman, Qatar, the Sudan, Egypt, Syria, Somalia, Jordan, Kuwait, Morocco, Bahrain and Algeria. Other Muslim-majority States include the institution of *waqf* under other structures within the government, such as the General Authority of Islamic Affairs and Endowments in the UAE.

As an example of the use of *waqf* for the assistance of persons with disabilities in non-armed conflict contexts, the Indonesian Dompot Dhuafa Foundation provides capital assistance to empower persons with disabilities to run their own businesses through the Economic Empowerment Programme.⁷⁶ However, it is unfortunate that the potential of the *waqf* system has not been used in long-term assistance and services to persons with disabilities in armed conflict in particular.

It is of paramount importance to add here that persons with disabilities and their representative organizations should work with all relevant organizations to shape the approaches, responses and programmes that aim at fulfilling their needs. Indeed, throughout Islamic history disabilities have not prevented people from becoming leaders in society and in various academic disciplines such as Islamic law, theology and art. As far back as the ninth century, some works were devoted to the biographies and achievements of prominent persons with disabilities in Islamic civilization.⁷⁷ It is worth mentioning here the famous incident that took place with ‘Abd Allah ibn Umm Maktum, the first blind Muslim, who undertook the *hijrah* (flight) with the Prophet Muhammad from Mecca to Medina (about 450 kilometres) on 16 July 622. Chapter 80 of the Qur’an begins by admonishing the Prophet Muhammad for turning away from ibn Umm Maktum, who once came to the Prophet seeking religious guidance and obviously not knowing that the Prophet was in the middle of discussions and negotiations with a delegation of the leaders of Quraysh. The Islamic sources explain that the Prophet appointed ibn Umm Maktum several times as the leader of Medina in his absence.⁷⁸ Thus, ibn Umm Maktum was acting head of the city-State of Medina and also led the congregational prayer in the Prophet’s absence.

76 Andika Primasiwi, “Dompot Dhuafa Berdayakan Kaum Disabilitas Melalui Program Pemberdayaan Ekonomi”, *Suara Merdeka*, 5 December 2018, available at: www.suaramerdeka.com/nasional/pr-0478910/dompot-dhuafa-berdayakan-kaum-disabilitas-melalui-program-pemberdayaan-ekonomi. The authors thank Muhammad Fikri Pido for the translation from Indonesian.

77 M. F. H. ‘Abdel-Hay, above note 10, p. 388.

78 As noted by Brenton Kinker, ‘Abd Allah ibn Umm Maktum was “a blind man who achieved fame as an avid student, eventual governor of Medina, leader of prayer, and commander of military expeditions – appointed for all these tasks by Muhammad himself.” Brenton Kinker, “An Evaluation of the Prospects for Successful Implementation of the Convention on the Rights of Persons with Disabilities in the Islamic World”, *Michigan Journal of International Law*, Vol. 35, No. 2, 2014, p. 466.

This is an example of the exercise of the right of persons with disabilities to participate in political and public life, as provided in Article 29 of the CRPD, which requires States Parties to “guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others”. Nonetheless, two of the seven conditions stipulated by the renowned Islamic constitutional jurist al-Māwardī (d. 1058) for eligibility for the position of the caliph (head of the historical umbrella Islamic State government system) are being of sound hearing, sight and speech and being free from physical disabilities that prevent him from movement.⁷⁹ The point here is that the rights of persons with disabilities have been deliberated throughout Islamic history, and recalling Islamic law and early Islamic precedents can sometimes immensely influence behaviour and make positive societal change in relevant Muslim contexts.

Conclusion

The current state of international law and international society is State-centric, but the reality on the ground at the moment shows that the great majority of armed conflicts are non-international armed conflicts, and the majority of these conflicts include NSAG parties to the conflict who use Islamic law as their source of reference. The present study has shown that Islamic law can positively contribute to efforts that aim at impactful mainstreaming of disability and use of the twin-track approach to humanitarian responses and the protection of persons with disabilities in armed conflict in Muslim contexts. Nothing is more indicative of this protection than considering the protection of life (*ḥifẓ al-nafs*) as the first of the five ultimate objectives of Islamic law (namely life, religion, intellect, lineage and property),⁸⁰ and the Qur’anic emphasis on the preservation of human dignity (Qur’an 17:70; 2:30–33; 45:12–13).

The law, lawyers, legal concepts and legal doctrines must encompass innovative ways to enhance compliance with the law. Legal innovation when it comes to many contemporary humanitarian issues in relevant Muslim contexts means sometimes revisiting Islamic law provisions going back over a millennium, because these provisions have a huge impact on both State and non-State actors.

Persons with disabilities are protected and accounted for by IHL and Islamic law, which are further informed by the CRPD. Unfortunately, the lack of practical implementation of the obligations to provide specific protection, services and assistance to persons with disabilities means that the oversized impact that armed conflict has on such persons will continue to be a preventable truth. Overcoming this gap will require the collection of disaggregated data on disability, as is set forth in Article 31 of the CRPD, in order to ensure

79 ‘Ali ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah*, Dār al-Ḥadīth, Cairo, 2010, p. 19.

80 See, for example, F. Opwis, above note 29. For some Islamic scholars, the protection of life comes second after the protection of religion.

comprehensive information as to the location of persons with disabilities and the diversity of their disabilities and associated needs. This data can and must then be used to create accessible advance warnings of impending attacks, to adjust targeting algorithms and assessment tools to incorporate the patterns of life of persons with disabilities, and to revise military manuals and trainings for commanders and soldiers. Additionally, this data can and must be used to mainstream disability into the humanitarian response by developing accessible evacuation procedures, ensuring inclusive access to essential services and information, revising emergency response policies, and creating targeted programming to address the particular needs of persons with disabilities. As authorities undertake the development and implementation of changes to policies and procedures to be more inclusive of disability, it is imperative that persons with disabilities and their representative organizations are consulted and directly involved.

Beyond the collection of data, shifts need to occur within States, militaries and humanitarian organizations to sensitize their policies, rules, practices and staff to the needs of persons with disabilities, in both Muslim and non-Muslim contexts. Trainings directly addressing the legal requirements of IHL and the CRPD to account for and provide particular protection and support to persons with disabilities are essential. All of this must be done in close coordination with persons with disabilities, OPDs and their representative organizations. This sensitization is necessary to overcome inherent bias related to the perception of persons with disabilities. Including persons with disabilities requires changing entrenched discriminatory cultural, religious and societal norms and embracing persons with disabilities as just that – people who must be protected and respected as envisioned by IHL, Islamic law and the CRPD.

Islamic law provides a layer of support that Muslim cultures can easily and quickly comply with and then relate to the IHL requirements concerning persons with disabilities. The use of an inclusive approach that reflects all relevant mutually reinforcing legal frameworks and traditions is impactful and can influence human behaviour more easily. Clearly, Islamic law, IHL and the CRPD all work towards providing comprehensive and inclusive protections and rights for persons with disabilities during times of armed conflict; what remains to be achieved is a concerted approach translating these legal requirements into practical application in order to ensure that disability-inclusive protection is a reality.

No context is too challenging: Promoting, doing and achieving inclusion in the humanitarian response in South Sudan

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Abstract

Disability inclusion has become a crucial issue for humanitarian action, at least at the international policy level. However, little is known about how humanitarian actors are “doing inclusion” in practice. With a case study on South Sudan, this article examines whether the increase in publications, policy tools and guidelines has made humanitarian action more inclusive for persons with disabilities, and how

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stakeholders can overcome persisting barriers for persons with disabilities. The article demonstrates noticeable progress in data collection, capacity-building, the removal of barriers and meaningful participation, but humanitarians still lack the skills, confidence and resources to address many persisting barriers. To advance inclusion, donors and humanitarian organizations must invest more time and resources in capacity-building and coordination.

Keywords: disability inclusion, humanitarian action, South Sudan, armed conflict.

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Introduction

Armed conflicts and civil wars devastate societies and cause immense human suffering, even beyond the period of active warfare.¹ They disproportionately affect persons with disabilities, who are exposed to heightened risks to their mental and physical well-being, safety and survival. Persons with disabilities often have difficulties fleeing attacks because they lack evacuation support, do not have assistive devices, or lack access to emergency shelter, or because they face communication barriers in accessing information about attacks or might be separated from their support persons or caregivers.² Moreover, multiple environmental, attitudinal and institutional barriers also prevent persons with disabilities from accessing crucial protection and other humanitarian services. This increases their vulnerability. In many instances, the heightened, aggravated and multiple risk factors result in higher levels of psychosocial distress among persons with disabilities.³ Furthermore, their meaningful participation in humanitarian programme design, implementation, monitoring and evaluation is extremely limited.⁴ The exclusion of persons with disabilities infringes upon fundamental human rights principles, as well as international humanitarian law and related protection principles.⁵

In 2016, over seventy humanitarian stakeholders launched the Charter on Inclusion of Persons with Disabilities in Humanitarian Action (Humanitarian

1 Hazem Adam Ghobarah, Paul Huth and Bruce Russett, “Civil Wars Kill and Maim People – Long After the Shooting Stops”, *American Political Science Review*, Vol. 97, No. 2, 2003, p. 189.

2 Inclusion Europe, “Weeks of Horror. And We Cannot Possibly Leave”, press release, 2022, available at: www.inclusion-europe.eu/weeks-of-horror-and-we-cannot-possibly-leave/ (all internet references were accessed in August 2022).

3 Human Rights Watch, “UN: High Risk in Conflicts for Children with Disabilities. Urgently Strengthen Protection, Assistance, Inclusion”, press release, New York, 2 February 2022, available at: www.hrw.org/news/2022/02/02/un-high-risk-conflicts-children-disabilities.

4 Handicap International, *Disability in Humanitarian Context: Views from Affected People and Field Organisations*, Lyon, July 2015, p. 24.

5 International human rights law: Convention on the Rights of Persons with Disabilities, Convention on the Rights of the Child. Human rights principles: dignity, non-discrimination, participation and inclusion, accessibility, age and gender equality. International humanitarian law: 1949 Geneva Conventions and their Additional Protocols. Humanitarian principles: humanity, impartiality, neutrality. Existing and emerging global humanitarian standards: Humanitarian Charter and Minimum Standards in Disaster Response (Sphere Standards), Minimum Standards for Age and Disability Inclusion in Humanitarian Action, Minimum Standards for Child Protection in Humanitarian Action.

Disability Charter).⁶ By signing the Charter, they expressed their commitment to the protection, safety and respect for the dignity of persons with disabilities in situations of armed conflict and other situations of risk, and affirmed their commitment to eliminating all forms of discrimination. The launch also initiated the process of developing United Nations (UN) Security Council Resolution 2475 on the protection of persons with disabilities in armed conflict, which was adopted unanimously in 2019.⁷ Moreover, it led to the publication of the *Guidelines on Inclusion of Persons with Disabilities in Humanitarian Action* (IASC Guidelines) in the same year. Endorsed by the Inter-Agency Standing Committee (IASC), the highest coordination body for humanitarian affairs in the UN system, and developed by more than 600 stakeholders across the disability, humanitarian and development sectors in a three-year process, the IASC Guidelines enjoy strong international support. They define four key “must-do” actions to facilitate the inclusion of persons with disabilities in humanitarian programming, namely (1) meaningful participation, (2) removal of barriers, (3) empowerment and capacity-building, and (4) and the collection, use and analysis of disaggregated data for monitoring inclusion.⁸ Yet, three years after the publication of the Guidelines, questions emerge as to whether humanitarian action has become more disability-inclusive and how relevant stakeholders can close persisting barriers for persons with disabilities in situations of armed conflict.

This article explores these questions with a case study on the humanitarian response in South Sudan. Building on document analysis, two focus group discussions with persons with disabilities and expert interviews with fifteen representatives from international and national organizations with and without disabilities, this contribution demonstrates that the publication of the IASC Guidelines has given humanitarian actors a push to commit themselves to inclusive humanitarian action. However, humanitarian staff still lack the knowledge, skills and resources to implement the four “must-do” actions in demanding operational environments. This limits the organizational capacity to design and implement inclusive programmes and projects. To meet their strategic goals and commitments on inclusion, humanitarian organizations and their donors need to invest more time and resources in capacity-building and coordination.

This article is divided into eight parts. After this introduction, the second part of the article gives a brief overview of different models of disability and the accepted definition of “disability inclusion” in humanitarian action. The third part explains the reasons for selecting South Sudan as a case study and describes the methods of data collection and analysis employed. Subsequently, the fourth part gives an overview of the humanitarian context, the civil war and the security environment. The fifth part describes the situation of persons with disabilities

6 Charter on Inclusion of Persons with Disabilities in Humanitarian Action, available at: <https://humanitarianinclusion.org/>.

7 UNSC Res. 2475, 20 June 2019.

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

and the legal and policy framework in place to protect their rights. After this, the sixth part explores how donors, UN agencies and non-governmental organizations (NGOs) promote the inclusion of persons with disabilities in their policies and guidelines. Taking the four “must-do” actions as a starting point, the seventh part then analyzes how humanitarian actors are “doing inclusion”, with a focus on the progress being made, and the gaps still existing, in implementing inclusive humanitarian action; it then discusses how humanitarian organizations can build on the progress already made and meet the remaining operational challenges. Finally, the conclusion summarizes these findings.

Disability inclusion and humanitarian action

The humanitarian principles of humanity and impartiality, to which all humanitarians must subscribe, entail that human suffering must be addressed wherever it is found (humanity), and that aid must be provided on the basis of need alone, giving priority to the most urgent cases of distress (impartiality). However, the task of protecting and providing assistance to persons with disabilities has long been assigned to specific disability-focused organizations or has been part of targeted programmes geared towards medical treatment, rehabilitation and care. Such an approach reflects the outdated medical and charity models of disability, which understand disability as a problem of the individual that needs to be treated, fixed or cured.⁹

With the UN Convention on the Rights of Persons with Disabilities (CRPD), a human rights model established itself that regards persons with disabilities as equal rights holders. This entails overcoming structural and institutional as well as direct and indirect forms of discrimination.¹⁰ Many humanitarian organizations committed themselves to the human rights approach by signing the 2016 Humanitarian Disability Charter. A system-wide UN Disability Strategy¹¹ and the IASC Guidelines followed in 2019 to facilitate the implementation of the Charter into practice. They clarify the meaning of inclusive humanitarian action, according to which “disability inclusion is achieved when persons with disabilities meaningfully participate in all their diversity, when their rights are promoted, and when disability-related concerns are addressed in compliance with the CRPD”.¹² Furthermore, and as mentioned, the IASC Guidelines define four key “must-do” actions, which apply in all sectors and at all stages of the humanitarian response.

However, only few studies examine how humanitarians seek to make their programmes and services more inclusive for persons with disabilities.¹³ Hence, it

9 Brigitte Rohwerder, *Disability Inclusion: Topic Guide*, GSDRC, University of Birmingham, November 2015, p. 5.

10 Theresia Degener, “Disability in a Human Rights Context”, *Laws*, Vol. 5, No. 35, 2016, p. 13.

11 UN, *UN Disability Inclusion Strategy*, 2019, available at: www.un.org/en/content/disabilitystrategy/.

12 IASC Guidelines, above note 8, p. 9; UN, above note 11, p. 20.

13 For exceptions, see Carolin Funke and Dennis Dijkzeul, *From Commitment to Action: Towards a Disability-Inclusive Humanitarian Response in South Sudan*, 2022, available at: <https://tinyurl.com/>

remains unclear how humanitarian actors are “doing inclusion”, particularly in situations of violence. This article will examine this question by focusing on disability inclusion in South Sudan.

Methods and case selection

South Sudan has been chosen to explore disability-inclusive humanitarian practices in armed conflict for three main reasons. First, South Sudan has long been grappling with inter-communal violence, inter-group conflict and regular violent attacks against civilians and aid workers. This requires humanitarian actors to operate in an environment of limited statehood “in which central authorities (governments) lack the ability to implement or enforce rules and decisions and/or in which the legitimate monopoly over the means of violence is lacking”.¹⁴ Consequently, humanitarian organizations have undertaken a central role and responsibility in offering basic services to the population, including internally displaced persons (IDPs), even in hard-to-reach areas. However, there is hardly any research on disability inclusion. Thus, this article can make a significant contribution towards a better understanding of challenges and good practices in disability-inclusive humanitarian programming.

Second, disability is no longer a marginal issue for humanitarian organizations in South Sudan. Persons with disabilities are included in the Humanitarian Needs Overviews and Humanitarian Response Plans, and many organizations cooperate with inclusion-focused NGOs to build their capacity and make their services more accessible for persons with disabilities. Simultaneously, persons with disabilities organize themselves and contribute to the humanitarian response and to development activities – a process that started in 2010, even before the national referendum that led to the country’s independence. They are involved in advocacy and engage in the political processes of the country, for instance by contributing to national efforts to develop a disability inclusion policy.¹⁵ In 2020, eight organizations of persons with disabilities (OPDs) founded an umbrella body, the National Union of Disabled People’s Organisations, which promotes the equal participation of persons with disabilities in all social, political and economic dimensions of public life.¹⁶

426jn43z; Flora Cohen and Lauren Yeager, “Task-Shifting for Refugee Mental Health and Psychosocial Support: A Scoping Review of Services in Humanitarian Settings through the Lens of RE-AIM”, *Implementation Research and Practice*, Vol. 2, 2021; Carolin Funke and Dennis Dijkzeul, *Mainstreaming Disability in Humanitarian Action: A Field Study from Cox’s Bazar, Bangladesh*, 2021, available at: <https://tinyurl.com/mv2w8yyna>; Jura L. Augustinavicius, M. Claire Greene, Daniel P. Lakin and Wietse A. Tol, “Monitoring and Evaluation of Mental Health and Psychosocial Support Programs in Humanitarian Settings: A Scoping Review of Terminology and Focus”, *Conflict and Health*, Vol. 12, No. 9, 2018.

14 Stephen D. Krasner and Thomas Risse, “External Actors, State-Building and Service Provision in Areas of Limited Statehood: Introduction”, *Governance*, Vol. 27, No. 4, 2014, p. 549.

15 E-Mail exchange with inclusion expert from HI (on file with author).

16 Light for the World, “A First for South Sudan’s Disability Movement”, press release, 2020, available at: www.light-for-the-world.uk/news/a-first-for-south-sudans-disability-movement/. Members include the

Third, the research for this article has been carried out with support of the inclusion-focused NGOs Humanity & Inclusion (HI) and Christian Blind Mission. Both organizations have a long-standing presence in South Sudan and were able to organize focus group discussions with persons with disabilities, establish contact with potential interview partners and share grey literature with the author. This facilitated the data collection considerably, given that the COVID-19 pandemic prevented data collection on the ground.

The data were acquired through two focus group discussions with twenty-one representatives of OPDs in the cities of Yei and Yambio,¹⁷ and fifteen expert interviews with representatives from UN agencies, international mainstream NGOs, OPDs, and three inclusion-focused organizations. Unfortunately, government officials who were contacted for interview did not respond despite repeated requests.¹⁸

Background: Civil war and the security environment in South Sudan

South Sudan has a relatively long history of political turmoil and civil war with its (now) northern neighbour Sudan. After a referendum on independence, with 99% of the votes in favour and with the referendum being perceived to have met international standards, South Sudan formally became an independent State on 9 July 2011. Hopes for a secure, free and stable country soon vanished, however, with the outbreak of another brutal civil war two years later. The 2018 peace deal, the so-called Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan, ended the fighting between armed forces loyal to President Salva Kiir and to opposition leader Riek Machar, but numerous inter-group conflicts and inter-communal violence in many parts of the country challenged government control and the State's monopoly on the use of force.¹⁹ In February 2020, the two political adversaries formed a unity government, but the elite struggle for political dominance continues.²⁰ In fact, many provisions of the peace accord and much-needed political reforms remain unimplemented to this

South Sudan Association of the Visually Impaired, the South Sudan Women with Disabilities Network, the South Sudan National Association for the Deaf, and the Jubek State Union of the Physically Disabled.

17 In total, five women and five men participated in Yei and four women and seven men participated in Yambio. These focus group discussions were facilitated by HI staff, and notes of the discussions were shared with the author afterwards.

18 Several interview partners had a disability, and some organizations had a dual mandate, which means that they were active in both the humanitarian and development sectors. All interviews were recorded, transcribed and analyzed using the MAXQDA software application. The names and affiliations of the interview partners will remain anonymous. Although the data are not representative for the whole humanitarian response in South Sudan, they still provide useful insights into the work of various key actors on disability inclusion, remaining gaps, ongoing challenges and progress, as well as inviting more in-depth and longitudinal field research.

19 Bertelsmann Stiftung, *Transformation Index BTI 2022 Country Report: South Sudan*, Gütersloh, 2022.

20 International Crisis Group, *South Sudan's Splintered Opposition: Preventing More Conflict*, Juba, Nairobi and Brussels, 25 February 2022.

day, hampering progress towards sustainable peace and long-term development. Moreover, South Sudan has neither signed nor ratified various major international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the CRPD.²¹

Basic service delivery is mainly in the hands of UN agencies and NGOs,²² but the negative effects of climate change (particularly heavy rain and severe flooding), renewed fighting among local non-State armed groups and insecurity are hampering development efforts and localization. Moreover, frequent attacks against aid workers threaten security and make South Sudan one of the deadliest places for aid workers worldwide.²³ Since 2013, at least 130 humanitarian workers, most of them South Sudanese nationals, have been killed on duty.²⁴

Eleven years after independence, South Sudan became a protracted crisis context, with the balance tipping back to increasing humanitarian and reducing development efforts. Of the country's 12.5 million inhabitants, 8.9 million are in dire need of assistance; this is an increase of 600,000 since 2021, largely due to the effects of the COVID-19 pandemic and inflation.²⁵ Among those people are 2.1 million women, 4.7 million children and 1.3 million people with disabilities.²⁶ Poverty rates are extremely high, despite abundant natural resources. An estimated 2 million people are expected to be acutely malnourished in 2022.²⁷ Furthermore, large parts of the population have only limited or no access to adequate health services, safe water, education and electricity.²⁸

In 2021, South Sudan hosted some 300,000 refugees and asylum-seekers, mainly from Sudan, and had 2 million IDPs.²⁹ Some 2.3 million South Sudanese have found refuge in neighbouring countries, mainly Ethiopia, Kenya, Sudan and Uganda.³⁰ The resurgence of violence in certain parts of the country has led to ever-more expulsions and displacements. In December 2021, for example,

21 "Ratification Status for South Sudan", *UN Treaty Body Database*, available at: https://tbineternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=215&Lang=en.

22 South Sudan Human Rights Defenders Network, Human Rights Watch and Amnesty International, *South Sudan: Human Rights Priorities for the Government of the South Sudan*, 3 February 2022, p. 2, available at: www.amnesty.org/en/documents/afr65/5196/2022/en/.

23 Care International, "10 Years from Independence and South Sudan Is One of the Deadliest Places to Be an Aid Worker", 19 August 2021, available at: www.care.org/news-and-stories/press-releases/10-years-from-independence-and-south-sudan-is-one-of-the-deadliest-places-to-be-an-aid-worker/.

24 Nyagoah Tut Pur, "Surge in Attacks on Aid Workers in South Sudan. Authorities Should Improve Protection, Investigate Attacks", press release, Human Rights Watch, 4 March 2022, available at: www.hrw.org/news/2022/03/04/surge-attacks-aid-workers-south-sudan.

25 UN Office for the Coordination of Humanitarian Affairs (OCHA), *Humanitarian Needs Overview: South Sudan*, February 2022, p. 6.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*, p. 16.

29 Office of the UN High Commissioner for Refugees (UNHCR), "South Sudan", 2022, available at: www.unhcr.org/south-sudan.html.

30 *Ibid.*

violence in Tonj North County, Warrap, displaced thousands of people, while 80,000 people were displaced from Tambura.³¹

Disability in South Sudan

Reliable and representative data on persons with disabilities in South Sudan do not exist. The last national census, conducted in 2008 before the country's independence, estimated that 5.1% of the population who lived in the region that is now South Sudan had a disability.³² This clearly contradicts global estimates, by which at least 15% of any population are persons with disabilities.³³ In fact, after years of civil war and armed violence – and the concomitant side effects, including the proliferation of mines, unexploded ordinance, physical trauma and abuse, insufficient access to essential health and medical services, lack of protection, and general poverty – it is likely that the percentage of citizens with a long-term impairment is even higher than the global estimate.³⁴

Legally, persons with disabilities are protected under the Transitional Constitution of the Republic of South Sudan of 2011, which has several articles relevant for persons with disabilities. However, the Constitution takes a welfare approach to disability and only indirectly refers to persons with disabilities as part of a larger group of “persons with special needs”. Articles 30(1) and (2) stipulate that the government has the obligation to ensure that “persons with special needs and the elderly” are able to enjoy their rights and freedoms and to participate in society. Moreover, it reaffirms the duty to ensure that persons with disabilities have access to public utilities, suitable education, and employment. Furthermore, the elderly and persons with disabilities have the right to the respect of their dignity and the right to be provided with necessary medical services. Other articles, including Article 29 on the right to education, Article 31 on the right to health, and Article 139(1)(d) on basic values and guidelines for civil services, indirectly address disability.³⁵

In 2013, the Ministry of Gender, Child and Social Welfare, Humanitarian Affairs and Disaster Management, the appointed line ministry for persons with disabilities, passed a National Disability and Inclusion Policy to better protect the rights of persons with disabilities.³⁶ Moreover, the Ministry of Education, Science and Technology, with support from the international inclusion-focused NGO

31 OCHA, “South Sudan Humanitarian Snapshot”, December 2021, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/south_sudan_humanitarian_snapshot_december_0.pdf.

32 South Sudan Association of the Visually Impaired (SSAVI), *South Sudan UPR Report – 2016: Coalition of Organizations of Persons with Disabilities*, 2016, p. 1.

33 World Health Organization and World Bank, *World Report on Disability*, Geneva, 2011.

34 OCHA, above note 25, p. 14.

35 For a comprehensive overview of South Sudan's legal obligations vis-à-vis persons with disabilities, see Innocentia Mgiijima-Konopi, Theophilus Odaudu and Reshoketswe Mapokgol, “Country Report: South Sudan”, *African Disability Rights Yearbook*, Vol. 7, Pretoria University Law Press, Pretoria, 2019.

36 Republic of South Sudan, Ministry of Gender, Child and Social Welfare, Humanitarian Affairs and Disaster Management, *South Sudan National Disability and Inclusion Policy*, 2013, p. 13.

Light for the World and Save the Children, launched an inclusive education policy in 2021 to ensure equal access to education and provide the ministry with a tool to monitor progress.³⁷ Yet, the absence of a comprehensive human rights agenda and action plan and gaps in governance and security challenge the implementation of these policies.

To further promote the human rights of persons with disabilities in law, policy and practice, it is crucial to appoint members of the disability movement to the national constitutional review commission that is tasked with drafting a permanent constitution for South Sudan. The process resumed in 2020 after a year-long suspension, but critics point out that it needs to be revised at its core to become participatory and inclusive for all.³⁸

Disability and inclusion surveys³⁹ in the Protection of Civilians sites (PoCs) in Wau, Malakal and Bentiu reveal that persons with disabilities face numerous barriers to accessing humanitarian services. The IDP camps, which used to be called PoCs under the protection of South Sudan's peacekeeping mission, UNMISS, are now officially under the control of the government, except in Malakal. The sites were formerly under the protection of the UN, but in 2020 UNMISS decided to hand over control of all but one of them to the authorities. Most IDPs in these camps belong to the country's ethnic minority groups and live in areas dominated by forces that had previously fought against them.⁴⁰ Particularly, survey respondents remarked that the long distances to service and distribution points, lack of information, lack of physical access, discrimination, harassment and safety concerns in the process of accessing services (for example, through emotional and physical abuse from other IDPs in the PoC) represented the most severe barriers. In Malakal, respondents expressed a fear of verbal violence and physical violence when accessing services. In Wau, almost a quarter of respondents cited fear of physical abuse when accessing services. In Bentiu, persons with disabilities faced higher risks of physical violation, bribery and coercion than persons without disabilities. Service providers in Bentiu explained that persons with disabilities are more often the target of various offences such as robbery, rape and harassment. Persons with disabilities lacked access to specialized services and assistive devices, and in Malakal, almost every second individual with a disability also reported at least one mental health concern.

37 Daniel Danis, "Save the Children Supports the Review of Education Policy Document", press release, Save the Children, Juba, 30 October 2021, available at: <https://southsudan.savethechildren.net/news/save-children-supports-review-education-policy-document>.

38 Mark Deng, "South Sudan's Constitution Making Process Is on Shaky Ground: How to Firm It Up", *The Conversation*, 10 March 2022, available at: <https://theconversation.com/south-sudans-constitution-making-process-is-on-shaky-ground-how-to-firm-it-up-177107>.

39 International Organization for Migration (IOM) Displacement Tracking Matrix South Sudan, HI and South Sudan CCCM Cluster, *Disability and Inclusion Survey: Wau PoC AA*, 31 October 2019; IOM Displacement Tracking Matrix South Sudan, HI and South Sudan CCCM Cluster, *Disability and Inclusion Survey: Malakal Protection of Civilians Site*, 15 February 2021; IOM Displacement Tracking Matrix and HI, *Access to Humanitarian Services for People with Disabilities: Situational Analysis in Bentiu Protection of Civilians Site, South Sudan*, 2018.

40 Daniel P. Sullivan, *Do Not Forget: Aiding and Protecting Civilians in South Sudan*, Refugees International, South Sudan, 13 January 2022, p. 2.

Furthermore, respondents demanded more support for family members and caregivers and access to livelihoods; they also expressed a need for access to clean water and to water, sanitation and hygiene facilities. Moreover, the survey found that the majority of persons with disabilities did not live in shelters that were suitable for their specific needs and essential requirements. Low participation of people with disabilities in camp coordination, leadership and management structures was considered a problem in all three disability and inclusion surveys.⁴¹

Outside the PoCs, barriers and facilitators assessments in the education sector in Juba, Torit and Bor found that most of the basic accessibility features, such as ramps, cemented pathways and handrails, were not in place in the schools under examination. Initiatives to make education more accessible for persons with disabilities came from individual teachers and administrators but were not part of an overarching policy approach.⁴² Similar findings could be observed in barriers and facilitators assessments in the health sector, which revealed that health services were barely accessible for persons with disabilities.⁴³ In the hospitals, doors were too narrow, door handles were too high and not painted in bright colours, signs were too small for those with visual impairments, and information was not available in accessible formats such as Braille or large print. Many buildings did not have ramps, tactile markings or accessible signage. Moreover, staff members were not trained in sign language.⁴⁴

Focus group discussions with representatives from OPDs showed comparable results.⁴⁵ Participants remarked that inaccessible buildings, lack of public transport options and a poor road network prevent many persons with a physical impairment from reaching service points, as well as health and education facilities. Moreover, persons with a visual impairment struggle to locate services and service points. In addition, the negative attitude of some service providers leads to discrimination and harassment. Persons with disabilities had few opportunities to earn a living since livelihood and employment opportunities were rare, as were possibilities for skill development and learning; this increases their risk of a life in poverty. Furthermore, lack of access to assistive devices and information in multiple formats and exclusion of persons with disabilities in community activities and social gatherings increase their dependence on family members and caregivers and hamper their participation in social life.⁴⁶

Women with disabilities face particularly high risks of harassment, rape and sexual exploitation, and are thus vulnerable to unwanted pregnancies and

41 See above note 39.

42 HI, *Barriers and Facilitators Assessment Report for Accessible Education in Buluk A1 Primary School, South Sudan*, 2017, p. 6; HI, *Barriers and Facilitators Assessment Report for Accessible Education in Torit East Primary School, South Sudan*, 2017, p. 6.

43 HI, *Barriers and Facilitators Assessment Report for Accessible Health Services in Juba Teaching Hospital, South Sudan*, 2017, pp. 11–13; HI, *Barriers and Facilitators Assessment Report for Accessible Health Services in Torit State Hospital, South Sudan*, 2017, pp. 11–13.

44 HI, *Juba Teaching Hospital*, above note 43, pp. 11–13; HI, *Torit State Hospital*, above note 43, pp. 11–13.

45 Focus group discussions with persons with disabilities and OPD representatives, Yambio, May 2021 (on file with author).

46 *Ibid.*

sexually transmitted disease.⁴⁷ Many of them have to raise their children alone, and due to their lack of skills and employment opportunities, women with disabilities struggle to provide their children with adequate shelter, food, clothes and education.⁴⁸

Because South Sudan is a conflict setting, it is not surprising that grave human rights abuses also occur. Amnesty International, Human Rights Watch and South Sudan Human Rights Defenders Network reported deliberate attacks on civilians and extrajudicial killings, including persons with disabilities, and inhuman and degrading treatments of persons with psychosocial disabilities who were under arrest or in detention.⁴⁹

Summing up, South Sudan represents a challenging humanitarian context, where persons with disabilities face serious risks of exclusion and marginalization. Although humanitarian organizations have little influence on the conflict dynamics and concomitant human rights violations, the following sections show that they work hard to promote inclusion and to make their services more accessible for person with disabilities.

Promoting Inclusion through donor and organizational policies

The precarious humanitarian conditions in South Sudan demand a massive and sustained humanitarian response. As of December 2021, 104 organizations were implementing emergency programmes in nine different sectors.⁵⁰ Most organizations offered health and nutrition services, while four organizations were involved in camp coordination and management⁵¹ and only two were responsible for logistics.⁵² In total, donors spent \$1.2 billion on humanitarian assistance;⁵³ this makes South Sudan one of the largest recipients of humanitarian aid worldwide.⁵⁴ Most donations for the 2020 Humanitarian Response Plan came from the United States (\$714.5 million), the United Kingdom (\$88.9 million),

47 OCHA, above note 25, p. 29.

48 Focus group discussion with persons with disabilities and OPD representatives, Yei and Yambio, May and June 2021 (on file with author).

49 South Sudan Human Rights Defenders Network, Human Rights Watch and Amnesty International, above note 22, p. 8.

50 OCHA, *South Sudan: Reporting Organizations Operational Presence (3W: Who Does What, Where)*, December 2021, available at: www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ss_20220130_3wop_county_level_december_final.pdf. The sectors are: (1) health; (2) nutrition; (3) food security and livelihoods; (4) protection; (5) water, sanitation and hygiene; (6) education; (7) shelter and non-food items; (8) camp coordination and camp management; and (9) logistics. In total, fifty-two international NGOs, forty-six national NGOs and six UN agencies were involved in the response.

51 These were ACTED, the Danish Refugee Council, UNHCR and the IOM.

52 These were the IOM and World Food Programme.

53 OCHA, *South Sudan: 2020 Humanitarian Response in Review*, 2020, p. 1, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/south_sudan_humanitarian_response_in_review_2020.pdf.

54 The five largest recipients of aid were, in descending order, Syria, Yemen, Lebanon, South Sudan and the Democratic Republic of the Congo. See Development Initiatives and Global Humanitarian Assistance, *Global Humanitarian Assistance Report 2021*, 2021, p. 10.

Germany (\$75.3 million), and the European Commission’s Directorate General for European Civilian Protection and Humanitarian Aid Operations (DG ECHO) (\$67 million).

The policy environment for inclusive humanitarian action is comparatively favourable. The four largest donors – the United States, the United Kingdom, Germany and DG ECHO – actively support the inclusion of persons with disabilities in all of their funded aid operations, and major international humanitarian organizations have also begun to develop policies and strategies on disability inclusion. The growing demand for more data and information on disability by donors has most likely contributed to this trend. In 2020, the International Committee of the Red Cross introduced its Vision 2030 on Disability; in 2019, the UN – as mentioned – published a system-wide Disability Inclusion Strategy; and major NGOs, such as Médecins Sans Frontières, Save the Children, World Vision International and the International Rescue Committee, have developed guidelines and policies to strengthen inclusion of persons with disabilities.⁵⁵ Moreover, relevant stakeholders expressed their commitment to inclusive humanitarian action at the 2022 Global Disability Summit. In total, they made 1,413 commitments, of which 180 relate specifically to the thematic area of “Situations of Conflict and Crises”.⁵⁶ This leaves no doubt that disability inclusion has become an integral part of humanitarian action – at least at the strategic and policy level. Yet, the question arises as to whether the publication of policies and guidelines has also changed humanitarian practice on the ground.

“Doing inclusion” in South Sudan

Looking closely at the activities of humanitarian actors in South Sudan, one will notice significant progress, but also significant gaps in the implementation of the four “must-do” actions of the IASC Guidelines. Going in reverse order, the following sections will examine the progress and the gaps in the collection of data; empowerment and capacity-building; removal of barriers; and the participation of persons with disabilities.

Progress on inclusion

Until 2019, Humanitarian Needs Overviews did not consider the rights, needs and vulnerabilities of persons with disabilities. The 2018 Humanitarian Needs Overview

55 Médecins Sans Frontières, “Inclusion of Persons with Disabilities: 6 Keys for Inclusion”, Geneva, available at: https://disabilityinclusion.msf.org/assets/files/IPWD_Guideline_KeyPPLs_EN.pdf; Save the Children International, *Save the Children’s Disability Inclusion Policy: Lifting Barriers, Realizing Equality*, London, 2021; World Vision International, *Guidelines on Inclusion of Persons with Disabilities*, Monrovia, CA, available at: www.wvi.org/sites/default/files/Guidelines_on_Inclusion_of_Persons_with_Disabilities.pdf; International Rescue Committee, *Inclusive Client Responsiveness: Focus on People with Disabilities and Older People*, New York, May 2021.

56 Global Disability Summit, “Commitments”, 2022, available at: www.globaldisabilitysummit.org/commitments.

only mentions persons with disabilities twice, alongside other “vulnerable” groups, including children, older people, and people living with HIV/AIDS or tuberculosis.⁵⁷ With the upsurge in new guidelines, policies and commitments, however, this changed radically. Four years later, the term “persons with disabilities” appears fifty-six times, indicating a heightened awareness of their needs and vulnerabilities.⁵⁸ In fact, cluster leaders have an increased interest in data on persons with disabilities, and some clusters (such as health and protection) have developed or are in the process of developing monitoring tools that incorporate the Washington Group Questions Short Set (WGQ-SS).⁵⁹ As one interview partner explained:

Up until at least last year, we did not collect data on persons with disabilities. Last year, we have collected [*sic*] information on how many persons with disabilities we are reaching out to in our interventions, but this is just information provided by partners. So maybe it is not so representative, but at least we tried to collect it for the last year, if I am not mistaken. Now we are definitely making more of an effort to ensure that the assessments have more substantive information. ... The aim has been to try to put Washington Group Questions into the protection-monitoring tool that is under development, so at least we would get a better idea of who among the affected communities is a person with a disability.

Moreover, the International Organization for Migration (IOM) Displacement Tracking Matrix South Sudan and World Food Programme, in collaboration with several clusters, have incorporated the WGQ-SS into two annual country-wide surveys, the Food Security and Nutrition Monitoring Survey and the Multi-Sector Needs Assessment. The latest Food Security and Nutrition Monitoring Surveys for the capital Juba and for Bentiu/Rubkona, for example, reveal that more than 40% of all households have a member with a disability.⁶⁰

At the programme level, UN agencies have established dedicated focal points or protection mainstreaming officers who are tasked with ensuring that all their assessments incorporate the WGQ-SS.⁶¹ Furthermore, inclusion-focused

57 OCHA, *Humanitarian Needs Overview: South Sudan*, 2018.

58 OCHA, above note 25.

59 The Washington Group on Disability Statistics has developed tools for measuring disability in line with the functional approach of the World Health Organization’s International Classification of Functioning Disability and Health. They avoid the term “disability” and only address limitations in undertaking basic activities. The WGQ-SS focuses on six domains, namely seeing, hearing, walking, remembering or concentrating, self-care, and communicating. See Washington Group on Disability Statistics, *WG Short Set on Functioning (WG-SS)*, 2020, available at: www.washingtongroup-disability.com/question-sets/wg-short-set-on-functioning-wg-ss/.

60 In collaboration with the Shelter Non-Food Items Cluster, Camp Management and Camp Coordination Cluster, Protection Cluster, Gender-Based Violence Sub-Cluster, Child Protection Sub-Cluster, Education Cluster, Food Security Cluster, Water Sanitation and Hygiene Cluster and Health Cluster. IOM Displacement Tracking Matrix South Sudan and World Food Programme, *Urban Multi-Sector Needs, Vulnerabilities and COVID-19 Impact Survey (FSNMS+): Juba Town*, 31 March 2021 (Juba Impact Survey), p. 11; IOM Displacement Tracking Matrix South Sudan, *Urban Multi-Sector Needs, Vulnerabilities and COVID-19 Impact Survey (FSNMS+): Bentiu/Rubkona Town*, 12 August 2021 (Bentiu/Rubkona Impact Survey), p. 12.

61 Interview with a representative of a UN agency, June 2021 (on file with author).

organizations train enumerators on the correct usage of the WGQ-SS; this has led to comprehensive barriers and facilitators reports, which are also quoted in the Humanitarian Needs Overviews.⁶²

Indeed, some humanitarian organizations have invested in capacity-building to raise awareness on the rights of persons with disabilities and increase their own skills on inclusive practices. Inclusion-focused organizations offer training and learning sessions on inclusive humanitarian action, coach and mentor staff at various levels of the response, engage in knowledge and experience sharing, conduct assessments, and give advice on inclusive programme design and management and the development of inclusive policies. In most cases, mainstream actors approach inclusion-focused organizations for training and coaching sessions because their staff lack the expertise to meet donor demands or their self-defined inclusion standards. Particularly, UN agencies have expanded their partnerships with inclusion-focused NGOs. The latter offer tailor-made capacity-building to staff at all levels of the response, as one interviewee confirms:

When we engage with senior management, we tend to focus on inclusive programming – for example, on issues related to universal design⁶³ and the participation of persons with disabilities in the development of programmes and projects – whereas our engagement with front-line staff in various organizations focuses on inclusive language – for example, the language that they are supposed to use when addressing people with disabilities.⁶⁴

Besides mainstream humanitarian actors, inclusion-focused organizations also support the capacity-building of OPDs. Specifically, they try to enhance OPDs' knowledge about the CRPD, international humanitarian law and the functioning of the humanitarian system. This also entails providing OPDs with skills related to humanitarian programming and coordination, including budgeting and proposal writing. One respondent explained:

Once a week, our head of finance spends time in the office of our three partner OPDs to train them on financial management to make sure that they learn how to report to donors. Thanks to his “on-the-job” coaching, we are confident that by the end of this year, or next year, they will have the capacity to report to donors without our support.⁶⁵

These efforts contributed to tangible progress in removing barriers for persons with disabilities – for example, by making distribution points more accessible for persons with a walking or visual impairment.⁶⁶ Moreover, they have led to more meaningful

62 Juba Impact Survey, above note 60, p. 8; Bentiu/Rubkona Impact Survey, above note 60, p. 9.

63 “Universal design means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design”: see Convention on the Rights of Persons with Disabilities, 13 December 2006 (entered into force 3 May 2008), Art. 2.

64 Interview with HI staff member, June 2021 (on file with author).

65 Interview with a representative of Light for the World, July 2021 (on file with author).

66 Interview with a representative of a UN agency, June 2021 (on file with author).

participation of persons with disabilities in project activities and cluster meetings. Some international organizations have even begun to recruit persons with disabilities in order to increase their organizational diversity and expertise on disability inclusion and to raise awareness for the needs of persons with disabilities and give them a voice in project design and implementation.⁶⁷ Furthermore, humanitarian organizations encourage and support the establishment of community groups or committees of persons with disabilities in order to help them communicate their needs to humanitarian actors through these governance structures.⁶⁸

Despite this remarkable progress, however, gaps in the inclusion of persons with disabilities remain.

Explaining the remaining gaps in inclusion

So far, most information on disability in the 2022 Humanitarian Needs Overview for South Sudan is either anecdotal or based on a few interviews or surveys from UN agencies and inclusion-focused NGOs. In many instances, persons with disabilities are mentioned as part of a list of particularly vulnerable people, without defining the parameters of their vulnerability. Moreover, the 2022 South Sudan Humanitarian Needs Overview applies the global estimate of 15% to all sectors of the response because clusters do not systematically collect data on disability. The health cluster, for example, has a data-monitoring tool for disability inclusion, but does not apply the tool consistently in its assessments. Hence, data on disability is patchy, and the needs, risks and vulnerabilities of persons with disabilities, particularly those with intellectual and psychosocial impairments, are not well understood.

Adding and contributing to the incomplete data is the fact that people in South Sudan widely believe that disability is a punishment from God or a curse.⁶⁹ The society regards disability as a problem of the individual, and many people believe that persons with disabilities are a burden on their families and are incapable of making a meaningful contribution to society.⁷⁰ Consequently, persons with disabilities often remain invisible. In this light, it is hardly surprising that consultations and community discussions are still regularly organized in locations that are hard to reach for persons with disabilities. Moreover, the meeting invitations are often not available in multiple formats and there is no reasonable accommodation, such as sign language interpretation, to facilitate interaction between persons with disabilities and humanitarian staff.

Furthermore, OPDs with strong financial and human resources are hardly present outside the capital Juba, effectively limiting their ability to communicate the needs, risks and vulnerabilities of persons with various types of impairments to

67 Interview with HI staff member, August 2021 (on file with author).

68 *Ibid.*

69 HI, *Torit East Primary School*, above note 44, p. 6.

70 SSAVI, above note 32, p. 1.

humanitarian actors and other relevant stakeholders in the response.⁷¹ Their participation in cluster meetings is also negligible. Unstable internet access and the absence of reasonable accommodation hampers communication, and OPDs are still not familiar enough with the humanitarian system; this latter issue limits their ability to acquire funding, implement projects and operate independently from their humanitarian partners.⁷²

Of course, and as mentioned, mainstream humanitarian actors are working on closing data gaps, reducing misconceptions, and enhancing the participation of persons with disabilities in their programme activities and cluster meetings, although a quantification of how many do so is not possible. Yet, at present, the information base on the needs, risks and concomitant vulnerabilities of persons with different types of impairments is small, prejudices and misperceptions are common, and participation rarely extends to the project design and evaluation phase. Hence, a mixed picture emerges when assessing the way humanitarians are “doing inclusion”.

Generally, humanitarians found the context too challenging to make the response truly disability-inclusive. In particular, lack of access and the concomitant inability to physically reach persons with disabilities was widely cited as one of the major impediments for inclusion. As one respondent explained:

Many humanitarian organizations put their tents on their back and walk into the woods. That is how you do a lot of humanitarian work. There is a physical barrier of getting to places. Oftentimes, you might not be able to access people who have disabilities on a face-to-face basis.⁷³

In such a context, humanitarian staff simply did not know how to reach persons with disabilities and collect robust data, empower them, remove barriers and enhance participation in project design, implementation and monitoring.

Where physical access was possible, humanitarians felt they lacked the skills and confidence to target persons with disabilities, including those with intellectual or hearing disabilities.⁷⁴ The number of sign language interpreters in South Sudan is considered too small, and the many different local languages spoken across the country represented additional communication barriers – one respondent admitted that, so far, “no one has a good strategy for really dealing with that”.⁷⁵ Moreover, tight submission deadlines for project proposals and issues with commuting and long-distance travel were seen as severe obstacles to “robust consultations” with persons with disabilities:

Well, the donor guidelines are there, but you have to see the context. For example, when you are given two weeks to work on a project proposal, some of the locations where you are intervening are far away from Juba. The flight

71 Interview with a representative of a mainstream NGO, June 2021; interview with a representative of HI, August 2021; interview with a representative of Christian Blind Mission, July 2021 (all on file with author).

72 Interviews with a representative of an international mainstream NGO and cluster co-lead, June 2021; interview with a representative of an OPD, August 2021 (both on file with author).

73 Interview with a representative of a UN agency, June 2021 (on file with author).

74 *Ibid.*

75 *Ibid.*

is only once a week, and you cannot spend the entire week in the field. So you end up writing from here [Juba] and just impose the project on them, or you try to convince them to accept that this is the package. Effectively, yes, the donor requests from you to consult with the beneficiaries. Again, this consultation cannot be robust, because there are other limitations – you know, you cannot travel to this place, or you cannot spend much time discussing with them.⁷⁶

Humanitarians therefore demand more guidance and support from the Humanitarian Country Team and/or the government. Requests to the government include signing and ratifying the CRPD, improving infrastructure, removing attitudinal and institutional barriers in public institutions, and designing a new national census that uses the WGQ-SS. Some humanitarians are also looking for a “strategy” or “consolidated approach” from the Humanitarian Country Team to support the systematic collection of data and the engagement of persons with disabilities in the response.⁷⁷

These demands are comprehensive, and the urgency of signing and ratify the CRPD is undisputed among inclusion experts and humanitarians. However, these steps alone will not create a more favourable environment for persons with disabilities. First, and as mentioned, the State lacks the monopoly of force in remote regions of the country and the government struggles with the implementation of laws and policies. Second, a national census, while helpful for identifying persons with disabilities and recognizing their full diversity, needs to be planned well in advance and does not offer immediate solutions to the existing data gaps; moreover, it will not deliver crucial qualitative data on the needs, specific requirements and vulnerabilities of persons with disabilities. Third, a “strategy” of the Humanitarian Country Team will not remove humanitarians from their responsibility to make their services accessible and inclusive.

Such demands rather reveal a lack of skills and confidence to implement inclusive projects. Moreover, they convey a perception whereby humanitarian staff see the reasons for the gaps in inclusive humanitarian practice in the external environment rather than in their own operational capacity. Hence, as noted, we see a mixed picture when assessing the way humanitarians are “doing inclusion”. Humanitarians recognize the need to be disability-inclusive and are trying their best to reach all persons in need, but the conditions in their operational environment, including access constraints, deficiencies in infrastructure, and unrealistic expectations from donors, are considered insurmountable obstacles to inclusion in humanitarian practice.

Achieving inclusion in a challenging context

Without doubt, widespread violence, regular attacks against civilians and aid workers, dysfunctional State structures and catastrophic climate shocks represent

76 Interview with a representative of an international NGO, June 2021 (on file with author).

77 Interview with a representative of a UN agency, June 2021 (on file with author).

enormous obstacles to humanitarian action in general and inclusive humanitarian action in particular. However, it is important to ensure that the complex operational environment does not become a pretext for the exclusion of persons with disabilities, particularly those with intellectual and hearing impairments. In fact, no context is too challenging when humanitarians know what steps to take and have the financial, human and other resources needed to make their services accessible and inclusive.

With respect to more robust and reliable data, all cluster leads in South Sudan could establish inter-cluster data management working groups to agree on certain standards for data collection, including the use of the WGQ-SS in all community engagement surveys and other questionnaires. Regular experience sharing on their application and use in the field could generate confidence among humanitarian staff and increase knowledge on the challenges of identifying persons with disabilities. In regions that are not physically accessible, humanitarian organizations should assume that at least 15% of the population has a disability. Partially this is already happening, but organizations need to make corresponding adjustments in their budgets – otherwise they will lack the financial means for reasonable accommodation, and this will effectively limit their ability to communicate and engage with persons with disabilities. Moreover, humanitarian organizations could identify key informants in inaccessible regions and train them to collect and interpret data on disability; this would enable these organizations to better deal with tight donor deadlines and travel restrictions.

Clearly, reliable and robust data are necessary to enhance the visibility of persons with disabilities in South Sudanese society. This will help humanitarians to organize consultations and community discussions in locations that are accessible for persons with disabilities. Ideally, these discussions will accommodate the needs of persons with all kinds of impairments and linguistic backgrounds, and not just those with a walking disability. To quote another respondent: “When we say ‘disability’, we often just assume that this is a person who can’t walk. I think that this is the approach we often take in our work.”⁷⁸

Sometimes, multiple layers of interpretation may be required in areas where different local languages are spoken. Although the small number of sign language interpreters in South Sudan can be a challenge, in practice, caregivers, teachers and social workers frequently act as interpreters. Project proposals and budgets should reflect these additional costs for consultation meetings, including when caregivers, teachers and social workers act as interpreters or translators. The same is true for cluster meetings, accountability mechanisms and material for information sharing and knowledge exchange, which may also require modifications and adjustments for persons with hearing, visual and other types of impairments.

Reasonable accommodation will be indispensable for meaningful participation and reducing attitudinal, environmental and institutional barriers. This means making necessary modifications and adjustments to avoid

78 Interview with a representative of a UN agency, online, July 2021 (on file with author).

discrimination and end exclusion. For example, organizations should provide interpreters, readers and other personal assistance in meetings and training sessions, ensure that distribution and service points, training sites and compounds are accessible for persons with visible and other types of physical impairments, and design documents, training material and evaluation tools in alternate formats such as Braille, large print or audio tape. Regular consultations and participation in programme design and implementation will also empower persons with disabilities to act as agents of change and stand up for their rights. Simultaneously, humanitarian organizations should encourage the establishment of OPDs and self-help groups and support their professionalization, particularly outside the capital of Juba. However, these adjustments carry additional costs and require sufficient funding. Particularly in a multilingual context such as South Sudan, it is crucial that donors allocate dedicated funding to sign language and local language interpretation in addition to other types of reasonable accommodation, such as subtitles in online cluster meetings. Moreover, precise indicators and funding allocation criteria by donors can create strong incentives for humanitarians to be more systematic in including those with “hidden” disabilities, such as persons with intellectual or psychosocial impairments. This could also enhance the transparency of expenditures on inclusive humanitarian action. At present, many donors do not work with precise indicators and funding allocation criteria, although, and as mentioned, many require data on disability.⁷⁹

Importantly, donors should be aware that humanitarian staff need to have the knowledge and skills to implement inclusive humanitarian projects. Thus, they should provide for long-term and reliable funding for capacity-building as a stand-alone activity, which is one of the four “must-do” actions of the IASC Guidelines. In fact, many inclusion-focused NGOs would like to invest more time into the capacity-building of their mainstream partners, but they often lack funding for these activities because donors see them as part of development rather than humanitarian action.⁸⁰ This is especially detrimental for mainstream NGOs, which, unlike UN agencies, often lack the financial and technical support from their own headquarters to train national and local staff on inclusive humanitarian action.

Finally, humanitarian organizations could establish a disability inclusion coordination mechanism to strengthen their performance and accountability vis-à-vis persons with disabilities. Such a mechanism could articulate strategic priorities and key deliverables and provide technical and advisory functions to the UN Office for the Coordination of Humanitarian Affairs (OCHA) team, cluster leads, working groups, focal points, and the humanitarian needs assessment programme. This will allow humanitarian organizations to pool resources, maintain continuity when staff changes, and monitor impact, and will provide them with a forum for sharing information.

79 E-mail exchange with a representative of HI (on file with author).

80 Interview with a representative of an inclusion-focused NGO, August 2021 (on file with author).

Summing up, the inclusion of persons with disabilities in humanitarian action does not depend on a “grand strategy” of the Humanitarian Country Team. Inclusion can succeed in complex operational environments as long as humanitarians possess the skills, knowledge and funding to apply the four “must-do” actions of the IASC Guidelines. Better coordination through regular knowledge exchange and experience sharing among mainstream organizations, inclusion-focused NGOs and OPDs, the provision of reasonable accommodation in consultation and cluster meetings, accessible accountability mechanisms and, not least, a serious investment into capacity-building at all levels of the response will establish the necessary conditions to make humanitarian action inclusive and accessible for all.

Conclusion

The publication of the Humanitarian Disability Charter and the concomitant publication of the IASC Guidelines have encouraged humanitarian actors to become more disability-inclusive. Many of them have distinct policies and internal guidelines that promote the inclusion of persons with disabilities in humanitarian practice. In South Sudan, humanitarian organizations have taken concrete steps to collect data on disability, invest in capacity-building and empowerment, remove barriers and enhance participation of person with disabilities. These measures have delivered concrete results. Persons with disabilities are now included in the Humanitarian Needs Overviews, the Food Security and Nutrition Monitoring Survey and the Multi-Sector Needs Assessment. UN agencies and NGOs have dedicated focal points that monitor progress on inclusion, set up and work with community groups to consult with persons with disabilities, establish services and distribution points in areas that are accessible for persons with physical impairments, and reach out to inclusion-focused organizations for guidance, training and other support.

Nevertheless, humanitarians struggle with access constraints, tight deadlines and communication barriers, and most importantly, the inability and incapacity to implement inclusive humanitarian action in such a challenging context. Hence, many gaps in the inclusion of persons with disabilities in South Sudan remain. Undoubtedly, the interviews with humanitarian staff carried out for this article reveal that awareness of the needs of, and protection gaps for, persons with disabilities is high, and many humanitarians are familiar with the IASC Guidelines, Humanitarian Disability Charter and internal organizational policies on inclusive humanitarian action. However, they lack the skills and knowledge to apply these tools in what they perceive as an extremely complex operational environment.

More investment into capacity-building and coordination at all levels of the humanitarian response is therefore called for. Through inclusion experts with and without disabilities, organizations can acquire the necessary skills and knowledge on how to overcome operational challenges in the field – for example, on how to

collect data on disability in hard-to-reach areas or reduce communication barriers. Donors play a key role and need to provide dedicated funding for reasonable accommodation, training, coaching and coordination. Over time, this will give humanitarians the skills and confidence to implement inclusive programmes and promote the human rights of persons with disabilities across the whole country. Humanitarian organizations should therefore indicate these additional costs in their project proposals.

Yet, in order to reduce gross human rights violations in South Sudan and enable persons with disabilities to live their lives in safety and dignity, the national government needs to take immediate steps to implement the peace accords and ratify crucial human rights instruments, including the CRPD. The more progress is made with the peace process, the easier humanitarian action and inclusion will become.

Exclusive humanitarianism: Policy recommendations for genuine inclusion of persons with disabilities in humanitarian action

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Abstract

The challenge faced by Somalia's newly established National Disability Agency (NDA), along with other emerging actors in the disability arena, is how to address the perception that disability is primarily a humanitarian issue in a country that not only is in conflict but also faces cyclical humanitarian crises. A further challenge for the NDA is how to ensure that the humanitarian architecture put in place facilitates non-discrimination, as well as the inclusion of and participation by persons with disabilities. While a typical humanitarian architecture can inadvertently reinforce an already stigmatizing charity or welfare approach towards persons with

* The views expressed in this article are the author's personal views and do not necessarily reflect those of the United Nations.

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disabilities, Somalia's experience demonstrates that humanitarian actors can do a lot with leadership, a willingness to leave agency branding behind, and an active committed partner such as the NDA. Nevertheless, genuine inclusion in Somalia's overall State-building project needs also to be the remit of development, reconciliation and similar actors, with access to and participation of persons with disabilities guaranteed in their range of processes and frameworks.

Keywords: Somalia, disability, UN Convention on the Rights of Persons with Disabilities, armed conflict, humanitarian action, Washington Group Questions.

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Introduction

Many countries in conflict face routine humanitarian crises. The use of a humanitarian-dominated approach in a conflict setting necessarily affects State priorities as well as how the State relates to its citizens through service provision, development opportunities, political space and so forth. In addition, the humanitarian paradigm impacts how, and which, international actors engage with the given State.

Given the historical medical and charity approaches to disability,¹ this context can, and does, influence how disability issues are handled in humanitarian operations that have an armed conflict dimension. This paper seeks to explore the extent to which a humanitarian-focused framework facilitates or inhibits inclusion of and participation by persons with disabilities. It asks whether the existence of armed conflict exacerbates this dynamic, acknowledging that armed conflict is fluid, frequently changing in intensity, tempo and geographical coverage. This latter point also means that State-building, development and reconciliation initiatives inevitably take place against this backdrop. As such, a third consideration that will be explored is how much the absence of a defined aftermath to a conflict affects the inclusion of disability voices in the reconciliation, development and State-building agendas.

1 Office of the UN High Commissioner for Human Rights (UN Human Rights), *Convention on the Rights of Persons with Disabilities Advocacy Toolkit*, Professional Training Series No. 15, HR/P/PT/15, 2008, available at: www.ohchr.org/sites/default/files/Documents/Publications/AdvocacyTool_en.pdf (all internet references were accessed in July 2022) (describing the UN Convention on the Rights of Persons with Disabilities as a “paradigm shift in the treatment of persons with disabilities from a medical or charity perspective to a rights-based approach”). The World Humanitarian Summit’s Agenda for Humanity also focused on this, albeit more broadly for the humanitarian sphere. One author has written that the Agenda “requires us to place equality and solidarity at the heart of our decision making processes, and remove the notion of ‘charity’”. Putting communities in the driving seat brings back their dignity in the midst of crisis. It also opens space for meaningful dialogue between humanitarians and vulnerable people on addressing needs; improves accountability; and crucially, shifts the power dynamic that is perpetuated by perceptions of international humanitarianism being the ‘rescuers’ of vulnerable communities.” Paul Murphy, “Humanitarian Reform Must Be a Collective Endeavour”, *Safer World Blog*, 19 August 2018, available at: www.saferworld.org.uk/resources/news-and-analysis/post/786-humanitarian-reform-must-be-a-collective-endeavour.

The experience of Somalia will be used to illustrate these points. Somalia has lurched from one humanitarian crisis to another and continues to deal with conflict and terrorism. Despite this, Somalia has made efforts to reinforce its human rights framework within the broader State-building process, including with the ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in 2019. Showing its commitment to the issue, the Somali government quickly passed legislation to establish a National Disability Agency, which has a broad promotional and representational mandate, as well as data collection and management and resource mobilization. The challenge that the NDA and other emerging actors in the disability arena will face is how to navigate the long-standing humanitarian framework, a civil war legacy and ongoing conflict and terrorism.

The Somali context

Somalia gained independence in 1960, forming a unitary system of government. In 1969, the Somali Republic's second president, Abdirashid Ali Sharmake, was assassinated, and Siad Barre, a military officer, took power on 21 October in what is referred to as a bloodless revolution.² Siad Barre suspended the Constitution and initially governed through the twenty-five-member Supreme Revolutionary Council, renaming the country the Somali Democratic Republic. His governance became increasingly repressive and brutal,³ leading to a loose alliance of opposition groups overthrowing him. This alliance did not survive, however, resulting in a civil war breaking out in the early 1990s. The subsequent two decades were marked by warlordism, clan conflict, governance by the Islamic Courts Union, and the emergence of Al-Shabaab. A Transitional Federal Government was formed in 2004 in Kenya, paving the way for the establishment of the Federal Government of Somalia in 2012. Prior to the government's return to Somalia, famine was declared in 2011, leading to significant displacement and a reported 260,000 deaths. Since 2012, key governmental priorities have included the implementation of federalism, a process that is still under way. While five federal member States have been created, certain boundaries remain undelimited.⁴ In addition, the Constitution, which would provide the contours of power-sharing and resolve some outstanding federalism questions, remains provisional and under review. At the time of writing, Somalis are facing a drought and possibly an impending famine, having only just emerged from a 2017 drought, floods in 2019, locust invasions in 2019 and 2020, and of course the COVID-19 pandemic.

The extended periods of conflict and political instability have resulted in Somalia continuing to rely heavily on humanitarian assistance to respond to the conflicts, the effects of warfare, cyclical droughts, floods, and climate change-induced degradation, which is increasingly affecting livelihoods, further exacerbating displacement.

2 Helen Chapin Metz (ed.), *Somalia: A Country Study*, Library of Congress, Field Research Division, 1993.

3 Africa Watch, *Somalia: A Government at War with Its Own People*, London, January 1990.

4 The region of Somaliland self-declared independence on 18 May 1991 following the collapse of President Siad Barre's regime. This self-declaration is not internationally recognized.

Historical approach to disability

Historically, the Somali Ministry of Labour and Social Affairs (MoLSA) led disability-related initiatives. With the destruction of government archives,⁵ however, information on how disability was addressed is limited. Nevertheless, in discussions with Somalis, it is evident that disability was understood as a social welfare issue in line with then president Siad Barre's scientific socialism as well as the global approach to disability in the 1980s. For example, graduates from a Mogadishu-based vocational school for men with disabilities were employed in government institutions. During this time, the Somali Disability Cooperative was established to advocate for the inclusion of people with disabilities, with government support.⁶

While the number of people injured and killed in conflict-related incidents is known, the psychological impact of over 30 years of war in Somalia has not been measured.⁷ As is typical in war zones, disabled former combatants in Somalia often actively contribute to advocacy, albeit more with a focus on acquired disabilities (and challenges around gender in a patriarchal society). For example, in Mogadishu during the 1980s, the government implemented a housing project for former military personnel who had become disabled while serving. Shops and offices for rent and a popular cinema were part of this project to generate income for these military personnel.⁸

Legal and policy frameworks

With the establishment of a Federal Government in Mogadishu in 2012, a Provisional Constitution of the Federal Republic of Somalia was drafted. It explicitly guarantees Somali citizens with disabilities equal rights before the law,⁹ and creates a positive obligation in terms of economic and social rights – it ensures that persons with disabilities “who have suffered discrimination get the necessary support to realise their socio-economic rights”.¹⁰ A National Council on Disability was formed in

5 Mohamed Trunji, *Somalia: The Untold History 1941–1969*, Looch Press, Leicester, 2015, p. xxvi, notes that “[r]egrettably, it has not been possible to consult the many important documents kept in government offices in Somalia before the civil war, which, whether intentionally or unintentionally, were destroyed by the gangs who occupied Mogadisho and other major urban centres at the beginning of 1991.”

6 See the Somali Disability Cooperative Facebook page, available at: www.facebook.com/isikaashaadanaafada/. The chairperson, Warsame Abdhullahi (known by the nickname “Indhole”, meaning “blind”), was able to influence the then president, Siad Barre, and has been credited by some with the achievements in disability inclusion that took place during that time.

7 Human Rights Watch, *Human Rights Watch World Report 1993 – Somalia*, 1 January 1993, available at: www.refworld.org/docid/467fca601e.html (stating that “[b]etween November 1991 and February 1992, Africa Watch and Physicians for Human Rights documented 14,000 people were killed and 27,000 injured in Mogadishu. An unknown number were permanently disabled. Tens of thousands more were psychologically scarred and will suffer from post-traumatic stress disorder and varieties of pathological grief, not only because of the horrors they have suffered, but also because of the failure to observe traditional rituals to respect the dead”).

8 Interview with key informant, 6 April 2022.

9 Provisional Constitution of the Federal Republic of Somalia, 2012, Art. 11(1): “All citizens, regardless of sex, religion, social or economic status, political opinion, clan, *disability*, occupation, birth or dialect shall have equal rights and duties before the law” (emphasis added).

10 *Ibid.*, Art. 27(5).

2012 with the role of mainstreaming disability into government policy. The Council, an umbrella platform of representatives from various disability groups, was linked to MoLSA.¹¹ Also, in 2012 Somalia became the 160th party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, or Ottawa Convention.¹²

The Ministry of Women and Human Rights Development (MoWHRD) was established under the 2012 government and became operational in 2013. The MoWHRD's broad mandate includes promotion and protection of the rights of persons with disabilities, which were factored into the first Human Rights Road Map adopted in 2013. In 2015, Somalia became party to the UN Convention on the Rights of the Child, providing a basis for advocacy on children with disabilities. In 2017, the then minister for women and human rights development prioritized disability with the launch of the National Disability Road Map, entitled "Inclusion of Persons with Disabilities and Disability Rights in Governance and Development Processes (2017–2019)".¹³ Following the Ministry's consultations with Somali organizations of persons with disabilities (OPDs),¹⁴ three priorities were set: first, adoption of a comprehensive law on disability; second, establishment of a National Disability Agency (NDA); and third, ratification of the UNCRPD.¹⁵ By 30 December 2018, the federal president of Somalia had signed the bill on the NDA into law and in August 2019, Somalia became the 178th party to the UNCRPD. The ratification of the UNCRPD, the UN Convention on the Rights of the Child and the Ottawa Convention complement Somalia's treaty obligations dating from prior to the civil war, which include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture, and the Convention on the Elimination of All Forms of Racial Discrimination. A draft Disability Rights Bill is with the Cabinet, and it is hoped that it will be a priority for Somalia's 11th Parliament.

The situation of persons with disabilities

The number of persons with disabilities in Somalia is unclear,¹⁶ with the World Health Organization/World Bank global estimate of 15%¹⁷ being used as the basis

11 Swedish International Development Agency (SIDA), *Disability Rights in Somalia*, 2014, p. 2, available at: <https://cdn.sida.se/app/uploads/2021/05/07125817/rights-of-persons-with-disabilities-somalia.pdf> (noting that no budget had been provided).

12 See the Ottawa Convention website's page for Somalia, available at: <https://new.apminebanconvention.org/en/membership/somalia/>.

13 The MoWHRD has developed a subsequent Road Map for 2020–23.

14 MoWHRD, *Rapid Assessment of the Status of Children with Disabilities in Somalia*, 2020, available at: https://mwhrd.gov.so/en/wp-content/uploads/2020/09/Rapid-Assessment-Children-with-Disabilities-in-Somalia_Report_FA_Digital-1-1.pdf. The minister acknowledged that the extensive progress made would not have been possible without the determination and advocacy of Somalis with disabilities and their representative organizations.

15 Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UNGA Res. 61/106, 13 December 2006 (entered into force 3 May 2008).

16 SIDA, above note 11 (noting that "[t]here are no reliable statistics of prevalence of disabilities in the Somali population").

17 World Bank, "Disability Inclusion", available at: www.worldbank.org/en/topic/disability.

for Somalia's Humanitarian Needs Overview as well as other strategies and plans that require figures on disability.¹⁸ It has nevertheless been acknowledged that the percentage is likely to be higher due to the legacy of war, which includes the collapse of the health system.¹⁹

While the normative building blocks for disability rights have been put rapidly in place, implementation has not been at a commensurate pace. As the *Somalia 2021 Human Rights Report* by the US Department of State notes:

The law provides equal rights before the law for persons with disabilities and prohibits the state from discriminating against them. Authorities did not enforce these provisions, and disability rights organizations reported a widespread lack of equal access to education, health services, public buildings, and transportation.²⁰

Similarly, Amnesty International has concluded in a report on Somalia that “the rights of most people with disabilities continue to be excluded, and their particular needs and concerns forgotten”.²¹

At the societal level, a 2019 Disability Assessment conducted by UN Human Rights in Somalia found that persons with disabilities are subjected to a range of stereotypes, including regarding a person with a specific impairment as disabled in his or her entirety.²² That being said, disability tends to be associated with physical impairments. This necessarily impacts inclusion of all persons with disabilities, particularly invisible disabilities.²³ Somalis with psycho-social or intellectual disabilities face the challenge of a specific set of cultural beliefs and stereotypes. For example, some Somalis believe that mental disabilities come from evil spirits or the evil eye²⁴ and that Somalis with such disabilities are not part of society.²⁵

There are a range of reasons why progress in implementing legal and policy frameworks has not been made. The 10th Parliament's term expired in December 2020, and a drawn-out electoral process prevented the new Parliament from being established until June 2022. This has affected investment in development,

18 UN Office for the Coordination of Humanitarian Affairs (OCHA), *Humanitarian Needs Overview Somalia: Humanitarian Programme Cycle 2022*, October 2021, available at: <https://tinyurl.com/2y8777kh>.

19 SIDA, above note 11.

20 US Department of State, Bureau of Democracy, Human Rights and Labour, *Somalia 2021 Human Rights Report*, 12 April 2022, p. 43, available at: www.state.gov/wp-content/uploads/2022/02/313615_SOMALIA-2021-HUMAN-RIGHTS-REPORT.pdf.

21 Amnesty International, *Somalia: Prioritise Protection for People with Disabilities*, 12 March 2015, p. 18, available at: www.amnesty.org/en/wp-content/uploads/2021/05/AFR5211662015ENGLISH.pdf.

22 UNSOM Human Rights and Protection Group (HRPG) and UN Human Rights, *Situation Analysis of Persons with Disabilities in Somalia*, 2019. On file with author.

23 Brigitte Rohwerder, *Disability in Somalia*, K4D Helpdesk Report, Institute of Development Studies, Brighton, 19 January 2018, p. 2, available at: <https://tinyurl.com/y2ekbcbp>.

24 Human Rights Watch, “*Chained Like Prisoners*”: *Abuses against People with Psychosocial Disabilities in Somaliland*, 2015, p. 24, available at: www.hrw.org/report/2015/10/25/chained-prisoners/abuses-against-people-psychosocial-disabilities-somaliland.

25 Aragsan Samatar, *Somali Parents and Their Perceptions of the Autism Spectrum Disorder Diagnosis*, St Catherine University Repository, Sophia, 2016, available at: https://sophia.stkate.edu/cgi/viewcontent.cgi?article=1668&context=msw_papers.

and advocacy attention has turned elsewhere. An added factor is another unfolding humanitarian crisis, in the form of an extreme drought, which requires prioritization.²⁶

Humanitarianism in a protracted crisis setting

The humanitarian apparatus: Promoting inclusion, minimizing exclusion

The main objective of humanitarian assistance is to address acute rather than chronic needs, often framed as saving lives at immediate risk.²⁷ However, this has changed globally, with terms such as “protracted” and “cyclical” being commonly ascribed to a range of humanitarian operations.²⁸ There has been a corresponding “rapid expansion of an organised humanitarian system” consisting of mechanisms, normative frameworks, policies and procedures coordinated through “diverse institutions that comprise what in some ways has become the world’s humanitarian welfare system”.²⁹ Somalia is an example of this. The historical presence and role of humanitarian assistance, which government services have not yet replaced, means that humanitarian actors are engaged in the delivery of basic services such as health care, nutrition and education, food and water, and social protection.³⁰

- 26 At the timing of writing, Somalia had “confirmed pockets of catastrophic food insecurity”. This means that the affected population have extreme critical levels of acute malnutrition and mortality, a situation identified by the Integrated Food Security Phase Classification (see below note 60) as a Famine (Phase 5). See OCHA, *Somalia: Drought Response and Famine Prevention*, Situation Report No. 8, 30 June 2022, available at: <https://reliefweb.int/report/somalia/somalia-drought-response-and-famine-prevention-situation-report-no-8-30-june-2022>.
- 27 International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies, “Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief”, available at: www.icrc.org/en/doc/assets/files/publications/icrc-002-1067.pdf.
- 28 Sarah Dalrymple and Amanda Thomas, *Supporting Longer Term Development in Crises at the Nexus: Lessons from Somalia*, February 2021, p. 50, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Supporting_longer_term_development_in_crises_at_the_nexus_Lessons_from_Somalia.pdf (stating that “[i]nterviewees unanimously argue that a crisis is not a crisis if it happens every year”); Marc DuBois, *The New Humanitarian Basics*, Humanitarian Policy Group Working Paper, May 2018, p. 8, available at: <https://cdn.odi.org/media/documents/12201.pdf> (stating that the term “protracted crisis” is an oxymoron); Alfonso Medinilla, Lidet Tadesse Shiferaw and Pauline Veron, *Think Local: Governance, Humanitarian Aid, Development and Peacebuilding in Somalia*, Discussion Paper No. 246, March 2019, p. 9, available at: <https://ecdpm.org/wp-content/uploads/DP246-march-2019-think-local-Governance-humanitarian-aid-development-peacebuilding-Somalia-ECDPM1.pdf> (stating that “Somalia is a good example of a country in which a state of crisis has become the norm”).
- 29 Norah Niland, Riccardo Polastro, Antonio Donini and Amra Lee, *Independent Whole of System Review of Protection in the Context of Humanitarian Action*, Norwegian Refugee Council, May 2015, p. 16, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/final_whole_of_system_report.pdf.
- 30 Christina Bennett and Matthew Foley, *Time to Let Go: Remaking Humanitarian Action for the Modern Era*, Humanitarian Policy Group, Overseas Development Institute, March 2016, p. 35, available at: <https://cdn.odi.org/media/documents/10422.pdf> (stating that “in protracted crises, humanitarian activities – and aspirations – have, by default, expanded into recovery and basic service provision, including long-term health, nutrition and education, food assistance, livelihoods support and social protection measures”).

For Somalia, this has meant that “humanitarian aid has become an essential part of the service delivery model” over the long term.³¹ As such, much service delivery is dependent on annualized funding; it is needs-based rather than rights-based. This paradigm should also be considered in the context of how humanitarian assistance has historically operated in Somalia. While the intent is “to alleviate immediate suffering, [humanitarian assistance] has also unwittingly reinforced abusive structures by failing to take into account the political economy of marginalization”.³² This was acknowledged in Somalia’s 2022 Humanitarian Response Plan, which noted that “[p]eople with disabilities in Somalia face additional barriers and risks, and are often excluded from humanitarian assistance either due to exploitation, pre-existing discrimination, and stigma or due to a lack of adequate consideration”.³³

These dynamics inevitably impact disability inclusion: the needs-based approach reinforces the welfare paradigm, which is already a significant challenge that persons with disabilities face, as well as structural marginalization. Within the UN-donor humanitarian frameworks, there are nevertheless a range of mechanisms and coordination fora in place that could both support inclusion and minimize exclusion and discrimination. Somalia’s Humanitarian Country Team (HCT) is headed by the UN humanitarian coordinator, with the UN Office for the Coordination of Humanitarian Affairs (OCHA) serving as the Secretariat. Through their coordination function, the role of HCTs is to provide strategic guidance and oversight of humanitarian action in a given country.³⁴ The Somalia HCT comprises UN agencies, donors, the Somali NGO Consortium³⁵ and a limited number of non-governmental organizations (NGOs), the latter being elected on a rotational basis.

HCTs are supported by the Inter-Cluster Coordination Group (ICCG). The ICCG provides coherence and plays a coordination role across the relevant sectoral areas, referred to as “clusters”, such as shelter, water and sanitation, protection, food security and nutrition.³⁶ Disability cuts across all of these clusters, with the level of priority given to the needs of persons with disabilities being particularly influenced by how and what information and evidence are gathered and analyzed.

Claiming participation through membership

OPDs could potentially be represented on the Somalia HCT, either through the Somali NGO Consortium or as one of the rotating NGOs. With respect to the

31 A. Medinilla, L. Tadesse Shiferaw and P. Veron, above note 28, p. 9.

32 UN Accountability Project – Somalia, “Neither Inevitable nor Accidental: The Impact of Marginalisation in Somalia”, in Michael Keating and Matt Waldman (eds), *War and Peace in Somalia: National Grievances, Local Conflict and Al-Shabaab*, Hurst, London, 2018, p. 41.

33 OCHA, *Humanitarian Response Plan Somalia: Humanitarian Programme Cycle 2022*, December 2021, p. 24, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/2022_Somalia_HRP.pdf.

34 Humanitarian Library, “Guidance for Humanitarian Country Teams”, available at: www.humanitarianlibrary.org/resource/guidance-humanitarian-country-teams-0.

35 See the Somali NGO Consortium website, available at: www.somaliangoconsortium.org/.

36 OCHA Services, Humanitarian Response, “Inter-Cluster Coordination Group (ICCG) Terms of Reference”, available at: www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/iccg_tor_23mar2016.pdf.

latter, the Somalia HCT's membership structure is defined by terms of reference which, for NGOs, require an established operational presence and programming as well as demonstrated commitment to participation in humanitarian coordination. These terms of reference are challenging for OPDs, which tend to be staffed by volunteers and do not have financial and organizational stability, sophisticated systems for proposal writing, reporting and accountability, or broad-ranging delivery mechanisms. In addition, because persons with disabilities have historically been viewed as beneficiaries of charity, there is an added power dynamic when trying to integrate themselves into mainstream NGO networks. For example, it is telling that a powerfully written March 2022 open letter from fifty NGO actors appealing to donors to fund the drought emergency response does not include OPDs, although some of the included organizations may work on disability.³⁷ To help remedy this, the Somalia HCT's terms of reference could be amended to ensure that the voices of OPDs are enabled, either through the Somalia NGO Consortium or as a standing agenda item on a monthly or similar basis. This approach would be in line with the HCT's strategic nature and also with the Grand Bargain commitment to localization.³⁸ Localization was considered a priority at the World Humanitarian Summit and refers to the call for humanitarian actors to be more inclusive of local actors in all phases of humanitarian action. The localization agenda also commits the humanitarian system to diversity and has explicitly acknowledged that "persons with disabilities and OPDs have tended to be sidelined within humanitarian coordination and decision-making platforms, reinforcing underlying inequalities that obstruct access to humanitarian services".³⁹

Donor representation on the HCT also provides an opportunity to advocate for better disability inclusion in its priority setting and funding criteria.⁴⁰ Inspiration could be drawn from the UN–Foreign, Commonwealth and Development Office (FCDO) performance review of the humanitarian system, a commitment from the

37 "Joint Statement to the Donor Community: NGOs Call upon Donors to Urgently Fund Somalia Drought Crisis", 1 February 2022, available at: <https://reliefweb.int/report/somalia/joint-statement-donor-community-ngos-call-upon-donors-urgently-fund-somalia-drought>.

38 The Grand Bargain is an agreement between certain large donors and humanitarian organizations with the aim of improving the effectiveness and efficiency of humanitarian action. See Inter-Agency Standing Committee (IASC), Grand Bargain Workstream 2, commitment 3, available at: <https://interagencystandingcommittee.org/grand-bargain> (committing to "[s]upport and complement national coordination mechanisms where they exist and include national responders in international coordination mechanisms as appropriate and in keeping with humanitarian principles"). See also IASC, "Statement by Principals of the Inter-Agency Standing Committee (IASC) on Accountability to Affected People in Humanitarian Action", 14 April 2022, available at: <https://interagencystandingcommittee.org/accountability-and-inclusion/statement-principals-inter-agency-standing-committee-iasc-accountability-affected-people> (reaffirming commitment to diverse, locally led coordination platforms and local leadership).

39 IASC, *IASC Guidance on Strengthening Participation, Representation and Leadership of Local and National Actors in IASC Humanitarian Coordination Mechanisms*, July 2021, available at: <https://interagencystandingcommittee.org/operational-response/iasc-guidance-strengthening-participation-representation-and-leadership-local-and-national-actors>.

40 Article 32 of the UNCRPD, above note 15, reflects a comprehensive approach to international cooperation, including financial cooperation, cooperation in research and access to scientific and technical knowledge, capacity-building and training programmes, exchange of information and access to assistive technologies, etc.

Grand Bargain. Core funding support to seven UN humanitarian agencies was assessed on a set of requirements to improve effectiveness, coherence and collaboration in individual and collective humanitarian performance, referred to as “payment by results for agency budgets”. This incentive-driven approach means that Humanitarian Needs Overviews and Humanitarian Response Plans have to demonstrate that a certain “percentage” of the Response Plan is disability-inclusive; in 2020 this percentage was 70%, and in 2021 it was 75%. This process was accompanied by annual lessons-learned exercises for specific countries, including Somalia.⁴¹ The exercise encouraged dialogue, helped raise awareness and provided practical examples of how disability can be included in the humanitarian architecture.⁴² The criteria used could be extrapolated and adapted to country contexts such as Somalia. This would also support the implementation of Article 32 of the UNCRPD, under which States Parties have to mainstream disability inclusion in their international cooperation, including development assistance. While Article 32 could be narrowly construed as applying only to development contexts, this would be inconsistent with the UNCRPD’s objective of promotion, protection and ensuring the full and equal enjoyment of rights by all persons with disabilities.⁴³ In addition, the protracted nature of many humanitarian crises means that development elements are intrinsic to the responses to those crises – for example, water management. In this regard, various aspects of disability inclusion, whether in an emergency setting or not, require development interventions, such as assistive technologies, which are rarely factored into a humanitarian response. Given this, the Article 32 commitment should also be factored into States Parties’ humanitarian portfolios and should be read in conjunction with Article 11⁴⁴ and Article 31, addressing data and statistics. In addition, the Organisation for Economic Cooperation and Development (OECD) Development Assistance Committee’s “policy marker on the inclusion and empowerment of persons with disabilities” is a useful reference, providing guidance to relevant countries.⁴⁵

Making the invisible visible – prioritization

It is well documented that the lack of high-quality and comprehensive data available regarding persons with disabilities inhibits effective planning, budgeting and

41 Six focus areas were examined in the selected countries: use of technical guidance, participation, data, country team dynamics, leadership, and monitoring.

42 UNGA Res. 48/96, *UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, UN Doc. A/RES/48/96, 14 March 1996, Rule 1, available at: www.un.org/development/desa/disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities.html (the importance of awareness-raising is reflected in the first standard rule, as persons with disabilities considered that attitudinal barriers are one of the most significant barriers to inclusion).

43 UNCRPD, above note 15, Art. 1.

44 Article 11 of the UNCRPD, above note 15, obliges States Parties to ensure the protection and safety of persons with disabilities in situations of risk, such as situations resulting from armed conflicts, humanitarian emergencies or natural disasters.

45 OECD, Development Assistance Committee, *The OECD-DAC Policy Marker on the Inclusion and Empowerment of Persons with Disabilities: Handbook for Data Reporters and Users*, 10 December 2020, available at: [https://one.oecd.org/document/DCD/DAC/STAT\(2020\)48/en/pdf](https://one.oecd.org/document/DCD/DAC/STAT(2020)48/en/pdf).

programme implementation⁴⁶ – or more simply put, “[i]f people with disabilities remain invisible in data, they remain unaccounted for”.⁴⁷ As humanitarian response is determined by needs,⁴⁸ it is essential that persons with disabilities are factored into that data collection and analysis. Efforts are under way to support this change, including through the Inter-Agency Standing Committee (IASC) *Guidelines on the Inclusion of Persons with Disabilities in Humanitarian Action* (Disability Inclusion Guidelines)⁴⁹ and monitoring.

In addition, the Accountability to Affected Populations initiative, which seeks to move from the notion of passive beneficiary of aid to someone who has agency, has a range of decision-making structures and processes that support community feedback, such as camp committees, disaster and risk coordination mechanisms, and hotlines.⁵⁰ The guiding principle is that consultation is not sufficient as it does not necessarily change an outcome; rather, a feedback loop system needs to be in place to ensure accountability. Given the power dynamics within communities, which are accordingly mirrored in community-based mechanisms, there is a need to invest in inclusion of persons with disabilities in these mechanisms, including through ensuring that they are accessible. This will support voices being better heard and ideally have a knock-on effect in addressing the relative invisibility in data collection and analysis exercises. Otherwise, crucial decisions will be made with what has been described as an ableist paradigm, meaning that persons with disabilities are excluded because there is a societal assumption that they have “less value than others” or because they are more broadly seen as beneficiaries who need care and are without agency.⁵¹

At the cluster level, disability tends to be housed under the HCT’s Protection Cluster, which historically happens to be the most underfunded.⁵²

46 Ola Abualghaib, Nora Groce, Natalie Simeu, Mark T. Carew and Daniel Mont, “Making Visible the Invisible: Why Disability-Disaggregated Data is Vital to ‘Leave No-One Behind’”, *Sustainability*, Vol. 11, No. 11, 2019, available at: <https://doi.org/10.3390/su11113091>.

47 *Ibid.*, p. 3096.

48 The calculation of “people in need” in humanitarian contexts is challenging. The overall guiding principle is need, with some exceptions based on status. As such, there is no automatic assumption that persons with disabilities have need of humanitarian assistance in a humanitarian setting. Need is accordingly subject to an assessment process generally conducted at scale. See IASC Information Management Working Group, *Humanitarian Population Figures*, April 2016, available at: www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/humanitarianprofilesupportguidance_final_may2016.pdf.

49 See Charter on Inclusion of Persons with Disabilities in Humanitarian Action, 2016, available at: <http://humanitariandisabilitycharter.org>; IASC, *Guidelines on 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>.

50 See IASC, “Statement by Principals”, above note 38.

51 Catalina Devandas-Aguilar, *Report of the Special Rapporteur of the Human Rights Council on the Rights of Persons with Disabilities*, UN Doc. A/71/314, 9 August 2016, para. 31, available at: <https://daccess-ods.un.org/tmp/895524.546504021.html>.

52 Norwegian Refugee Council and Global Protection Cluster, *Breaking the Glass Ceiling: A Smarter Approach to Protection Financing*, November 2020, p. 6, available at: www.globalprotectioncluster.org/wp-content/uploads/Breaking-the-glass-ceiling-A-smarter-approach-to-protection-financing-report-FINAL.pdf (finding that the protection sector remains significantly underfunded in consolidated appeals relative to most other clusters and recommending, *inter alia*, that a fixed percentage of organizational funding goes to protection activities).

Somalia follows this trend, and since the Somalia HCT's adoption of the Centrality of Protection Strategy in 2017,⁵³ one of the three consistent strategic objectives has been addressing exclusion.⁵⁴ The Somalia HCT has gone further with a push on mainstreaming across all clusters, supported initially by an OCHA disability inclusion adviser.⁵⁵ Given how critical data are, clusters were trained on the IASC Disability Inclusion Guidelines, data issues and overall disability inclusion principles, which resulted in strengthened Humanitarian Needs Overviews and Humanitarian Response Plans. The then disability inclusion adviser recommended a roadmap comprising key areas of intervention, many of which have been taken up.⁵⁶ For example, in 2021, using the Washington Group Questions Short Set (WGQ-SS) as a basis,⁵⁷ the *Cluster Guidelines for Gathering Data on Disability* were adopted.⁵⁸ This means that the thematic clusters now have a tool that helps them to integrate disability into data collection and reporting modalities, many of which become public. For 2022, the Somalia HCT has also volunteered to be part of a self-assessment pilot on disability inclusion in Humanitarian Needs Overviews and Humanitarian Response Plans as a way to galvanize thinking and increase understanding.

Nevertheless, application of the WGQ-SS is not without complications and experience suggests that its use is seen as not viable or too time-consuming in emergency responses. This naturally results in limited information being available about the needs of persons with disabilities, creating a risk that they will be left behind. As such, strong leadership is vital to ensure that disability inclusion is taken seriously, not only in the HCTs but also in individual UN agencies and NGO partners.

Specific considerations should be placed on how assessments are conducted, including the training of enumerators and who those enumerators are, as well as the basic operating assumption that most data are collected at the household level.⁵⁹ For example, if we take the food security sector, planning and

53 The IASC principals' Centrality of Protection Statement confers clear responsibility on humanitarian coordinators, HCTs and cluster leads to ensure that protection is central to humanitarian action. See IASC, "The Centrality of Protection in Humanitarian Action: Statement by the IASC Principals", 17 December 2013, available at: www.humanitarianresponse.info/en/topics/transformation-agenda/document/centrality-protection-humanitarian-action-statement-inter.

54 Somalia HCT, "Humanitarian Country Team Centrality of Protection Strategy 2022–2023", available at: <https://reliefweb.int/report/somalia/somalia-humanitarian-country-team-centrality-protection-strategy-2022-23>.

55 The disability adviser served from April 2020 to March 2021, via standby partner Red R Australia, funded by Australia Assists.

56 On file with author.

57 The Washington Group Questions were developed by the UN Statistical Commission in collaboration with member States. The Short Set focuses on six core domains of functioning: seeing, hearing, walking, cognition, communication, and self-care. Respondents rate their functional difficulty on a four-point scale, from "no difficulty" to "cannot do at all".

58 On file with author.

59 SIDA, above note 11, p. 1 (stating that "[p]ersons with disabilities and elderly have great difficulty in accessing humanitarian aid. Persons with disabilities remain excluded from the most essential services in emergencies and are left behind in refugee camps. There are however efforts by the international community to do something about this in the various clusters").

response is driven through large-scale needs assessments or surveys.⁶⁰ Ideally, this is accompanied by qualitative tools such as community consultations which allow greater understanding to inform targeting decisions, prioritization and response. These assessments are the primary entry point for persons with disabilities to be brought into the humanitarian orbit. As such, certain considerations need to be kept in mind. First, community consultations are influenced by power dynamics, which are often more marked in conflict settings where access to populations is challenging. Persons with disabilities generally sit outside these power structures, and Somalia is no exception. Second, engagement is often remote; for example, assessments may be conducted over the phone, which excludes certain disabilities, usually those already more marginalized within the disability community, such as deaf people and persons with intellectual disabilities. To concretely help make the invisible visible, consultative and feedback processes should be designed to be accessible, with specific need considerations in mind – for example, ensuring that OPDs are brought into the design of such processes rather than relying on the broader community to identify who may be disabled, and training enumerators, community committees⁶¹ and monitors on accessible communication techniques. Humanitarian actors should also consider crafting solutions for long-standing and deep-rooted social and cultural biases and power imbalances. This could be done by moving beyond indicators such as age and gender, to factoring in marginalization as a ground in vulnerability assessments.⁶²

The development continuum

While these efforts can ensure better visibility of persons with disabilities in protracted humanitarian and conflict settings, this does not automatically translate into their full participation in a development context. It has been acknowledged globally that there is a need to shift the balance in crisis settings towards development for there to be sustainable progress. This need is more patent in protracted settings where humanitarian actors have expanded their remit. As has been noted elsewhere, this puts a strain on humanitarian funding

60 The Integrated Food Security Phase Classification (IPC) determines the severity and magnitude of acute and chronic food insecurity, as well as acute malnutrition in a country. The aim is to arrive at a consensus-based figure of the level of food insecurity in a geographic area. See IPC, “IPC Acute Food Insecurity Classification”, available at: www.ipcinfo.org/ipcinfo-website/ipc-overview-and-classification-system/ipc-acute-food-insecurity-classification/en/.

61 See e.g. Trinity College Dublin and World Food Programme, *Inclusive Accountability to Affected Populations: Mainstreaming Accessible Communication for Vulnerability-Based Targeting in Mozambique*, 2022, available at: www.tcd.ie/slscs/research/assets/images/AccessibleMozambique.pdf. This paper discusses a pilot on inclusive community engagement which conducted messaging on assistance by using supported communication formats for people with communication disabilities, who are generally the most marginalized and excluded. The paper concludes that “[b]y prioritizing inclusion as a starting point, rather than an add-on, the result was increased access for all”.

62 UN Accountability Project – Somalia, above note 32, p. 43.

and creates “a mismatch between humanitarian mandates and coordination structures and the long-term strategies needed to respond to protracted crises”.⁶³

The UN system has tried to address this through the concept of the humanitarian–development nexus, or, as in the case of Somalia, the humanitarian–development–peace triple nexus.⁶⁴ Given Somalia’s dependence on humanitarian assistance, the nexus approach has been welcomed and “is generally seen to be a critical condition for maintaining what has been achieved in the past few years”.⁶⁵ The UN’s efforts are also dependent on those entities funding the respective areas, which remains a challenge as governments generally divide development cooperation and humanitarian assistance portfolios, resulting in different management and accountability structures. The gap in coherence in Somalia – or as one external review on Somalia put it, the “siloeled funding windows” in the country⁶⁶ – has led to development partners being called on to “consider reorganising management structures, strategy and planning processes, and allocation decisions around regional, country or subnational geographic areas – rather than humanitarian, development and political functions”.⁶⁷ One external review noted that “[t]here is little in the way of a ‘nexus’ on the ground in Somalia” and found that the UN and other partners were not “ready to bridge the gap between their sectoral specialisations”.⁶⁸ The deep structural changes necessary in Somalia were exposed during the COVID-19 pandemic when humanitarian actors provided the bulk of health services in the country due to a weak public health system.⁶⁹

The UN’s development architecture in Somalia is built around the UN Sustainable Development Cooperation Framework (UNSDCF). The UNSDCF is designed to support the government’s development priorities, one of which is to strengthen the interface between humanitarian and development planning.⁷⁰ Conversely, the Somalia HCT’s terms of reference recognize the need to support the humanitarian–development–peace nexus and to coordinate where possible with development platforms.⁷¹ This mutual recognition provides leverage for an issue such as disability inclusion to be a thematic focus across the humanitarian–development continuum, keeping in mind the normative guidance as expressed

63 C. Bennett and M. Foley, above note 30, p. 35.

64 A. Medinilla, L. Tadesse Shiferaw and P. Veron, above note 28, p. v (noting that “the ‘triple nexus’ between humanitarian aid, development and peacebuilding has become a commonly used term, especially in the context of the UN reform agenda and the ‘New Way of Working’”).

65 *Ibid.*, p. i.

66 *Ibid.*, p. iv.

67 S. Dalrymple and A. Thomas, above note 28, p. 8. It was also noted that the core issue is that development and humanitarian actors have different planning cycles for responding to their respective mandates. More specifically, development cooperation actors tend to plan on the basis of five- to seven-year strategies, often with a more decentralized decision-making structure, whereas humanitarian donors plan on the basis of much shorter time frames.

68 A. Medinilla, L. Tadesse Shiferaw and P. Veron, above note 28, p. vi.

69 S. Dalrymple and A. Thomas, above note 28, p. 38.

70 Somalia National Development Plan 2020–2024, available at: <https://andp.unescwa.org/plans/1245>.

71 Terms of Reference for Somalia Humanitarian Country Team, February 2022, paras 2.3, 3.2.8. On file with author.

by the Special Rapporteur on the Rights of Persons with Disabilities. She has emphasized that “[i]nclusive development cannot be effectively achieved in the absence of a human rights framework” and has called on States to “[e]nsure a human-rights based approach in the design, implementation and evaluation of all policies and programmes”.⁷² This emphasis is highly relevant in the Somali context, where human rights, gender and inclusion are mainstreamed in both the government’s National Development Plan and the UNSDCF, the latter aligning with the government’s priorities. This necessarily means that issues such as disability rights and inclusion are, in principle, everywhere, but also risk being nowhere. As such, operationalization needs particular attention, and the minimum preconditions for inclusion, such as accessibility, support services and assistive devices, need to be in place.⁷³ The UN Disability Inclusion Strategy (UNDIS), issued by the UN Secretary-General in 2019, can also play an important role in this regard. The UNDIS places a heightened obligation on UN entities to demonstrate disability inclusion across the board, from organizational change and accessibility through to programming and projects.⁷⁴

The triple nexus – that is, the humanitarian–development–peace nexus – should, in principle, enable disability inclusion to be taken one step further. In other words, to arrive at sustainable peace, broad-based participation is vital, including through processes that support reconciliation, and State-building. The next section explores the concept of participation and what considerations need to be taken into account in Somalia for persons with disabilities to claim it.

Claiming participation

Ensuring disability inclusion is heavily dependent on how persons with disabilities and their representative organizations are enabled to participate.⁷⁵ Terms such as “engagement”, “consultation” and “participation” are used interchangeably in the context of disability, but all seek to respond to the systematic exclusion of persons with disabilities from decision-making processes that affect them. A research study commissioned by the European Union, entitled *The Unsteady Path*, unpacked these concepts, noting that “opening or creating participation space does not equate [to] meaningful participation, let alone effective changes

⁷² C. Devandas-Aguilar, above note 51, para. 78(b).

⁷³ Alexandre Cote, *The Unsteady Path towards Meaningful Participation of Organisations of Persons with Disabilities in the Implementation of the CRPD and SDGs. A Pilot Study by Bridging the Gap*, 2020, p. 21, available at: <https://bridgingthegap-project.eu/wp-content/uploads/The-unsteady-path.-A-pilot-study-by-BtG.pdf>.

⁷⁴ UNDIS, indicator 11, available at: www.un.org/en/content/disabilitystrategy/.

⁷⁵ The UNCRPD, above note 15, considers participation as fundamental to the enjoyment of all rights, framing it as general obligation 4(3), as separate rights (Articles 29 and 30), and in the overall monitoring of the Convention (Article 33(3)). See also A. Cote, above note 73, p. 5 (noting that the “emphasis on participation of persons with disabilities has been a response to their systematic exclusion from consultation and decision-making mechanisms related to design, planning and monitoring of policies, programs and services that affect their lives and their communities”).

for concerned population[s]”.⁷⁶ The research offers an analytical framework that is useful for the Somalia context. It warns that “participation can also be used to legitimize policies and processes that preserve [the] status quo or perpetuate inequalities”.⁷⁷ The framework looks at three elements: first, the State’s role in facilitating participation; second, the disability movement’s engagement; and third, the role and influence of international cooperation actors and service providers in the relationship between the State and the disability movement.⁷⁸ The ideal outcome of this set of relationships is that the State will be able to depend on a strong disability movement, which is in turn dependent on an engaged State that dedicates political space and resources to that movement. The capacity of both the State and the disability movement should be supported by international cooperation actors, who can also facilitate dialogue between them.⁷⁹

Conflict settings add another layer of complexity to State-building, development and reconciliation initiatives, particularly with respect to who gets to participate in those processes. Or otherwise stated, conflicts absorb political energy, and in the struggle for political consensus, many issues end up being left off the table.

Somalia’s State-building process is anchored in a number of initiatives, including stabilization, reconciliation and constitutional review, all seeking to consolidate the State-building agenda. These initiatives already bring together two actors – that is, the State and the international community, and to some extent domestic civil society. Opening this space to the disability movement would help ensure its meaningful engagement in those critical processes and materialize a mutually reinforcing relationship between the State, persons with disabilities and international cooperation actors. Such inclusion would also help tackle societal stereotypes which can be partially summed up by the words of one Somali OPD representative, who stated: “persons with disabilities in Somalia are often not valued by society – they are frequently asked by their family, ‘what do you know?’”.⁸⁰ This level of stigmatization is of course a challenging starting point from which to claim participation. As part of its effort to address these challenges, the Somali government has acknowledged the necessity of moving towards the inclusion of persons with disabilities, including through the establishment of the NDA.

Coalescing around Somalia’s National Disability Agency

The National Disability Agency was established in 2018, but officially launched by its five commissioners in 2021. It is a federal agency responsible for the design, development and implementation of the Somali government’s plan for persons

76 A. Cote, above note 73, p. 15. The project identified eleven “different stylized forms of interaction which may or may not be qualified as participation”.

77 *Ibid.*, p. 7.

78 *Ibid.*, p. 20.

79 *Ibid.*, p. 44.

80 UNSOM HRPG and UN Human Rights, above note 22.

with disabilities, and it leads on legal reform in relation to disability.⁸¹ A key objective of the NDA's Establishment Act was also to ensure that Somalis with disabilities have a body to represent them and advocate for their rights.⁸²

After the launch, the NDA immediately started its work with three main objectives: first, to raise awareness about the Agency and what it is mandated to do; second, to start its engagement with OPDs, with the aim of finding ways to help them have a voice and engage international community interest; and third, to influence the government system, planning and budget allocation. The latter is critical from a purely practical point of view as the NDA's financial support is limited to stipends to the commissioners, who are currently working out of homes or hotels. The Ministry of Women and Human Rights Development, which is already trying to find space for its own staff, has provided a small office, but the bathrooms are inaccessible, which means that it remains largely unused.⁸³

The NDA motivated a group of UN entities and the Camp Coordination and Camp Management Cluster and Protection Cluster to support it. A range of ideas were discussed, and it was eventually agreed that a country-wide survey which aimed to understand the perspectives and priorities of persons with disabilities would be the best entry point. The rationale was that the overarching goal was for the NDA to create a relationship of confidence and trust with OPDs that would evolve into a structured mechanism for consultation and joint advocacy. The launching of the survey would provide a platform for the NDA to discuss its mandate and engage with OPDs at the local level, including support in identifying community members and enumerators. In addition, it was agreed that the NDA was not in a position to undertake a typical needs assessment as it does not have the capacity to meet such needs or expectations; rather, by focusing on perspectives and priorities, the survey would be a tool to bring persons with disabilities and their representative organizations into a State–citizen dialogue. The survey's development was initially informed by a typical humanitarian needs assessment tool for internally displaced people with disabilities, based on the WGQ-SS and also including the WG-UNICEF Child Functioning Module.⁸⁴ The process of negotiating additional questions and removing others was fascinating, involving the NDA, OPDs, UN partners, clusters, the National Bureau of Statistics, and Trinity College Dublin.⁸⁵ It was recognized early on that there needed to be a development dimension that should be grounded in human rights, particularly in relation to claiming participation and accountability. The methodology was also crafted in such a way as to foster greater cross-sectional

81 Federal Government of Somalia, National Disability Agency Establishment Act, 2018.

82 *Ibid.*, Art. 5.

83 Site visit by author, 8 December 2021, and subsequent interview with the NDA.

84 See UNICEF, "Module on Child Functioning: Questionnaires", available at: <https://data.unicef.org/resources/module-child-functioning/>.

85 Trinity College Dublin has been providing support to UN Human Rights in Somalia since 2021 on disability inclusion issues, particularly in relation to quantitative and qualitative data collection and analysis.

representation, increased participation by women with disabilities, increased inclusion of children with disabilities, and broader geographical coverage.

The survey was piloted in one regional capital in early 2022, and while it is too early to discuss the overall findings, the need to support participation claims clearly came across through the survey, most notably in responses to questions about representation of persons with disabilities. For example, 90% of persons with disabilities who took the survey stated that they had not been involved in community decision-making processes. Some 84% stated that they did not think that the rights of persons with disabilities are considered in political discussions. Interestingly, a lower number of persons with disabilities, 57.8%, felt that they were treated negatively or differently due to their disability status. Based on the responses, the next stage is to take a smaller subset of survey participants, both in key informant and focus group formats, and follow up with qualitative questions addressing participation.

Applying the analytical framework for participation discussed above, the NDA is moving steadily towards a situation where it, as a State entity, and OPDs are contributing to and collaborating on carving out a participation space. The following section outlines some recommendations on how that can be reinforced, especially at this nascent stage.

Conclusion and recommendations

In its current form, the typical humanitarian architecture, even where there is political will, has a limited ability to address the exclusion of people with disabilities and, more broadly, the rights of persons with disabilities. This is because it operates on a needs-based approach that serves beneficiaries as opposed to rights-holders – hence, it can inadvertently reinforce an already stigmatizing charity or welfare approach to persons with disabilities.⁸⁶ Furthermore, from the perspective of representation or having a role in the delivery of structured humanitarian action, few OPDs have the governance systems in place that could provide the breadth of services that are required to compete in a call for proposals for the different sectoral areas involved, such as water and sanitation, food security or shelter. Similarly, while the Accountability to Affected Populations framework has improved, it depends heavily on engagement with existing power structures and the set of identified beneficiaries. As persons with disabilities often sit outside these structures or are not reached in large-scale needs assessments, their voices are not always being captured. If this

86 C. Devandas-Aguilar, above note 51, para. 11 (stating that “policy efforts should move away from the charitable and medical approaches towards a human rights-based approach to disability, where persons with disabilities are considered as rights holders, rather than mere receivers of protection, rehabilitation and/or welfare”). See also Peter Uvin, *Human Rights and Development*, Kumarian Press, Bloomfield, CT, 2004, p. 54 (recalling Paul Farmer’s use of the term “pragmatic solidarity”, which Uvin criticizes as depending too often “on the continued presence of foreigners and foreign money, and it sometimes unintentionally ends up disempowering local dynamics of social change”).

work is also taking place in a conflict setting, challenges are exacerbated due to the natural division of who is negotiating peace and who is awaiting those peace dividends. Nevertheless, as the Somalia example demonstrates, HCTs can do a lot with leadership, a willingness to leave agency branding behind, and an active committed partner such as the NDA. However, with system dependency on annualized funding, the Somalia HCT will not be able to fill the NDA's resource void, which needs more sustainable options.

On another note, as is evident from the nature of protracted humanitarian settings, humanitarian action does not operate in a hermetically sealed bubble; rather, it moves in and out of different spaces, particularly in a conflict setting.⁸⁷ In addition, frameworks for a different approach to action, such as the triple nexus, can also be harnessed. The following recommendations seek to identify some potential areas for further exploration.

Frameworks

- Humanitarian needs assessments, response plans and the like should pay more attention to indicators that define disability inclusion as an outcome, rather than simply being focused on outputs of the number of persons with disabilities reached.⁸⁸
- As has been stated elsewhere, the WGQ-SS was “not designed to be used in isolation”⁸⁹ and should be included in all relevant surveys, assessments and registration documentation to support disaggregation on the basis of disability across humanitarian, development and peace-related spheres, including political participation. Where possible, quantitative assessments should be supported by qualitative data exercises to strengthen understanding of marginalization dynamics.
- In this regard, using the WGQ-SS as a starting point, disability inclusion is an ideal thematic to test the potential value of the triple nexus. As described above, the humanitarian–development nexus is relatively straightforward, and the third element of peace can be partially addressed by supporting “claiming participation” initiatives; for example, as Somalia moves to universal suffrage, the government should ensure that the NDA has a place at the National Independent Electoral Commission's first national stakeholders' conference.⁹⁰ The NDA would have the responsibility of engaging and consulting effectively across the entire disability constituency – age, gender, type of disability and location – thereby transcending any historical identity claims.

87 A. Medinilla, L. Tadesse Shiferaw and P. Veron, above note 28, p. 3 (noting that “[f]or target communities, the distinction between humanitarian, development and peace and security efforts is artificial”).

88 World Food Programme, “WFP Global Protection and Accountability Policy”, 11 November 2020, available at: https://executiveboard.wfp.org/document_download/WFP-0000119393.

89 O. Abualghaib *et al.*, above note 46, p. 3094.

90 S. Dalrymple and A. Thomas, above note 28, p. 38 (stating that the government in Somalia needs to take on a stronger decision-making role in crisis response in order to reduce dependency on humanitarian aid, but noting that “this remains challenging in the absence of a genuinely inclusive electoral process”).

- Strengthening disability inclusion will also depend on the extent to which the individuals whose rights are affected are willing to exercise and use their rights. Thus, the humanitarian apparatus needs to guarantee access to the disability community and embed its participation in it. This could take the form of ensuring representation in the HCT or Inter-Cluster Coordination Group, donor accountability using the Article 32 framework on mainstreaming disability into international cooperation, and through effective Accountability to Affected Populations initiatives. Given historical marginalization, capacity-building elements should also be included in support to OPDs.
- States Parties' obligations under Article 32 could be better met through disability data disaggregation in humanitarian and development programming as well as drawing on initiatives similar to the UN-FCDO "payment by results" model.
- The UNCRPD Treaty Reporting Guidelines in relation to Article 11 could be strengthened to guide on the often "non-emergency nature" of humanitarian crises – that is, focusing on how disability inclusion can be addressed in protracted settings.

Partnerships

- Support national entities such as Somalia's NDA; this will help humanitarian actors to strengthen relationships with OPDs and demystify OPD engagement, thereby transforming the relationship from one of beneficiaries to one of rights-holders who have agency.
- Leverage the UNDIS, which includes an indicator on disability inclusion in programmes and projects, and engage with the UNDIS Secretariat, which has an extensive network, including in peace operation settings.
- Link national entities, such as the NDA, to the academic community. The Trinity College Dublin experience demonstrates that such entities could benefit from the latest methodological approaches and analytical experience, as well as lessons learned from other countries that such academic institutions work in or on.
- Ensure that disability data collected is linked to the work of the National Bureau of Statistics or equivalent in order to start building an archive of information and data to inform planning, programming and budgeting. This would also help raise awareness within national statistics bureaux on disability issues and ideally inform policy direction and analytical approaches to support system change.

Advancing rights and inclusion of persons with disabilities in humanitarian action: a donor perspective

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Abstract

Despite increasing awareness and high-level commitments on disability inclusion by humanitarian donors and actors, persons with disabilities continue to be ignored from humanitarian assistance. Rights and inclusion of persons with disabilities are a foreign policy priority for the Ministry for Foreign Affairs of Finland, including in humanitarian assistance. The primary means for donors, such as Finland, to promote disability-inclusive humanitarian action are funding and advocacy. Trade-offs between flexible and earmarked funding for disability inclusion are

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challenging when reporting on results is inadequate. This article shares examples on how the Ministry promotes inclusion of persons with disabilities in humanitarian action and explores challenges that need to be resolved by stakeholders.

Keywords: Disability inclusion, humanitarian assistance, government donors, multilateral organizations, flexible funding, reporting.



Introduction

The rights and inclusion of persons with disabilities are a priority in Finland's foreign and security policy.¹ Finland promotes the implementation of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) in its human rights policy, development policy and cooperation and humanitarian assistance and in particular emphasizes intersections among disability, gender and the rights of women and girls with disabilities. In addition, disability inclusion is a cross-cutting objective in Finland's development policy. To that end, the Ministry for Foreign Affairs of Finland (MFA) has integrated minimum criteria for ensuring that rights of persons with disabilities are considered across sectors and funding instruments. These include disability-inclusive context analyses, preventing and mitigating risks to rights of persons with disabilities, removing barriers to participation and ensuring the collection of disability-disaggregated data. In its humanitarian assistance, the MFA advocates for the rights of persons with disabilities and their access to services essential for their survival, protection and recovery during and in the aftermath of crises.

The focus on persons with disabilities is the outcome of powerful advocacy from the Finnish disability rights movement combined with strong ministerial-level support for disability-inclusive international cooperation. Finnish organizations of persons with disabilities (OPDs) have a long history in promoting the human rights of persons with disabilities, both domestically and internationally. As a result of this advocacy, supporting and collaborating with OPDs is a cornerstone of Finland's international cooperation. Many of these Finnish OPDs implement development cooperation programmes with funding from the MFA. For example, Disability Partnership Finland² supports local OPDs in the Global South to advocate for and promote rights of persons with disabilities in their countries.

1 Ministry for Foreign Affairs of Finland (MFA), *Theories of Change and Aggregate Indicators for Finland's Development Policy 2020*, 26 April 2021, available at: <https://um.fi/documents/35732/0/theories-of-change-and-aggregate-indicators-for-finlands-development-policy-2020.pdf/7bc4d7f2-ffc8-5f4d-8382-43193fd887e8?t=1619609986346> (all internet references were accessed in October 2022).

2 Disability Partnership Finland is a non-profit development cooperation organization comprised of a network of eight Finnish OPDs. The organization aims to strengthen the capacity of local OPDs in the Global South to better advocate for rights of persons with disabilities in their contexts. See Vammaiskumppanuus, "Disability Partnership Finland – The World Belongs to Everyone", available at: www.vammaiskumppanuus.fi/en/.

The Abilis Foundation is a Finnish non-governmental organization that grants project funding to grassroots OPDs and small businesses run by persons with disabilities in developing countries.

Several studies show the disproportionate impacts of crises on persons with disabilities and the barriers that persons with disabilities face in accessing humanitarian services.³ In 2012, the MFA commissioned a report from the Abilis Foundation. In that report, Abilis developed recommendations on how to better address the rights of persons with disabilities in Finland's foreign policy.⁴ The report identified gaps in humanitarian assistance that further exacerbated the negative impacts of crises, such as the lack of accessibility in preparedness and the lack of coordination in the humanitarian sector to address the needs of persons with disabilities. At the time, these findings confirmed observations made by MFA officials during monitoring visits in humanitarian contexts that, despite efforts to focus on the needs of those considered to be in the most vulnerable situations, the situation of persons with disabilities in humanitarian crisis had not improved in the last decade.

For decades, humanitarian actors have recognized the vulnerability of persons with disabilities in humanitarian crises. As a result, disability has traditionally been categorized as one vulnerability factor among others and assigned as a targeting criterion for prioritized assistance, including provision of shelter, water and food. Insufficient understanding and application of the social model have prevented humanitarian actors from recognizing how to improve conditions for persons with disabilities in humanitarian contexts. With the social model, disability is recognized as a social construct in which disability is the result of the intersection of impairments with environmental and attitudinal barriers that hinder participation of persons with disabilities on an equal basis with others. Under the social model, the responsibility lies with society to dismantle barriers that prevent full participation of persons with disabilities. This means that without a restructuring of humanitarian practices, policies and attitudes to remove barriers, persons with disabilities remain invisible and their actual needs and right to equality overlooked.

During the 2010s, the MFA's understanding of disability in humanitarian contexts shifted towards recognizing disability as a social construct and a human rights issue. Finland's current humanitarian policy, which was revised and launched in 2019, explicitly states that improving rights of persons with disabilities in crisis contexts is a priority and criterion for funding.⁵ Finland's humanitarian action has long taken a needs-based approach and has emphasized

3 See, for example, Handicap International, *Disability in Humanitarian Context: Views from Affected People and Field Organisations*, 2015, available at: <https://reliefweb.int/report/world/disability-humanitarian-context-views-affected-people-and-field-organisations>.

4 Abilis Foundation, *Vammaisten ihmisoikeudet Suomen ulkopolitiikassa*, Helsinki, 2012, available at: https://um.fi/julkaisut-aiheittain/-/asset_publisher/pNPEiXNbcwol/content/julkaisu-vammaisten-ihmisoikeudet-suomen-ulkopolitiikassa/35732.

5 MFA, *Finland as a Donor of Humanitarian Assistance*, 2019, available at: <https://julkaisut.valtioneuvosto.fi/handle/10024/161936>.

the importance of neutrality and non-discrimination. In the past decade, Finland has focused on disability-inclusive humanitarian action and actively promoted the protection of and respect for the rights of persons with disabilities in crises settings.⁶ Finland's current humanitarian policy states that the MFA will work towards ensuring that all humanitarian actors consider the rights and needs of persons with disabilities and ensure their full participation.

Donors have a number of means to promote priority issues. This article discusses the primary influencing channels for a donor to ensure that policy priorities are addressed by implementing partners, namely through funding and advocacy.⁷ Funding allocation processes entail quality assurance, eligibility and criteria in grant processes to guide funding recipients. A donor's influencing of multilateral organizations through funding includes decisions on replenishments, and core and earmarked budget allocations.⁸ International recruitment, secondments and staff placements are considered part of the MFA's resource contributions to multilateral organizations. Advocacy can include policy influencing, dialogue with funding recipients and awareness raising in national and international platforms. These can take place in corporate governance bodies such as boards of multilateral organizations, through formal channels such as bilateral consultations with donors and organizations, information channels such as joint events and meetings of like-minded groups, among others.⁹ In its humanitarian policy and assistance, Finland has aimed to support key initiatives that would drive disability-inclusive humanitarian action. Often these are anchored in existing commitments or processes that advance disability inclusion.

The results and impact of Finland's funding and advocacy are difficult to assess and verify. A recent external evaluation of Finland's humanitarian assistance reported that Finland is a valued donor and that Finland's policy dialogue on non-discrimination and inclusion of persons with disabilities is found by partners to be relevant and valuable.¹⁰ The evaluation also found that Finland's humanitarian assistance has led to some significant normative results on disability inclusion, but that data on humanitarian results are lacking. Country-level results related to disability are not yet available.¹¹ According to the latest *The State of the Humanitarian System* study, gaps between policy

6 MFA, *Finland's Humanitarian Policy*, 2012, available at: https://um.fi/documents/35732/48132/finlands_humanitarian_policy.

7 Rose Worden and Patrick Saez, *How Do Humanitarian Donors Make Decisions, and What Is the Scope for Change?*, Center for Global Development, 28 October 2021, available at: www.cgdev.org/publication/how-do-humanitarian-donors-make-decisions-and-what-scope-change.

8 MFA, *Evaluation of Finnish Development Policy Influencing Activities in Multilateral Organisations*, Vol. 1: *Main Report*, 2020, available at: https://um.fi/documents/384998/0/Vol1+_MainReport_Evaluation+of+Finnish+Development+Policy+Influencing+Activities+in+Multilateral+Organisations+%281%29.pdf/2666cd6a-0bb2-1c76-0659-db1ac6fa30bf?t=1591860985653.

9 *Ibid.*

10 MFA, *Catalysing Change: Evaluation of Finland's Humanitarian Assistance 2016–2022*, Vol. 1: *Main Report*, 2022, pp. 20–32, available at: https://um.fi/development-cooperation-evaluation-reports-comprehensive-evaluations/-/asset_publisher/nBPgGHSLrA13/content/evaluointiraportti-muutosta-kaynnistamassa-suomen-humanitaarinen-apu-2016-2022-1/384998.

11 *Ibid.*, pp. 33–6.

commitments on disability-inclusive humanitarian action and their operational implementation and gaps in reporting of results appear to be systemic throughout the humanitarian sector, as although awareness among humanitarian actors on disability inclusion has increased over the last years, significant gaps remain in operational implementation.¹²

This article aims to outline the primary means that Finland has used to promote disability-inclusive humanitarian action, while recognizing that the effectiveness of these measures remains unclear. Therefore, this article also discusses some of the main challenges faced by donors in advancing protection priorities.

Finland's funding and advocacy to promote and advance rights and inclusion of persons with disabilities in humanitarian assistance

This section describes some of the main actions that Finland has taken to promote the rights and inclusion of persons with disabilities in humanitarian assistance.

The UN CRPD as a guide for Finland's international cooperation

The CRPD guides Finland's international cooperation on rights and inclusion of persons with disabilities. Key CRPD articles relevant to Finland's foreign policy are Articles 11 and 32.

Article 11 on situations of risk and humanitarian emergencies states that:

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.¹³

Article 32 on international cooperation states that:

1. States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional

12 A. Obrecht, S. Swithern and J. Doherty, *The State of the Humanitarian System*, Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP), London, 7 September 2022, pp. 145–6, available at: <https://sohs.alnap.org/help-library/2022-the-state-of-the-humanitarian-system-sohs-%E2%80%93-full-report-0>.

13 UN Office of the High Commissioner for Human Rights, Convention on the Rights of Persons with Disabilities, UN Doc A/RES/61/106, 13 December 2006, available at: www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities.

- organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:
- (a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;
 - (b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;
 - (c) Facilitating cooperation in research and access to scientific and technical knowledge;
 - (d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.
2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.¹⁴

Finland ratified the CRPD in 2016. Finland is currently in its second National Action Plan for the CRPD's implementation.¹⁵ The National Action Plan stipulates how Finland will implement the CRPD's various articles, including Articles 11 and 32. For example, to operationalize the fulfilment of rights and inclusion of persons with disabilities in its human rights-based foreign and security policy, the National Action Plan includes objectives on raising awareness and taking the rights of persons with disabilities into account in humanitarian crises.

Finland applies a two-track approach, employing both targeted measures and mainstreaming.¹⁶ Finland does not have a dedicated disability-inclusion strategy for international cooperation, but actively advances rights of persons with disabilities in the majority of its funding instruments. Still, gaps in implementing disability inclusion in some funding mechanisms persist. Through internal training on non-discrimination and disability issues, as well as integration of disability inclusion in planning, quality assurance and reporting processes, the MFA works towards more consistent implementation. Continuous capacity building is important both within the MFA and externally to improve understanding of CRPD commitments.

Finland's promotion of the rights and inclusion of persons with disabilities in humanitarian action in its global advocacy

Finland has become a significant global advocate for inclusion of persons with disabilities in global events and platforms, including in influencing the policies of

¹⁴ *Ibid.*

¹⁵ Ministry of Social Affairs and Health, *Right to Social Inclusion and Equality: National Action Plan on the UN Convention on the Rights of Persons with Disabilities (2020–2023)*, 2021, available at: <https://julkaisut.valtioneuvosto.fi/handle/10024/163217>.

¹⁶ MFA, *Leaving No One Behind: The Finnish Approach to Addressing the Rights of Persons with Disabilities in the Development Cooperation and Policy*, 2018, available at: https://um.fi/publications/-/asset_publisher/TVOlgBmLyZvu/content/the-finnish-approach-to-addressing-the-rights-of-persons-with-disabilities-in-the-development-cooperation-and-policy.

multilateral organizations. The MFA prioritizes disability inclusion in its policy influencing, both in diplomacy in international fora and in funding multilateral humanitarian organizations. A recent external evaluation commissioned by the MFA on its policy influencing activities in multilateral organizations found that “Finland was considered a defender of human rights ... and to possess experience, expertise and credibility especially related to ... the rights of persons with disabilities”.¹⁷

An example of the MFA’s advocacy in promoting rights and inclusion of persons with disabilities in the humanitarian sector is showcased in Finland’s active role in the lead up to and at the World Humanitarian Summit held in 2016. In particular, Finland played an important role as part of the core group that prepared the Charter on the Inclusion of Persons with Disabilities in Humanitarian Action – a significant result for Finland’s advocacy and a huge milestone for disability-inclusive humanitarian action. Leading up to the Summit, the MFA worked with other States, UN agencies, civil society and OPDs, as well as with International Disability Alliance – an instrumental partner providing technical assistance and expertise – to ensure that disability inclusion was given prominence. This ground-breaking Charter was launched at the Summit and is considered one of the most important outcomes of the event, with endorsement to date from more than 260 stakeholders, including governments and organizations.¹⁸

The Charter outlines concrete solutions to improve the situation of persons with disabilities in humanitarian crises. For example, the Charter calls for inclusive policies and guidelines that “based on existing frameworks and standards, [support] humanitarian actors to improve inclusion of persons with disabilities in emergency preparedness and responses”.¹⁹

The Charter has, in turn, shaped Finland’s humanitarian policy, in which non-discrimination, participation, rights and inclusion of and accessibility for persons with disabilities are central.²⁰ In addition, Finland’s humanitarian policy states that results should be disaggregated by age, sex and disability for all humanitarian projects and operations implemented with MFA funding. When funding Finnish non-governmental organizations, the MFA applies quality-assurance criteria to grant proposals: applicants are required to describe in both grant applications and final reports how they address the rights and needs of persons with disabilities. The aim is to guide organizations to ensure better inclusion of persons with disabilities in their projects and programmes.

The MFA has also worked to further support operationalization of the Charter. To that end, the MFA, together with other government donors, has provided financial and technical support for the development of system-wide inter-agency guidelines on the Inclusion of Persons with Disabilities in

17 MFA, above note 8, p. 23.

18 Charter on Inclusion of Persons with Disabilities in Humanitarian Action, available at: <https://humanitariandisabilitycharter.org/>.

19 *Ibid.*

20 MFA, above note 5.

Humanitarian Action, which were later endorsed by the Inter-Agency Standing Committee (IASC) in 2019.²¹ To ensure the voice and participation of persons with disabilities, these guidelines were developed with the active engagement of persons with disabilities and their representative organizations and aim at driving change and transformation across all sectors of humanitarian action. The impact and use of the guidelines among humanitarian actors have not yet been assessed.

Policy influencing for the rights and inclusion of persons with disabilities is central in Finland's humanitarian work

Finland, like other donors, raises policy priorities in its bilateral consultations with and on governing bodies of multilateral humanitarian organizations. Together with MFA headquarters, Finland's missions in New York, Geneva and Rome play a key role in this kind of policy influence. One of the major achievements is a joint ministerial letter of support for a UN system-wide approach to disability inclusion, which the MFA as penholder drafted with like-minded States, addressed to the UN Secretary-General in 2018 – and which played a pivotal role in the process that eventually led to the UN Disability Inclusion Strategy (UNDIS).²²

The UNDIS launched in 2019 and is a UN-system-wide policy and action plan for strengthening disability inclusion. It includes annual mandatory reporting against accountability indicators for all UN organizations. In addition to Finland's work that helped lead to the UNDIS, in 2021 Finland also contributed funding to the implementation of the Strategy. Finland's New York mission continues to follow up with implementation of the Strategy across the UN system.

The MFA missions maintain dialogue with headquarters of international organizations, which receive Finland's regular budgetary, unearmarked support, as well as with other, like-minded donors. The MFA headquarters, together with the permanent missions in New York, Geneva and Rome, consistently includes disability inclusion as one of the agenda items in dialogue and updates on current issues and progress made in humanitarian affairs. For example, the Rome mission has systematically and actively advocated for disability inclusion at the World Food Programme (WFP). According to the external evaluation commissioned by the MFA on its work to influence policy, "in the case of the WFP, the MFA was perceived as very active in influencing the executive board during the entire evaluation period, highlighting consistently Finnish policy priorities such as the needs and rights of women and girls, the rights of persons with disabilities".²³ The Rome mission also maintains dialogue on the implementation and results of

21 IASC, *IASC Guidelines, Inclusion of Persons with Disabilities in Humanitarian Action*, 2019, 19 November 2019, available at: <https://interagencystandingcommittee.org/iasc-guidelines-on-inclusion-of-persons-with-disabilities-in-humanitarian-action-2019>.

22 UN, *Disability Inclusion Strategy*, 2019, available at: www.un.org/en/content/disabilitystrategy/. For more information on the process, see, for example, UN Special Rapporteur on the Rights of Persons with Disabilities, "Strengthening the Inclusion of the Rights of Persons with Disabilities in the United Nations – UNDIS", available at: www.ohchr.org/en/special-procedures/sr-disability/strengthening-inclusion-rights-persons-disabilities-united-nations-undis.

23 MFA, above note 8, p. 92.

the WFP's road map on disability inclusion for 2020–2021. Although the MFA does not typically earmark funding, it invested in the road map with funding for the WFP's dedicated trust fund.²⁴ Earmarked funding has provided a deeper and more specific dialogue with the WFP and has led to better reporting on progress and on the results of the road map.

Advocacy extends to MFA-supported and -organized events with other donors at international forums to promote and raise awareness on disability inclusion. For example, in Geneva, the Permanent Mission of Finland to the UN, together with Australia and the United Kingdom, has co-chaired the Group of Friends of the Charter on Inclusion of Persons with Disabilities in Humanitarian Action since 2016. The Group of Friends is an informal network of States supporting the strengthening of inclusion of persons with disabilities in humanitarian action and was founded to advance the implementation of the Charter. Finland and the Group of Friends, in collaboration with OPDs and international humanitarian organizations, regularly organize events to increase the understanding of the importance of disability inclusion in humanitarian action. These events include ones, for example, at the UN Office for Coordination of Humanitarian Affairs' (OCHA) Humanitarian Networks and Partnerships week, the UN Economic and Social Council Humanitarian Affairs Segment and at the 33rd International Conference of the Red Cross and Red Crescent. Events aimed at raising awareness are important for improving understanding of disability issues and for creating space for discussion and ideas. Still, it is difficult to assess the effects or impacts of such events, as it is not feasible to track how participants use the information they have gained.

However, one of the challenges with policy influencing is that policy commitments do not always translate into concrete advancement of the rights and inclusion of persons with disabilities. Although humanitarian actors agree that addressing the needs of persons with disabilities is central to the humanitarian principle of impartiality, many challenges persist in realizing the meaningful inclusion of persons with disabilities.²⁵ For example, Finland served on the UN Central Emergency Response Fund (CERF) Advisory Group from 2017 to 2020. While in that role, Finland successfully advocated for persons with disabilities to be included as one of the four priority areas in CERF,²⁶ which is a humanitarian fund intended to complement humanitarian funding mechanisms by providing grants for rapid response and underfunded emergencies. However, an independent review indicates the challenges in translation of policy

24 WFP trust funds hold contributions whose purpose, scope and reporting requirements fall outside the WFP's regular operational programmes but that are consistent with its policies, aims and activities. The MFA earmarked funding towards the WFP's dedicated trust fund on disability inclusion for the purpose of kick-starting the WFP's work on disability inclusion.

25 Tasneem Mowjee and Andy Featherstone, *Independent Review of the Four Priority Underfunded Areas for the Central Emergency Response Fund (CERF)*, 10 October 2020, p. 3, available at: <https://cerf.un.org/sites/default/files/resources/CERF%20Priority%20Areas%20Review%20Final%20Report%20201010.pdf>.

26 CERF, *Q&A on the Emergency Relief Coordinator's Four Priority Areas for CERF*, Advisory Group Meeting, 19–20 June 2019, available at: https://cerf.un.org/sites/default/files/resources/Q%26A%20on%20the%20ERCs%20Four%20Priority%20Areas%20for%20CERF_0.pdf.

commitments to concrete results.²⁷ The review examined the implementation of the four priority areas (support for women and girls, programmes targeting persons with disabilities, education in protracted crises, and other protection aspects), including looking at, for example, how the priority areas were incorporated into the CERF programme cycle and how implementing partners reflected the priority areas in service delivery. Findings showed that CERF funding had increased in some of the priority areas (education and protection). Although the focus in CERF on persons with disabilities had increased attention to provision of assistance to persons with disabilities, mainstreaming disability inclusion had not yet made much progress. Some of the challenges identified in the report that undermined progress were a system-wide lack of tracking funding and mainstreamed activities as well as a weak capacity to identify and assist persons with disabilities. The report also stated that there was broad agreement on the relevancy of the priority areas, but nevertheless humanitarian actors felt that the priority areas were “yet another demand on the already over-stretched resources of humanitarian actors rather than fundamental to ‘do no harm’ and for effectiveness”.²⁸

Strategic investments as a source of support for humanitarian organizations’ work on disability inclusion

In addition to Finland’s provision of flexible funding, the MFA has allocated funding to specific investments intended to accelerate disability-inclusive humanitarian action, such as toward the IASC guidelines, toward disability-inclusion specialists and toward dedicated trust funds for disability inclusion.

Key investments towards disability-inclusive action include funding for specific positions at international humanitarian organizations, such as disability-inclusion specialists and junior professional officer posts. Although the impacts of such investments have not been assessed, through dialogue with the organizations, recruitment of thematic experts has proven to concretely support changes within the organization. Finland’s collaboration on disability-inclusive humanitarian action with the UN High Commissioner for Refugees (UNHCR) has a long history. With funding from Finland, the UNHCR recruited a disability-inclusion specialist for 2014–2016. Collaboration with the UNCHR continued in the drafting of the Global Compact on Refugees in 2018. At the first Global Refugee Forum, the MFA, together with the UNHCR, drafted a guidance document on commitments on disability inclusion. The MFA ensured that inclusion of persons with disabilities and respect for the rights of persons with disabilities were reflected throughout the document. In preparations for the Global Refugee Forum, the MFA contributed to the webinars that the UNHCR and the International Disability Alliance organized for regional OPDs. Finland pledged at the Forum to support the UNHCR in its efforts on disability inclusion

27 T. Mowjee and A. Featherstone, above note 25.

28 *Ibid.*

in forced displacement settings, and has done so by, for example, funding a junior professional officer post.

In order to build awareness and discussion among donors, protection issues, including disability inclusion, were made one of the priority themes during Finland's co-presidency of the Good Humanitarian Donorship Initiative, which is an informal group of forty-two donors working together for more effective and ethical humanitarian assistance. The MFA commissioned a study in 2022 to explore whether flexible, unearmarked funding combined with advocacy is an effective means to ensure disability-inclusive humanitarian action. Findings of the study were presented in the Good Humanitarian Donorship meetings for discussion on how donors can best work with humanitarian organizations to improve the access of persons with disabilities to humanitarian assistance in contexts where unearmarked funding combined with advocacy has not yielded desired results. The main outcomes of the study were that disability inclusion was visible in strategies, but this had not yet translated into implementation in country operations, and the lack of systems to track funding and to monitor disability-inclusive activities makes it difficult to report results.²⁹

Concrete results of these investments may be visible only after many years, and assessing the impact of Finland's contribution is likely to be difficult, as global processes are slow and changes in large organizations incremental. Also, disability inclusion tends to be one of many competing protection priorities, thus potentially making it even more challenging to achieve concrete results. Lack of disability data collection further weakens reporting progress on disability-inclusive implementation.

Increased awareness as a contributor to strategic action in humanitarian organizations – despite persistent implementation gaps

Clearly, a significant shift in awareness of the rights and needs of persons with disabilities has occurred in recent years. Since the adoption of the CRPD in 2006, but particularly since the Charter on Inclusion of Persons with Disabilities in Humanitarian Action, international humanitarian organizations have increasingly paid attention to the inclusion of persons with disabilities through both targeted and mainstreaming measures. Targeted measures include, for example, activities to identify persons with disabilities in humanitarian registration processes, and the provision of physical rehabilitation and assistive devices. Mainstreaming disability-inclusive measures can mean, for example, removing barriers, such as in accessibility of the built environment or of communications and information, for persons with disabilities to access services, and ensuring the participation of persons with disabilities in programming.

29 Good Humanitarian Donorship (GHD), *Brief on the GHD Study: Everyone's Business – Use of Unearmarked Funding for Disability Inclusion in Humanitarian Action*, June 2022, available at: www.ghdinitiative.org/assets/files/Brief-GHD-Study-on-use-of-unearmarked-funding-for-disability-inclusion-in-humanitarian-action.pdf.

Many humanitarian organizations have adopted their own organization-specific strategies and guiding documents. For example, the International Red Cross and Red Crescent Movement adopted its Strategic Framework on Disability Inclusion in 2015,³⁰ and the International Committee of the Red Cross adopted its Vision 2030 on Disability in 2020.³¹ The UNHCR launched its Disability Inclusion Action Plan 2020–2024³² as part of implementation of the UNDIS.³³ Nevertheless, persons with disabilities still face barriers in accessing humanitarian services and continue to be left behind in humanitarian crises, as the 2022 humanitarian response to Russia’s invasion of Ukraine has shown.³⁴ While there is a recognition of the importance of disability inclusion in humanitarian organizations at the headquarters level and among human rights actors, it is insufficiently mainstreamed across operational contexts. Such mainstreaming could be, for example, ensuring accessibility for persons with disabilities in humanitarian services and providing data disaggregated by disability in annual system-wide reports, which are the main source of information for donors and the wider public. While reference is made to physical rehabilitation and projects focusing on, for example, the provision of assistive devices, other important themes largely remain absent from these reports, including results on the extent to which persons with disabilities are able to access humanitarian protection and assistance and of disability inclusion more widely.

The following section discusses some of the main challenges that donors face related to funding and advocacy for inclusion of persons with disabilities in humanitarian action.

Challenges in advancing disability-inclusive humanitarian action

Finland’s consistent and long-term commitments to specific issues in its international policy influencing, such as rights of persons with disabilities, is well recognized according to Finland’s partners.³⁵ This article has already discussed the primary tools that the MFA uses to support and promote disability-inclusive humanitarian action: funding and advocacy. The effectiveness of these measures remains an important question that donors and other stakeholders must consider. Are resources, especially funding, being used to ensure that persons with

30 Council of Delegates of the International Red Cross and Red Crescent Movement, *Adoption of the Strategic Framework on Disability Inclusion by the International Red Cross and Red Crescent Movement*, 7 December 2015, available at: https://rcrcconference.org/app/uploads/2015/03/CoD15_Res-4-disability-inclusion-FINAL-EN.pdf.

31 International Committee of the Red Cross, *The ICRC’s Vision 2030 on Disability*, 6 August 2020, available at: www.icrc.org/en/publication/4494-icrcs-vision-2030-disability.

32 UNHCR, *Disability Inclusion Action Plan 2020–2023*, 2019, internal document.

33 *Disability Inclusion Strategy*, above note 22.

34 UN Office of the High Commissioner for Human Rights, *Ukraine: 2.7 Million People with Disabilities at Risk, UN Committee Warns*, 14 April 2022, available at: www.ohchr.org/en/statements/2022/04/ukraine-27-million-people-disabilities-risk-un-committee-warns.

35 MFA, above note 8, p. 92.

disabilities can access humanitarian services? Are donor advocacy messages on disability-inclusive humanitarian action relevant and effective? Are grant-awarding criteria tailored to ensure results and positive impact? What are the most effective means of ensuring that impact?

Donors' commitments to flexible funding – and the ensuing trade-offs

In terms of resourcing disability-inclusive humanitarian action, it is important to examine the use of flexible *versus* earmarked funding. Flexible and unearmarked funding is one of the core commitments in the Grand Bargain. The Grand Bargain was launched at the World Humanitarian Summit in 2016 and is an agreement between donors and humanitarian organizations to improve the effectiveness and efficiency of humanitarian action.³⁶ Flexible funding is vital for enabling operational organizations to prioritize allocation of funds based on humanitarian needs and react swiftly to emergencies and crises. Like other donors, Finland has made Grand Bargain commitments to progressively reduce earmarking of humanitarian contributions. While flexible funding can be both unearmarked (also referred to as core) funding, and loosely earmarked funding, Finland aims to provide specifically unearmarked funding.³⁷ In 2021, unearmarked funding comprised 46% of Finland's humanitarian funding.

Despite the Grand Bargain and its related commitments, earmarked funding still plays a role in the humanitarian space. In particular, earmarked funding is one of the tools used by donors to ensure overlooked priorities gain attention. Donors must often weigh the implications of flexible *versus* earmarked funding for thematic and often underfunded priorities such as disability inclusion, gender equality, child protection and psychosocial support. As opposed to flexible funding, earmarked funding is typically used to ensure humanitarian assistance for specific sectoral or thematic priorities and geopolitical contexts. However, the practice has been found to be detrimental to the ability of humanitarian organizations to respond to urgent needs.³⁸ Changing and competing donor priorities have also affected the ability of humanitarian organizations to operate according to their own strategic goals. Organizations can even face difficulties in understanding and fulfilling the multiple, diverse requirements of different donors.

Another trade-off when considering earmarked funding is long-term sustainability and ownership of disability inclusion in the organization receiving

36 IASC, *About the Grand Bargain*, available at: <https://interagencystandingcommittee.org/about-the-grand-bargain>.

37 For detailed definitions of multi-year and flexible funding, see IASC, *Multi-Year and Flexible Funding – Definitions Guidance*, 15 April 2020, available at: <https://interagencystandingcommittee.org/grand-bargain-official-website/multi-year-and-flexible-funding-definitions-guidance>.

38 Interagency Standing Committee Humanitarian Financing Task Team, *Donor Conditions and their Implications for Humanitarian Response*, April 2016, available at: <https://reliefweb.int/report/world/donor-conditions-and-their-implications-humanitarian-response>.

funding.³⁹ In other words, once the earmarked funding ends, there is a risk that progress on disability inclusion will end, unless new or flexible funding is allocated. Earmarked funding may be necessary for now, as humanitarian organizations are not yet sufficiently resourcing disability inclusion. At the same time, organizations receiving significant amounts of earmarked funding for a variety of priorities are less able to adapt operations to the changing contexts and humanitarian needs locally and internationally.⁴⁰

Finally, earmarked funding often faces distinct reporting requirements. Earmarking is typically accompanied by reporting on the use of the earmarked funds, whereas flexible funding may not cover thematic priorities of interest to donors. For donors, earmarking is one way to ensure implementation of protection priorities as well as accountability on the use of public funds to both political decision-makers and taxpayers.⁴¹ Avoiding earmarking of funds would entail humanitarian organizations' integrating disability inclusion into their regular programming and operations, covering costs from their core budget and, importantly, reporting results accordingly.

Moving forward, organizations must apply disability-inclusive budgeting whether from flexible or earmarked funding. While integrating disability-inclusive design into organizational processes and planning does not necessarily require funds, often mainstreaming necessitates actions that do require funding to ensure good-quality implementation. These may be, for example, piloting of new processes such as disability-disaggregated data collection, training on disability and on the rights of persons with disabilities, and participatory activities to engage persons with disabilities and their representative organizations. Also, funds are needed for some accessibility measures such as communication using sign language interpreters and easy-read materials, as well as transportation and personal assistants for persons with disabilities to be able to participate in activities.

Transparent reporting on disability-inclusive humanitarian action as necessary for accountability

For government donors to be held accountable and report to political decision-makers and taxpayers on the use of public funds, mechanisms for reporting and tracking the use of funds are important. Expenditure on disability inclusion does not necessarily translate directly into concrete demonstrable results for persons with disabilities, but lack of tracking the use of funds makes it difficult for donors and humanitarian organizations alike to monitor resources and budget for

39 Piera Tortora and Suzanne Steensen, *Making Earmarked Funding More Effective: Current Practices and a Way Forward*, Organisation for Economic Co-operation and Development, Development Co-operation Directorate Report Number 1, 2014, available at: www.oecd.org/dac/aid-architecture/Multilateral%20Report%20N%201_2014.pdf.

40 Marte Nilsen, *The Politics of Humanitarian Aid to Myanmar: Competing Strategies among Norwegian Aid Organizations*, Peach Research Institute Oslo, 2019, available at: www.prio.org/publications/12330.

41 Victoria Metcalfe-Hough, Wendy Fenton, Barnaby Willitts-King and Alexandra Spencer, *The Grand Bargain at Five Years: An Independent Review*, ODI, London, 8 June 2021, available at: <https://odi.org/en/publications/the-grand-bargain-at-five-years-an-independent-review>.

disability-inclusive humanitarian assistance. Unless disability inclusion is resourced with earmarked funding, donors face difficulties in obtaining reports on implementation of and results from disability inclusion. The use of flexible funding for disability inclusion has not been assessed or researched widely, but one report on monitoring and tracking disability inclusion in multilateral international organizations states that information on expenditure on disability inclusion is mostly lacking.⁴²

A report from the Organisation for Economic Co-operation and Development (OECD) highlights the importance of transparent reporting and discussion of results to ensure more meaningful dialogue with partners.⁴³ Annual reports from multilateral humanitarian organizations are generally based on their overall strategy and annual plans, and cover a vast range of activities, but often do not adequately include results on persons with disabilities accessing humanitarian protection and assistance. Mainstreaming disability inclusion across all programmes can have the largest impact in reaching persons with disabilities. International humanitarian organizations already implement many programmes and operations that benefit persons with disabilities. These are often disability-specific programmes such as physical rehabilitation and provision of assistive devices. Mainstreaming throughout humanitarian protection and assistance appears to be less prevalent. Targeted programmes and actions are certainly vital to persons with disabilities in humanitarian contexts. However, the needs of persons with disabilities are just as varied as those of everyone else; therefore, ensuring access to all humanitarian protection and assistance is important.

Some qualitative information on the implementation of mainstreaming disability inclusion is available primarily from narrative reports, but quantitative data are largely lacking. For UN entities, the UNDIS outlines concrete measures for organizations to take to ensure that they are inclusive to persons with disabilities. The strategy includes an accountability framework with indicators against which UN entities are required to report. The indicators on strategic planning, for example, require disability-disaggregated data. Organizations that have progressed further than the basic level are then expected to implement systems for tracking resource allocation for disability inclusion. With an increasing number of multilateral organizations adopting their own disability-specific strategies and action plans, and UN entities implementing the UNDIS requirements, reporting against various relevant indicators is likely to increase in coming years.

Reliable disability data as largely lacking from reporting

All organizations, including donors, face major challenges in collecting reliable disability data. This is primarily due to gaps in global disability data, disability

42 Mona Christophersen, Ingunn Bjørkhaug and Åge A. Tiltnes, *Tracking Disability Inclusion in Multilateral Organizations*, Faforeport 2022:04, 21 February 2022, available at: www.faf.no/zoo-publikasjoner/faf-rapporter/tracking-disability-inclusion-in-multilateral-organizations.

43 P. Tortora and S. Steensen, above note 39.

data collection, and tracking of expenditure and actions on disability inclusion. Disability-disaggregated data is an area where donor requirements, such as the MFA's, and efforts by organizations have increased. This increase includes a growing use of questions and methodology developed by the Washington Group on Disability Statistics,⁴⁴ which is a UN Statistical Commission City Group focusing on disability data. The Washington Group developed internationally validated questionnaires for reliable and cross-nationally comparable disability data in large-scale surveys, such as censuses. Disability-disaggregated data on persons accessing humanitarian protection and assistance can help identify the specific needs of persons with disabilities through inclusive and accessible baseline assessments, feedback and accountability mechanisms, and monitoring progress toward implementing inclusive and accessible services.

Disability-disaggregated data can provide information on the extent to which persons with disabilities are accessing humanitarian protection and assistance. Still, assessing the impacts of disability-inclusive actions is not enough.⁴⁵ To track implementation of disability-inclusive approaches and demonstrate results, organizations would need to have, for example, a reporting system with mandatory indicators for country-level implementation. Indicators would generate comparable data across the organization and could be used to track annual progress. Internal reporting processes should consistently require and include information on disability inclusion and persons with disabilities. Importantly, reporting requirements must also be extended to implementing partners of humanitarian organizations. Tools for tracking disability-inclusive programming and operations and for collecting disability data already exist. The OECD's Development Assistance Committee (DAC) disability policy marker⁴⁶ for tracking programmes and interventions aimed at inclusion and empowerment of persons with disabilities is one possible tool, for example, that some government donors, including the MFA, and multilateral organizations are already currently using.

Both donors and humanitarian organizations must recognize the importance of allocating adequate time and resources necessary for good-quality disability-inclusive programming and operations as well as data collection and reporting. Although the aforementioned tools for tracking and data collection are gradually being used by multilateral organizations, information from disability data is not yet available in reports. Developing, testing and implementing a marker requires significant time and resources, including setting up systems,

44 The Washington Group on Disability Statistics website provides all of the validated questionnaires, in multiple languages, as well as information on the application of the questionnaires. See Washington Group on Disability Statistics, "Question Sets", available at: www.washingtongroup-disability.com/question-sets/.

45 Claire F. O'Reilly, Louise Caffrey and Caroline Jagoe, "Disability Data Collection in a Complex Humanitarian Organisation: Lessons from a Realist Evaluation", *International Journal of Environmental Research and Public Health*, Vol. 18, No. 19, 2021.

46 OECD-DAC, *The OECD-DAC Policy Marker on the Inclusion and Empowerment of Persons with Disabilities: Handbook for Data Reporters and Users*, 10 December 2020, available at: [https://one.oecd.org/document/DCD/DAC/STAT\(2020\)48/en/pdf](https://one.oecd.org/document/DCD/DAC/STAT(2020)48/en/pdf).

guidance, criteria for each marker level, and training. Testing of disability data collection in humanitarian contexts has shown that training on disability and rights of persons with disabilities are key for reliable data.⁴⁷ Particularly training enumerators and staff can improve the validity and reliability of data. Studies show that a poor understanding of disability results in underestimations of the prevalence of disability.⁴⁸ Inappropriate approaches to disability, such as the medical approach, which focuses on curing the person's impairment as a way for the individual to be part of society, and the charity approach, which views the individual as a passive aid recipient, perpetuate harmful stereotypes and perceptions of persons with disabilities. Not only do the charity and medical approaches to disability overlook the agency of persons with disabilities, but they can also undermine the rights and inclusion of persons with disabilities and even cause harm. Resourcing should include disability-inclusion experts and participation of OPDs to support good-quality and CRPD-compliant, disability-inclusive mainstreaming and programming.

Conclusions

This article has highlighted the significance of investing in transparent expenditure tracking and reporting on results for a meaningful exchange between humanitarian organizations and donors. For continued commitment to flexible funding, humanitarian organizations must be able to report on results of disability-inclusive humanitarian action. Also, donor messages and priorities should be coherent. There exist challenges in balancing reporting on the largest possible quantity of persons in affected populations reached by humanitarian actors with the quality of humanitarian assistance, in other words the extent that persons, who are often in the most vulnerable situations in a crisis, can access humanitarian assistance. Donors often place demands on value for money and cost-effectiveness of reaching the largest number of affected people possible. Resources, such as those described in this article, are essential for reaching those people who cannot readily access humanitarian assistance, such as persons with disabilities. Of course, in acute crises it is vital to reach as many as possible quickly. However, an increasing number of humanitarian crises are prolonged, thus providing opportunities for better and more inclusive planning and implementation. Cost-effectiveness and timeliness of humanitarian assistance for persons with disabilities are likely to improve when disability-inclusive measures are integrated into organizational processes.

In addition, donors should coordinate messaging and avoid competing priorities. At the same time, too few donors are currently prioritizing inclusion of

47 Leonard Cheshire and Humanity & Inclusion, *Disability Data Collection: A Summary Review of the Use of the Washington Group Questions by Development and Humanitarian Actors*, October 2018, available at: www.humanity-inclusion.org.uk/sn_uploads/document/2018-10-summary-review-wgq-development-humanitarian-actors.pdf.

48 *Ibid.*

persons with disabilities in humanitarian action or providing funding towards disability-inclusive humanitarian action. Donor coordination and a broader donor base would create synergies in terms of joint and deeper understanding, and stronger advocacy and policy influencing. For a more effective impact, both donors and humanitarian organizations would benefit from enhanced coordination between donors and joint dialogue with their humanitarian partners. Platforms for dialogue on disability inclusion already exist, for example the aforementioned Group of Friends and the Global Action on Disability Network.⁴⁹

Disability inclusion in humanitarian action is evolving. All stakeholders, including governments, would benefit from sharing good practices and key challenges with each other. Governments and donors can learn from the progress made in other organizations. Government donors, which themselves are large organizations, face the comparable challenges of ensuring that disability inclusion is recognized and mainstreamed across organizational structures and processes, funding instruments and sectors. Similarly to humanitarian organizations, governments should have key elements and technical capacity in place at headquarters, such as strategies and expertise on the rights and inclusion of persons with disabilities, as well as adequate staff in embassies to follow up and maintain dialogue with humanitarian organizations. This would allow for better follow-up on the implementation of disability inclusion and more effective engagement in technical and organization-specific discussions in annual consultations. This would require time, resources and accumulation of knowledge, which can be challenging with a diplomatic rotation system, typical in most foreign ministries. Also, setting up markers and collecting and reporting disability-disaggregated data are challenging for government donors, but a necessary requirement for tracking implementation of policy priorities.

A few key questions deserve further investigation by donors and humanitarian organizations alike. Firstly, although humanitarian organizations may have disability-specific strategies in place for advancing inclusion of persons with disabilities and they may have dedicated high-level experts to discuss and share information on progress, information is not yet available – or perhaps not yet known – on what the actual impact is for affected persons with disabilities in contexts of humanitarian crises. Also, as progress is made in the development and implementation of disability-inclusive humanitarian action, it is as yet not clear to what extent these actions are compliant with the CRPD. Lastly, major gaps remain in facilitating collaboration in the humanitarian sector with OPDs. Funding for capacity building of OPDs on humanitarian action, as well as coordination among national OPDs for easier and more effective collaboration with humanitarian actors, is limited. Dialogue between donors, humanitarian organizations and OPDs on issues raised in this article could help progress disability-inclusive humanitarian action even further.

49 The Global Action on Disability Network is a coordination body of bilateral and multilateral donors, agencies, public and private foundations, as well as key coalitions of the disability movement with a common interest in achieving disability-inclusive international development and humanitarian action. For more information, see GLAD Network, “The Network”, available at: <https://gladnetwork.net/network>.

Mental health and the law: What else is needed for particularly vulnerable contexts facing armed conflict and development obstacles?

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Abstract

Mental disorders have high prevalence for disability and almost 80% of the global burden occurs in low- and middle-income countries. The impacts of mental health conditions can affect many sectors of society and threaten peace, human rights and development. However, international law jurisprudence has not sufficiently developed to guide mental health governance. This paper reviews the international

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legal protections for people who experience mental health conditions, including mental disorders and psychosocial disabilities. It focuses on State application of legal instruments in particularly vulnerable contexts, namely, least developed countries and situations of armed conflict. It argues that relying on existing treaties and soft-law instruments from the health and human rights angles is inadequate, and the Convention on the Rights of Persons with Disabilities is not the right fit. New hard- and soft-law instruments are urgently needed to meet positive obligations and safeguard rights in these vulnerable contexts. Some suggestions for the contents of future instruments are made.

Keywords: Mental health, mental disorders, armed conflict, least developed countries, Convention on the Rights of Persons with Disabilities, humanitarian action.

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Introduction

Globally, mental disorders are among the top seven causes of health-related disability.¹ Almost 80% of the global burden occurs in low- and middle-income countries,² and many of these countries are also the most susceptible to armed conflict. The global prevalence of mental disorders is 10.6% of the population,³ and for populations affected by armed conflict, the prevalence increases to 22.1%.⁴ Despite the high prevalence, people with mental health conditions have not been prioritized as a target of humanitarian aid, development activities or law reform.⁵

“Mental health conditions” is a broad term to cover mental disorders, psychosocial disabilities and other mental states associated with significant distress, impairment in functioning, or risk of self-harm. When distress or impairment reaches a clinically significant level, leading to a disturbance in cognition, emotional regulation or behaviour, it is considered a mental disorder.⁶ Mental disorders

1 Global Burden of Disease Collaborative Network, “Global Burden of Disease Study 2019”, Results, Institute for Health Metrics and Evaluation (IHME), Seattle, WA, 2021, available at: <https://ourworldindata.org/grapher/share-of-total-disease-burden-by-cause> (all internet references were accessed in November 2022).

2 World Health Organization (WHO), *Mental Health and Development: Targeting People with Mental Health Conditions as a Vulnerable Group*, Geneva, 2010, available at: www.who.int/publications/i/item/9789241563949; WHO, *World Mental Health Report: Transforming Mental Health for All*, Geneva, 2022, available at: www.who.int/teams/mental-health-and-substance-use/world-mental-health-report.

3 Global Burden of Disease Collaborative Network, above note 1.

4 Fiona Charlson, Mark van Ommeren, Abraham Flaxman, Joseph Cornett, Harvey Whiteford and Shekhar Saxena, “New WHO Prevalence Estimates of Mental Disorders in Conflict Settings: A Systematic Review and Meta-Analysis”, *Lancet*, Vol. 394, No. 10194, 2019.

5 Report of the Special Rapporteur, Paul Hunt, on The Right of Everyone to the Enjoyment of the Highest Available Standard of Physical and Mental Health, UN Doc. E/CN.4/2003/58, 13 February 2003.

6 WHO, “Mental Disorders”, 8 June 2022, available at: www.who.int/news-room/fact-sheets/detail/mental-disorders. Note that, across the sectors, the terms “mental illness” and “mental disorder” are used interchangeably. This paper will use the terminology “mental disorders”, as outlined by the WHO and the American Psychiatric Association, unless referring to the specific language of a legal instrument where, for example, the term “mental illness” is used.

include, among others, depressive disorders, anxiety disorders, schizophrenia, bipolar disorder and post-traumatic stress disorder. A psychosocial disability refers to the social consequences of a disability and the way that life is impacted by a mental disorder, such as limitations from being in certain environments, concentration, coping with life challenges, managing stress and interacting with others. The term “disability” arises if a person faces barriers to their equality with others.

The impact of mental health conditions reaches many sectors of society. The impacts include high unemployment rates, homelessness, poor educational and health outcomes, and poverty; and these issues are directly linked to the Sustainable Development Goals adopted in 2015.⁷ Positive mental health for individuals protects dignity and is linked to good development outcomes, including: improved productivity, health, academic achievement, relationships, social networks, quality of life and coping with adversity.⁸ For communities as a collective, this positive effect is magnified because good mental health for individuals also improves their ability as a breadwinner or caregiver, and as a supporting member of the family and community to which they belong. People are resilient, and if their mental health needs are addressed, they will be more likely to find reasons for hope, to help others and to participate in economic activities.

In contrast, poor mental health at an individual level depletes people’s inner resources, and mental health conditions can be exacerbated and become long-term problems. At a community level, poor mental health hinders social cohesion and community contribution,⁹ and this can lead to unhealthy cycles of social unrest and propensity for violence and armed conflict. Communities can struggle to regain a sense of agency, and efforts to rebuild strong communities can be negatively impacted, both in the short term, and they can also undermine the long-term well-being of a population. As a result, these impacts of mental health conditions may threaten peace, human rights and development. Despite the prevalence and burden of disease, and the important role of mental health, international law jurisprudence has not sufficiently developed to guide mental health governance.

This paper will outline the international legal protections for people who experience mental health conditions, including mental disorders and psychosocial disabilities.¹⁰ It will focus on State application of legal instruments in particularly vulnerable contexts. For the purpose of this paper, particularly vulnerable contexts include least developed countries (LDCs) and situations of armed conflict. This paper will argue that reliance on existing treaties and legal instruments is inadequate and that new hard- and soft-law instruments are urgently needed to meet positive obligations and safeguard rights.

7 UN General Assembly, Transforming our World: The 2030 Agenda for Sustainable Development, General Assembly Resolution 70/1, UN Doc. A/RES/70/1, 21 October 2015.

8 *Ibid.*

9 *Ibid.*

10 This paper focuses on the legal instruments. A deeper discussion on economic and resource issues is beyond the scope of this paper.

LDCs and situations of armed conflict

LDCs are low-income countries experiencing severe obstacles to sustainable development due to structural instability, economic insecurity, disaster vulnerability, and poor medical infrastructure and human assets.¹¹ The United Nations (UN) lists forty-six LDCs: 72% in Africa, 20% in Asia, 6% in the Pacific, and 2% in the Caribbean.¹² These countries comprise 12% of the global population; however, they account for less than 2% of the gross domestic product (GDP).¹³ Only six countries have graduated from LDC status since 1994, revealing the challenges of overcoming development barriers. Other particularly vulnerable contexts are those which are affected by armed conflict. Of the ten world's poorest countries, eight have suffered from large-scale armed conflicts.¹⁴ While armed conflict can occur as a result of many factors, there is a nexus between those facing development barriers such as economic stagnation, political and social inequalities, and environmental degradation, and those with security issues and the incidence of violence.

The following section will outline relevant international law instruments as they relate to mental health law, and highlight limitations which apply in particularly vulnerable contexts, that is, LDCs and situations of armed conflict. It will focus on UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (UNMI principles)¹⁵ adopted by the General Assembly Resolution in 1991; the World Health Organization's (WHO's) ten basic principles of mental health law (WHO MHL principles), developed in 1996;¹⁶ and the Convention on the Rights of Persons with Disabilities (CRPD).¹⁷

Relevant international law instruments regarding mental health protections

In terms of hard law, there is no specialized treaty which outlines detailed international legal protections specific to mental health. Some treaties mention mental health, but they do not contain sufficient provisions, specific to mental health, to create positive duties for States; to limit the exercise of procedural discretions regarding mental health; nor to ensure effective remedies for

11 United Nations (UN) Conference on Trade and Development, "UN Recognition of the Least Developed Countries", 2021, available at: <https://unctad.org/topic/least-developed-countries/recognition>.

12 *Ibid.*

13 *Ibid.*

14 Frances Stewart, "Root Causes of Violent Conflict in Developing Countries", *British Medical Journal*, Vol. 324, No. 7333, 2002.

15 UN General Assembly, Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, General Assembly Resolution 46/119, UN Doc. A/RES/46/119, 17 December 1991.

16 WHO, *Mental Health Care Law: Ten Basic Principles*, Geneva, 1996.

17 UN General Assembly, Convention on the Rights of Persons with Disabilities, General Assembly Resolution 61/106, UN Doc. A/RES/61/106, 24 January 2007 (CRPD).

violations. For example, the WHO Constitution (1946) declares that the highest attainable standard of health is a fundamental right of every human being. This creates a legal obligation on States to ensure access to healthcare and to address health determinants, such as water, food, housing, health-related information and education, and gender equality. As we cannot separate mind and body, mental healthcare is contained within healthcare, but this has not always been automatically assumed by States without explicit mention. This general right to health is also outlined in Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) whereby States Parties are to take steps to realize the right of everyone to “the enjoyment of the highest attainable standard of physical and mental health, including sexual and reproductive health”.¹⁸ While mental health is specifically referenced as a human right in the ICESCR, the specificities of mental healthcare are absent, as is sufficient legal interpretation and commentary on the treaty, with relation to mental health. The CRPD has made some steps in the right direction, but as can be seen later in this paper, it also does not answer the necessary questions for mental health.

In addition to the gaps, dispersion of mental healthcare laws makes it hard to consolidate the guidance. In some States, resources for mental health services are outlined in local law,¹⁹ but, in most, the funding of the services is seen as the responsibility of the Executive and policy makers. This means that trying to gather mental health laws and socio-economic rights which are spread throughout different laws can make it problematic for enforcement, and protections can become piecemeal and incomplete. It also offers States a wide margin of appreciation in implementing standards and incorporating the provisions into domestic legislation. This has not helped to advance the agenda for mental health rights. As a result, there remains a gap in hard law and its application, and subsequently a gap in mental health protections.

With regards to soft-law guidance on the topic of mental health in vulnerable contexts, this can be found in: The International Committee of the Red Cross (ICRC) Guidelines for Mental Health and Psychosocial Support²⁰ and the Inter-Agency Standing Committee (IASC) Guidelines on Mental Health and Psychosocial Support in Emergency Settings.²¹ The ICRC publication includes the framework and approach to mental health and psychosocial support during and after armed conflicts and other situations of violence. This guideline raises

18 Constitution of the World Health Organization, New York, 22 July 1946 (entered into force 7 April 1948); UN General Assembly, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. A/RES/2200, 16 December 1966.

19 For example, mental health law in Brazil (no. 102216) legislates the government to allocate resources to mental health governance and services that are inclusive.

20 ICRC, *Guidelines on Mental Health and Psychosocial Support*, 2017, available at: www.icrc.org/en/publication/4311-guidelines-mental-health-and-psychosocial-support.

21 IASC, *Guideline: Mental Health and Psychosocial Support in Emergency Settings*, 2007, available at: <https://interagencystandingcommittee.org/system/files/2020-11/IASC%20Guidelines%20on%20Mental%20Health%20and%20Psychosocial%20Support%20in%20Emergency%20Settings%20%28English%29.pdf>.

awareness of the mental health needs of affected populations and how mental health and psychosocial support should be provided. The IASC Guidelines were created to coordinate action among government and non-government humanitarian actors in the domain of mental healthcare in emergencies. They provide a multi-sectoral, inter-agency framework for effective coordination, identification of useful practices (and flag potentially harmful practices), clarification of different interventions, and form part of an advocacy package. While both guidelines are well regarded in the international humanitarian sectors, they are designed for practitioners and do not provide specific and binding guidance for States for advancing legal protections for people with mental health conditions.

Two other sources of guidance in international mental health law are the UNMI principles²² adopted by a General Assembly Resolution in 1991; and the WHO MHL principles, developed in 1996.²³ As they are human rights instruments, they have universal application during times of armed conflict and peace. At their creation in the 1990s, they were seen to be pioneering in the field. Both are non-binding but may be argued to have normative value such that many States have accepted them as voluntary guidance.²⁴

Critics of the UNMI and WHO ML principles say that the protection of human rights for people with mental illness is more limited in these documents than those offered under the International Bill of Rights.²⁵ For example, the UNMI principles refer in nineteen of the twenty-five principles to “patients” and not “people”, so it can be argued that they provide a standard, dependent on medical status.²⁶ In contrast, the International Bill of Rights applies to all people at all times by virtue of being human. Nevertheless, General Comment No. 5 of the ICESCR supported the UNMI principles as a guide to the protections for people who have mental health conditions that all States should be striving to implement.²⁷

While the advent of these principles acknowledged the need to protect people with mental health conditions, many particularly vulnerable contexts are challenged in implementing them. The challenges relate to resource limitations such as the absence of qualified personnel, inadequate infrastructure, security

22 UN General Assembly, above note 15.

23 WHO, above note 16.

24 The Special Rapporteur on the Right to Health can report on which States are implementing relevant laws related to mental health in the context of the UN General Assembly Resolution and others. See UN Office of the High Commissioner of Human Rights (OHCHR), “Special Rapporteur on the Right to Health”, available at: www.ohchr.org/en/special-procedures/sr-health. See also, for reports on mental health and human rights, OHCHR, “Mental Health and Human Rights: OHCHR and the Right to Health”, available at: www.ohchr.org/en/health/mental-health-and-human-rights.

25 Melinda Jones, “Can International Law Improve Mental Health? Some Thoughts on the Proposed Convention on the Rights of People with Disabilities”, *International Journal of Law and Psychiatry*, Vol. 28, No. 2, 2005.

26 According to the UNMI principles, a “[p]atient” means a person receiving mental health care and includes all persons who are admitted to a mental health facility”. UN General Assembly, above note 15, Annex, definition (f).

27 UN Committee on Economic, Cultural and Social Rights, General Comment No. 5: Persons with Disabilities, UN Doc. E/1995/22, 9 December 1994.

considerations, access challenges, and non-existent, incomplete or piecemeal mental health rule of law. Additionally, questions about the suitability of international legal definitions and legal instruments remain unanswered. Each of these challenges will be elaborated below.

Prevention and equity of access, but how with resource limitations?

Principles 1 and 2 of the WHO MHL and UNMI principles highlight the prevention of mental illness and equity of access to mental healthcare. While ideal goals, realizing these protections may be difficult for many particularly vulnerable contexts that are resource-restricted due to low GDP, security issues, armed conflict and/or vulnerability to disaster. In 2015 it was estimated that 58% of all people living with dementia reside in low- and middle-income countries; and it is also expected that by 2050, Asia will account for nearly half of the world's cases of dementia (due to population volume and an ageing population of illness co-morbidities)²⁸. Such prevalence rates mean that there is a great need for medical and psychiatric care, and for social services to support daily psychosocial needs. In parallel, changing lifestyle patterns in communities have also affected morbidity. Historically, ageing family members were cared for within the family unit, but due to increasing urbanization of the population and geographic dispersion, or family separation due to conflict, this family-as-carer role has increasingly become harder to fulfil. People living longer due to advances in medical technology has also meant increasing vulnerabilities and co-morbidities needing intervention. In States affected by armed conflict, there may be a redirection of the scarce healthcare resources away from mental healthcare and into treatment for the wounded and sick. Essentially, the legal principles of prevention of mental illness are admirable but can sometimes only be attained through a greater access to mental healthcare and social services, which is lacking in particularly vulnerable contexts due to low State capacity and resources.

A further challenge to realizing these principles is the geographic maldistribution of mental health services in many States. In China, for example, about 80% of psychiatrists practise from cities, although about 80% of the population lives in rural areas.²⁹ This means reduced equity of access and a challenge in meeting the WHO MHL and UNMI principles 1 and 2.

Furthermore, analysis of humanitarian data shows that people living in the most fragile ecosystems are most prone to environmental shocks such as natural disasters.³⁰ While disaster risk is a global experience, its negative impacts can more greatly affect particularly vulnerable contexts because of their reliance on natural resources and less resilience to climatic alterations.³¹ It is thus cyclical

28 Alzheimer's Disease International, *World Alzheimer Report 2015*, London, October 2015, available at: www.alzint.org/u/WorldAlzheimerReport2015.pdf.

29 Allan Tasman, "Too Few Psychiatrists for Too Many", *Psychiatric Times*, Vol. 32, No. 4, 2015.

30 M. M. G. T. De Silva and Akiyuki Kawasaki, "Socioeconomic Vulnerability to Disaster Risk: A Case Study of Flood and Drought Impact in a Rural Sri Lankan Community", *Ecological Economics*, Vol. 152, 2018.

31 *Ibid.*

that the most vulnerable people (due to cumulative exposures) are the most prone to mental health conditions, and the most prone are more vulnerable.

As a result of these concerns, particularly vulnerable contexts will find challenges in applying the principles of prevention and equity of mental health access when they are not in control of the social determinants of health, such as high incidence of difficult-to-manage diseases, conflict, poor social services, and exposure to environmental shocks that deplete coping resources.

Best practice mental health assessments, but are there enough qualified personnel?

Principles 3 and 4 of the WHO MHL and UNMI principles require that mental health assessments be conducted using international manuals³² such as the *ICD-11 International Classification of Diseases*.³³ In reality, the use of this manual involves the education and availability of trained staff, both scarcely available in particularly vulnerable contexts where there are few psychiatrists or psychologists. Research has shown that the ratios of psychiatrists per capita in the Global North are around 10–16 per 100,000; in contrast, the numbers of psychiatrists in Africa are 0.33 per 100,000; Western Pacific around 0.32; and Southeast Asia around 0.2.³⁴ For perspective, the United States, with only about 5% of the global population, has about 30% of the world’s psychiatrists.³⁵

The “brain drain” caused by emigration to more developed countries of psychiatrists who originate from low- and middle-income countries has also impacted on the population ratios of psychiatrists.³⁶ It is predicted that many particularly vulnerable contexts would have more than double the number of psychiatrists per 100,000 population (e.g. Bangladesh, Myanmar, Afghanistan), and some would have five to eight times more psychiatrists per 100,000 (e.g. Pakistan, Sri Lanka, Liberia, Nigeria and Zambia), if this did not occur.³⁷ The World Psychiatric Association Taskforce on the “brain drain” conducted a study to examine push and pull factors for emigration. They found that professional isolation, limited multi-disciplinary opportunities with other mental health professionals, training limitations, and poor treatment conditions for people with mental health conditions were key factors for emigration.³⁸ Armed conflict and

32 UN General Assembly, above note 15; WHO, above note 16.

33 WHO, *ICD-11 – International Classification of Diseases, 11th Revision*, Geneva, 2019/2021, available at: <https://icd.who.int/en>; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed., text rev., 2022, available at: <https://doi.org/10.1176/appi.books.9780890425787>.

34 Rachel Jenkins *et al.*, “International Migration of Doctors, and Its Impact on Availability of Psychiatrists in Low and Middle Income Countries”, *PLoS One*, Vol. 5, No. 2, 2010.

35 *Ibid.*

36 Benedetto Saraceno, Mark van Ommeren, Rajaie Batniji, Alex Cohen, Oye Gureje, John Mahoney, Devi Sridhar and Chris Underhill, “Barriers to Improvement of Mental Health Services in Low-Income and Middle-Income Countries”, *Lancet*, Vol. 370, No. 9593, 2007.

37 *Ibid.*

38 Oye Gureje, Sheila Hollins, Michel Botbol, Afzal Javed, Migue Jorge, Violet Okech, Michelle Riba, Jitendra Trivedi, Norman Sartorius and Rachel Jenkins, “Report of the WPA Task Force on Brain Drain”, *World Psychiatry*, Vol. 8, No. 2, 2009.

instability within their country of origin can be speculated as also playing a role. Having standards that mental health assessments must be conducted using international manuals is aspirational; however, in practice, very few particularly vulnerable contexts can meet this principle. With less mental health professionals staying in their country of origin, it becomes a problem hard to resolve for such countries to meet the necessary assessment standards.

Mental healthcare under least restrictive means, but how with no suitable facilities?

UNMI principle 9 and WHO MHL principle 4 both stipulate that people with mental disorders should be provided with healthcare which is the least restrictive practice.³⁹ The principles guide that community-based mental health services should be made available to people who are of lower acuity (with less severe symptoms), and institution-based treatments should be provided for people who are higher in acuity (with more severe symptoms). However, issues arise when in particularly vulnerable contexts there are no community services or facilities to implement the least restrictive practice, or a mental health facility has been destroyed and health professionals have fled due to armed conflict. In all of these scenarios, considerations of the need for an involuntary admission to a hospital are impossible and/or in many cases detention facilities are used for containment of people with mental health conditions.⁴⁰ Detention facilities are created for deterrence and punishment rather than treatment and care. They are not equipped or staffed for the provision of health services, nor are they conducive to good mental health. Holding people with a mental health condition in a detention facility exposes them to risk of discrimination and a decline in their mental state. People with mental health conditions should be diverted to the mental health system.

With regards to places of mental health service provision, according to the WHO, 68% of countries have psychiatric training programmes, and, of these, 38% have the availability of psychiatric wards, 39% have rehabilitation beds, 55% have places to care for people who are deemed high risk due to their mental disorder, and 50% offer day service/outpatient-type support.⁴¹ However, if particularly vulnerable contexts do not have these services due to development- or conflict-related barriers, and budget does not allow for such improvements, this leads to questions regarding whether the liberty of people who have a mental health condition can be addressed by least restrictive means according to the legal standard.

39 UN General Assembly, above note 15; WHO, above note 16.

40 It is beyond the scope of this paper to deepen the discussion on the needs of people with mental health conditions within detention environments, or people deprived of their liberty due to mental disorders with no criminal charge, or considerations of internment, even though this discussion is still much needed in mental health law reform.

41 WHO, *Atlas: Psychiatric Education and Training across the World 2005*, Geneva, 2005.

Decisions about people with mental health conditions without mental health rule of law

UNMI principle 1 and WHO MHL principle 10 indicate that decisions about people with mental health conditions must be made in accordance with the rule of law in that jurisdiction and not arbitrarily.⁴² However, there are many jurisdictions without adequate rules of law around mental health. According to the WHO, 25% of countries have no mental health legislation at all.⁴³ The international disparity is evident, whereby 92% of countries in Europe have mental health laws; however, only 67% in Africa, and 13% of the Western Pacific have such laws.⁴⁴ Without such legislation, it is thus feasible that particularly vulnerable contexts might make decisions about people with mental health conditions arbitrarily.

Even worse is that, in some countries, domestic laws actively violate human rights.⁴⁵ For example, in some countries the mental health laws are considered discriminatory whereby they encourage the authorities to imprison and forcibly commence treatment.⁴⁶ In such circumstances, having no laws at all would be better than having ones which defy the principles and violate human rights. These countries are in urgent need of mental health legal reform.

Consent to treatment without a definition

Consent to treatment is another challenging area for the implementation of mental health protections in particularly vulnerable contexts. Article 7 of the International Covenant on Civil and Political Rights provides that no one shall be subjected without their free consent to medical or scientific experimentation;⁴⁷ and UNMI principle 5 discusses self-determination, and that consent is required before any type of interference, such as diagnostic procedures, medical treatment and mandatory commitment to hospital. However, there is no suitable mental health definition in international law of free consent, especially as it pertains to involuntary mental health treatment for people who are experiencing psychosis, suicidal or homicidal ideation⁴⁸. Where a person's risk of harm to self or others has been deemed in need of medical intervention for safety considerations, without a definition and adequate mental health legislation this is hard to attain for particularly vulnerable contexts, and in fact all States.

42 UN General Assembly, above note 15; WHO, above note 16.

43 WHO, *Atlas: Mental Health Resources in the World 2001*, Geneva, 2001.

44 *Ibid.*

45 Mental Disability Rights International, *Behind Closed Doors: Human Rights Abuses in the Psychiatric Facilities, Orphanages and Rehabilitation Centers of Turkey*, Istanbul, 28 September 2005, p. 32, available at: www.driadvocacy.org/wp-content/uploads/turkey-final-9-26-05.pdf.

46 Natalie Drew *et al.*, "Human Rights Violations of People with Mental and Psychosocial Disabilities: An Unresolved Global Crisis", *Lancet*, Vol. 378, No. 9803, 2011.

47 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

48 The UNMI principles have some definition of consent, but competing rights in law can sometimes nullify it (see the section of this paper below under the heading "Disability instruments: Are they the right fit?" where the clash of the right to liberty and the right to treatment is discussed).

The African Commission on Human and Peoples' Rights⁴⁹ and the Inter-American Court on Human Rights⁵⁰ have ruled on matters relating to the rights of persons with mental disorders and psychosocial disabilities. Additionally, there is a range of case law under the European Convention on Human Rights related to persons with mental disorders/illness. For example, in *Herczegfalvy v. Austria*, the European Court of Human Rights held that the position of powerlessness experienced by persons institutionalized due to a mental disorder should allow for enhanced vigilance in the application of the human rights norms.⁵¹ This shows the importance of law in the field and how it can be used to improve mental healthcare.

Disability instruments: Are they the right fit?

In an attempt to address the gaps, in 2008 the prominent disability instrument, the CRPD,⁵² took effect. As of 2022, the CRPD has 164 signatories and 185 parties, and has been quickly ratified by many States, some with reservations such as Australia, which exercises a margin of appreciation in administering medication involuntarily when it is considered a last resort, and France, which does not consider it legally binding.⁵³

The CRPD adopts a human rights-based approach to disability and was designed to supersede previous international soft-law developments, including the UNMI and WHO MHL principles. It was intended to reflect the most advanced international human rights standards on the rights of persons with psychosocial disabilities.

Some agencies have used the CRPD for legislative change. For example, an Indian non-governmental organization represented the rights of people with mental health conditions against the State in the High Court of Karnataka, India, using the CRPD. They were raising awareness of the lack of rights-based legislation; discrimination against people with mental disorders in the domestic legislation; and inactivity in the implementation of the National Mental Health Plan of India.⁵⁴ The successful case led to legislative and policy reforms, including improved hospital standards for mental healthcare, creating an open psychiatric ward (where doors are not locked) and establishing a budget for mental health resource allocation.

This case illustrated how international and local development agencies have a critical role in oversight and redress for mental health law reform, although they

49 African Commission on Human and Peoples' Rights, *Purohit and Moore v. The Gambia*, Communication No. 241/2001, Judgment, 15–29 May 2003.

50 Inter-American Court of Human Rights, *Ximenes-Lopes v. Brazil*, Series C, No. 149, Judgment, 4 July 2006.

51 European Court of Human Rights, *Herczegfalvy v. Austria*, Application No. 10533/83, Judgment, Merits and Just Satisfaction (Court Chamber), 24 September 1992.

52 CRPD, above note 17.

53 *Ibid.*

54 National Human Rights Commission and National Institute of Mental Health and Neurosciences, *Mental Health Care and Human Rights*, New Delhi, 2008, available at: www.antonioacasella.eu/archipsy/nagaraja_2008.pdf.

should not be the primary method for addressing human rights violations. Judicial review, monitoring mechanisms, and access to legal remedies in domestic law must be available to people with mental health conditions on an equal and accessible basis in all countries, including particularly vulnerable contexts.

While its contribution to the protection of persons with disabilities is of course noteworthy, the CRPD has been argued to require reconsideration of mental health and mental capacity law. With its foundations in the rights-based model, it introduced a new theory into international law whereby it relied on the social model of disability such that disability is considered by social determinants rather than limitations or impairments. While the social model can be argued as a favourable approach, the CRPD, however, offers no definition of which disabilities are in scope. As such, how it should be implemented for the mental health sector has lacked clarity.

Other criticisms of the CRPD refer predominantly to Article 12 and Article 14. Article 12 states that all persons with disabilities must be allowed to exercise legal capacity,⁵⁵ thus prohibiting practices such as forced admission and treatment, guardianship and other forms of substitute decision-making. Article 14 on the right to liberty and security of the person states that persons with disabilities should not be deprived of their liberty unlawfully or arbitrarily.⁵⁶ This means that “persons with mental health conditions cannot be involuntarily detained in mental health services or other facilities such as institutions, sheds, or houses”.⁵⁷

Some health practitioners argue that Articles 12 and 14 of the CRPD undermine the rights to the highest attainable standard of health, because measures such as guardianship, involuntary admission and treatment are necessary to prevent danger to oneself or others and to ensure that people receive the care and support they need. This is especially pertinent where a symptom of the mental health episode is poor judgement and decision-making.⁵⁸ It thus becomes a clash of the right to liberty and the right to treatment. Other mental health practitioners who are critics argue that, under the CRPD, persons experiencing psychosis, or manic spending in the context of bipolar disorder, or older persons with dementia, who may be unable to care for their own needs or finances, cannot be compelled to have a guardian and this is problematic as it can cause irreparable harm to their life.⁵⁹ Other scholars have posited that specific/specialized mental health law leads to stigmatization,⁶⁰ and exclusively focusing

55 Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014), Article 12: Equal Recognition before the Law, UN Doc. CRPD/C/GC/1, 19 May 2014.

56 *Ibid.*, Art. 14.

57 *Ibid.*

58 Melvyn Colin Freeman, Kavitha Kolappa, Jose Miguel Caldas de Almeida, Arthur Kleinman, Nino Makhashvili, Sifiso Phakathi, Benedetto Saraceno and Graham Thornicroft, “Reversing Hard Won Victories in the Name of Human Rights: A Critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities”, *Lancet Psychiatry*, Vol. 2, No. 9, 2015.

59 Paul S. Applebaum, “Saving the UN Convention on the Rights of Persons with Disabilities – From Itself”, *World Psychiatry*, Vol. 18, No. 1, 2019.

60 Alfred Allan, “The Past, Present and Future of Mental Health Law: A Therapeutic Jurisprudence Analysis”, *Law in Context*, Vol. 20, No. 2, 2003.

laws on people who have a mental health condition should be repealed as it is discriminatory.⁶¹ All of these criticisms argue against the CRPD in the domain of mental health, claiming that people's rights are undermined by some of the CRPD provisions. It can thus be presented that the CRPD does not adequately fit a mental health context.

In terms of the disability terminology, practitioners from the mental health sector may also debate the classification of people who live with mental health conditions as being disabled. It would be rare to find a label of disability for someone who suffers a chronic physical health condition such as asthma or diabetes. As such, it is discriminatory to label and fragilize someone who suffers chronic depressive or anxiety disorders by calling them disabled. Impacts on daily functioning resulting from a mental health episode were not likely the target audience for the drafters of the object and purpose of the treaty provisions in the CRPD and therefore the legal framework remains inadequate guidance for States to encompass the range of needs in the mental health domain.

In summary, despite the existence of the UNMI and WHO MHL principles, a gap exists in the international law instruments for safeguarding mental health rights. Additionally, the CRPD is not an adequate fit for the protections needed for mental health. For particularly vulnerable contexts suffering from underdevelopment whereby they have low GDP, low State capacity, poorly resourced and funded medical services, or destroyed infrastructure due to armed conflict, this gap widens. Given the breadth of particularly vulnerable contexts (LDCs and situations of armed conflict) across many countries and continents, this demonstrates a need for a global legal change.

Global legal change in mental health law

Global legal change in mental health law could be accomplished by either developing new hard law such as an Additional Protocol to the CRPD focusing specifically on mental health (noting this does not alleviate the argument of fit), or the soft-law UNMI and WHO MHL principles should be redefined for particularly vulnerable contexts such as LDCs and situations of armed conflict. Whichever method is chosen, to be useful, the laws would need to address the following topics:

- Definition of mental illness and which mental disorders and psychosocial disabilities are considered in scope;
- Definition of consent, right to consent to treatment, and right to refuse treatment;
- Conditions in admitted facilities and residential facilities which resemble institutions;
- How to handle involuntary mental healthcare within the scope of human rights when someone is at risk of harm to themselves and others, especially if there are no suitable facilities;

61 Tom D. Campbell, "Mental Health Law: Institutionalised Discrimination", *Australian & New Zealand Journal of Psychiatry*, Vol. 28, No. 4, 1994.

- If and when the use of mechanical and chemical restraints and electroconvulsive therapy is allowed;
- What to do if there are no qualified practitioners or facilities for assessment and treatment, especially in particularly vulnerable contexts;⁶²
- Regulation of community-based orders;
- Specific guidance regarding minors and people in forensic facilities and hospitals in an LDC context;
- Confidentiality protections;
- Guidance on guardianship proceedings;
- A legal framework to support the use of advanced consent agreements so that people can designate their care requests when they are well and give the authority to a third party to execute in the event they become unwell;
- Requirement that review bodies satisfy natural justice or due process procedures;
- Creation of provisions in the law to ensure that people who are deemed by medical professionals to be medically incompetent must also have the right of review of their competency by an independent medical professional;
- In situations of armed conflict, people with mental health conditions have not been explicitly protected under international humanitarian law. Therefore, global legal change must also consider the protections during armed conflict, especially as contemporary conflicts are increasingly long and create chronic vulnerabilities.

Whether hard law in the form of a new CRPD treaty protocol or soft law such as revisions to the UNMI and WHO MHL principles adapted for particularly vulnerable contexts, effective change and development are needed to guide mental health law reform.

Conclusion

If globally mental disorders have high prevalence for disability and almost 80% of the global burden occurs in low- and middle-income countries, we are forced to no longer deprioritize them as a target of development and reform. If the impacts of mental health conditions may also threaten peace, human rights and development, we must act now, or else face more protracted crises.

62 Consider the use of digital technology and capacity building. Many people living with mental disorders have no access to mental healthcare, but most have access to a mobile phone. Digital technology has been shown to hold potential for improving access to, and quality of, mental healthcare in low- and middle-income countries. For a review, see John A. Naslund, Kelly A. Aschbrenner, Ricardo Araya, Lisa A. Marsch, Jürgen Unützer, Vikram Patel and Stephen J. Bartels, “Digital Technology for Treating and Preventing Mental Disorders in Low-Income and Middle-Income Countries: A Narrative Review of the Literature”, *Lancet Psychiatry*, Vol. 4, No. 6, 2017. This would mean that psychiatric, psychological and social services could be provided by qualified people in places more distant from them, and that mental health law reform could involve legislating how this occurred consistent with the international legal framework. This would address the matter of qualified personnel per capita, perhaps slow the trend of the brain drain, and would also allow the matter of review of decisions.

Similarly, if international law jurisprudence, including the CRPD, is inadequately guiding the governance of mental health development in particularly vulnerable contexts, and is in fact allowing violations of human rights to occur, there is no justification for inaction. As mental health law involves a relationship between the State, the community and the individual, with a high need for balancing coercion and human rights, it is critical to get it right.

In December 2019, the 33rd International Conference of the Red Cross and Red Crescent Movement marked an important milestone in the field of mental health and psychosocial support, namely, a Resolution was adopted to address the mental health and psychosocial needs of people affected by armed conflicts, natural disasters and other emergencies.⁶³ The Resolution was signed by the Red Cross and Red Crescent Movement together with the 196 States as signatories of the Geneva Conventions. The Resolution is an urgent call for increased action and sets a joint agenda for States to: ensure early and sustained access to mental healthcare for emergency-affected populations; to increase local and community-based action and cooperation; and to integrate mental healthcare into all humanitarian activity including health, education and protection. With the advent of this Resolution, there cannot be a riper time to establish the international legal protections for people with mental health conditions, including mental disorders and psychosocial disabilities. This jurisprudence is critical to help particularly vulnerable contexts such as LDCs and situations of armed conflict tackle this issue, and to meet positive obligations and protect rights.

63 33rd International Conference of the Red Cross and Red Crescent, “Resolution 2: Addressing Mental Health and Psychosocial Needs of People Affected by Armed Conflicts, Natural Disasters and Other Emergencies”, 33IC/19/R2, Geneva, Switzerland, 9–12 December 2019, available at: <https://pscentre.org/wp-content/uploads/2020/10/solution.pdf>.

Advancing towards inclusive peace and security: Persons with disabilities and Security Council Resolution 2475

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Abstract

Persons with disabilities are at higher risk of injury or death during an armed conflict, either as specific targets or through inability to protect themselves. Humanitarian responses concentrate on meeting the immediate basic needs of an average population. Yet historically, the situation of persons with disabilities during armed conflict, as well as peacebuilding processes, has been largely absent in the discussion at the Security Council. On 20 June 2019, the United Nations Security Council unanimously passed Resolution 2475. This groundbreaking text marks the first time the Council has dedicated an entire resolution to the situation of persons with disabilities in situations of armed conflict. The resolution has significantly raised the attention and understanding of the situation of persons with disabilities in the context of the armed conflict in the Security Council and beyond. This article details the process that led to Resolution 2475, as well as what has happened since.

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Keywords: Persons with disabilities, United Nations Security Council (UNSC), UNSC Resolution 2475, inclusive peace, Convention on the Rights of Persons with Disabilities (CRPD), CRPD Article 11, protection of civilians.

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Introduction

Persons with disabilities make up about 15% of the world's population.¹ Estimates suggest that, out of the 235 million people who needed humanitarian protection and assistance in 2021, thirty-five million were persons with disabilities.² Of the 79.5 million people forcibly displaced in 2019 as a result of conflict, persecution and human rights violations, approximately twelve million are persons with disabilities.³ It is well reported that persons with disabilities are at higher risk of injury or death during an armed conflict, either as specific targets or through inability to protect themselves.⁴ Armed conflict and humanitarian emergencies have a devastating and disproportionate impact on persons with disabilities, in all phases of conflict and its consequences: for persons in conflict zones; for those fleeing conflict; and for those in post-conflict situations or dealing with the aftermath of conflict.⁵

During armed conflict, persons with disabilities face numerous threats to their physical and mental wellbeing, up to and including being subjects of targeted killings, which can aggravate pre-existing disabilities and lead to secondary disabilities. They often cannot access humanitarian assistance, basic services and shelter. Women and girls with disabilities, in particular, are more often victims of sexual and gender-based violence, as compared to their counterparts without disabilities. According to the Women's Refugee Commission, women with physical disabilities and women and girls with intellectual disabilities are at higher risk of rape and other forms of sexual violence in both camp and urban refugee settings. Equally, children with disabilities are three times more likely to experience sexual violence,⁶ and three to

1 World Health Organization (WHO) and the World Bank, *World Report on Disability*, WHO, Geneva, 14 December 2011, p. 30, available at: www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability (all internet references were accessed in September 2022).

2 United Nations (UN) Office for the Coordination of Humanitarian Affairs, *Global Humanitarian Overview 2021*, 1 December 2020, available at: <https://2021.gho.unocha.org/>.

3 Office of the United Nations High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2019*, 18 June 2020, available at: <https://reliefweb.int/report/world/global-trends-forced-displacement-2019>.

4 Diakonia International Humanitarian Law Centre, *Conflict and Persons with Disabilities: Fact Sheet*, 3 December 2021, available at: <https://reliefweb.int/report/world/fact-sheet-conflict-and-persons-disabilities-3-december-2021>.

5 Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, 2019.

6 Women's Refugee Commission, *Gender-based Violence among Displaced Women and Girls with Disabilities: Findings from Field Visits 2011–2012*, available at: www.womensrefugeecommission.org/wp-content/uploads/2020/04/GBV_and_disability_field_visit_findings_022513.pdf.

four times more likely to experience violence in general, compared to their peers without disabilities. In addition, they very often face barriers in accessing education and medical care.⁷ This is exacerbated in particular by the use of explosive weapons with wide area effects in populated areas, which causes disruptions, degradation and destruction of essential services, even when those services are not directly targeted.

The prevalence of protracted conflicts only serves to enhance this overall impact on persons with disabilities due in large part to the degradation and collapse of essential and support systems and services, thereby creating new barriers on top of pre-existing ones.⁸ Refugees and internally displaced persons with disabilities in particular frequently face exclusion from basic services. Refugee and displacement camps and facilities often lack formal and comprehensive procedures to identify all refugees with disabilities and consequently fail to provide them with protection and essential services, such as shelter and medical care that are accessible and responsive to their needs.⁹ Persons with disabilities are also largely excluded from peacebuilding efforts – often due to prejudice.¹⁰ Gaps in post-conflict reintegration processes, especially in addressing the needs of ex-combatants and civilians with newly acquired disabilities, as well as pervasive stigma and discrimination against persons with disabilities, only serve to amplify experiences of marginalization.¹¹ There is also little evidence of systematic engagement with persons with disabilities and their representative organizations in humanitarian response delivery.¹²

Persons with disabilities in the context of armed conflict in the Security Council and beyond

Until the adoption of United Nations Security Council (UNSC) Resolution 2475 (2019),¹³ the situation of persons with disabilities during armed conflict and

7 A. Priddy, above note 5.

8 Special Rapporteur on the rights of persons with disabilities, Gerard Quinn, Report on the rights of persons with disabilities in the context of armed conflict, UN Doc. A/76/146, 19 July 2021.

9 UN Office of the High Commissioner for Human Rights, “Migrants and Refugees with Disabilities Must be a Priority in New Global Compact on Migration – UN Experts”, Press Release, 12 April 2017, available at: www.ohchr.org/en/press-releases/2017/04/migrants-and-refugees-disabilities-must-be-priority-new-global-compact.

10 Anita Aaron, Danielle Lane and Ariana Barth, *The Involvement of Persons with Disabilities in Conflict Resolution and Peacebuilding Efforts: Inclusion of Persons with Disabilities (PWD) as Part of the Solution in the Post Conflict Arena*, World Institute on Disability, Berkeley, 2015.

11 Elizabeth Murray and Rashad Nimr, “The Role of Accessibility and Funding in Disability-Inclusive Peacebuilding”, United States Institute of Peace, 29 July 2022, available at: www.usip.org/publications/2022/07/role-accessibility-and-funding-disability-inclusive-peacebuilding.

12 CBM International, Humanity & Inclusion (HI) and the International Disability Alliance (IDA), *Case Studies Collection 2019. Inclusion of Persons with Disabilities in Humanitarian Action*, 2019, available at: www.internationaldisabilityalliance.org/sites/default/files/case_studies_inclusion_of_persons_with_disabilities_in_humanitarian_action_cbm_hi_ida_0.pdf.

13 UNSC, Resolution 2475 (2019), UN Doc. S/RES/2475 (2019), 20 June 2019, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/186/60/PDF/N1918660.pdf?OpenElement>.

during peacebuilding processes was largely unaddressed in the Council's discussions. There were only three resolutions of the UNSC that mentioned persons with disabilities: Resolution 2217 (2015), Resolution 2427 (2018) and Resolution 2459 (2019). Resolution 2217, which extended the Mandate of the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), expressed:

serious concern about the dire situation of persons with disabilities in the CAR [Central African Republic], including abandonment, violence and lack of access to basic services, and emphasiz[ed] the need to ensure that the particular needs of persons with disabilities are addressed in the humanitarian response.¹⁴

In addition, the Council requested that MINUSCA:

monitor, help investigate and report on violations and abuses committed against children, women as well as persons with disabilities, including rape and other forms of sexual violence in armed conflict, and to contribute to efforts to identify and prosecute perpetrators, and to prevent such violations and abuses.¹⁵

Similar language was included in Resolution 2459 (2019) on the situation in South Sudan.¹⁶ The fact that this language has been included was mainly due to reporting from civil society organizations and other stakeholders regarding grave violations.¹⁷ Resolution 2427 on Children and Armed Conflict addressed the special needs of children with disabilities only in the context of providing reintegration and rehabilitation assistance to children affected by armed conflict.¹⁸

Additionally, reporting on the situation of persons with disabilities was generally absent from country-specific reports submitted to the UNSC by peacekeeping and political missions. Until 2019, the situation of persons with disabilities had been rarely addressed by the Office of the Secretary-General in its annual report on protection of civilians, which is presented to the UNSC. In the 2019 report, the Secretary-General called for a “more comprehensive thematic approach across all relevant situations that takes into account the role of conflict in both aggravating existing disabilities and causing new ones, and the need to ensure effective protection and assistance for persons with disabilities”.¹⁹

14 UNSC, Resolution 2217 (2015), UN Doc. S/RES/2217 (2015), 28 April 2015, preambular para. 33, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/121/41/PDF/N1512141.pdf?OpenElement>.

15 *Ibid.*, para. 32(e)(11).

16 UNSC, Resolution 2459 (2019), UN Doc. S/RES/2459 (2019), 15 March 2019, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/075/20/PDF/N1907520.pdf?OpenElement>.

17 For example, in the case of South Sudan: Human Rights Watch, “South Sudan: People with Disabilities, Older People Face Danger”, 31 May 2017, available at: www.hrw.org/news/2017/05/31/south-sudan-people-disabilities-older-people-face-danger.

18 UNSC, Resolution 2427 (2018), UN Doc. S/RES/2427 (2018), 9 July 2018, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/216/81/PDF/N1821681.pdf?OpenElement>.

19 UNSC, Protection of civilians in armed conflict, UN Doc. S/2020/366, 6 May 2020, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/115/79/PDF/N2011579.pdf?OpenElement>.

Ultimately, this has proved an important political message that facilitated the later adoption of Resolution 2475.

Some limited steps have been taken to include disability in the peace and security agenda by other bodies. The UN Secretary-General has highlighted that persons with disabilities are a critical group under Core Responsibility 3 of the Agenda for Humanity that outlines changes that are needed to alleviate suffering, reduce risk and lessen vulnerability on a global scale.²⁰ The Charter on Inclusion of Persons with Disabilities in Humanitarian Action was adopted at the 2016 World Humanitarian Summit and has been endorsed by over 140 humanitarian and human rights organizations, organizations of persons with disabilities (OPDs), UN agencies and governments.²¹ The Charter concerns all humanitarian disasters and emergency situations, including armed conflict. Signatories commit, among other things: to eliminating all forms of discrimination against persons with disabilities in humanitarian policy and programming;²² undertaking meaningful consultations with persons with disabilities and their representative organizations in humanitarian programme design, implementation and monitoring; and improving quantitative and qualitative data collection on persons with disabilities.²³ It serves as a useful advocacy and awareness-raising tool in the humanitarian environment. It is proof of a collective willingness to enhance the full and meaningful inclusion and participation of persons with disabilities and their representative organizations across the humanitarian system, in line with the UN Convention on the Rights of Persons with Disabilities (CRPD).²⁴

In 2013, the United Nations Children's Fund (UNICEF) launched a series of guidance resources on the inclusion of children with disabilities in humanitarian action, including thematically focused guidance in the areas of education, health and HIV/AIDS, nutrition, protection, and water, sanitation and hygiene.²⁵

The path leading to the adoption of Resolution 2475

With the exception of the documents noted above, discussions on persons with disabilities in the context of armed conflict in the work of the UNSC were effectively non-existent. The first time the UNSC discussed this topic was during the UNSC's Arria-Formula Meeting on 3 December 2018, International Day of Persons with Disabilities.²⁶ The meeting was organized by the Permanent Mission

20 UN General Assembly, *One Humanity: Shared Responsibility: Report of the Secretary-General for the World Humanitarian Summit*, UN Doc. A/70/709, 2 February 2016, §79.

21 Charter on Inclusion of Persons with Disabilities in Humanitarian Action, available at: <http://humanitarianism.org/>.

22 *Ibid.*, section 2.1.

23 *Ibid.*, section 2.2.

24 Charter on Inclusion of Persons with Disabilities in Humanitarian Action, above note 21.

25 UNICEF, *Guidance on Including Children with Disabilities – Education Kit Handbook*, July 2013, available at: www.unicef.org/supply/reports/guidance-including-children-disabilities-education-kit-handbook.

26 UN, "The Situation of Persons with Disabilities in Armed Conflict – Security Council, Open Arria-Formula Meeting", *UN Web TV*, 3 December 2018, available at: <https://media.un.org/en/asset/k1a/k1any949pw>.

of Poland to the UN in cooperation with Permanent Missions of Côte D'Ivoire, Germany and Peru and featured representatives from the UN, civil society and academia. The meeting was initiated by the Permanent Mission of Poland as the non-permanent member of the UNSC in 2018 and 2019, as part of the Polish government's long-standing priority of promoting the rights of persons with disabilities.

With that in mind, the Arria-Formula Meeting involved inviting Member States of different regional groups to co-organize the event to show the interregional support for this matter. The meeting took place with support of UNICEF, the Office of the High Commissioner for Human Rights and the International Disability Alliance. The objective of the meeting was to recognize the disproportionate impact of armed conflict on persons with disabilities. The aim was also to discuss how to ensure a more inclusive and participatory approach towards persons with disabilities during conflicts and reflect on possible measures to implement adequate solutions and emergency responses in conflict zones, as well as to reflect on the role of the UNSC and the wider UN system in this regard.

What came out very clearly from the meeting was the need for the UNSC to do more to better protect persons with disabilities – and also to learn from experiences of persons with disabilities to make sure the needs of this group are taken into consideration while programming humanitarian activities, including evacuations or post-conflict reconstruction. The discussion also made very clear that the UN and its Member States were not doing enough to protect and promote rights of persons with disabilities in armed conflict.

The following year saw another milestone in the development of this agenda: the UNSC briefing by Nujeen Mustafa, a refugee and disability rights advocate, who was invited to provide a civil society perspective and recommendations when the UNSC met to discuss the humanitarian situation in Syria.²⁷ During the briefing, she underlined that the war in Syria has a disproportionately high impact on people with disabilities, including psychological impact.²⁸ During the briefing, Ms Mustafa also highlighted that use of landmines and cluster bombs has had devastating human consequences, as thousands of Syrians have lost limbs to these dreadful weapons that have rightly been banned by most governments because of their immense harm to civilians.²⁹

Adoption of the resolution and its key features

The momentum created in recent years was critical to start the work on the resolution. The negotiations on the draft text were led by Poland and the United

27 Nujeen Mustafa, "Statement by Ms. Nujeen Mustafa during the UN Security Council Briefing on the Humanitarian Situation in Syria, UN Headquarters, New York", 24 April 2019, available at: <https://www.womenpeacesecurity.org/peacebuilder-resource-un-security-council-briefing-syria-nujeen-mustafa-04-2019/>.

28 *Ibid.*

29 *Ibid.*

Kingdom. For both Poland and the United Kingdom, the protection and promotion of rights of persons with disabilities have been a long-standing priority. Meanwhile, the United Kingdom is the so-called penholder of the Protection of Civilians agenda in the UNSC. As a Permanent Member of the Council, the United Kingdom brought institutional knowledge and expertise. With very little agreed-upon language to build on, the resolution relied for its baseline largely on the Geneva Conventions and the CRPD. It was necessary to draw from resolutions on related issue areas, such as those on the protection of civilians,³⁰ on children and armed conflict³¹ and on women, peace and security.³² The text also builds on the tireless work of OPDs in advocating for greater disability representation in official processes, participating in these processes and ensuring that disability rights are included in official documents. Finally, it builds on the pre-existing framework, such as the Geneva Conventions and the UN CRPD without creating new obligations. The negotiations for the resolution started in April 2019, and after numerous rounds of negotiations and bilateral meetings, the final text was adopted on 20 June 2019.

This groundbreaking text marks the first time the Council has dedicated an entire resolution to the situation of persons with disabilities in situations of armed conflict. The resolution has significantly raised the attention and understanding of the situation of this group in the UNSC and beyond. It acknowledges the disproportionate impact of armed conflict on persons with disabilities, while reinforcing the obligations of parties to the conflicts, Member States and the UN in line with the Geneva Conventions and the UN CRPD, in particular Article 11 on situations of risk and humanitarian emergencies. The resolution ensured human rights focus and urged Member States to take steps to eliminate discrimination and marginalization on the basis of disability in situations of armed conflict.

In the resolution's individual provisions, the fifteen-member UNSC issued numerous calls to action. The text calls upon all parties to armed conflict to allow and facilitate safe, timely and unimpeded humanitarian access to all people in need of assistance.³³ The document encouraged Member States to ensure that persons with disabilities enjoy equal access to basic services, including education, health care, transportation and information and communications (ICT) and systems.³⁴ It further urged them to prevent violence and abuses against civilians in situations of armed conflict.³⁵ Resolution 2475 also reiterates the need to end impunity for criminal acts directed at or having negative impacts on persons with disabilities as it calls for victim "access to justice and effective remedies and, as

30 UNSC, Resolution S/RES/1265 (1999), UN Doc. S/RES/1265 (1999), 17 September 1999, and subsequent resolutions, available at: <http://unscr.com/en/resolutions/1265>.

31 UNSC, Resolution S/RES/1261 (1999), UN Doc. S/RES/1261 (1999), 30 August 1999, and subsequent resolutions, available at: <http://unscr.com/en/resolutions/1261>.

32 UNSC, Resolution S/RES/1325 (2000), UN Doc. S/RES/1325 (2000), 31 October 2000, and subsequent resolutions, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement>.

33 UNSC Resolution 2475, above note 13, preambular para. 14.

34 *Ibid.*, operational para. 5.

35 *Ibid.*, operational para. 1.

appropriate, reparations”.³⁶ It calls on Member States to build the capacity and knowledge on the needs and rights of persons with disabilities among peacekeepers and peacebuilders.³⁷ The Resolution contributed to strengthening the data collection and reporting on persons with disabilities by the UN Peacekeeping Operations, Special Political Missions and Other Political Presences. And though Resolution 2475 encourages further reporting, it does not formally request it, as part of a deliberate decision to avoid creating any budgetary implications for the UN.

Finally, the resolution aims to shift power to persons with disabilities as agents of change, participating and leading in decision-making “in humanitarian action, conflict prevention, resolution, reconciliation, reconstruction and peacebuilding”.³⁸ It stressed that persons with disabilities can be – and have been – the source of solutions for peace and security challenges. It encourages the UNSC to invite persons with disabilities as briefers and additionally opened the door to look at other intersecting groups, such as children with disabilities in the context of armed conflict.

The resolution’s greatest strength lies in its consensual character. Through the negotiations, two Permanent Members of the UNSC raised many concerns regarding the initiative in general and the specific text. Those concerns were primarily linked to the fact that both the Russian Federation and China considered bodies other than the UNSC as more appropriate venues to discuss this matter – with a particular focus on shifting discussion to the Third Committee of the General Assembly and the Human Rights Council. The Russian and Chinese delegations raised other concerns, as well, including that the resolution would create legal obligations beyond the Geneva Conventions. Moreover, discussions on the cooperation of the UNSC with civil society and other stakeholders, in particular the Special Rapporteur on the rights of persons with disabilities, were particularly difficult and caused objections by some Member States. In particular, a paragraph related to briefings by the Special Rapporteur had to be deleted. It was also a deliberate aim for the resolution not to create any budgetary implications for the UN, important in the interest of ensuring the resolution’s consensual adoption.

Ultimately, the Council adopted Resolution 2475 with all fifteen votes in favour. Sixty-eight Member States of the UN joined as co-sponsors of the resolution.

UN-wide developments since the adoption of Resolution 2475

In addition to its own substantive text, Resolution 2475 demands more synergies among the peace and security, development and humanitarian pillars of the UN. Most notably, the resolution and its aims have been reinforced by the launch of

³⁶ *Ibid.*, operational para. 2.

³⁷ *Ibid.*, operational para. 6.

³⁸ *Ibid.*, preambular para. 7.

the United Nations Disability Inclusion Strategy (UNDIS) in March 2019. The Strategy's aim is to ensure that UN systems and programmes are themselves optimizing the contribution of the Organization to realizing the goals of the CRPD.

UNDIS has four related goals: the development of leadership across the UN system; strategic planning in mainstream activities to take explicit account of persons with disabilities; the development of disability-specific policies; and the development of teams with specific knowledge of disability and disability rights.³⁹ UNDIS has an entity accountability framework with detailed indicators across all four goals. The Strategy signalled the highest level of commitment from UN entities to the inclusion of persons with disabilities. It provides guidance to enable UN support and facilities, including in areas of armed conflicts and humanitarian settings, to be inclusive and accessible to all persons. It provides an institutional framework for the UN to support Member States in implementing the 2030 Agenda for Sustainable Development, the CRPD and Resolution 2475, as well as other international humanitarian and human rights law instruments.

Particularly crucial in the context of Resolution 2475 is UNDIS's aim to transition the UN peacekeeping, humanitarian and development sectors toward greater disability inclusivity, to increase coherence and collaboration at the country level and to build the capacity of staff working to ensure human rights in armed conflict and humanitarian emergencies. This largely shares the goals of Resolution 2475 as a whole, and, in particular, closely mirrors its paragraph 7 ("Emphasizes the importance of building capacity and knowledge of the rights and specific needs of persons with disabilities across UN peacekeeping and peacebuilding actors and urges Member States to play a central role in this regard"). It has also contributed to a shift in the way UN departments, in particular the Department of Peacekeeping Operations, approach the question of rights of persons with disabilities. Under UNDIS, the rights of persons with disabilities cannot any longer be seen as only a development issue, but rather must constitute part of the peace and security agenda.

The way forward

Resolution 2475 must now be fully implemented, as must international humanitarian law and the International CRPD. It is worth mentioning that on the first anniversary of the adoption of Resolution 2475, seventy-nine Member States signed a statement recommitting themselves to strengthen efforts to protect and promote the rights of persons with disabilities in the context of armed conflict. Likewise, there has been some progress, linked largely to UNDIS, to enhanced reporting from UN missions on relevant topics, but that reporting is still not sufficient to help understand the Resolution's impacts on the ground and shape policies. Future resolutions establishing or extending the mandates of

³⁹ UN, *United Nations Disability Inclusion Strategy*, available at: www.un.org/en/content/disabilitystrategy/assets/documentation/UN_Disability_Inclusion_Strategy_english.pdf.

missions should request information on the situation of persons with disabilities to help fully deliver on the Resolution's and UNDIS's promise.

The Council should also consider mandating in a new resolution a report from the Secretary-General on the issue of the rights of persons with disabilities in armed conflict in a more comprehensive way. The reports of the Secretary-General could be then a basis for further actions by the UNSC. Whereas other reports exist, such as of the Special Rapporteur on the rights of persons with disabilities, those are not seen as a source of information for the UNSC by some of its members. In addition, the protection and promotion of the rights of persons with disabilities should be mainstreamed in other UNSC agendas, such as those on children with disabilities and on women, peace and security. To date, the only other UNSC resolution that explicitly mentions Resolution 2475 is Resolution 2594 on peacekeeping transitions.⁴⁰ It must be also stressed that persons with disabilities are not a homogeneous group and the future documents of the UNSC in this area could address, for example, children or women with disabilities in the peace and security context.

Unfortunately, in the time since Resolution 2475 was adopted, little has improved when it comes to engaging persons with disabilities in the work of the UNSC. The number of briefers with disabilities that took part in the meetings of the UNSC remains very limited. The Member States holding presidency in the Council should consider inviting briefers with disabilities to take part in geographic and thematic meetings of the UNSC. The experience so far shows that persons with disabilities can bring very important perspectives to the Council's discussions. Finally, when UNSC Member States organize the Council's field visits, they could consider meeting with persons with disabilities and OPDs as part of that work.

To date there has been no open debate of the UNSC dedicated exclusively to the situation of persons with disabilities in armed conflict. Perhaps that is the next important step.

40 UNSC, Resolution S/RES/2594 (2021), UN Doc. S/RES/2594 (2021), 9 September 2021, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/247/56/PDF/N2124756.pdf?OpenElement>.

United Nations Disability Inclusion Strategy: A framework to accelerate transformative change for persons with disabilities in the peace and security pillar

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Abstract

The United Nations Disability Inclusion Strategy establishes the first-ever framework for the United Nations system to advance disability inclusion across all pillars of the Organization's work, including the peace and security pillar, and to measure the progress made across the system. Evidence reported since the launch of the Strategy in 2019 demonstrates that the Strategy has provided a clear impetus among United Nations entities and peace operations working in the sector to address the rights of persons with disabilities, who are among the most marginalized in any crisis-affected community. However, the evidence also reveals that while humanitarian entities have made progress since the launch of the Strategy, disability inclusion remains an emerging area of work for peace operations in the field. The article argues that the Strategy's accountability framework has provided a much-needed blueprint and ability to monitor progress across the system, yet far more needs to be done to ensure that the United Nations system is equipped to respond to complex situations and reach the furthest behind first.

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Keywords: United Nations Disability Inclusion Strategy, peace and security pillar, coordination, system-wide implementation, persons with disabilities, conflicts, crises, humanitarian action, disability inclusion.



Disability inclusion is essential to upholding human rights, sustainable development, and peace and security. However, persons with disabilities – who are among those most adversely affected in crises and conflict – continue to be one of the most excluded groups in society. The increasing number of conflicts and natural disasters, alongside the impact of climate change and the socio-economic consequences of the COVID-19 pandemic and other crises, stand to further exacerbate the situation of persons with disabilities.¹

In June 2019, the Secretary-General launched the United Nations Disability Inclusion Strategy to provide the Organization with a clear road map to accelerate progress on the inclusion of persons with disabilities across all United Nations pillars – human rights, development, and peace and security – and at all levels of the Organization.² While the United Nations has been working for many decades on the rights of persons with disabilities, the need for organizational change was clearly articulated in an institutional review, commissioned by the Secretary-General in 2018. The review recognized pockets of good practice, yet also identified clear gaps in mainstreaming disability inclusion across the United Nations system, in particular in the area of peace and security and at the field level. The progress made as a result of the Convention on the Rights of Persons with Disabilities (CRPD),³ and the explicit inclusion of persons with disabilities in the 2030 Agenda and its Sustainable Development Goals as well as other international commitments have made it even more vital for the United Nations to become fit for purpose on disability inclusion.

The Strategy has strengthened the United Nations' internal and external accountability on disability inclusion. For the first time, the Organization has a comprehensive, system-wide framework to assess and advance disability inclusion across programmes and internal operations, from headquarters to country level. With concrete indicators and benchmarks to measure progress, the United Nations now has a clear picture of the extent to which disability inclusion is addressed across the work of the Organization. All parts of the United Nations report annually on their performance. In turn, the Secretary-General reports to the United Nations General Assembly on system-wide implementation of the Strategy – thereby ensuring accountability to its Member States.

All United Nations entities engaged in humanitarian action, peace and security, as well as the majority of peacekeeping and political missions and 130

1 United Nations, *Policy Brief: A Disability-Inclusive Response to COVID-19*, May 2020, available at: www.un.org/sites/un2.un.org/files/2020/05/sg_policy_brief_on_persons_with_disabilities_final.pdf (all internet references were accessed in November 2022).

2 United Nations, *United Nations Disability Inclusion Strategy*, June 2019, available at: www.un.org/en/content/disabilitystrategy/assets/documentation/UN_Disability_Inclusion_Strategy_english.pdf.

3 United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, General Assembly Resolution 61/106, UN Doc. A/RES/61/106, 24 January 2007.

country teams, are implementing the Strategy. Evidence from the first three years of reporting demonstrates that the Strategy has generated considerable momentum and triggered action in this sector. United Nations agencies, funds, programmes and Secretariat offices working on humanitarian action have demonstrated progress in performance, moving from meeting the Strategy's benchmarks in 15% of indicators in 2019 to 40% in 2021. In 2021, the Central Emergency Response Fund assisted an estimated three million persons with disabilities, of whom the majority, 1.6 million, were women and girls, and a further sum of USD 10 million was earmarked to target persons with disabilities. Reporting indicates that these entities are also promoting disability-inclusive humanitarian action by collecting disability-disaggregated data, documenting participation by organizations of persons with disabilities and developing related guidance.⁴

Yet while humanitarian agencies have stepped up their efforts considerably, disability inclusion remains an emerging area of work for peace operations in the field. Peacekeeping and political missions play a key role in the Organization's work to ensure disability inclusion in zones of crisis and conflict. The number of peace operations implementing and reporting on the Strategy has increased by 50% since 2019. However, peace operations are currently meeting only 17% of the benchmarks of the Strategy, which is lower than the overall system-wide performance.⁵

It is therefore encouraging that as part of the Strategy's implementation, peace operations as well as humanitarian entities are developing action plans that put forward foundational commitments for disability inclusion including: the development of disability-specific policy/strategies; conducting assessments on accessibility; integrating disability inclusion into strategic plans and evaluations; and better representing persons with disabilities in their communications. A range of training and capacity-building initiatives on disability inclusion for staff is also planned. Country teams and humanitarian country teams have expanded their focus on disability-inclusive humanitarian action through the development of resources, strengthening data collection to inform needs assessments, and delivery of capacity building and technical assistance to national authorities, humanitarian actors and organizations of persons with disabilities, among other initiatives.⁶

These actions demonstrate the importance of the Strategy's accountability framework in triggering change and maintaining the momentum for continued transition toward disability inclusion. For example, in Colombia the country team and humanitarian country team Humanitarian Needs Overview included an analysis of how persons with disabilities are affected by COVID-19, conflict, natural disasters and mixed migration. In Iraq, the field mission has worked closely with national organizations of persons with disabilities and the

4 United Nations, *Report of the Secretary-General: Mainstreaming Disability Inclusion in the United Nations System*, forthcoming, 2022.

5 *Ibid.*

6 *Ibid.*

government to take specific measures to ensure that national elections are accessible to persons with disabilities. In Somalia, the field mission is collaborating with organizations of persons with disabilities to build awareness and capacity of staff on disability-inclusive programming.⁷

The increasing number of conflicts and crises worldwide make disability-inclusive action in the areas of peace and security and humanitarian response imperative. Indeed, Security Council Resolution 2475,⁸ adopted just prior to the Strategy's launch, was a significant step in recognizing that more needs to be done by all stakeholders to ensure that persons with disabilities do not continue to be overlooked in conflict and crisis settings. While operating in difficult and high-risk situations poses unique implementation challenges, the potential positive impact for persons with disabilities, who are among those most in need of assistance and support in these contexts, is high.

Resolution 2475's call to action in a number of key areas is addressed by the Strategy. In line with Resolution 2475 and the CRPD, the Strategy recognizes that persons with disabilities are actors of change who possess unique knowledge and lived experience of disability, and consulting persons with disabilities is a foundational indicator of the Strategy's accountability framework.⁹ Close consultation and active involvement with persons with disabilities and organizations of persons with disabilities across all actions by peace operations and humanitarian agencies will be crucial to ensuring disability inclusion as well as improving effectiveness and accountability, and is an area that has seen considerable advances since 2019.

The Strategy urges all parts of the Organization to deepen their knowledge and collect data on the situation of persons with disabilities, taking into account the diversity of the population of persons with disabilities while doing so. As a system, we cannot structure our programmes and projects to reach those most likely to be left behind if we do not know the current situation of persons with disabilities in relation to our areas of work, and make plans to address it. Furthermore, deeper knowledge of the situation of persons with disabilities enhances the Organization's ability to make concrete recommendations to Member States on issues relevant to persons with disabilities. Developing and utilizing resources to build knowledge and capacity of staff on disability inclusion have been key in supporting all parts of the Organization to implement the Strategy.

Leadership commitment, particularly that of the Secretary-General, Deputy Secretary-General, United Nations entity principals and country team leadership, has maintained the momentum of implementation. High-level leadership has spurred the engagement of staff on disability inclusion across programmes and operations and at all levels of the Organization, which has been fundamental to the progress achieved since 2019. The Strategy encourages shared ownership and

7 *Ibid.*

8 United Nations Security Council, Resolution 2475 (2019), UN Doc. S/RES/2475 (2019), 20 June 2019.

9 United Nations, *Guidelines on Consulting Persons with Disabilities: Indicator 5*, May 2021, available at: www.un.org/sites/un2.un.org/files/un_disability-inclusive_consultation_guidelines.pdf.

responsibility for disability inclusion by staff at all levels, across programmes and internal operations.

While progress has clearly been made by the United Nations system on disability inclusion in the peace and security pillar, much more needs to be done. The Strategy provides the Organization with a framework to come together and advance disability inclusion in a coordinated and comprehensive manner to achieve the Secretary-General's vision of leading by example on disability inclusion – a commitment we can and must all aspire to. A disability-inclusive United Nations will better serve everyone. It will provide for more inclusive, accessible and agile systems capable of responding to complex situations, reaching the furthest behind first, and ensuring a more just and peaceful world for all.

Addressing the accountability void: War crimes against persons with disabilities

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Abstract

Academics rarely raise the need to consider persons with disabilities when preventing, investigating and prosecuting international humanitarian law (IHL) violations. Worse still, no actual attempts have been made to include a disability perspective into practical guidance and monitoring mechanisms. This article addresses that void by laying out how existing yet unutilized IHL obligations can be leveraged to repress and suppress disability-based IHL violations. In doing so, the article will detail how fact-finding approaches, criminal investigative processes and reporting methods for IHL violations can be inclusive of persons with disabilities and thus more appropriately address the endemic under-representation of a disability perspective in the planning and execution of military operations during armed conflict and the specific crimes they thereby suffer. Additionally, this article will articulate concrete changes that should be made to international criminal law procedures for prosecuting war crimes to provide recognition and accountability for disability-based IHL violations, as has been done for violations against women and children. Finally, this article will diagnose the state of the law to address any legal challenges or hurdles that may hamper the inclusion of a disability perspective in fulfilling the IHL obligation to reduce and address violations of humanitarian law.

Keywords: Accountability, Convention on the Rights of Persons with Disabilities, disability, international humanitarian law, persons with disabilities, war crimes.

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Introduction

Atrocities against persons with disabilities during armed conflict remain as much a fixture in today's conflicts as in historical ones. In many cases these heinous acts can and do constitute serious violations of international humanitarian law (IHL) and custom,¹ commonly referred to as war crimes.² The High Contracting Parties to the Geneva Conventions of 1949 (GCs) and Additional Protocol I of 1977 (AP I) are obligated to “repress” and “suppress” acts that are contrary to the provisions of these treaties and customs of war, during both international and non-international armed conflicts.³ This duty is nonetheless overlooked and

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- 1 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; Report of the Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, on the Rights of Persons with Disabilities in the Context of Armed Conflict, UN Doc. A/76/146, 19 July 2021, paras 92–4 (SR Report Disability & Armed Conflict).
- 2 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), Rule 156, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156 (all internet references were accessed in November 2022).
- 3 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art.

unutilized in regard to war crimes perpetrated against and specifically targeting persons with disabilities, despite such acts being included within the IHL obligation to prevent, investigate and prosecute serious violations of humanitarian law.

Addressing this *lacuna* in the application of IHL is crucially important from an accountability perspective, and is also required by the Convention on the Rights of Persons with Disabilities (CRPD)⁴ which requires States to take “all necessary measures to ensure the protection and safety of persons with disabilities in ... situations of armed conflict”.⁵ Article 11 of the CRPD, titled “Situations of Risk and Humanitarian Emergencies”, protects individuals with disabilities during the conduct of hostilities and prohibits the perpetuation of war crimes against them. Likewise, it requires the identification, investigation and prosecution of serious disability-based IHL violations, including via the international criminal law (ICL) process.⁶

The adoption of Article 11 set in motion, albeit belatedly, a process of reconciling IHL with specific CRPD obligations pertaining to the protection of persons with disabilities. Recognition at the United Nations (UN) level of the disproportionate impact of armed conflict on persons with disabilities came a year after the adoption of the CRPD in a report by the Secretary-General to the UN Security Council (UNSC) noting the lack of attention to the specific risks that conflicts posed to individuals with disabilities.⁷ More than a decade later, in 2019, the Secretary-General’s annual report on civilian protection in armed conflict called for the creation of a comprehensive approach to effectively protect and provide assistance to persons with disabilities impacted by conflict.⁸ This in turn led to the unanimous adoption by the UNSC of Resolution 2475 in June

49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 50; 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. 129; 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. 146; 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); see also Rome Statute of the International Criminal Court of 17 July 1998, 2187 UNTS 38544 (entered into force 1 July 2002) (Rome Statute), Art. 8; and ICRC Advisory Service on International Humanitarian Law, “Obligations in Terms of Penal Repression”, March 2014 (ICRC Penal Repression), available at: www.icrc.org/en/download/file/1067/obligations-in-terms-of-penal-repression-icrc-eng.pdf, reflecting that while treaty law contains no specific obligation to repress such violations, the duty to suppress has been interpreted to include their repression, which has been judicially recognized; for customary law, see ICRC Customary Law Study, above note 2, Rule 158.

4 CRPD, UN Doc. A/RES/61/106, 24 January 2007 (entered into force 3 May 2008), Art. 11. For a comprehensive exploration, see Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford University Press, Oxford, 2018.

5 CRPD, above note 4, Art. 11.

6 W. I. Pons, J. E. Lord and M. A. Stein, above note 1, p. 71.

7 UNSC, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2007/643, 28 October 2007, paras 27–8.

8 UNSC, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2019/373, 7 May 2019, para. 49.

2019 which makes clear the specific obligations and protections owed to persons with disabilities during armed conflict arising out of Article 11.⁹ The by-product of years of advocacy, Resolution 2475 demonstrates the international community's eventual recognition of the need to harmonize IHL with the CRPD, utilizing Article 11 as the harmonization bridge.

This article discusses the accountability void in identifying, investigating, preventing and prosecuting war crimes for persons with disabilities – a significant oversight in the otherwise progressive movement towards reconciling IHL protections with the CRPD. In the first part of the article, we provide a brief precis of IHL's prime directive to limit the impact of armed conflict and protect individuals who are not (or are no longer) engaged in hostilities. In the second part, we analyse CRPD obligations arising from Article 11 regarding protection during armed conflict and draw the connection between war crimes and disability-related violations. In the final part, we propose recommendations for addressing the gap in accountability mechanisms in relation to crimes perpetrated against individuals with disabilities in armed conflict. We do so at three levels, outlining actions to advance accountability for fact-finding and commissions of inquiry, ICL processes and national criminal jurisdiction over international crimes. We conclude with recommendations for advancing a disability-inclusive approach to identifying, investigating, preventing and prosecuting war crimes that will facilitate the full application of the IHL accountability mechanisms for persons with disabilities impacted by armed conflict.

Accountability for serious violations of IHL

The primary purpose of IHL rules is to limit the impact of armed conflict, by providing protection to individuals who are not (or no longer are) engaged in hostilities and to restrict the means and methods of warfare.¹⁰ Far from mere aspirational goals, IHL requires States to provide a process and mechanisms for accountability for violations of its rules. To ensure necessary accountability, the GCs and AP I obligate States to “repress” those violations which constitute war crimes and “suppress” all other violations of IHL.¹¹

While the primary focus of this article is the duty to repress, the duty to suppress bears mention at the outset. The obligation to suppress all other violations of IHL – those not giving rise to individual responsibility and therefore not grave breaches – requires States to undertake measures to halt current violations, prevent future violations and their reoccurrence, usually through administrative investigations.¹² Given that not every IHL violation targeting or impacting persons with disabilities will rise to the level of a war crime, the

9 UNSC, Resolution 2475 (2019), UN Doc. S/RES/2475 (2019), 20 June 2019.

10 See ICRC Advisory Service on International Humanitarian Law, “What is International Humanitarian Law?”, December 2014, available at: www.icrc.org/en/download/file/4541/what-is-ihl-factsheet.pdf.

11 GC I, above note 3, Art. 146; GC II, above note 3, Art. 50; GC III, above note 3, Art. 129; GC IV, above note 3, Art. 146; and AP I, above note 3, Arts 85(1) and 86(1).

12 See GC I, GC II, GC III, GC IV and AP I, and ICRC Penal Repression, above note 3.

obligation to suppress is an essential aspect of comprehensively addressing the gap in IHL accountability for disability-based violations via harmonization with the CRPD. Accordingly, the suppression of other disability-related IHL violations is crucial.

For a State to fulfill its obligation to repress requires the identification, investigation and prosecution of individuals, regardless of nationality, who have committed or ordered the commission of “grave breaches” during international armed conflicts. Notably, there exists no explicit requirement within the GCs to repress serious violations of IHL occurring during non-international armed conflicts. Nonetheless, such an obligation is found in other international law treaties,¹³ along with judicial recognition of criminal liability for violations of Article 3 common to the four GCs.¹⁴ This establishes a requirement on States to repress war crimes occurring during both international and non-international armed conflicts.¹⁵

Reflecting this recognition, the Statute of the International Criminal Court (Rome Statute) has reaffirmed the requirement to identify, investigate and prosecute serious violations of IHL (meaning, grave breaches of the GCs and serious violations of common Article 3)¹⁶ which it collectively refers to as “war crimes”.¹⁷ The acts that constitute war crimes within Article 8 of the Rome Statute are broader than those initially considered within the “grave breaches” regime. Nonetheless, the wider list of acts in the Rome Statute is generally accepted as being reflective of customary international law.¹⁸

Harmonizing IHL with the CRPD

Article 11 precipitates the CRPD’s transversal application into the realm of IHL. In addition to protecting individuals with disabilities from human rights violations, the

13 See Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948 (entered into force 12 January 1951), Art. 4; Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 215, 14 May 1954 (entered into force 7 August 1956), Art. 28; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 1986, 10 December 1984 (entry into force 26 June 1987), Art. 7; 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. 14; 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), Art. 9; and Convention on Cluster Munitions, 2668 UNTS 39, 3 December 2008 (entered into force 1 August 2010), Art. 9.

14 See Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), UNSC Res. 808/1993, 827/1993 and amended by UNSC Res. 116/1998, 1329/2000, 114/2002, 25 May 1993, Art. 3; Statute of the International Criminal Tribunal for Rwanda, UNSC Res. 955, Arts 2–4, Annex, 8 November 1994, Art. 4; and Statute of the Special Court for Sierra Leone, UNSC Res. 1315, 16 January 2002, Art. 3.

15 See ICRC Penal Repression, above note 3, stating that the duty to suppress has been interpreted to include the repression of war crimes occurring during non-international armed conflicts as codified by Article 8 of the Rome Statute.

16 Rome Statute, above note 3, preamble and Art. 8.

17 This article will also refer to grave breaches and other serious violations of the laws and customs of war collectively as war crimes for continuity and constituency.

18 ICRC Customary Law Study, above note 2, Rule 156.

CRPD obligates States to investigate and prosecute perpetrators of disability-related human rights violations. Atrocities perpetrated against persons with disabilities during armed conflict can and do reach the threshold for serious violations of IHL as enumerated in the GCs, AP I and the Rome Statute.

Article 11

Article 11 of the CRPD establishes the co-applicability and complementarity of the treaty with other fields of international law, thereby requiring a reading of disability-based human rights and protections into all international law obligations – including those found in IHL and ICL.¹⁹ Markedly, States are required to take “all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters”.²⁰ Such explicit recognition to co-applicability and complementarity between human rights law and other distinct areas of international law is rare, and makes Article 11 all the more significant.²¹ Consequently, the provision calls attention to existing legal obligations in IHL and other international law regimes, and reminds States that the CRPD framework is part and parcel of a wider protective framework that must inform international legal protections. Article 11 thus supports the assertion that there must be accountability for perpetrators of violations of international law against persons with disabilities, and in particular within ICL.²²

Some progress is evident within IHL given the recognition by the International Committee of the Red Cross (ICRC) of the complementarity between the two bodies of law during armed conflict taken together with the ICRC’s explicit acknowledgement of the myriad ways that IHL seeks to protect persons with disabilities in accordance with CRPD obligations.²³ The ICL field has also seen some progress through the unanimous adoption of Resolution 2475 calling for an “end to impunity for criminal acts against civilians, including those with disabilities” and to increase “access to justice and effective remedies and, as appropriate, reparations” within the context of armed conflict.²⁴ Similarly, emerging scholarship has advanced arguments for prosecuting disability-based crimes within the framework of ICL as crimes against humanity.²⁵ Further, the UN Special Rapporteur on the Rights of Persons with Disabilities affirmed the

19 See Stephanie Motz, “Article 11: Situations of Risk and Humanitarian Emergencies”, in I. Bantekas, M. A. Stein and D. Anastasiou (eds), above note 4, p. 314.

20 CRPD, above note 4.

21 For a discussion, see Helen Duffy, “Trials and Tribulations: Co-applicability of IHL and Human Rights in an Age of Adjudication”, in Ziv Bohrer, Janina Dill and Helen Duffy, *Law Applicable to Armed Conflict*, Max Planck Trialogues, Vol. I, Cambridge University Press, Cambridge, 2020.

22 See W. I. Pons, J. E. Lord and M. A. Stein, above note 1.

23 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.

24 See UNSC Res. 2475, above note 9.

25 W. I. Pons, J. E. Lord and M. A. Stein, above note 1.

direct application of the CRPD to “all international law, including international criminal law”, while also noting the requirement “to end impunity for criminal acts directed at or having negative impacts on persons with disabilities” during armed conflict.²⁶

Still missing, however, are specific attempts to utilize the IHL obligation to prevent, investigate and prosecute war crimes specifically targeting or impacting persons with disabilities. This is not due to a lack of applicability or instances of such violations. It is instead attributable to the insufficient harmonization of IHL and the ICL framework for accountability of war crimes with the CRPD.

CRPD obligations to protect and prosecute

Among the CRPD’s signal contributions is an affirmation that States are obligated to protect persons with disabilities and bear additional duties to investigate and prosecute perpetrators of human rights violations against them. These obligations are little enforced in practice owing to limited and ableist understandings regarding how ill-treatment manifests against persons with disabilities and how protection, investigation and prosecution must adapt to those circumstances.²⁷ Interrogating these obligations and reading them through a disability-rights lens requires a transversal reading of the CRPD across its framework and in relation to duties arising out of IHL and other international legal regimes.²⁸

The text of the CRPD is relatively sparse when it comes to addressing egregious human rights violations perpetrated against persons with disabilities. Indeed, it does not move beyond other core human rights treaties in its articulation in Article 10 of the right to life or in Article 15’s prohibition against torture. Progressively, Article 15(1) provides for a general proscription of all forms of ill-treatment and specifically prohibits medical experimentation without consent, while Article 15(2) requires States to take effective legislative, administrative, judicial or other measures to protect victims from ill-treatment. Article 17 shores up these protections by underscoring that persons with disabilities are to be accorded physical and mental integrity.

To date, commentators have mainly focused on the substantive interpretation of Articles 15 and 17 in relation to what position the provisions may take on involuntary treatment.²⁹ Nonetheless, as Janos Fiala-Butora’s work

26 SR Report Disability & Armed Conflict, above note 1, para. 66.

27 Janos Fiala-Butora, “Disabling Torture: The Obligation to Investigate Ill-treatment of Persons with Disabilities”, *Columbia Human Rights Law Review*, Vol. 45, No. 1, 2013, pp. 219–40; and 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.

28 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.

29 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.

on the duty to investigate demonstrates, the protection against ill-treatment can only be effective if the substantive provisions are accompanied with an obligation on domestic authorities to effectively investigate torture and other ill-treatment.³⁰ Such a coordinated effort is required to afford victims an effective means by which to secure their access to courts and international bodies where they can make use of substantive provisions. The CRPD through its other provisions amplifies State duties to investigate and prosecute ill-treatment and abuse against persons with disabilities. It also sets out obligations in relation to ensuring that they have access to justice.

Additionally, the CRPD provides that States Parties must ensure that persons with disabilities enjoy the right to liberty and security of person and that they are not deprived of their liberty unlawfully or arbitrarily. Article 14 further requires that “any deprivation of liberty is in conformity with the law and that in no circumstances shall the existence of a disability serve to justify a deprivation of liberty”. Where persons with disabilities are deprived of their liberty, they are entitled to protections guaranteed under the CRPD, inclusive of the provision of reasonable accommodation.

Article 16 on exploitation, violence and abuse, likewise, is a major contribution to the protective framework of the CRPD and its applied measures unequivocally addressing persons with disabilities. Crucial to that protection, Article 16 sets out State obligations in relation to ensuring that all forms of exploitation, violence and abuse against persons with disabilities are investigated and prosecuted.³¹ Article 16(5) includes a groundbreaking provision that is explicit in its requirement that States put in place legislation and policies “to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted”. Fiala-Butora underscores the point that States carry the duty to investigate both peacetime and wartime violations, such that persons with disabilities are not obliged to put forward high standards of evidence about their own abuse; rather, there is a positive obligation on the part of States to proactively investigate allegations of serious abuses including torture which is crucial in cases where, as is often the case, victims have no access to evidence.³² The issue of effective investigation into credible allegations of war crimes against persons with disabilities calls for specific attention in order to give persons with disabilities an effective and timely remedy.³³

30 J. Fiala-Butora, above note 27, p. 214.

31 CRPD, above note 4, Art. 16.

32 J. Fiala-Butora, above note 27, p. 214. See European Court of Human Rights, *Assenov and Others v. Bulgaria*, Case No. 24760/94, Judgment (Court Chamber), 28 October 1998, § 102, the Court finding that “where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention’, requires by implication that there should be an effective official investigation”.

33 See W. I. Pons, J. E. Lord and M. A. Stein, above note 1.

The CRPD also supports procedural due process for persons with disabilities. This is essential given the multitude of barriers that persons with disabilities so often experience in seeking accountability for human rights violations. Article 13 affirms that measures must be undertaken to ensure procedural due process. This requires, as explicated in Article 9's provisions on accessibility and in Article 5's mandates for equality and non-discrimination, a range of measures that identify and dismantle barriers to accessible justice mechanisms. Moreover, Article 13 affirms substantive rights in relation to accessing justice. When read together with Article 12, Article 13 clarifies that persons with disabilities must be accorded the right to be heard as witnesses and may not be barred from doing so on the basis of their disability through application of retrogressive administrative "standards" such as presumed legal incapacity or conditioning access to justice through capacity assessments. Instead, Article 12 affirms that where needed, support must be provided to facilitate legal capacity, whether in relation to court proceedings or any other decisional process. This, then, serves as a clear indicator for the measurement of accountability mechanisms insofar as they must afford persons with disabilities the procedural accommodations needed in order to be effective witnesses.³⁴

These provisions of the CRPD underscore the myriad types of harm that persons with disabilities commonly suffer and the structural exclusion and discrimination that prevent full access to justice mechanisms that would otherwise ensure accountability and redress for those harms. Through the co-applicability and complementarity of Article 11, these obligations provide clear guidance that can serve as the basis for identifying, investigating and prosecuting war crimes against persons with disabilities.

The connection between war crimes and CRPD obligations

Atrocities perpetrated against persons with disabilities during armed conflict can and do meet the threshold for serious violations of IHL enumerated in the GCs, AP I and the Rome Statute. While rarely given explicit expression in domestic legislation or the policies and practices of international criminal tribunals, it is axiomatic that persons with disabilities are a specifically protected class, like women and children, in IHL.³⁵ As such, mechanisms designed to redress serious violations of IHL, including those perpetrated against specially protected groups, must accommodate violations against persons with disabilities.

Notwithstanding the recognition as to the legal obligation within IHL to provide specific protection to persons with disabilities during armed conflict as an especially at-risk population, there has been little (if any) effort to identify, investigate, prevent and prosecute those committing IHL violations against them. Not unlike the invisibility of crimes against women in armed conflict characterized by Christine Chinkin for their tendency to be cast in minimalist

³⁴ *Ibid.*

³⁵ See ICRC, above note 23, p. 3, footnote 7.

terms and labelled as “abuse” and not breaches of IHL and criminal conduct, the treatment of persons with disabilities is frequently similarly downgraded.³⁶ Relatedly, documentation of war crimes against persons with disabilities is often overlooked or ignored by investigative teams and international mechanisms, save for disability researchers.³⁷

Yet, the reporting that has been undertaken on atrocities perpetrated against disability communities in the context of armed conflict makes obvious that such acts can and do meet the standard for IHL violations, and quite plausibly as war crimes. For example, the targeted killings of individuals with disabilities by the Khmer Rouge in Cambodia, summary execution of persons with disabilities by guerrilla forces in Colombia, and the mass killing of persons with disabilities housed in psychiatrist hospitals and rehabilitation centres during the Rwandan genocide, each stand in sharp relief.³⁸ Contemporary examples include the involuntary use of persons with disabilities as human shields and suicide bombers in the context of the conflicts in Iraq and Afghanistan.³⁹ Further, attacks on and destruction of hospitals, rehabilitation centres, schools, utilities, psychiatric medical facilities and other public institutions have a directly larger effect on persons with disabilities, thereby placing them at higher risk of harm and death.⁴⁰

36 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.

37 See, e.g., 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 Library Reference, New York, 2004.

38 Deutsche Presse Agentur, “U.N. Team Arrives in Cambodia to Investigate Khmer Rouge Genocide”, *LexisNexis(r) Academic Universe*, 14 November 1998; Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Colombia, UN Doc. CRPD/C/COL/CO/1, 30 September 2016, para. 24; Art Blaser, “From the Field – People with Disabilities and Genocide: The Case of Rwanda”, *Disability Studies Quarterly*, Vol. 22, No. 53, 2002; Arthur Blaser, “Always the First to Go?: People with Disabilities and Genocide”, in Alexandre Kimenyi and Otis Scott (eds), *Anatomy of Genocide: State-Sponsored Mass-Killings in the Twentieth Century*, 2001, p. 78; and United States Holocaust Memorial Museum, “Nazi Persecution of the Disabled: Murder of the ‘Unfit’”, available at: www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/nazi-persecution-of-the-disabled.

39 Soraya Sarhaddi Nelson, “Disabled Often Carry Out Afghan Suicide Missions”, *NPR*, 15 October 2007, available at: www.npr.org/2007/10/15/15276485/disabled-often-carry-out-afghan-suicide-missions; and Iraqi Observatory for Human Rights, “ISIS Uses Children and People with Disabilities as Human Shields”, *ReliefWeb*, 31 March 2017, available at: <https://reliefweb.int/report/iraq/isis-uses-children-and-people-disabilities-human-shields>.

40 The list of wider acts constituting war crimes is significant given the extensive overlap with those actions found in CRPD articles obligating States to take action to provide protection from, and accountability for, torture, murder, medical experimentation and the equal enjoyment of the right to life. CRPD, above note 4, Arts 10, 14, 15, 16 and 17. This alignment between those acts constituting war crimes and a need for accountability makes the required harmonization of the IHL duty to suppress and repress straightforward in legal theory, but elusive in practice, because of lack of considered attention to the co-applicability of the CRPD to ICL. This present article does not seek to resolve the uncertainty as to the proper source of individual criminal responsibility and confusion over which acts constitute a war crime. Instead, the authors seek to raise awareness to the fact that the IHL obligation to repress war crimes is a tool yet to be employed to provide accountability for the overlooked reality that persons with disabilities are more likely to be targeted and impacted by war crimes. See Oona A. Hathaway, Paul K. Strauch, Beatrice A. Walton and Zoe A. Y. Weinber, “What is a War Crime?”, *Yale Journal of*

Where referenced at all in the context of an armed conflict, the experiences of persons with disabilities tend to be recorded as abuse, abandonment or neglect. Even though acknowledging the harm regularly endured by persons with disabilities, such characterizations should be recognized and considered as potentially rising to the level of torture, cruel, inhuman or degrading treatment.⁴¹ Inaccessible evacuation procedures, for example, leave persons with disabilities without the ability to flee impending attacks leading to them experiencing greater physical and mental harm. Lack of reasonable accommodations for detainees with disabilities means that essential facilities and services, such as healthcare, sanitation and rehabilitation, are not accessible on an equal basis. This can result in exacerbating existing impairments and raising the likelihood of developing secondary impairments.

These examples, although poignant, represent a small fraction of the serious violations of IHL committed against persons with disabilities. Unlike the circumstances of war crimes involving women, children and sexual violence, similar acknowledgement is absent regarding persons with disabilities. Even those instances that garner attention lack explicit mention of persons with disabilities within acts constituting war crimes, thereby ensuring that accountability will remain elusive. Addressing this shortcoming requires adjustments at various levels in recognition and specific consideration of violations of IHL targeting or impacting persons with disabilities.

In sum, due to the absence of explicit inclusion of disability in the identification, investigation, prevention and prosecution of war crimes, IHL obligations to suppress and repress cannot be fully realized. This void in accountability for war crimes specifically targeting or impacting persons with disabilities looms large, especially in light of the numerous historical and current examples of IHL violations involving persons with disabilities.

Recommendations for addressing the accountability gap

The accountability gap for war crimes perpetuated against persons with disabilities can be redressed by operating at three levels, respectively, through: (A) fact-finding missions and commissions of inquiry; (B) ICL process; and (C) national criminal jurisdiction to recognize disability-based war crimes.

Ensuring an inclusive mandate for commissions of inquiry and fact-finding bodies

UN fact-finding missions and commissions of inquiry have become the principal mechanisms to establish the evidentiary foundation necessary to seek criminal accountability for violations of human rights and IHL, including war crimes. While the formulation of these missions and commissions is varied in scope and

International Law, Vol. 44, No. 1, 2019, discussing the history, evolution and current state of confusion and uncertainty surrounding the term of war crime.

41 Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, UN Doc. A/63/175, 28 July 2008.

duration, each seeks to establish facts surrounding incidents and allegations of violations, provide assessment of those facts within the applicable legal framework, reach conclusions as to whether violations exist and issue recommendations based on the conclusions.⁴² Such mechanisms have, for instance, been established by the UN Security Council, General Assembly, Human Rights Council, Secretary-General and High Commissioner for Human Rights. Regional organizations, such as the Organization for Security and Cooperation in Europe, have likewise established such bodies.

Fact-finding missions and commissions of inquiry, when given sufficient access, can provide robust investigative capabilities and have the potential – if their mandates are inclusive – to establish good practice and visibility for IHL violations and war crimes against persons with disabilities. Although providing crucial evidence for the prosecution of war crimes and other IHL violations, the missions and commissions lack judicial authority to hold perpetrators to account. Even with such limitations, these mechanisms have a significant role in transitional justice efforts – especially war crimes over which there is universal jurisdiction. They also can play important roles in combatting impunity in their efforts to gather and verify information, create an historical record of events, support adjudication efforts and recommend measures to redress violations.

To be clear though, such mechanisms have not to date yielded an inclusion of disability-based crimes or, when they have, the documentation and investigation have been less than satisfactory. This is so even in cases where egregious violations amounting to crimes against humanity or war crimes committed against persons with disabilities seemed apparent, and, stunningly, the only instance where the UNSC directly requested an investigation into possible violations against persons with disabilities in an armed conflict went unheeded.⁴³ We offer several recent examples that illustrate this omission.

The Commission of Inquiry on Lebanon mandated to investigate the thirty-three-day conflict was tasked:

- (a) to investigate the systematic targeting and killings of civilians by Israel in Lebanon; (b) to examine the types of weapons used by Israel and their conformity with international law; and (c) to assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.

The Commission determined that the hostilities occurring from 12 July to 14 August 2006 constituted an international armed conflict to which conventional and customary IHL and human rights law are applicable. The report by the Commission made only a passing reference to individuals facing “difficulties related to age or disability”, thereby meaning that they were made more

42 See UN Office of the High Commissioner, *Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, New York and Geneva, 2015, available at: www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf.

43 See UNSC, Resolution 2217 (2015), UN Doc. S/RES/2217 (2015), 28 April 2015.

“vulnerable to the ongoing violence and were further at risk due to limited access to water, electricity, food and medical care, as well as restricted humanitarian access”.⁴⁴ This cursory examination, although underscoring the well-known risks and harm faced by persons with disabilities and their families, provides no recommendations or conclusions on how or whether to account for such realities. By contrast, the report contains extensive substantive recommendations and conclusions, including specific sub-sections related to the disproportionate impact of the armed conflict on women and children, with disability merely an afterthought – mentioned only once (see above quotation) throughout a 153-page report.⁴⁵

The Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (North Korea Commission) was established to investigate human rights country conditions and to determine whether such circumstances constituted crimes against humanity.⁴⁶ While not a war crimes investigation, the North Korea Commission’s report bears scrutiny for its coverage of country conditions, some of which were both glaring and egregious. The report, while paying some attention to discrimination on the basis of disability and referencing potential grave human rights violations, also noted that some of the allegations could not be verified by eyewitnesses.⁴⁷ Ample evidence of forced sterilization and disability-based persecution serving eugenic State policies in North Korea akin to those well documented in Nazi Germany were simply not explored by the North Korea Commission.⁴⁸ Further, and disturbingly, it pointed to the adoption of national disability legislation in 2003 as evidence of a possible improvement in status of persons with disabilities, even though testimony on disability discrimination strongly suggested otherwise. Indeed, the North Korea Commission’s sparse coverage on the situation of persons with disabilities did not account for evidence of crimes approximating Nazi-era persecution published by the Korean Institute for National Unification.⁴⁹ Hence, although technically including disability, the North Korea Commission’s minimalistic and methodologically flawed

44 Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, p. 50, para. 204.

45 While the CRPD did not enter into force until 2009, disability as an issue and the disproportionate harm faced by persons with disabilities in armed conflict did not simply surface with the establishment of the treaty.

46 See generally, Jae-Chun Won, Janet E. Lord, Michael Ashley Stein and Yosung Song, “Disability, Repressive Regimes, and Health Disparity: Assessing Country Conditions in North Korea”, in Ruth Bonneville-Kok and Jure Vidmar (eds), *Hague Yearbook of International Law*, Vol. 27, Brill Nijhoff, Leiden, 2014.

47 Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, UN Doc. A/HRC/25/63, 7 February 2014.

48 See, e.g., Korean Institute for National Unification, *White Paper on Human Rights in North Korea*, 2007.

49 Korean Institute for National Unification, *White Paper on Human Rights in North Korea*, 2012, p. 482, noting that forced sterilization was often coupled with other abuses; thus, in 2011, 80% of refugee respondents indicated that North Korea segregated and relocated little people, and 67% indicated that the State forced those individuals to undergo sterilization. See also Damien McElroy, “North Korea Locks up Disabled in ‘Subhuman’ Gulags, Says UN”, *The Telegraph*, 21 October 2006, available at: www.telegraph.co.uk/news/worldnews/1532036/North-Korea-locks-up-disabled-in-subhuman-gulags-says-UN.html.

investigation and ultimate report affirms the need for more focused attention on the human rights status of persons with disabilities in the investigative process of such commissions, as well as explicit reference to disability-based crimes in the formulation of fact-finding missions and commissions of inquiry. There is a broader need to ensure that international inquiries take into account the experience of the populations of persons with disabilities facing armed conflict and/or living in repressive regimes.

The Commission on Human Rights in South Sudan (South Sudan Commission) was initially established in 2016 and reports on the situation in South Sudan with the remit to prevent further deterioration of the situation and achieve meaningful transitional justice.⁵⁰ It focuses on the collection and preservation of evidence of gross violations of human rights and conflict-related crimes – and in particular sexual and gender-based violence and ethnic violence – in order to end impunity and provide accountability. Throughout the process, the South Sudan Commission has met with a range of victims, witnesses, government officials, members of civil society and other key stakeholders. Having produced a number of reports over the years, the South Sudan Commission has made suggestive reference to the connection between the violence of armed conflict and physical and mental impairments.⁵¹ Notwithstanding its broad mandate and suggestive reference, the South Sudan Commission has paid no explicit attention to the situation of persons with disabilities, or specifically to women and children with disabilities, who are at heightened risk of sexual and gender-based violence in armed conflict. Thus, significant attention has been given to the impact on women and children generally without cognizance of the intersectional relationship between the identities of disability, gender and age and the compounding impact those intersections portend on the likelihood of victimization.⁵²

More recently, the Independent International Commission of Inquiry on Ukraine (Ukraine Commission) was created to investigate all alleged violations and abuses of human rights and violations of IHL related to the armed conflict between Ukraine and the Russian Federation.⁵³ Provided with both a broad and focused mandate, the Ukraine Commission will report and make recommendations on responsibility of individuals and entities for violations of human rights and IHL within Ukraine, as well as on the events in the areas of Kyiv, Chernikhiv, Kharkiv, Mariupol and Sumy regions with the goal of ensuring accountability. Neither of the resolutions establishing the Ukraine Commission

50 Resolution adopted by the Human Rights Council on the Situation of Human Rights in South Sudan, UN Doc. A/HRC/RES/31/20, 27 April 2016.

51 Report of the Commission of Human Rights in South Sudan, UN Doc. A/HRC/49/78, 15 February 2022, para. 41.

52 CRPD Committee, General Comment No. 3 (2016) on Women and Girls with Disabilities, UN Doc. CRPD/C/GC/3, 25 November 2016.

53 Resolution adopted by the Human Rights Council on the Situation of Human Rights in Ukraine Stemming from the Russian Aggression, UN Doc. A/HRC/RES/49/1, 7 March 2022; and Resolution adopted by the Human Rights Council on the Deteriorating Human Rights Situation in Ukraine Stemming from the Russian Aggression, UN Doc. A/HRC/RES/S-34/1, 16 May 2022.

mentions or addresses the disability dimension of the armed conflict and possible crimes committed against persons with disabilities.⁵⁴ Yet again, the mandate explicitly calls upon the Ukraine Commission to collect and analyse the gender dimension in regard to IHL violations and human rights abuses without mentioning its intersection with disability. Nonetheless, the Ukraine Commission, via the establishing resolution, has been specifically tasked with complementing, consolidating and building on the work of the UN Human Rights Monitoring Mission in Ukraine (HRMMU), lending potential for the investigation of crimes directly or indirectly impacting persons with disabilities. The HRMMU was created in 2014 to monitor, report and advocate for accountability in the conflict area of eastern Ukraine and the Autonomous Republic of Crimea. Unlike other missions, the HRMMU lists persons with disabilities as a spotlighted population for reporting and monitoring, placing them alongside women and children.⁵⁵ The wide remit of the Ukraine Commission, therefore, has the potential to address the specific disability dimension of alleged human rights and IHL violations, and is indeed required to do so in light of Resolution 2475. Practically, the Ukraine Commission could take the following actions to ensure inclusion of a disability perspective: engage one or more disability advisers to provide counsel on disability-inclusive investigation practices; help build the capacity of commissioners and investigative teams on disability issues, as has been the practice with gender advisers; link investigators to local organizations of persons with disabilities (OPDs) and familiarize OPDs with the scope and methods of work of the Commission to encourage them to make submissions; and engage with the UN Special Rapporteur on the rights of persons with disabilities and the UN CRPD Committee to ensure a disability perspective. Whether this potential comes to fruition remains to be seen; however, the poor track record of previous missions suggests that much work remains to be done to sensitize fact-finders to the disability dimension of their work.

Directing attention to violations carried out against groups specifically recognized under IHL as being at particular risk during armed conflict would seem to be a *sine qua non* of mandated investigations into war crimes. It certainly is mandated by Article 11. In any case, proposing a disability-inclusive approach is a modest ask and mirrors those made in relation to other specifically protected groups under IHL, namely women and children. While the efforts to better account for fact-finding, investigation and reporting for war crimes perpetrated against women and children in armed conflict are by no means fulfilled, much progress has been made to better equip such bodies to account for these crimes. Elevating the situation of persons with disabilities through similar policy pronouncements is appropriate given the explicit direction to States Parties in the

⁵⁴ *Ibid.*

⁵⁵ Persons with disabilities are highlighted on the HRMMU's website. See Office of the High Commissioner for Human Rights (OHCHR), "UN Human Rights in Ukraine", available at: www.ohchr.org/en/countries/ukraine/our-presence#:~:text=The%20UN%20Human%20Rights%20Monitoring,occupied%20by%20the%20Russian%20Federation.

CRPD regarding the protection of persons with disabilities in situations of risk, inclusive of IHL and, more pointedly, the adoption of Resolution 2475.

Inclusive reform in ICL processes

Recognition of the need to take specific measures for historically disadvantaged and highly at-risk minority groups in the identification, investigation and prosecution of war crimes under ICL is not a novel concept. Indeed, the Office of the Prosecutor of the International Criminal Court (OTP) has developed specific policy papers for children and sexual and gender-based crimes.⁵⁶ In both instances, the OTP established standards and methods to investigate, charge and prosecute crimes – including war crimes – impacting and involving children and victims of sexual and gender-based crimes, with the stated goal of “closing the impunity gap”.⁵⁷ In so doing, the OTP signalled the importance of crimes perpetrated against at-risk groups, acknowledged the barriers encountered in ensuring the successful prosecution of such crimes, and set forth guidance that could help operationalize international legal commitments. Notably, the OTP’s legal rationale for the development of such policy papers relies on Article 21(3) of the Rome Statute, finding that both age and gender are covered in the designation of “other status”.⁵⁸ Further, the OTP also affirms that Article 21(3) requires “the application and interpretation of the [Rome] Statute be consistent with internationally recognized human rights” and that any evolution relating to human rights would be taken into account in the development and execution of the mandate of the OTP.⁵⁹ As a core and nearly universally ratified human rights treaty,⁶⁰ the CRPD surely ought to be harnessed to provide context and guidance for how justice is to be made accessible to persons with disabilities.

Given the lack of any meaningful progress within ICL to provide access to the legal system and gap in accountability for disability-based crimes generally – but also specifically to war crimes targeting or impacting persons with disabilities – development of an OTP policy paper on disability-based crime is necessary and warranted. Such a policy could also serve to provide guidance on how States might seek to adjust domestic legislation and policy to ensure appropriate identification, investigation, prevention and prosecution of war crimes against persons with disabilities.

56 See OTP, *Policy Paper on Children*, November 2016 (International Criminal Court Child Policy Paper); OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014 (International Criminal Court Sexual and Gender-Based Crimes).

57 International Criminal Court Child Policy Paper, *ibid.*, p. 4; International Criminal Court Sexual and Gender-Based Crimes, *ibid.*, p. 5.

58 International Criminal Court Child Policy Paper, *ibid.*, para. 51; International Criminal Court Sexual and Gender-Based Crimes, *ibid.*, para. 26.

59 *Ibid.*

60 See generally, Committee on the Rights of Persons with Disabilities, *Concluding Observations*, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5.

Following the format of the policy papers on children and sexual and gender-based crimes, any OTP policy paper on disability must establish a meaningful framework for ensuring not only the inclusion of a disability perspective in preliminary examinations, investigations and prosecutions but also meaningful participation of persons with disabilities. First, this requires any OTP policy paper to affirmatively recognize the legal capacity of persons with disabilities and the environmental, attitudinal and policy barriers preventing them from full and equal participation in justice mechanisms. This will require an adjustment to OTP policy, procedure and training of justice personnel on what inherent barriers exist and then what individualized measures are necessary to overcome them to ensure inclusion of persons with disabilities. Second, the diversity of disability and the intersection that it has with other identities held by an individual to create complex and overlapping forms of discrimination must be noted. This will necessitate the OTP acknowledging that a nuanced approach is required when assessing alleged war crimes and IHL violations to underscore the fact that disability is in many cases the primary motivation for the perpetrator in targeting a certain individual or group of individuals.⁶¹ Third, accessibility must be provided to all judicial procedures and processes through the provision of reasonable accommodations – and especially for those with psychosocial or intellectual disabilities. More than simply making the physical space accessible, the OTP will need to have all information and communication provided in accessible formats considering the diversity of disability, as well as gender- and age-appropriate accommodations. Lastly, and most importantly, any OTP policy paper must make every effort to avoid substituted decision-making and encourage empowerment through accessibility and reasonable accommodation.

The above are merely the main pillars of a suggested OTP policy paper, but significant and comprehensive detail will be necessary to ensure that a disability perspective exists when conducting preliminary examinations, investigations, prosecutions and ensuring the physical and psychological well-being of victims and witnesses with disabilities. This can only be ensured through consultation with persons with disabilities, their representative organizations, and experts in the development and implementation of an OTP policy on disability.

The exercise of national criminal jurisdiction to address war crimes against persons with disabilities

States retain prosecutorial and punitive powers in respect of individuals who engage in war crimes, crimes against humanity and other atrocities. Indeed, IHL requires domestic action to make perpetrators for IHL violations accountable under national law.⁶² The exercise of national criminal jurisdiction in this context

61 See W. I. Pons, J. E. Lord and M. A. Stein, above note 1, pp. 62–70.

62 The High Contracting Parties to the Geneva Conventions and Additional Protocol I are obliged to enact legislation needed to provide effective penal sanctions for those committing (or ordering to be committed) any grave breaches of the Geneva Conventions and Additional Protocol I; to take measures for the suppression of other acts contrary to those treaties or to other IHL obligations; and to repress serious

exposes an additional level at which to press for an inclusive accounting for violations committed against persons with disabilities. Here, too, the CRPD offers some useful guidance to inform domestic processes addressing international crimes.

The process of investigating alleged war crimes at the domestic level has given rise to varied domestic frameworks and divergent practices. Efforts to bring some uniformity to national criminal jurisdiction for such crimes include the formulation of *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* published by the Geneva Academy of International Humanitarian Law and Human Rights together with the ICRC.⁶³ These *Guidelines* are useful in terms of encouraging more standardized processes, specifically ones that rely on laws, policies and best practices on the triggering of investigations, different types of investigations, and effective standards and principles used in the investigations. Nevertheless, these *Guidelines* lack the kind of guidance needed to ensure that national-level bodies properly account for and effectively accommodate instances of violations against highly at-risk groups, including persons with disabilities. Although the *Guidelines* mention the need for expertise in investigating instances of violations against groups known to be at high risk – for instance, sexual violence, torture, or incidents where children might be victims, witnesses, or suspects – it falls short of providing sufficient direction to ensure consideration of persons with disabilities and other at-risk groups.⁶⁴

The omission of disability as an explicit case requiring special expertise is telling and highlights the pervasive invisibility of persons with disabilities within domestic policies, laws and practice relating to the administration of justice for war crimes by States. In accordance with the CRPD, States are required to abolish or change existing laws, policies and practices that discriminate against persons with disabilities to allow access to justice mechanisms. Insofar as States are beginning to reform their criminal justice system generally to better accommodate persons with disabilities,⁶⁵ they must also undertake measures to ensure a disability-inclusive approach to the identification, investigation, prevention and prosecution of war crimes. These adjustments should in the first instance include procedural accommodations to ensure the accessibility of legal process and acknowledgement of the right of persons with disabilities to serve as witnesses. In the second instance, substantive adjustments should be undertaken

violations of IHL. They are also obliged to search for persons alleged to have committed (or have ordered to be committed) such grave breaches, and to bring these persons before their own domestic courts; or to hand them over for trial, in accordance with their national legislation, to another High Contracting Party concerned, provided that this High Contracting Party has made out a *prima facie* case. See GC I, above note 3, Art. 49; GC II, above note 3, Art. 50; GC III, above note 3, Art. 129; GC VI, above note 3, Art. 146; and AP I, above note 3, Art. 85.

63 See Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, Geneva Academy of International Humanitarian Law and Human Rights and ICRC, September 2019, available at: www.icrc.org/en/download/file/123868/guidelines_on_investigating_violations_of_ihl_final.pdf.

64 *Ibid.*, paras 126, 131 and 142.

65 See Report of the Office of the United Nations High Commissioner for Human Rights on the Right to Access to Justice under Article 13 of the Convention on the Rights of Persons with Disabilities, UN Doc. A/HRC/37/25, 27 December 2017, paras 22 and 30.

to permit war crimes directly targeting or impacting persons with disabilities to be prosecuted or alternatively to have such disability-based impact of the crime as an aggravated offence, as has been done for crimes against women and children.⁶⁶

Conclusion

The integration of a disability human rights perspective into the process of identifying, investigating and prosecuting war crimes is a requirement of both the CRPD and IHL. Far more work towards implementation of this requirement is needed for the promise of Article 11 to be realized. That said, the adoption of Resolution 2475 is serving as a much-needed impetus for greater action towards achieving a disability sensibility in accountability for violations of IHL and the impact of such violations on persons with disabilities. Both mainstream and disability-specific organizations are working to amplify the documentation of atrocities perpetrated during armed conflict against persons with disabilities.

And yet, much as these examples provide evidence of progress in line with the CRPD drafters' intent, significant obstacles remain in achieving the aims of Article 11 in the context of armed conflict. The mandate of fact-finding missions and international commissions of inquiry investigating war crimes and crimes against humanity remain limited and have not been expanded to allow for a remit that covers crimes committed against persons with disabilities, a group subject to specific protection under IHL. Processes to further develop international law to strengthen accountability for atrocities likewise miss the mark on evoking any sort of disability sensibility, seemingly incognizant of the specific protection accorded to persons with disabilities in IHL. Regrettably, some of the more apparent yet most easily remedied barriers are within the system of ICL and process where understanding of disability law is low among scholars and practitioners and the implications of the lived experience of disability for protection is not appreciated. The exercise of national criminal jurisdiction to address the *lacunae* in accounting for war crimes targeting or directly impacting persons with disabilities could be aided by specific guidance on disability accountability. That said, the CRPD, together with Resolution 2475, provide the point of departure for redressing the accountability void at the three levels outlined in the present article, offering a realistic, if modest, proposal.

66 See W. I. Pons, J. E. Lord and M. A. Stein, above note 1, pp. 82–3.

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

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Abstract

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

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

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

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



Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

9 Office the UN High Commissioner for Human Rights (UN Human Rights), "Persons with Disabilities 'Forgotten Victims' of Syria's Conflict – UN Committee", 17 September 2013, available at: <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13736&LangID=E>.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 See, for example, ICTY, *Prosecutor v. Boskoski and Tarculovski*, Case No. IT-04-82-PT, Amended Indictment, 2 November 2005, para. 34.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42 *Ibid.*, para. 340.

43 *Ibid.*, para. 301.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Violence against persons with disabilities during the conflict in Rwanda

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Violence against persons with disabilities during the conflict in Sierra Leone

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

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

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

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

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

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

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

70 M. Mayhew, above note 67.

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

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

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

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

Evidentiary trends and prosecutorial failures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The *ad hoc* tribunals

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

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

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

83 UN Charter, Preamble.

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

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

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

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

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

84 *Ibid.*, Art. 1.

85 *Ibid.*, Preamble.

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

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

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

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

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

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

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

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

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

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

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

93 T. Meron, above note 81.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Framing violence against persons with disabilities as a crime against humanity

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

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

113 *Ibid.*, para. 697.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

127 Catalina Devandas Aguilar and John H. Knox, “Introduction to the Symposium on William I. Pons, Janet E. Lord, and Michael Ashley Stein, ‘Disability, Human Rights Violations, and Crimes against Humanity’”, *American Journal of International Law*, Vol. 116, No. 1, 2022, p. 68.

128 William I. Pons, Janet E. Lord and Michael Ashley Stein, “Disability, Human Rights Violations, and Crimes against Humanity” *American Journal of International Law*, Vol. 116, No. 1, 2021, p. 82.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

143 Customary International Humanitarian Law, Rules 110 and 138.

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

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

146 *Ibid.*, p. 708.

147 *Ibid.*, p. 710.

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

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

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

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

150 *Ibid.*, para. 1544.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

158 CRPD, above note 126, Art. 13.

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

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

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

162 *Ibid.*, p. 16.

163 *Ibid.*, p. 16.

164 *Ibid.*, p. 23.

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

No longer the “forgotten victims of armed conflict”: Operational and legal considerations for accountability mechanisms regarding crimes affecting persons with disabilities

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Abstract

Despite the fact that persons with disabilities comprise, according to current statistics, a significant portion of conflict-affected communities and are disproportionately affected by armed conflict, the lack of inclusion in accountability mechanisms for acts amounting to crimes under international law is notable. The Convention on the Rights of Persons with Disabilities (CRPD) provides a framework for mainstreaming inclusive investigation practices and promoting greater accountability, through application of the principles of autonomy, non-discrimination and accessibility. This article makes suggestions for the operationalization of this CRPD framework through specific recommendations for accountability mechanisms, alongside legal opportunities for recognition of crimes affecting persons with disabilities and crimes resulting in disability. A case study of the so-called Islamic State of Iraq and the Levant and persons with disabilities in Iraq is used to illustrate the application of recommendations to ensure that persons with disabilities are no longer the “forgotten victims of armed conflict”.

Keywords: accountability, crimes against humanity, disability, genocide, inclusivity, investigations, mainstreaming, war crimes.



Introduction

This article addresses the means through which the complementary role of international criminal law can and should prioritize violations of international humanitarian law and human rights that rise to the level of applicable international crimes for survivors, victims and other witnesses with disabilities, arguing that the inclusion of and accessibility for persons with disabilities at all investigative and legal phases is critical for achieving this aim. This is key both for persons with disabilities prior to conflict and for those who become disabled as a result of conflict. The United Nations (UN) system has repeatedly called for an interpretation of international law in light of a human rights-based approach to disability – as required under Article 11 of the Convention on the Rights of Persons with Disabilities (CRPD) – noting that this would in turn “lead to substantive changes in policy and practice”.¹ Though persons with disabilities are disproportionately affected by conflict, the lack of international criminal prosecutions involving persons with disabilities as survivors, victims or other witnesses is startling.

Operationalizing the CRPD principles of autonomy, non-discrimination and accessibility² within UN fact-finding and investigative bodies and

1 *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, 30 November 2015, para. 4.

2 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008) (CRPD), Art. 3(a)(b)(f).

international criminal courts and tribunals (hereafter referred to as “accountability mechanisms”)³ can help to realize fully inclusive accountability processes for persons with disabilities. Recommendations for accountability mechanisms will be considered within the intelligence analysis cycle in order to facilitate the mainstreaming of a CRPD-compliant approach across the full range of investigative activities.⁴ Potential avenues for prosecutions of crimes affecting persons with disabilities, along with crimes resulting in disability, that can provide recognition for such suffering will then be discussed to highlight the opportunities for accountability that could be pursued. This discussion will then be applied to a case study regarding the so-called Islamic State of Iraq and the Levant and persons with disabilities in Iraq in order to illustrate the application of recommendations within the CRPD framework.

Utilizing the CRPD as the framework for mainstreaming inclusive investigative practices and promoting greater accountability for crimes affecting persons with disabilities, along with crimes resulting in disability, can help to ensure that persons with disabilities will no longer be the “forgotten victims of armed conflict”⁵.

The CRPD as relevant to accountability mechanisms

The scale of impact of conflict on persons with disabilities

Persons with disabilities comprise, based on statistics alone, a significant portion of conflict-affected communities. More than 1 billion people, or 15% of the world’s population, are living with some form of disability,⁶ not accounting for the fact that impairments are often not reported or not recorded due to prevalent discriminatory attitudes, social stigma or inadequate data collection.⁷ Of the 274 million people who are in need of humanitarian protection and assistance in 2022,⁸ then, a conservatively estimated 41 million are people with disabilities.

3 This categorization was first utilized to classify crimes affecting children in Federica D’Alessandra *et al.*, *Advancing Justice for Children: Innovations to Strengthen Accountability for Violations and Crimes Affecting Children in Conflict*, Save the Children and University of Oxford, March 2021, p. 19 fn. 6.

4 UN Office on Drugs and Crime (UNODC), *Criminal Intelligence: Manual for Analysts*, Vienna, 2011, p. 10.

5 Office of the UN High Commissioner of Human Rights, “Persons with Disabilities ‘Forgotten Victims’ of Syria’s Conflict – UN Committee”, 17 September 2013, available at: <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13736&LangID=E> (all internet references were accessed in September 2022).

6 World Health Organization and World Bank, *World Report on Disability*, Geneva, 2011, p. 44.

7 Alice Priddy, *Disability and Armed Conflict*, Academic Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, April 2019, p. 11; see also *Protecting the Rights of Persons with Disabilities in Armed Conflict and Humanitarian Emergencies*, UN Doc. CRPD/CSP/2021/2, 30 March 2021, paras 20, 28.

8 UN Office for the Coordination of Humanitarian Affairs, *Global Humanitarian Overview 2022*, New York, 2021, p. 7.

Further, of the 84.2 million people who have been forcibly displaced as a result of conflict, persecution, human rights violations or events seriously disturbing the public order as of 2021,⁹ approximately 12 million are persons with disabilities, with available data confirming that the prevalence and impact of disability in internal displacement has increased.¹⁰ This illustrates the stark intersectionality of disability and potential situations involving international crimes.

Within armed conflict and humanitarian emergencies, persons with disabilities are documented as being disproportionately affected, but this is not reflected in their involvement in accountability mechanisms that lead accountability efforts for alleged international crimes. Persons with disabilities, particularly within these contexts, are often overlooked: their needs are not adequately identified, and they are frequently deprived of protections and their rights,¹¹ with specific violations that could amount to international crimes. Persons with disabilities can be amongst the first to be targeted during attacks by non-State actors,¹² and they are uniquely vulnerable to being used as human shields and hostages.¹³ Indiscriminate attacks and attacks on populated areas, together with the particular challenges that persons with physical, mental and/or psychosocial disabilities face in escaping active hostilities, have disproportionately harmful consequences for persons with disabilities.¹⁴ This is in addition to persons who acquire disabilities during or whilst fleeing from armed conflict, and those who experience psychological distress resulting in longer-term impacts.¹⁵

Humanitarian assistance actors have made steps forward, albeit with room for improvement, in ensuring that service provision takes the needs of persons with disabilities into account. Key amongst these initiatives is ensuring that considering the needs and inclusion of persons with disabilities occurs across all humanitarian sectors, not only humanitarian protection actors, through “mainstreaming”.¹⁶ However, inclusion of persons with disabilities has not yet been realized, at least publicly, in investigative teams working towards documentation of or accountability for international crimes, despite the fact that persons with disabilities statistically comprise a significant number of survivors, victims and other witnesses of international crimes.

9 Office of the UN High Commissioner for Refugees, *Global Trends: Forced Displacement in 2021*, Geneva, 2020, p. 2.

10 *Ibid.*, p. 28.

11 *Protecting the Rights of Persons with Disabilities*, above note 7, para. 16.

12 *Ibid.*, para. 16; UNICEF, *Children with Disabilities in Armed Conflict*, New York, November 2018, p. 11; Global Protection Cluster, *Silver Linings: Mental Health and Wellbeing in the COVID 19 Era*, February 2021, p. 7.

13 Gerard Quinn, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/76/146, 19 July 2021, para. 67.

14 *Ibid.*, paras 29, 67.

15 *Ibid.*, paras 30, 31; Global Protection Cluster, above note 12, p. 7.

16 *Protecting the Rights of Persons with Disabilities*, above note 7, paras 13, 14; G. Quinn, above note 13, paras 69–76.

The CRPD as a framework for change

The CRPD, which was adopted in 2006 and entered into force in 2008,¹⁷ is a crucial tool for realizing the full protection of rights for persons with disabilities. With 185 States Parties,¹⁸ it provides undeniable recognition that persons with disabilities are full and equal rights holders, with the autonomy and right to access and participate in justice processes, in furtherance of ending impunity.¹⁹ Critically, the CRPD applies across the peace–conflict continuum and does not allow for derogation or suspension of its provisions during national emergencies, foreign occupations, natural disasters or armed conflict.²⁰ It additionally creates a framework of disability-informed principles that aim to ensure equality, inclusion, participation, non-discrimination and full accessibility for persons with disabilities throughout the Convention’s interpretation or application.²¹ While the CRPD in itself is not binding on accountability mechanisms, as they cannot be a party to the Convention, the principles set out for States are still applicable to mechanisms that maintain mandates inclusive of international human rights law (IHRL), and those mechanisms should act in accordance with IHRL, as IHRL sets up baseline standards for the rights which people are due. These fundamental principles should inform a strategy within the accountability mechanisms, taking into account current recommendations on the matter. This is to ensure that efforts to increase the inclusivity of and accountability for persons with disabilities are guided by a common, human rights-based framework.

As many accountability mechanisms hold a whole or partial UN mandate,²² recent UN Security Council or Secretariat calls to action are an important recognition of the need for such steps forward and can serve as relevant guidance. The Security Council’s historic Resolution 2475 on the protection of civilians with disabilities during armed conflict was the first to specifically espouse the duty to assist and enable the meaningful participation of persons with disabilities and to consult those with expertise on disability mainstreaming, in concert with ending impunity for criminal acts against civilians with disabilities.²³ Additionally in March 2019, the UN Secretary-General adopted the *United Nations Disability Inclusion Strategy* (UNDIS) to enable the UN system to support the implementation of the CRPD and

17 CRPD, above note 2.

18 As of 1 September 2022.

19 William I. Pons *et al.*, “Disability, Human Rights Violations, and Crimes against Humanity”, *American Journal of International Law*, Vol. 116, No. 1, 2022, pp. 79–80.

20 CRPD, above note 2, Art. 11; G. Quinn, above note 13, para. 84.

21 *Thematic Study*, above note 1, paras 3, 4; *Protecting the Rights of Persons with Disabilities*, above note 7, paras 8–11.

22 UN Security Council, “Commissions and Investigative Bodies”, available at: www.un.org/securitycouncil/content/repertoire/commissions-and-investigative-bodies; Human Rights Council, “List of HRC-Mandated Commissions of Inquiries/Fact-Finding Missions and Other Bodies (as of May 2022)”, available at: www.ohchr.org/en/hr-bodies/hrc/list-hrc-mandat.

23 UNSC Res. 2475, 20 June 2019, paras 2, 4, 6.

mainstream a human rights-based approach to disability.²⁴ However, no specific data on implementation of the Strategy for UN investigative teams has been included in the corresponding first report on disability inclusion in the UN system to establish a baseline for tracking progress.²⁵

In July 2021, the *Report of the Special Rapporteur on the Rights of Persons with Disabilities* noted that there is “low to no visibility” of persons with disabilities within international criminal law in the peace–conflict continuum.²⁶ The report included specific recommendations for a greater focus on the disability dimension of existing and future accountability efforts, such as increasing the attention paid by States and multilateral institutions to disability within existing and future investigations of, commissions of inquiry into and trials regarding relevant crimes;²⁷ more research on how international criminal law bodies across the board are addressing crimes affecting persons with disabilities and recommendations on how they can ensure accessibility and responsiveness to their investigations or related processes;²⁸ a more intentional focus by investigators and prosecutors on the disability impacts of conflicts and suspected criminal activity;²⁹ the routine and visible advancement of investigations into alleged instances of harm involving persons with disabilities;³⁰ and prosecutions where appropriate, particularly in cases where the criminal act specifically targets persons with disabilities or could be anticipated to have a devastating impact on such persons.³¹ The report stressed the need to end impunity, as called for in the CRPD, and the relevance of the CRPD across the peace continuum.³²

In line with recent calls to action within the UN system, accountability mechanisms should utilize the CRPD as a normative framework for beginning and accelerating accountability processes for international crimes affecting persons with disabilities and international crimes resulting in disability. This can result in the creation and implementation of policies and methodologies that better protect and realize the autonomy of persons with disabilities, ensuring that their individual and collective voices and experiences are fully included across all workflows in furtherance of inclusive accountability, as envisaged in the CRPD.³³ Utilizing the CRPD as a framework for operational change can additionally promote a broader, deeper conception of equality, inclusion and participation³⁴ – all principles and rights enshrined in the CRPD – and contribute

24 G. Quinn, above note 13, para. 26; UN Secretary-General, *United Nations Disability Strategy*, New York, June 2019 (UNDIS), p. 1.

25 UN Secretary-General, *Disability Inclusion in the United Nations System: 2020 Programme Year*, New York, October 2021.

26 G. Quinn, above note 13, p. 16.

27 *Ibid.*, para. 92.

28 *Ibid.*, para. 106(c).

29 *Ibid.*, para. 94.

30 *Ibid.*, para. 68.

31 *Ibid.*, para. 68.

32 *Ibid.*, paras 84, 92–94.

33 CRPD, above note 2, preambular paras (u), (y), Art. 13.

34 G. Quinn, above note 13, para. 12.

to the end of the historic invisibility of persons with disabilities in law enforcement processes.³⁵

The nexus between international criminal law and the CRPD

In addition to UN system calls to action and policies, there is a nexus between international criminal law and the CRPD that can further ground the use of the CRPD as a framework for accountability processes. Article 11 of the CRPD clarifies that, in taking all necessary measures to ensure the protection and safety of persons with disabilities, the CRPD principles are linked not only to other human rights law, but also to international humanitarian law and other international law fields – including international criminal law.³⁶ All realms of international law should be sensitive to the barriers that persons with disabilities often face in vindicating their human rights.³⁷ In addition, investigative team mandates often specifically include a provision to act in accordance with relevant international law, including IHRL.³⁸

The CRPD framework for increasing accountability

Accountability mechanisms can use the following specific principles from the CRPD as a framework for developing specific, operational actions, furthering accountability efforts for persons with disabilities.³⁹ While these principles do comprise fundamental human rights principles, accountability mechanism staff may not be familiar with some of the nuances⁴⁰ of how they should be put into practice in the context of persons with disabilities. Working within this framework can bring meaningful steps toward disability inclusion, defined by the UNDIS as the meaningful participation of persons with disabilities, and the promotion of their rights and the consideration of disability-related perspectives in compliance with the CRPD.⁴¹ It can also ensure that future policies and practices are CRPD-compliant – or that they follow the general principles and obligations underlined in the Convention, along with the standards of the Committee on the Rights of Persons with Disabilities⁴² – and that a consistent

35 *Ibid.*, para. 16.

36 CRPD, above note 2, Art. 11; W. I. Pons *et al.*, above note 19, pp. 85, 91; G. Quinn, above note 13, para. 66.

37 Stephanie Motz, “Art.11 Situations of Risk and Humanitarian Emergencies”, in Ilias Bantekas *et al.* (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford Scholarly Authorities on International Law, Oxford, 2018, pp. 316–317.

38 See UNSC Res. 2379, 21 September 2017, para. 6; UNGA Res. 71/248, 11 January 2017, para. 1; HRC Res. 39/2, 27 September 2018, para. 22.

39 W. I. Pons *et al.*, above note 19, pp. 77, 78.

40 See A. Priddy, above note 7, p. 25, regarding the CPRD as an “implementing convention” that “sets out a detailed code [for how existing rights] should be put into practice” for persons with disabilities.

41 UNDIS, above note 24, p. 20.

42 *Ibid.*

and systematic approach to disability inclusion in all areas of operations and programming is achieved through mainstreaming.⁴³

The following is an overview of the core CRPD principles that can be used to guide the creation and operationalization of a strategy for accountability mechanisms, namely (1) autonomy, (2) non-discrimination and (3) accessibility. These core principles are interlinked, and they underpin the rights espoused in the CRPD, such as the substantive rights found in Article 12 (right to equal recognition before the law), Article 5 (right to equality and non-discrimination) and Article 9 (right to accessibility). As these principles serve to guide the CRPD’s interpretation and implementation, they should guide all legislative and policy developments that relate to persons with disabilities.⁴⁴ Together, these principles can achieve the full and effective participation and inclusion⁴⁵ of persons with disabilities within accountability mechanisms.

Autonomy

As a necessary foundation for the participation and inclusion of persons with disabilities within accountability mechanisms, the CRPD affirms the legal capacity of such persons.⁴⁶ This provision was included to ensure that persons with disabilities’ acts and decisions are treated as legally effective within a particular legal system.⁴⁷ This provides a legal foothold for accountability mechanisms to support their work with persons with disabilities as survivors, victims and other witnesses, and for advocacy regarding persons with disabilities’ equal recognition before the law, should national jurisdictions benefiting from cooperation maintain a discriminatory, status-based approach of denial of legal capacity.⁴⁸ The exercise of legal capacity should then be appropriately facilitated through operationalizing the principles of non-discrimination and accessibility, which will be discussed more at length below, in order to achieve inclusion and participation.⁴⁹

Non-discrimination

The CRPD principle of non-discrimination,⁵⁰ in furtherance of achieving participation and inclusion,⁵¹ is interwoven throughout the Convention and can guide the core framework for developing initiatives to promote accountability for victims and survivors with disabilities in accountability mechanisms. Discrimination on the basis of disability, the key inhibiting factor for

43 *Ibid.*

44 A. Priddy, above note 7, pp. 27, 28.

45 CRPD, above note 2, Arts 3(c), 29, 30.

46 *Ibid.*, Arts 3(a), 12.

47 S. Motz, above note 37, p. 352.

48 *Ibid.*, pp. 352–354.

49 Committee on the Rights of Persons with Disabilities, General Comment No. 1, “Article 12: Equal Recognition before the Law”, UN Doc. CRPD/C/GC/1, 19 May 2014, para. 17.

50 CRPD, above note 2, Arts 3(b), 5.

51 *Ibid.*, Art. 2.

participation and inclusion, means any distinction, exclusion or restriction on the basis of disability that has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of human rights on an equal basis with others.⁵² A novel innovation for achieving non-discrimination is the provision for reasonable accommodation,⁵³ which is relevant for accountability mechanisms' work with persons with disabilities in all respects in order to ensure that participation and inclusion is possible at all stages of the accountability process.

Duty to provide reasonable accommodation

The CRPD not only recognizes that failure to provide reasonable accommodation amounts to unlawful discrimination,⁵⁴ but goes further by enshrining the right to reasonable accommodation as a stand-alone legally enforceable right by way of CRPD Article 2.⁵⁵ As an integral part of non-discrimination, the duty to provide reasonable accommodation, one of the CRPD's most innovative aspects, requires the provision of

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.⁵⁶

The CRPD further enshrines the duty to provide reasonable accommodation within access to justice.⁵⁷ A CRPD-compliant assessment of the reasonableness of accommodation and what would be considered an undue burden on the accountability mechanism requires consideration of the proportional relationship between the means employed to provide the accommodation and its aim, through objective criteria and considering factors such as the availability of resources, financial implications and third-party benefits.⁵⁸

Overall, reasonable accommodation is a tool of substantive equality,⁵⁹ focusing on individual needs in differing contexts. Its application requires an assessment of individuals' needs on a case-by-case basis, as individualized and contextualized responses are core components of the concepts of equality and non-discrimination.⁶⁰ As UN agencies work to develop reasonable

52 *Ibid.*, Arts 3(c), 29, 30.

53 *Ibid.*, Art. 5(3).

54 *Ibid.*, Art. 2; A. Priddy, above note 7, p. 29.

55 CRPD, above note 2, Art. 2.

56 *Ibid.*, Arts 2, 5(3).

57 *Ibid.*, Arts 14(2), 27(1)(i).

58 Committee on the Rights of Persons with Disabilities, "General Comment No. 6 (2016) on Equality and Non-Discrimination", UN Doc. CRPD/C/GC/6, 26 April 2018, paras 26(e)(f)(g), 17; Committee on the Rights of Persons with Disabilities, *Michael Lockery v. Australia*, Communication No. 13/2013, UN Doc. CRPD/C/15/D/13/2013, 30 May 2016, para. 8.5.

59 A. Priddy, above note 7, p. 31.

60 *Ibid.*, p. 32; Committee on the Rights of Persons with Disabilities, General Comment No. 2, "Article 9: Accessibility", UN Doc. CRPD/C/GC/2, 22 May 2014, para. 26.

accommodation procedures as part of the UNDIS,⁶¹ UN-affiliated accountability mechanisms in particular should begin to work towards this goal.⁶² Although reasonable accommodation is in principle an individual measure, teams can take into account the potential beneficial effects of such accommodation for ongoing inclusion of other persons with disabilities in order to achieve the widest impact possible.⁶³

For example, survivors, victims and other witnesses with disabilities may require venue adjustments of the in-person premises or technology used for taking evidence or for legal proceedings, such as a wheelchair ramp or specific equipment to ensure that visual or hearing disabilities are not an obstacle to participation and inclusion.⁶⁴ There may also be a need to arrange for evidence to be taken in a familiar or otherwise accommodating environment within a longer time frame – slowly and with more breaks – in the case of either physical or mental disability.⁶⁵ The environment may need to be made suitable to the individual for reasons that are not immediately apparent, such as certain kinds of lighting affecting those with epilepsy.⁶⁶ In addition, a modified communication approach by the use of physical aids or other techniques may be required, and an interpreter may be needed to assist with speech impairments. Training to enable staff within the accountability mechanism to recognize disabilities, particularly those that may not be immediately apparent, could further work towards ensuring that those needing reasonable accommodation can receive it.⁶⁷ Such training could potentially be facilitated by specialized UN agencies or non-governmental organizations.

Accessibility

Accessibility is one of the key principles of the CRPD as a precondition for the effective and equal enjoyment of all rights by persons with disabilities.⁶⁸ Article 9 provides an obligation to take appropriate measures to ensure access on an equal basis with others to the physical environment, transportation, information and communications (including information and communications technologies and systems), and facilities and services.⁶⁹ This obligation applies to private as well as public actors,⁷⁰ and is separate from the duty to provide reasonable

61 UNDIS, above note 24, p. 8.

62 W. I. Pons *et al.*, above note 19, p. 78.

63 Committee on the Rights of Persons with Disabilities, General Comment No. 6, above note 58, paras 24 (b), 26(e); Committee on the Rights of Persons with Disabilities, *Marie-Louise Jungelin v. Sweden*, Communication No. 5/2011, UN Doc. CRPD/C/12/D/5/2011, Joint Opinion of Committee Members Carlos Rios Espinosa, Theresia Degener, Munthian Buntan, Silvia Judith Quan-Chang and Maria Soledad Cisternas Reyes (Dissenting), 14 November 2014, para. 5.

64 Julinda Beqiraj, Lawrence McNamara and Victoria Wicks, *Access to Justice for Persons with Disabilities: From International Principles to Practice*, International Bar Association, October 2017, p. 28.

65 *Ibid.*, pp. 28, 39.

66 *Ibid.*, p. 28.

67 *Ibid.*, pp. 29, 30.

68 CRPD, above note 2, Arts 3(f), 9, 13.

69 *Ibid.*, above note 2, Art. 9.

70 Committee on the Rights of Persons with Disabilities, above note 60, para. 13.

accommodation; accessibility obligations relate to groups and apply *ex ante*,⁷¹ while reasonable accommodation applies on an individual basis, in a particular context, and thus is normally considered an *ex nunc* duty.⁷² The duty to ensure accessibility is considered unconditional, and the entity providing accessibility may not excuse its omission to do so by referring to any burden.⁷³ This is particularly relevant to investigative teams seeking to develop CRPD-compliant assessments and policies, which can work towards accomplishing accessibility within this framework, *ex ante*.

Article 13 builds on Article 9, requiring that effective access to justice for persons with disabilities is ensured on an equal basis with others, including through the provision of procedural and age-appropriate accommodations to facilitate their effective role as direct and indirect participants.⁷⁴ This can include as witnesses in legal proceedings, specifically at investigative and other preliminary stages.⁷⁵ The CRPD is the first international human rights treaty to explicitly guarantee a right to access justice, but the Committee on the Rights of Persons with Disabilities has since articulated persistent concerns about the lack of accommodation in judicial procedures for persons with disabilities, along with the need for training of justice personnel on the human rights-based approach to disability.⁷⁶

Accessibility for survivors, victims and other witnesses with disabilities within accountability mechanisms could, for example, utilize the “universal design” concept of the CRPD, involving the “design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design”.⁷⁷ The benefit of a universal design approach is that it helps to ensure full, equal and unrestricted access for all users, including persons with disabilities.⁷⁸ Examples include providing information in an understandable format, such as easy-to-read or plain language formats, as well as the capacity to provide Braille translations, audio recordings of information, or professional sign language translation.⁷⁹

Operationalization of the CRPD framework

The intelligence analysis cycle and disability

This section proposes practical suggestions for accountability mechanisms on how to operationalize the CRPD framework in order to realize an inclusive approach and

71 *Ibid.*, para. 25.

72 *Ibid.*, para. 26.

73 *Ibid.*, para. 25.

74 CRPD, above note 2, Art. 13(1).

75 *Ibid.*

76 *Report of the Committee on the Rights of Persons with Disabilities*, UN Doc. A/72/55, 2016, para. 35; see also *Report of the Committee on the Rights of Persons with Disabilities*, UN Doc. A/74/55, 2018, para. 58.

77 CRPD, above note 2, Arts 2, 4(1)(f).

78 J. Beqiraj, L. McNamara and V. Wicks, above note 64, p. 25.

79 *Ibid.*, p. 24.

address current access to justice challenges for persons with disabilities. Noting the importance of mainstreaming the CRPD principles,⁸⁰ suggested actions are placed within the intelligence analysis cycle, which is broadly recognized as the foundation of the intelligence analysis process and can encompass the full range of investigative activities.⁸¹ Depending on the specific accountability mechanism, the utilization of the cycle may differ in terms of the exact steps or team configuration, but in general this is a baseline process that will feature in any investigation, leading to prosecutions as appropriate. The permutation of the intelligence analysis cycle used here includes five core phases: (1) planning and direction, (2) collection, (3) processing and collation, (4) analysis and (5) dissemination and feedback. This provides a structure for recommendations on how to overcome barriers from the beginning of the investigation process, noting that the way the intelligence is used for law enforcement purposes, including discovery and evidence considerations, will be determined based on applicable jurisdictions and the statutes, mandates, terms of reference and standard operating procedures of the specific investigative team.⁸²

Planning and direction

Planning and direction are crucial to all investigation stages, from the formation of a specific investigation unit, including initial hiring of staff, to preparing for trial. The principles of non-discrimination, participation and inclusion, along with autonomy and accessibility, are all relevant for assessing how measures can be taken to mainstream disability considerations within planning and direction activities.⁸³ Three interrelated suggestions are presented below to begin ensuring that persons with disabilities can actively and equally participate in international criminal law mechanisms.

The first suggestion is to create a CRPD-compliant organizational policy, along with a disability-inclusive investigative strategy or plan at a more micro level. A guiding organizational policy can build the necessary institutional capacity of the organization to conduct preliminary examinations, investigations and prosecutions of crimes (according to the mandate scope) against persons with disabilities and require that its engagement with persons with disabilities is supporting autonomy and non-discrimination and the duty to provide reasonable accommodation along with accessibility.⁸⁴ In addition, the mandating body of any newly established accountability mechanism can require provisions highlighting the need to consider the experiences of persons with disabilities in

80 UNDIS, above note 24, p. 1; Inter-Agency Standing Committee, *Guidelines: Inclusion of Persons with Disabilities in Humanitarian Action*, July 2019, p. 10.

81 UNODC, above note 4, p. 10.

82 *Ibid.*

83 For discussion on the importance of mainstreaming for crimes affecting children and sexual and gender-based violence (SGBV) crimes, see F. D’Alessandra *et al.*, above note 3, paras 57, 60, 62.

84 For a discussion of how a policy on persons with disabilities fits with the structure of the International Criminal Court (ICC) in particular, see W. I. Pons *et al.*, above note 19, pp. 91–92.

terms of reference, such as the current provisions mentioning survivors of sexual and gender-based violence (SGBV) crimes and crimes against children.⁸⁵ The more micro-level investigative strategy or plan will usually include the who, what, where and why of an investigation, and it is particularly crucial that persons with disabilities are featured in each part of this strategy or plan. This should include employment issues to be considered at the outset or at later phases of review, such as employment of persons with disabilities, potential outreach strategies, and collaboration with representative or specialist organizations, along with time and personnel resources dedicated to initial leads or uncovering leads.⁸⁶

Organizational policies at any level developed at the start of or during an investigation should ensure that risks are mitigated and accommodation measures are in place, as recommended by the UNDIS,⁸⁷ much like policies developed regarding SGBV crimes and crimes against children.⁸⁸ Disability-inclusive policies can refer to the CRPD and Committee on the Rights of Persons with Disabilities jurisprudence to provide the framework for specific policy provisions, such as the International Criminal Court (ICC) Office of the Prosecutor has included in its Policy on Children, citing the Convention on the Rights of the Child and its related Committee decisions.⁸⁹ To facilitate further participation, to the extent that confidentiality allows and memorandums of understanding or similar collaboration mechanisms can be enacted, representative organizations or specialized UN agencies can be consulted and provide input into these policies.⁹⁰ This document can also concretely articulate the international investigative team's commitment to disability inclusion and mainstreaming throughout its sub-units (such as the witness protection and support unit) and investigation processes,⁹¹ as detailed in the remaining components of the intelligence cycle and when moving toward legal proceedings. Additionally, such a policy should include accessibility considerations,⁹² particularly regarding mechanism staff, survivors, victims and other witnesses with disabilities.

85 *Independent Investigative Mechanism for Myanmar: Terms of Reference*, UN Doc. A/73/716, 21 January 2019, paras 25, 30; *Terms of Reference of the Investigative Team to Support Domestic Efforts to Hold Islamic State in Iraq and the Levant (Da'esh) Accountable for Acts that May amount to War Crimes, Crimes against Humanity and Genocide Committed in Iraq, established pursuant to Security Council Resolution 2379 (2017)*, UN Doc. S/2018/118, 14 February 2018, para. 15; *Implementation of the Resolution Establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/71/755, 19 January 2017, para. 19, 41.

86 UNDIS, above note 24, p. 18.

87 *Ibid.*, para. 26(a).

88 See ICC Office of the Prosecutor, *Policy Paper on Children*, November 2016; ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014.

89 W. I. Pons *et al.*, above note 19, p. 77.

90 UNDIS, above note 24, para. 26(d).

91 *Ibid.*, p. 13.

92 *Ibid.*, p. 15.

The second suggestion is to hire in-house expertise that is inclusive of staff with disabilities, who can themselves lead the development and operationalization of policies to be mainstreamed.⁹³ These staff could preferably act as embedded experts within investigation and analysis teams in order to further ensure the day-to-day integration of such considerations and provide on-hand capacity-building.⁹⁴ Thirdly, to ensure both feasibility and accountability for mainstreaming initiatives, funding proposals and team budgets should have dedicated funds. In parallel to the investigative strategy and plan, donor-funded investigations can include specific, yet realistic, targets with the funding’s logframe, including number of leads, lines of inquiry or witnesses (including survivors and victims) related to crimes affecting persons with disabilities and crimes resulting in disability. This can also help to ensure that donors are invested in such mainstreaming, along with holding accountability mechanisms accountable for reaching certain indicator targets. Donors already familiar with humanitarian funding should be well placed to facilitate this and will be furthering their compliance with UN Security Council Resolution 2475.

Collection

The scope of the collection phase of the intelligence analysis cycle may differ depending on the phase of the investigation, as there will be a wider net cast toward the beginning, with likely a wide variety of information and evidence brought in, versus strategic gap-filling later to address gaps in the required crime elements. While acknowledging the realistic operational difficulties of reaching persons with disabilities on the ground and building enough trust with affected communities to have productive and trauma-informed discussions, this is not a justification for a lack of resource dedication. Persons with disabilities should be a focus in the collection phase, regarding both witness information and evidence and other types of data, including open- and closed-source datasets.

To realize autonomy, non-discrimination and accessibility within the investigation, for all types of information and evidence available, accountability mechanisms should work with specialized organizations⁹⁵ – including relevant humanitarian protection organizations, as well as camp management actors for displacement sites – as partners for reaching persons with disabilities. Actors specialized in disability in the local context should also be consulted and collaborated with prior to and during communications with persons with disabilities and for institutional learning, to the extent possible. If and when persons with disabilities are willing to engage, accountability mechanisms should

93 For a discussion of this suggestion in the context of achieving accountability for crimes affecting children, see F. D’Alessandra *et al.*, above note 3, paras 72, 77.

94 *Ibid.*, paras 78, 79.

95 UNDIS, above note 24, p. 14.

make reasonable accommodations for survivors, victims and other witnesses in the collection phase, within remote or in-person discussions and outreach, including witness screenings or interview processes.⁹⁶ Further, a record of reasonable accommodations requested and provided, along with feedback on the provided accommodation by the requester, is recommended to ensure that lessons learned can be shared and improvement can be achieved.⁹⁷

Processing and collation

This intelligence analysis cycle framework combines processing and collation into one phase, whereby the data collected is organized into a format from which it can be retrieved and analyzed.⁹⁸ This may involve organizations' chain of custody or evidence life-cycle management process, remote information and evidence management platform interfaces, e-discovery tools or manual information management by staff.⁹⁹ Without relevant data processing and collation, the information and evidence collected will not be able to facilitate further analysis of crimes affecting persons with disabilities and resulting in disability.

Suggestions to ensure a non-discriminatory investigative process include having appropriate data tags and biographical information questions, along with search terms (in all relevant languages) for open- and closed-source data searches. In-house expertise, along with relevant humanitarian, development and other civil society actors, can assist with biographical information and other data tags; humanitarian protection actors in particular should hold relevant experience with such data collation and processing in their own systems that is inclusive of persons with disabilities, in consultation with the accountability mechanism's information systems staff.

Analysis

The analysis phase of the intelligence cycle entails the in-depth examination of the meaning and essential features of the available information¹⁰⁰ within the overall aims and objectives of the investigation. Suggestions to ensure that autonomy, non-discrimination and accessibility for persons with disabilities can be championed include proper information tagging, along with advice from staff and consultant analysts in the investigation on considerations involving persons with disabilities, to ensure that patterns, correlations and inferences¹⁰¹ involving

96 *Ibid.*, para. 26(f). An example of this includes the disability ramp access construction for the Baghdad office of the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD). Publicly available information on this is available at: www.ungm.org/Public/Notice/145472.

97 UNDIS, above note 24, p. 15.

98 UNODC, above note 4, p. 13.

99 See UNITAD's Evidence Lifecycle Management System, Shuhud online crime reporting tool and use of e-discovery platforms, as referenced in UNITAD, *Harnessing Advanced Technology in International Criminal Investigations*, Baghdad, 2021.

100 UNODC, above note 4, p. 13.

101 *Ibid.*, pp. 14–15.

crimes affecting persons with disabilities or resulting in disability can be found using the analytical methods and tools available. This is the step which can most accelerate access to justice by ensuring that such topics are of analytical priority and are included in case-building.

Dissemination and feedback

The dissemination phase entails the release of the results of analysis to the relevant members of the accountability mechanism.¹⁰² This should, in turn, fit into a continual review of the entire intelligence cycle to identify ways it should be improved or to re-assess priorities and actions according to operational needs.¹⁰³ Inclusion can be achieved by ensuring that there is space within all levels of the accountability mechanism to receive information and further discussion on crimes affecting persons with disabilities and resulting in disability. Suggestions include highlighting relevant results focused on the experiences of survivors, victims and other witnesses with disabilities through analysis products and briefings, and creating opportunities for the affected communities themselves to provide feedback, to the extent feasible given the mechanism’s confidentiality procedures. Sharing lessons learned between accountability mechanisms,¹⁰⁴ whether formal or informal, could also accelerate disability inclusion best practices and help to ensure that autonomy, non-discrimination and accessibility can be achieved across international justice institutions.

Legal opportunities for accountability

The aim of the intelligence analysis cycle within accountability mechanisms is to utilize the results in case-building for relevant prosecutions, and as such, a crime base is often considered throughout investigations as lines of inquiry are pursued. The extent to which the crime base is narrowed may depend on the specific leadership of the investigation, resources, and legal expertise, but in any event, the crime base considered at the investigation stage will have a significant impact on the likelihood of achieving criminal accountability for certain groups of victims and survivors.¹⁰⁵ Accountability mechanisms often represent the first, and at times only, attempt to raise recognition for victim groups.¹⁰⁶ Highlighting the legal opportunities for pursuing accountability for crimes against persons with disabilities is critical to ensuring that they will be included in investigation priorities,¹⁰⁷ as guided by leads and evidence collected, and included in the intelligence analysis cycle at whatever

102 *Ibid.*, p. 15.

103 *Ibid.*, pp. 15–16.

104 UNDIS, above note 24, p. 18.

105 For a discussion of this factor in the context of achieving accountability for crimes affecting children, see F. D’Alessandra *et al.*, paras 24, 58, 60, 77.

106 *Ibid.*, para. 5.

107 *Ibid.*, paras 58, 72.

points are most appropriate for the particular investigation in order to realize the CRPD principles and as a key step in the ultimate call for action to end impunity.¹⁰⁸

There are opportunities for prosecution available for crimes affecting persons with disabilities and resulting in disability within war crimes, crimes against humanity and potentially genocide. The term “crimes affecting persons with disabilities” is used to denote both acts against persons with disabilities that are constituted if the victim is a person with a disability, and generic crimes against the civilian population that disproportionately affect persons with disabilities.¹⁰⁹ While any current international crime may be committed against persons with disabilities, this article highlights how new crimes might be pursued to bring recognition for their specific suffering, along with crimes that can recognize the disproportionate effects of attacks on persons with disabilities. The term “crimes resulting in disability” refers to disability caused by unlawful acts that may amount to international crimes. There are different legal implications for each, but the full realm of possibilities should be considered by accountability mechanisms in order to ensure the inclusion of survivors, victims and witnesses with disabilities.

This overview analysis focuses on international crimes previously found to be part of customary international law by international courts (and specifically mentioned in the Rome Statute of the ICC),¹¹⁰ in order to provide the most impactful and practicable analysis, particularly given the jurisdictional uncertainties that many accountability mechanisms face. While no international prosecution to date has publicly mentioned persons with disabilities, with the exception of the ICC Chambers noting the need to take into account the “particular special needs” of victims with disabilities in the abstract,¹¹¹ potential future prosecutions can follow the trajectory of the development of prosecution of SGBV-related crimes.¹¹²

Crimes affecting persons with disabilities

Persecution. Persecution can serve as the legal foothold for developing specific recognition of crimes targeting persons with disabilities, on the basis that persecution can occur on “other grounds that are universally recognized as impermissible under international law”.¹¹³ The International Criminal Tribunal

108 W. I. Pons *et al.*, above note 19, p. 80.

109 This categorization is utilized in F. D’Alessandra *et al.*, p. 29 fn. 11.

110 Such crimes can be specifically found in Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Arts 6, 7(1)(a)(f)(h), 7(1)(d), 8(2)(a)(i)(ii-1), 8(2)(b)(i)(ii)(ix)(x-1)(xxi), 8(2)(c)(i-1)(i-2)(i-4)(ii), 8(2)(e)(i)(iv)(xi-1).

111 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1119, Decision on Victims’ Participation (Trial Chamber I), 18 January 2008, para. 127; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2904, Decision Establishing the Principles and Procedures to Be Applied to Reparations (Trial Chamber I), 7 August 2012, para. 189; ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 30 September 2008, para. 144(c).

112 W. I. Pons *et al.*, above note 19, pp. 80–82; F. D’Alessandra *et al.*, paras 96–99.

113 ICC, *Elements of Crimes*, 2011, Art. 7(1)(h)(3).

for the former Yugoslavia (ICTY) has stated that its list of persecutory grounds is also not exhaustive,¹¹⁴ noting that “the experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5(h), such as physical or mental disability, age or infirmity, or sexual preference”.¹¹⁵ The ICC has not yet dealt with the question of how to define the “other grounds that are universally recognized as impermissible under international law”. The standard of “universally recognized” was developed as a compromise between those in favour of an open list of prohibited persecution grounds and those fearing a subsequent violation of legality.¹¹⁶

It has been suggested that the high standard of “universally recognized” can be interpreted by considering *jus cogens* norms, customary international law and treaty law, to the extent that IHRL is to be relied on for interpretation.¹¹⁷ Regarding *jus cogens*, there is no consensus that discrimination based on disability reaches this threshold.¹¹⁸ If following a consensus among scholars that interpretation of “universally recognized” that the ground in question should be recognized as impermissible in all countries and societies is too high, then an *eiusdem generis* interpretation supports a lower standard than *jus cogens*: that it must be recognized by customary international law.¹¹⁹ Given the widespread ratification and accession of the CRPD,¹²⁰ the ground of disability may find favourable recognition in future judicial proceedings when analyzing the required state practice and *opinio juris*.¹²¹ The phrase “under international law” could also spur debate on whether it is required to meet the customary international law threshold of examining state practice and *opinio juris*, instead of relying on the practice and interpretation of human rights treaty bodies, for example.¹²² Using a lower standard than customary international law can further be supported by taking into account the Rome Statute drafting history, which reveals that the term “universally recognized under customary international law” was rejected because the standard was seen as too high.¹²³ Scholarship has also suggested that

114 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 285.

115 *Ibid.*

116 Valérie V. Suhr, “Persecution on ‘Other Grounds that Are Universally Recognized as Impermissible under International Law’”, in *Rainbow Jurisdiction at the International Criminal Court: Protection of Sexual and Gender Minorities under the Rome Statute*, Springer, Berlin, and T. M. C. Asser Press, The Hague, 2022, p. 287; Gideon J. Boas, “Crimes against Humanity”, in Gideon J. Boas *et al.* (eds), *International Criminal Law Practitioner Library: Elements of Crimes under International Law*, Vol. 2, Cambridge University Press, Cambridge, 2009, pp. 107–108; Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 4th ed., Cambridge University Press, Cambridge, 2019, p. 253.

117 V. V. Suhr, above note 116, p. 288.

118 *Ibid.*

119 William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, Oxford, 2016, pp. 198–199; A Widney Brown and Laura Grenfell, “The International Crime of Gender-Based Persecution and the Taliban”, *Melbourne Journal of International Law*, Vol. 4, No. 2, 2003, p. 358.

120 *Ibid.*, p. 198 fn. 413.

121 V. V. Suhr, above note 116, pp. 289–290.

122 *Ibid.*, pp. 292–293.

123 *Ibid.*, p. 292.

disability may have already reached the threshold needed,¹²⁴ despite the lack of any judicial recognition of a prohibition under customary international law.

It is likely that a finding of crimes against humanity would emerge after many years of evidence collection and analysis, along with key evidence through which can be inferred discriminatory intent.¹²⁵ Due to the complexity of satisfying the requisite contextual elements for crimes against humanity, mainstreaming considerations for persons with disabilities is crucial from the start. This includes ensuring engagement with survivors and victims with disabilities, appropriate data tagging, and relevant search terms for non-testimonial evidence.¹²⁶

*Murder/killing, torture, outrages upon personal dignity, attacks against civilians and civilian infrastructure, and forcible transfer or deportation.*¹²⁷ The crimes of murder/killing, torture, outrages upon personal dignity, attacks against civilians and civilian infrastructure, and forcible transfer or deportation are of note, as they are likely to have a more significant impact on persons with disabilities¹²⁸ and have all been recognized as crimes under customary international law.¹²⁹ Persons with disabilities have reportedly been the subject of targeted killings,¹³⁰ in addition to being more likely to be killed or injured due to inaccessible emergency information, evacuation procedures and shelters.¹³¹ For allegations of torture,¹³² torture as a war crime¹³³ provided an opportunity for increased recognition of SGBV, most notably rape as torture,¹³⁴ through inclusion of discrimination on any ground (including gender) as a prohibited purpose under customary international law.¹³⁵ The same legal methodology could be used to recognize acts amounting to torture committed against persons with disabilities, because they

124 W. Schabas, above note 119, p. 198; Evelyne Schmid, *Taking Economical, Social and Cultural Rights Seriously in International Criminal Law*, Cambridge University Press, Cambridge, 2015, pp. 137–138.

125 ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment (Appeals Chamber), 17 September 2003, para. 184.

126 W. I. Pons *et al.*, above note 19, p. 91.

127 The author notes that whether the crimes fall under crimes against humanity or war crimes would depend on the fact patterns meeting the requisite contextual elements, and for war crimes, which acts are prohibited in international and non-international armed conflicts. Recognition of specific targeting of persons with disabilities due to their disability would then be covered under the crime against humanity of persecution, if applicable.

128 W. I. Pons *et al.*, above note 19, p. 91.

129 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 16 November 1998, paras 128–135; ICTY, *Prosecutor v. Kunarac*, Case Nos IT-96-23-T, IT-96-23/1-T, Judgment (Trial Chamber), 22 February 2001, para. 480; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-AR73.3, Decision (Appeals Chamber), 11 March 2005, paras 29, 30; ICTY, *Krnojelac*, above note 125, paras 222–230.

130 W. I. Pons *et al.*, above note 19, pp. 62–64.

131 A. Priddy, above note 7, p. 24.

132 *Ibid.*, p. 92; W. I. Pons *et al.*, above note 19, p. 66.

133 Regarding the crime against humanity of torture, the author notes that no specific purpose may need to be proved for this crime, and thus discrimination on the ground of disability would not be applicable. ICC, above note 113, Art. 7(1)(f), in contrast to Arts 8(2)(a)(ii)-1(2) and 8(2)(c)(i)-4(2).

134 ICTY, *Prosecutor v. Delalić and Others*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 493; International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 597.

135 ICTY, *Kunarac*, above note 129, para. 485.

are persons with disabilities, under the war crime of torture. Regarding outrages upon personal dignity, persons with disabilities may have particular gauges of personal dignity depending on their circumstances.¹³⁶ Outrages upon personal dignity was another crime through which accountability for SGBV crimes gained increasing recognition,¹³⁷ and thus might be an opportunity to highlight the experiences of, and pursue accountability for such acts that violate the dignity of, persons with disabilities.

Attacks on civilian infrastructure may also have a disproportionately high impact on persons with disabilities,¹³⁸ and this should be acknowledged through evidence presented and the participation of victims with disabilities, if this crime is pursued. Examples include attacks on or destruction of independent living facilities, rehabilitation centres, specialized schools, hospitals, utility services, public transportation, orphanages and other public institutions. Persons with disabilities are more likely to use and rely on these facilities and are therefore placed at a much higher risk of harm by their destruction or inoperability, whether purposeful or not.¹³⁹ As such, persons with disabilities should be included within information and evidence collection, in particular from victim and witness accounts, in order to fully capture the impact of these crimes on the affected communities.

Additionally, for persons with disabilities who do flee from conflict zones, displacement is a complicating factor that poses numerous threats to their physical and mental health and well-being, which can further aggravate existing disabilities or lead to secondary ones.¹⁴⁰ This could be acknowledged through the crimes of forcible transfer or deportation, depending on fulfilment of the required crime elements.

Crimes resulting in disability

Genocide. While this may be the most novel suggested connection between crimes related to persons with disabilities and potential prosecutions, due to the potential application to multiple current contexts it will be initially explored. The crimes of causing serious bodily or mental harm, along with measures intended to prevent births among a protected national, ethnical, racial or religious group, in whole or in part, could provide accountability for crimes resulting in disability. This is considered in the context of the use of chemical weapons in particular, but could also include biological and nuclear weapons should their deeply unfortunate and abhorrent use become a fact of the future.

136 ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Judgment (Trial Chamber), 2 November 2001, para. 167: “subjective criteria must be taken into account, including a particular victim’s temperament or sensitivity”.

137 W. I. Pons *et al.*, above note 19, p. 82.

138 G. Quinn, above note 13, para. 53; W. I. Pons *et al.*, above note 19, p. 91.

139 W. I. Pons *et al.*, above note 19, pp. 62–70.

140 *Protecting the Rights of Persons with Disabilities*, above note 7, para. 2.

Those who survive a chemical weapon attack are left with disabilities that have yet to be formally recognized within an international criminal tribunal or court since Nuremberg. Due to the catastrophic impacts and clearly indiscriminate nature of such attacks, the potential to find evidence of genocidal intent on perpetrators could be greater.¹⁴¹ As studies of victim populations and results of investigations emerge,¹⁴² experiences of the resulting disabilities can be included in the accountability narrative regarding potential serious bodily or mental harm,¹⁴³ including reproductive challenges such as infertility, miscarriages and birth defects, which could potentially be linked to measures intended to prevent births if such intention can be shown.¹⁴⁴

Mutilation. The war crime of mutilation can be a non-controversial means to pursue accountability for acts that have resulted in physical disability. As a crime under customary international law,¹⁴⁵ it covers permanently disfiguring the person or persons, including removal or permanent disabling of an organ or appendage that is not justified by the medical, dental or hospital treatment of the person concerned nor carried out in the person's interests.¹⁴⁶ Factual findings in previous international jurisprudence have included the severing of limbs.¹⁴⁷

Indiscriminate weapons and weapons used indiscriminately. In addition to the specific considerations regarding the use of chemical or biological weapons, any use of indiscriminate weapons or indiscriminate use of conventional weapons that results in a disability – for example, through cluster munitions, barrel bombs or landmines¹⁴⁸ – should also be prioritized to recognize the high number of resulting physical disabilities.¹⁴⁹ In terms of assessing whether an attack was

141 ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment (Trial Chamber), 12 December 2012, paras 1170–1171; Iraqi High Tribunal, *Al Anfal Special Verdict*, Second Criminal Court, Case 1/2nd Criminal/2006, 2007, pp. 496, 853, translation available at: www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Iraq/Anfal_verdict.pdf.

142 UNICEF, above note 12, p. 10; Motjaba Satkin *et al.*, “The Quality of Life of Mustard Gas Victims: A Systematic Review”, *Tanaffos*, Vol. 16, No. 2, 2017, pp. 116, 121–123.

143 ICTR, *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgment (Appeals Chamber), 12 March 2008, para. 46.

144 ICTR, *Akayesu*, above note 134, paras 507, 508; District Court of Jerusalem, *Attorney-General of Israel v. Adolf Eichmann*, Judgment, 36 ILR 5, 1968, para. 159.

145 Special Court for Sierra Leone (SCSL), *The Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, para. 179; ICTY, *Tadić*, above note 114, para. 285 (as part of common Article 3 violations).

146 SCSL, *The Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T, 20 June 2007, para. 724; SCSL, *Sesay*, above note 145, para.180(i); ICC, above note 113, Arts 8(2)(b)(x)-1(1), 8(2)(c)(i)-2(1), 8(2)(e)(xi)-1(1).

147 SCSL, *Brima*, above note 146, para. 1213; SCSL, *Sesay*, above note 145, para. 1208.

148 The author notes the lack of an established universal regime regarding the ban of anti-personnel landmines: see Peter Malanczuk, “The International Criminal Court and Landmines: What Are the Consequences of Leaving the US Behind?”, *European Journal of International Law*, Vol. 11, No. 1, 2000, pp. 84–87.

149 International Committee of the Red Cross, “Anti-Personnel Landmines: Friend or Foe? A Study of the Military Use and Effectiveness of Anti-Personnel Mines, Commissioned by the ICRC, March 1996”, in Louis Maresca and Stuart Maslen (eds), *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1999*, Cambridge University Press, Cambridge, 2000, p. 457; UNICEF, above note 12, p. 11; Naomi Hart *et al.*, “Making Every Life Count:

launched in an indiscriminate manner, the analysis should focus on the manner and context in which the attack was launched and whether it was likely directed at a specific military target, whether the weapon was capable of being sufficiently guided by the launch method (e.g., an unguided bomb from a fast and/or high-flying aircraft), and whether the weapon’s effects would be sufficiently limited to disabling the military objective.¹⁵⁰

Attempted crimes resulting in disability. Attempted crimes that could likely result in both physical and mental disabilities should also be noted, in particular murder/killing, torture and extermination.

Additional note on sentencing

Personal characteristics have been used as an aggravating factor in sentencing,¹⁵¹ and this is now codified in Rule 145 of the ICC *Rules of Procedure and Evidence*.¹⁵² It has been confirmed that vulnerabilities cannot be used in both establishing the material elements of a crime and sentencing; however, if none of the above crimes are pursued, introducing disability as an aggravating factor in sentencing could have positive implications for the development of the law, as it has with SGBV crimes.¹⁵³

Case study: ISIL and persons with disabilities in Iraq

The following case study can illustrate the application of the CRPD principles within the intelligence analysis cycle, with the following information to be thought of as initial leads identified. The example was selected due to its potentially unique nature and relevance to current accountability processes. To preserve the confidentiality requirements of ongoing investigations, the example utilizes only open-source allegations and does not reflect any past or current investigative work done.

Official statistics indicate that there are more than 1.3 million disabled people in Iraq (3% of the population); however, campaigners believe the real number is three times that.¹⁵⁴ While the overall coverage of the impact of the Islamic State in Iraq and the Levant (ISIL) within Iraq on populations with pre-

Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts”, *Monash University Law Review*, Vol. 40, No. 1, 2014, p. 168.

150 ICTY, *The Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgment (Trial Chamber), 12 June 2007, paras 462–463; Office of the UN High Commissioner for Human Rights, “Indiscriminate Attacks and Indiscriminate Weapons in International Humanitarian Law”, 30 March 2016, p. 6.

151 ICTY, *Kunarac*, above note 129, para. 874; ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 355.

152 ICC, *Rules of Procedure and Evidence*, 2013, Rule 145.

153 W. I. Pons *et al.*, above note 19, pp. 83–84.

154 Raya Al-Jadir, “I Was Lucky I Escaped Iraq When I Did – to Be Disabled There Is to Live a Nightmare”, *The Independent*, 4 December 2018, available at: www.independent.co.uk/voices/iraq-disability-war-corruption-public-transport-un-convention-middle-east-a8666281.html.

existing disabilities and those who are disabled due to conflict-related events is sparse, there are several notable open-source allegations regarding ISIL's conduct in Iraq and persons with disabilities.

Open-source reporting included allegations that the Shar'ia Board of ISIL issued an oral fatwa to its members authorizing them to kill newborn babies with Down's syndrome and congenital deformities.¹⁵⁵ In 2016, allegedly more than thirty-eight children born with Down's syndrome and congenital deformities, aged between one week and three months, were killed by lethal injection or suffocation, including victims in Mosul.¹⁵⁶ In October 2016, ISIL members reportedly killed a physically disabled girl and those accompanying her for failing to keep up with a group forcibly displaced from Rufeila.¹⁵⁷ Regarding civilian infrastructure, a school for people with autism and Down's syndrome in Mosul was destroyed after ISIL entered the city, leaving many children stuck at home with no formal education.¹⁵⁸ There are additionally several open-source allegations of ISIL's use of chemical weapons against Iraqis, most notably mustard gas.¹⁵⁹ While the short- and long-term effects of these attacks on victims are not widely reported, longer-term effects may mirror past chemical weapons' reported impacts, which include children having a higher risk of a range of congenital disorders, acute neurological and mental health effects, and a range of respiratory and initial immunological dysfunctions and cardiovascular complications for further study.¹⁶⁰

The operationalization of investigation measures within the CRPD framework in order to best promote autonomy, non-discrimination and

155 Emma Glanfield, "How Much More Depraved can ISIS Get? Group's Sharia Judges Order Children with Down Syndrome and Other Disabilities to Be Killed in Chilling Echo of the Nazis", *Mail Online*, 14 December 2015, available at: www.dailymail.co.uk/news/article-3358840/How-depraved-ISIS-Group-s-Sharia-judges-order-children-s-syndrome-disabilities-killed-chilling-echo-Nazis.html; Debra Killalea, "ISIS Wants to Kill Kids with Down Syndrome, Mosul Eye Says", *News.com.au*, 15 December 2015, available at: <https://tinyurl.com/2p9swwybr>; David K. Li, "ISIS Is Slaughtering Babies Born with Disabilities", *New York Post*, 14 December 2015, available at: <https://nypost.com/2015/12/14/isis-is-slaughtering-babies-born-with-disabilities/>. All of these articles reference Mosul Eye, "ISIL Issues 'Fatwa' to Exterminate Children with Down's Syndrome", *Facebook*, 13 December 2015, available at: www.facebook.com/MosulEye/videos/829441013844069/.

156 E. Glanfield, above note 155; D. Killalea, above note 155; D. K. Li, above note 155; Mosul Eye, above note 155.

157 Stephen Jones, "ISIS Terrorists Kill Disabled Girl 'for Failing to Keep Up' as She's Marched Out of Village Near Mosul", *The Mirror*, 26 October 2016, available at: www.mirror.co.uk/news/world-news/isis-terrorists-kill-disabled-girl-9128988.

158 R. Al-Jadir, above note 154.

159 Qasim Abdul-Zahra, "ISIS Is Accused of Chemical Attack in Iraq that Wounds Hundreds, Kills Child", *Washington Post*, 12 March 2016, available at: <https://tinyurl.com/4evtcnv6>; Nafiseh Kohnavard, "Iraqi Town Taza 'Hit in IS Chemical Attack' Appeals for Help", *BBC News*, 25 March 2016, available at: www.bbc.co.uk/news/world-middle-east-35898990.

160 Hassan Abolghasemi *et al.*, "Childhood Physical Abnormalities Following Paternal Exposure to Sulfur Mustard Gas in Iran: A Case-Control Study," *Conflict and Health*, Vol. 4, No. 13, 2010, p. 5; Samira Alaani *et al.*, "Uranium and Other Contaminants in Hair from the Parents of Children with Congenital Anomalies in Fallujah, Iraq", *Conflict and Health*, Vol. 5, No. 1, 2011, p. 13; Mahdi Balali-Moodin, "Early and Delayed Effects of Sulfur Mustard in Iranian Veterans after the Iraq-Iran Conflict", in Ramesh C. Gupta *et al.* (eds), *Handbook of Toxicology of Chemical Warfare Agents*, Elsevier Science & Technology, Saint Louis, MI, 2015, p. 45.

accessibility would facilitate greater inclusion of persons with disabilities and recognition of these incidents within accountability efforts. Regarding the planning and direction phase of the investigation, a mechanism-wide strategy or micro-level investigation plan could assist in ensuring accessibility and non-discrimination for persons with disabilities, in particular, and emphasize the need to promote autonomy. Regarding collection, conscious searching for open-source leads involving persons with disabilities could uncover these reports, and if treated as initial leads, they could further inform the investigation plan for validation, prioritization of the affected area, and the types of acts to include in screening or interview plans for potential witnesses. Staff with expertise in disability, ideally alongside staff from the affected locations, could then assist in developing appropriate questions to ask and translation considerations. Searches of any already collated evidence databases can be run to see if any similar incidents have been reported, along with information from any collaborating humanitarian, human rights or disability-focused agencies. This can be in addition to trying to achieve a general increase in outreach and searches for persons with disabilities, across investigative activities. Donors can further assist by noting such efforts with specific measurable indicators and dedicated budget lines for reasonable accommodation measures, should they be needed further on in the investigation, and specific institutional reporting could occur, much like with SGBV crimes and crimes against children. For collation, tags that would allow patterns of disabled victims to emerge in analytical work could be implemented to facilitate analysis products such as thematic intelligence briefings, including geospatial intelligence or network analysis products that can feed back into the intelligence analysis cycle for future case-building. The crime base discussed above can serve as an example of crimes widely applicable in many jurisdictions due to their customary international law status, for consideration as a legal foothold. As a start, this could begin progress towards the full inclusion and participation of persons with disabilities, promoting their autonomy, ensuring non-discrimination and providing accessibility to the investigation process.

Conclusion

Consistent implementation of and building upon the recommendations laid out in this paper can increase the realization of the CRPD principles of autonomy, non-discrimination and accessibility within accountability mechanisms as a critical start towards closing the gap in impunity for crimes against persons with disabilities, along with increased recognition for crimes resulting in disability. Most importantly, persons with disabilities should have a prioritized space within accountability mechanisms as survivors, victims and other witnesses, and as staff, in order to realize an inclusive and participatory accountability process, working to ensure that persons with disabilities are not the “forgotten victims of armed conflict”.

Inaccessible justice: The violation of Article 13 of the CRPD and the ICC's role in filling the accountability gap

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Abstract

This article examines how women and girls with disabilities who are survivors of sexual and gender-based violence crimes have a right to access justice under Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD). It explains how the right to access justice requires States to actively address gender and disability stigmas and discriminations that create barriers within justice systems, and how the failure to do so violates the CRPD. Further, the author argues that when a State fails to eliminate such barriers post-armed conflict, the International Criminal Court may then exercise jurisdiction over these crimes in order to raise awareness of crimes against women and girls with disabilities, strengthen domestic justice systems by pressuring States to investigate and prosecute these crimes, and act as a court of last resort for crimes against women and girls with disabilities.

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Keywords: women, disability, sexual and gender-based violence, human rights, access to justice, international criminal court, complementarity.

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Introduction

As a result of intersectional discrimination between gender and disability, women and girls with disabilities experience higher rates of sexual and gender-based violence (SGBV)¹ than their non-disabled peers, and these disparities only increase during times of armed conflict and humanitarian crises.² Under Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD), States have a duty to ensure effective access to justice for rights violations and crimes that occur during peacetime and armed conflicts.³ Yet, States consistently fail to remove barriers that limit and deny access to justice for women and girls with disabilities. Thus, when a State fails to remove these institutional barriers from all stages of the criminal justice system, it violates Article 13 of the CRPD. However, for women and girls with disabilities, these domestic denials in access to justice do not necessarily mean that their perpetrators may carry on with impunity, as the International Criminal Court (ICC) can take action when a State fails to.⁴ Despite the ability of the ICC to exercise jurisdiction in many of these cases, it has failed to do so for crimes against women and girls with disabilities, thereby perpetuating a global legal system that denies justice to these individuals. The lack of inclusion of SGBV crimes against women and girls with disabilities at the

- 1 SGBV crimes include both (1) sexual crimes and (2) gender-based crimes. This paper uses sexual and gender-based crimes as defined in International Criminal Court (ICC), *Policy Paper on Sexual and Gender-Based Crimes*, 20 June 2014.
- 2 United Nations Population Fund (UNFPA), “Five Things You Didn’t Know about Disability and Sexual Violence”, 30 October 2018, available at: <https://tinyurl.com/33t8jef7> (all internet references were accessed in September 2022). See also UNFPA, *Young Persons with Disabilities: Global Study on Ending Gender-Based Violence, and Realising Sexual and Reproductive Health and Rights*, July 2018. While SGBV can also impact boys and men with disabilities, this article focuses solely on SGBV against women and girls with disabilities due to the distinguishing intent behind SGBV crimes and the societal contexts within which these crimes are committed. Crimes against women are often committed to enforce a societal structure in which women are inferior and subordinate to men, whereas SGBV against men is often used to punish, oppress, intimidate and degrade an individual’s masculinity. While these crimes are committed in order to disempower all targeted individuals, they occur within different societal structures and gender roles, which can impact how accountability for these crimes is ensured. See ADD International, *Disability and Gender-Based Violence: ADD International’s Approach: A Learning Paper*, available at: https://add.org.uk/sites/default/files/Gender_Based_Violence_Learning_Paper.pdf (discussing SGBV violence against men and boys with disabilities and the need for additional data and research within this area); Plan International, “Fact Sheet: Violence against Women and Girls with Disabilities”, February 2013.
- 3 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008) (CRPD), Art. 13.
- 4 While violations of Article 13 of the CRPD can also be addressed through other mechanisms such as national, regional and international human rights bodies, this paper focuses solely on how individual criminal accountability at the ICC can ensure justice when domestic courts are unable to do so for SGBV crimes against women and girls with disabilities.

ICC is partially attributable to the historical development of international criminal law (ICL) as a body of law that has excluded accountability for crimes against persons with disabilities more broadly.

This article argues that the failure of States to prosecute SGBV crimes against women and girls with disabilities violates the right to access justice under the CRPD, and that the ICC should prosecute where the State fails to ensure accountability for crimes against women and girls with disabilities. Thus, the second part of the article argues that the failure to prosecute SGBV crimes against women and girls with disabilities is a violation of Article 13 of the CRPD. The third part reviews the history of the prosecution of international crimes against persons with disabilities and of SGBV crimes from the Nuremberg Tribunals to the ICC. The fourth part reviews SGBV crimes against women and girls with disabilities in States where the ICC is currently active and elaborates on how the failure of these State courts to prosecute creates grounds for the ICC's jurisdiction over these crimes; it further argues that the ICC should exercise its jurisdiction in these cases. Lastly, the fifth part provides recommendations for the ICC on improving inclusion of persons with disabilities within the Court, ultimately to improve accountability for SGBV crimes against women and girls with disabilities.

How the failure to prosecute crimes against women and girls with disabilities violates Article 13 of the CRPD

Access to justice is essential to protecting the rights of women and girls with disabilities, ensuring that perpetrators of crimes against women and girls with disabilities are held accountable, and deterring future crimes against women and girls with disabilities. However, due to barriers within justice systems, women and girls with disabilities often do not have the full benefit of this right. Thus, the below section explains the prevalence of SGBV crimes against women and girls with disabilities, and how the failure to prosecute these crimes due to institutional barriers violates Article 13 of the CRPD.

The global prevalence of crimes against women and girls with disabilities

Women and girls with disabilities are more likely to experience violence⁵ and increased rates of SGBV, due to a variety of factors such as early discrimination against girls with disabilities,⁶ lack of reproductive health and sexual education, and dual disability- and gender-based discriminations.⁷ During armed conflicts,

5 See, generally, World Bank, *Brief on Violence against Women and Girls with Disabilities*, December 2019, p. 6 (finding that girls and young women with disabilities are nearly ten times more likely to experience violence in their lifetime compared to their non-disabled peers).

6 Early discrimination against girls with disabilities includes being shunned from society due to social stigma surrounding disability, and subsequent exclusions from education and social services. *Ibid.*

7 *Ibid.*, p. 6; United Nations Department of Economic and Social Affairs, "Women and Girls with Disabilities: Using Both the Gender and Disability Lens", available at: www.un.org/development/desa/disabilities/issues/women-and-girls-with-disabilities.html.

these discriminatory attitudes and barriers can often be exacerbated within humanitarian responses, resulting in women and girls with disabilities experiencing heightened risks for victimization.⁸ Armed conflicts can also result in the loss of community, familial support, education, and health-care services, which can contribute to increased risks for SGBV against women and girls with disabilities.⁹ For example, due to the fast-moving nature of conflicts, many women may be forced to leave their wheelchairs, assistive aids, medications and/or prosthetics behind while fleeing from their homes.¹⁰ As a result of loss of access to mobility tools and familial support, these individuals are “more vulnerable to physical, psychological, sexual or financial violence, neglect, entrapment, and coercion”.¹¹ The loss of these accessibility tools can also increase mobility barriers for women and girls with disabilities, resulting in them having less access to reporting and justice mechanisms.¹²

In addition to the complications brought about by armed conflicts, regional stigmas and discriminations can also place women and girls with disabilities at the centre of harmful folklore, thereby increasing their risk of SGBV. For example, one common folk myth alleges that if a person with HIV has sex with a virgin, their HIV will be cured.¹³ Women and girls with disabilities are often seen by societies as asexual, and as this presumption assumes that they are sexually inactive and therefore virgins, it places them at higher risk of being targets for sexual violence under the HIV cure folklore.¹⁴ Other forms of discrimination and stigma surrounding gender and disability can originate as early as birth, making young girls targets for gender-based violence.¹⁵ For instance, the United Nations (UN) Economic and Social Commission for Asia and the Pacific has reported that it is not uncommon for children born with congenital disabilities to be killed or left to die after birth, and this practice is more common for girls with disabilities.¹⁶

8 Stephanie Ortoleva, “Accounting for Women and Girls with Disabilities in Conflict and Crisis Situations: Recommendations for Action and Implementation”, *Human Rights Magazine*, Vol. 42, No. 4, 2017, available at: www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/disability-rights-under-siege/accounting-for-women-and-girls-with-disabilities-in-conflict-and/.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Ibid.* (noting that even when displaced women and girls with disabilities can reach refugee camps, these camps are often inaccessible and may require some women and girls with disabilities to rely on others, increasing their risk of experiencing gender-based violence). See World Bank, above note 5, p. 12.

13 UN, *Toolkit on Disability for Africa: Culture, Beliefs, and Disability*, Division for Social Policy Development and Department of Economic and Social Affairs, 18 September 2016, pp. 13–15 (identifying additional misconceptions surrounding disability such as cultural beliefs that a child's disability was caused by a mother's sin or promiscuity, ancestral curse, or demonic possession). See also Charlotte Baker and Elvis Imafidon, “Traditional Beliefs Inform Attitudes on Disability in Africa. Why It Matters”, *The Conversation*, 15 June 2020, available at: <https://theconversation.com/traditional-beliefs-inform-attitudes-to-disability-in-africa-why-it-matters-138558> (discussing beliefs about disability and traditional animisms, such as that bad deeds caused a child to have a disability).

14 Nora Ellen Groce and Reshma Trasi, “Rape of Individuals with Disability: AIDS and the Folk Belief of Virgin Cleansing”, *The Lancet*, Vol. 363, No. 9422, 2004; World Bank, above note 5, p. 8.

15 *Hidden Sisters: Women and Girls with Disabilities in Asia and Pacific Region*, UN Doc. ST/ESCAP/1548, 1995.

16 *Ibid.*, p. 1.

Laws can also formalize societal stigmas and discrimination against women and girls with disabilities, increasing their risk of experiencing legally permissible sexual violence.¹⁷ For example, in several European countries such as Sweden, Norway, Denmark, Finland, Switzerland and Iceland, the crime of forced sterilization was still a legal practice used against women and girls with disabilities until the 1970s.¹⁸ Under these programmes, forced sterilization was promoted under the false stereotype that women with disabilities could not be mothers; therefore, it was best for these women to be sterilized, considering their high rates of abuse and potential for future pregnancies as a result of that abuse.¹⁹ While these programmes justified their operation under paternalistic concerns for women and girls with disabilities, in actuality, they punished women and girls with disabilities for being survivors of sexual assault, rather than focusing on holding perpetrators accountable and addressing why these women and girls were at a higher risk of experiencing this type of violence.²⁰

Overall, across the globe women and girls with disabilities experience SGBV crimes from childhood through adulthood – thus, under international human rights law, a State is obligated to ensure access to justice and accountability for these crimes and rights violations. Moreover, as the perpetration of these crimes increases with armed conflicts, the responsibility of prosecuting these crimes can extend beyond the State and to international criminal courts under ICL.

Article 13: The right to access justice under the CRPD

In December 2006, the CRPD was adopted and codified as the first human rights treaty on the rights of persons with disabilities. The CRPD is historic as a human rights treaty for its recognition that persons with disabilities are individuals with rights who have autonomy in decision-making and as members of society. Notably, Article 13 of the CRPD recognizes the right to access justice. The inclusion of the right to access justice under the CRPD is important, as this right

17 European Parliament Directorate-General for Internal Policies, *Discrimination Generated by the Intersection of Gender and Disability*, May 2013, p. 56. See, generally, European Economic and Social Committee, “Europe Must Do More to Protect Women with Disabilities”, 7 July 2018, available at: www.eesc.europa.eu/en/news-media/news/europe-must-do-more-protect-women-disabilities.

18 European Disability Forum and Fundación Cermi Mujeres, *Ending Forced Sterilization of Women and Girls with Disabilities*, May 2016, p. 13.

19 *Ibid.*, pp. 20–27. Post-Second World War, both the United States and Canada also had forced sterilization laws: see *ibid.*, p. 26. See also Linda A. Thompson, “A New Report Highlights the Scandal of the Forced Sterilization of Women in Europe”, *Equal Times*, 8 May 2018, available at: www.equaltimes.org/a-new-report-highlights-the#.YEUx2l1Kg6F (reporting that Spain, the United Kingdom and Croatia all still allow the use of forced sterilization with court orders in certain circumstances).

20 Despacho de la Tercera Fiscalía Superior Penal De Lime Señor Fiscal Luis Landa Burgos, *Amicus Curiae Brief on the War Crimes Research Office at American University Washington College of Law*, 2 November 2017; see also William 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. 58 (discussing crimes against persons with disabilities as crimes against humanity).

is a fundamental pillar of international law and is the means by which all other human rights can be protected and upheld.²¹

As such, Article 13 requires State Parties to the CRPD to “ensure effective access to justice for persons with disabilities on an equal basis with others”. Under Article 13, to ensure access to justice, States must provide procedural and age-appropriate accommodations to ensure that persons with disabilities can act as participants in investigations and legal proceedings. This obligation also requires States to make procedural accommodations and ensure that staff in the justice system are effectively trained on ensuring access to justice for persons with disabilities. The UN Office of the High Commissioner for Human Rights (UN Human Rights) has elaborated that access to justice under Article 13 is broader than the notions of fair trial and requires States to ensure that persons with disabilities can participate at all stages of the legal system; this in turn requires States to *actively remove* legal and institutional barriers to justice.²²

UN Human Rights has divided the right to access justice into three categories: (1) equality before the courts and the right to a fair trial; (2) the right to an effective remedy; and (3) participation in the administration of justice.²³ Under the first category of equality before the courts and fair trial rights, States must ensure that proceedings are physically accessible; information is presented in a manner which allows persons with disabilities to understand and defend their rights; procedural and age-appropriate accommodations are provided; the right to decision-making and legal capacity are protected; the presumption of innocence is maintained; and legal aid is provided for those who are unable to afford counsel.²⁴ Under the second category, the right to an effective remedy includes the duty to investigate and prosecute if sufficient evidence of a crime is found; the right to redress, reparations and remedies for human rights violations; and restoration of the individuals dignity.²⁵ Lastly, the right to participate in the administration of justice includes the ability to participate as victim-survivors, defendants, witnesses, experts, jurors, judges and lawyers, as well as the obligation for States to actively train administration of justice officials on attitudes and institutional barriers that impair access to justice for persons with disabilities.²⁶ The requirement to train individuals who help administer justice is critical to ensuring that once legal barriers have been removed by the State through the operation of law or procedural amendments, the individuals in the justice system applying the law do not create new barriers based on old discriminatory attitudes.²⁷

While UN Human Rights' guidance frames the right to access justice in terms of institutional reforms such as ensuring access to the courts,

21 *Right to Access Justice under Article 13 of the Convention on the Rights of Persons with Disabilities*, UN Doc. A/HRC/37/25, 27 December 2017, para. 3.

22 *Ibid.*, p. 5.

23 *Ibid.*, pp. 10–14.

24 *Ibid.*, pp. 10–11.

25 *Ibid.*

26 *Ibid.*, pp. 14–15.

27 *Ibid.*

accommodations, and participation for persons with disabilities, application of this right must not omit the requirement that States demonstrate that they are ensuring individual criminal responsibility for crimes against persons with disabilities, and particularly women and girls with disabilities. Interpreting Article 13 to require individual accountability is consistent with the Committee on the Rights of Persons with Disabilities' (the Committee) reporting on States' compliance, UN Human Rights' illustrative list for ensuring access to justice, and the *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (International Principles and Guidelines). For instance, in its review of Venezuela's compliance with Article 13, the Committee requested that Venezuela explain

how the State party ensures that all violations of the rights of persons with disabilities, particularly those of women and children, committed in the context of the emergency situation by State and non-State actors, most notably acts of sexual violence and violations of social and cultural rights, are duly investigated, *prosecuted and punished* by means of legal proceedings against the perpetrators.²⁸

This request demonstrates that in the Committee's considerations of access to justice, actual perpetrator accountability for victim-survivors with disabilities is within the mandate of Article 13.

This interpretation is also supported by UN Human Rights' illustrative list, which recognizes that ensuring access to justice requires States not only to reform justice systems but also to ensure that this reform creates improved prosecutorial outcomes.²⁹ Specifically, under this list, when States are assessing their compliance with the access to justice requirement, they are urged to consider the "number of complaints submitted to the justice system by person with disabilities, that have been investigated and adjudicated; [and the] proportion of those found in favour of the complainant".³⁰ Again, this recognition identifies that States must ensure that persons with disabilities can feasibly submit complaints to the justice system (i.e., recognizing an outcome indicator for ensuring an accessible justice systems), *and* it recognizes that the State must consider how those claims are adjudicated in favour of or against the complainant (i.e., ensuring actual perpetrator accountability in a certain number of cases).

Lastly, Principle 8 of the International Principles and Guidelines states that persons with disabilities have the right to "have their complaints investigated and be afforded effective remedies".³¹ This principle specifically recognizes that in criminal cases, individuals who abuse or otherwise mistreat persons with disabilities should

28 *List of Issues in Relation to the Initial Report of the Bolivarian Republic of Venezuela*, UN Doc. CRPD/C/ VEN/Q/1, 29 October 2019, para. 13(a) (emphasis added).

29 EU, "Article 13: List of Illustrative Indicators on Access to Justice", 2020.

30 *Ibid.*, para. 13.18.

31 *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, August 2020 (International Principles and Guidelines), Principle 8.

be *prosecuted, convicted, and subject to appropriate punishments*. This principle reaffirms that ensuring individual perpetrator accountability is part of the right to access justice under international law. Therefore, the right to access justice must be understood to require States to ensure that it is possible to file complaints with the justice system and that individual perpetrators can be held accountable for crimes committed against persons with disabilities, particularly women and girls with disabilities.

How the right to access justice for women and girls with disabilities is violated

In its Communication No. 12/2013, the Committee on the Rights of Persons with Disabilities recognized that for there to be a violation of a protected right under the CRPD, there must be an omission by the State Party concerning the individual's enjoyment of that right.³² Thus, under Article 13 of the CRPD, all signatory States must ensure that victim-survivors with disabilities of all crimes, including SGBV crimes, have access to courts and accountability for the crimes committed against them, and therefore, when a State fails to *actively remove* barriers that limit access to courts and fails to hold individual perpetrators accountable, the State violates the individual's right to access justice.³³ For women and girls with disabilities, States consistently violate their right to access justice through institutional legal barriers which formalize and perpetuate disability and gender discrimination against persons with disabilities, and through physical and procedural access barriers; these combined barriers result in courts failing to ensure that individual perpetrators of SGBV crimes against women and girls with disabilities are held accountable.³⁴

Legal systems that perpetuate inappropriate stigmas and discriminatory attitudes about women and girls with disabilities create institutional barriers that deny them access to justice. For example, stereotypes that infantilize women with disabilities often perpetuate SGBV because laws can improperly permit the deprivation of the rights of women with disabilities, such as the right to bodily autonomy.³⁵ By permitting violations of the rights of women with disabilities to occur under a State's law, States are essentially removing the ability of these individuals to receive any justice for these violations, as any actor will have the complete defence that their conduct was legal. Moreover, as the Council of Europe reported in 2018, the deprivation of legal capacity of persons with disabilities is also a substantial barrier to justice, as without equality before the

32 Committee on the Rights of Persons with Disabilities, Communication No. 12/2013, 17 April 2015.

33 *Right to Access Justice under Article 13*, above note 21; Stephanie Ortoleva, "Women with Disabilities and the Justice System: Rights without Remedies", World Justice Project, 20 February 2013, available at: <https://worldjusticeproject.org/news/women-disabilities-and-justice-system-rights-without-remedies>.

34 S. Ortoleva, above note 33.

35 Women Enabled International, *Comments for Report on Access to Justice for Persons with Disabilities*, Washington, DC, 1 May 2017. See also *Right to Access Justice under Article 13*, above note 21.

law, persons with disabilities are essentially barred from having their rights recognized, upheld and protected.³⁶

Even when a State's laws prohibit the conduct that violates women's rights, legal systems may operate with formalized stigmas that make it difficult or impossible for women with disabilities to access justice through a criminal justice system. For instance, in cases of sexual and domestic violence, a prosecution's case often relies on the witness testimony of the victim-survivor.³⁷ In sexual and domestic violence cases involving women with disabilities, this can be made difficult as women with disabilities can often be deemed to lack legal capacity or be considered unreliable solely due to their disability.³⁸ Furthermore, laws that are intended to protect women against sexual and other forms of violence can also often fail to address the unique forms of violence experienced by women with disabilities, and can even provide excuses for such crimes. For example, in the United Kingdom, the law prohibits domestic violence that is controlling or coercive, but creates an exception to the crime under the "caregiver defence".³⁹ Under this defence, a person is not considered to be acting coercively or in a controlling manner if they are acting in the best interest of a person with a disability.⁴⁰ For women and girls with disabilities who may rely on a partner for caregiving support, this exception creates an additional hurdle for them as they must affirmatively demonstrate that they have autonomy over themselves.⁴¹

In addition to laws that interfere with women with disabilities being able to access justice, some women may also lack awareness of their legal rights and how to engage with justice systems.⁴² For example, a 2014 study by Leeds University found that many deaf women surveyed were unfamiliar with their formal rights under criminal law.⁴³ Even when women with disabilities are aware of their rights and are able to advocate for accountability, reporting mechanisms and court systems may not be adequately prepared to meet their needs.⁴⁴ In particular, women with disabilities may experience physical accessibility barriers such as inaccessible courtrooms or lack of transportation from rural communities to courthouses.⁴⁵

36 Council of Europe, *Implementation of the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: Improving the quality of life of people with disabilities in Europe 2006-2015*, 2015, p. 56.

37 Women Enabled International, above note 35, p. 2.

38 *Ibid.* (reporting on practices in Ghana and India).

39 *Ibid.*, p. 3; Crown Prosecution Service, "The Code for Crown Prosecutors: Controlling or Coercive Behaviour in an Intimate or Family Relationship", 30 June 2017, available at: www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship.

40 Crown Prosecution Service, above note 39.

41 Women Enabled International, above note 35.

42 Women Enabled International, above note 35, p.4.

43 University of Leeds *et al.*, *Access to Specialised Victim Support Services for Women with Disabilities Who Have Experienced Violence: National Report, United Kingdom of Great Britain and Northern Ireland*, June 2014, p. 24.

44 See also Center for American Progress, *Transforming the Culture of Power*, 31 October 2019, pp. 21–24 (discussing how resources in the United States for college campus sexual assault are not in accessible formats).

45 *Ibid.*; see also World Federation of the Deaf and World Association of Sign Language Interpreters, "Contribution of OHCHR study on article 13 of the Convention on the Rights of Persons with Disabilities", available at: www.ohchr.org/sites/default/files/Documents/Issues/Disability/RightAccessJusticeArticle13/CSO/WFD-WASLI.pdf.

These compounding layers of obstruction result in women and girls with disabilities receiving limited justice for the crimes committed against them, with one study in the United States finding that broadly, only 22% of perpetrators of crimes against persons with disabilities were charged, and only 9% of perpetrators were convicted.⁴⁶ Ultimately, this results in women and girls with disabilities experiencing multilayered institutional barriers based on societal stigmas and discrimination that impair their ability to report crimes, participate in proceedings and ultimately have their perpetrators held accountable under their national criminal justice systems.⁴⁷

The existence of these systematic and institutional barriers fails to meet the requirements of Article 13, according to which CRPD States Parties are obligated to ensure access to justice by *actively removing* barriers that impair access justice. As such, the failure by States to remove and revise such institutional and legal barriers for women and girls with disabilities is a violation of Article 13 of the CRPD.

Crimes against people with disabilities: From Nuremberg to the ICC

Before turning to the current role that the ICC could play in ensuring justice for women and girls with disabilities under ICL, it is essential to understand how the creation and evolution of ICL as a field has omitted prosecuting crimes against persons with disabilities, and how this may impact the ability of the Court to ensure accountability for these victim-survivors in the future.

The Nuremberg Tribunals

The post-Second World War International Military Tribunal (Nuremberg Tribunal) prosecutions are praised for establishing the first international court to recognize international norms during armed conflict and the violations of such norms through crimes against peace, war crimes and crimes against humanity.⁴⁸ While the Nuremberg Tribunal was intended to ensure individual accountability for the most egregious actors, it was also intended to educate the German people on the full extent of the Nazi atrocities.⁴⁹ For persons with disabilities who were victims

46 Nancy Smith, Sandra Harrell and Amy Judy, *How Safe are Americans with Disabilities?*, Vera Institute for Justice, April 2017, p. 20.

47 See also UN, above note 13, p. 15 (noting regional barriers in Africa such as attitudinal barriers in police, lawyers, and judges resulting in persons with disabilities seeming less credible as victims and witnesses; lack of knowledge on the right to report crimes; physical barriers at police stations and courtrooms; and lack of victim advocates at health-care facilities where evidence may be collected); European Parliament Directorate-General for Internal Policies, above note 17, p. 56 (the European Economic and Social Committee acknowledged that it and its member States lacked strong institutions to protect the human rights of women and girls with disabilities).

48 Department of State, "The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)", Office of the Historian, available at: <https://history.state.gov/milestones/1945-1952/nuremberg>.

49 National WWII Museum, "The Nuremberg Trial and Its Legacy", 17 November 2020, available at: www.nationalww2museum.org/war/articles/the-nuremberg-trial-and-its-legacy.

of the Nazis' crimes, the Tribunal failed to provide both justice and acknowledgment of the crimes committed against them. For instance, during the war, the Nazis forcibly sterilized persons with disabilities and implemented a programme known as T4. The T4 programme authorized "mercy death" killings for persons with disabilities, resulting in the murder of nearly 70,000 Austrian and German persons with disabilities by poisonous gas, as well as killing thousands of children with disabilities through morphine injections.⁵⁰ This programme also broadly mandated physicians to kill anyone who had a "life unworthy of living", which resulted in the murder of an estimated 275,000 persons with disabilities.⁵¹

During the Nuremberg Tribunal, the doctors who perpetrated the killings of adults and children with disabilities were prosecuted in the case of *United States v. Karl Brandt et al.*⁵² A total of twelve doctors were charged with crimes against humanity and war crimes for their conduct during the Second World War.⁵³ Notably, the third charge, which was classified as a crime against humanity, related to the doctors' participation in the "euthanasia" programme, though it did not specifically recognize that this programme was used to target children and adults with disabilities.⁵⁴ This case resulted in both death sentences and decades-long imprisonments for the doctors involved.⁵⁵ While there were many more doctors and nurses who perpetrated crimes against humanity and war crimes against persons with disabilities, these actors were not prosecuted at the Tribunal or by domestic courts.⁵⁶ The fact that a very small number of doctors were prosecuted for the intentional killing of hundreds of thousands of persons with disabilities is both a reflection of the historical discrimination faced by persons with disabilities and an example of the early experiences of persons with disabilities being denied recognition for the crimes committed against them under both international and national criminal law.

In addition to limited accountability for perpetrators of the T4 programme, many Second World War survivors of forced sterilization did not have a remedy

50 Suzanne E. Evans, *Forgotten Crimes: The Holocaust and People with Disabilities*, Ivan R. Dee, Chicago, IL, 2004, pp. 32, 41–94, 111; "T4 Program", *Britannica*, available at: www.britannica.com/event/T4-Program; United States Holocaust Memorial Museum (USHMM), "People with Disabilities", available at: www.ushmm.org/collections/bibliography/people-with-disabilities.

51 "T4 Program", above note 50; USHMM, above note 50. See, generally, Sylwia Afrodyta Karowicz-Bienias, "Nazi Crimes on People with Disabilities in the Light of International Law – a Brief Review", *Białostockie Studia Prawnicze*, Vol. 23, No. 4, 2016.

52 S. E. Evans, above note 50, p. 145; see also S. A. Karowicz-Bienias, above note 51.

53 S. E. Evans, above note 50, p. 145.

54 *Ibid.*, p. 146.

55 *Ibid.*; S. A. Karowicz-Bienias, above note 51. In addition to the prosecution of the Nazi doctors, fourteen nurses were also charged for their role in the mass murder of nearly 8,000 adults and children with disabilities at a State hospital. However, all fourteen nurses were acquitted as they stated that they were relying on orders from their superiors – a defence that would likely be held to be invalid under today's "superior orders" doctrine. S. E. Evans, above note 50, p. 147.

56 S. E. Evans, above note 50, p. 146. See also S. A. Karowicz-Bienias, above note 51 (noting the Polish efforts to ensure accountability for the murder of persons with disabilities in Poland, though with ultimately unsuccessful prosecutions).

post-Nuremberg.⁵⁷ While the Allies in the Nuremberg Tribunal recognized forced sterilization as a crime, in post-Nuremberg Germany forced sterilization was not found to be a crime as it was held to have followed appropriate procedures.⁵⁸ Moreover, because the forced sterilization law was implemented before the Nazi era, it was not recognized as a “Nazi-era law”⁵⁹ – therefore, survivors of forced sterilization were not entitled to restitution from the German government and were not recognized as a part of subsequent legal proceedings such as the Holocaust Victim Assets Litigation.⁶⁰

Ultimately, the historical context provided by the Nuremberg Tribunal is important as it sets the stage for how ICL developed as a body of law that did not fully recognize persons with disabilities as victim-survivors in ICL prosecutions.⁶¹

The prosecution of SGBV crimes under ICL

The next evolution of ICL did not occur until the early 1990s, in response to the internal armed conflicts in the former Yugoslavia and the Republic of Rwanda.⁶² The temporal proximity of these two conflicts and the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) resulted in ICL developing two substantial bodies of jurisprudence for international crimes, and specifically for SGBV crimes.⁶³ Both the ICTR and the ICTY produced notable decisions on accountability for SGBV crimes through the *Akayesu*,⁶⁴ *Celibici*⁶⁵ and *Kunarac et al.*⁶⁶ cases. However, these courts only recognized the vulnerability of certain groups, such as women, and did not include broader intersectional concerns such as disability.⁶⁷

It wasn't until the Special Court for Sierra Leone (SCSL) prosecuted members of the Revolutionary United Front (RUF) for sexual violence crimes

57 *Ibid.*, p. 159.

58 *Ibid.*, p. 158.

59 *Ibid.*

60 *Ibid.*, pp. 158–160.

61 See, generally, William Pons, “An Argument for the Prosecution of Crimes against Persons with Disabilities”, *Intercross*, 11 May 2017, available at: <https://intercrossblog.icrc.org/blog/an-argument-for-the-prosecution-of-crimes-against-persons-with-disabilities>; W. Pons, J. E. Lord and M. A. Stein, above note 20, p. 58.

62 International Criminal Tribunal for the former Yugoslavia (ICTY), “The Tribunal – Establishment”, available at: www.icty.org/en/about/tribunal/establishment.

63 *Ibid.*; UNSC Res. 827, 25 May 1993; UNSC Res. 955, 8 November 1994.

64 ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998; Phillip Weiner, “The Evolving Jurisprudence of the Crime of Rape in International Criminal Law”, *Boston College Law Review*, Vol. 54, No. 3, 2013, p. 1210. See also Mukwege Foundation, “Jurisprudence of Sexual Violence in Conflict: Important Cases at International Tribunals”, available at: www.mukwegefoundation.org/jurisprudence-sexual-violence/.

65 ICTY, “Celibici Case: The Judgement of the Trial Chamber. Zejnil Delalic Acquitted, Zdravko Mucic Sentenced to 7 Years in Prison, Hazim Delic Sentenced to 20 Years in Prison, Esad Landzo Sentenced to 15 Years in Prison”, press release, 16 November 1998.

66 ICTY, “Landmark Cases”, available at: www.icty.org/en/features/crimes-sexual-violence/landmark-cases; ICTY, *Prosecutor v. Kunarac, Kovač, and Vuković*, Case Nos IT-96-23, IT-96-23/1, Judgment (Trial Chamber), 22 February 2001.

67 See W. Pons, above note 61.

that an international court considered the impact a disability could have during an armed conflict.⁶⁸ In the prosecution of the RUF, the SCSL recognized that in the context of rape, the very nature of war was “universally coercive”, thereby creating an environment in which consent is virtually non-existent.⁶⁹ Further, in discussing the issue of consent, the SCSL recognized that there can be circumstances in which consent is impossible based on “age, *disability*, or being under the influence of some substance”.⁷⁰ This recognition of how a disability may play a role in providing consent was important, as it was an early attempt by an international court to consider multi-sectional aspects of victim-survivors during armed conflicts.⁷¹

Like the early *ad hoc* tribunals, the ICC has also struggled to include disability considerations in its prosecutions, and its jurisprudence on SGBV crimes poses unique challenges for accountability for women and girls with disabilities. In 2016, Jean-Pierre Bemba Gombo (known as Bemba) was the first defendant to be convicted under the command responsibility doctrine for rape as both a crime against humanity and a war crime.⁷² However, the Court’s victory was short-lived as the decision was overturned by the Appeals Chamber in 2018.⁷³ In reversing the Trial Chamber, the Appeal Chamber’s judgment reasoned that the Pre-Trial Chamber was required to demonstrate in the indictment that there were “substantial grounds to believe” the crimes alleged were committed, and to establish each underlying act.⁷⁴ This can be difficult for SGBV crimes (particularly those perpetrated in the chaos of war), as they may not be discoverable at the beginning of an investigation due to cultural and societal stigmas surrounding SGBV crimes and reporting.⁷⁵ Imposing strict timelines for reporting SGBV crimes is not only inconsistent with how ICL has previously prosecuted these crimes⁷⁶ but also creates unique challenges to reporting for women and girls with disabilities, who face additional stigmatization due to their disability and may be experiencing post-conflict accessibility barriers due to loss of assistive devices and lack of disability-inclusive humanitarian responses. This perspective is also consistent with the ICC Prosecutor’s *Policy*

68 Valerie Oosterveld, “The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments”, *Cornell International Law Journal*, Vol. 44, No. 1, 2011, pp. 50–56.

69 *Ibid.*, p. 56.

70 *Ibid.* (emphasis added).

71 Save the Children, *Weapons of War: Sexual Violence against Children in Conflict*, 18 February 2021, p. 18.

72 International Justice Monitor, “Background: Jean-Pierre Bemba Gombo”, available at: www.ijmonitor.org/jean-pierre-bemba-gombo-background/; Susana SáCouto, “The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?”, International Justice Monitor, 22 June 2018, available at: www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/.

73 International Justice Monitor, “Background”, above note 72. See, generally, Susana SáCouto and Patricia Visser Sellers, “The Bemba Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes?”, *William & Mary Bill of Rights Journal*, Vol. 27, No. 3, 2019.

74 Alex Whiting, “Appeals Judges Turn the ICC on Head with Bemba Decision”, *Just Security*, 14 June 2018, available at: www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision/.

75 *Ibid.*

76 S. SáCouto, above note 72 (referencing how in *Akayesu*, evidence of rape was discovered during a witness’s testimony and added to the indictment six months after the trial had already begun).

*Paper on Sexual and Gender-Based Crimes.*⁷⁷ In her policy paper, the then Prosecutor recognized how power relationships and dynamics can shape gender roles in a given context, and how stigma and societal, cultural and religious factors can all play a role in the reporting and prosecuting of SGBV crimes.⁷⁸ The former Prosecutor's paper also recognizes that specific gender roles, societal standards, behaviours and activities assigned to men and women can impact the reporting of these crimes.⁷⁹ The recognition of gender roles and societal expectation is important for accountability for crimes against women and girls with disabilities, who can experience discrimination and stereotypes at the intersection of gender and disability, such as being seen as asexual or less valued by society.⁸⁰ As a result of such discriminations, women and girls with disabilities who are survivors of SGBV can be unable to report crimes due to a lack of community support and access to courts.⁸¹ Thus, the time-based requirement will likely make it more difficult to identify and prosecute SGBV crimes against women and girls with disabilities, who have longer delays in reporting due to the aforementioned accessibility barriers.⁸²

Like the history of the Nuremberg Tribunal prosecutions of the T4 cases, the jurisprudence of SGBV crimes is important if we are to properly understand the lack of global accountability for these crimes. While the above-mentioned prosecutions are notable for the development of accountability for SGBV generally, this body of law does not recognize the impact on women and girls with disabilities other than in a one-off reference.⁸³ Thus, because the foundation of ICL has not properly included the needs of, and accountability for crimes against, persons with disabilities, and particularly women and girls with disabilities, these crimes continue to be perpetuated with impunity, even at the ICC.

The case for prosecuting SGBV crimes against women and girls with disabilities at the ICC

During armed conflicts, the legal systems that operate to protect people from harm and human rights violations can often fail to remain in effect due to the anarchical

77 ICC, above note 1; Valerie Oosterveld, "The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law", *William & Mary Journal of Women and the Law*, Vol. 24, No. 3, 2018.

78 ICC, above note 1, p. 5.

79 *Ibid.*, p. 12.

80 Human Rights Watch, *Invisible Victims of Sexual Violence: Access to Justice for Women and Girls with Disabilities in India*, 3 April 2018.

81 *Ibid.*; ICC, above note 1, pp. 12–14.

82 Human Rights Watch, above note 80.

83 For a discussion on the broad lack of accountability for crimes against people with disabilities in armed conflict, see, generally, Inclusion Europe, "People with Intellectual Disabilities in Armed Conflict", 30 October 2012, available at: www.inclusion-europe.eu/people-with-intellectual-disabilities-in-armed-conflict/ (discussing crimes against persons with intellectual disabilities in Sierra Leone and Sudan); see also Michael Howard, "Bombs Strapped to Down's Syndrome Women Kill Scores in Baghdad Markets", *The Guardian*, 1 February 2008, available at: www.theguardian.com/world/2008/feb/02/iraq.international1.

nature of such conflicts.⁸⁴ As a result, pre-existing patterns of discrimination are exacerbated, and vulnerable groups such as women, children and persons with disabilities are at a heightened risk of victimization and rights violations.⁸⁵ Furthermore, post-conflict, as situations begin to stabilize and justice mechanisms are implemented at the national level, the same pre-conflict barriers and discrimination will continue to exist, which can limit the ability of women and girls with disabilities to engage with post-conflict justice mechanisms.⁸⁶ ICL can play a unique role in ensuring accountability for SGBV crimes against women and girls with disabilities by acting as a mechanism for raising awareness of how women and girls with disabilities are targeted during armed conflicts, identifying the frequency of SGBV crimes against them, identifying how States are failing to prosecute these crimes, and acting as a court of last resort to ensure justice and accountability.

The inclusion of women and girls with disabilities in States under ICC investigations

Currently, the ICC has thirteen active investigations and fifteen preliminary examinations in States across South America, Africa, Asia and Europe.⁸⁷ Across these twenty-eight States, the ICC has produced numerous reports on the type of crimes committed, the types of victim-survivors, and whether a State is pursuing prosecutions for these cases. In addition, the Court has produced over 300 decisions on applications by victim-survivors to participate in the proceedings.⁸⁸

84 ICRC, “Disintegration of State Structures”, *How Does Law Protect in War?*, available at: <https://casebook.icrc.org/case-study/icrc-disintegration-state-structures>.

85 Christine Beerli, “Keynote Address: Vulnerabilities in Armed Conflicts”, 14th Bruges Colloquium on International Humanitarian Law, 17–18 October 2013; ICRC, “Women in War: A Particularly Vulnerable Group”, 3 January 2007, available at: www.icrc.org/en/doc/resources/documents/feature/2007/women-vulnerability-010307.htm; Human Rights Watch, “UN: High Risk in Conflicts for Children with Disabilities”, 2 February 2022, available at: www.hrw.org/news/2022/02/02/un-high-risk-conflicts-children-disabilities; UN Human Rights, “Women’s Human Rights and Gender-Related Concerns in Situations of Conflict and Instability”, available at: www.ohchr.org/en/women/womens-human-rights-and-gender-related-concerns-situations-conflict-and-instability.

86 See World Institute of Disability, *The Involvement of Persons with Disabilities in Conflict Resolution and Peacebuilding Efforts: Inclusion of Persons with Disabilities (PWD) as Part of the Solution in the Post-Conflict Arena*, August 2014 (discussing the inclusion of persons with disabilities in peacebuilding efforts); Amnesty International, *Burundi: No Protection from Rape in War and Peace*, 9 October 2007, p. 8.

87 The ICC has investigations in the Democratic Republic of the Congo, Uganda, Sudan, the Central African Republic, Kenya, Libya, Côte d’Ivoire, Mali, Georgia, Burundi, the State of Palestine, Bangladesh/ Myanmar and Afghanistan. See ICC, “Situations under Investigation”, available at: www.icc-cpi.int/pages/situation.aspx. The ICC currently has preliminary examinations in Colombia, Guinea, Nigeria, Honduras, the Republic of Korea, the Registered Vessels of Comoros, Greece and Cambodia, Iraq and the United Kingdom, Gabon, the Republic of the Philippines, Venezuela, the Plurinational State of Bolivia, and Ukraine. See ICC, “Preliminary Examinations”, available at: www.icc-cpi.int/pages/pe.aspx.

88 See, generally, ICC, *Report on the Activities Performed during the First Three Years (June 2003–June 2006)*, 12 September 2006; ICC, *Report on Preliminary Examination Activities (2014)*, 2 December 2014; ICC, *Report on Preliminary Examination Activities (2015)*, 12 November 2015; ICC, *Report on Preliminary Examination Activities (2016)*, 14 November 2016; ICC, *Report on Preliminary Examination Activities (2017)*, 4 December 2017; ICC, *Report on Preliminary Examination Activities (2018)*, 5 December 2018; ICC, *Report on Preliminary Examination Activities (2019)*, 5 December 2019. This author reviewed all

However, these reports and decisions contain limited references to how persons with disabilities, and specifically women and girls with disabilities, are targeted and victimized during armed conflicts. For instance, in reviewing the ICC Prosecutor's *Report on the Activities Performed during the First Three Years*, there is no mention of crimes perpetrated against women and girls with disabilities or, more broadly, persons with disabilities.⁸⁹ Similarly, in the ICC's *Prosecutorial Strategy 2009–2012*, while there was a recognition for the need for subject matter experts in intersectional areas such as gender, there was no recognition as to how disability should be an intersectional consideration.⁹⁰

Beginning in 2011, the ICC's preliminary investigation reports began to specifically include reports of SGBV crimes. Throughout the last decade, these reports have identified multiple incidents of SGBV crimes, such as in Guinea, where over 100 women and girls reported being raped or subject to sexual violence mutilations;⁹¹ gender-based violence in Afghanistan, where girls' schools were subjected to persistent attacks by arson, armed attacks, bombings, and the poisonings of female students and teachers;⁹² Boko Haram's kidnapping of 200 girls from a primary school and subjecting them to forced marriage, rape and other forms of sexual violence;⁹³ and in Burundi, where women associated with men who opposed the president's re-election were subject to sexual violence by security forces.⁹⁴ In 2016, the ICC even explicitly recognized that SGBV crimes in Afghanistan were having a severe impact on the lives of women and girls, but it did not discuss how marginalized women, such as women and girls with disabilities, could specifically be impacted by this increased violence.⁹⁵

decisions by Trial Chamber III on the applications by victims to participate in proceedings. Publicly available documents address claims by 4,869 victims, none of which included claims by women and girls with disabilities as victims.

89 ICC, *Report on the First Three Years*, above note 88.

90 ICC, *Prosecutorial Strategy 2009–2012*, 1 February 2010.

91 ICC, *Report on Preliminary Examination Activities (2011)*, 13 December 2011, para. 110; ICC, *Report on Preliminary Examination Activities (2012)*, 22 November 2012, para. 147; ICC, *Report on Preliminary Examination Activities (2013)*, 25 November 2013, para. 186.

92 ICC, *Report on Preliminary Examination Activities (2011)*, above note 91, para. 28; ICC, *Report on Preliminary Examination Activities (2012)*, above note 91, para. 31; ICC, *Report on Preliminary Examination Activities (2013)*, above note 91, para. 31; ICC, *Report on Preliminary Examination Activities (2014)*, above note 88, para. 87; ICC, *Report on Preliminary Examination Activities (2015)*, above note 88, para. 125.

93 ICC, *Report on Preliminary Examination Activities (2014)*, above note 88, para. 177; ICC, *Report on Preliminary Examination Activities (2015)*, above note 88, para. 199; ICC, *Report on Preliminary Examination Activities (2016)*, above note 88, paras 50, 292; ICC, *Report on Preliminary Examination Activities (2017)*, above note 88, para. 211; ICC, *Report on Preliminary Examination Activities (2018)*, above note 88, para. 225; ICC, *Report on Preliminary Examination Activities (2019)*, above note 88, para. 186.

94 Edward B. Rackley, "Armed Violence against Women in Burundi", *Humanitarian Exchange*, No. 31, September 2005; Julia Steers, "Women Say They Are Being Raped as Part of President of Burundi's Fight to Keep Power", *Time*, 14 January 2016, available at: <https://time.com/4179101/rape-burundi/>.

95 ICC, *Report on Preliminary Examination Activities (2016)*, above note 88, para. 227; ICC, *Report on Preliminary Examination Activities (2017)*, above note 88, para. 248 (reporting that women and girls who were studying, teaching, working, and participating in public affairs experienced repeated attacks, death threats and killings from the Taliban). See also Padmini Murthy, Ushma Upadhyay and Eleanor Nwadinobi, "Violence against Women and Girls: A Silent Global Pandemic", in Padmini Murthy,

The above examples demonstrate how SGBV crimes are of importance to the ICC, yet this concern rarely extends to investigating SGBV crimes against women and girls with disabilities in States where the Court is conducting investigations or preliminary examinations. The only reference to women and girls with disabilities being impacted during armed conflict is in the 2014 *Report on Preliminary Examination Activities*' section on Colombia. Here, the ICC recalled that there was a "close link between existing disability and vulnerability to sexual violence, in particular in the context of forced displacement".⁹⁶ However, while future reports would address crimes of sexual slavery and forced abortions, the 2014 report was the only one that included women and girls with disabilities in relation to SGBV crimes.⁹⁷

Ultimately, in the ICC's decade-long reporting of SGBV in preliminary examinations, women and girls with disabilities and their increased vulnerability to SGBV in armed conflicts are included only once.⁹⁸ It is important to recognize that this lack of inclusion of crimes against women and girls with disabilities is a result not of a scarcity of these crimes being perpetrated, but rather of a lack of ICC investigations inquiring into these types of crimes against this group of victim-survivors. For example, the United Nations Population Fund (UNFPA) has reported that girls with intellectual and mental disabilities report increased experiences of sexual violence, with one UN Women report finding that women and girls with disabilities in Afghanistan are ten times more likely to experience sexual violence than their non-disabled peers.⁹⁹ Similarly, in Nigeria, a 2013 study found that girls with intellectual disabilities reported higher rates of sexual

Clyde Lanford Smith (eds), *Women's Global Health and Human Rights*, Jones and Bartlett, Sudbury, MA, 2010, p. 12, available at: http://samples.jbpub.com/9780763756314/56314_CH02_MURTHY.pdf.

- 96 ICC, *Report on Preliminary Examination Activities (2014)*, above note 88, para. 122 (quoting the Colombian Constitutional Court's Working Group on Forced Displacement).
- 97 ICC, *Report on Preliminary Examination Activities (2019)*, above note 88, para. 117; ICC, *Report on Preliminary Examination Activities 2020*, 14 December 2020, para. 134 (the sections on Colombia in the 2019 and 2020 reports addressed accountability for sexual slavery and forced abortions against boys and girls but did not mention the impact of these crimes on girls with disabilities, despite the earlier recognition of a close link in forced displacements). Forced abortions also raise concerns for women and girls with disabilities: see Universidad de Los Andes, "Submission to the Committee on the Rights of Persons with Disabilities for Considering in Drafting General Comment No. 3 on Article 6: Women and Girls with Disabilities", Program de Accion por la Igualdad y la Inclusion Social, 2015, p. 2, available at: www.ohchr.org/sites/default/files/Documents/HRBodies/CRPD/GC/Women/PAIIS.doc; Center for Reproductive Rights, "Submission to the Special Rapporteur on the Rights of Persons with Disabilities—Questionnaire on the Rights of Persons with Disabilities and Bioethics", 17 October 2019, p. 10 (stating that "[i]n Colombia, the Constitutional Court validated the practice of surgical sterilization of minors with intellectual and psychosocial disabilities. In its decision, the Court explained, 'The decision to undergo surgical sterilization ensures more dignified living conditions for those who cannot make decisions related to the exercise of their reproductive freedom and that may be exposed to forced pregnancies in detriment of their dignity and personal integrity'").
- 98 ICC, *Report on Preliminary Examination Activities (2014)*, above note 88, para. 122.
- 99 UNFPA, "Five Things You Didn't Know", above note 2; UN Women, *Gender Alert on COVID-19 Afghanistan*, No. 10: *Women with Disabilities during COVID-19*, 25 June 2020. See also Human Rights Watch, "Disability Is Not Weakness": *Discrimination and Barriers Facing Women and Girls with Disabilities in Afghanistan*, 28 April 2020; Human Rights Watch, "Afghanistan: Women with Disabilities Face Systemic Abuse", 27 April 2020, available at: www.hrw.org/news/2020/04/27/afghanistan-women-disabilities-face-systemic-abuse.

violence because perpetrators intentionally targeted these girls due to their difficulty in recognizing offenders later on.¹⁰⁰ Most recently, the UN Human Rights Council's reporting on the situation in Ukraine expressed concern for the "impact of the conflict on women, children and persons in vulnerable situations, including persons with disabilities and older persons, who are at risk also of SGBV".¹⁰¹

In essence, SGBV crimes against women and girls with disabilities are occurring in the places where the ICC is conducting investigations, and if anything, these crimes are likely occurring at higher rates where the ICC is investigating, due to the loss of governmental stability. Yet, the ICC has not included these victim-survivors in its investigations or prosecutions, resulting in a lack of accountability for perpetrators and continuations of legal systems that deny justice to women and girls with disabilities.

The ICC's jurisdiction over SGBV crimes against women and girls with disabilities

While the ICC seeks to ensure accountability for global criminal acts, its scope of authority is limited to both who it can prosecute and under what circumstances it may prosecute.¹⁰² Specifically, under the Rome Statute, the ICC's jurisdiction is limited to crimes of sufficient gravity¹⁰³ and its prosecutions must be complementary to national criminal prosecutions.¹⁰⁴ The complementarity principle is at the core of the ICC, as it is intended to be a court of last resort and may therefore only prosecute a case when there is a lack of genuine national prosecutions.¹⁰⁵

In ensuring accountability for crimes against women and girls with disabilities, the ICC could have a basis to exercise jurisdiction over these crimes because (1) there is subject matter jurisdiction over the crimes, and (2) the complementarity principle could likely be satisfied. First, as explained above, SGBV crimes against women and girls with disabilities occur at disproportionate rates even outside of armed conflicts, and they only increase during times of armed conflict – thus, the widespread nature of these crimes should satisfy the ICC's gravity requirement.¹⁰⁶ SGBV crimes also fall within the ICC's subject

100 Women Enabled International, above note 35, pp. 2–5.

101 HRC Res. S-34/1, 12 May 2022.

102 ICC, *Policy Paper on Case Selection and Prioritization*, 15 September 2016, p. 14.

103 Marco Longobardo, "Factors Relevant for the Assessment of Sufficient Gravity in the ICC Proceedings and the Elements of International Crimes", *Questions of International Law*, 30 November 2016, available at: www.qil-qdi.org/factors-relevant-assessment-sufficient-gravity-icc-proceedings-elements-international-crimes/.

104 Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002), Art. 7(g).

105 See, generally, Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, International Center for Transitional Justice, New York, 2016. See also Amnesty International, "This Is What We Demand": *Impunity for Sexual Violence against Women in Colombia's Armed Conflict*, 2011.

106 See, generally, Megumi Ochi, *Gravity Threshold before the International Criminal Court: An Overview of the Court's Practice*, ICD Brief No. 19, International Crimes Database, January 2016.

matter jurisdiction because they constitute crimes against humanity under Article 7 (g) of the Rome Statute.¹⁰⁷ Second, while the complementarity assessment is conducted on a case-by-case basis in each situation, the complementarity principle could likely be satisfied in many of these cases. Considering that State courts often fail to actively remove barriers that limit access to justice, in violation of Article 13 of the CRPD, the ICC would likely be able to establish that because of the existence of these institutional barriers, there is sufficient evidence to believe that there are no genuine State prosecutions which would prohibit the ICC from exercising jurisdiction over these cases.¹⁰⁸

This approach would also be consistent with the ICC Prosecutor's *Policy Paper on Sexual and Gender-Based Crimes*, in which the then Prosecutor recognized that she does not have the authority to prosecute crimes when such crimes are being prosecuted by *genuine and relevant national proceedings*; however, she recalled that discriminatory attitudes, gender stereotypes in substantive law, and limited access to justice may all create a basis for the Office of the Prosecutor to find that there are no relevant national proceedings occurring.¹⁰⁹ This acknowledgement supports the ICC's ability to exercise jurisdiction over crimes against women and girls with disabilities when State courts fail to remove physical and societal barriers to justice, such as discriminations in witness credibility, failure to provide accommodations, and permissive laws that legalize international crimes like forced sterilization.¹¹⁰ Thus, under these circumstances the ICC could recognize that because of these institutional barriers the State is unable to facilitate genuine and relevant national proceedings, and therefore, the Court could exercise its jurisdiction.

The ICC's prosecution of these crimes would not only hold those most responsible accountable, but would also help pressure State institutions to strengthen their criminal justice systems in order to remove these cases from the ICC's jurisdiction. For example, during the ICC's investigation into the situation in Colombia, the Prosecutor's 2017 report recognized that the Colombian government was failing to prosecute State actors who had executed civilians and reported the deaths as guerrillas killed in combat to boost the State success rate

107 Rome Statute, above note 104.

108 See, generally, Linda E. Carter, "The Principle of Complementarity at the International Criminal Court: The Role of *Ne Bis in Idem*", *Santa Clara Journal of International Law*, Vol. 8, No. 1, 2010; Katharine A. Marshall, "Prevention and Complementarity in the International Criminal Court: A Positive Approach", *Human Rights Brief*, Vol. 17, No. 2, 2010.

109 ICC, above note 1, pp. 22–23; see also Amnesty International, above note 105.

110 A report by the National Women's Law Center in the United States found that thirty-one out of fifty US states have laws legalizing forced sterilization of persons with disabilities: National Women's Law Center, *Forced Sterilization of Disabled People in the United States*, 2022. See also Center for Reproductive Rights, "Organizations in Several Countries Reject Decision of the Colombian Constitutional Court Allowing for Sterilization of Minors with Disabilities without Their Consent", 18 March 2014, available at: <https://reproductiverights.org/organizations-in-several-countries-reject-decision-of-the-colombian-constitutional-court-allowing-for-sterilization-of-minors-with-disabilities-without-their-consent/>; Open Society Foundations, *Against Her Will: Forced and Coerced Sterilization of Women Worldwide*, 2011.

in the internal armed conflict.¹¹¹ These were known as false-positive cases.¹¹² The 2017 report clearly stated that its investigations had identified twenty-nine commanders who were potentially responsible for false-positive killings, yet the Colombian government was only prosecuting seventeen of these individuals.¹¹³ Therefore, the report recognized that if the Colombian courts did not prosecute the remaining individuals, the ICC could potentially have jurisdiction over those cases.¹¹⁴ Subsequently, in the ICC's 2018 report, the Court recognized that there was improved accountability and prosecution in Colombia for these false-positive crimes.¹¹⁵ Thus, the pressure placed by the ICC on these cases in the 2017 report helped facilitate, or rather motivate, accountability for these crimes. With similar pressure from the ICC for accountability for SGBV crimes against women and girls with disabilities, the Court could help develop justice at the State level and ensure prosecution at the international level if the pressure failed to encourage State accountability.¹¹⁶ Lastly, even if the ICC only included the impact of SGBV crimes on women and girls with disabilities in its investigation report, this could nonetheless be beneficial in raising awareness as to the prevalence of these crimes during armed conflicts. Addressing the needs of diverse intersectional victim-survivors could also help bolster the Court's credibility by demonstrating a new inclusive perspective.¹¹⁷

Recommendations on increasing accountability for crimes against women and girls with disabilities

While State courts work to improve access to justice for women and girls with disabilities, the ICC must do the same to improve how it provides justice for victim-survivors with disabilities under ICL. Like the State justice systems that must remove and actively address historical stigmas, institutional barriers and exclusion, the ICC must do the same before it can even begin providing accountability for SGBV crimes against women and girls with disabilities. For States this reform often takes decades to achieve, but for the ICC it can occur much more quickly, as the ICC is only required to improve one court's positions, policies and procedures, rather than an entire State's legal system. Therefore, the following recommendations are intended to be used as a starting point for the Court to begin addressing accountability for crimes against persons with disabilities, and particularly women and girls with disabilities. However, it is

111 ICC, *Report on Preliminary Examination Activities (2012)*, above note 91, para. 8.

112 ICC, *Report on Preliminary Examination Activities (2017)*, above note 88, para. 135.

113 *Ibid.*

114 *Ibid.*, paras 149–153.

115 ICC, *Report on Preliminary Examination Activities (2019)*, above note 88, paras 110–128.

116 Human Rights Watch, *Pressure Point: The ICC's Impact on National Justice: Lessons from Colombia, Georgia, Guinea, and the United Kingdom*, 3 May 2018.

117 Natasha Godsiff, "The Failure of the International Criminal Court to Prosecute Sexual and Gender-Based Violence", Cambridge University Law Society, available at: www.culs.org.uk/per-incuriam/the-failure-of-the-international-criminal-court-to-prosecute-sexual-and-gender-based-violence.

important to note that if adopted, these recommendations alone would not address the accountability gap currently experienced by women and girls with disabilities, and the ICC would need to continue to evolve in order to ensure that once the changes were adopted, the Court was actually including women and girls with disabilities in investigations and prosecutions.

The ICC Prosecutor should appoint a Special Adviser on disability

In 2021, the ICC Prosecutor appointed seventeen new Special Advisers, with fourteen acting as Special Advisers on specific portfolios, such as gender persecution and crimes against and affecting children.¹¹⁸ Special Advisers are appointed with specific mandates based on their specialty and may support the Prosecutor’s training initiatives for the Office of the Prosecutor (OTP).¹¹⁹ As of August 2022, the Prosecutor has not appointed a Special Adviser on disability. Thus, to improve the Court’s perspective, accessibility, and inclusion of disability, the Prosecutor should appoint a Special Adviser on disability.

Appointing a Special Adviser on disability could provide subject matter expertise on international crimes against persons with disabilities, and educate the Court on the historical exclusion of persons with disabilities in ICL.¹²⁰ The scope of the mandate for the Special Adviser on disability could include working with currently appointed Special Advisers to ensure that the ICC’s work is inclusive of a disability perspective within intersectional fields such as gender crimes, crimes against children, and ICL more broadly. A Special Adviser on disability could also provide guidance to ICC investigations on engaging local, regional and national organizations of persons with disabilities, which could help the Court to identify crimes committed against persons, and specifically women and girls with disabilities, during armed conflicts.¹²¹ Using a Special Adviser on disability to more actively engage national organizations and coalitions led by persons with disabilities would also further the aims put forward in the Prosecutor’s policy paper on ensuring accountability for SGBV crimes, which stated that the OTP would work with local stakeholders to “stop, prevent, and punish sexual and gender-based crimes”.¹²²

A Special Adviser on disability could also review how the ICC’s mechanisms are currently impairing access for victim-survivors with disabilities. For example, under the Court’s Rules of Procedure and Evidence, when a victim-survivor is applying to be recognized as a victim before the Court, Rule 89 provides:

118 ICC, “ICC Prosecutor Mr Karim A.A. Khan QC Appoints Seventeen Special Advisers”, Press Release No. ICC-CPI-20210917-PR1611, 17 September 2021.

119 *Ibid.*

120 ICC, above note 1, p. 16 (stating that the OTP would work to “[u]nderstand the intersection of factors such as gender, age, race, *disability* ... and other status or identities which may give rise to multiple forms of discrimination and social inequalities” (emphasis added) – a promise the Court has yet to fulfil).

121 S. Ortoleva, above note 8.

122 ICC, above note 1, pp. 14–15.

An application referred to in this rule may also be made in person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child, or when necessary, a victim who is disabled.

The inclusion of disability within this rule perpetuates a generalization that persons with disabilities lack the capacity to advocate for themselves because they are disabled, essentially conflating lack of legal capacity with disability more broadly. This rule has also been interpreted by the Court to require applicants to establish a relationship between the victim-survivor and the individual completing the application on behalf of the applicant with a disability.¹²³ This requirement by the Court largely focuses on the role of legal guardianship for individuals who lack capacity, but as stated above, not all persons with disabilities will need legal guardianship, and some may be able to participate independently. Thus, a Special Adviser on disability would be well poised to review whether and how this rule has limited individuals with disabilities from participating in the Court's proceedings. Furthermore, a Special Adviser on disability could also advise the Court on the type of relationship requirement, if any, that should be established between a victim-survivor with a disability and the individual completing the application. Ultimately, ensuring that the Court's rules do not impair victim-survivors with disabilities from participating on an equal basis with others would also be consistent with Principles 1 and 5 of the International Principles and Guidelines.¹²⁴

Lastly, a Special Adviser could also review how the ICC internally views disability within its jurisprudence.¹²⁵ While the Court has discussed disability in terms of victim-survivor applications for participation, it often views disability as a consequence of armed conflicts rather than a co-occurring condition of armed conflicts. Therefore, it would be important for a Special Adviser to address how the Court should internally understand disability, in order to ensure that it does not apply a narrow view of disability. This education could be conducted in support of the OTP's staff training, a responsibility already within the Special Advisers' mandate. Providing this type of training would also be consistent with Principle 10 of the International Principles and Guidelines, which recommends awareness-raising and training within justice systems.

123 See ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Ground for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009; ICC, *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, First Decision on Victims' Participation in the Case, 30 March 2011; ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014; ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Decision on Contested Victims' Applications for Participation, Legal Representation of Victims and Their Procedural Rights, 27 November 2015; ICC, *Prosecutor v. Ruto and Sang*, Case No. ICC-01/09-01/11-249, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 8 August 2011.

124 International Principles and Guidelines, above note 31.

125 See, for example, SCSL, *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-2004-16-T, transcript, 27 September 2006, pp. 99–102 (discussing the ability of a hearing-impaired man to give evidence via a sign language interpreter).

Ultimately, appointing a Special Adviser on disability would build upon the work that the Prosecutor has started by recognizing the need for subject matter experts at the ICC, and it would ensure that the Court continues to develop with an inclusive disability lens that provides accountability for persons with disabilities, and particularly women and girls with disabilities.

The ICC Prosecutor should issue a policy paper on crimes against persons with disabilities

Since the ICC's creation, the OTP has produced three policy papers on its position in relation to the interests of justice,¹²⁶ SGBV crimes¹²⁷ and children.¹²⁸ These policy papers play an important role in ensuring that the international community is aware of the Prosecutor's position on these thematic issues. A policy paper on crimes against persons with disabilities would be a substantial contribution from the OTP in recognizing the frequency of crimes against persons with disabilities, and establishing clear policies and procedures for engaging these communities during preliminary examinations, investigations, and prosecutions.¹²⁹

An OTP policy paper must recognize (1) the historical exclusion, and if any, inclusion,¹³⁰ of crimes against persons with disabilities under ICL; and (2) the intersectionality of persons with disabilities such as gender, sexual orientation, race and ethnicity. First, any policy paper must recognize the historical shortcomings of ICL for persons with disabilities,¹³¹ in order to ensure that as the ICC becomes more inclusive, it does not perpetuate the same barriers experienced by persons with disabilities in the decades prior.¹³² It would also be critical for the Prosecutor to address how the Court would handle cases in which crimes against humanity, such as the crime of forced sterilization,¹³³ are considered legal under a State's domestic laws while nonetheless still violating ICL.

Second, a policy paper must also address the national and international access to justice barriers faced by persons with disabilities, and women and girls with disabilities. With that in mind, a policy paper must address how the Prosecutor will review whether genuine domestic prosecutions are occurring, what weight it would give to human rights bodies' finding that a State is denying individuals with disabilities the right to access justice, and how the violation of

126 ICC, *Policy Paper on the Interests of Justice*, 1 September 2007

127 ICC, above note 1.

128 ICC, *Policy on Children*, 15 November 2016.

129 This recommendation was first proposed in W. Pons, J. E. Lord and M. A. Stein, above note 20.

130 See, for example, SCSL, *Prosecutor v. Charles Taylor*, Case No. SCSL-2003-01-T, transcript, 15 May 2008, pp. 9936–9938 (witness discussing how individuals with disabilities who were begging were taken to a river and executed because they were “embarrassing the organization”).

131 For example, recognizing the contributions from the Nuremberg Tribunal and post-Nuremberg exclusion of persons with disabilities in the Holocaust Victim Assets Litigation.

132 See, generally, Phitalis Were Masakhwe, “The Disabled and the Rwanda Genocide: The Untold Story”, *Disability World*, Vol. 23, April–May 2004 (discussing crimes against persons with disabilities during the Rwandan armed conflict).

133 Rome Statute, above note 104.

the right to access justice could create grounds for the ICC's jurisdiction. Lastly, a policy paper should explain how the OTP will include a disability lens throughout its work, including how disability intersects with other factors such as gender, sexual orientation, race and ethnicity.

Conclusion

ICL is at a pivotal stage, with an ICC Prosecutor recently appointed to a new eight-year term, and armed conflicts now plaguing nearly all continents across the globe. While this body of law has continued to develop for the better and build off its past victories and losses, it can no longer operate as a mechanism for justice for only a select group of victim-survivors and a select group of States. The future of ICL must ensure accountability for crimes against women and girls with disabilities during armed conflict. As a court of last resort, it is well within the ICC's mandate and authority to prosecute SGBV crimes against women and girls with disabilities during armed conflicts when a State's national mechanism is unwilling or unable to do as a result of institutional failures in ensuring accessible justice systems. The ICC must step up and eliminate impunity for these crimes as this will not only provide justice to victims-survivors but also help strengthen national institutions to comply with the requirements of Article 13 of the CRPD.

REPORTS AND DOCUMENTS

ICRC and International Red Cross and Red Crescent Movement: Some recent documents on international humanitarian law and persons with disabilities

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- International Committee of the Red Cross, “How Law Protects Persons with Disabilities in Armed Conflict”, 13 December 2017, available at: www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict (all internet references were accessed in November 2022).
- International Committee of the Red Cross, “Chapter 3: Needs of the Civilian Population in Increasingly Long Conflicts: Selected Issues”, in *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, 2019, available at: www.icrc.org/sites/default/files/

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document/file_list/challenges-report_the-needs-of-civilians-in-increasingly-long-conflicts.pdf.

- 33rd International Conference of the Red Cross and Red Crescent, “Addressing Mental and Psychosocial Needs of People Affected by Armed Conflicts, Natural Disasters and Other Emergencies”, Resolution 33IC/19/R2, Geneva, Switzerland, 9–12 December 2019, available at: <https://pscentre.org/wp-content/uploads/2020/10/solution.pdf>.
- Council of Delegates of the International Red Cross and Red Crescent Movement, “International Red Cross and Red Crescent Movement Policy on Addressing Mental Health and Psychosocial Needs”, Resolution CD/19/R5, Geneva, Switzerland, 8 December 2019, available at: https://pscentre.org/wp-content/uploads/2020/10/CD19-R5-Adopted-MHPSS-need-policy-draft-resolution-FINAL-EN_clean.pdf.
- 33rd International Conference of the Red Cross and Red Crescent, “Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law”, Resolution 33IC/19/R1, Geneva, Switzerland, 9–12 December 2019, available at: https://rcrcconference.org/app/uploads/2019/12/33IC-R1-Bringing-IHL-home_CLEAN_ADOPTED_FINAL-171219.pdf.

Resolution 33IC/19/R1 contains the following wording (bold emphasis added):

Preamble

recalling that persons taking no active part in the hostilities shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria,

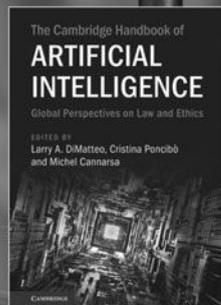
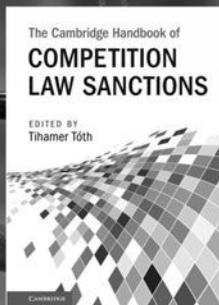
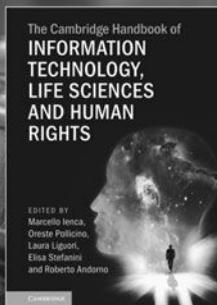
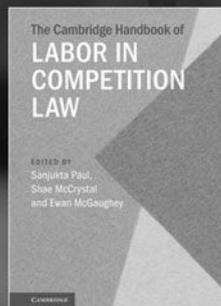
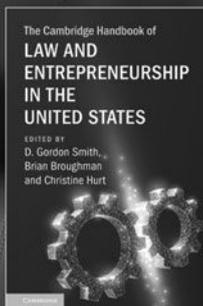
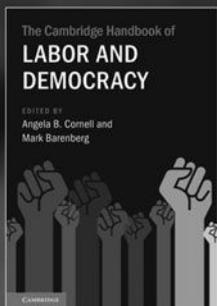
recognizing that women, men, girls and boys of different ages, **disabilities** and backgrounds can be affected differently by armed conflict, and that these differences need to be considered when implementing and applying IHL, in order to safeguard adequate protection for all

Operative para. 9

calls upon States to protect the most vulnerable people affected by armed conflicts, in particular women, children and **persons with disabilities**, and to provide that they receive timely, effective humanitarian assistance

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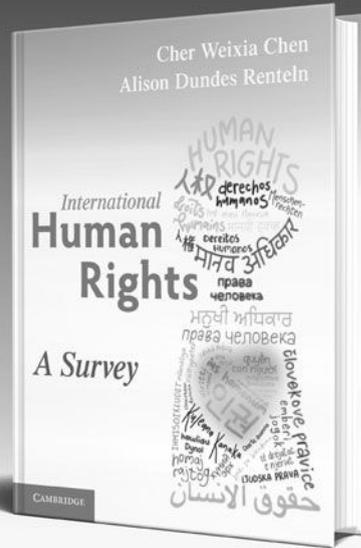


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Cher Weixia Chen
Alison Dundes Renteln

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Rights**

A Survey



This book provides an interdisciplinary overview of international human rights issues, offering truly international coverage including the Global South. Considering the philosophical foundations of human rights, Chen and Renteln explore the interpretive difficulties associated with identifying what constitute human rights abuses, and evaluate various perspectives on human rights. This book goes on to analyze institutions that strive to promote and enforce human rights standards, including the United Nations system, regional human rights bodies, and domestic courts. It also discusses a wide variety of substantive human rights including genocide, torture, capital punishment, and other cruel and unusual punishments. In particular, the book offers an accessible introduction to key understudied topics within human rights, such as socioeconomic rights, cultural rights, and environmental rights. It also focuses on the rights of marginalized groups, including children's rights, rights of persons with disabilities, women's rights, labor rights, indigenous rights, and LGBTQ+ rights, making this an engaging and invaluable resource for the contemporary student.

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