

**GENEVA
ACADEMY**

Académie de droit international
humanitaire et de droits humains
Academy of International
Humanitarian Law and Human Rights

ACADEMY BRIEFING N°14

DISABILITY AND ARMED CONFLICT

**ALICE PRIDDY
APRIL 2019**

THE ACADEMY A JOINT CENTER OF



—
INSTITUT DE HAUTES
ÉTUDES INTERNATIONALES
ET D'ÉVELOPPEMENT
GRADUATE INSTITUTE
OF INTERNATIONAL AND
DEVELOPMENT STUDIES



**UNIVERSITÉ
DE GENÈVE**
FACULTY OF LAW

DISABILITY AND ARMED CONFLICT

ACKNOWLEDGEMENTS

This Academy Briefing was researched and written by Alice Priddy, Senior Researcher at the Geneva Academy of International Humanitarian Law and Human Rights.

With thanks to Professor Andrew Clapham, Professor Marco Sassòli, Mina Mojta-hedi, Facundo Chávez Penillas and Dr Annyssa Bellal who provided comments on an earlier draft.

The Geneva Academy would like to thank the Swiss Network for International Studies for their support, without which this project would not have been possible.

We would also like to thank Diakonia for their support of this Briefing and its launch and Pro Victimis for their initial support of this research.

DISCLAIMERS

This Briefing is the work of the author. The views expressed in it do not necessarily reflect those of the project's partners, supporters or anyone else who provided input to the project, or commented on drafts of this Briefing.

April 2019

ISBN: 978-2-9701253-0-3

**© The Geneva Academy
of International Humanitarian Law
and Human Rights**

TABLE OF CONTENTS

1. PROJECT DESIGN AND METHODOLOGY	6	B. THE CRPD AND ARMED CONFLICT	34
A. PROJECT TEAM AND RESEARCH METHODOLOGY	8	1. THE APPLICATION OF THE CRPD TO NON-CITIZENS OF A STATE PARTY	35
1. PROJECT TEAM AND EXPERT ADVISORY BOARD	8	2. THE EXTRATERRITORIAL APPLICATION OF THE CRPD	35
2. METHODOLOGY	8	3. THE RELATIONSHIP BETWEEN IHL AND THE CRPD	38
2. INTRODUCTION	11	4. SITUATIONS OF OCCUPATION	43
A. THE IMPACT OF ARMED CONFLICT ON PERSONS WITH DISABILITIES	11	5. OBLIGATIONS OF ARMED NON-STATE ACTORS (ANSAS) TOWARDS PERSONS WITH DISABILITIES DURING ARMED CONFLICT	44
1. THE FORGOTTEN VICTIMS OF ARMED CONFLICT	13	6. DE FACTO CONTROL OF TERRITORY OR A POPULATION BY A ANSA	45
2. PREVENTION OF PRIMARY IMPAIRMENT, NOT DISABILITY RIGHTS	16	7. OBLIGATIONS OF HUMANITARIAN ACTORS TOWARDS PERSONS WITH DISABILITIES	47
3. UNDERSTANDING DISABILITY: FROM THE CHARITY MODEL TO A HUMAN RIGHTS-BASED APPROACH	18	5. PERSONS WITH DISABILITIES IN TIMES OF ARMED CONFLICT	48
A. THE CHARITY MODEL	18	A. WHAT IS ARMED CONFLICT?	48
B. THE MEDICAL MODEL	19	B. SUMMARY OF IHL GOVERNING ARMED CONFLICT	49
C. THE SOCIAL MODEL	19	1. PERSONS WITH DISABILITIES WITHIN IHL	52
D. THE HUMAN RIGHTS-BASED APPROACH	20	2. THE LANGUAGE OF IHL	53
4. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES	22	3. GENERAL PRINCIPLES OF IHL RELATING TO PERSONS WITH DISABILITIES	54
A. OVERVIEW OF THE CRPD	23	C. ANALYSIS OF PARTICULAR IHL PROVISIONS FROM A DISABILITY INCLUSIVE PERSPECTIVE	57
1. PREAMBLE	26	1. THE CONDUCT OF HOSTILITIES	57
2. PURPOSE AND GENERAL PRINCIPLES	27	2. PROPORTIONALITY	59
3. DEFINING DISABILITY	28	3. EFFECTIVE ADVANCE WARNING	62
4. REASONABLE ACCOMMODATION	29	4. PRECAUTIONS AGAINST THE EFFECTS OF AN ATTACK	64
5. THE RIGHT TO EQUAL ACCESS	33	5. TREATMENT OF INTERNEES AND PRISONERS OF WAR WITH A DISABILITY	65
		D. A CONCLUDING REMARK	73
		6. EIGHT KEY FINDINGS AND RECOMMENDATIONS FROM OUR RESEARCH	74
		ANNEX I. SAMPLE FIELD RESEARCH QUESTIONNAIRE	78
		ANNEX II. REPORT ON COLOMBIA	83

1. PROJECT DESIGN AND METHODOLOGY

This Academy Briefing is the final output of a two-year project on disability and armed conflict. The overarching aims of the project have been to raise awareness of this much-overlooked topic, and to provide legal and policy guidance to increase implementation of the rights and protections of persons with disabilities living in situations of armed conflict. To achieve these aims, the project tested three hypotheses:

Hypothesis One (conduct of hostilities)

During armed conflict, in the conduct of hostilities (meaning when targeting and selecting the methods and means of warfare), states and armed non-state actors (ANSAs) are not meeting their obligations under international humanitarian law (IHL) and international human rights law (IHRL) to protect persons with disabilities, in part due to ignorance of the legal framework (the UN Convention on the Rights of Persons with Disabilities (CRPD) in particular) and lack of international pressure to comply.

Associated research questions:

1. Under IHL and IHRL, what are the obligations and duties of states and ANSAs towards persons with disabilities during the conduct of hostilities?
2. Are there examples in a selection of case studies (Democratic Republic of the Congo (DRC), Colombia, Palestine and Ukraine) of state and/or ANSAs that are not meeting these obligations and duties? What are the reasons for this? What have been the national and international responses, if any, to these incidents (including NGO and media responses, resolutions, United Nations (UN) commission of inquiry reports, general comments, jurisprudence and press releases from UN mechanisms)?

Hypothesis Two (protection and assistance)

States and ANSAs, as well as humanitarian organizations, are not meeting their obligations under IHL and IHRL, to protect and assist persons with disabilities during armed conflict and in its aftermath (whether pre-existing or caused by the armed conflict), owing, among other reasons, to: lack of awareness and understanding of the scale and plight of those with disabilities in armed conflict; entrenched stigma and discrimination towards those with disabilities; lack of political will and resource allocation; lack of policy frameworks and tailored practice; and/or lack of awareness among rights-holders and their representatives of the rights of persons with disabilities during armed conflict and in its aftermath.

Associated research questions:

3. What obligations and/or duties do states, ANSAs and humanitarian organizations have under IHL and IHRL to protect and assist persons with disabilities during and in the aftermath of armed conflict? Is this legal framework sufficient and what, if any, protection gaps exist within it?
4. What disability inclusive data exists on the impact of armed conflict? Are any groups disproportionately affected, such as children or those with a particular pre-existing disability?
5. If/where states, ANSAs and humanitarian organizations are not meeting their obligations/duties towards persons with disabilities in armed conflict, what are the reasons for this? Do such reasons include: lack of awareness and understanding by states, ANSAs and humanitarian organizations of the impact of armed conflict on persons with disabilities; entrenched stigma and discrimination towards persons with disabilities; lack of political will and resource allocation; lack of humanitarian aid and international assistance; lack of inclusive policy frameworks and tailored practice; and/or lack of awareness among rights-holders and their representative organizations of the rights of persons with disabilities during armed conflict?

Hypothesis Three (adoption and implementation of tailored laws and policies)

States, ANSAs and humanitarian organizations will be better able to implement their obligations and duties toward persons with disabilities during armed conflict if they adopt informed and tailored laws and policies, aligned with the CRPD, and implement these in practice.¹

Associated research questions:

6. What laws, policies and/or practices – whether at international and/or domestic levels – do states, ANSAs and humanitarian organizations have in place to protect and assist persons with disabilities during and in the aftermath of armed conflict? Are these laws, policies and/or practices compliant with the CRPD?
7. What laws, policies and/or practices need to be put in place and/or amended by states, ANSAs and humanitarian organizations to better meet their specific obligations to protect and assist persons with disabilities during and in the aftermath of armed conflict?

¹ It is appreciated that entrenched discriminatory attitudes towards persons with disabilities may take generations to overcome. Cultural and social norms, as well as the inherent insecurity of armed conflict, mean that ensuring *total* and *consistent* realization of the rights and protections of all persons with disabilities during armed conflict and in its aftermath is, at present, an unobtainable goal.

A. PROJECT TEAM AND RESEARCH METHODOLOGY

1. PROJECT TEAM AND EXPERT ADVISORY BOARD

The project was led by Professor Andrew Clapham (Graduate Institute of International and Development Studies). Research, other activities and the writing of this report were primarily undertaken and overseen by Alice Priddy (Geneva Academy of International Humanitarian Law and Human Rights). Other team members include Dr Annyssa Bellal (Geneva Academy), David Shaw (Institute for Biomedical Ethics) and Ms Catalina Devandas (UN Special Rapporteur on the rights of persons with disabilities). Aude Brus (Handicap International) and Nathalie Herlemont (Handicap International) were involved at the early stages of the project, including in the development of an ethics policy for interviews. Local consultants were engaged to draft the field reports for the DRC (Delus Lusambya) and Vietnam (Nguyen Thi Thanh Hong, Association for the Empowerment of Persons with Disabilities in Quang Binh).

The project team has been assisted by an Expert Advisory Board, which includes representatives of inter-governmental and non-governmental organizations (IGOs and NGOs), as well as humanitarian organizations including the International Committee of the Red Cross (ICRC), the Office of the UN High Commissioner for Refugees (UNHCR) and the Office of the High Commissioner for Human Rights (OHCHR); members of the disability community; experts working in the field; and academics. The Expert Advisory Board has been a source of guidance and advice throughout the project, including through providing comments on draft reports.

2. METHODOLOGY

The methodology for the project was developed in consultation with stakeholders and those working in states affected by armed conflict. An expert roundtable meeting was held at the Geneva Academy of International Humanitarian Law and Human Rights in November 2014 to discuss the methodology and parameters of the project. The ICRC, OHCHR, UNHCR, the UN Special Rapporteur on the rights of persons with disabilities, the UN International Children's Emergency Fund (UNICEF), Handicap International, International Disability Alliance, representatives of organizations of disabled persons (ODPs), experts from the field and academics participated in the meeting and shaped the project's methodology.

The project adopted several research methods, each tailored to the nature of the research questions and the relevant hypothesis. Research methods included a combination of: desk research; structured interviews with persons with disabilities and their representative organizations, NGOs and humanitarian personnel; and field workshops through which feedback was sought on discrete issues.

A key feature of the project is to take an inclusive development approach. In accordance with the right to participation, outlined in Articles 4(3), 29 and 33(2) of the CRPD, and the oft-used motto of the disability community, 'nothing about us, without us', the involvement of persons with disabilities in shaping the project's

design, implementation, and the conclusions and recommendations identified in this report, has been a key aspect of this project. Key stakeholders from the national and international disability community joined the project as team members, members of the Expert Advisory Board, field consultants or as participants and interlocutors in project activities.

The first stage of the project was to undertake desk research to map the obligations, protections and duties contained in IHL and IHRL, specific to states, ANSAs and humanitarian organizations with regard to persons with disabilities in armed conflict. In doing so, an evaluation was undertaken of: (a) how these bodies of law relate to one another and interact; and (b) whether this legal framework is sufficient or, alternatively, whether protection gaps exist within the legal framework.

The project focused on the situation of persons with disabilities in five states experiencing different levels of armed conflict or its aftermath (the DRC, Colombia, Palestine, Ukraine and Vietnam). These states were selected because they are all States Parties to the CRPD,² and they represent a diverse range of regions and cultures, differing types of conflicts (including the involvement of ANSAs), different stages of conflict or post-conflict situations, differing levels of economic development and varying levels of international assistance.³

Field research was undertaken in each of these five states, either by team members or local consultants. The field research was centred on confidential, structured interviews with stakeholders (including state officials, armed-non state actors, persons with disabilities and their representative organizations, international organizations, local NGOs, academics and journalists).⁴ A sample questionnaire used in these structured interviews can be found in Annex I to this briefing.

Based on research gathered during our field trips, as well as desk research, reports were drafted on each state. The reports provide an overview of the conflict and the situation of persons with disabilities within each state as well as any relevant trends; and they identify gaps in the implementation of states' and non-state actors' obligations and duties. Each draft field report was shared with those interviewed and other stakeholders for their feedback before being finalized. A redacted sample of one of the field reports can be found in Annex II to this briefing.⁵

The five state reports formed the basis of workshops that were carried out in the field to further test as well as disseminate our findings among a wide range of

² Of relevance to Palestine and the Gaza conflict of 2014, Israel has also ratified the CRPD.

³ It should be noted that the nature of the conflict does not affect the application of the CRPD. The obligations of different actors may, however, vary, i.e. state versus armed non-state actors. These differing obligations are explored in the research.

⁴ Interviews were conducted on a confidential basis to mitigate any potential risk of adverse effects of taking part in the study for interviewees. The Ethics and Data Security and Confidentiality policies of the project are on file with the Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy) and can be shared upon request.

⁵ The remaining state reports are on file with the Geneva Academy and can be shared upon request.

stakeholders. Workshops in Gaza, the West Bank and Kiev were undertaken in partnership with OHCHR. In total, approximately 200 people participated in the field workshops, including state authorities, local NGOs, local ODPs, IGOs, various UN agencies, academics and journalists.

This Academy Briefing is the final output of the project and brings together our legal mapping, undertaken in the first stage of the project, and the field research. It sets out legal and policy analyses as the basis for overarching findings and recommendations that would be applicable to any armed conflict setting.

2. 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 Academy Briefing 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. First we provide an overview of the CRPD, (with a particular emphasis on the provision of equal access, reasonable accommodation, and the prohibition of discrimination) and international humanitarian law. The means by which the extraterritorial application of the CRPD might be activated, the relationship between IHL and the CRPD and the obligations of armed non-state actors towards persons with disabilities are explored. The briefing concludes with eight key findings of our research, and our associated recommendations. This introductory section provides an overview of the current situation of persons with disabilities within the conflict setting.

A. THE IMPACT OF ARMED CONFLICT ON PERSONS WITH DISABILITIES

Persons with disabilities routinely face discrimination and isolation in all contexts. The effects are exacerbated in situations of emergency or armed conflict, where persons with disabilities are at increased risk of acute harm, gross human

rights violations and serious violations of IHL.⁶ 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;⁷ ‘clustered settlements’ of persons with disabilities (including psychiatric institutions, orphanages and care homes) are used as human shields;⁸ 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;⁹ 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 – see Section 5.C.3);¹⁰ inaccessible evacuation procedures (including transport and emergency information) result in their being left behind;¹¹ 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;¹² 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.¹³

6 For example, research indicates that the mortality rate among persons with disabilities was twice that of the rest of the population during the 2011 Japan earthquake and tsunami. Statement of the Committee on the Rights of Persons with Disabilities (CmmttRPD), on disability inclusion for the World Humanitarian Summit, 5 September 2015.

7 In Colombia, for example, persons with psychosocial and intellectual disabilities were subjected to ‘false positive’ killings, where they were lured into remote areas, often on the promise of work, and killed. The killing would then be staged to look like the lawful killing of a combatant by placing a gun and/or FARC-EP or other guerrilla-group memorabilia on the body. CmmttRPD, *Concluding Observations on the Initial Report of Colombia*, UN doc CRPD/C/COL/CO/1, 30 September 2016, §24.

8 UNICEF, *Children with Disabilities in Situations of Armed Conflict*, November 2018, p 4.

9 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).

10 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.

11 Human Rights Watch (HRW), ‘Central African Republic: People with Disabilities Left Behind’, 28 April 2015. The UN Fact-Finding Mission on the Gaza Conflict of 2009 heard testimony from persons with disabilities and their families who live in constant fear that in the event of an attack they would be left behind because, without support, evacuation would be too difficult. One mother was specifically told by an Israeli soldier to evacuate her home and leave behind her child who had a disability, which she refused to do. Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN doc A/HRC/12/48, 25 September 2009, §§1286–1288.

12 E.g., persons with spinal cord injuries who stop receiving physiotherapy are more susceptible to pressure sores and urinary tract infections, the impact of which can be significant. World Confederation for Physical Therapy, *The Role of Physical Therapists in Disaster Management*, 2016, p 42.

13 Syria Relief reported that four out of five children living in conflict-affected areas of Syria did not have access to education. Syria Relief, *Children Living with Disabilities Inside Syria*, 2018, p 23.

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’.¹⁴ 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 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.¹⁵ 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.¹⁶

1. THE FORGOTTEN VICTIMS OF ARMED CONFLICT

Persons with disabilities are the largest minority group in the world.¹⁷ Despite this, and the severe consequences that armed conflict has on them, persons with disabilities remain the ‘forgotten victims of armed conflict’.¹⁸ ‘Disability’ is still wide-

14 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.

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

16 Humanity and Inclusion has recently launched a toolkit to improve the collection of quality data and its use in humanitarian action. The toolkit is based around the Washington Group Questions and can be found at <https://humanity-inclusion.org.uk/en/disability-data-in-humanitarian-action/#8> (last accessed 8 April 2019).

17 UN Enable, *Fact Sheet on Persons with Disabilities*, n.d.

18 In relation to the Syrian conflict, the CmmttRPD described persons with disabilities as ‘too often the forgotten victims of conflict’, highlighting that they face ‘gross violations’ of their rights on a daily basis and face a disproportionate risk of being ‘neglected, excluded or even abused because of their impairments and traumas, particularly the most vulnerable women and children with disabilities’, CmmttRPD, ‘Persons with Disabilities “Forgotten Victims” of Syria’s Conflict – UN Committee’, press release, 17 September 2013.

ly considered a niche issue, particularly in the conflict setting. Very little research or literature exists on the topic.¹⁹ 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,²⁰ even when specifically asked to do so;²¹ not a single resolution of the UN Security Council,²² Human Rights Council²³ or General Assembly is dedicated to addressing the disproportionate impact of armed conflict on persons with disabilities. In comparison, the gender impact and response to armed conflict is rightly receiving growing attention, including through the Women, Peace and Security framework.²⁴ Instead, persons with disabilities are often implicitly referred to as ‘vulnerable groups’, and thereby purportedly included

19 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).

20 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, highlights the continuing application of the CRPD and, albeit briefly, the targeted killing of persons with psychosocial impairments, but it does not go on to make any findings or recommendations regarding the impact of the conflict on persons with disabilities. See also the Report of the UN Commission on South Sudan, UN doc A/HRC/40/CRP.1, 20 February 2019, §§177–182, which details specific violations and contains recommendations with regard to that specific conflict.

21 In its Resolution 2217, 28 April 2015, the UN Security Council (UNSC) asked the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) to ‘monitor, help investigate and report on violations and abuses committed against children, women as well as persons with disabilities’. In the 24-page responding report, disability was mentioned once, in relation to victims of torture who were mainly ‘elderly, widows, persons with disabilities or persons who do not have strong support in their local communities’. MINUSCA and OHCHR, Report on the Situation of Human Rights in the Central African Republic, n.d., §62, available at https://www.ohchr.org/Documents/Countries/CF/MINUSCA_9Dec2015.pdf (last accessed 8 April 2019).

22 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, in which the Council stresses ‘the particular impact that armed conflict has on women, children, including as refugees and internally displaced persons, and other civilians who may have specific vulnerabilities including persons with disabilities and older persons’. The resolution goes on to stress ‘the need for humanitarian assistance to be gender- and age- sensitive, and to remain responsive to the different needs of the population’ (without expressly referencing disability). The UNSC has also highlighted the particular vulnerability of women with disabilities to sexual violence in the conflict setting (UNSC Res 2106, 13 June 2013, §19) and the need to ensure that the needs of all children, including those with disabilities, are addressed in healthcare, psychological support and education programmes (UNSC Res 2427, 9 July 2018). A UNSC resolution dedicated to the impact of armed conflict on persons with disabilities is currently under consideration.

23 Persons with disabilities have implicitly been referred to in generic resolutions on armed conflict. See e.g., 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, which highlights the impact of armed conflict on women and children and other ‘vulnerable groups’.

24 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.

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.²⁵

Small and recent steps have been taken to include disability in the conflict setting within the international agenda. The UN Secretary-General has highlighted that persons with disabilities are a critical group under Core Responsibility 3 of the Agenda for Humanity (leave no one behind).²⁶ The Charter on Inclusion of Persons with Disabilities in Humanitarian Action was adopted at the 2016 World Humanitarian Summit, and has been endorsed by over 140 humanitarian and human rights organizations, organizations of disabled persons (ODPs), UN agencies and governments.²⁷ The Charter concerns all humanitarian disasters and emergency situations, including armed conflict. Signatories commit to: eliminating all forms of discrimination against persons with disabilities in humanitarian policy and programming; undertaking meaningful consultations with persons with disabilities and their representative organizations in humanitarian programme design, implementation and monitoring; and improving quantitative and qualitative data collection on persons with disabilities. In December 2018, members of the UN Security Council attended an Arria-Formula meeting, the first dedicated discussion on the impact of conflict on persons with disabilities to be held by the Security Council.²⁸

To remedy the lack of inter-agency guidelines on the inclusion of persons with disabilities in humanitarian action, and to realize the ambitions of the Charter on Inclusion of Persons with Disabilities in Humanitarian Action, the Inter-Agency Standing Committee Task Team on the Inclusion of Persons with Disabilities in Humanitarian Action is currently drafting guidelines to address the experiences of persons with disabilities in humanitarian disasters. It is intended that the guidelines will ‘assist humanitarian actors and affected communities to coordinate, plan, implement, monitor and evaluate essential actions that foster the full and effective participation and inclusion of persons with disabilities, changing practice across all sectors in a humanitarian response’.²⁹

25 E.g., the HRC in its resolution on the human rights situation in the Syrian Arab Republic, highlights and ‘strongly condemns’ a number of human rights abuses (including sexual violence) against women, children, journalists and human rights defenders and internally displaced persons and calls for all citizens to ‘receive equal protection regardless of gender, religion or ethnicity’ yet fails to make reference to persons with disabilities, UN doc A/HRC/37/L.38, 19 March 2018, Preamble, §§3, 12 and 19.

26 UN General Assembly (UNGA), One Humanity: Shared Responsibility: Report of the Secretary-General for the World Humanitarian Summit, UN doc A/70/709, 2 February 2016, §79.

27 See <http://humanitariananddisabilitycharter.org> (last accessed 11 April 2019).

28 The meeting can be viewed at <http://webtv.un.org/watch/the-situation-of-persons-with-disabilities-in-armed-conflict-security-council-open-arria-formula-meeting/5975361795001/> (last accessed 11 April 2019).

29 Inter-Agency Standing Committee (IASC), ‘Concept Note: Subsidiary Body to Develop IASC Guidelines on Inclusion of Persons with Disabilities in Humanitarian Action’, 2 June 2016. The guidelines are due to be finalized in the latter half of 2019. Other notable initiatives include the Global Compact for Safe, Orderly and Regular Migration, adopted in December 2018, which commits to establish human rights-based, ‘disability-responsive’ migration policy and practice (§§23(a), 31(a) and 31(c)). The UK, Kenya and the International Disability Alliance hosted the first ever Disability Summit in July 2018, in London. The summit focused on all issues related to persons with disabilities and although attention was paid to ensuring equal access to humanitarian responses per se, very little attention was paid to the conflict setting.

At present, however, 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 (see Section 4.A.5).³⁰ 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.

2. 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,³¹ 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’ exclusion of civilians.³² Reading these provisions from a disability inclusive perspective, the marking of mined areas should be in accessible formats

³⁰ Arts, 2,5 and 9, CRPD.

³¹ 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).

³² 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.

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.

3. UNDERSTANDING DISABILITY: FROM THE CHARITY MODEL TO A HUMAN RIGHTS-BASED APPROACH

Over the last 50 or so years, there have been several theoretical models developed to aid understanding of and responses to disability. These models have been the foundations of disability related practices and policies and have had both negative and positive results for persons with disabilities. It is the social-model understanding of disability, and the human rights-based approach to respond to it that are adopted within the CRPD and form its philosophical basis.

A. THE CHARITY MODEL

Historically, persons with disabilities have been viewed as objects of charity, and the charity model of understanding disability has thus been prominent in disability discourse. According to the charity model, persons with disabilities are victims of their impairment and their situation is tragic. As such, persons with disabilities deserve pity and charity. Persons with disabilities are assumed to be burdens on their families and on society. The charity model thereby exacerbates discriminatory prejudices towards persons with disabilities and conceives them as being ‘lesser’ than persons without a disability. This model not only reinforces negative stereotypes but also perpetuates the idea that persons with disabilities need special and separate treatment, such as special schools, thereby supporting segregation. Persons with disabilities viewed from the charity-model perspective are not seen as rights holders, but rather as passive recipients of charity, which is given out based on the good will of others.

The charity model is still widely adopted by states, humanitarian organizations, NGOs, media and the general public, even if on a subconscious basis, fuelled by the widely held prejudicial assumption that persons with disabilities are living a lesser and sadder life than persons without a disability. On numerous occasions, the Committee on the Rights of Persons with Disabilities, established under the Convention as the body responsible for monitoring implementation of the CRPD, has criticized States Parties for adopting a charity model to disability, including through the use of language and images that perpetuate the idea that persons with disabilities are victims (a person in a wheelchair looking sad and desperate within road safety campaigns is an often-cited example) and by holding state-sponsored charity fundraisers for persons with disabilities.³³

³³ CmmttRPD, Concluding Observations on the Initial Report of Paraguay, UN doc CRPD/C/PRY/CO/1, 15 May 2013, §17; Concluding Observations on the Initial Report of Colombia, supra fn 7; Concluding Observations on the Initial Report of Croatia, UN doc CRPD/C/HRV/CO/1, 15 May 2015; Concluding Observations on the Initial Report of Peru, UN doc CRPD/C/PER/CO/1, 16 May 2015.

B. THE MEDICAL MODEL

The medical model, which considers persons with disabilities as in need of cure and medical treatment to make them ‘normal’, is not dissimilar from the charity model in the prejudices and stereotypes that underlie it. The medical model also disempowers persons with disabilities and reinforces discriminatory attitudes that persons with disabilities are somehow lesser. The medical model ‘has guided and dominated clinical practice with the resulting assumption that both problems and solutions lie within people with disabilities rather than within society’.³⁴ The assumption that the problem and solution rest exclusively on the person with a disability has resulted in discriminatory policy and practices that perpetuate negative stereotypes, and has enabled states to defend their failure to redress inequality as unavoidable and therefore in compliance with their obligations.

Policy developed on the basis of the medical model can lead to human rights violations. Most obvious is law and policy that permits persons with an impairment to be treated without their consent, based on the assumption that an impairment always requires medical treatment. Following the logic of the medical model, a person with an impairment is abnormal and unable to function normally, such that medical professionals are permitted, and have a duty to step in and make decisions on the person’s behalf. The assumption that a person lacks the ability to function normally and lacks capacity has also resulted in the common practice of assigning legal guardians to act on a person’s behalf, thereby denying persons with disabilities their legal capacity.

Despite its obvious flaws, many states, humanitarian organizations and mainstream human rights organizations still understand disability from a medical-model perspective.³⁵ This is evident in the state reports submitted to the Committee on the Rights of Persons with Disabilities.³⁶

C. THE SOCIAL MODEL

The social model was developed as a critique of the charity and medical models, and can be traced back to the 1960s when it first began to be conceptualized by disability rights activists in the United Kingdom.³⁷ One of its creators, Michael Oli-

³⁴ S. French., ‘Defining Disability – Its Implications for Physiotherapy Practice’ in S. French (ed), *Physiotherapy: A Psychosocial Approach*, Butterworth-Heinemann Ltd, 1992, p 217.

³⁵ World Health Organization (WHO), *World Report on Disability*, 2011, pp 11 and 12; T. Degener and G. Quinn, ‘A Survey of International, Comparative and Regional Disability Law Reform’, in M. Breslin and S. Lee (eds), *Disability Rights Law and Policy: International and National Perspectives*, Transnational Publishers, 2002; Report of the Special Rapporteur on the rights of persons with disabilities, UN doc A/70/297, 7 August 2015, §§23 and 56.

³⁶ CmmttRPD, Concluding Observations on the Initial Report of Oman, UN doc CRPD/C/OMN/CO/1, 17 April 2018, §7(a). At its most severe, the medical approach still routinely results in persons with disabilities being subjected to forced medical treatment, particularly in psychiatric institutions, in situations that may amount to torture or cruel, inhuman or degrading treatment. See, CmmttRPD, Concluding Observations on the Initial Report of Slovenia, UN doc CRPD/C/SVN/CO/1, 18 April 2018, §26.

³⁷ For one of the first articulations of the social model, see The Union of the Physically Impaired Against Segregation and The Disability Alliance, ‘Fundamental Principles of Disability’, November 1976.

ver, explains that disability is a socially created problem and not an attribute of an individual, and, as such, it requires a political and societal response:

Disability according to the social model, is all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on. Further, the consequences of this failure do not simply and randomly fall on individuals, but systematically upon disabled people as a group who experience this failure as discrimination institutionalized throughout society.³⁸

The social model identifies disability as a social construct that is borne out of discrimination and oppression. Impairment and disability are differentiated from one another. Impairment is the condition of the body or mind, whereas disability is the way in which society and the environment responds to the actual or perceived impairment. Impairment is, in this way, viewed as part of the diversity of human beings rather than something in need of 'cure'. At its core, the social model focuses on society rather than on the impairment, or indeed the individual, and, as such, places the onus on society to dismantle disabling barriers. Physical barriers such as steps (that hinder wheelchair users' access to courts, schools or libraries) or voting material that is not produced in accessible formats (thereby excluding persons with visual impairments from participating in political life) are, by way of example, identified as a forms of disabling and discriminatory barriers.

Although the social model is now widely endorsed by the disability rights movement, it is not without its critics, who point to the fact that it only concerns itself with the environment and society, and neglects to address the realities that persons with disabilities may face, such as pain, low cognitive ability, fear of an early death and deterioration in quality of life. Jenny Morris, a feminist disability activist, has identified the 'tendency with the social model of disability to deny the experience of our own bodies, insisting that our physical differences and restrictions are entirely socially created. While environmental barriers and social attitudes are a crucial part of our experience of disability – and do indeed disable us – to suggest that this is all there is, is to deny the personal experience of physical or intellectual restrictions, of illness, of the fear of dying.'³⁹

D. THE HUMAN RIGHTS-BASED APPROACH

The human rights approach is the normative basis for responding to disability. It underscores the fundamental premise of human rights – that every person has them through virtue of being human. They are inherent to us as human beings and, as such, cannot be given or taken away. They are not earned, nor are they privileges, nor are they conditional on discharging individual responsibilities to society. They are rights acquired through birth, by us all, equally. To paraphrase the

38 M. Oliver, *Understanding Disability: From Theory to Practice*, St Martin's Press, 1996, p 33.

39 J. Morris, *Pride Against Prejudice: A Personal Politics of Disability*, Women's Press, 1991, p 10.

Universal Declaration of Human Rights, we, human beings, are all born 'free and equal in dignity and in rights'.⁴⁰ No characteristic, sex, nationality, social status, religion or any other status, including having any form of impairment, prevents a person from being a full rights-holder. In sum, the human rights-based approach to disability holds that persons with a disability, like every other human being, are full subjects of human rights. It is the social-model understanding of disability and the human rights-based approach that are enshrined in the CRPD.

A human rights approach may also supplement the social-model understanding of disability, and fill some of the gaps that it allegedly leaves.⁴¹ The human rights-based approach addresses the criticism levied at the social model, that it ignores the realities of living with an impairment. The human rights model demands that the person, alongside her or his impairment and experience of and with it, is recognized, as this is fundamental to human dignity. The CRPD, in this regard, deliberately treads a fine line. It does not make an express statement regarding impairment through fear of evoking negative judgments about the quality – and therefore value – of the lives of persons with disabilities. It instead underscores the importance of human dignity and human diversity. Persons who 'require more intensive support' are mentioned in the Preamble to the Convention, as a reminder that those with the most severe impairments must not be left behind and that the CRPD is meant to protect all persons with disabilities and 'not only those who are "fit" for mainstreaming'.⁴²

Combining the social-model understanding of disability (now referred to as the human rights model of disability by the Committee on the Rights of Persons with Disabilities) and the human rights-based approach allows for recognition that impairment is only one element of a person's identity, and that persons with disabilities are not a homogenous group. A woman who is visually impaired and living in poverty will have a very different experience of living with her impairment compared to a man with the same condition living in wealth. Sexual orientation, ethnicity, religion, age, gender and social status are all major factors that shape a person's identity, and may have a greater influence on a person's identity than their impairment. The social model alone does not provide room for these additional factors that shape a person's identity and the intersectional and multidimensional discrimination they may face. The human rights approach does allow, and even demands that all these factors be considered through its emphasis on human dignity and through evoking the full canon of human rights to be enjoyed by all. Therefore, it is when the social model is adopted alongside the human rights-based approach that the strongest understanding and response to disability is found.

40 Art 1, Universal Declaration of Human Rights.

41 One commentator, Theresa Degener, has gone further and attempted to separate the two, arguing that the human rights model is a stand-alone alternative to the social-model understanding of disability, T. Degener, 'A New Human Rights Model of Disability', in V. Della Fina, R. Cera and G. Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, 2017.

42 Ibid, pp 56-59.

4. 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. It was opened for signature on 30 March 2007 and received the highest number of signatories to any UN Convention on its opening day, 82 to be exact, plus one ratification.⁴³

The CRPD was the first, and remains the only convention to be open for signature by regional integration organizations,⁴⁴ and was immediately signed by the European Union.⁴⁵ Upon receiving its twentieth ratification, the Convention entered into force on 3 May 2008. The CRPD is heralded as the fastest negotiated human rights treaty of all time, having been negotiated over four years, during eight sessions of the Ad Hoc Committee established by the General Assembly.

The CRPD is not only remarkable for the speed with which it was negotiated and the support it received, but also for its ground-breaking content. Speaking at the adoption of the CRPD, the then UN Secretary-General, Kofi Annan, heralded the ‘dawn of a new era – an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long’.⁴⁶ The CRPD has brought about a ‘paradigm shift’ in our understanding of and approach to disability.⁴⁷ It 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. Before the adoption of the CRPD, the mainstream human rights movement had largely ignored persons with disabilities, and the application of existing human rights to persons with disabilities was not obvious to many actors. Persons with disabilities were, and in some instances still are treated as a ‘lesser’ type of human being; denied their rights, and at times subjected to odious human rights abuses including murder, torture, sexual violence, denial of access to justice and arbitrary deprivation of liberty.⁴⁸

43 UN Disability, ‘Convention on the Rights of Persons with Disabilities’, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last accessed 1 August 2018).

44 Art 45, CRPD.

45 UN Treaty Collection, ‘15. Convention on the Rights of Persons with Disabilities’, 13 December 2006.

46 UN, ‘Secretary-General Hails Adoption of the Landmark Convention on the Rights of Persons with Disabilities’, 13 December 2006.

47 OHCHR, General Assembly Ad Hoc Committee, 8th Session, New York, 5 December 2006, Statement by Louise Arbour, UN High Commissioner for Human Rights.

48 HRW, ‘They Stay Until They Die: A Lifetime of Isolation and Neglect in Institutions for People with Disabilities in Brazil’, 23 May 2018; Report of the UN Special Rapporteur on the rights of persons with disabilities, UN doc, A/72/133, 14 July 2017, §§29–37.

A. OVERVIEW OF THE CRPD

There are numerous unique and revolutionary aspects to the Convention, which contains a Preamble and 50 articles. To aid accessibility, each article has a number as well as a title, a first for a UN-negotiated human rights treaty. The CRPD enshrines civil and political rights alongside economic, social and cultural rights and, in this regard, is a strong example of the indivisibility and interdependence of rights. 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.

States Parties to the CRPD are obligated to ‘respect’, ‘protect’ and ‘fulfill’ the rights it enshrines. These threefold obligations are found in all the core human rights treaties. The obligation to ‘respect’ requires states parties to refrain from interfering, directly or indirectly, in an individual’s enjoyment of their rights. Under the obligation to ‘protect’, states parties must take positive measures to protect an individual from violations committed by a third party, including businesses and other private actors. Finally, the obligation to ‘fulfill’ requires that states parties adopt legislation, policy measures, budgetary allocation and other promotional measures to ensure the full realization of rights.

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,⁴⁹ equal recognition before the law,⁵⁰ liberty and security of the person, privacy and family life,⁵¹ education, health, employment and the right to participate in political, public and cultural life,⁵² apply equally to persons with disabilities. Freedoms enshrined include freedom from torture, cruel, inhuman or degrading treatment or punishment,⁵³ liberty of movement and nationality,⁵⁴ and freedom of expression and opinion.

49 Art 10, CRPD.

50 Art 12, *ibid.*

51 Arts 22 and 23, *ibid.*

52 Arts 29 and 30, *ibid.*

53 Art 15, *ibid.*

54 Art 18, *ibid.*

Articles 10 to 30 cover the rights guaranteed to persons with disabilities

Article 10 – The right to life

Article 11 – Situations of risk and humanitarian emergencies

Article 12 – Equal recognition before the law

Article 13 – Access to justice

Article 14 – Liberty and security of the person

Article 15 – Freedom from torture or cruel, inhuman or degrading treatment or punishment

Article 16 – Freedom from exploitation, violence and abuse

Article 17 – Protecting the integrity of the person

Article 18 – Liberty of movement and nationality

Article 19 – Living independently and being included in the community

Article 20 – Personal mobility

Article 21 – Freedom of expression and opinion, and access to information

Article 22 – Respect for privacy

Article 23 – Respect for home and the family

Article 24 – Education

Article 25 – Health

Article 26 – Habilitation and rehabilitation

Article 27 – Work and employment

Article 28 – Adequate standard of living and social protection

Article 29 – Participation in political and public life

Article 30 – Participation in cultural life, recreation, leisure and sport

Most commentators, including those involved in the drafting of the Convention, vehemently deny that the Convention has created new rights and argue that the CRPD complements the UN core human rights treaties ‘without recognizing new human rights for persons with disabilities’.⁵⁵ Indeed, throughout the CRPD’s drafting, the Ad Hoc Committee repeated that the CRPD is to be an ‘implementing convention’ that ‘sets out a detailed code [for how existing rights] should be put into practice’ for persons with disabilities.⁵⁶ Supporting this approach, the UN webpage of the CRPD describes the instrument as a document to ‘identify the *existing* civil, cultural, economic, political and social human rights’ (emphasis added).⁵⁷

This denial of creating new rights is understandable considering the long road that led to the drafting of the Convention, and unsurprising considering the disability rights communities’ rhetoric that persons with disabilities are equal to those without disabilities, such that they are neither lesser nor superior and thus do not deserve or warrant more or additional rights. In other words, all that is sought is equality; meaning the full enjoyment of all human rights on an equal basis with others. However, it might be that this denial of the existence of new rights does ‘not do justice to the multi-layered normative reality of as rich an instrument as the Convention’.⁵⁸

It has been argued that while the Convention does indeed enshrine existing rights, it also ‘amplifies upon, evolves from and even departs from them in the sort of ways required by the issue of disability’.⁵⁹ The latter, nuanced view of the normative foundations of the Convention does have merit. For example, the right to independent living, as enshrined in Article 19 of the CRPD, does not appear to exist before the CRPD. Rather, the right to independent living is the CRPD’s response to the isolation and segregation from society experienced by persons with disabilities as a result of forced institutionalization. The right could arguably be derived from the rights to private and family life, freedom of movement and the prohibition on discrimination, but as a right in and of itself, it only came to exist through the CRPD.

As well as amplifying existing rights, the CRPD spells out in detail exactly how states parties should implement each right by addressing the experiences of persons with disabilities in ‘accessing’ that right and its problematic features. This is an innovative feature of the CRPD that is not found in the other core human rights treaties. By way of example, the right to family life is enshrined in the Inter-

55 V. Della Fina, ‘Article 1 (Purpose)’, in V. Della Fina, R. Cera and G. Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, 2017, p 93.

56 UN, ‘Committee Negotiating Convention on Rights of Disabled Persons Concludes Current Session’, press release, 12 August 2005.

57 UN – Disability, ‘Frequently Asked Questions Regarding the Convention on the Rights of Persons With Disabilities’, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/frequently-asked-questions-regarding-the-convention-on-the-rights-of-persons-with-disabilities.html> (last accessed 12 September 2018).

58 F. Mégret, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’, 30 *Human Rights Quarterly* 494 (2008) 498.

59 Ibid.

national Covenant on Civil and Political Rights (ICCPR) without any elaboration beyond the fact that the ‘right of men and women of marriageable age to marry and to found a family shall be recognized’, and that no marriage should be entered into without free and full consent.⁶⁰ The reality of persons with disabilities is that they have been denied the right to family life through forced marriage, denial of the capacity to marry, forced sterilization, abandonment and forced separation of children from the family. To address these realities in the human rights experience of persons with disabilities, the CRPD details what the right to a family life entails: the right to marry and found a family on the basis of free and informed consent; the right to freely decide the number and spacing of children, and to have access to reproductive education and contraception (this is implicitly stated as the right includes ‘the means necessary’ to enable access to the aforementioned rights); the right to retain fertility on an equal basis with others; information, services and support to families with a child with a disability (to prevent abandonment, neglect and segregation of children with disabilities); the prohibition on the separation of a child from parents on the basis of disability of either the child or one or both of the parents, and separation as only permissible by competent authorities subject to judicial review, in accordance with applicable law and procedures, and that separation must be necessary for the best interests of the child.⁶¹

1. PREAMBLE

As in other international treaties, the 25 paragraphs of the Preamble lay out the founding principles of the Convention and the ideology that steers it, thereby providing an important interpretation tool where ambiguity within the Convention exists. The Preamble opens by underscoring the ‘inherent dignity and worth and the equal and inalienable rights of all members of the human family’, and goes on to recognize that ‘discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person’. It notes that, despite the various human rights treaties that have come before it, persons with disabilities continue to face human rights violations and challenges to their participation as equal members of society.⁶²

Notably, the Preamble also casts aside previous soft-law texts that perpetuated discrimination against persons with disabilities by not referencing the 1971 Declaration on the Rights of Mentally Retarded Persons or the 1975 Declaration of the Rights of Disabled Persons. In contrast, the ‘importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities’ in promoting equality for the rights of persons with disabilities is highlighted. Given the high number of States Parties to the Convention, it represents a fresh start in the international community’s approach to disability rights and to persons with disabilities.

60 Art 23, International Covenant on Civil and Political Rights (ICCPR).

61 Art 23, CRPD.

62 Preamble (K), *ibid.*

The Preamble also addresses a number of themes that may have been too sensitive to deal with in the main text. One such theme is the rights and duties of the family of a person with a disability. For cultural reasons, some delegates argued that families should be extensively referenced in the final text, while many ODPs argued that this was inappropriate as it is often families that are responsible for the discrimination and ill-treatment experienced by persons with disabilities.⁶³ To address these concerns, the final text does not confer any rights upon family members that are independent from the rights of persons with disabilities, and deliberately positions persons with disabilities within an instrumental rather than dependent role.⁶⁴ The Preamble delicately reaffirms that ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities’.

2. PURPOSE AND GENERAL PRINCIPLES

The purpose of the Convention, according to its Article 1, is to ‘promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’.⁶⁵ To achieve its purpose, the treaty enshrines eight guiding principles:

1. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons
2. Non-discrimination
3. Full and effective participation and inclusion in society
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
5. Equality of opportunity
6. Accessibility
7. Equality between men and women
8. Respect for the evolving capacities of children with disabilities and respect for the rights of children with disabilities to preserve their identities

The eight guiding principles form the core of the Convention and serve to guide its interpretation and implementation. Many of these principles are interlinked and interdependent. ‘Respect for difference and acceptance of persons with disabilities

63 R. Cera, ‘Preamble’, in *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, supra fn 55, p 81.

64 R. Kayess and P. French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ 8 *Human Rights Law Review* 1 (2008) 25.

65 Art 1, CRPD.

as part of human diversity’, for example, is intrinsic to ‘respect for inherent dignity’. These principles also underpin many of the rights and freedoms expressly contained within the Convention. Individual autonomy, respect for inherent dignity and respect for difference, by way of example, are foundational principles of freedom from non-consensual medical intervention.⁶⁶ It is these eight principles that should guide all legislative and policy developments that relate to persons with disabilities, including within the armed conflict setting.

3. 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 (discussed in Section 3.C) and, through recognizing disability as an ‘evolving concept’, it allows for the Convention to adapt and remain relevant over time and in different contexts.

The Committee on the Rights of Persons with Disabilities has begun to build a body of jurisprudence on the definition of disability. It has adopted a broad interpretation of Article 1 and added that persons with disabilities ‘include, *but are not limited to*, those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others’ (emphasis added).⁶⁷ In its limited jurisprudence so far (the Committee is still in its infancy), the Committee has found that a diverse range of impairments satisfy this definition of disability, including albinism,⁶⁸ blindness,⁶⁹ head injuries,⁷⁰ intellectual impairment,⁷¹ and hearing impairment.⁷²

⁶⁶ Art 25(d), CRPD.

⁶⁷ CmmttRPD, *Mr. X v United Republic of Tanzania*, Comm no 22/2014, UN doc CRPD/C/18/D/22/2014, 5 October 2017, §7.6.

⁶⁸ *Ibid.*

⁶⁹ CmmttRPD, *F v Austria*, Comm no 21/2014, UN doc CRPD/C/14/D/21/2014, 21 September 2014.

⁷⁰ CmmttRPD, *Makaraov v Lithuania*, Comm no 30/2015, UN doc CRPD/C/18/D/30/2015, 5 October 2017.

⁷¹ CmmttRPD, *D.R v Australia*, Comm no 14/2003, UN doc CRPD/C/17/D/14/2013, 19 May 2017.

⁷² CmmttRPD, *Beasley v Australia*, Comm no 11/2013, UN doc CRPD/C/15/D/11/2013, 25 May 2016.

4. REASONABLE ACCOMMODATION

Article 2 Reasonable Accommodation

‘Reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms

One of the most revolutionary and innovative aspects of the CRPD is its inclusion of the concept of reasonable accommodation.⁷³ 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.

a. The Effective and Proportional ‘Burden’ of Reasonable Accommodation

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’.⁷⁴ 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. Three interpretative challenges are raised by the language of Article 2: first, ‘reasonable’ versus ‘effective’ accommodation; second, the relevance of proportionality in assessing reasonableness; and, third, the implications of reference within Article 2 to the imposition of an ‘undue burden’.

On the first point, the meaning of ‘reasonable’ and what it refers to continues to cause confusion and has led to differing national interpretations.⁷⁵ According to

⁷³ Arts 2 and 5, CRPD.

⁷⁴ Art 2, CRPD.

⁷⁵ See: The Netherlands, Equal Treatment on the Grounds of Disability or Chronic Illness Act of 2 August 2003, Section 2. Unofficial translation by Equal Rights Trust, <http://www.equalrightstrust.org/content/netherlands-equal-treatment-disability-and-chronic-illness-act-2003> (last accessed 8 April 2019); and the amended Irish Employment Equality Act, which clarifies that ‘appropriate measures’ in relation to a person with a disability ‘means effective and practical measures, where needed in a particular case, to adapt the employer’s place of business to the disability concerned’ (emphasis added).

the Committee on the Rights of Persons with Disabilities, the reasonableness of the accommodation relates to the effectiveness of the accommodation in overcoming the barrier that the individual is facing, rather than an assessment of the burden on the provider.⁷⁶ It is regrettable that Article 2 was not drafted as an obligation to provide ‘effective’ accommodation, as this may have avoided some confusion.

A second matter of interpretation is raised when assessing the fairness of ‘burden’ placed on the provider, triggered by the Article 2 proviso that appropriate modification or adjustments should not amount to a ‘disproportionate or undue burden’. The Committee has in this respect clarified that ‘disproportionate and undue burden’ is a single concept, in other words that the terms ‘disproportionate’ and ‘undue’ should be considered synonyms.⁷⁷ Assessing whether the modification imposes a disproportionate or undue burden on the provider requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned. The availability of resources and financial implications for the duty-bearer will be factors in determining whether the burden is ‘undue’.⁷⁸ Although reasonable accommodation is in principle an individual measure, assessments also need to take into account the potential beneficial effects of the accommodation in question for the future enjoyment of the right concerned by other persons with disabilities.⁷⁹

Concerning the implications of reference within Article 2 to the imposition of an ‘undue burden’, two further sub-issues arise. The first is that use of the expression is unfortunate and inappropriate as it perpetuates the idea that persons with disabilities are burdens on society: a discriminatory perception that the CRPD otherwise aims to overcome. Secondly, reference to an apparent motivation behind use of this language engages issues of immediate versus progressive effect of the obligation under Article 2. Inclusion of ‘undue burden’ in the definition of reasonable accommodation was due to unease amongst some drafters regarding the inclusion of both civil and political rights (which have immediate effect) alongside economic, social and cultural rights (which are in large part to be progressively realized). It is therefore debatable whether or not reasonable accommodation is a right to be progressively realized or applicable with immediate effect. ‘Undue burden’ is said to allow for states parties to enjoy a margin of discretion and to some extent thereby introduces an element of progressive realization.⁸⁰

⁷⁶ CmmttRPD, *Michael Lockery v Australia*, Comm no 13/2013, UN doc CRPD/C/15/D/13/2013, 30 May 2016; *Marie-Louise Jungelin v Sweden*, Comm No 5/2011, UN doc CRPD/C/12/D/4/2011, 14 November 2014.

⁷⁷ CtteeRPD, *General Comment No 6 (2018) on Equality and Non-Discrimination*, UN doc CRPD/C/GC/6, 26 April 2018, §25(b). See also OHCHR, *Equality and Non-Discrimination Under Article 5 of the Convention on the Rights of Persons with Disabilities*, UN doc A/HRC/34/26, 9 December 2016, §31.

⁷⁸ CtteeRPD, *General Comment No 4 (2016) on the Right to Inclusive Education*, UN doc CRPD/C/GC/4, §27.

⁷⁹ *Jungelin*, supra fn 76, §§2–6, and Joint Opinion of Committee Members Carlos Rios Espinosa, Theresia Degener, Munthian Buntan, Silvia Judith Quan-Chang and Maria Soledad Cisternas Reyes (Dissenting), §5.

⁸⁰ A. Lawson, ‘The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?’ in O.M. Arnardottir and G. Quinn (eds), *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Martinus Nijhoff, 2009, p 104.

The Committee on the Rights of Persons with Disabilities has confirmed that states parties enjoy a certain margin of appreciation when assessing the reasonableness of accommodation measures and the issue of undue burden in a particular case.⁸¹ However, as Article 5(3) makes clear, the right to reasonable accommodation is essential to non-discrimination. It can therefore be argued that the link between the two creates an obligation of immediate effect and is not subject to the principle of progressive realization.⁸² The Committee has expressly stated that ‘the duty to provide reasonable accommodation is immediately applicable and not subject to progressive realization’.⁸³

b. Reasonable Accommodation, Equality and Discrimination

Article 2 Definition of Discrimination

‘Discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

Discrimination – meaning differential treatment of (in the context of the Convention) persons with disabilities, for example by prohibiting a person with a disability from voting – is, of course, prohibited in the CRPD. However, the CRPD also extends this classical understanding of discrimination to include reasonable accommodation. As states slowly progress towards equality of persons with disabilities, the more classical and blatant forms of discrimination should be eradicated. As they recede they will likely expose equally harmful forms of discrimination where, through equal treatment at face value, rather than accommodation of the needs of a person with disabilities, the disability(ies) is/are exacerbated and the person is denied equal enjoyment of rights.⁸⁴

Reasonable accommodation is a tool of substantive equality. It takes into account difference as opposed to sameness. In some ways aligned with cultural and feminist critiques, it appreciates that humans are not one homogenous group and that, consequently, the uniform application of human rights will not always be appropriate. Reasonable accommodation therefore goes against the traditional understanding of equality, namely formal equality, that demands everyone be treated the same. Formal equality neglects individual difference, including impairment,

⁸¹ *Jungelin*, supra fn 76, §10.5.

⁸² R. Cera, ‘Article 5 [Equality and Non-Discrimination]’ in *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, supra fn 55, p167.

⁸³ CmmttRPD, *Concluding Observations on the initial report of Spain*, UN doc CPRD/C/ESP/CO/1, 19 October 2011, §44.

⁸⁴ OHCHR, *Equality and Non-Discrimination Under Article 5*, supra fn 77, §28.

and reduces all humans to ‘empty vessels bereft of characteristics that would require special attention’.⁸⁵ Formal equality is particularly dangerous for persons with disabilities as it can allow blatant and deliberate discrimination to masquerade as indifference. By its inability to take into account individuals’ characteristics and associated needs, formal equality will never be an appropriate tool for realizing the rights of persons with disabilities.

As opposed to formal equality, substantive equality recognizes that every person has the right to participate equally in society and appreciates that, to achieve this, differential treatment may be necessary. Substantive equality, which in contrast to formal equality, seeks to address historical structural inequalities and indirect discrimination, is developed throughout the CRPD. Substantive equality is particularly important for achieving the full enjoyment of the rights of persons with disabilities, as it acknowledges the ‘dilemma of difference’ among human beings in order to achieve equality. Acting as an antidote to formal equality, reasonable accommodation focuses on individual needs in differing contexts. It allows for different treatment that is ‘necessary or appropriate’ to allow a particular individual with a disability to fully enjoy her or his human rights and fundamental freedoms. The measures necessary will vary from one individual to the next. Applying reasonable accommodation is a far more complex process than the simple demand of formal equality, to treat everyone the same. It requires assessment of an individual’s needs and a search for compromises on a case-by-case basis. The very essence and point of reasonable accommodation is that an individualized and contextualized response is needed to give meaning to the concepts of equality and non-discrimination.

The CRPD enshrines the duty to provide reasonable accommodation across a host of sectors including education,⁸⁶ liberty and security of the person,⁸⁷ access to justice and employment.⁸⁸ As evidence of the importance of the concept, the first individual communication considered by the Committee on the Rights of Persons with Disabilities concerned failure to provide reasonable accommodation. The petition, *HM v Sweden*, concerned a person who had Ehlers-Danlos Syndrome and, as a result, suffered from severe and regular dislocation of her joints. Due to her condition, the author had been confined to her bed for two years, and had not been able to stand for eight years. As there was a high risk of dislocation and injury when moved, the author could not leave her home. The author’s doctors recommended that she receive hydrotherapy treatment to strengthen her muscles and joints. She applied for planning permission to build a hydrotherapy pool in her home as this was the only way she would be able to access one. The application was denied as the property extension required to build the pool would encroach on land on which construction was prohibited by Sweden’s Planning and Building Act. Sweden argued that the Planning and Building Act applied equally to all

85 F. Mégret, ‘Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality’, 30 *South African Journal on Human Rights* 252 (2014) 262.

86 Art 24(2)(c), CRPD.

87 Art 14(2), *ibid.*

88 Art 27(1)(i), *ibid.*

persons whether or not they had a disability and, as such, was not discriminatory (a formal equality argument). The author argued that the natural application of the law was discriminatory as it had an indirectly discriminatory effect on her, by denying her equal access to rehabilitation and improved health. The Committee agreed with the author:

A law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat different persons whose situations are significantly different.⁸⁹

The Committee found that granting of planning permission would, in the context, not impose an ‘undue or disproportionate burden on the state’. It found that the author’s rights to equality before the law, the entitlement, without discrimination, to the protection of the law (Article 5(1)) and the requirement for states parties to take appropriate measures to ensure the provision of reasonable accommodation (Article 5(3)) had been violated.

5. 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’.⁹⁰

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. Accessibility should be provided to all persons with disabilities, regardless of the type of impairment, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, legal or social status, gender or age. Accessibility should especially take into account the gender and age perspectives for persons with disabilities.⁹¹

89 CmmttRPD, *H.M v Sweden*, Comm no. 3/2011, UN doc CRPD/C/7/D/3/2011, 21 May 2012, §8.3.

90 Art 9, CRPD.

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

Reasonable accommodation is often confused with accessibility, but the two obligations are not the same. Accessibility obligations relate to groups, and apply *ex ante*, meaning before the person with a disability has tried to access the right, as would be the case where a local authority is constructing a public library, in which case it has an obligation to make the building accessible (e.g. by building ramp access).⁹² In contrast, reasonable accommodation applies only on an *individual* level in a particular context and, as such, is normally an *ex nunc* duty. It applies in a particular situation and in a particular context, often, but not necessarily upon the request of the person with a disability. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination is ensured, taking the human dignity, autonomy and choices of the individual into account.⁹³ For example, if a person who wishes to use a public library finds that the loan of books is only for two-week periods but she or he, owing to a learning impairment, needs three weeks to read a book and is therefore granted a three-week loan, this would be a reasonable accommodation.

Furthermore, unlike reasonable accommodation, which only applies to the extent that it does not cause an ‘undue burden’, the duty to implement accessibility is unconditional. As explained by the Committee on the Rights of Persons with Disabilities, ‘the entity obligated to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities’.⁹⁴

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 (discussed further in Section 5.C)

B. THE CRPD AND ARMED CONFLICT

An additional feature of the Convention is its application during armed conflict and its relationship with IHL. The CRPD is one of only two human rights treaties (the other being the Convention on the Rights of the Child)⁹⁵ 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.

⁹² The CmmttRPD has confirmed that the ‘duty to provide accessibility is an *ex ante* duty’, *ibid*, §25.

⁹³ *Ibid*, §26.

⁹⁴ *Ibid*, §25.

⁹⁵ Art38(1), Convention on the Rights of the Child.

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.

1. THE APPLICATION OF THE CRPD TO NON-CITIZENS OF A STATE PARTY

At the outset of considering the application of the CRPD to the armed conflict setting, it should be noted that the CRPD applies to all persons within the territory of a state party irrespective of their nationality. This is not a point of controversy and is the case for all human rights treaties, albeit that there may be some treaty provisions that specifically apply to aliens.⁹⁶ Article 1 states the CRPD’s purpose to be to ‘promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’ (emphasis added). The Optional Protocol to the CRPD also permits any individual, regardless of nationality, to bring a complaint before the Committee on the Rights of Persons with Disabilities, further emphasizing that no distinction is to be made in the enjoyment of CRPD rights between nationals and aliens within the territory of a state party.⁹⁷

2. 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 extraterritorial application of human rights law involves complex legal issues and is still the subject of debate amongst international law scholars and practitioners. What can be noted at the outset is that the CRPD does not expressly stipulate its geographical scope of application, which would ordinarily be, at the very least and

⁹⁶ E.g., Art 13, ICCPR, regarding expulsion of aliens lawfully in the territory of a state party, and Art 4 concerning derogations, which does not include discrimination on grounds of nationality as a prohibited form of discrimination in this context.

⁹⁷ See Human Rights Committee (HRCtee), *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, §10; Committee against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, UN doc CAT/C/GC/2, 24 January 2008, §7; Art 1(1), CRPD Optional Protocol.

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).⁹⁸ 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.

The conclusion that the CRPD will apply to a state party's extraterritorial conduct is not controversial and is consistent with the approach of international courts and human rights treaty bodies.⁹⁹ Indeed, the Human Rights Committee, the treaty body responsible for monitoring implementation of the ICCPR (which unlike the CRPD, does contain an express jurisdiction clause in its Article 2), has described it as 'unconscionable to interpret the responsibility under [...] the Covenant so as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.¹⁰⁰ The Human Rights Committee has gone on to conclude that a state party must respect and ensure the rights laid down in the ICCPR with respect to anyone within the power or effective control of that state party, even if outside the state territory. According to the Committee, ICCPR rights apply 'to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation'.¹⁰¹ More recently, the Committee has gone further and added that a state party has an obligation to respect the right to life of 'persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner'.¹⁰² This would cover situations where a state has no effective control on the ground, but where individuals or groups are targeted from a distance or from the air.

98 Art. 4(1)(d), CRPD.

99 See International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, §§106–13; ICJ, *Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment, 19 December 2005, §19; HRCtee, concluding that the reference to jurisdiction within the ICCPR 'is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred', *López Burgos v Uruguay*, Case no 52/79, 1984, §12.2; see also European Court of Human Rights (ECtHR), *Al-Skeini and Others v United Kingdom*, Judgment, App no 5521/07, 7 July 2011, §137.

100 *López Burgos*, supra fn 99, §12.3.

101 HRCtee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, §10.

102 HRCtee, *General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN doc CCPR/C/GC/36, 30 October 2018, §63.

Parties to the CRPD, including the EU, will in such circumstances take their CRPD obligations with them when they act outside of their territory, including within peacekeeping operations, albeit that those obligations might not apply to the same extent as within the territory of States Parties (as explained below).

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').¹⁰³ According to the spatial model, jurisdiction will be established when a state exercises *de facto* effective control over a geographical area. The spatial model approach to jurisdiction has been adopted by numerous courts and international bodies including the European Court of Human Rights,¹⁰⁴ the Human Rights Committee, and the International Court of Justice (ICJ).¹⁰⁵ It is irrelevant how the state came to be exercising effective control over the territory – whether lawful (e.g. by invitation or by treaty of cession) or unlawful (i.e. in violation of *jus ad bellum* norms). All that matters is the existence of such control.¹⁰⁶ In such a situation, the state will have human rights obligations towards the population of the territory that it controls. 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. The Human Rights Committee, in a case concerning abduction by Uruguayan state agents of an individual on Argentinian territory, concluded that 'individuals subject to its jurisdiction' is not a reference to the place where the violation occurred, 'but rather to the relationship *between the individual and the State* in relation to a violation of any rights set forth in the Covenant, *wherever they occurred*' (emphasis added).¹⁰⁷ Where a state party is exercising authority and control over an individual extraterritorially (e.g. by detaining that person at

103 Marco Milanovic persuasively argues for a third model 'based on the distinction between the duty to respect and the duty to secure human rights that solves these borderline cases. In short, because duty to "secure" or "ensure" alludes to the full scope of obligations – negative and positive – there is no reason that the State would not be responsible for breaches of the negative duty to respect human rights even where it does not exercise jurisdiction in the spatial or personal sense described above. Rather, the State should respect human rights irrespective of the traditional notion of jurisdiction to the extent that it can.' M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford University Press, 2011.

104 ECtHR, *Loizidou v Turkey*, Preliminary Objections, App no 15318/89, 23 March 1995.

105 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, supra fn 99, §§106–13; *Armed Activities on the Territory of the Congo* Judgment, supra fn 99, §19.

106 ECtHR, *Loizidou v Turkey*, Judgment, App no 40/1993/435/514, 23 February 1995, §62.

107 *López Burgos*, supra fn 99, §12.3.

a checkpoint), the human rights norms that ‘are relevant to the situation’ will apply.¹⁰⁸ 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,¹⁰⁹ 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 (see Section 5.C.5) for further discussion on the treatment of detainees with a disability).¹¹⁰ 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,¹¹¹ 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.

As mentioned above, in the UN Human Rights Committee’s General Comment on Article 6 (right to life), the Committee appears to have extended the personal model (or even created a third model) by taking an ‘impact approach’ to extraterritorial jurisdiction:

In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.¹¹²

It remains unclear what the threshold of ‘impact’ on the right to life might be within this context. Nevertheless, the Committee’s position is a welcome development and may have particular relevance to persons with disabilities, for example in circumstances where their ability to access medical and habilitation services is impacted upon by a military blockade.

3. 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 discussed, it is then necessary to consider the interrelationship between the CRPD and IHL. As affirmed in Article 11 of the CRPD, IHRL applies alongside IHL in situations of armed conflict. 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.

¹⁰⁸ *Al-Skeini*, supra fn 99, §88.

¹⁰⁹ Arts 10 and 15, CRPD.

¹¹⁰ Arts 25, 9 and 5, CRPD.

¹¹¹ Arts 27 and 30, *ibid*.

¹¹² HRCtee, *General Comment No 36*, supra fn 102, §63.

The relationship will ultimately always be context dependent. One can envisage four clear scenarios that will impact this relationship: firstly, where IHL and human rights law, in this instance the CRPD, are aligned. Secondly, where the two bodies of law complement each other, including where one body of law provides more detail on the scope or content of a norm. Thirdly, where one body of law is silent on an issue that the other body of law expressly addresses. Fourthly, where the two bodies of law are at odds with one another on a particular issue.

It is worth noting that the CRPD expressly addresses the situation where another body of law – whether domestic or international – provides more conducive norms to the realization of the rights of persons with disabilities than are contained in the Convention.¹¹³ In such a situation, nothing in the CRPD shall affect the implementation of the more conducive norm. In other words, the more conducive body of law will have priority over the CRPD. This is an even more generous (and rights-friendly) approach than that in the Vienna Convention on the Law of Treaties, which requires that any given treaty must be interpreted in harmony with other applicable rules of international law.¹¹⁴

In determining the relationship between IHRL and IHL, one form of the *lex specialis* approach has been invoked by international courts and tribunals.¹¹⁵ According to which, the more specific law to the given situation informs the more general law. For example, when considering the relationship between the right to life under Article 6 of the ICCPR and the relevant rules of IHL, the ICJ concluded:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and deduced from the terms of the Convention itself.¹¹⁶

In other words, IHL in the context of armed conflict defines the meaning of IHRL when it comes to deciding whether a particular weapon in warfare is to be considered an arbitrary deprivation of life in violation of human rights law. In its *Wall Advisory Opinion* the ICJ considered the relationship between the entirety of IHL and human rights rather than in relation to one specific norm (as was the case in the *Nuclear Weapons* case). The Court concluded:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be

¹¹³ Art 4(4), CRPD.

¹¹⁴ Art 31(3)(c), Vienna Convention on the Law of Treaties 1969.

¹¹⁵ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, §25.

¹¹⁶ *Ibid*.

exclusively matters of human rights law; yet others may be matters of both these branches of law. In order to answer the questions put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.¹¹⁷

In the case concerning *Armed Activities on the Territory of the Congo*, the ICJ quoted its earlier opinion in the *Wall Advisory Opinion* but dropped the reference to *lex specialis* and instead concluded that ‘both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration’.¹¹⁸ Although reference to *lex specialis* is not made by the Court, the effect is the same as in earlier ICJ decisions, but the judgment is couched in language that avoids any implication that one body of law replaces the other; instead the Court makes it clear that both bodies of law may be applicable and capable of informing the legal regulation of the particular situation.¹¹⁹

Similarly, the Human Rights Committee has also concluded that both IHL and human rights law remain applicable and capable of informing the content of the legal regulation of the given situation. In its *General Comment No 31*, the Committee found that although ‘in respect of certain Covenant Rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive’.¹²⁰

When considering the relationship between IHL and the CRPD, one must take into account the realities of the factual situation of armed conflict. The CRPD will not always apply in peacetime in the same way it does in armed conflict – nor will any human rights treaty. Considerations will have to be made as to the feasibility and effectiveness of any possible application. Interpretation of States Parties’ obligations within the CRPD will need to be adapted to the realities of the armed conflict setting, so long as this interpretation remains in compliance with ‘the fundamental purpose’ of the right in question.¹²¹ The eight principles of the CRPD (discussed in Section 4.A.2) will have particular importance as an interpretative tool.

A further point to be made about the relationship between IHL and the CRPD is that the Committee on the Rights of Persons with Disabilities has an important role to

117 *Wall*, Advisory Opinion, supra fn 99, §106.

118 *Armed activities on the Territory of the Congo*, Judgment, supra fn 99, §216.

119 Milanovic, *Extraterritorial Application of Human Right Treaties*, supra fn 103, pp 229–259; D. 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, pp 81–88.

120 HRCtee, *General Comment No 31*, supra fn 101, §11. The Inter-American Court of Human Rights (IACtHR) has also recognized the complementarity of IHL and IHRL and appears to also take the approach of balancing these two bodies of law. See IACtHR, *Mapiripan Massacre v Colombia*, Judgment, 15 September 2005, §115; IACtHR, *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia*, Judgment, 20 November 2013, §221.

121 ECtHR *Hassan v the UK*, Judgment, App no 29750/09, 16 September 2014, §105.

play in the contextual interpretation and, therefore, enforcement of *both* these bodies of law.¹²² 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 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.

In sum, when considering the relationship between IHL and the CRPD, it is beyond doubt that the CRPD continues to apply during situations of armed conflict. The extent to which the CRPD will apply will be context dependent.¹²³ Going back to our four scenarios, 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),¹²⁴ 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 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.¹²⁵ 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.

In the third scenario, 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

122 States Parties themselves have affirmed that the CRPD continues to apply in armed conflict and its complementarity with IHL, and through ratifying the Optional Protocol have expressly given the Committee the authority to consider both bodies of law in relation to individual complaints.

123 Murray et al, *Practitioners’ Guide to Human Rights Law in Armed Conflict*, supra fn 119, p 88. Murray et al distinguish between ‘active hostilities’ where IHRL remains applicable but IHL is the primary framework, and ‘security operations’ where IHRL provides the primary framework and IHL must be interpreted as secondary to it.

124 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. Though, notably, the CRPD greatly extends the traditional understanding of discrimination to include failure to provide reasonable accommodation, which is therefore much broader than the prohibition on ‘adverse distinction’ (see Section 4.A.4 for further discussion on this).

125 Arts 9 and 25, CRPD.

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.’¹²⁶ 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.¹²⁷ 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.

In our last scenario, 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.¹²⁸

In determining the application of the CRPD in a situation of armed conflict the following questions should be considered:

1. Is a state party to the CRPD exercising extraterritorial authority and control over territory or an individual?
2. If jurisdiction exists, which rights have been engaged? Are these rights non-derogable?
3. Does the state party have the authority and ability to guarantee the right or rights in question in the factual situation?
4. Is IHL applicable and, if so, does it affect the application of the CRPD obligation?

126 Murray et al, *Practitioners’ Guide to Human Rights Law in Armed Conflict*, supra fn 119, §4.67.

127 ICRC Customary IHL Study, Rule 20.

128 Art 30, Geneva Convention III (GCIII) allows for prisoners of war with ‘mental disease’ to be held in isolation. See the discussion of this issue in Section 5.C.5.

4. 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. The occupation extends only to the territory where such authority has been established and can be exercised.’¹²⁹ Territory will be considered occupied when a hostile state has ‘effective control’ over it.¹³⁰ Whether or not ‘effective control’ can be established will be context dependent and will vary from one circumstance to the next. Relevant factors may include ongoing resistance, troop density, population density, effective command and control, organization of hostile actors, the terrain (sea or land), control of the sky, control of natural resources, control of infrastructure and control of cyberspace.

In theory, the existence of an occupation will satisfy the ‘effective control’ test required to establish extraterritorial jurisdiction, and therefore once occupation by another state has been established, international human rights obligations will be applicable.¹³¹ 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,¹³² and to refrain from prohibited acts, such as torture, cruel, inhuman or degrading punishment and discrimination based on impairment.¹³³ 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.

129 Art 42, 1907 Hague Regulations.

130 The term ‘effective control’ is not found in treaty law but rather is a test that has been developed in legal discourse on occupation. See ICTY, *Prosecutor v Duško Tadić*, Trial Chamber, Judgment, 7 May 1997, Case no IT-94-1-T, §580, amongst others.

131 *Armed Activities on the Territory of the Congo*, Judgment, supra fn 99, §19.

132 Art 17, CRPD.

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

5. 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 states may become parties to international treaties’.¹³⁴ 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.

Common Article 3 states that it contains obligations for ‘each Party to the conflict’ (emphasis added). These obligations are to persons not taking active part in the hostilities, including those placed *hors de combat* by sickness, wounds, detention or ‘any other cause’, which would of course include persons with disabilities, irrespective of whether their impairment is conflict related. The obligations include treating humanely persons not taking active part in the hostilities, without any adverse distinction, which would include on the basis of impairment (see Section 5.B.3 for further discussion). Common Article 3 prohibits murder, violence against the person, torture and cruel treatment, hostage-taking, outrages upon personal dignity, in particular humiliating and degrading treatment, and sentences or executions without judicial safeguards. Of further relevance to *some* persons with disabilities, Common Article 3 includes a positive obligation to collect and care for the wounded and sick (see text box ‘wounded and sick’). The protections offered by APII extend those contained in Common Article 3, with extra protections for internees, civilians, children and medical and religious personnel. Clearly all these additional protections would also apply to persons with disabilities owing to the prohibition on adverse distinction. However APII, and therefore the additional obligations it contains, will only apply to an ANSA that controls part of the territory of a state party to APII.¹³⁵

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. The main arguments put forward as to why ANSAs are not or should not be bound by IHRL are that human rights law is considered, doctrinally, to apply only to states. Secondly, most human rights treaties do not expressly refer to ANSAs (this is certainly true of the CRPD),¹³⁶ and lastly, some states appear hesitant to recognize ANSAs as having human rights obligations because they fear that recognizing these groups may give them legitimacy. Conversely, sev-

¹³⁴ Special Court for Sierra Leone, *Prosecutor v Sam Hinga Norman*, Case no SCSL-2004-14-AR72(E), Appeal Chamber, Decision, 31 May 2004, §22.

¹³⁵ Art 1, APII.

¹³⁶ There are a few exceptions to this, including Art 4 of the Optional Protocol the Convention on the Rights of the Child on the involvement of children in armed conflict, which states that ‘armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons aged under 18’.

eral arguments have been put forward as to why and how ANSAs are bound by human rights law. Firstly, by looking to the foundational basis of human rights that human rights ‘belong to the individual in recognition of each person’s dignity. The implication is that these natural rights should be respected by everyone and every entity.’¹³⁷ A second approach is through the application of customary international law. Although customary international law will not include all the norms that can be found in human rights treaty law, it still serves as a tool for holding ANSAs to account because the rights and obligations enshrined as customary are ‘generally applicable and binding on every entity that has the capacity to bear them’.¹³⁸ In this regard, a study of customary international law from a disability perspective would be helpful.

The practice of the UN increasingly supports the application of IHRL to ANSAs. Commissions of inquiry, Special Rapporteur reports and UN Security Council, General Assembly and Human Rights Council resolutions have expressly referred to, and affirmed, the human rights obligations of ANSAs on numerous occasions. A 2017 study identified over 125 UN Security Council resolutions and approximately 65 General Assembly resolutions that refer to the human rights obligations and/or responsibilities of ANSAs.¹³⁹ 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.¹⁴⁰ There are a number of recent scholarly studies that detail which human rights obligations should be considered to apply to ANSAs.¹⁴¹

6. 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.¹⁴² This position has been widely affirmed by the UN Security Council, the UN Sec-

¹³⁷ A. Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement*, Geneva Academy, 1 February 2010.

¹³⁸ A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006, pp 85–86.

¹³⁹ J. Burniske, N. Modirzadeh and A. Lewis, *Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly*, Harvard Law School Program on International Law and Armed Conflict, June 2017. See also A. Bellal, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, Academy In-Brief no 7, Geneva Academy, December 2016.

¹⁴⁰ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/19/69, 22 February 2012, §106. Note that the Commission of Inquiry made this finding in a situations where it found that IHL was not yet applicable to the conduct of the ANSAs (in this case, the Free Syrian Army).

¹⁴¹ See D. Murray, *Human Rights Obligations of Non-State Armed Groups*, Hart, 2016; K. Fortin, *The Accountability of Armed Groups Under Human Rights Law*, Oxford University Press, 2017; T. Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups Under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, 2018.

¹⁴² Bellal, *Human Rights Obligations of Armed Non-State Actors*, supra fn 139, p 26.

retary-General, treaty bodies, UN special procedures, commissions of inquiry and fact-finding missions, as well as the OHCHR.¹⁴³ 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’.¹⁴⁴ 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.¹⁴⁵ 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.

In sum, ANSAs participating in an armed conflict have both IHL and human rights law obligations. Although the exact scope of international human rights obligations of ANSAs is difficult to determine in the abstract, there is nothing stopping ANSAs from declaring themselves bound by these norms. Indeed, Geneva Call’s Deeds of Commitment for the Protection of Children from the Effects of Armed Conflict, and for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination¹⁴⁶ have both been signed by over 60 ANSAs. A similar deed of commitment related to the prohibition of discrimination against persons with disabilities in armed conflict would add clarity to and improve protection of ANSA obligations vis-à-vis persons with disabilities.

Although it can be concluded that at least some human rights obligations apply to ANSAs, we do not yet have any specific guidance on this with regard the obligations contained within the CRPD. Indeed, as situations of armed conflict expressly fall under the mandate of the Committee on the Rights of Persons with Disabilities, it is hoped that it is only a matter of time before the Committee makes clear its position on this. In the meantime, it is suggested that, at the very least, ANSAs are obligated to respect the human rights of persons with disabilities that are con-

143 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.

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

145 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.

146 Geneva Call, Deed of Commitment for the Protection of Children from the Effects of Armed Conflict, 2010; Geneva Call, Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination. Both deeds contain IHL and IHRL norms and are available on Geneva Call’s website, <https://genevacall.org/how-we-work/deed-of-commitment/> (last accessed 9 April 2019).

sidered to be jus cogens norms, and that the applicable human rights obligations will be developed to cover the full remit of rights contained in the CRPD where the ANSA exercises full and effective control over persons and has the capacity to implement those Convention rights.

7. OBLIGATIONS OF HUMANITARIAN ACTORS TOWARDS PERSONS WITH DISABILITIES

Some attention has been paid to the standards applicable to the organizations and individuals involved in humanitarian action in the context of armed conflict and other humanitarian crises. Organizations can choose to commit to the Core Humanitarian Standard on Quality and Accountability. This standard contains nine commitments designed to, among other things, ‘facilitate greater accountability to communities and people affected by crisis, and improve the quality of services provided to them’. The first commitment includes as a key action that humanitarian actors ‘[d]esign and implement appropriate programmes based on an impartial assessment of needs and risks, and an understanding of the vulnerabilities and capacities of different groups’.¹⁴⁷ While a footnote explains that such an understanding means avoiding distinction with regard to persons with disabilities, referencing such a non-discrimination approach on its own is a long way from the approach outlined in the CRPD, explained in the present briefing. Other initiatives, such as the Sphere Association and its Charter have stressed the importance of disaggregated data, and include more detailed guidance.¹⁴⁸

The extent to which the obligations of humanitarian actors extend beyond the commitments undertaken through such sector-wide initiatives is rather under-researched,¹⁴⁹ and again it could be helpful for the Committee on the Rights of Persons with Disabilities to consider the application of the Convention in this context with a view to making recommendations to humanitarian organizations.

147 See Key Action 1.2 (footnote omitted), Core Humanitarian Standard on Quality and Accountability, 2014, <https://corehumanitarianstandard.org/the-standard/language-versions> (last accessed 9 April 2019).

148 *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response*, 4th edn, Sphere Association, 2018.

149 For an early discussion see Clapham, *Human Rights Obligations of Non-State Actors*, supra fn 138, pp 310–316.

5. PERSONS WITH DISABILITIES IN TIMES OF ARMED CONFLICT

As illustrated in the introduction to this briefing, armed conflict has a disproportionate and devastating impact on persons with disabilities.

This chapter considers the general IHL provisions of humane treatment and those which prohibit adverse distinction that should limit the impact of armed conflict on all persons, including persons with disabilities. The provisions selected are by no means an exhaustive list of all the issues that affect persons with disabilities in times of armed conflict. Many more issues require consideration, such as fair trial guarantees and the situation of sieges, but such issues are beyond the scope of this study. Instead, the selected provisions serve to demonstrate what is at stake when a disability inclusive approach is not taken and how equality in the provisions of these IHL protections can be achieved.

A. WHAT IS ARMED CONFLICT?

Under IHL, there are two types of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC). The classification of a conflict as either an IAC or NIAC is important, since the legal framework that applies differs between the two types of conflict and determination of the type of conflict will therefore impact on the rules and context to be examined when considering persons with disabilities. That said, it should also be noted at the outset that the existence of one does not rule out the parallel existence of the other. Several different armed conflicts, comprising one or both categories, may be ongoing at the same time in any given geographic location.¹⁵⁰

An IAC exists in one of four possible situations, the most common of which is where there is armed force between two or more states. There is no minimum requirement as to the level of force used between the parties. As affirmed by the ICRC Commentary on Common Article 2 to the Geneva Conventions, '[e]ven minor skirmishes between the armed forces, be they land, air or naval forces would spark an international armed conflict and lead to the applicability of humanitarian law.'¹⁵¹ An IAC would also be found to exist where one state invades and occupies another, even if there is no armed resistance by the state under invasion.¹⁵² Thirdly, an IAC may exist when one state significantly supports an ANSA operating in violent

150 For a detailed description and analysis on the classification of armed conflicts and the applicable norms see A. Bellal (ed), *The War Report: Armed Conflicts in 2017*, Geneva Academy, 2018, pp 17–29. For a list and analysis of current armed conflicts, see Rule of Law in Armed Conflicts (RULAC), www.rulac.org.

151 ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2016, §§236–237.

152 Common Art 2 to the four 1949 Geneva Conventions.

conflict with another state. The support must be such that it amounts to the supporting state having 'overall control' over the actions of the ANSA. The last, and controversial, potential basis for the existence of an IAC is in circumstances where a people is fighting 'against colonial domination and alien occupation and against racist regimes in the existence of their right to self-determination'.¹⁵³ However, 'the threshold of armed violence for such a conflict to occur is not settled, but it is probably the same as for an IAC – that is, much lower than it is for an NIAC'.¹⁵⁴

A NIAC exists when there is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.¹⁵⁵ The first constituent element concerns the level or intensity of violence needed within a state for it to rise to the threshold of a NIAC. Situations of 'internal disturbances and tensions', including 'riots, isolated and sporadic acts of violence' and other similar acts do not amount to a NIAC.¹⁵⁶ Also, the violence need not involve governmental authorities. An IAC may also be found to exist where intense armed violence occurs between two or more organized groups across an international border.¹⁵⁷ The authoritative criteria for the existence of a NIAC were provided by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case, which confirms the latter two elements and adds a third, temporal, element. According to the ICTY, for an NIAC to exist three cumulative requirements must be satisfied: there must be 'protracted armed violence'; the violence must be conducted *between* government forces and at least one *organized* ANSA, or *between* organized ANSAs (organized, meaning those with command and control structures, who typically possess weapons and have a significant capacity to conduct regular military operations).

B. SUMMARY OF IHL GOVERNING ARMED CONFLICT

IHL is a set of rules that seek, for humanitarian reasons, to limit the effects of armed conflict. These rules protect persons who are not, or who are no longer, participating in hostilities (civilians and persons *hors de combat*) and restricts the means and methods that may be used during the hostilities. As already mentioned, IHL does not apply to internal disturbances and isolated acts of violence, and the rules are in almost all respects applicable only for the duration of the armed conflict. The core treaties of IHL include, but are not limited to, the 1907 Hague Regulations; the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 relating to the protection of victims of armed conflict; the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, plus its two protocols; the 1972 Biological Weapons Convention; the 1980 Conventional Weapons Conven-

153 Art 1(4), API.

154 Bellal, *The War Report*, supra fn 150, p 22.

155 ICTY, *Prosecutor v Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, §70.

156 Art1(2), APII; Bellal, *The War Report*, supra fn 150, p 24.

157 Bellal, *The War Report*, supra fn 150.

tion and its five protocols; the 1993 Chemical Weapons Convention; the 1997 Ottawa Convention on anti-personnel mines; and the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Many IHL rules have crystallized into rules of customary international law.¹⁵⁸ It is this entire body of law, both treaty and customary, that the CRPD refers to when it states in its Article 11 that states parties ‘shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict’.

As discussed above, IHL distinguishes between IACs and NIACs. Where either an IAC and/or a NIAC exists, the fundamental rules of IHL, including those set out in Common Article 3 to the four Geneva Conventions,¹⁵⁹ will apply throughout the territory of the state or states concerned. However, the rules governing the conduct of hostilities, such as targeting assessments and precautions in attack, are limited to areas where combat is occurring. There must be a certain nexus between the act and the conflict for IHL to apply, as affirmed in the 2016 ICRC Commentary on the First Geneva Convention:

[T]he applicability of humanitarian law in the whole of the territory of a State party to the conflict does not mean that all acts within that territory therefore fall necessarily under the humanitarian law regime. As noted by the ICTY, a particular act must be ‘closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict’ for that act to be committed in the context of the armed conflict and for humanitarian law to apply... The applicability of humanitarian law to a specific act therefore requires a certain nexus between that act and the non-international armed conflict. Acts that have no such connection to the conflict generally remain regulated exclusively by domestic criminal and law enforcement regimes, within the boundaries set by applicable international and regional human rights law.¹⁶⁰

Although the exact IHL rules that are applicable will differ between an IAC and an NIAC, certain core provisions of IHL remain applicable to both. These core provisions will apply equally to persons with disabilities (as either a civilian or as a combatant rendered *hors de combat*) through the IHL norm of adverse distinction (see section 5.B.3). They include the principle of distinction, which requires all parties to a conflict to only target combatants and military objects; civilians and civilian

158 The ICRC has identified 161 rules of customary IHL, which can be found at ihl-databases.icrc.org (last accessed 11 April 2019).

159 Common Art 3 applies in both IACs and NIACs and requires humane treatment of all persons in enemy hands, without any adverse distinction. It prohibits murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial; requires that the wounded, sick and shipwrecked be collected and cared for; and grants the ICRC the right to offer its services to the parties to the conflict.

160 ICRC, Commentary on the First Geneva Convention, *supra* fn 151, §460.

objects may never be targeted.¹⁶¹ Failure to distinguish between the two, or to deliberately target civilians or civilian objects is a serious violation of IHL and may constitute a war crime (provided the requisite *mens rea* can be established).¹⁶² Any weapon or other means of warfare that is unable to discriminate between military objectives and civilians is therefore prohibited.¹⁶³ Furthermore, any weapon that causes superfluous injury or unnecessary suffering, or severe or long-term damage to the environment, is also prohibited. Such weapons include blinding laser weapons, expanding bullets, poison and chemical and biological weapons.¹⁶⁴ Although civilian casualties and damage to civilian objects may not always be avoidable, the rule of proportionality (discussed in further detail in Section 5.C.2) prohibits attacks that would be ‘excessive’ compared to the ‘concrete and direct military advantage anticipated’.¹⁶⁵ All feasible precautions including target verification and the provision of advanced effective warnings (discussed in further detail in Section 5.C.3) must be taken to avoid, and in any event, minimize incidental loss of civilian life, injury to civilians and damage to civilian objects.¹⁶⁶

Other core IHL provisions include the prohibition on recruiting or allowing children to participate in hostilities.¹⁶⁷ Recruiting children aged under 15 years is a war crime in both IACs and NIACs.¹⁶⁸ Murder, rape and other forms of sexual violence, torture or other cruel, inhuman or degrading treatment are prohibited against any person and at all times. Arbitrary deprivation of liberty is also prohibited.¹⁶⁹ Persons *hors de combat* because of sickness, injury, detention or other cause must be treated humanely.¹⁷⁰ Conviction and sentencing of persons must be subject to proceedings that respect the guarantees of fair trial, including the right to know the nature and cause of the accusation, the right to defence, the presumption of innocence and trial without undue delay by an independent, impartial and regularly constituted court.¹⁷¹

161 Preamble, St Petersburg Declaration, 1868; Arts 48, 51(2) and 52(2), API; Arts 13–18, APII. See also Art 8(2)(b) (i)-(v) and (e)(i)-(iv), Statute of the International Criminal Court (ICC Statute).

162 Arts 8(2)(b)(i) and 8(2)(e)(i), ICC Statute.

163 Art 51(4), API; ICRC Customary IHL Study, Rule 71.

164 St Petersburg Declaration, 1868; Hague Declaration Concerning Asphyxiating Gases; Hague Declaration Concerning Expanding Bullets; Art 23(e), 1899 Hague Regulations; Art 23(e), 1907 Hague Regulations; Art 35(2), API; Preamble, Convention on Certain Conventional Weapons; Art 6(2), Protocol II to the Convention on Certain Conventional Weapons; Art 3(3), Amended Protocol II to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention); ICRC Customary IHL Study, Rule 70.

165 ICRC, Customary IHL Study, Rule 14; Art 51(5)(b) and Art 57(2)(a)(iii), API.

166 Art 2(3), 1907 Hague Conventions (IX); Art 57(1), API.

167 Art 77(2), API; Art 4(3)(c), APII.

168 Art 8(2)(b)(xxvi) and (e)(vii), ICC Statute.

169 ICRC Customary IHL Study, Rule 99.

170 Common Art 3, Geneva Conventions; Art 12(1), GCI; Art 12(1), GCII; Art 13, GCIII; Arts 5 and 27, GCIV; Art 75(1), API; Art 4(1), APII.

171 ICRC Customary IHL Study, Rule 100; Art 49, GCI, fourth paragraph; Art 50, GCII, fourth paragraph; Arts 102–108, GCIII; Arts 5 and 66–75, GCIV; Art 75(4), API; Art 6(2), APII.

1. 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.¹⁷² 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.

As explained in section 3.C, 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, 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.¹⁷³ A dynamic and evolved interpretation of IHL is also necessary and possible with respect to disability. However, although it is true that the ‘CRPD is a new normative landscape against which IHL obligations must be assessed and accordingly refreshed’,¹⁷⁴ we should be wary of not asking more of IHL than it can possibly achieve. IHL has a narrow and pragmatic mandate to limit the catastrophic effects of armed conflict. Its role is not to bring about the societal changes demanded by the CRPD. Instead, the CRPD calls for specific attention to be

172 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 (see discussion of the medical model in Section 3.B). According to the charity approach, persons with disabilities are passive victims of their impairment in need of charity and protection (see discussion of the charity model in Section 3.A).

173 For a feminist critique of IHL and the evolving recognition of gender-based violence in armed conflict, see: J. Gardam, ‘Women and Law of Armed Conflict: Why the Silence?’, 46, *International & Comparative Law Quarterly* 1 (1997) 72; C. Lindsey, ‘Women and War – An Overview’, 839 *IRRC* (2000) 561; C. Chinkin, ‘Gender and Armed Conflict’, in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2014, p 675.

174 Lord, ‘Persons with Disabilities in International Humanitarian Law’, *supra* fn 19, p 172.

paid to the experiences of persons with disabilities within armed conflict and offers the opportunity for IHL norms to be interpreted in light of these experiences, whilst recognizing IHL’s limitations.

2. 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’,¹⁷⁵ ‘cases of ... mental disease’, ‘the blind’,¹⁷⁶ ‘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’.¹⁷⁷

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.¹⁷⁸ Although 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

175 Art 17, GCIV.

176 Art 30, GCIII.

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

178 See, by way of example, ICRC Advisory Service on International Humanitarian Law, *International Humanitarian Law and Persons with Disabilities*, 2017, which includes the provisions of IHL that prohibit weapons that cause superfluous injury or unnecessary suffering in its legal analysis of IHL and persons with disabilities; Hart et al, ‘Making Every Life Count’, *supra* fn 19.

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.

3. GENERAL PRINCIPLES OF IHL RELATING TO PERSONS WITH DISABILITIES

a. Humane Treatment

From the drafting of its earliest text, IHL sought to ensure humane treatment of combatants with injuries and disabilities resulting from conflict.¹⁷⁹ These protections have now been extended to also include civilians. In accordance with the general provisions of IHL, civilians and persons *hors de combat* because of sickness, injury, detention or other cause must be treated humanely.¹⁸⁰ ‘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.¹⁸¹ 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.¹⁸² 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.

179 See, by way of example, Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864.

180 The requirement of humane treatment is contained in Common Art 3 to the four Geneva Conventions, as well as specific provisions within the Geneva Conventions and Additional Protocols I and II. Art 12, GC I, first paragraph; Art 12, GC II, first paragraph; Art 13, GC III; Arts 5 and 27, GC IV, first paragraph; Art 75(1), API; Art 4(1), APII. The obligation is also a norm of customary international law, ICRC Customary IHL Study, Rule 87.

181 ICRC Customary IHL Study, Rule 87.

182 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; HRCtee, *CCPR General Comment No 20: Article 7 (Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992; HRCtee, *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.

b. 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, birth or wealth or ‘any other similar criteria’ is prohibited.¹⁸³ 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,¹⁸⁴ such as repatriation of seriously wounded prisoners of war.¹⁸⁵ The ICRC Commentary to GCIII states that this list is not exhaustive, confirming that other grounds for privileged treatment may be included, and affirms that ‘[a]bsolute equality might easily become injustice’ if applied without regard to such considerations.¹⁸⁶ 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.¹⁸⁷ Failure to ensure equal access, including through differential treatment, is of itself a form of discrimination and therefore unlawful (for further discussion on the CRPD and the principle of non-discrimination see Section 4.A.2).

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 (discussed further at Section 4.A.4) 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.

183 Common Art 3; Art 16, GC III; Art 13, GC IV; Art 75(1), API; Art 4(1), APII; ICRC Customary IHL Study, Rule 87.

184 Art 16, GC III.

185 Art 109(3), GC III.

186 J. S. Pictet (ed), *Third Geneva Convention Relevant to the Treatment of Prisoners of War*, ICRC, 1960, p 154. The Commentary to GC IV contains a similar finding in relation to Art 27, and also states: ‘[i]t should be noted too that the prohibition of all adverse distinctions in the treatment given to protected persons is not merely a negative duty. It implies an active role. An Occupying Power is, for example, bound to abrogate any discriminatory laws it may find in occupied territory, if they place difficulties in the way of the application of the Convention’, J. S. Pictet (ed), *Fourth Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, 1958, p 207.

187 Art 5(4), CRPD.

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.¹⁸⁸ Parties to a conflict must take *all possible measures* to search for, collect and evacuate the wounded and sick.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ However, although it may be 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.¹⁹² 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. These could include, for example, the provision of medical equipment such as catheters or services such as physiotherapy, which might not be an immediate medical need but would make the life of a wheelchair user more comfortable and prevent

188 ICRC Customary IHL, Study, Rule 47.

189 Ibid, Rule 109; Common Art 3; Art 15, GC1; Art 18, GCII; Art 16, GCIII; Art 10, API; Art 8, APII.

190 ICRC Customary IHL Study, Rule 110.

191 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; Art 8(a), API considers that the protection and care due to the wounded and sick is also due to persons with a disability and to other persons who may be in need of immediate medical assistance or care, such as the infirm ... and who refrain from any act of hostility’ (emphasis added).

192 Preamble(e), CRPD.

health complications in the future. 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 chapter, 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.

C. 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.¹⁹³ It should, however, be borne in mind that within the conflict setting the degree of application of the CRPD will be context dependent (see Section 4.B).

1. 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, and includes:

- The principle of distinction; parties to a conflict must distinguish at all times between civilians and civilian objects, and combatants and military objects. Attacks may only be directed against combatants and military objects,¹⁹⁴ and never against civilians and civilian objects. Thus, indiscriminate attacks, meaning those that are not directed at a specific military ob-

193 Art 11, CRPD.

194 The IHL governing IACs defines ‘combatants’ as members of the armed forces of a party to the conflict including members of an armed-group party to the conflict, Art 43, API. The status of ‘combatant’ in a NIAC does not exist; however, an individual directly participating in the hostilities is not immune from attack (Art 13(3), APII; ICRC Customary IHL Study, Rule 6) and it is argued that, in NIACs, members of an armed group with a continuous combat function are in a similar position, N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, May 2009. Military objectives are defined as those ‘objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’, Art 52(2), API.

ject, or those that use means or methods that cannot be directed at a specific military object, or the effects of which cannot be limited, are prohibited.

- The rule of proportionality (discussed further below).
- Feasible precautions to be taken to spare civilians and civilian objects from the effects of an attack, including using means or methods of attack that keep to a minimum the incidental harm to civilians and civilian property, providing effective warnings (discussed further below).
- The prohibition of weapons that cause superfluous injury or unnecessary suffering.

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 (see Section 4.B.3). 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 (discussed earlier in Section 4.B.3). 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,¹⁹⁵ retrospective state investigations into conflicts¹⁹⁶ and UN-mandated commissions of inquiry¹⁹⁷ indicates

195 Including, but not limited to, Australia's Law of Armed Conflict (LOAC) Manual, Australian Defence Force Doctrine, 2006; Canada's Law of Armed Conflict at Operational and Tactical Level, 2001; France's *Fiche de Synthèse sur les Règles Applicables dans les Conflits Armés*, 432/DEF/EMA/OL.2/NP, 1992, and *Manuel de droit des conflits armés*, supra fn 191; Ireland's Basic Guide to the Law of Armed Conflict, TP/TRG/01-2005, Director of Defence Forces Training, Department of Defence, 2005; Israel's Rules of Warfare on the Battlefield, Military Advocate-General's Corps Command, IDF School of Military Law, 2006; New Zealand's Manual of Armed Forces Law: Law of Armed Conflict, vol 4, New Zealand Defence Force, 2017; Sweden's International Humanitarian Law in Armed Conflict, Swedish Ministry of Defence, January 1991; Ukraine's Manual on the Application of the Rules of International Humanitarian Law in the Armed Forces of the Ukraine, Manual Order 400, Ministry of Defence, September 2004; the United Kingdom's, The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, as amended in May 2013 by Amendment 7; Switzerland's Regulation on Legal Bases for Conduct during an Engagement, 2005; and the Danish Military Manual on International Law Relevant to Danish Armed Forces in International Operations, 2016. Note that the majority of these manuals were drafted before the CRPD, which may in part explain their failure to address disability.

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

197 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 20; 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 2018. The Report of the Fact-Finding Mission on the Gaza Conflict, supra fn 11, does undertake a dedicated, albeit brief, analysis of the impact of the 2008 Gaza conflict on persons with disabilities (§§1283–1291). Most recently, the Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory details a number of emblematic cases of killings of persons with disabilities, UN doc A/HRC/40/CRP.2, 18 March 2019, §718.

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.¹⁹⁸ In contrast, the age and gender impact of these norms is sometimes given some consideration.¹⁹⁹

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)²⁰⁰ 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.²⁰¹ 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 policies adopted to overcome discriminatory barriers are reflective of persons with disabilities' lived experience.²⁰²

2. 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 cause incidental loss of civilian life, injury to civilians, damage

198 The Danish Military Manual expressly recognizes the application of the CRPD to the conduct of the Danish Armed Forces, and reiterates its obligation to ensure and promote the full realization of human rights for all persons with disabilities (though it does not expressly state how Denmark interprets the provisions of the CRPD in relation to the conduct of hostilities). The manual concludes that in situations of risk, including armed conflict, persons with disabilities may need 'special support', but Denmark takes the position that although this 'support must be provided primarily by the territorial State there may be situations in which the Danish armed forces should be attentive to the specific needs of persons with disabilities. This applies, for instance, in evacuation situations in which impaired mobility can be remedied or in communications with the civilian population in which steps must be taken to ensure that persons with disabilities are capable of engaging in dialogue with the Danish armed forces', Danish Military Manual, supra fn 195, p 95.

199 See e.g., Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict, A/HRC/29/52, 24 June 2015, §37, where the impact on women of airstrikes on residential buildings during the conduct of hostilities was considered.

200 To date, no UN-mandated commission of inquiry has had a person with a (publicly declared) disability serve on it.

201 WHO, *World Report on Disability*, supra fn 35, p 29.

202 States parties are obligated '[i]n the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities' to 'closely consult with and actively involve persons with disabilities', Art 4(3), CRPD. For guidance on implementation of this provision see CommtrRPD, *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.

to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.²⁰³

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'.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶

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.²⁰⁷ Nevertheless, where there are doubts about the preponderance of the concrete and direct military advantage, the interests of the civilian population should prevail,²⁰⁸ 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'.²⁰⁹

a. Practice and Recommendations

The principle of proportionality is said to be applied 'every day by military commanders in armed conflicts around the world'.²¹⁰ Numerous meetings, reports,

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

204 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.

205 Art 8(2)(b)(iv), ICC Statute.

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

207 With regard to assigning value to the 'incidental loss of civilian life' and injury, there are diverging views on how and if value should differ from one person to the next. Some are of the view that 'a life is a life' and all civilian lives weigh the same – irrelevant of age, vulnerability etc. – while others suggest that where certain groups, in particular children, may be exposed to the incidental harm of an attack, the 'bar should be higher and err on the protective side when expected incidental harm to children is involved'. However, caution should be taken as this could lead to a 'slippery slope towards considering that the lives of some civilians "weighed less", for example in certain contexts individuals belonging to lower castes, ethnic minorities, women, etc', 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, pp 61 and 63.

208 ICRC, Commentary to the Additional Protocols, 1987, §1979.

209 *Galic* Trial Judgment, supra fn 206, §58.

210 ICRC, The Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law, supra fn 207, p 8.

books and articles have been devoted to its meaning and scope.²¹¹ 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.²¹² 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 and a review of military manuals, it appears that 'civilians' are viewed as one homogenous group, with the same ability to understand and respond to the danger posed.²¹³ 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.²¹⁴

211 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.

212 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.

213 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 207, p.37, where some experts appeared to reject the view that mental harm should be included in a population assessment as the 'reaction of different individuals to the same potentially traumatic event differ markedly depending on different vulnerabilities and resilience' – i.e. the civilian population's characteristics was used *against* adopting a more protective interpretation. Conversely, although the inherent characteristics of the civilian population have been given little attention, the characteristics of military commanders undertaking proportionality assessments has received some attention, *ibid*, pp 56–57.

214 Although inconvenience, stress or fear are caused by an attack are not part of the proportionality assessment, there is growing support for more severe forms of psychological harm, such as post-traumatic stress disorder, to be included within the meaning of 'injury' to civilians: M. Schmitt and C. E. Highfill, 'Invisible Injuries: Concussive Effects and International Humanitarian Law', 9 *Harvard National Security Journal* (2018); ICRC, The Principle of Proportionality in the Rules Governing the Conduct of Hostilities Under International Humanitarian Law, supra fn 207, pp 34–36; E. Lieblich, 'Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law', in D. Jink, J. N. Maogoto and S. Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects*, Asser Press, 2014, p 201; Report of the UN Fact-Finding Mission on the Gaza Conflict, supra fn 11, §§80–88. However, it must be recognized that assessing psychological harm *ex ante* during armed conflict does pose a significant challenge. It should also be noted the IHL does prohibit intentional infliction of certain types of psychological harm, through the prohibition of acts whose primary purpose is spreading terror among the civilian population (Art 51(2), API), mental torture (Art 75(2), API) and violence to mental wellbeing (Art 4(2)(a), APII).

Hypothetical scenario

An attack is proposed against an elusive high-level enemy commander who will be at a command post located next to a civilian building for a 30-minute period. It is not possible to send in ground troops owing to the number of enemy fighters in the area. A precision-guided missile strike is therefore proposed. It is known that the next-door civilian building, which would likely be destroyed in the attack, is a drop-in centre for unemployed jobseekers and, at this particular time of day, normally has around 10 civilians in it. It is proposed that a one-minute warning be given to the drop-in centre.

Would an assessment of the proportionality of the attack change if it is known that the civilians attending the drop-in centre that morning have physical, sensory and/or intellectual impairments that will likely affect their ability to respond to the warning in a timely manner? Does this information affect the proportionality assessment? Does not taking this information into account amount to discrimination under the CRPD and go against the principle of adverse distinction in IHL?²¹⁵

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. Thus, the above scenario is illustrative of some of the issues that should be given greater consideration by states and those that monitor the application of IHL norms. 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.

3. 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'.²¹⁶ The aim of this provision is to provide the civilian

²¹⁵ See Section 5.B.3, 'Adverse Distinction', noting that only 'adverse distinction' is prohibited, meaning 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.

²¹⁶ Art 57 (2)(c), API; ICRC Customary IHL Study, Rule 20.

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',²¹⁷ 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'.

An 'effective' warning will be one that is 'comprehensible' to those most directly affected by the attack,²¹⁸ 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'.²¹⁹ 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. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon, as a false alarm of hoax may undermine future warnings, putting civilians at risk.²²⁰

a. Practice and Recommendations

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.²²¹ 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 al-

²¹⁷ New Zealand Defence Force, Manual of Armed Forces Law, vol 4, supra fn 195, §8.7.23.

²¹⁸ 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.

²¹⁹ K. Dörmann, 'Obligations of International Humanitarian Law', 4 *Military and Strategic Affairs* 2 (2012) 19.

²²⁰ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, supra fn 11, §530.

²²¹ Arts 5(3), 9,11 and 21, CRPD.

lowing 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,²²² as well as resulting violations of the rights to life,²²³ physical and mental integrity, highest attainable standard of physical health and mental health and freedom of access to information.²²⁴ 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.

4. 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.²²⁵ '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.²²⁶ Possible feasible precautions include removing the civilian population from the vicinity of military objects,²²⁷ providing shelters and humanitarian supplies and distributing emergency information and warnings.

a. Practice and Recommendations

Persons with disabilities appear to be routinely excluded from considerations to the nature and delivery of precautionary measures.²²⁸ Evacuation procedures are

222 Art 11, *ibid*.

223 Art 25, *ibid*.

224 Art 21(a), *ibid*.

225 ICRC Customary IHL Study, Rule 22; Art 58(c), API.

226 See 'State Practice', ICRC Customary IHL Study, Rule 22.

227 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.

228 In Israel's report on the 2014 Gaza conflict, *supra* fn 196, stated that the Israeli Home Front Command issued precautionary warnings and recommendations to Israeli civilians that could be affected by incoming attacks and that these recommendations included that 'individuals with limited mobility' who cannot get to the nearest shelter in time 'should consider creating an alternative shelter or turning their sleeping area into one. It is also recommended that the path to cover be cleared in advance to avoid tripping on obstacles, and that the wheelchair bound have spare batteries on hand just in case their motors run out of power.' In the event that they are unable to use an elevator to reach the nearest shelter, the Home Front Command recommended they 'prepare themselves to be carried by others.' Despite an apparent acceptance of the fact that some of the precautions taken by Israel are not accessible, loud-speaker warnings, for example, are not accessible to persons who are deaf, overcoming these barriers appears to be left to civilian organizations working with persons with disabilities. See IMFA, 'Keeping Special Populations Safe From Missiles', 16 July 2014. The IMFA report on the 2014 Gaza conflict does not include any consideration of the impact of strikes in Gaza on persons with disabilities, nor any precautions taken to limit their impact.

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,²²⁹ 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.²³⁰

5. 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,²³¹ as well as special protections for those detained and the minimum requirements for detention conditions. IHRL will also be applicable.²³² 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 CRPD will apply. The extent and exact application of the CRPD

229 Art 4(3) states: 'In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.'

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

231 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.

232 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; *Hassan Judgment*, *supra* fn 121.

to internees and prisoners of war will be dependent on the context and the norms engaged. (See Section 4.B for an analysis of the modes of application of the CRPD in the armed conflict setting). With regard to liberty and security of the person, the CRPD states:

Article 14 – Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

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.²³³ 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,²³⁴ a clearly disproportionate number considering that persons with disabilities are thought on average to represent 15 per cent of the population.²³⁵

²³³ Despite its best efforts, the project team was unable to gain access to any places of detention during the field research.

²³⁴ Report of the Special Rapporteur on the Rights of Persons With Disabilities, UN doc A/HRC/40/54, 11 January 2019, §14.

²³⁵ WHO, *World Report on Disability*, supra fn 35, p 29.

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’.²³⁶

a. 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.

In accordance with both IHL and IHRL, prisoners of war and internees must be treated humanely at all times.²³⁷ Any unlawful act or omission that causes death or seriously endangers the health of the detainee is prohibited.²³⁸ 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.²³⁹ 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’.²⁴⁰ Internees and prisoners of war must be provided with water and food of sufficient ‘quantity, quality and variety’ to keep them in good health.²⁴¹ Open spaces and equipment should be provided to ensure detainees can exercise and undertake recreational and educational pursuits.²⁴² All of these protections and guarantees apply equally to internees and prisoners of war regardless of disability.

²³⁶ Art 31(1) and (2), CRPD, when read in light of Art 11.

²³⁷ Common Art 3 to the Geneva Conventions. Art 10 (1), ICCPR. The HRCtee 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, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’, HRCtee, *General Comment No 35*, supra fn 232, §64, and HRCtee, *General Comment No 21*, supra fn 182, §4.

²³⁸ Art 13, GCIII.

²³⁹ Art 29, *ibid*.

²⁴⁰ Art 31, *ibid*.

²⁴¹ Art 26, *ibid*; GCIV, Chapter III.

²⁴² Art 38, GCIII.

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.²⁴³ 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.²⁴⁴ 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.²⁴⁵

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.²⁴⁶ Specialist facilities must be provided for the healthcare and rehabilitation of persons with disabilities, ‘in particular the blind’.²⁴⁷ 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.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰

Failure to ensure that internees and prisoners of war with disabilities have equal access to the special protections afforded under IHL, including through the pro-

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

244 Art 4(3), CRPD; for guidance on implementation of Art 4, see CtteeRPD, *General Comment No 7*, supra fn 202, §§15–33.

245 Art 21 (a) (b) and (e), CRPD.

246 Art 15, GCIII; Art 81, GCIV.

247 Art 30, GCIII.

248 Arts 5 and 9, CRPD.

249 Art 25, CRPD.

250 Art 25(d), CRPD.

vision 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.²⁵¹ 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.

b. 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 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.²⁵² 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 (see Section 4.B.3).

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.²⁵³ If isola-

251 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).

252 Art 5, CRPD.

253 The Commentary states: ‘This provision, requiring the isolation of cases of contagious disease, is based on the risk of infection which is increased by the crowded conditions in which prisoners of war live. The 1949 Diplomatic Conference inserted the reference to cases of mental disease. Like the preceding provision, however, this stipulation must be interpreted as applying to relatively slight cases only; serious illness must be treated in hospitals or other appropriate establishments.’

tion 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.²⁵⁴ On the contrary, evidence shows that persons with psychosocial impairments are more likely to be victims of violence than to commit a violent act.²⁵⁵ 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 threat.²⁵⁶ 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.²⁵⁷ It may result in the denial of a person's legal capacity to decide on their own treatment and care.²⁵⁸ It may also violate rights to personal integrity and freedom from torture and ill-treatment.²⁵⁹

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'.²⁶⁰ The effects are 'particularly harmful' in cases of persons who have a pre-existing

254 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).

255 Report of the Special Rapporteur on the Rights of Persons With Disabilities, supra fn 234, §27; S. L. Desmarais, R. A. Van Dorn, K. L. Johnson, K. Grimm, K. S. Douglas and M. S. Swartz, 'Community Violence Perpetration and Victimization Among Adults With Mental Illness', 104 *American Journal of Public Health* 12 (2014).

256 The 2017 New Zealand LOAC Manual, supra fn 195, for example, expressly states that 'vulnerable persons', defined to include persons who have a 'mental or other disability', are to be 'segregated from other persons deprived of their liberty' if the 'safety of such people cannot be guaranteed in any other way', §12.10.62.

257 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.

258 Art 12(2), CRPD.

259 Arts 15 and 17, CRPD.

260 Amnesty International, *Entombed: Isolation in the US Federal Prison System*, 2014, p 31.

psychosocial or intellectual disability,²⁶¹ and in some cases lead to self-harm and suicide.²⁶² 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',²⁶³ 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'.²⁶⁴

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.²⁶⁵ 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.²⁶⁶

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,²⁶⁷ arbitrary deprivation of liberty²⁶⁸ and may

261 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 260, pp 31–32; Report of the Special Rapporteur on the rights of persons with disabilities, supra fn 234, §61.

262 Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, 5 August 2011, supra fn 257, §68.

263 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.

264 ICRC Customary IHL Study, Rule 45.

265 ECtHR, *Premniny 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.

266 Arts 2, 5 and 14(2), CRPD.

267 Art 5, *ibid*.

268 Art 9, ICCPR; Art 14, CRPD. The Special Rapporteur on the rights of persons with disabilities has confirmed that deprivation of liberty will be 'arbitrary when it is imposed in a manner that is inappropriate, unjust, disproportionate, unpredictable, discriminatory or without due process'. Report of the Special Rapporteur on the rights of persons with disabilities, supra fn 234, §39. The Committee on the Rights of Persons with Disabilities has stated that the prohibition on unlawful and arbitrary deprivation of liberty applies when additional factors are used to justify the deprivation of liberty, such as being a 'danger to self or others', *CrteeRPD*, '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.

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.²⁶⁹ 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.

c. 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.²⁷⁰ 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,²⁷¹ 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.²⁷²

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.²⁷³ 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.

269 Note that Art 16, GCIII, states: ‘Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria’ (emphasis added).

270 Art 110, GCIII; Art 132, GCIV.

271 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.

272 Art 85(4)(b), API.

273 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.

D. 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. That said, when reviewing IHL from a CRPD perspective, practitioners and commentators must be wary of not asking more of IHL than it has the capability of achieving. IHL has the narrow and pragmatic mandate to limit the devastating effects of armed conflict, its mandate does not include bringing about the societal changes demanded by the CRPD.

6. 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 hu-

manitarian 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.²⁷⁴

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.²⁷⁵ However, it is not just states that bear the responsibility for data collection. All humanitarian agencies need to ensure that their policies, 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.

²⁷⁴ WHO, *World Report on Disability*, supra fn 35, p 29.

²⁷⁵ Art 31(1), CRPD.

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 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 CRPD 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 policies, 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.

ANNEX I

SAMPLE FIELD RESEARCH QUESTIONNAIRE

Note: This is a sample of the research questionnaire used. The questionnaire was adapted to each interview depending on who was being interviewed (i.e. a person with a disability or representative organization, a representative of an IGO, humanitarian organization, or NGO, a state or military official, ANSA or journalist etc) and the context of the conflict.

All interviews opened with a briefing on the project, its aim, design and methodology. If the person was new to disability discourse, the interviewer provided a brief overview of the meaning of disability (based on the CRPD definition). All interviews were conducted on a confidential basis and all interviewees were told how and where their responses would be stored, how they would be used and who would have access to them. Some interviewees expressly asked to go on the record with their responses to some or all of the questions.

The treatment of survivors of the conflict who had a pre-existing impairment, who sustained an impairment or whose impairment was aggravated as a result of the conflict.

1. Are there any particular trends in the types of impairments sustained during the conflict?
2. Is there any indication of a gender impact of the conflict on persons with disabilities?
 - a) Were impairments disproportionately sustained by women and girls or by men and boys?
 - b) Was there an impact on access to humanitarian aid and services based on gender?
 - c) Are there any reports of persons with disabilities being subjected to sexual violence (such as rape, sexual abuse and sexual exploitation) or gender-based violence (such as domestic violence)?
3. Are there reports of persons with disabilities being subjected to other forms of physical abuse or other mistreatment?

4. What is the age impact of the conflict on persons with disabilities?
 - a) Were the impairments sustained during the conflict disproportionately sustained by a particular age group?
5. What services are/were available for persons with disabilities outside of the conflict area/or before the conflict (dependent on context)?
 - a) Who is providing these services?
 - b) Social welfare?
 - c) Medical care – including physiotherapy and psychosocial support?
 - d) On what basis are these services available?
 - e) Are distinctions made between persons with physical, sensory, psychosocial and intellectual impairments?
6. Are/were the services normally available for persons with disabilities affected by the conflict?
 - a) If so, how and what impact did this have on persons with disabilities?
 - b) Are/were attempts made to resume services?
 - c) What are the barriers/challenges to resuming services?

Impact of occupation or other territorial control (where relevant)

1. Who has control over the general administration of the territory, including health services?
2. What is the situation of persons with disabilities in the territory? For example:
 - a) Are persons with disabilities permitted to leave, including for treatment outside the territory?
 - b) If so, under what, if any, conditions?
 - c) Are parents or primary care-givers permitted to leave with them?
3. Is humanitarian aid allowed into the territory?
 - a) Are there any conditions and/or limitations put on this?
 - b) If so, is this on a regular basis and how often?
 - c) Are there interruptions to the delivery of or access to humanitarian aid?
 - d) If so, when and why?
 - e) How are such interruptions resolved, if at all?
4. Are there interruptions to essential services in the territory? For example:
 - a) Electricity?
 - b) Safe drinking water?
5. Which humanitarian agencies have access to the territory?
 - a) Have any humanitarian agencies been denied access?
 - b) If so, what was the basis for this?

The use of landmines (where relevant)

1. What is/was the scale of landmine use during the conflict?
2. Are/were there any trends in how landmines are/were used?
3. What types of injuries were sustained as a result of landmine use in the conflict?
4. Did such injuries disproportionately affect:
 - a) Women and girls or men and boys?
 - b) A particular age group?
5. What steps are being taken in the country to implement the Mine Ban Treaty, specifically in relation to:
 - a) The obligation to provide assistance for the care and rehabilitation of mine survivors?
 - b) The social and economic reintegration of mine survivors?

The general conduct of the hostilities

1. What factors do military commanders take into account in relation to inherent characteristics, including disability, when undertaking a proportionality assessment? Is there any evidence of incorporating such characteristics into the 'incidental harm' assessment affecting the decision reached?
2. Are there accounts of persons with disabilities being specifically targeted during the conflict by any party? (If yes, follow-up Q asking what was alleged to have happened, who witnessed/reported it etc.)
3. Were hospitals and/or rehabilitation centres damaged? Was the location of the centre widely known? Had this information been passed on to enemy forces? Was any explanation offered as to why the centre was damaged?
4. Were persons with disabilities given sufficient warning to flee before attacks by either party?
5. What warning practices were used by the parties to the conflict? Is there any evidence of parties considering the accessibility of these warnings?
6. Were evacuation plans in place and, if so, did these include specific measures concerning the evacuation of persons with disabilities?
7. What are the evacuation practices of parties to the conflict?
 - a) Is emergency information distributed detailing what to do in the event of an attack? What format does this information take? Have there been efforts to ensure this information is accessible?

- b) Have any measures been taken to ensure persons with disabilities are evacuated safely?
- c) Is transportation provided? Is this accessible to wheelchair users? Can persons being evacuated take their assistive devices and animals with them on such transport?
- d) Are shelters used? Is there any registration/screening process upon entering the shelter?
- e) Are any measures taken to ensure the shelters are accessible? Are assistive devices and animals permitted within the shelter?
- f) How is emergency information distributed within the shelter?
- g) Are sanitation facilities within the shelter accessible?
- h) How are food, water and medical care distributed within the shelter?

8. Once evacuated, or having fled, what services were available to persons with disabilities? For example:
 - a) Were persons with disabilities and their families provided with housing? Together?
 - b) If so, was such housing adapted according to the nature of the persons' disability?
 - c) What services were made available to internally displaced persons with disabilities and/or refugees?

Disabled prisoners of war, interned persons or persons made subject to administrative detention (where relevant)

1. Does your organization have access to places of detention?
2. Is there any information available on the number of detainees who have any form of physical, psychosocial or intellectual impairment?
 - a) On what basis was this information gathered?
 - b) How were persons with disabilities identified?
3. What access to support and services do disabled detainees have? For example:
 - a) Provision of adequate medical care in places of detention?
 - b) What forms of support are available to disabled detainees?
 - c) Do disabled detainees have access to the same facilities and services as non-disabled detainees?
 - d) If not, what are the reasons for this?
 - e) Have attempts been made to overcome these barriers?
4. Are persons with disabilities detained in the same areas of the detention facilities as other detainees?
 - a) If persons with disabilities are detained separately, on what basis is this?

The peace process (where relevant)

1. Are persons with disabilities included within the peace process?
 - a) If so, how?
2. Are persons with disabilities represented in the formulation, planning and implementation of the peace process?
 - a) If so, how?
3. Are specific measures or policies being taken to support or rehabilitate:
 - a) Persons who sustained physical, sensory or psychosocial impairments during the conflict?
 - b) Persons whose pre-existing physical, sensory or psychosocial impairments were aggravated by the conflict?

ANNEX II**REPORT ON COLOMBIA**

This report is focussed on Colombia as one of the project's case study states. It is based on open sources as well as interviews conducted by Alice Priddy in March 2017 with numerous stakeholders in Bogotá, including representatives of various Colombian Ministries, inter-governmental and non-governmental organizations (IGOs and NGOs), local organizations of disabled persons (ODPs), armed non-state actors, and academics. All interviews were conducted on a strictly confidential basis. This report was finalized in June 2017 (having been shared with and approved by those interviewed).

A. PERSONS WITH DISABILITIES IN COLOMBIA

Colombia is a middle-income state with a registered population of 48.2 million. Of this, 27.8 per cent live below the poverty line.²⁷⁶ According to the 2005 national census, 6.4 per cent of the population have some form of disability (approximately 3 million people).²⁷⁷ However, 'disability' in Colombia is still mainly understood on a medical-model basis and is therefore under-inclusive.²⁷⁸ Furthermore, the identification of persons with disabilities is said to be largely under-reported owing to insecurity, lack of access and social stigma. The actual percentage of persons with disabilities is therefore likely to be far higher than the census figure. The Colombian Constitutional Court has estimated that 15 per cent of the population are persons with disabilities,²⁷⁹ and the Saldarriaga-Concha Foundation, one of Colombia's largest NGOs, estimates that 7.2 million people in Colombia have a disability (corresponding to approximately 15 per cent of the registered population figure).²⁸⁰

The Registry for the Location and Characterization of Persons with Disability (RL-CPD), overseen by the Ministry of Health and Social Protection, is mandated to collect information regarding persons with disabilities, including related to housing, health, education and employment. The Register is self-referential and can be added to by individuals or 'data generating units' on behalf of a private individual or ODP. This self-referential mode of data collection, and the fact that the Register

276 World Bank Group, 'Colombia', <http://data.worldbank.org/country/colombia>. Based on 2015 statistics.

277 The 2005 Census of the National Statistics Department. The next national census is imminent.

278 The census treated persons with disabilities as those with 'limitations' to their sight (even when using glasses), movement, hearing, use of hands and arms, learning or understanding or 'other'.

279 Colombian Constitutional Court, Order 006 of 2009 and Order 173 of 2014.

280 Saldarriaga-Concha Foundation (FSC), *Disability and Social Inclusion in Colombia*, 2016, p 8.

presently has limited coverage, means that the data produced by it cannot be treated as accurate. Approximately 60 per cent of those who registered did not provide any information on the nature of their disability, which hinders the usefulness of any data gathered in identifying the barriers that persons with disabilities face. The most common form of impairment reported was physical. Only 1.7 per cent of those registered reported having a psychosocial impairment. Stakeholders agreed that the actual percentage is far higher and this figure demonstrates the preserved stigma and particular exclusion of this group. The RLCPD has been criticized for largely excluding persons with intellectual disabilities and not being very user friendly.

B. CONFLICT AND VIOLENCE IN COLOMBIA

Colombia has been in a state of non-international armed conflict (NIAC) for 52 years. During that period, 220,000 people have been killed and at least 7.7 million people displaced. The government has been engaged simultaneously in a NIAC with the Revolutionary Armed Forces of Colombia (FARC-EP) and the National Liberation Army (ELN). The conflict has predominately raged in remote rural areas of Colombia where there is little state presence. This state of lawlessness in rural areas has also facilitated an environment of extreme violence committed by armed criminal gangs associated with drug production and illegal mining.

Until 2011, the government's official position had been that Colombia was not engaged in an armed conflict but, rather, FARC-EP and the ELN were terrorist groups in respect of whom the government had been responding with counter-terrorism measures. In June 2011, the government changed its position when President Manuel Santos signed the Victims and Land Restitution Law (*Ley de Víctimas y Restitución de Tierras*, Law 1448), which acknowledges the existence of an armed conflict in Colombia and provides for reparations for some survivors of human rights violations and abuses committed during the conflict and restitution of stolen land.

The protracted nature of the conflict has led to a normalization of extreme violence. Furthermore, the remoteness of the violence has negatively impacted on reporting and data collection. However, it is known that extrajudicial killings, forced displacement, enforced disappearances, kidnapping, sexual violence and the use of landmines have all been prominent features of the conflict. The situation in Colombia has been under preliminary examination by the International Criminal Court's (ICC) Office of the Prosecutor (OTP) since June 2004. In its November 2016 report, the OTP stated:

237. ... the information available provides a reasonable basis to believe that crimes against humanity under article 7 of the Rome Statute have been committed in the situation in Colombia by different actors, since 1 November 2002, including murder under article 7(1)(a); forcible transfer of population under article 7(1)(d); imprisonment or other severe deprivation of physical liberty under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence under article 7(1)(g) of the Statute.

238. There is also a reasonable basis to believe that war crimes under article 8 of the Statute have been committed in the context of the non-international armed conflict in Colombia, including, since 1 November 2009, murder under article 8(2)(c)(i); attacks against civilians under article 8(2)(e)(i); torture and cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c)(ii); taking of hostages under article 8(2)(c)(iii); rape and other forms of sexual violence under article 8(2)(e)(vi); and conscripting, enlisting and using children to participate actively in hostilities under article 8(2)(e)(vii) of the Rome Statute.

239. During the reporting period, the Office continued to receive and gather information on alleged crimes, including killings and enforced disappearances known as false positives cases. This information together with relevant open sources information has been analysed to inform the identification of potential cases that would likely arise from an investigation of the situation, on the basis of which the Office is analysing the admissibility of cases relating to this area of focus of the preliminary examination.

C. THE FARC-EP PEACE AGREEMENT

In July 2015, FARC-EP announced a ceasefire following which, in November 2016, the Government and FARC-EP signed a peace agreement (the Havana Agreement). Negotiations to form a similar peace agreement with Colombia's second largest armed group, the ELN, are ongoing. While the Havana Agreement has brought about an overall reduction in armed violence, several armed groups remain active and there appears to be an increase in violence related to drug production and trafficking as well as illegal mining.

The Havana Agreement envisages the establishment of the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*) to investigate and prosecute the 'most serious and representative' crimes committed by both state armed forces and FARC-EP fighters during the conflict. Although important aspects concerning the jurisdictional reach of the court are still to be decided, it seems clear that no immunity for state actors, or amnesty for FARC-EP fighters, will be provided in the case of crimes against humanity, genocide, serious war crimes, hostage-taking and other serious deprivation of liberty such as the kidnapping of civilians, torture, extrajudicial executions, forced disappearance, violent sexual intercourse and other forms of sexual violence, forced displacement or the recruitment of minors.²⁸¹

There are concerns over the whether the Special Jurisdiction for Peace will secure justice for victims and their families.²⁸² Firstly, there appears to be room for amnesties and immunities for a large number of crimes. Under the Peace Agreement,

281 *Presidencia De La Republica, Summary of Colombia's Agreement to End Conflict and Build Peace*, Summer 2016, p 30.

282 See e.g., F. Andreu-Guzman, 'La Jurisdicción Especial para la Paz: impunidad para la Fuerza Pública?', *Razon Publica*, 12 March 2017.

FARC members will be exempt from any form of detention if they promptly and fully confess to their crimes (discussions around which crimes this will apply to are ongoing). Instead, they will be subject to ‘restorative and reparative’ programmes. President Santos has stated that state armed forces will receive the same ‘justice benefits’ that are given to the FARC-EP.²⁸³ Secondly, the Judicial Panel of the Special Jurisdiction for Peace will prosecute those who have ‘major responsibility’ in the ‘worst representative crimes’²⁸⁴ and there are thus concerns that the Special Jurisdiction for Peace will only pursue prosecutions of a small number of high-profile persons and grant immunities or amnesties to the majority of perpetrators. Thirdly, the legislative framework for the Special Jurisdiction for Peace infers the future application of a narrow definition of command responsibility. Under international criminal law, including as captured under Article 28 of the Rome Statute of the ICC, the doctrine of command responsibility can see commanders prosecuted for crimes carried out by their subordinates if they had effective control over their subordinates, had knowledge or reason to know about the commission of the crime and had means to prevent the crime and/or ensure it was investigated. The principle also exists in customary international law.²⁸⁵ In contrast, the Havana Agreement envisages that culpability will only be established where the commander had actual knowledge and not constructive knowledge (that which they should have known). Furthermore, it appears that the prosecution will have to establish that the commander had ‘effective control of the respective *conduct*’, (emphasis added) i.e. the actual act, rather than control over the persons who committed the act.

There are also overarching concerns about victim participation in the prosecution of crimes related to the conflict and whether, and if so to what extent, remedies and reparation for victims will be within the jurisdictional competence of the Special Jurisdiction for Peace. These concerns are particularly acute in relation to victims with disabilities. At present, it appears that little to no attention is being paid to ensure that victims of the conflict with a disability can access and participate in the justice processes.

283 PresidenciaDeLaRepublica, Colombianos: Nunca habíamos estado tan cerca a la paz, 23 December 2015 <http://es.presidencia.gov.co/discursos/Alocucion-del-Presidente-Juan-Manuel-Santos-sobre-el-acuerdo-en-materia-de-victimas-con-las-FARC>.

284 Guidelines on justice for state agents, §9: ‘The Judicial Panel of Legal Situations will be in charge of establishing the legal situation of the state agents that participated in the armed conflict and did not have a major responsibility in worst and representative crimes. In these cases, regarding those who comply with the conditions of the System, the Special Jurisdiction could apply, depending on the responsibility, measures to establish the legal situation, including, for instance, suspending the execution of the sentence and waiving criminal prosecution, among others’, as translated in HRW, *Colombia: Prosecution of False Positive Cases Under the Special Jurisdiction for Peace*, 28 March 2016, fn vii.

285 ICRC Customary IHL Study, Rule 153.

D. THE LEGAL FRAMEWORK APPLICABLE TO PERSONS WHOSE DISABILITIES HAVE BEEN CAUSED OR EXACERBATED BY THE ARMED CONFLICT IN COLOMBIA

Colombia ratified the Convention on the Rights of Persons with Disabilities (CRPD) in May 2011.²⁸⁶ Before the deposit of Colombia’s instrument of ratification, the CRPD was incorporated into domestic law through Law 1346 of 2009. In 2013, the National Disability and Social Inclusion Policy, concerning implementation of the CRPD, was adopted. Colombia is also a party to the Inter-American Convention on the Elimination of All Forms of Discrimination and the International Covenant on Civil and Political Rights, both of which also prohibit discrimination against persons with disabilities.²⁸⁷

The Colombian Constitution enshrines the right to equality for all and prohibits discrimination against persons with disabilities.²⁸⁸ The Colombia Constitutional Court has in this regard defined discrimination against persons with disabilities as ‘a behaviour, attitude or treatment consciously or unconsciously aimed at cancelling or restricting their rights, freedoms and opportunities without objective and reasonable justification ... [or] a discriminatory act consisting of an unjustified omission in the special treatment that they are entitled to ... which brings about as a direct effect their exclusion from a benefit, advantage or opportunity’.²⁸⁹ Discrimination against persons with disabilities was made a criminal offence under the Colombian Penal code in 2015.²⁹⁰

In relation to the conflict, treaty and customary international humanitarian law (IHL) apply. Colombia is a High Contracting Party to all the Geneva Conventions and has ratified Additional Protocol II, which supplements Common Article 3 and specifically applies to NIACs.

1. INTERDICTION AND DENIAL OF EQUAL RECOGNITION BEFORE THE LAW

Despite the strong anti-discrimination laws that exist in Colombia, persons with disabilities can be denied equal recognition before the law (as enshrined in and required by Article 12 of the CRPD) as a judge in Colombia may appoint a guardian to make legal decisions on behalf of a person with a disability (interdiction).²⁹¹ Interdiction is in violation of Article 12 of the CRPD, which requires that persons with disabilities must enjoy legal capacity on an equal basis with others in all aspects of life. A draft bill to remove interdiction due to disability and ensure the full

286 Colombia has not ratified the Optional Protocol to the CRPD.

287 Art 1 (2); Inter-American Convention on the Elimination of All Forms of Discrimination, Art 26, International Covenant on Civil and Political Rights.

288 Art 13(3), Colombian Constitution of 1991.

289 Colombian Constitutional Court, Decision T-288.

290 Law 1752 of 2015.

291 Law 1306 of 2009.

and equal recognition before the law of persons with disabilities is currently being debated by parliament.

In practice, interdiction has prevented survivors of violence from accessing justice, and survivors of the conflict from accessing reparations under the Victims and Land Restitutions Law. It has also resulted in women and girls being forcibly sterilized,²⁹² thereby perpetuating conflict-related sexual violence (discussed in more detail below).

E. TRENDS IN THE COLOMBIAN CONFLICT AND ITS IMPACT ON PERSONS WITH DISABILITIES

This section of the report concerns itself with trends in the conflict in Colombia as it affects the three groups of persons with disabilities within the project: persons with pre-existing impairments; persons who sustained an impairment as a result of the conflict; and persons whose impairment was aggravated as a result of the conflict.

There is no information available on the number of persons who sustained a disability or whose disability was exacerbated as a result of the conflict. Such data is likely to prove impossible to gather given the difficulties mentioned earlier regarding the classification and identification of disability, the protracted nature of the conflict, the remoteness of areas affected by the conflict, lack of infrastructure and the cultural barriers that lead to under-reporting.²⁹³ However, it is accepted by all stakeholders that the conflict has had a disproportionate impact on persons with disabilities, recognized as being at increased risk of: death or serious injury owing to an inability to flee the violence and a lack of accessible warnings and humanitarian assistance; abandonment owing to the inability of families and carers to quickly flee the violence with a person with a disability and any equipment they may need; extrajudicial killings by state authorities of persons with disabilities in order to present such persons as the lawful killing of members of illegal armed groups (see below on false positive killings); being subjected to sexual violence; and being killed or injured by landmines. The Colombian Constitutional Court has highlighted the impact of the conflict on civilians, and especially persons with disabilities, and has criticized the government for not effectively responding to the conflict.²⁹⁴ The Court has also found that the rights of internally displaced persons (IDPs) with disabilities have been systematically denied.²⁹⁵

²⁹² Colombian Constitutional Court, Decision C-131 of 2014.

²⁹³ FSC has attempted to gather data on this issue; however, the methodology that it used and how it defined disability are not clear. Furthermore, the data produced is considered to be inaccurate according to experts interviewed; therefore, the author has decided not to include these figures in this report.

²⁹⁴ Colombian Constitutional Court, Order 006 of 2009 on the special constitutional protection of the victims of forced displacement with disabilities; and Order 173 of 2014.

²⁹⁵ Colombian Constitutional Court, Order 006 of 2009.

Following the adoption of the 2011 Victims and Land Restitution Law,²⁹⁶ an online portal was created where people can self-register as a victim of the conflict (the Central Register of Victims). To date, 8.2 million people are registered as victims of the conflict, mainly as IDPs (7,769,281 registered IDPs as of March 2017). A person must be registered on the Victims Register before they can access the rehabilitation, social, legal and land restitution services envisaged in the Victims and Land Restitution Law. The Law defines a victim as any person who has suffered grave violations of human rights law or IHL after 1 January 1985, as well as the immediate family members of persons who have been murdered or disappeared.²⁹⁷ Friends of a victim, or witnesses to a human rights or humanitarian law violations, who have suffered psychosocial harm as a result – for example, post-traumatic stress disorder (PTSD) are unlikely to qualify as ‘victims’. The Register is run by the Unidad para la Atención y Reparación Integral de Víctimas (UARIV) which, following the review and fact-checking of each new registration, makes the final decision on whether or not to grant victim status. The UARIV has 60 working days to assess and respond to registration.

Although the Ministry of Health is adamant that the Central Register of Victims portal is accessible to persons with disabilities (although no details of how or evidence of this could be provided), ODPs and NGOs reported that there is no state support for persons with disabilities to access the site. This means that persons who are visually impaired or who have an intellectual impairment, for example, appear not to have equal access. If the site is not accessible to all persons with disabilities this would be a violation of Article 9 of the CRPD as states parties are obligated to ‘take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas’. Article 9(1)(b) obliges the state to identify and eliminate any obstacle and barrier to accessing ‘[i]nformation, communications and other services, including electronic services and emergency services’. The Committee on the Rights of Persons with Disabilities, in its *General Comment No 2* (2014), affirmed that persons with disabilities should have ‘equal access to all ... services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity’, and that ‘[a]ccessibility should be provided to all persons with disabilities, regardless of the type of impairment, without distinction of any kind’.²⁹⁸

²⁹⁶ Ley de Víctimas y Restitución de Tierras, Law 1448, 2011.

²⁹⁷ Art 3, *ibid*.

²⁹⁸ CmmttRPD, *General Comment No 2: Article 9: Accessibility*, UN doc CRPD/C/GC/2, 22 May 2014, §13.

1. ENFORCED DISAPPEARANCE

Enforced disappearances have been a consistent feature of the conflict and 85,900 people are still missing.²⁹⁹ While the National Register of Missing Persons has documented 24,900 cases of enforced disappearance the real figure is likely to be far higher. Lack of access to reporting mechanisms, lack of centralized documentation and poor coordination among the relevant state institutions have all contributed to the lack of data on persons disappeared during the conflict. There is no data available on the number of persons with disabilities who are missing as a result of the conflict.

Colombia is a party to the International Convention for the Protection of All Persons from Enforced Disappearances (CED) and is thus under an obligation to investigate all cases of enforced disappearances and to prosecute perpetrators.³⁰⁰ Reading the CED in light of the CRPD, it is clear the Colombia not only has an obligation to investigate all cases of the enforced disappearance of a person with a disability but also to ensure that reporting mechanisms are accessible so that a person with a disability is able to report an alleged instance of enforced disappearance and have their allegation promptly and seriously investigated.³⁰¹

2. EXTRAJUDICIAL EXECUTIONS

Persons with disabilities were reportedly subjected to extrajudicial execution during the conflict. The killings were often cases of 'false positives' whereby a person would be lured into a remote area, often on the promise of work, and killed. The killing would then be staged to look like the lawful killing of a combatant by placing a gun and/or FARC-EP or other guerrilla-group memorabilia on the body. Approximately 3,000 civilians were subjected to false positive killings between 2002 and 2008.

Persons with intellectual impairments were specifically targeted in 'false positive killings', though the exact number is not known. At a minimum, the Committee on the Rights of Persons with Disabilities has identified 10 cases of false positive killings against persons with disabilities; however, persons that I interviewed from independent human rights and humanitarian organizations reported that the correct number is more likely to be in the hundreds. The Colombian Office of the High Commissioner for Human Rights has 40 reported cases on its files of false positive killings of persons with disabilities – all of which were undergoing investigation by the Attorney General's Office, and 17 of which were or are now before courts. It is disputed whether or not the false positive killings were part of a state policy;³⁰² however, it was widely reported that formal and informal incentives within the military, such as monetary rewards, medals and peer praise, were a significant factor in the killings.

299 ICRC, *Humanitarian Challenges in 2017: ICRC Colombia Report: Results and Perspectives*, p 17.

300 Arts 3 and 5, International Convention for the Protection of All Persons from Enforced Disappearances (CED).

301 Arts 3, 5 and 12, CED, read in light of Arts 5, 9 and 11 of the CRPD.

302 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston A/HRC/14/24/Add.2, 31 March 2010.

The right to life is non-derogable and continues to apply during armed conflict.³⁰³ False positive killings and other forms of extrajudicial executions are a violation of the right to life as enshrined in Article 10 of the CRPD and Article 6 of the International Covenant on Civil and Political Rights amongst others. According to international human rights law, the state is obligated to investigate all deprivations of life.

To date, only a small number of false positive killings have been investigated and impunity remains rife. Around 600 members of the armed forces are under investigation or have been convicted for false positive killings. Discussions remain as to whether the cases that were being investigated by the Attorney General's Office will now be handed over to the Special Jurisdiction for Peace and whether those already prosecuted will have their convictions replaced by the sanctions in the Agreement on the Victims of the Conflict.

3. GENDER-BASED AND SEXUAL VIOLENCE AGAINST PERSONS WITH DISABILITIES

Gender-based violence is widespread in Colombia and woman and girls with disabilities remain particularly vulnerable to abuse.³⁰⁴ Sexual violence has been a prominent feature of the conflict. According to the Unit for Victims, between 1980 and 2016, 17,100 women and girls were subjected to conflict-related sexual violence. However, due to the stigma related to sexual violence, fear of retaliation and lack of accessible reporting mechanisms, sexual violence goes mainly unreported and the actual number of survivors is far higher.

Sexual violence in the context of the conflict and its impact on persons with disabilities is an issue that has been predominately overlooked or ignored. There are reports of women and girls with disabilities being subjected to conflict-related violence, but there have been no attempts to gather data on this issue. There are victim-assistance programmes available to survivors of conflict-related sexual violence, run by the state, IGOs and NGOs. However, at present none of these programmes are designed to be accessible and inclusive for person with disabilities.

Article 6 of the CRPD specifically recognizes that women and girls with disabilities are subjected to multiple discrimination, sexual violence being one manifestation of this, and the state should therefore take specific measures to ensure the full and equal realization of the rights of women and girls with a disability. This would include taking measures to prevent sexual violence through the education and training of military, ensuring reporting mechanisms as well as medical and rehabilitation services are accessible, as well as ensuring access to justice and reparations.

303 Human Rights Committee (HRCtee), *Guerrero v Colombia*, Comm No R.11/45, 31 March 1992, UN doc (A/37/40).

304 The Constitutional Court has highlighted that 'people with cognitive and psychosocial disabilities are the most vulnerable to sexual violence, among other reasons, due to their limited possibilities for denouncing these facts as a result of lack of credibility that the authorities afford their testimonies, meaning that together with many existing barriers and a lack of adjustments in systems of denunciation, these crimes often go unpunished'. Colombian Constitutional Court, Special Monitoring Chamber for Decision T-025 of 2004 on forced displacement, Order 173 of 2014.

As highlighted above, interdiction and forced sterilization of girls and women with psychosocial and intellectual impairments³⁰⁵ have reportedly facilitated sexual violence by a family member. As well as denying the right to equal legal capacity, forced sterilization is a violation of the rights of persons with disabilities to found and maintain a family and to retain their fertility on an equal basis with others (Article 23, CRPD) and is in violation of Article 25 of the CRPD, which affirms that free and informed consent must be the basis for providing healthcare to persons with disabilities. Furthermore, forced sterilization violates the absolute prohibition of torture and cruel, inhuman and degrading treatment,³⁰⁶ as well as the right to privacy.³⁰⁷

4. THE USE OF LANDMINES

Anti-personnel mines were used on a large scale during the conflict by the military, FARC-EP and ELN. Vast areas of Colombia are still mined and there are reports of armed drug cartels and guerrilla groups continuing to use anti-personnel mines to protect illegal crops and mineral mining. Between 1990 and 2017, there have been approximately 12,000 direct mine victims (meaning those who sustained a physical injury from a mine rather than those who were displaced or who, for example, suffered PTSD having witnessed a mine explosion). Approximately 40 per cent of these victims are civilians and the rest military. Injuries appear to differ between the two groups: the military sustains injuries to the lower limbs, while civilians tend to sustain damage to lower limbs, the hands and face, which corresponds with civilians triggering landmines whilst working the land. Approximately 20 per cent of victims died as a result of their injuries. The continued widespread presence of mines is cited as one of the main factors preventing IDPs from returning to their homes.

Since Colombia signed the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention), the military has stopped using landmines and has destroyed its stockpile. Colombia's Mine Action Authority, DIACMA, was established to undertake demining and mine-risk education and develop victim-assistance programmes including emergency rescue, medical attention, rehabilitation and social support such as re-training and education programmes to allow survivors to access employment etc. again. Resource constraints and ongoing problems within the health service in Colombia (see below) mean that many survivors face long delays in accessing their right to medical assistance and rehabilitation.

Demining activities are being carried out. However, the scale of the mined areas is huge and currently only a quarter of the municipalities where mines are present are being demined. As part of the peace agreement with FARC-EP, it has been agreed that 1,200 former FARC-EP combatants will be trained and deployed as deminers.

305 Colombian Constitutional Court, C-131 of 2014.

306 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN doc A/HRC/22/53, 2013, §31.

307 HRCtee, *General Comment No 28: Equality of Rights Between Men and Women*, 29 March 2000, CCPR/C/21/Rev.1/Add.10, §§11 and 20.

At present, there are no anti-personnel mine warning signs/notifications or mine-education programmes that are disability inclusive. For example, warning signs remain visual only, and are not in braille, meaning a person with a visual impairment is not able to access them. The mine-risk education programmes that are currently being delivered by both the state and NGOs have not developed with a disability inclusive approach and, as such, are not accessible for person with intellectual impairments or the hearing impaired (by way of example).

F. THE GENERAL CONDUCT OF HOSTILITIES

1. TARGETING OF HOSPITALS AND AMBULANCES

Although there were unverified reports of hospitals and ambulances being targeted by guerrilla groups during the conflict, these occurrences were rare and it was mainly thought to be as a result of collateral damage. In the rural areas, where the conflict predominately raged, there was (and continues to be) very little infrastructure such as hospitals in any case, which may also be a factor in the low number of reports of these facilities being effected by the violence. According to the International Committee of the Red Cross, since the clear labelling of medical facilities and ambulances with 'Mision Medica' was introduced, incidents of violence affecting these facilities has dramatically reduced.

2. PRECAUTIONS BEFORE ATTACK AND EVACUATION MEASURES

In relation to the conflict between FARC-EP and the government, there appears to have been a trend in both sides providing warnings before attack, though not in all cases. These warnings were mainly through word of mouth when delivered by FARC-EP. The government reportedly did provide early warnings before attack where there were civilians present and invited civilians to evacuate, though no reliable information was available on the timeframe of these warnings. However, there were no instances of warnings being made accessible to persons with disabilities or evacuation procedures being disability inclusive.

It was clear from interviews that no party to the conflict has considered whether warnings were accessible to person with disabilities, nor did they provide any support to persons with disabilities wishing to flee before an attack.

3. THE TREATMENT OF DISABLED INTERNEES

There is very little information available on the numbers or details of internees with disabilities held in Colombia. Approximately 1,000 FARC-EP members are currently detained by the state. FARC has released all of its internees and it is unclear if the ELN holds any. There is currently no screening process to assess whether an internee has a disability and establish their needs; therefore, reasonable accommodation is not provided to disabled internees. Internees are predominately held in separate wings of the main prisons in Bogotá. Prisons are extremely overcrowded and under-resourced, thus detention conditions remain very poor for all

detainees and internees. The detention facilities themselves are dated and most are not accessible for persons with a physical or visual impairment. Only very basic healthcare is provided to internees with a disability and no rehabilitation services are available.

The government is due to imminently announce improvements to the healthcare services available to detainees in general, but it is understood that these improvements do not include any specific provisions for internees with disabilities.

As part of the peace agreement, FARC-EP members who are serving sentences for crimes not listed in the amnesty agreement, or who have not yet served five years of their sentence (those that have are to be released), are due to be transferred to serve the remainder of their sentences in one of the zones (see below). As of March 2017, no consideration had been given to ensuring that these places of detention were accessible to persons with disabilities.

4. PROVISION OF REHABILITATION AND HABITATION TO SURVIVORS OF THE CONFLICT WHO HAVE A DISABILITY (WHETHER CAUSED BY OR EXACERBATED BY THE CONFLICT)

The Colombian Government is under an obligation to develop habitation and rehabilitation programmes that respond to the needs of persons with disabilities affected by the conflict (Articles 11 and 25–26, CRPD, and Colombian Law 1448 of 2011). Non-combatants who have a disability (either pre-existing or caused or exacerbated by the conflict) and who have been recognized as victims in the Central Register for Victims (see above) are entitled to access the Programme of Psychosocial Attention and Integrated Health for Victims (PAPSIVI), which provides physical healthcare and psychosocial support to victims. Since its inception in 2013, PAPSIVI has provided 301,000 persons with psychosocial support. Victims are entitled to eight sessions of psychosocial therapy under PAPSIVI. Rehabilitation takes a holistic approach and is tailored to the individual taking into account factors such as the person's gender and ethnicity. One example of PAPSIVI's provisions I was told about concerned a visually impaired IDP who had been a farmer (it was unclear how he lost his sight but it was clear it had gone untreated owing to the conflict). He was provided with psychotherapy to help him come to terms with his visual impairment and social support through workshops and re-education programmes that helped him adapt to life in the city.

PAPSIVI has been widely criticized for not adopting a holistic approach to responding to the needs of persons with a psychosocial impairments, and for not addressing the intersectionality between the conflict and mental health. At present, it appears that it is largely impossible for persons with a psychosocial impairments (either caused by or exacerbated by the conflict) to access their right to healthcare (Article 25, CRPD), habitation and rehabilitation (Article 26, CRPD). Despite the correlation between addiction and the conflict, Colombia does not recognize addiction as form of disability and those that develop an addiction as a direct result of the conflict – I heard reports of both civilians and combatants using alcohol to cope with the traumatizing effect of the violence and/or displacement and this

turning into an addiction which impeded them from being able to integrate and access services – are not recognized as victims of the conflict and are therefore not entitled to access any of the services available to victims.

Healthcare in Colombia is a mixture of public and private with only very basic services being public.³⁰⁸ This leads to an inequality in the provision of healthcare between persons with disability. An example highlighted to me during interviews was the fact that prosthetics for an amputee are available on the Benefits Health Plan (the public part of the health system) but wheelchairs are not, meaning that if you are a landmine survivor who is not a suitable candidate for prosthetics you have to go through a lengthy (on average, up to one-year) and often unsuccessful process of petitioning the state to grant you a wheelchair. Arguably, this amounts to discrimination on the basis of disability as access to healthcare differs according to one's impairment. Article 24(e) of the CRPD affirms that states must prevent the discriminatory denial of healthcare or health services on the basis of disability. It was also repeated that although prosthetics are technically available free of charge in practice, there is a shortage of both prosthetics and specialized healthcare providers who can fit them; therefore, many amputees do not have timely access to them.

Healthcare and rehabilitation services for IDPs with a disability appear to be particularly lacking. Although, in theory, it is illegal to deny health insurance to a person based on their status, I was told that IDPs are in practice often denied healthcare cover or told their policy is invalid as they have no fixed or permanent address and/or move during their cover. This results in IDPs with a disability often not having access to anything other than very basic healthcare and no rehabilitation services.

5. THE FARC-EP PEACE PROCESS

Persons with disabilities were excluded from participating in the FARC-EP peace process negotiations. This was put down to ignorance rather than lack of political will by many of those interviewed. Nevertheless, it appears that persons with disabilities were the only minority group not to be consulted and engaged with in the peace talks.

Although the government has said that 'everyone' will be included in the implementation of the peace process, there are no details yet as to how persons with disabilities will be accommodated to ensure their inclusion. To oversee the implementation of the peace process and corresponding legislation, the Commission for the Follow-up, Promotion and Verification of the Implementation of the Final Agreement was created in December 2016. The Commission is composed of three government officials and three members of FARC-EP. It has focused on the establishment of the FARC-EP reintegration zones (see below), passing and implementing the amnesty law and other peace legislation, reaching agreement on crop substitution and designing development programmes in rural areas. Although

³⁰⁸ One of Colombia's biggest health insurers went bankrupt in 2015, which has resulted in many persons not having health insurance cover and an overburdening of the basic state healthcare system.

gender-related issues, such as maternal health in the reintegration zones, were reportedly being considered by the Commission, as of March 2017 it had not taken a disability inclusive approach to its work. A high-level consultation was held between the Commission and members of civil society in January 2017; women's groups and some ethnic minority groups participated in these consultations, but no ODPs. It is unclear if ODPs were invited to participate.

To oversee the reintegration of FARC-EP members, a Reintegration Council, comprised of government and FARC-EP members, has been established. As of March 2017, the Council did not include persons with disabilities; its work had solely focused on the reintegration of child members of FARC-EP.

a. FARC-EP Zones

As part of the peace agreement, 26 zones have been set up where approximately 6,900 FARC-EP members are handing over their weaponry and being processed for reintegration or prosecution. Of these zones, 19 have reception centres and the remaining 7 are more basic campsites. The zones were hastily developed and many, as of March 2017, did not have running water, sanitation facilities, electricity and sufficient road access. Such provisions are the responsibility of the government, whereas the living quarters within the zones are to be built by FARC-EP members with material provided by the government and the United Nations. A small number of the zones have health centres where very basic healthcare is available. FARC-EP members will not have any private health insurance as most don't have the necessary identification papers.

Upon arrival at the zones, there is no screening process to establish if any FARC-EP members have a disability and what their needs might be. Once in the camp, FARC-EP members are processed to determine if they will be prosecuted, or given papers to allow them to access integration programmes. As no attempts are currently being made to identify FARC-EP members with a disability, reasonable accommodation cannot be made to ensure a person with a disability has equal access to legal and other services within the zones.

6. PEACE TALKS WITH THE ELN

The Government of Colombia began peace talks with the ELN in February 2017. The six-point negotiating agenda, agreed as the framework for the peace talks, includes: (i) societal participation in the construction of peace; (ii) democracy for peace; (iii) transformations for peace; (iv) victims; (v) end of the armed conflict; and (vi) implementation. It was anticipated by a number of those interviewed that lessons have been learnt from the FARC-EP talks and the ELN talks will be more inclusive of persons with disabilities.

G. IN SUMMARY

The protracted conflict in Colombia has had a disproportionate impact on persons with disabilities. Disability was/is not being mainstreamed in the conduct of hostilities, treatment of internees, provision of healthcare, rehabilitation and access to justice, nor in activities related to anti-personnel mines or in the peace process. There is a gap in knowledge on the impact of the conflict on persons with disabilities and their needs. Disaggregated data, as required by Article 36 of the CRPD, is needed to help assess Colombia's implementation of the CRPD and to identify the barriers faced by persons with disabilities in accessing their rights. There also appears to be a general lack of understanding on the intersectionality between disability and other factors including gender, age, socioeconomic background and ethnicity. This is a further area where disaggregated data is needed to overcome the incorrect understanding of persons with disabilities as a homogenous group and thus help in the development of legislation and policies to ensure the full realization of their human rights.

Overall, there seems to be a political will to ensure the effective implementation of the CRPD and the ultimate realization of the rights of persons with disabilities across Colombia. However, disability is still largely perceived based on the medical model by IGOs and government authorities, with a focus on 'curing' or 'rehabilitating' a person with a disability rather than accommodating them. Lack of resources and infrastructure, the remoteness of the location of persons with disabilities, the movement of IDPs with a disability, insecurity and corruption were repeatedly cited as preventing the implementation of the CRPD. The departmental and municipal systems were also credited with creating a fragmented approach to implementing the CRPD as there is little vertical coordination across departments, nor any horizontal coordination from the ministries to the municipalities. There are still large rural areas where the state has no presence and armed groups control the territory; this is a major challenge to implementing the CRPD.

The Geneva Academy provides post-graduate education, conducts academic legal research and policy studies, and organizes training courses and expert meetings. We concentrate on branches of international law that relate to situations of armed conflict, protracted violence, and protection of human rights.

Established in 2007 by the Faculty of Law of the University of Geneva and the Graduate Institute of International and Development Studies, the Geneva Academy has acquired a global reputation for excellent teaching and research, and it attracts students of high quality to its master's and training programmes. Our graduates are employed around the world, promoting and protecting international humanitarian law (IHL) and human rights (HR) in governments, NGOs, international organizations and academic institutions. The Geneva Academy thus contributes to the dissemination of legal knowledge in these crucial sectors.

Our scientific research focuses on clarifying IHL, strengthening human rights protection, and developing the areas of complementarity between IHL and international human rights law. In these areas, the Geneva Academy makes a specific contribution to policy development and debate, in government and among scholars and practitioners.

The Geneva Academy is a cosmopolitan community located in the heart of Geneva, an international city and humanitarian hub. Through close interaction with international organizations, NGOs, experts, and governments, we actively participate in global discussions of IHL, HR, international criminal law, and transitional justice.

978-2-9701253-0-3



The Geneva Academy
of International Humanitarian Law
and Human Rights

Villa Moynier
Rue de Lausanne 120B
CP 1063 - 1211 Geneva 1 - Switzerland
Phone: +41 (22) 908 44 83
Email: info@geneva-academy.ch
www.geneva-academy.ch

© The Geneva Academy
of International Humanitarian Law
and Human Rights

This work is licensed for use under a Creative
Commons Attribution-Non-Commercial-Share
Alike 4.0 International License
(CC BY-NC-ND 4.0).