Disability and Armed Conflict

This report is a consolidated version of the Geneva Academy Briefing 'Disability and Armed Conflict' which is the final output of the SNIS funded research project 'Improving the Protection of Persons with Disabilities in Armed Conflict. The Academy Briefing sets out, in detail: the projects three hypothesis', research questions, plan and methodology; the impact of armed conflict on persons with disabilities; the models adopted to understand and respond to disability; the CRPD and its key features; the modes of application of the CRPD in differing conflict settings (including international armed conflict, non-international armed conflict, and occupation by states as well as armed-non state actors), and analysis of a selection of international humanitarian law norms from a disability inclusive perspective. The overarching findings and recommendations that are identified at the end of this report are identical to those contained in the Geneva Academy Briefing. Readers who wish to learn more about the project and its findings and recommendations should refer to the Geneva Academy Briefing.

Introduction

An estimated 15 per cent of the world's population, approximately 1 billion people, have some form of disability, involving sensory, physical, psychosocial and/or intellectual impairments. However, given that impairments are often not reported (owing to prevalent discriminatory attitudes and social stigma), or not recorded (owing to inadequate data collection), this figure is likely to be much higher. The UN Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006 and entered into force in 2008, cemented, in a widely endorsed international human rights law treaty, the undeniable fact that persons with disabilities are full and equal rights holders. This recognition is significant in its own right, since it is a position that had not previously been obvious to many actors, and that remains unapparent to some. The CRPD underscores that denial of the full enjoyment of any human right based on a person's real or perceived impairment amounts to unlawful discrimination. Crucially, the CRPD affirms its continuing application in situations of armed conflict, alongside international humanitarian law (IHL). States Parties, in accordance with their obligations under IHL and the CRPD, are obligated to take 'all necessary measures to ensure the protection and safety of persons with disabilities' in situations of armed conflict.

Against that background, this report explores the complementarity between the CRPD and IHL and considers how, in specific situations within armed conflict (concerning the conduct of hostilities and the treatment of detained persons), a selected sample of IHL provisions (concerning humane treatment and adverse distinction) should be applied and evaluated in a disability inclusive manner and concludes with eight key findings of our research, and our associated recommendations.

The Impact of Armed Conflict on Persons With Disabilities

Armed conflict has a particularly 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. In the conflict setting, persons with disabilities are the subject of targeted killings;[1] 'clustered settlements' of persons with disabilities (including psychiatric institutions, orphanages and care homes) are used as human shields;[2] women and girls with disabilities are at increased risk of sexual and gender-based violence (SGBV), including through the use of SGBV as a strategy, tactic or policy in war;[3] persons with disabilities are more likely to be killed or sustain serious injury as a result of inaccessible protection mechanisms (such as effective advanced warnings before attacks);[4] inaccessible evacuation procedures (including transport and emergency information) result in their being left behind;[5] inaccessible humanitarian assistance (including food, water and shelters) can have a disproportionate and catastrophic impact on the health of persons with disabilities; those with existing impairments risk secondary and preventable conditions owing to the interruption or deterioration of medical care;[6] and the destruction of infrastructure and assistive devices can create physical barriers, preventing persons with disabilities from accessing their places of education and/or employment.[7]

In the context of those fleeing conflict, refugees and internally displaced persons with disabilities face exclusion from basic services. Refugee and displacement camps and facilities 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'.[8] In the aftermath of conflict, persons with disabilities are routinely denied access to justice, including access to effective remedies and reparation, for violations carried out during the conflict. Across conflict and post-conflict settings, persons with disabilities are widely seen as passive victims and are yet to be recognized and empowered to act as agents of change. They are not meaningfully consulted in humanitarian policy design, implementation and monitoring: they are not adequately represented within, or meaningfully consulted in, the design and implementation of action by many human rights and humanitarian organizations and mechanisms; they are not granted equal participation and full involvement in peace processes; and their

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[1] CmmttRPD, Concluding Observations on the Initial Report of Colombia, UN doc CRPD/C/COL/CO/1, 30 September 2016, §24.

[2] UNICEF, Children with Disabilities in Situations of Armed Conflict, November 2018, p 4.

[3] Ibid. See also E. J. Wood, 'Conflict-Related Sexual Violence and the Policy Implications of Recent Research', 96 *International Review of the Red Cross* (*IRRC*) 894 (2014).

[4] By way of example, two female residents, with physical impairments, of the Mobarat Falastin Centre in Gaza were killed and four others injured when the centre was attacked by Israeli rockets during the 2014 conflict. A 'roof-knock' warning was given two minutes before the attack but this was insufficient time to evacuate or try to shelter all residents from the blast owing to their mobility restrictions. Interview with the manager of the Mobarat Falastin Centre by the author, Alice Priddy, in Gaza, November 2018. Notes on this interview are on file with the author and can be shared upon request. The attack was also reported in *The Guardian*, 'Disabled Palestinians Unable to Escape Israeli Air Strike', 12 July 2014.

[5] Human Rights Watch (HRW), 'Central African Republic: People with Disabilities Left Behind', 28 April 2015. Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN doc A/HRC/12/48, 25 September 2009, §§1286–1288.

[6] World Confederation for Physical Therapy, *The Role of Physical Therapists in Disaster Management*, 2016, p 42.

[7] Syria Relief, Children Living with Disabilities Inside Syria, 2018, p 23.

[8] UN Office of the High Commissioner for Human Rights (OHCHR), 'Migrants and Refugees with Disabilities Must be a Priority in New Global Compact on Migration – UN Experts', press release, 12 April 2017.

role and potential contribution to conflict prevention and resolution is yet to be realized.

The consensus is that armed conflict has a disproportionate impact on persons with disabilities who, based on their impairment, are denied the rights and protections they are entitled to under both international human rights law (IHRL) and IHL. Yet the exact extent and nature of that impact is unknown. There is an acute lack of data that is reliable, comprehensive and disaggregated by age and gender on the impact of armed conflict on persons with a range of impairments. States Parties to the CRPD are not meeting their commitment to collect data and statistical research to enable them to formulate and implement the policies necessary to give effect to the CRPD.[9] Where data sets do exist they are often under-inclusive, relying on a narrow, medical-model understanding of disability. Such data sets do not adequately or consistently reflect the prevalence of those with psychosocial and/or intellectual impairments. Where this data is used to justify budget allocations and develop policy, it exacerbates the exclusion of persons with unrecognized disabilities and leads to further discrimination.

The Forgotten Victims of Armed Conflict

Persons with disabilities are the largest minority group in the world.[10] Despite this, and the severe consequences that armed conflict has on them, persons with disabilities remain the 'forgotten victims of armed conflict'.[11] 'Disability' is still widely considered a niche issue, particularly in the conflict setting. Very little research or literature exists on the topic.[12] Open the contents page or index of any textbook on armed conflict and it is unlikely to include 'disability'; military manuals and IHL training programmes do not meaningfully incorporate the disability perspective; UN-mandated commissions of inquiry and UN agency reports routinely fail to include a disability analysis of armed conflict,[13] not a single resolution of the UN Security Council,[14] Human Rights Council[15] or General Assembly is dedicated to addressing the disproportionate impact of armed conflict on persons with disabilities. In

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[9] Art 31(1), Convention on the Rights of Persons with Disabilities (CRPD).

[10] UN Enable, Fact Sheet on Persons with Disabilities, n.d.

[11] CmmttRPD, 'Persons with Disabilities "Forgotten Victims" of Syria's Conflict – UN Committee', press release, 17 September 2013.

[12] The few academic publications that do exist include: J. Lord, 'Persons with Disabilities in International Humanitarian Law', in M. Gill and C. Schlund-Vials (eds), *Disability, Human Rights and the Limits of Humanitarianism*, Routledge, 2015; N. Hart, M. Crock, R. McCallum and B. Saul, 'Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts, 40 *Monash University Law Review* 1 (2014).

[13] Notable exceptions include OHCHR, 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; the Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN doc A/HRC/39/CRP, 17 September 2018; Report of the UN Commission on South Sudan, UN doc A/HRC/40/CRP.1, 20 February 2019, §§177–182.

[14] The UNSC has recognized, albeit in a rather nominal manner, the particular risks experienced by persons with disabilities in resolutions devoted to particular conflicts (see e.g., UNSC Res 2409, 27 March 2018, on the conflict in the DRC, §36(i)(b)) or in its resolutions devoted to conflict per se. See e.g., UNSC Res 2417, 24 May 2018.

[15] UN Human Rights Council (HRC) Res 9/9, Protection of the Human Rights of Civilians in Armed Conflict, UN doc A/HRC/9/L.11, 2008.

comparison, the gender impact and response to armed conflict is rightly receiving growing attention, including through the Women, Peace and Security framework.[16] Instead, persons with disabilities are often implicitly referred to as 'vulnerable groups', and thereby purportedly included within relevant discussions. Little *dedicated* attention is paid to the diversity of disability and the lived experiences of persons with disabilities in the conflict setting.

Where disability is included within humanitarian policy (by states or humanitarian organizations), there tends to be a focus on physical and sensory impairments to the exclusion of persons with psychosocial and intellectual impairments. This approach might be explained by under-inclusive data sets and/or a lack of awareness of the diversity of disability. The result is that services for persons with disabilities in the conflict setting are often only concerned with rehabilitation of persons with physical impairments, such as the provision of prosthetics and physiotherapy for amputees. Persons with psychosocial or intellectual impairments are excluded and responses to the broader rights-based needs of persons with disabilities are absent or inadequate, such as, for example, accessible reproductive health services for survivors of sexual violence or mental health services to overcome psychological trauma.

Ultimately, all mainstream humanitarian services should be fully accessible to all persons, including persons with disabilities. Failure to ensure full and equal access to services amounts to discrimination based on impairment and violation of associated rights.[17] Additional to the need for equally accessible 'mainstream' services, services should also be targeted and specific to persons with disabilities, for example training and education programmes on the use of sign language and braille for persons with auditory or visual impairments.

Prevention of Primary Impairment, Not Disability Rights

As well as a distorted focus on physical impairments, states and other stakeholders often confuse prevention of primary impairment with disability rights. Prevention of a primary impairment is part of the general right to the highest attainable standard of health. It is not part of disability rights and, as such, is not an implementing measure under the CRPD. It is of concern that the two are muddled, as resources and finances are, as a consequence, often dedicated to primary impairment prevention at the expense of giving effect to disability rights. Within the armed conflict setting, this confusion is evident in states' inclusion of weapons control and disarmament strategies within disability discourse.

Although some weapons law treaties expressly add to disability rights discourse and provide for specific reparations and support that should be available to survivors,[18] it is not their focus on preventing primary impairment that is of relevance to disability rights advocates. Rather, it is the equal access to the provisions of these texts that is their concern. The Mine Ban Treaty, for example, includes provisions concerning mine awareness activities and the marking of mined areas to ensure the 'effective'

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[16] UNSC Res 13/25, 31 October 2000, amongst others. In relation to sexual violence, women with disabilities have been included within the Framework on Women, Peace and Security.

[17] Arts, 2,5 and 9, CRPD.

[18] E.g., the 2008 Convention on Cluster Munitions expressly recognizes the rights and dignity of victims of cluster munitions as well as the risk of discrimination based on impairment that they face (Preamble and Arts 2 and 5).

exclusion of civilians.[19] Reading these provisions from a disability inclusive perspective, the marking of mined areas should be in accessible formats and mine awareness activities should include providing mine education that is tailored to members of the community who have sensory and intellectual impairments, thereby ensuring that persons with existing impairments receive the benefit of these provisions and reducing the risk of death or serious injury from mines.

The Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) was adopted on 13 December 2006 at the UN Headquarters in New York. The CRPD marks a seismic shift in attitudes away from the view that persons with disabilities are objects of charity and medical treatment towards the realization that persons with disabilities are full and equal rights-holders. There are numerous unique and revolutionary aspects to the Convention, most notably for present purposes, unlike most other human rights treaties, the Convention expressly provides in Article 11 that it continues to apply during armed conflict alongside IHL.

The raison d'être of the CRPD is to ensure that persons with disabilities enjoy the same human rights as everybody else. The CRPD expressly affirms that existing rights and freedoms, such as the rights to life,[20] equal recognition before the law,[21] liberty and security of the person, privacy and family life,[22] education, health, employment and the right to participate in political, public and cultural life,[23] apply equally to persons with disabilities. Freedoms enshrined include freedom from torture, cruel, inhuman or degrading treatment or punishment,[24] liberty of movement and nationality,[25] and freedom of expression and opinion.

Defining Disability

As disability is an evolving concept that changes across both contexts and time, incorporating a definition into the Convention would risk time-locking it. Therefore, the Convention's drafters opted to make clear in the Preamble 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'. In a similar vein, the definition of 'persons with disabilities' within Article 1 includes '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'. The CRPD thereby adopts a social model understanding of disability and, through recognizing disability as an 'evolving concept', it allows for the Convention to adapt and remain relevant over time and in different contexts.

[19] Arts 6(7)(d) and 5(2), Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction.
[20] Art 10, CRPD.
[21] Art 12, ibid.
[22] Arts 22 and 23, ibid.
[23] Arts 29 and 30, ibid.
[24] Art 15, ibid.
[25] Art 18, ibid.

Reasonable Accommodation

One of the most revolutionary and innovative aspects of the CRPD is its inclusion of the concept of reasonable accommodation.[26] Reasonable accommodation refers to the granting 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 enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.[27] At its core, reasonable accommodation is about responding to the *individual* needs of a person with a disability to effectively redress the inequalities within society and the environment faced by persons with disabilities.

The CRPD not only recognizes that failure to provide reasonable accommodation amounts to unlawful discrimination (Article 2), but goes further by enshrining the right to reasonable accommodation as a stand-alone legally enforceable right. Compliance with the need to provide reasonable accommodation will fall on the public sector (for example, in the provision of services to the public such as education) as well as the private sector (such as in the employment context or public service delivery that is contracted to private entities). Therefore, states parties have a duty to directly comply with the obligation as well as to take 'all appropriate steps to ensure that reasonable accommodation is provided'. This would include enacting legislation that obliges private employers to provide reasonable accommodation and possibly providing support to smaller business to meet this obligation.

The Right to Equal Access

The right to equal access, or in other words accessibility, is one of the key principles of the CRPD and an essential pre-condition to the effective and equal enjoyment of human rights by persons with disabilities. To enable persons with disabilities to participate fully in all aspects of life, Article 9 obliges states parties to take appropriate measures to ensure access on an equal basis with others to 'the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to facilities and services provided to the public'.[28]

In its General Comment on Article 9, the Committee confirmed that denial of access should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity.[29] The right to equal access of all services provided to the public is of particular relevance when considering the provision of humanitarian protections and services in the conflict setting, such as emergency information, evacuation procedures, shelters and transitional justice mechanisms.

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[26] Arts 2 and 5, CRPD.

[27] Art 2, CRPD.

[28] Art 9, CRPD..

[29] CmmttRPD, *General Comment No 2: Article 9*: *Accessibility*, UN doc CRPD/C/GC/2, 22 May 2014, §13.

The CRPD and Armed Conflict

CRPD is one of only two human rights treaties (the other being the Convention on the Rights of the Child)[30] to expressly provide that it continues to apply during armed conflict alongside IHL. Article 11 of the Convention requires 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 of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

The CRPD does not contain a derogations clause – as is provided, for example, in Article 4 of the ICCPR – meaning that there is no possibility for States Parties to suspend application of the Convention's provisions during states of emergency or armed conflict. Instead, it affirms that the rights of persons with disabilities continue to apply during armed conflict and that these rights exist alongside IHL.

The extent to which the CRPD applies to any given armed conflict will be context dependent and influenced by who the actors are, the territory on which the acts take place, the rights engaged and the IHL norms that are applicable. Below, several scenarios related to armed conflict are explored with regard to the extent to which the CRPD will apply.

The Extraterritorial Application of the CRPD

The extraterritorial application of human rights law is especially relevant to armed conflict where a state may be operating outside its territory (e.g. in an international armed conflict where operations take place outside the state party's territory; or as a third party in a non-international armed conflict (NIAC) taking place outside the state party's territory). Where a state party to the CRPD is engaged in an armed conflict abroad, this raises the question of whether or not their human rights obligations (in this case those contained in the CRPD) follow them.

The CRPD does not expressly stipulate its geographical scope of application, which would ordinarily be, at the very least and as discussed earlier, within a state's territory. Instead, the CRPD takes a broader approach by requiring States Parties to 'refrain from engaging in *any* act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention' (i.e. no limitation is set as to the location of the act; emphasis added).[31] This provision, combined with the CRPD's silence on its geographical application, suggests that the states' obligations will remain whether or not it is acting on its territory. This conclusion is further supported by Article 11's express application of the CRPD to armed conflicts per se, without limitation regarding the location or nature of the conflict.

There are two well-known means by which extraterritorial jurisdiction may be activated: personal jurisdiction (the 'personal model' of jurisdiction) or geographical jurisdiction (the 'spatial model'). According to the spatial model, jurisdiction will be established when a state exercises de facto effective control over a geographical area.

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[30] Art38(1), Convention on the Rights of the Child.

[31] Art, 4(1)(d), CRPD.

Although it can be said with certainty that the CRPD will apply to a state party's extraterritorial conduct where it has de facto effective control over an area, it does not necessarily mean that the CRPD will apply in the same way and to the same extent extraterritorially as it does territorially. Some obligations may not apply at all or, at least, not in their entirety. The extent to which the CRPD will apply will be dependent on the degree of authority and control the state party has, how long it has had such control and whether or not it has the power to guarantee the right or provision in question.

According to the personal model, jurisdiction will be established when a state exercises authority and control over individuals, the obvious example being when a state detains an individual. Where a state party is exercising authority and control over an individual extraterritorially (e.g. by detaining that person at a checkpoint), the human rights norms that 'are relevant to the situation' will apply.[32] In the context of the extraterritorial application of the CRPD in armed conflict, such norms will include the prohibitions on arbitrary deprivation of life and torture,[33] and the obligation to provide detained persons with access to healthcare equal to that of other detainees and not to discriminate against the detainee on the basis of their disability.[34] Other CRPD obligations, such as to protect the rights of persons with disabilities in the workplace or to ensure that persons with disabilities have access to cultural materials in accessible formats,[35] will clearly not be relevant to the treatment of the detainee and therefore not applicable. The situation is more complex, and requires a more detailed case-by-case assessment in the instance of long-term occupation of a foreign territory by a state party, including having regard to the extent to which the Occupying Power takes control of infrastructure, public security and the like.

The Relationship Between IHL and the CRPD

Where it has been established that the CRPD is applicable within a situation of armed conflict under one of the models of jurisdiction, it is then necessary to consider the interrelationship between the CRPD and IHL. The relationship between these bodies of law and how they apply in relation to one another is complex and is still to be firmly settled within international law. The relationship will ultimately always be context dependent. One can envisage four clear scenarios that will impact this relationship: firstly, where IHL and the CRPD are clearly aligned (for example, the prohibition on 'adverse distinction' in IHL and the prohibition on all forms of discrimination based on disability in the CRPD),[36] there is little controversy as to how to interpret these norms. Secondly, where the two bodies of law complement each other (including where one body of law extends or provides more detail on the scope or content of a norm), again the situation is relatively straightforward: the more specific body of law will provide the primary framework but the second body of law will still make a significant contribution. For example, on the provision of food aid to

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[32] European Court of Human Rights (ECtHR), *Al-Skeini and Others v United Kingdom*, Judgment, App no 5521/07, 7 July 2011, §88.
[33] Arts 10 and 15, CRPD.
[34] Arts 25, 9 and 5, CRPD.
[35] Arts 27 and 30, ibid.
[36] Although disability is not expressly included as one of the prohibited grounds of adverse distinction in IHL, it would fall under 'any other similar criteria', Common Art 3 to the Geneva Conventions; Art 75 (1), Additional Protocol I (API), 1977; Art 4(1), Additional Protocol II (APII), 1977; and International Committee of the Red Cross, Study on Customary International Humanitarian Law (ICRC Customary IHL Study), Rule 88.

the civilian population in a NIAC, IHL may be the primary body of law, and the CRPD, as the secondary body of law, will provide detail on how food aid should be carried out in an accessible manner to ensure that persons with disabilities are not excluded.[37] Nevertheless, in some circumstances the CRPD could be the primary body of law to be interpreted in light of IHL designed to deal with the specific situation of armed conflict.

Thirdly, where one body of law is silent on an issue that the other body of law expressly addresses. Freedom of expression, by way of example, is outlined in detail in the CRPD (as well as other human rights treaties), whereas IHL contains no provisions related to freedom of expression. It could be assumed that where one body of law is silent on an issue, the other body of law automatically fills this gap. However, this will not always be the case as 'the gap in the law of armed conflict may be a deliberate omission, reflective of the reality of the armed conflict.'[38] Thus, it cannot be said that the human rights norm will apply unaltered; instead, it will be determined on a case-by-case basis. By way of example, parties to an armed conflict must give effective advance warning of attacks that may affect the civilian population, unless circumstances do not permit.[39] IHL does not provide guidance on the means used to deliver this warning, but Article 21 of the CRPD (freedom of expression and opinion and access to information) does outline the measures that need to be taken to ensure that 'information intended for the general public' is accessible to all persons with disabilities. This includes using sign languages, braille, augmentative and alternative communication. Although the CRPD is clear on this issue, on which IHL is silent, the former will still have to be interpreted in light of the armed conflict setting and so may not apply in the same manner as it would in peacetime.

A final scenario would be where the two bodies of law are at odds with one another on a particular issue. Where the two bodies of law are conflicting, consideration will have to be given to which offers the greatest protection and whether one has been superseded by a newer norm, for example the IHL provision allowing prisoners of war to be held in isolation based on their impairment has arguably been superseded by the CRPD prohibition on discrimination based on impairment.[40]

The Committee on the Rights of Persons with Disabilities has an important role to play in the contextual interpretation and, therefore, enforcement of *both* IHL and the CRPD these bodies of law. When reviewing state reports and individual complaints, Article 11 requires the Committee to ask whether this state is taking 'all necessary measures' in accordance with their obligations under IHL and human rights law (including the CRPD) to ensure the safety and protection of persons with disabilities in armed conflict? In this regard, the Committee is in a special and exceptionally important position of being mandated to review the complementarity between IHL and the CRPD and consider the application of IHL as it affects persons with disabilities. Such a review should also be undertaken by the Human Rights Council working group during the Universal Periodic Review

[37] Arts 9 and 25, CRPD.
[38] Murray, E. Wilmshurst, F. Hampson, C. Garraway, N. Lubell and D. Akande, *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford University Press, 2017, §4.67.
[39] ICRC Customary IHL Study, Rule 20.
[40] Art 30, Geneva Convention III (GCIII) allows for prisoners of war with 'mental disease' to be held in isolation.

mechanism, within the Special Rapporteur on the rights of persons with disabilities' thematic and country-specific reports, as well as during the International Conference of the Red Cross and Red Crescent.

Situations of Occupation

All or part of a state's territory will be considered under belligerent occupation by another state when 'it is actually placed under the authority of the hostile forces. Whether or not CRPD obligations will apply, and to what extent, to a situation of occupation will be context dependent. Factors including the prevailing security situation and the duration of the occupation will be relevant. A prolonged occupation will lead to high expectations with regard to fulfilling the occupied population's human rights, including those contained in the CRPD. At the very least, an occupying state party is required to *respect* the rights of the occupied population under the CRPD – as well as any other applicable human rights law treaties – such as the right to respect for a person's physical and mental integrity on an equal basis with others,[41] and to refrain from prohibited acts, such as torture, cruel, inhuman or degrading punishment and discrimination based on impairment.[42] If the Occupying Power has established effective authority and jurisdiction over an area and thus is capable of fully fulfilling its CRPD obligations, it will be obligated to do so.

Conversely, where a state has lost effective control of part of its territory to another state, it still remains under an obligation to take all the appropriate diplomatic, economic, judicial and other measures within its power to protect the human rights, including those contained in the CRPD, of the population living in its territory outside of its control.

Obligations of Armed Non-State Actors (ANSAs) Towards Persons with Disabilities During Armed Conflict

The exact legal framework applicable to the conduct of ANSAs within armed conflict remains a moot point within international law. It is settled that all parties to an armed conflict, 'whether states or non-state actors, are bound by international humanitarian law, even though only sates may become parties to international treaties'.[43] According to state practice, as well as international case law, at a minimum Common Article 3 of the 1949 Geneva Conventions (Common Article 3), Additional Protocol II of 1977 (APII) and customary IHL would all apply to ANSAs that are party to a NIAC.

Although it is clear that ANSAs are duty bearers under IHL, a more contentious issue is whether ANSA actors are also duty bearers under IHRL, and for present purposes the CRPD specifically. It has been affirmed by several UN entities, including the Commission of Inquiry on Syria that 'at a minimum, human rights obligations constituting peremptory international law (jus cogens) bind State, individual and non-State collective entities', including armed groups. Acts violating jus cogens – for instance, torture or enforced disappearances – can never be justified.'[44]

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[41] Art 17, CRPD.

[42] Art 15, CRPD; Art 7, ICCPR; Art 2, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT).

[43] Special Court for Sierra Leone, *Prosecutor v Sam Hinga Norman*, Case no SCSL-2004-14-AR72(E), Appeal Chamber, Decision, 31 May 2004, §22.

[44] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/19/69, 22 February 2012, §106.

De Facto Control of Territory or a Population by a ANSA

There is growing acceptance that, when acting as a de facto authority, a non-state actor must respect human rights law, which will of course include the CRPD. This position has been widely affirmed by the UN Security Council, the UN Secretary-General, treaty bodies, UN special procedures, commissions of inquiry and fact-finding missions, as well as the OHCHR.[45] It remains unclear for how long an ANSA must exercise effective control before it becomes subject to human rights law, but it appears that the ANSA must have 'consolidated its control and authority over a territory on a more than temporary basis'.[46] With regard to which rights are applicable to an ANSA in de facto control of territory, rights have been found to include jus cogens norms as well as the rights to freedom of expression and information, education, health and freedom of religion.[47] The exact list and scope of applicable rights will be context dependent and will be influenced by the ANSA's capacity to implement the norms in question.

It should also be borne in mind that where a state has lost effective control of part of its territory to an ANSA, it still remains under an obligation to take all the appropriate diplomatic, economic, judicial and other measures within its power to protect the human rights, including those contained in the CRPD, of the population living in the territory outside of its control.

Persons with Disabilities in Times of Armed Conflict

Persons with Disabilities Within IHL

When viewed as a whole, IHL largely reflects the medical and charity approaches to disability by framing persons with disabilities as passive, weak, defective and vulnerable and, as such, in need of special, paternalistic protection.[48] This is unsurprising considering the time at which most IHL instruments were drafted, long before disability rights discourse had begun to develop. Both the medical and charity approaches have now been rejected by the CRPD and superseded by the social-model understanding of disability and the human rights-based approach.

The social-model understanding of disability differentiates impairment from disability. Impairment is a condition of the body or mind, whereas disability is the way society and the environment responds to that impairment. As such, disability is context specific. Within this framework, it is easy to see how two people with the same impairment are likely to face differing levels and manifestations of disability,

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[45] See, amongst others, Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, UN doc A/HRC/17/44, 1 June 2011, §72; Report of the High Commissioner for Human Rights on the Implementation of Human Rights Council Resolution 7/1, UN doc A/HRC/8/17, 6 June 2008, §9.

[46] Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, UN doc A/HRC/28/66, 29 December 2014, §54.

[47] Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in Mali, UN doc A/HRC/22/33, 7 January 2012.

[48] The medical approach, in sum, views persons with a disability entirely in light of their impairment, as abnormal and in need of 'fixing', as such persons with disabilities are disempowered objects of medical treatment. According to the charity approach, persons with disabilities are passive victims of their impairment in need of charity and protection.

where one lives in a peaceful state and the other lives in a conflict-affected state. In a peaceful state, it is more likely that services and infrastructure are accessible, whereas in a conflict-affected state basic infrastructure may have been destroyed and humanitarian responses are not disability inclusive. The human rights-based approach to disability, enshrined in the CRPD, reflects the fundamental principle of human rights: that we are all full and equal human rights holders by virtue of being human. Therefore, no characteristic, including having any form of impairment, prevents a person from being a full rights-holder. Practitioners therefore need to be aware, when interpreting and applying IHL norms, that these norms reflect an outdated and often discriminatory approach to disability, which has been superseded by the CRPD.

The outdated approaches to disability reflected across IHL are not a fatal flaw. IHL has been interpreted to take into account other issues and developments unforeseen by its drafters, for example in the context of autonomous weapons and gender-based violence in conflict. A dynamic and evolved interpretation of IHL is also necessary and possible with respect to disability.

The Language of IHL

In unpacking the language of IHL, we find that persons with disabilities are referred to in outdated and, at times, discriminatory terminology such as 'the infirm',[49] 'cases of … mental disease', 'the blind',[50] 'maimed' and 'disfigured'. The impairment is referred to rather than the person, who is thus defined solely by their impairment. 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. Impairment is one part of a person's complex and multifaceted identity that will also be influenced by a host of other characteristics such as gender, age, nationality, sexuality, culture and religion.

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'. Language matters; it can feed and reinforce negative and discriminatory attitudes, and IHL practitioners accordingly need to ensure that they are not repeating discriminatory terminology. Recognizing that the terminology used within IHL treaties is 'outdated in light of contemporary understandings of disability', the ICRC has said that 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'.[51]

A note on prevention of primary impairment

In interviews with states and humanitarian personnel, as well as in articles, blogs and commentaries on IHL and persons with disabilities, the role that IHL and weapons law play in preventing primary impairment is often highlighted.[52] Although

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[49] Art 17, GCIV.

[50] Art 30, GCIII.

[51] ICRC, *How Law Protects Persons With Disabilities in Armed Conflict*, December 2017, p 7.

[52] See, by way of example, ICRC Advisory Service on International Humanitarian Law, *International Humanitarian Law and Persons with Disabilities,* 2017, which includes the

prevention is of course an essential function of IHL, as well as disarmament and weapons control laws more broadly, it should be pointed out that this is not part of disability rights discourse. Prevention of primary impairment is instead aligned with provisions concerning the human rights to health and security of the person, failure to comply with which may result in an impairment. The CRPD, however, deliberately does not talk of prevention of primary impairment as it is instead concerned with ensuring the human rights of persons with *existing* impairments. It is therefore important to maintain a strict separation between narratives concerning the prevention of primary impairment and those concerning the response to it. It is dangerous when prevention of primary impairment is mixed in with disability rights when allocating budgets and resources and developing policy. When this occurs, practice shows that the focus tends to be on prevention at the expense of securing the rights of persons with existing impairments. This study is concerned with the rights of persons with disabilities and, therefore, does not look at the prevention of primary impairment in its analysis of IHL.

General Principles of IHL Relating to Persons with Disabilities

Humane Treatment

'Humane treatment' is not explicitly defined within IHL. The lack of definition is deliberate as the meaning and content of 'humane treatment' will be context-specific, its understanding developing over time with changes in society.[53] The foundational principles underlying humane treatment are respect for human dignity and for a person's physical and mental integrity. The principles' meaning has been clarified and influenced by a rich body of standards and jurisprudence at global, regional and national levels.[54] Thus, a person's characteristics – including any impairment, gender and age – as well as the environmental and social context will shape the meaning and content of 'humane treatment'. In practical terms, this means that treatment that may not be considered inhumane, such as prohibiting animals from passing through checkpoints, might nevertheless be considered inhumane when its impact is considered from the perspective of a person with a disability, for example where a person with a visual impairment wishes to cross a checkpoint to reach a safe zone and where that person is dependent on a guide dog.

Adverse Distinction

All IHL protections afforded to civilians and persons rendered *hors de combat* must apply equally to persons with or without a disability by virtue of the prohibition of adverse distinction. In the provisions and application of IHL norms, any adverse distinction founded on race, colour, religion or faith, sex,

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provisions of IHL that prohibit weapons that cause superfluous injury or unnecessary suffering in its legal analysis of IHL and persons with disabilities.

[53] ICRC Customary IHL Study, Rule 87.

[54] See e.g.CAT, ICCPR, especially Arts 7 and 10; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UNGA Res 3452, 1975; HRCttee, *CCPR General Comment No 20*: *Article 7 (Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992; HRCttee, *CCPR General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, replacing *General Comment No 9* concerning humane treatment of persons deprived of liberty.

birth or wealth or 'any other similar criteria' is prohibited.[55] Although disability is not explicitly mentioned as a prohibited ground, a complementary approach to the interpretation of IHL demands that disability be treated as falling under 'any other similar' criteria. The CRPD, as well as other human rights law texts, also prohibit 'adverse distinction' under the equivalent principle of non-discrimination.

Only '*adverse* distinction' is prohibited. Differential treatment that is necessary to respond to the specific needs of a particular individual or group, including persons with disabilities, will be lawful and may even be required. The Third Geneva Convention (GCIII), for example, allows for 'privileged treatment' to be given to prisoners of war owing to their 'state of health', sex or age,[56] such as repatriation of seriously wounded prisoners of war.[57] Aligned with this approach, differential treatment to ensure de facto equality is an explicit requirement of the CRPD where different treatment is necessary or appropriate to allow a particular individual with a disability to fully enjoy their human rights.[58] Failure to ensure equal access, including through differential treatment, is of itself a form of discrimination and therefore unlawful.

In accordance with the IHL prohibition of adverse distinction and the CRPD right to non-discrimination and equal access, persons with disabilities are entitled to the same IHL protections that are afforded to all other persons, including rules that relate to treatment of civilians and persons *hors de combat*, as well as the rules that relate to the conduct of hostiles, for example precautions in attack. Furthermore, differential treatment, including reasonable accommodation may be required to ensure that the applicable IHL protections are applied in a non-discriminatory manner and are accessible to all persons with disabilities.

The wounded and sick

Persons considered 'wounded and/or sick' are afforded a host of special protections under IHL. Persons who are *hors de combat*, including 'anyone who is defenceless because of … wounds or sickness' may not be attacked.[59] Parties to a conflict must take *all possible measures* to search for, collect and evacuate the wounded and sick.[60] The wounded and sick must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.[61] This is to name but a few of the protections afforded under IHL. Persons with disabilities are widely considered to fall within the category of 'wounded' and/or 'sick' and thus entitled to the benefits of the associated protections.[62] However, although it may be

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[55] Common Art 3; Art 16, GCIII; Art 13, GCIV; Art 75(1), API; Art 4(1), APII; ICRC Customary IHL Study, Rule 87.
[56] Art 16, GCIII.
[57] Art 109(3), GCIII.
[58] Art 5(4), CRPD.
[59] ICRC Customary IHL, Study, Rule 47.
[60] Ibid, Rule 109; Common Art 3; Art 15, GCI; Art 18, GCII; Art 16, GCIII; Art 10, API; Art 8, APII.
[61] ICRC Customary IHL Study, Rule 110.
[62] E.g. France's military manual states '[o]ut of concern for their protection … the disabled … are included in the same category as the wounded and sick under humanitarian law', *Manuel de droit des conflits armés*, Ministère de la Défense, Direction des Affaires Juridiques, Sous-Direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armés, 2001, p 32.

beneficial to some individuals with a disability to be afforded the protections offered, this is not a perfect fit and strong caution should be taken when assumptions are made that all persons with disabilities are either 'wounded' or 'sick'.

The qualification of a person as 'wounded or sick' requires the fulfilment of two cumulative criteria: a person must require medical care and must refrain from any act of hostility. It is the first of the two that is particularly problematic for numerous, interlinked, reasons. Firstly, identifying persons with disabilities through the requirement of medical care is emblematic of the outdated medical approach to persons with disabilities under which such persons are seen as abnormal and in need of 'fixing'. This fails to appreciate that disability is created by the attitudinal and environmental barriers that persons with disabilities face.[63] Secondly, this approach on the face of it places an onus on the person with a disability to accept medical care that they may not want or actually 'require'. Thirdly, it fails to appreciate the diversity of disability and would not capture a vast number of persons with disabilities whose impairment does not require a medical response, such as, for example, a person with an untreatable blindness. Fourthly, it only envisages a medical response, whereas other responses may be required to meet the protection needs of a person with a disability, including economic and other forms of assistance (such as, for example, the provision of emergency material in braille or on voiced apps, assistive technologies and mobility devices for a person who is blind). Furthermore, as 'medical care' is not defined under IHL, it is unclear if non-lifesaving or non-urgent care should be provided. Lastly, the protection of the 'wounded or sick' is granted only for so long as the person requires medical care, meaning that once the person's *medical* needs have been met they will fall outside of the protections granted to the wounded and sick.

As emphasized throughout this report, persons with disabilities are entitled to the equal protection of IHL norms through the prohibition of adverse distinction and the requirement of humane treatment, as reinforced and elaborated on by the CRPD. Limiting advocacy regarding persons with disabilities within the conflict setting to the 'wounded and sick' detracts from that fact, falsely linking protection to the perceived need for medical care and therefore weakening protection.

Analysis of Particular IHL Provisions from a Disability Inclusive Perspective

What follows is consideration of *some* IHL provisions from a disability inclusive perspective. These provisions have been selected because they illustrate a diverse range of circumstances within the conflict setting, where states are required under Article 11 of the CRPD to take 'all necessary measures' in accordance with their obligations under IHL and human rights law (including the CRPD) to ensure the protection and safety of persons with disabilities in situations of armed conflict.[64]

The Conduct of Hostilities

Conduct of hostilities provisions are designed to minimize, to the greatest extent possible, the impact of conflict on human suffering, particularly for civilians, whilst allowing for legitimate military action to be taken. The law on the conduct of hostilities regulates targeting and the means and methods that may be used in warfare.

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[63] Preamble(e), CRPD.
[64] Art 11, CRPD.

IHL provides the primary framework regulating the conduct of hostilities, although IHRL, including the CRPD, may provide further context or guidance as to the interpretation of these rules. All of the norms pertaining to the conduct of hostilities will apply equally to all civilians, including those with disabilities, in accordance with the IHL prohibition on adverse distinction, as well as the IHRL prohibition on discrimination based on impairment. The CRPD definition of discrimination, which includes failure to ensure equal access, including through failure to provide reasonable accommodation, may influence interpretation of the rules relating to the conduct of hostilities.

A review of international jurisprudence, military manuals,[65] retrospective state investigations into conflicts[66] and UN-mandated commissions of inquiry[67] indicates that little attention, if any, is given to the interpretation of IHL rules related to the conduct of hostilities as they apply to persons with disabilities.

Gathering disability inclusive data and increasing expertise on disability rights and the diversity of disability within militaries, commissions of inquiry and other human rights mechanisms (including by ensuring that persons with disabilities are represented in such mechanisms)[68] would increase the attention paid to ensuring that the norms related to the conduct of hostilities are not applied in a discriminatory manner. In the interim, whilst we wait for such data to be gathered, the well-founded minimum estimate that 15 per cent of every population will be made up of persons with a range of disabilities should steer policy and practice.[69] Routinely and meaningfully consulting persons with disabilities living in the particular conflict setting, as well as their representative organizations, is also essential to ensure that polices adopted to overcome discriminatory barriers are reflective of persons with disabilities' lived experience.[70]

Proportionality

The principle of proportionality is to be applied when a party to a conflict is considering launching an attack against a military objective. Whilst recognizing that, in the conduct of hostilities, causing incidental harm to civilians and civilian objects may be unavoidable, the principle of proportionality places a limit on that harm by balancing the considerations of humanity with military necessity. According to the proportionality assessment, an attack must not be launched if it 'may be expected to

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[65] For a full list of the military manuals reviewed for this study see Geneva Academy Briefing, Disability and Armed Conflict, May 2019.

[66] Israeli Ministry of Foreign Affairs (MFA), 'The 2014 Gaza Conflict 7 July–26 August 2014, Factual and Legal Aspects', May 2015.

[67] Situation in Yemen, Report of the United Nations High Commissioner for Human Rights Containing the Findings of the Group of Eminent International and Regional Experts and a Summary of Technical Assistance Provided by the Office of the High Commissioner to the National Commission of Inquiry, UN doc A/HRC/39/43, 17 August 2018; Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, supra fn 13; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/37/72, 1 February 2018; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/39/65, 9 August 2018Commission of Inquiry on the Protests in the Occupied Palestinian Territory, UN doc A/HRC/40/CRP.2, 18 March 2019, §718.

[68] To date, no UN-mandated commission of inquiry has had a person with a (publically declared) disability serve on it.

[69] WHO, *World Report on Disability,* 2011, p 29.

[70] Art 4(3), CRPD.

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'.[71]

The anticipated 'military advantage' is considered in some contexts to include the advantage anticipated from the military attack considered 'as a whole and not only from isolated or particular parts of that attack'.[72] Intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects 'which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' constitutes a war crime in IACs under the Statute of the International Criminal Court.[73] The decision reached through the proportionality assessment is based on all the information available to military commanders at the time, and is not reviewed with the benefit of hindsight.[74]

The application of the proportionality assessment is not, and cannot be, an exact science. There is no set formula to follow. The weight given to civilian harm versus the expected military benefit is a question of degree and will vary greatly from one context to the next. Nevertheless, where there are doubts about the preponderance of the concrete and direct military advantage, the interests of the civilian population should prevail, since '[t]he basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack'.[75]

The principle of proportionality is said to be applied 'every day by military commanders in armed conflicts around the world'.[76] Numerous meetings, reports, books and articles have been devoted to its meaning and scope.[77] Attention has been paid to what is meant by a 'civilian' population in the proportionality assessment, and indeed throughout IHL, with the idea that a 'civilian' is essentially anyone who is not a member of a state's armed forces, nor a member of an armed group with a continuous combat function.[78] However, this understanding of 'civilian' is purely focused on the role or behaviour of the individuals concerned and not their inherent characteristics. Based on interviews ana review of military manuals, it appears that 'civilians' are viewed as one homogenous group, with the same ability to understand

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[71] Arts 51(5)(b), 57(2)(a)(iii) and 57(2)(b), API; ICRC Customary IHL Study, Rule 14.

[72] The ICC refers to civilian injuries, loss of life or damage which would be '*clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated', Art 8(2)(b)(iv), ICC Statute (emphasis added). See 'Interpretation', ICRC Customary IHL Study, Rule 14, and fn 27 in particular.

[73] Art 8(2)(b)(iv), ICC Statute.

[74] ICTY, *Prosecutor v Galic*, Trial Judgment, IT- 98-29-T, 5 December 2003, §58.

[75] Ibid, *Galic* Trial Judgment, §58.

[76] ICRC, The Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law, International Expert Meeting Report 22–23 June 2016, meeting report, 2016, p 8.

[77] See amongst others: ibid; International Law Association Study Group on the Conduct of Hostilities in the 21st Century, 'The Conduct of Hostilities and International Humanitarian Law Challenges of the 21st Century Warfare', Final Report, 93 International Law Studies 322 (2017), 'Part II: The Principle of Proportionality'; E–C. Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Research Paper, Chatham House, December 2018.

[78] Art 50(1), API. Views differ on whether or not wounded and sick members of armed forces, who are entitled to special protection, fall within the reference to the notion of 'civilian population' when undertaking a proportionality assessment.

and respond to the danger posed.[79] In the context of persons with disabilities, this is where the danger lies with respect to the practical application of the principle of proportionality, since the idea that civilians will be one homogenous group –devoid of inherent characteristics - is a fallacy. The civilian population will be made up of a diverse range of people, whose sex, age and disability will impact on their response to, and ability to respond to, an armed attack, as well as the harm that can be expected to follow. It is these characteristics that will be one variable affecting the incidental harm expected to be caused by an attack. For example, a person with a visual impairment may not be able to flee an attack as quickly as those with full vision and may experience greater physical and mental harm through not being able to protect themselves.

Bearing in mind that the principle of proportionality is based on the principle of humanity, with the object and purpose of limiting human harm, having an appreciation of the diversity of the civilian population that would be affected by an attack would lead to greater protection. Where information is known about the civilian population that would be affected by an attack, consideration of the characteristics of that population will inevitably allow more accurate predictions to be made as to the potential incidental harm. Here, disability inclusive national censuses will be a vital source of information. The proportionality principle's flexibility, in that there is no set formula to be followed, is also an advantage in this context as there is scope for it to be interpreted in light of societal changes, including the recognition and implications of disability rights. At a minimum, it would be beneficial for military commanders to receive training on the rights of persons with disabilities as well as the diversity of disability and the barriers faced by persons with disability in the conflict setting so that they are better equipped to consider the effect of an attack on persons with disabilities when undertaking proportionality assessments.

Effective Advance Warning

Linked to the foregoing discussion, parties to a conflict are obligated to give 'effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit'.[80] The aim of this provision is to provide the civilian population with an opportunity to move away from a pending attack or at least take measures to protect themselves. An advance warning will not be required when circumstances do not permit. In deciding whether circumstances permit, the military commander should consider the 'vital humanitarian duty to spare lives and avoid unnecessary suffering',[81] whether or not the element of surprise is essential to the success of an operation or to the security of the attacking forces and whether the military force has the resources or time necessary to communicate with the civilian population. Advance warnings may, for example, take the form of loud siren alerts, radio broadcasts, leaflet drops or text messages. The key element of this IHL protection, especially when read alongside the CRPD, is that it must be 'effective'.

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[79] See the discussions at the expert meeting in ICRC, The Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law, supra fn 76, p.37, pp 56–57.

[80] Art 57 (2)(c), API; ICRC Customary IHL Study, Rule 20.

[81] New Zealand Defence Force, Manual of Armed Forces Law, vol 4, §8.7.23

An 'effective' warning will be one that is 'comprehensible' to those most directly affected by the attack,[82] and delivered in such a way as to reach those most likely to be directly affected. The warning should be in a 'language that the civilian population understands and it must give civilians enough time to evacuate'.[83] The Goldstone report, concerning the Gaza 2008–2009 conflict, clarified that for a warning to be effective it must 'reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning'.[84]

A review of military manuals and interviews with stakeholders, including persons who have been in the vicinity of armed attacks, indicates that parties to conflicts are not at present considering whether or not the advance warnings they give are accessible to persons with disabilities. When considering how this relates to persons with disabilities, and the implications of the CRPD, if it is known or ought to be known to the attacking party that a person or persons with disabilities are within the vicinity of the legitimate military target, and where circumstances permit, *accessible* warnings must be provided.[85] Accessible formats may include leaflets in braille and large print, alerts through apps and assistive devices, as well as radio and televised warnings where available. Crucially, this would also include allowing sufficient time for persons with disabilities within the vicinity of the attack to act on the warning – through evacuation or seeking shelter.

Failure to provide accessible warning, where it is feasible to do so, would arguably amount to discrimination based on impairment and a violation of States Parties' obligations to take all necessary measures to ensure the safety of persons with disabilities in situations of armed conflict,[86] as well as resulting violations of the rights to life,[87] physical and mental integrity, highest attainable standard of physical health and mental health and freedom of access to information.[88] This failure would also arguably amount to a violation of IHL when considering the duty to provide effective warning alongside the prohibition of adverse distinction, which, as discussed, requires differential treatment that is necessary to respond to the specific needs of a particular individual or group, including persons with disabilities.

Precautions Against the Effects of an Attack

Parties to a conflict are obliged to take feasible precautions to minimize the risk to civilians and civilian objects from the effects of an attack.[89] 'Feasible precautions' has been interpreted by states to mean that the obligation is limited to those precautions that are practicable or practically possible, taking into account all circumstances applying at the time, including humanitarian and military considerations.[90] Possible

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[82] United Kingdom Ministry of Defence, The Manual of the Law of Armed Conflict, 1 July 2004, as amended in May 2013 by amendment 7, §5.32.8.

[83] K. Dörmann, 'Obligations of International Humanitarian Law', 4 *Military and Strategic Affairs* 2 (2012) 19.

[84] Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN doc A/HRC/12/48, 25 September 2009, §530.

[85] Arts 5(3), 9,11 and 21, CRPD.

[86] Art 11, ibid.

[87] Art 25, ibid.

[88] Art 21(a), ibid.

[89] ICRC Customary IHL Study, Rule 22; Art 58(c), API.

[90] See 'State Practice', ICRC Customary IHL Study, Rule 22.

feasible precautions include removing the civilian population from the vicinity of military objects,[91] providing shelters and humanitarian supplies and distributing emergency information and warnings.

Persons with disabilities appear to be routinely excluded from considerations to the nature and delivery of precautionary measures. Evacuation procedures are not accessible, including transport that cannot accommodate persons with disabilities who rely on assistive devices, leaving such persons at risk of being left behind. Emergency information and places of shelter are also rarely accessible, leaving persons with disabilities unable to ascertain where they can seek shelter from a pending attack or unable to access the place of shelter. Inaccessible precautions render persons with disabilities more likely to be killed or injured. They also place their families in the impossible position of having to either flee to safety without a loved one or stay with them at the risk of their own safety.

To ensure that precautions taken are accessible to the whole of the affected civilian population, including persons with disabilities, a better understanding of the 'civilian population' and its non-homogenous nature is again necessary. The availability of disability inclusive data, disaggregated by age and sex, as well as trained military commanders who have an understanding of the diversity of disability, will strengthen states' ability to ensure that precautions taken are accessible and not discriminatory.

Furthermore, it is persons with disabilities themselves and their representative organizations, that will be best placed to identify barriers in accessing precautions taken, and the steps needed to overcome these barriers, and so it is persons with disabilities that should be regularly and meaningfully consulted. Within the broader context of emergency planning, to conform with Article 4(3) of the CRPD, persons with disabilities and their representative organizations should be meaningfully consulted within needs assessments and the design, implementation and monitoring of conflict-response planning and mechanisms.[92]

Treatment of Internees and Prisoners of War With a Disability

IHL provides the framework under which persons can be detained as prisoners of war or internees,[93] as well as special protections for those detained and the minimum requirements for detention conditions. IHRL will also be applicable.[94] It should be borne in mind when considering the treatment of an internee or prisoner of war that such persons are not being deprived of their liberty as a punitive measure following criminal conviction, but rather to prevent them from participating in hostilities or for posing a security threat to the detaining authorities.

Where a state party to the CRPD holds a person with a disability as a prisoner of war or internee, the CPRD will apply. The extent and exact application of the CRPD to

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[91] Art 58(a), API; ICRC Customary IHL Study, Rule 24. Any removal of civilians must comply with Art 49, GCIV, which protects the inhabitants of occupied territory from unwarranted evacuations and transfers.

[92] Charter on the Inclusion of Persons with Disabilities in Humanitarian Action, §2.2(a).

[93] Note that prisoner of war status is restricted to situations of IAC. See Art 4, GCIII, regarding prisoners of war, and Arts 42 and 78, GCIV, regarding internment.

[94] See, amongst others: HRCtee, *General Comment No 35*: *Article 9 (Liberty and Security of Person)*, UN doc CCPR/C/GC/35, 16 December 2014, §64.

internees and prisoners of war will be dependent on the context and the norms engaged. Of particular concern to the detention of a person with a disability are the prohibitions on 'arbitrary detention' and the deprivation of liberty based on impairment (Article 14(1)(b)), and the equality of guarantees and protections for those deprived of liberty (Article 14(2)). Below, consideration is given to the general conditions and health and security provisions that should be provided for prisoners of war and internees with a disability, the isolation of persons with psychosocial or intellectual disabilities and repatriation of persons with disabilities. It should be noted in this regard that issues concerning the application of guarantees for persons deprived of their liberty concerns not only Article 14(2) of the CRPD, but also Article 14(1)(b), since the failure to adhere to such guarantees might render a person's detention arbitrary.

There is no publicly available data on persons with disabilities who have been detained as internees or prisoners of war, collected either by states or humanitarian organizations.[95] Therefore it is unknown how many or what percentage of internees or prisoners of war have a disability, nor is there any information available about the types of disabilities such detainees have. However, in non-conflict settings, persons with disabilities represent as many as 50 per cent of prisoners,[96] a clearly disproportionate number considering that persons with disabilities are thought on average to represent 15 per cent of the population.[97]

The lack of data regarding internees and prisoners of war with disabilities is a cause for concern. Without an understanding of the numbers and individual needs of persons with disabilities detained, the necessary policies and practices to ensure their enjoyment of IHL protections and human rights cannot be developed. By not collecting such data, States Parties to the CRPD are failing in their responsibilities under Article 31, which affirms that state parties shall collect 'statistical and research data to enable them to formulate and implement policies to give effect to the present Convention […] and to address barriers faced by persons with disabilities in exercising their rights'.[98]

Humane Treatment, Safe and Sanitary Conditions of Detention and the Provision of Medical Assistance

The IHL protections afforded to internees and prisoners of war relate mainly to the humane treatment of detainees, safe and sanitary conditions of detention and the provision of medical assistance. The CRPD complements many of these IHL norms and may make a significant contribution to interpreting and applying these norms in a disability inclusive and accessible manner.

[95] Despite its best efforts, the project team was unable to gain access to any places of detention during the field research.
[96] Report of the Special Rapporteur on the Rights of Persons With Disabilities, UN doc A/HRC/40/54, 11 January 2019, §14.
[97] WHO, *World Report on Disability*, 2011, p 29.
[98] Art 31(1) and (2), CRPD, when read in light of Art 11.

In accordance with both IHL and IHRL, prisoners of war and internees must be treated humanely at all times.[99] Any unlawful act or omission that causes death or seriously endangers the health of the detainee is prohibited.[100] The Detaining Power must take 'all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and prevent epidemics', including through the provision of baths and/or showers.[101] Medical inspections must be undertaken 'at least once a month' to assess 'the general state of health, nutrition and cleanliness of prisoners and to detect contagious diseases'.[102] Internees and prisoners of war must be provided with water and food of sufficient 'quantity, quality and variety' to keep them in good health.[103] Open spaces and equipment should be provided to ensure detainees can exercise and undertake recreational and educational pursuits.[104] All of these protections and guarantees apply equally to internees and prisoners of war regardless of disability.

Measures should be taken by the Detaining Power to enable all detainees with disabilities to attain and maintain maximum independence, and full inclusion and participation in all aspects of life within the place of detention, on an equal basis with others.[105] In practical terms, this means that all *feasible* measures should be taken to ensure that sanitary facilities are designed, or adapted, to ensure that they are accessible to persons with physical impairments. Ramps, handrails and wide corridors and doorways should be integrated throughout the place of detention to ensure wheelchair users and those with physical impairments can move about independently and freely. Those managing and working within the place of detention should be trained in the rights of persons with disabilities and the diversity of disability. The Detaining Power should meaningfully consult with detainees regarding their needs and how to meet them to ensure equal access to all the detention facilities and services provided.[106] All information provided to detainees, and in particular emergency information concerning evacuation plans, should be in accessible formats including through the use of sign language, large print, braille and assistive devices.[107]

The Detaining Power must also provide medical care, without charge, to all prisoners of war and internees to the degree required by their state of health.[108] Specialist

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[99] Common Art 3 to the Geneva Conventions. Art 10 (1), ICCPR. The HRCttee has confirmed that 'article 9 [right to liberty and security of the person] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable' and '[t]reating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind' HRCttee, *General Comment No 35*, supra fn 94, §64, and HRCttee, *General Comment No 21*, supra fn 54, §4.

[100] Art 13, GCIII.

[101] Art 29, ibid.

[102] Art 31, ibid.

[103] Art 26, ibid; GCIV, Chapter III.

[104] Art 38, GCIII.

[105] Arts 5, 9, 11, and 14(2), CRPD, as well as the IHL guarantee of humane treatment and the prohibition of adverse distinction.

[106] Art 4(3), CRPD; for guidance on implementation of Art 4, see CommttRPD, *General Comment No 7 (2018) on the Participation of Persons with Disabilities, Including Children With Disabilities, Through Their Representative Organizations, in the Implementation and Monitoring of the Convention*, UN doc CRPD/C/GC/7, 9 November 2018, §§15–33.

[107] Art 21 (a) (b) and (e), CRPD.

[108] Art 15, GCIII; Art 81, GCIV.

facilities must be provided for the healthcare and rehabilitation of persons with disabilities, 'in particular the blind'.[109] Although those with visual impairments are singled out, the principle of non-discrimination demands that specialist facilities and rehabilitation services must be *equally* accessible to all internees and prisoners of war with a disability, irrespective of the type of impairment.[110] The CRPD further explains that persons with disabilities have the right to the highest attainable standard of health without discrimination on the basis of disability, and that persons with disabilities should be provided with the same range, quality and standard of healthcare and programmes as provided to other persons.[111] Failure to provide adequate healthcare may lead to the exacerbation of an existing impairment or the development of a secondary one. Furthermore, healthcare professionals working in detention camps should be trained in disability rights and ethics and should provide healthcare on the basis of free and informed consent in conformity with the human rights, dignity, autonomy and needs of the person.[112]

Failure to ensure that internees and prisoners of war with disabilities have equal access to the special protections afforded under IHL, including through the provision of reasonable accommodation, will constitute discrimination based on impairment, and may amount to torture, cruel, inhuman or degrading treatment as prohibited under both IHL and IHRL.[113] Where it is not feasible to make prison facilities and services (including healthcare and rehabilitation services) accessible to a prisoner of war or an internee with a disability, repatriation should be considered, even though the person might not be considered 'seriously wounded' or fall within the other bases of repatriation (see the section on 'Repatriation' below). Repatriation could be considered a reasonable accommodation (see Section 4.A.4 on the meaning of reasonable accommodation) for the Detaining Power to make.

Access by the ICRC to all places of detention in the conflict setting is an essential safeguard for the rights and protections of all prisoners of war and internees. To ensure that this safeguard is adequately operating in relation to the rights of prisoners of war and internees with a disability, ICRC delegates should receive specialist training on the rights of persons with disabilities, the diversity of disabilities and the identification of barriers faced by persons with disabilities in the detention setting. Furthermore, the ICRC and other agencies with access to places of detention in conflict settings should establish mechanisms to ensure disability inclusive disaggregated data on detainees is collected. Such data should include physical, sensory, psychosocial as well as intellectual impairments.

Isolation Based on Impairment

Article 30 of GCIII provides that 'isolation wards shall, if necessary, be set aside for cases of contagious or *mental disease*' (emphasis added), thereby allowing prisoners

[109] Art 30, GCIII.
[110] Arts 5 and 9, CRPD.
[111] Art 25, CRPD.
[112] Art 25(d), CRPD.
[113] Discrimination based on impairment is prohibited under IHL under the prohibition of adverse distinction (Common Art 3; Art 16, GCIII; Art 13, GCIV; Art 75(1), API; Art 4(1), APII; ICRC Customary IHL Study, Rule 87) and under IHRL (Arts 5 and 9, CRPD). Torture, cruel, inhuman or degrading treatment is prohibited under IHL (Common Art 3; Art 12, GCI; Art 12, GCII; Arts 17, 87 and 89, GCIII; Art 32, GCIV; Art 75(2), API; Art 4(2), APII) and IHRL (Art 15, CRPD; Art 7, ICCPR; and CAT, amongst others).

of war to be held in isolation based on their impairment. This aspect of Article 30 of GCIII is an example of where IHL appears to be at odds with the CRPD, which expressly prohibits discrimination based on impairment.[114] Where two bodies of law are conflicting, consideration should be given to which offers the greatest protection and whether one has been superseded by a newer norm.

Little illumination is provided by the Commentary on GCIII as to why the isolation of persons with psychosocial or intellectual disabilities is included in Article 30. Of concern, however, is that the Commentary on GCIII Article 30 states this stipulation 'must be interpreted as applying to *relatively slight* cases only; serious illness must be treated in hospitals or other appropriate establishments' (emphasis added) – a clear example of the outdated medical approach to disability. If isolation is based on the incorrect belief that persons with psychosocial impairments are prone to violence (and that their isolation is therefore necessary for the safety of other detainees), this discriminatory assumption has been proven wrong.[115] On the contrary, evidence shows that persons with psychosocial impairments are more likely to be victims of violence than to commit a violent act.[116] Isolating a detainee on the basis that they pose a perceived risk to others contradicts the general presumption of innocence and is arbitrary and unjust. Likewise, no disciplinary action should be taken on the *basis* of disability. Isolating a detainee for the safety of other detainees will only be lawful when applied within punitive measures applicable to all detainees and not when it is pre-emptive and based on a person's real or perceived impairment.

It may be argued that isolating a detainee is necessary for their own safety, either because they pose a danger to themselves or because other detainees pose the treat.[117] With regard to the 'danger to self' argument, any resulting isolation will still be arbitrary as it disproportionately applies to persons with psychosocial or intellectual impairments.[118] It may result in the denial of a person's legal capacity to decide on their own treatment and care.[119] It may also violate rights to personal integrity and freedom from torture and ill-treatment.[120]

Furthermore, there is a significant body of evidence 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'.[121] The effects are 'particularly harmful' in cases of persons who have a pre-existing psychosocial or

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[114] Art 5, CRPD.
[115] J. P. Stuber, A. Rocha, A. Christian and B. G. Link, 'Conceptions of Mental Illness: Attitudes of Mental Health Professionals and the General Public', 65 *Psychiatric Services* 4 (2014).
[116] Report of the Special Rapporteur on the Rights of Persons With Disabilities, UN doc A/HRC/40/54, 11 January 2019, §27.
[117] The 2017 New Zealand LOAC Manua, §12.10.62.
[118] As there is no definition of 'isolation wards' within IHL, the level of isolation and confinement that a detainee may face is unclear. However, the terms 'isolation', 'solitary confinement', 'segregation' and 'separation' are widely used to describe the same phenomena. Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, UN doc A/66/268, 5 August 2011, §§26 and 76; Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, 25 February 2016, UN doc A/HRC/31/57/Add.1, §21.
[119] Art 12(2), CRPD.
[120] Arts 15 and17, CRPD.
[121] Amnesty International, *Entombed: Isolation in the US Federal Prison System*, 2014, p 31.

intellectual disability,[122] and in some cases lead to self-harm and suicide.[123] Thus, the former UN Special Rapporteur on torture and cruel, inhuman, and degrading treatment, Juan Méndez, concluded that as 'solitary confinement often results in severe exacerbation of a previously existing mental condition',[124] the imposition of solitary confinement *of any duration* on persons with psychosocial or intellectual impairments amounts to cruel, inhuman, or degrading treatment. The United Nations 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 '[t]he 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'.[125]

The Detaining Power, where it knows or ought to know that there is a 'real and immediate risk' to a detainee's safety owing to a threat posed by other detainees, is obligated to take reasonable steps to eliminate that risk.[126] Where the safety of the detainee is under threat from other detainees, repatriation, and not isolation, should be considered, even though the person might not be considered 'seriously wounded' or fall within the other bases of repatriation (see the section on 'Repatriation' below). Repatriation could be considered a 'reasonable accommodation' for the Detaining Power to make.[127]

In sum, isolation is a further restriction on the liberty of the internee or prisoner of war, and where this is based on actual or perceived disability, it will constitute discrimination based on disability,[128] arbitrary deprivation of liberty[129] and may amount to torture, cruel, inhuman or degrading treatment as prohibited under both IHL and IHRL. It may also be argued that it contravenes the prohibition of adverse distinction. Therefore, the provision allowing isolation based on real or persuaded impairment within GCIII has been superseded by the CRPD and should be interpreted as such.

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[122] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment, 21st General Report, 11 November 2011, §53; S. Grassian, 'Psychiatric Effects of Solitary Confinement', 22 *Washington University Journal of Law & Policy* 325 (2006); P. Scharff Smith, 'The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature' 34 *Crime and Justice* 1 (2006); Amnesty International, *Entombed*, supra fn 121, pp 31–32; Report of the Special Rapporteur on the rights of persons with disabilities, supra fn 116, §61.

[123] Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, 5 August 2011, supra fn 118, §68.

[124] 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 22 to 24 hours a day.

[125] ICRC Customary IHL Study, Rule 45.

[126] ECtHR, *Premininy v Russia*, Judgment, App no 44973/04, 10 February 2011, §§73 and 84; IACtHR, *Ituango Massacres v Colombia*, Judgment, 1 July 2006, §161; IACtHR, *Case of the Pueblo Bello Massacre*, Judgment, 31 January 2006, §120.

[127] Arts 2, 5 and 14(2), CRPD.

[128] Art 5, ibid.

[129] Art 9, ICCPR; Art 14, CRPD; CtteeRPD, 'Guideline on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons With Disabilities, 2015, §6.

Repatriation

IHL provides for repatriation of prisoners of war and internees based on ill health. The repatriation should be direct for those 'incurably' or 'gravely' wounded or sick, or to a neutral country where the prospects of a speedy recovery are higher, or when a prisoner's mental or physical health is seriously threatened by continued captivity.[130] A special agreement may be reached between the parties to the conflict to define the categories and modalities of detainees to be repatriated. A model agreement is annexed to GCIII, which provides a non-exhaustive list of examples of medical conditions that must lead to direct repatriation. As has been argued elsewhere, this model agreement should be revised in light of current medical knowledge,[131] and contemporary understandings of disability as enshrined in the CRPD. Any 'wilful' and unjustified delay in repatriation of prisoners of war or civilians amounts to a grave breach of the Geneva Convention and can be prosecuted as a war crime.[132]

The grounds for repatriation should be interpreted in light of the prohibition of torture, cruel, inhuman or degrading treatment (contained in the CRPD as well as other human rights law treaties) as well as the principle of equality and non-discrimination, and considered as a measure of reasonable accommodation.[133] This interpretation would also be in conformity with IHL's own guarantee of human treatment as well as the prohibition of adverse distinction. There may be instances where, owing to the Detaining Power's inability to secure the rights of the detainee with a disability to equal access to health and rehabilitation, and/or their safety (discussed above), failure to repatriate may amount to torture, cruel, inhuman or degrading treatment, and/or discrimination through failure to provide reasonable accommodation.

A Concluding Remark

In comparison with IHRL, where there is a growing understanding of the impact and interaction between an individual's inherent characteristics – sex, age, ethnicity, disability etc. – and their access to and enjoyment of their human rights, a survey of IHL from a disability perspective indicates that there does not seem to be a similar appreciation of the impact such characteristics can have on the application and realization of the protections afforded by IHL. Instead, the focus is on the role that the individual plays in the conflict setting. However, as this brief survey of some of the protections afforded by IHL indicates, the inherent characteristics of an individual will have a profound effect on their access to IHL guarantees and protections. In compliance with its own norms of humane treatment and adverse distinction, as well as the CRPD, IHL should be interpreted and applied in a manner that takes into account inherent characteristics such as disability, and respond to the lived experience of persons with disabilities in the conflict setting.

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[130] Art 110, GCIII; Art 132, GCIV.

[131] M. Sassóli, *Release, Accommodation in Natural Countries, and Repatriation of Prisoners of War*, in A. Clapham, P. Gaeta and M. Sassóli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, p 1042.

[132] Art 85(4)(b), API.

[133] The CtteeRPD has confirmed that reasonable accommodations should be applied in the detention context. Concluding Observations on the Initial Report of Mongolia, UN doc CRPD/C/MNG/CO/1, §25.

Eight key findings and recommendations from our research

One. Armed conflict has a devastating and disproportionate impact on persons with disabilities

Persons with disabilities are at increased risk of acute harm at all phases of an armed conflict; at least in part because they are denied the rights and protections they are entitled to under both IHRL and IHL. Persons with disabilities are the subject of targeted killings, used as human shields and at increased risk of sexual and gender based violence. They are more likely to be killed or injured as a result of inaccessible emergency information, evacuation procedures and shelters. Refugee and displacement camps and facilities lack comprehensive procedures to identify refugees and internally displaced persons with disabilities, and consequently fail to ensure they have equal access to essential services including food, water, shelter and medical care. In the aftermath of conflict, persons with disabilities are routinely denied access to justice, including remedies and reparation, for violations carried out during the conflict.

Two. Persons with disabilities remain the forgotten victims of armed conflict

The impact of armed conflict on persons with disabilities remains a largely ignored topic, by all actors. There are at least 1 billion people with a disability in the world, a large number of whom live in conflict-affected states. Despite this, and the disproportionate impact that conflict has on persons with disabilities, disability is widely regarded as a niche issue within the conflict setting. As a result, IHL provisions that serve to minimize the impact of armed conflict are not being applied in a disability inclusive manner. Mainstream humanitarian services and programmes, run by states as well as humanitarian organizations, are not fully and equally accessible to all persons with disabilities. Services that target, and are specific to the needs of, persons with disabilities are not being developed. In the post-conflict setting, persons with disabilities are not given equal access to full participation in peace processes and transitional justice mechanisms, and their role and potential contribution to conflict prevention and resolution is yet to be realized. Failure to ensure equal access to IHL protections, humanitarian services and transitional justice mechanisms may amount to discrimination on the basis of disability and violations of associated rights and protections.

To remedy some of the abuses faced by persons with disabilities in the conflict setting, these persons must be recognized and empowered to act as agents of change and given equal access to fully and meaningfully participate in humanitarian policy design, implementation and monitoring, as well as peace processes and transitional justice mechanisms. UN agencies and humanitarian organizations must ensure that their services are fully accessible to all persons, including persons with disabilities, and, where necessary, develop specific services that respond to the humanitarian needs of persons with disabilities. UN-mandated commissions of inquiry and UN agency reports should include a disability analysis of armed conflict. The UN General Assembly, Security Council and Human Rights Council should consider the adoption of resolutions dedicated to addressing the disproportionate impact that armed conflict has on persons with disabilities to galvanize attention towards this issue, and call on states, non-state actors and humanitarian actors to take a disability inclusive approach to their law, policy and practice.

Militaries should receive training on disability rights and the diversity of disability, and should consider the impact of their law of armed conflict policies and practices on persons with disabilities. Humanitarian organizations that engage in training ANSAs should ensure that this training includes disability rights and the inclusion of persons with disabilities in the application of the law of armed conflict.

Three. Reliable, comprehensive and disaggregated data is needed

There is an acute lack of reliable and comprehensive quantitative and qualitative data on the impact of armed conflict on persons with physical, sensory, psychosocial and/or intellectual disabilities. Because persons with disabilities are not a homogenous group, data disaggregated by age and gender, as well as other identities as appropriate, is needed to understand the intersectional and multidimensional discrimination they may face. Where data sets do exist, they are often under-inclusive, relying on a narrow, medical-model understanding of disability that excludes psychosocial and/or intellectual impairments. Reliance on poor, under-inclusive data sets to justify budget allocations and develop policy exacerbates the exclusion of certain groups of persons with disabilities and leads to further discrimination.

Only once comprehensive data sets are available, reflecting the lived experiences of persons with disabilities in the conflict setting and the multidimensional discrimination that they face, can advocacy, resources, policy and practice be developed to respond to their lived experience and overcome the barriers faced in accessing their human rights and IHL protections. Nevertheless, we cannot afford to wait for such data to be available. In the interim, whilst we wait for data to be gathered, the well-founded minimum estimate that 15 per cent of every population will be made up of persons with a range of disabilities should steer resource allocation, advocacy and the development of disability inclusive policy and practice.[134]

States Parties to the CRPD should ensure they are meeting their commitment to collect data and statistical research to enable them to formulate and implement the policies necessary to give effect to the CRPD.[135] However, it is not just states that bear the responsibility for data collection. All humanitarian agencies need to ensure that their polices, services and practices in the conflict setting are accessible to persons with disabilities, and should therefore also be collecting data to test the accessibility of their services. To adequately collect such data, personnel should be given specialist training on disability inclusive data collection, data collection ethics as well as the rights of persons with disabilities and the diversity of disability.

Four. The CRPD continues to apply during armed conflict, alongside IHL, and may inform the content of the legal regulation of the given situation. Where a state party is engaged in armed conflict abroad, its CRPD obligations follow it.

The CRPD affirms that the rights of persons with disabilities continue to apply during armed conflict. These rights include the right to equal access and the right to non-discrimination, including through the provision of reasonable accommodation. The extent to which the CRPD applies to any given armed conflict will be context

[134] WHO, *World Report on Disability*, 2011, p 29.
[135] Art 31(1), CRPD.

dependent and influenced by who the actors are, the territory on which the acts take place, the rights engaged and the IHL norms that are applicable.

States Parties take their CRPD obligations with them when they act outside of their territory, including in the conduct of military operations where they exercise de facto effective control over a geographical area (the spatial model of jurisdiction), or when there is authority and control over an individual or individuals (the personal model of jurisdiction). States' extraterritorial obligations under the CRPD might not apply to the same extent as within their own territory, and some obligations may not apply at all, or at least not in their entirety. The extent to which the CPRD applies will be dependent on the degree of authority and control the state has over the geographical area or the individual(s), how long it has had such control, the rights engaged, the application of IHL provisions and whether or not it has the power to guarantee the right or provision in question.

Five. Prevention of primary impairment is confused with disability rights.
Prevention of primary impairment, through mine-ban campaigns for example, is part of the rights to life and to attainment of the highest standard of health, applicable to all persons equally. Such prevention is not part of disability rights and is thus not an implementing measure under the CRPD. The two are often confused by all actors, resulting in resources and financing being dedicated to prevention initiatives and strategies at the expense of giving effect to disability rights. Although primary prevention policies and practices are not part of the rights of persons with disabilities, all prevention polices, for example mine warning signs and mine awareness campaigns, should be equally accessible to all persons, including those with disabilities.

Six. The CRPD calls for specific attention to be paid to the experiences of persons with disabilities within armed conflict and obligates states parties to ensure the protection and safety of persons with disabilities in situations of armed conflict in accordance with their obligations under IHL and IHRL.
The CRPD unifies IHL and the CRPD in the overall framework applicable in armed conflict, such that IHL norms should be applied in a manner that conforms to the fundamental rights within the CRPD, namely equal access and non-discrimination. The IHL norms of humane treatment – the meaning of which is shaped by the context and characteristics of the individual, including disability – and the prohibition of adverse distinction complement and are reinforced by the CRPD.

In accordance with IHL provisions of humane treatment and the prohibition of adverse distinction, when read in light of the rights to equal access and non-discrimination within the CRPD, persons with disabilities are entitled to the same IHL protections that are afforded to all other persons, including the rules that relate to the treatment of civilians and persons *hors de combat*, as well as rules governing the conduct of hostilities. Differential treatment, including reasonable accommodation, may be required to ensure that the applicable IHL protections are applied in a non-discriminatory manner and are accessible to all persons with disabilities.

States, to date, have paid little attention to the experiences of persons with disabilities in the conflict setting and have failed to ensure that their interpretation and application of IHL norms are not carried out in a discriminatory manner. Gathering and using

disability inclusive data, increasing expertise within militaries on disability rights and the diversity of disability and routinely and meaningfully consulting with persons with disabilities and their representative organizations will aid militaries' interpretation of IHL obligations from a disability inclusive perspective.

Seven. IHL, states and humanitarian organizations approach persons with disabilities from the medical and/or charity understanding of disability – as passive recipients of medical treatment and social 'protection', and not as full and equal rights-holders whose disability is the result of discriminatory barriers and attitudes in society.

Both the medical and charity understandings of disability have been superseded by the social-model understanding and the human rights-based approach enshrined in the CRPD. The text of many IHL provisions reflect the medical and charity models of disability, framing persons with disabilities as passive, weak and vulnerable, and take a paternalistic approach to persons with disabilities. IHL practitioners and commentators need to be aware when interpreting and applying IHL norms, that the wording of these norms reflects an outdated and often discriminatory approach to disability. This is not a fatal flaw, since IHL is capable of dynamic and evolved interpretation that is reflective of changes in society and attitudes.

The medical and charity models, rather than a social-model understanding and human rights-based approach, are also reflected in the policy and practice of states and humanitarian organizations. Consequently, the vast majority of humanitarian responses to persons with disabilities in armed conflict are focused on medical services and rehabilitation. Persons with disabilities are not meaningfully consulted regarding the design, implementation and monitoring of humanitarian responses to armed conflict. Nor are persons with disabilities equally and meaningfully included in peace processes.

Eight. The Committee on the Rights of Persons with Disabilities is in a unique and important position of being mandated to review the complementarity between the CRPD and IHL

When reviewing periodic reports and considering individual communications, Article 11 of the CRPD requires the Committee to ask: is the state in question taking 'all necessary measures' in accordance with its obligations under IHL and the CRPD to ensure the safety and protection of persons with disabilities in armed conflict? The Committee is in the unique position of having a role to play in considering the contextual interpretation of *both* these bodies of law. To date, there remains huge potential to develop sophisticated jurisprudence concerning the implementation of both the CRPD and IHL with regard to persons with disabilities living in situations of armed conflict. To do so, the Committee must ensure it enhances its IHL capacity and, in accordance with Article 34 of the CRPD, recruit members that are experts with 'competence and experience' not just in disability discourse but also IHL.