

# MAKING EVERY LIFE COUNT: ENSURING EQUALITY AND PROTECTION FOR PERSONS WITH DISABILITIES IN ARMED CONFLICTS

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## I PROTECTING THE VULNERABLE

Armed conflicts and natural disasters both cause impairments and pose acute challenges for persons with disabilities. On 26 December 2004 the so-called Boxing Day Tsunami in the Indian Ocean took the lives of 200,000 people. Of these, four times more women than men were killed,<sup>1</sup> while children constituted up to one third of the fatalities.<sup>2</sup> Persons with disabilities were among those who fared worst, unable to flee or resist the wall of water. They were less able to access life-saving aid in the immediate aftermath of the disaster. They were also the most vulnerable to abuse, exploitation and exclusion. In more recent years the conflict in Syria — which had caused the displacement of more than two million people by November 2013 — has had a devastating impact upon persons with disabilities. At its tenth session in September 2013, the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) issued a statement imploring all concerned in this conflict to safeguard persons with disabilities. It noted that:

Syria is a State Party to the *Convention on the Rights of Persons with Disabilities*. Article 11 of the Convention says that a State Party is obliged under international humanitarian and human rights law to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including armed conflict.<sup>3</sup>

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1 John Aglionby, 'Four Times as Many Women Died in Tsunami', *The Guardian* (online), 26 March 2005 <<http://www.theguardian.com/society/2005/mar/26/internationalaidanddevelopment.indianoceansunamidecember2004>>.

2 UNICEF, 'UNICEF Launches \$144.5 Million Appeal' (Press Release, 6 January 2005) <[http://www.unicef.org/media/media\\_24707.html](http://www.unicef.org/media/media_24707.html)>.

3 Office of the United Nations High Commissioner for Human Rights, 'Persons with Disabilities 'Forgotten Victims' of Syria's Conflict' (Press Release, 17 September 2013) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13736&LangID=E>>. The CRPD Committee is the monitoring body for the United Nations Convention on the Rights of Persons with Disabilities.

The CRPD Committee exhorted all parties to stop targeting civilians, to allow humanitarian agencies to undertake their work without hindrance, and to give assistance to persons with disabilities in refugee camps and in other facilities where such persons have sought shelter.

On the one hand, it is not difficult to see how conflict and other disasters make people more vulnerable. Physical injuries and the mental anguish and trauma endured by individuals affected by emergency situations lead to both short term and more enduring disabilities.<sup>4</sup> Persons with disabilities face unique challenges when normal physical, social, economic and environmental networks are interrupted. They are more likely to be left behind during evacuations as a result of poor preparation or inaccessible evacuation facilities and transport systems. Humanitarian assistance is frequently inaccessible to persons with disabilities. Refugee camps and settlements often struggle to accommodate the mobility restrictions and other needs of persons with disabilities.<sup>5</sup> Medical services can be ill-equipped to offer the complex or ongoing services that persons with disabilities require. Competition over scarce resources brings a heightened risk of discrimination against persons with disabilities. Persons with disabilities are routinely excluded from recovery and reconstruction programs.<sup>6</sup> In October 2013, the UN released an online survey that confirmed the needs of persons with disabilities in emergency situations more generally were too often neglected by governments.<sup>7</sup> The survey also showed that persons with disabilities are rarely consulted when governments make plans to deal with emergency situations arising out of natural disasters or armed conflicts.

The Ad Hoc Committee on a Comprehensive and Integral International Convention Protecting the Rights and Dignity of Persons with Disabilities was formed by the UN General Assembly in 2002.<sup>8</sup> This Committee was tasked with drafting a text that would guarantee that persons with disabilities enjoy, fully and effectively, all

4 Janet E Lord, 'Disability-Inclusive Disaster Preparedness and Response' (2010) 104 *American Society of International Law Proceedings* 118, 119–20; United Nations Enable, *Disability, Natural Disasters and Emergency Situations* <<http://www.un.org/disabilities/default.asp?id=1546>>.

5 See Mary Crock et al, 'To "Promote, Protect and Ensure": Overcoming Obstacles to Identifying Disability in Forced Migration' (Draft Paper, University of Sydney). This is prepared for the AusAID project 'Protecting Refugees with Disabilities in Displacement' — please refer to authors for publication.

6 See Lord, above n 4; United Nations Enable, above n 4.

7 United Nations Office for Disaster Risk Reduction, 'UN Global Survey Explains Why So Many People Living with Disabilities Die in Disasters' (Press Release, 10 October 2013) <[http://www.unisdr.org/files/35032\\_2013no29.pdf](http://www.unisdr.org/files/35032_2013no29.pdf)>.

8 *Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, GA Res 56/168, 3<sup>rd</sup> Comm, 56<sup>th</sup> sess, 88<sup>th</sup> plen mtg, Agenda Item 119, UN Doc A/RES/56/168 (26 February 2002) [2].

human rights enumerated in existing human rights conventions.<sup>9</sup> Its fifth meeting was held shortly after the Boxing Day tsunami. With the disaster fresh in mind, the Costa Rican delegation found general support when it suggested that the text should include a separate provision on ‘special situations’ in which persons with disabilities were ‘especially vulnerable’.<sup>10</sup>

Article 11 of the *Convention on the Rights of Persons with Disabilities*,<sup>11</sup> which was eventually concluded in 2007, requires that States Parties:

take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

The *CRPD* does not contain a derogation clause permitting the suspension of certain human rights in public emergencies (as in art 4 of the *ICCPR*). On the contrary, it directs states on the importance of maintaining the rights of persons with disabilities in such situations. In addition, the *CRPD* is unusual among the core human rights treaties in explicitly invoking humanitarian law alongside human rights law in armed conflicts. The only other core human rights treaty to do this is the *CRC*, which, in art 38(1), requires States Parties ‘to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child’. It also limits the recruitment of child soldiers, and demands that States Parties ensure ‘protection and care of children who are affected by an armed conflict’.<sup>12</sup>

This article considers the implications of art 11 of the *CRPD*, which is one of the most significant and novel of the human rights protections that the Convention extends to persons with disabilities. It focuses on one type of emergency situation — armed conflict. This choice allows the intersection between one of the oldest fields of human rights law and one of the newest to be explored. International humanitarian law (IHL) is a centuries old legal regime that governs international

9 These instruments included the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (*CRC*); *International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

10 Marianne Schulze, ‘A Handbook on the Human Rights of Persons with Disabilities: Understanding the UN Convention on the Rights of Persons with Disabilities’ (Handicap International, July 2010) 83.

11 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (*CRPD*).

12 *CRC* art 38(4).

and non-international armed conflicts, while the human rights regime relating to the rights of persons with disabilities is a newcomer in international law.

Traditionally, IHL exclusively governed armed conflicts, principally because binding international human rights law did not exist until the adoption of the twin covenants in 1966. Thereafter there was a prevailing view that IHL applied in armed conflicts as a ‘strong’ form of *lex specialis* (or special law), which excluded human rights law as the more general law (*lex generalis*).<sup>13</sup> Over time it has been generally accepted that international human rights law continues to operate during armed conflict,<sup>14</sup> although its precise relationship to IHL varies according to the norm in question and the context. Thus IHL may cover the field where human rights law does not address a certain issue, while human rights law may apply in full where IHL is silent. Where both regimes potentially apply in a given area, IHL can operate as a ‘weak’ form of *lex specialis* to qualify (but not exclude) the application of human rights norms (as in the case of the right to life). In other areas, controversy remains as to the scope of application of human rights norms (such as detention and criminal trials in non-international conflicts).

Article 11 of the *CRPD* expressly acknowledges the concurrent application of IHL and the *CRPD* in armed conflict. It requires State Parties to abide by all of their human rights obligations, including those owed to persons with disabilities, during situations of emergency.<sup>15</sup> To some extent it leaves open the precise relationship between particular norms of the *CRPD* and IHL in specific contexts. Given the highly specialised nature of the *CRPD*, it might be the case that a particular *CRPD* rule could apply as the *lex specialis* to qualify or displace a less favourable rule of IHL. In its application, questions will arise whether it is proper to view certain rules of the *CRPD* or IHL as the more ‘special’ law in the particular circumstances. The issue is yet to be addressed by authoritative international bodies.

The *CRPD* contains various mechanisms for monitoring and enforcing the rights it enshrines. At the national level, as for all human rights treaties, States Parties are required to implement their obligations in national law and provide binding, effective and accessible remedies to individuals for breaches — including the usual forms of reparation (restitution, compensation, guarantees of non-repetition, apology, and so on). In addition, art 34 of the *CRPD* establishes an international treaty body, the *CRPD* Committee, for monitoring and supervising states’ implementation of their *CRPD* obligations. Like other treaty bodies, the

13 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 240.

14 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 242–3 [216], quoting *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 178 [106]; Konstantinos Mastorodimos, ‘The Utility and Limits of International Human Rights Law and International Humanitarian Law’s Parallel Applicability’ (2009) 5 *Review of International Law and Politics* 129, 129; Jean-Marie Henckaerts, ‘Concurrent Application of International Human Rights Law and International Humanitarian Law: Victims in Search of a Forum’ (2007) 1 *Human Rights and International Legal Discourse* 95, 96–7.

15 Cassandra Phillips, Steve Estey and Mary Ennis, ‘The Convention: On Paper and in Practice’ (2010) 35 *Forced Migration Review* 23, 23.

CRPD Committee does not have the power to issue legally binding decisions capable of directly vindicating the rights of victims of violations. Rather, the Committee engages in a constructive dialogue with states to identify problems of implementation and to persuade them to bring their laws and practices into conformity with the *CRPD*. This is done via a process of States Parties submitting progress reports and, following discussion with the state, the Committee making recommendations (in the form of ‘concluding observations’) on how States Parties could better promote and protect *CRPD* rights (arts 35–6).<sup>16</sup> Under art 1 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities*,<sup>17</sup> individuals may submit complaints about a violation of their rights by a State Party. The Committee may urgently request interim measures ‘to avoid possible irreparable damage to the victim ... of the alleged violation’ (art 4), and may make non-binding, quasi-judicial recommendations for ceasing the violation and repairing any damage caused by it (art 5). The Committee may also launch an inquiry into allegations of grave or systematic violations (art 6).<sup>18</sup>

The focus of this article is on both the protection of persons with disabilities under IHL outside of the *CRPD*, and how the *CRPD* enhances the rights of persons with disabilities affected by conflict. In order to assess the protections under IHL, it draws on both treaty law and the authoritative statement of customary IHL in a study by the International Committee of the Red Cross (ICRC) in 2005.<sup>19</sup> While some of the customary rules identified by the ICRC have been contested by some states, for present purposes the rules relevant to the treatment of persons with disabilities have not been controversial.

In this article we argue that the *CRPD* reorients and transforms the protections offered through IHL by casting them in the language of ‘rights’. IHL is necessarily a product of its time and approaches disability in ways that the *CRPD* now renders outdated. Prior to the *CRPD*, one conventional approach to disability was the ‘medical model’, which views persons with disabilities entirely in terms of their medical profile and medical needs. Another is the ‘charity model’ that portrays persons with disabilities as recipients of welfare and passive protection.<sup>20</sup> Under both these approaches, persons with disabilities are disempowered objects of treatment and protection. The relevant IHL rules discussed below largely conform

16 By September 2013, the Committee had completed dialogues with ten countries: Tunisia, Spain, Peru, China, Argentina, Hungary, Paraguay, Austria, Australia and El Salvador.

17 *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc A/RES/61/106 (entered into force 3 May 2008) annex II (‘*CRPD Optional Protocol*’).

18 IHL also contains a fact-finding procedure, but it has been little used in practice.

19 Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge University Press, 2005) (‘*ICRC Study*’). For a summary of the project, see generally Jean-Marie Henckaerts, ‘Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict’ (2005) 87 *International Review of the Red Cross* 175.

20 Statement by Louise Arbour, ‘Ad Hoc Committee’s Adoption of the International Convention on the Rights of Persons with Disabilities’ (Ad Hoc Committee on the Convention on Rights of Persons with Disabilities, New York, 5 December 2006), cited in Rosemary Kayess and Phillip French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 *Human Rights Law Review* 1, 3.

to this pattern. The rules are directed towards either a need for medical treatment and/or physical protection of persons with disabilities. In situations of armed conflict, where law and safety are both typically scarce, these are no small things, but they are not sufficient to safeguard the interests of persons with disabilities.

The revolution wrought by the *CRPD* is that it advances a ‘social’ model of disability. This approach conceptualises persons with disabilities as rights-bearing agents, ‘able to claim those rights as active members of society’.<sup>21</sup> The *CRPD* also approaches disability as a phenomenon that is context specific: that is, it conceptualises disability as the result of society and environment as much as the product of a personal condition. It recognises that in times of war, minor impairments can become major impediments to leading a safe, dignified life. The *CRPD* articulates rights in a way that is sensitive to the particular needs of persons with disabilities, recognising that differential treatment may be necessary to ensure universal enjoyment of rights.

The contribution that the *CRPD*, as a rights-based instrument, can make to upholding the rights of persons with disabilities during armed conflict is explored in the five sections below. Each section investigates one type of protection under IHL and considers how the *CRPD* can enhance rights in this area.

## II SPECIALISED PROTECTIONS FOR THE ‘DISABLED AND INFIRM’

The ICRC Study confirms that people who are ‘disabled or infirm ... are entitled to special respect and protection’ in situations of international and non-international armed conflict.<sup>22</sup> This norm existed in IHL treaties and customary IHL before, and independently of, the *CRPD*.

The most general rule is stated in art 16 of the *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (‘*Fourth Geneva Convention*’), which provides that ‘the infirm’ are among the groups of civilians who ‘shall be the object of particular protection and respect’.<sup>23</sup> In its authoritative commentary on the *Fourth Geneva Convention*, the ICRC explains that infirm civilians were singled out as deserving special status because ‘those persons are in a state of weakness which demands special consideration’.<sup>24</sup> The commentary explains that the term ‘respect’ in this article means ‘to spare, not to attack’, while ‘protect’ means ‘to come to someone’s defence, to give help and support’. This language ‘make[s] it unlawful to kill, ill-treat or in any way injure [a person with a disability], while at the same time [it imposes] an obligation to come to his aid and

21 Arbour, above n 20.

22 Henckaerts and Doswald-Beck, above n 19, 489–91.

23 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (‘*Fourth Geneva Convention*’).

24 Jean S Pictet (ed), ‘IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War’ (Commentary, International Committee of the Red Cross, Geneva, 1958) 134 (‘*IV Geneva Convention Commentary*’).



give him any care of which he stands in need'.<sup>25</sup> This general obligation is echoed in prolific State practice, especially in the form of domestic military manuals, many of which state that it is a responsibility of national armed forces to provide special care and protection to 'the infirm'.<sup>26</sup>

The general principle of protection and respect in IHL is coupled with more specific obligations relating to the physical health and safety of persons with disabilities. Some obligations relate to medical care. The *Geneva Convention III Relative to the Treatment of Prisoners of War*<sup>27</sup> requires that '[s]pecial facilities' must be established in prisoner of war camps 'for the care to be given to the disabled, in particular to the blind, and for their rehabilitation'.<sup>28</sup> The *Fourth Geneva Convention* upholds the right of disabled persons to receive medical treatment by prohibiting armed attacks on convoys of vehicles or vessels carrying people who are infirm, according them the same protection as civilian hospitals.<sup>29</sup> The responsibility to protect persons with disabilities also includes an obligation to prioritise evacuating persons with disabilities from besieged areas, as expressed in the *Fourth Geneva Convention*.<sup>30</sup>

As this brief survey illustrates, many of the most fundamental guarantees relating to the physical health and security of persons with disabilities are protected under IHL, and have been since well before the conclusion of the *CRPD*. Rights which are now enshrined in the *CRPD* — such as the right to life,<sup>31</sup> the right to respect for one's physical and mental integrity,<sup>32</sup> and the right to the enjoyment of the highest attainable standard of health,<sup>33</sup> — have been long promoted through the rules of IHL (subject to the latter's special rules, for instance, on targeting combatants or civilians taking a direct part in hostilities, which render certain deprivations of life or inflictions of personal injury non-arbitrary).

The novelty of the *CRPD* is that it drastically shifts the lens through which these protections are viewed. The IHL rules generally relate to treatment and protection, approaches which conform largely to the charity and medical models of disability. Even the use of terminology such as 'the disabled and infirm'

25 Ibid.

26 Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Levels* (13 August 2001) § 1110 (Canada); Ministerio de Defensa Nacional, *Derecho Internacional Humanitario – Manual Básico para las Personerías y las Fuerzas Armadas de Colombia* (1995) 25 (Colombia); Ministry of Defence, *Fiche didactique relative au droit des conflits armés* (4 January 2000) 4 (France); New Zealand Defence Force Headquarters, *Interim Law of Armed Conflict Manual* (November 1992) s 1108 (New Zealand); Armée Suisse, *Lois et coutumes de la guerre (Extrait et commentaire)* (1987) art 36 (Switzerland); The War Office, HMSO, *The Law of War on Land being Part III of the Manual of Military Law* (1958) s 28 (United Kingdom); Department of the Air Force, *Air Force Pamphlet 110-31: International Law – The Conduct of Armed Conflict and Air Operations* (1976) § 14-3 (United States).

27 *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 30 ('*Third Geneva Convention*').

28 Ibid art 30.

29 *Fourth Geneva Convention* art 21.

30 *Fourth Geneva Convention* art 17.

31 *CRPD* art 10.

32 *CRPD* art 17.

33 *CRPD* art 25.

defines persons with disabilities solely in terms of their impairments, rather than as complex, multifaceted individuals whose disability forms only one dimension of their identity.

As already noted, the *CRPD* instead advances the social model of disability. This is evident in the fact that the *CRPD* contains rights beyond physical security and health, and in ways that go beyond the general guarantees in other human rights treaties. For example, it enumerates the right to an accessible physical environment (art 9), rights to access to justice and equality before the law (arts 12–13), to information (art 21), to education (art 24), and the right to be consulted on issues of relevance to them (arts 4(3)–33(3)). The *CRPD* requires States to conduct programs that raise awareness of issues relating to disabilities (art 8).

Article 11 explains that these rights continue to operate in emergency situations. The *CRPD* thus aims to create meaningful changes in the experience of persons with disabilities in situations of armed conflicts. For example, when camps are being constructed for refugees fleeing a conflict zone, the *CRPD* requires that they be built in a way that is physically accessible for people with mobility impairments. When States train their armed forces in general IHL, the *CRPD* compels them to incorporate programs raising awareness of and sensitivity towards persons with disabilities. Crucially, when States and humanitarian organisations conduct reconstruction programs following a conflict, the *CRPD* requires them to actively consult persons with disabilities on how to best meet their needs for protection and inclusion. Numerous reports have cited the lack of such consultation with persons with disabilities as one of the gravest shortcomings of most current reconstruction projects following emergencies.<sup>34</sup>

The *CRPD*, as a rights-oriented instrument, makes another critical contribution to protection during armed conflict. Like other human rights treaties, the *CRPD* vests *rights* in individuals, and thus goes beyond the IHL paradigm which primarily imposes *duties* on states without normally recognising individual rights. Further, the *CRPD* provides additional avenues through which the rights of persons with disabilities can be *enforced* and monitored. A significant limitation of IHL is that victims of violations enjoy a limited capacity to obtain remedies. States are required to implement their IHL obligations in domestic law, which includes an effective system of military discipline and criminal repression of breaches. However, IHL instruments, while guaranteeing minimum standards of treatment, do not usually confer on individuals any procedural rights to

34 See, eg, Lord, above n 4, 119–21; United Nations Enable, above n 4; Peter David Blanck, 'Disaster Mitigation for Persons with Disabilities: Fostering a New Dialogue' (Report, Annenberg Washington Program, 1995) <<http://www.annenberg.northwestern.edu/pubs/disada/>>; International Disability and Development Consortium, 'Emergency and Humanitarian Assistance and the UN Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' 5; Connecticut Developmental Disabilities Network, 'A Guide for Including People with Disabilities in Disaster Preparedness Planning' (2005) 5–6.



seek remedies for IHL violations,<sup>35</sup> or establish any enforcement mechanisms for pursuing such rights. The ICRC's commentary on the *Geneva Conventions* confirms this interpretation,<sup>36</sup> and numerous suits in domestic jurisdictions have failed because courts have reached the same conclusion.<sup>37</sup> Compensation for victims of armed conflict has generally been ad hoc or derived from human rights standards and procedures. Most often, IHL has been enforced through national, hybrid or international criminal tribunals. However, such trials are often driven not by victims asserting their rights, but by prosecutors charging alleged wrongdoers. The focus is on breached obligations, rather than on individuals claiming rights. Only in some of the more recent serious crimes tribunals have processes for victims' rights and compensation emerged.

The *CRPD* reorients protections by recognising individual right-holders who are capable of asserting and enforcing certain legal entitlements. Admittedly, its machinery of dialogue with states through progress reports and concluding observations and — under the *CRPD Optional Protocol* — individual complaints and investigations, has yet to be widely deployed or tested. Apart from its statement on the conflict in Syria (under art 6 of the *CRPD Optional Protocol*), the CRPD Committee has not had the occasion to directly comment upon situations of armed conflict. In its concluding observations, the CRPD Committee has of course commented upon the importance of including persons with disabilities in national and regional plans to deal with emergency situations. For example, after its dialogue with Australia at its tenth session in September 2013, the CRPD Committee opined that 'disability needs are often not explicitly factored into disaster response measures and ... there are as yet no specific measures in national plans to address emergency strategies for persons with disabilities'.<sup>38</sup> It recommended that Australia, 'in consultation with people with disabilities ... establish nationally consistent emergency management standards'.<sup>39</sup>

In future statements and concluding observations, the CRPD Committee most likely will develop more specific norms around the precise requirements of the

35 Christian Tomuschat, 'Individual Reparations Claims in Instances of Grave Human Rights Violations: The Position under General International Law' in Albrecht Randelzhofer and Christian Tomuschat (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (Kluwer Law International, 1999) 1, 4–5, 13; Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 497, 507. The International Court of Justice has equivalently found that the *Optional Protocol to the Vienna Convention on Consular Relations* confers primary rights on individuals, but that the secondary right to enforce those rights lies with the individual's national state: *LaGrand Case (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, 494.

36 Pictet, *IV Geneva Convention Commentary*, above n 24, 373.

37 *Distomo*, Bundesgerichtshof [German Federal Supreme Court], BGH – III ZR 245/98, 26 June 2003; *Handel v Artukovic*, 601 F Supp 1421, 1425–6 [3]–[4] (CD Cal, 1985); *Hamdi v Rumsfeld*, 316 F 3d 450, 468–9 [18]–[19] (4<sup>th</sup> Cir, 2003); *Tel-Oren v Libyan Arab Republic*, 726 F 2d 774, 817 (DC Cir, 1984); *Former Prisoners of War and civilian detainees of the ex-allied powers v Japan*, Tokyo District Court, 26 November 1998, 46 Shōmu Geppō (2000), cited in Shin Hae Bong, 'Compensation for Victims of Wartime Atrocities: Recent Developments in Japan's Case Law' (2005) 3 *Journal of International Criminal Justice* 187, 189.

38 Committee on the Rights of Persons with Disabilities, *Concluding Observations on Australia*, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [22].

39 *Ibid* [23].

‘special respect and protection’ that is to be accorded to ‘the infirm’, the extent of specialised medical and rehabilitative care that parties to a conflict are obliged to provide for persons with disabilities, and the nature of the mandatory measures for evacuating people with disabilities from besieged areas. Given that, under art 34 of the *CRPD*, the Committee’s members must be ‘experts’ who are ‘of high moral standing and recognized competence and experience in the field’, there is ample scope for progressing a sophisticated jurisprudence around the existing protections for persons with disabilities under IHL. There may also be a need for CRPD Committee members to acquire expertise in IHL. As noted earlier, to the extent that certain IHL provisions are the *lex specialis* qualifying the application of the *CRPD* in armed conflict, the CRPD Committee is appropriately interpreting *CRPD* rights in the light of IHL norms, not applying IHL as a freestanding norm. The explicit reference to IHL in art 11 also overcomes any objection that, as a human rights body, the CRPD Committee is straying beyond its mandate in considering IHL. This was a concern in the Inter-American human rights system after the *Tablada* decision.<sup>40</sup>

The Committee can follow the example set by the Committee on the Rights of the Child (CRC Committee) in some respects. As noted earlier, art 38(1) of the *CRC* requires States Parties to respect IHL rules relevant to children. In monitoring states the CRC Committee has, for example, applied standards on the recruitment, demobilisation and reintegration of child soldiers.<sup>41</sup> Through an IHL framework, the Committee has also addressed threats to children’s right to life, sexual violence, family reunification, and general protections of children in armed conflict.<sup>42</sup> The Committee has pronounced on violations of IHL instruments (including the *Geneva Conventions*), for example, in demanding that Israel ‘refrain from the demolition of civilian infrastructure, including homes, water supplies and other utilities’.<sup>43</sup> Unlike the CRC Committee, which cannot hear individual communications, the *Optional Protocol to the CRPD*<sup>44</sup> will enable the CRPD Committee to more deeply consider the interaction of IHL and *CRPD* rights in specific factual situations. A related inquiry is whether the *CRPD* protects individuals against violations by a State of which they are not citizens,<sup>45</sup> which is a common risk in international conflicts. There was some early discussion in the CRPD Committee about the applicability of the *CRPD* to non-nationals

40 *Abella v Argentina (La Tablada Case)* (Inter-American Commission of Human Rights, Case 11.137, Report No 55/97, OEA/Ser.L/V/II.95 Doc 7, 18 November 1997).

41 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Cambodia*, 24<sup>th</sup> sess, UN Doc CRC/C/15/Add.128 (28 June 2000) [8], [58]–[59]; Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Chad*, 50<sup>th</sup> sess, UN Doc CRC/C/TCD/CO/2 (12 February 2009) [69], [71].

42 For references and an even fuller comprehensive survey of these issues, see David Weissbrodt, Joseph C Hansen and Nathaniel H Nesbitt, ‘The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law’ (2011) 24 *Harvard Human Rights Journal* 115, 134.

43 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Israel*, 31<sup>st</sup> sess, UN Doc CRC/C/15/Add.195 (9 October 2002) [51].

44 *CRPD Optional Protocol* art 1.

45 See Mary Crock, Christine Ernst and Ron McCallum, ‘Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities’ (2012) 24 *International Journal of Refugee Law* 735, 741.

in certain circumstances.<sup>46</sup> The protections for the infirm in the *Fourth Geneva Convention* ‘cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, [or] nationality’ (art 13). The text of the *CRPD* equally suggests its universal applicability. The *CRPD*’s purpose, articulated in art 1, is to ‘promote, protect and ensure the full and equal enjoyment of *all* human rights and fundamental freedoms by *all* persons with disabilities’.<sup>47</sup> The fact that the *CRPD* expressly refers to emergencies, including armed conflicts, without distinguishing between nationals and non-nationals, supports the conclusion that states owe universal obligations.<sup>48</sup> Like its parent instrument, the *Optional Protocol to the CRPD* draws no distinction between citizens and non-citizens. On the contrary, any individual is entitled to bring a complaint before the *CRPD* Committee provided that he or she is subject to the State’s jurisdiction in respect of the circumstances giving rise to the complaint.<sup>49</sup>

This raises the broader question of the extraterritorial applicability of the *CRPD* itself. The protections for the sick and infirm in the *Fourth Geneva Convention* apply to anyone within the state’s own territory or foreign occupied territory (that is, wherever the state actually exercises its control).<sup>50</sup> The *CRPD* does not expressly stipulate the geographical scope of its application. Ordinarily, obligations will apply implicitly to the state’s territory. However, art 4(1)(d) also requires States Parties ‘[t]o 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’. This provision implies that a state’s *CRPD* obligations follow the state’s conduct, wherever it occurs, and is not confined to state territory. The explicit application of the *CRPD* to armed conflicts under art 11 further supports the view that it may apply to state conduct abroad. This view is consistent with the general position that obligations under the key United Nations human rights treaties apply to the State’s territory or wherever it exercises jurisdiction (that is, control) extraterritorially.<sup>51</sup>

The protections of both IHL and the *CRPD* in international conflicts will face acute difficulties of application, however, where no state effectively controls a disputed area of territory due to the persistence of active hostilities. In such cases,

46 Personal recollection of co-author McCallum, then a member of the *CRPD* Committee.

47 *CRPD* art 1 (emphasis added). Likewise, the Preamble recalls the ‘inherent dignity and worth and the equal and inalienable rights of *all* members of the human family’, and recognises that ‘*everyone* is entitled to all the rights and freedoms set forth [in the Universal Declaration of Human Rights], without distinction of any kind’ (emphasis added).

48 The universal applicability of the *CRPD* is consistent with the approach under other human rights instruments: see, eg, Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10] (‘*General Comment No. 31*’); Committee against Torture, *General Comment No. 2: Implementation of Article 2 by State Parties*, UN Doc CAT/C/GC/2 (24 January 2008) [7].

49 *CRPD Optional Protocol* art 1(1).

50 *Fourth Geneva Convention* arts 1, 2, 13, 14.

51 *General Comment No. 31* [10] (*ICCPR* art 2); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 180–2 [111]–[116] (control over territory abroad under the ICESCR), quoted in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 242–3 [216] (state exercise of jurisdiction abroad under the ICESCR).

neither state forces nor their military or civilian administrations may be capable of *fully* providing certain kinds of rights or protections, such as education, health, rehabilitation, physical mobility and accessibility, and access to justice. Under human rights law, the State is required to ensure rights are respected to the extent that it exercises jurisdictional control. Self-evidently, it cannot be legally required to provide rights (such as rehabilitation services or operational courts) if it is not in a functional position to do so. Only when intense hostilities subside, and one state succeeds in establishing its effective authority and jurisdiction over an area, will the state be capable of fulfilling the full extent of its IHL and *CRPD* obligations.

Naturally, this does not mean that those caught in the midst of hostilities are in a legal black hole — here IHL assumes particular importance. Under IHL, even where territorial control is contested, states must still respect the rules on fighting (including the principles of distinction and proportionality), and other basic civilian protections (including the provision of humanitarian subsistence needs, themselves arguably qualified by the special needs of persons with disabilities). *CRPD* rights above these minimum safeguards will not apply to the extent that the state is not capable of exercising its jurisdiction.

In non-international conflicts, if a state has lost control of part of its territory to a rebel group, the state will similarly not be responsible for its practical inability to fulfil its *CRPD* obligations, as long as it has diligently sought to repress the non-state group and to implement its own international obligations to the extent of its authority.<sup>52</sup> Again, this is because *CRPD* rights apply where the state exercises territorial or jurisdiction control, and not where the state's authority is displaced; the state does not bear absolute liability for every act on its own territory, absent control. In such cases, IHL potentially offers more protection than human rights law.

Non-state actors in non-international conflicts are themselves bound by the broad minimum standards of humane treatment under common art 3 of the *Geneva Conventions* and customary IHL,<sup>53</sup> notwithstanding that they are not strictly parties to the treaties.

In contrast, neither the *CRPD* nor other human rights treaties expressly bind non-state actors, but are solely addressed to States Parties. While it is desirable for non-state actors to respect human rights, considerable legal uncertainty remains as to the extent to which they may be seen as duty bearers, in contrast to the surer legal footing of non-state actors' obligations under IHL. At the same time, however, IHL in non-international conflict says nothing specific about protections

52 This is a general principle of the international law of state responsibility: see, eg, *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States of America v Great Britain)* (1920) VI RIAA 42; *GL Solis v Mexico (United States of America v Mexico)* (1928) IV RIAA 358; *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* (1991) 30 ILM 577, [72].

53 Henckaerts and Doswald-Beck, above n 19, 497–8.

for the infirm or persons with disabilities, but is limited to general provisions on the care of the sick and wounded.<sup>54</sup>

### III PROTECTIONS FOR THE SICK AND WOUNDED

People who are sick and wounded during armed conflict are entitled to various forms of protection as a matter of treaty and customary international law.<sup>55</sup> Customary IHL protects combatants who are no longer able to defend themselves by prohibiting attacks on a person who is *hors de combat*, a term which encompasses ‘anyone who is defenceless because of ... wounds or sickness’,<sup>56</sup> whether combatants or civilians. This prohibition is drawn from common art 3 of the *Geneva Conventions* (concerning non-international conflicts) and art 41(1) of the *First Additional Protocol* (concerning international conflicts). Beyond not being attacked, persons *hors de combat* must be treated humanely.<sup>57</sup> This rule is drawn from the fundamental guarantees of humane treatment laid out in common art 3 of the *Geneva Conventions*, art 75 of the *First Additional Protocol*, and art 4(1) of the *Second Additional Protocol*<sup>58</sup> (concerning non-international conflicts).

The ICRC explains that the obligation to treat persons *hors de combat* humanely is an ‘overarching concept’ that is not strictly defined but rather evolves over time.<sup>59</sup> It appears that humane treatment entails both negative and positive obligations. Article 12 of both the *First Geneva Convention*<sup>60</sup> and the *Second Geneva Convention*<sup>61</sup> stipulates that wounded and sick combatants ‘shall be respected and protected’ and imposes negative obligations not to engage in murder, extermination, torture or biological experiments. The ICRC commentary to this provision makes clear that abstaining from these acts is insufficient, stating that ‘[i]f a soldier, who is *hors de combat*, is respected and protected against injury of any kind, but is at the same time left to struggle alone against the effects of his

54 Geneva Conventions of 1949, common art 3(2); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) arts 5(1)(a), 7.

55 Henckaerts and Doswald-Beck, above n 19, 164–70, 306–8, 396–405.

56 Ibid 164–70.

57 Ibid 306–8.

58 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 4(2).

59 Ibid 307–8.

60 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (‘*First Geneva Convention*’).

61 *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (‘*Second Geneva Convention*’).

wound or his sickness, he runs a great risk of succumbing'.<sup>62</sup> The commentary concludes '[t]here is therefore a positive, as well as a negative, obligation ... [to care for] the wounded and sick'.<sup>63</sup>

Other protections for persons who are wounded or sick apply irrespective of a person's status as a civilian or combatant. Under common art 3(2) of the *Geneva Conventions*, as well as specific arts in the individual *Geneva Conventions*,<sup>64</sup> parties to a conflict must search for, collect and evacuate the wounded and sick.

There is also a customary rule demanding that the wounded and sick 'receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition', and that, moreover, '[n]o distinction may be made among them founded on any grounds other than medical ones'.<sup>65</sup> Several arts of the *Geneva Conventions* and the *First Additional Protocol*, as well as national military manuals and legislation, reiterate this obligation.<sup>66</sup>

There is a separate rule of custom requiring States to 'take all possible measures to protect the wounded [and] sick ... against ill-treatment and against pillage of their personal property'.<sup>67</sup> This rule is drawn from the *Geneva Conventions*<sup>68</sup> and art 8 of the *Second Additional Protocol*.

What is the relevance of these protections to persons with disabilities? Some sources of law explicitly include any person with a disability in definitions of sick and wounded persons. For example, the *First Additional Protocol* defines the sick and wounded as 'persons ... who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care'.<sup>69</sup> Beyond those specific references, the inclusion of persons with disabilities in references to the wounded and sick is more ambiguous. The ICRC noted in its commentaries that none of the *Geneva Conventions* define 'wounded or sick' as 'any definition would necessarily be restrictive in character'; instead, the term's interpretation and application is 'a matter of common sense and good faith'.<sup>70</sup> They are thus potentially inclusive of a wide range of physical and

62 Jean S Pictet (ed), 'I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' (Commentary, International Committee of the Red Cross, Geneva, 1952) 137 ('*I Geneva Convention Commentary*').

63 Ibid.

64 *First Geneva Convention* art 15; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 18 ('*Second Geneva Convention*'); *Fourth Geneva Convention* art 16.

65 Henckaerts and Doswald-Beck, above n 19, 400–3.

66 *First Geneva Convention* art 12; *Second Geneva Convention* arts 12, 18; *Fourth Geneva Convention* art 16; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 10(2) ('*First Additional Protocol*'). For a survey of domestic sources, see Henckaerts and Doswald-Beck, above n 19, 400–1.

67 Henckaerts and Doswald-Beck, above n 19, 403–5.

68 *First Geneva Convention* art 15; *Second Geneva Convention* art 18; *Fourth Geneva Convention* art 16.

69 *First Additional Protocol* art 8(a).

70 Pictet, *I Geneva Convention Commentary*, above n 62, 136; Pictet, *IV Geneva Convention Commentary*, above n 24, 134.



mental disabilities. In practice, the ICRC and other humanitarian organisations have provided a broad variety of specialised equipment, assistance and services to persons with a diverse range of disabilities, thus widely interpreting and applying the protective provisions of IHL. Annually the ICRC assists more than 250,000 people in 53 countries through its Physical Rehabilitation Program and its Special Fund for the Disabled, making it amongst the most operational of all international organisations aiding persons with disabilities. While its focus has predominantly been on medical rehabilitation thus far, it is currently developing a more comprehensive approach which involves social and economic reintegration, social inclusion, and participation, having been influenced by the *CRPD*.<sup>71</sup>

The conceptual shortcoming of these definitions and explanations is that they focus exclusively on a person's own condition. Under the definition in the *First Additional Protocol*, a person must have a 'physical or mental disorder or disability' that places him or her in need of medical assistance or care.<sup>72</sup> This definition contains no reference to environmental factors that may contribute to personal difficulties. It also shows no recognition that a person, by virtue of his or her condition and environment, may not require medical attention but may nonetheless be prevented from participating fully in society. The explanation in the ICRC commentary leaves determining who falls under these protections to 'common sense and good faith'. This may mean that people who need specialised protections are left bereft. A person may have an injury or condition of a kind that would not, according to common sense, warrant attention during times of peace, but is substantially more disabling during a conflict, including because of difficult physical circumstances of conflict, shortages of essential goods and services, and restrictions on mobility and access to assistance.

For these reasons, the approach under IHL conforms to a conventional medical model which focuses only on a person's condition and what medical treatment they require. In contrast, the *CRPD*'s social model acknowledges that disability is created as much by society and environment as it is by pure impairment. Disability, as envisaged by the *CRPD*, arises from structures that unnecessarily isolate persons with physical, mental, intellectual or sensory impairments and exclude them from full participation in a community.<sup>73</sup> The *CRPD* recognises 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'.<sup>74</sup> It defines persons with disabilities as 'those who have long-term physical,

71 Claude Tardif, 'Round Table One: "International and Regional Cooperation and Partnerships for Disability Inclusive Development"' (Speech delivered at the High-level Meeting of the General Assembly on the Realization of the Millennium Development Goals and Other Internationally Agreed Development Goals for Persons with Disabilities, New York, 23 September 2013) <<https://papersmart.unmeetings.org/media2/107588/icrc.pdf>>.

72 *First Additional Protocol* art 8(a).

73 Union of the Physically Impaired against Segregation, *Policy Statement* (3 December 1974), [1] <<http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/UPIAS.pdf>>. See also Tom Shakespeare, 'The Social Model of Disability' in Lennard J Davis (ed), *The Disability Studies Reader* (Routledge, 4th ed, 2013) 214, 214–22.

74 *CRPD* Preamble para (e).

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.<sup>75</sup> This innovative model is of particular significance during armed conflict. It is conceivable that a combatant or civilian may acquire injuries or illnesses that, during peacetime, would not amount to a disability. During wartime, when there are scarce resources, more hostile physical environments and sub-standard services and facilities, this condition may effectively render the person disabled.

The *CRPD* conceptualises disability in a way that captures many wounded or sick people who cannot participate fully in society during armed conflict. In doing so, the *CRPD* unlocks many other rights for such individuals — beyond the rights to physical security and health, which is the main category of rights protected under IHL. As explored in part 2, the *CRPD*'s focus on social inclusion and development rights is far more expansive than the fundamental guarantees provided under IHL. Given that the basic security and health protections under IHL are themselves very difficult to secure, the broader rights recognised in the *CRPD* may face even greater challenges in implementation, in part because they rest on concepts (such as social inclusion and development) which were developed primarily to apply in 'normal' peacetime situations. Such concepts may require adaptation to the challenges encountered in conflict areas and which IHL was specially formulated to address.

#### IV FUNDAMENTAL GUARANTEES OF HUMANE TREATMENT

Although the ICRC explained that the architects of the *Geneva Conventions* deliberately left the term 'humane treatment' undefined to allow its interpretation to evolve over time,<sup>76</sup> IHL nonetheless provides some more explicit minimum guarantees to ensure that individuals are treated in accordance with basic standards of humanity.

Firstly, under IHL in both international and non-international conflicts, there is an absolute prohibition on torture, cruel or inhuman treatment, and outrages upon personal dignity, in particular humiliating and degrading treatment.<sup>77</sup> This rule is drawn from common art 3 of the *Geneva Conventions*, which applies to both civilians and persons *hors de combat*. Various other terms in the *Geneva Conventions* and their *Additional Protocols* prohibit 'torture',<sup>78</sup> 'cruelty',<sup>79</sup> and

75 *CRPD* art 1 (emphasis added).

76 Pictet, *I Geneva Convention Commentary*, above n 62, 53.

77 Henckaerts and Doswald-Beck, above n 19, 315–19.

78 *First Geneva Convention* art 12; *Second Geneva Convention* art 12; *Third Geneva Convention* art 17; *Fourth Geneva Convention* art 32; *First Additional Protocol* art 75(2); *Second Additional Protocol* art 4(2).

79 *Third Geneva Convention* art 87.

treatment that is ‘brutal’.<sup>80</sup> Conduct inflicting such treatment amounts to a war crime under the *Rome Statute of the International Criminal Court*.<sup>81</sup>

Secondly, fundamental guarantees are accorded to displaced persons. As a rule of custom, ‘[i]n case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated’.<sup>82</sup> This is reflected in the rules on evacuating civilian populations in the *Fourth Geneva Convention*<sup>83</sup> and *Second Additional Protocol*,<sup>84</sup> which relate to international and non-international conflicts respectively.

Thirdly, IHL provides fundamental guarantees for people in detention. As a matter of customary international law, persons deprived of their liberty in every type of conflict ‘must be provided with adequate food, water, clothing, shelter and medical attention’.<sup>85</sup> The *Geneva Conventions* enshrine this right for both prisoners of war and civilians,<sup>86</sup> including where the latter pose security threats.

These fundamental guarantees are important for anyone in situations of armed conflict, but hold heightened significance for persons with disabilities. Those persons are especially vulnerable to mistreatment during wartime in the form of exploitation, abuse (of a physical, mental or sexual nature), lack of medical care, and abandonment by their families and communities.<sup>87</sup>

The *CRPD* makes a critical contribution to upholding the right of persons with disabilities to humane treatment because of its ‘reasonable accommodation’ requirements.<sup>88</sup> The *CRPD* compels States to promote equality and eliminate discrimination by making ‘necessary and appropriate modification and adjustments ... 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’.<sup>89</sup> This responsibility imposes on States a duty to take positive steps and, on some occasions, give preferential treatment to persons with disabilities in order to eliminate discrimination and inequality.<sup>90</sup>

The *CRPD* specifically attaches ‘reasonable accommodation’ requirements to some of its fundamental guarantees of humane treatment. For example, art 14(2)

80 *Third Geneva Convention* art 89; *Fourth Geneva Convention* art 32.

81 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 8(2)(a)(ii), 8(2)(a)(iii), 8(2)(c).

82 Henckaerts and Doswald-Beck, above n 19, 463–8.

83 *Fourth Geneva Convention* art 49.

84 *Second Additional Protocol* art 17(1).

85 Henckaerts and Doswald-Beck, above n 19, 428–31.

86 For prisoners of war, see *Third Geneva Convention* arts 25–32. For civilians, see *Fourth Geneva Convention* arts 76, 85, 87, 89–92.

87 See, eg, Manfred Nowak, Special Rapporteur for Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN GAOR, 63<sup>rd</sup> sess, UN Doc A/63/175 (28 July 2008) [37]–[41].

88 See *CRPD* arts 2, 5, 14, 24, 27.

89 *Ibid* arts 2, 4(3).

90 For further analysis, see Kayess and French, above n 20, 32–3.

of the *CRPD* requires the provision of reasonable accommodation to ensure that persons with disabilities enjoy, equally with others, the right not to be arbitrarily deprived of their liberty.

The prohibition on torture, cruel or inhuman treatment and outrages upon personal dignity also attracts this requirement. In addition to a general prohibition on such inhumane treatment,<sup>91</sup> the *CRPD* obliges States Parties to ‘take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, *on an equal basis with others*, from being subjected to torture or cruel, inhuman or degrading treatment or punishment’.<sup>92</sup> This provision acknowledges that some treatment that would not qualify as inhumane for fully able persons may qualify as such for persons with disabilities.

This approach is consistent with that taken by various human rights tribunals around the world, which have found that what is classified as torture or cruel, inhuman or degrading treatment is contextual and depends on the characteristics and vulnerabilities of the person in question. In 1999, the UN Human Rights Committee considered a communication brought under the ICCPR by a prisoner incarcerated in Jamaica who was paralysed from the waist down. He was unable to move from his cell unless carried by other inmates, and his slop bucket would be removed from his cell only when he could afford to pay inmates to remove it for him.<sup>93</sup> The Committee found that these problems were ‘difficulties he ... encountered *as a disabled person*’, and that the conditions violated his ‘right to be treated with humanity and with respect for the inherent dignity of the human person ...’<sup>94</sup>

Similarly, under the *European Convention on Human Rights*,<sup>95</sup> the European Court of Human Rights considered the case of an incarcerated woman with physical disabilities.<sup>96</sup> It found that the conditions of detention amounted to degrading treatment because the bed and toilet were inaccessible to a person with disabilities.<sup>97</sup> The same Court, dealing with the right to family life, heard the complaint of a man with hearing and speech impairments who had been convicted of sexual assault and whom the French authorities intended to deport.<sup>98</sup> The Court found that in light of the ‘accumulation of special circumstances, notably his situation as a deaf and dumb person, capable of achieving a minimum psychological and social equilibrium only within his family’, removal from his

91 *CRPD* art 15(1).

92 *CRPD* art 15(2) (emphasis added).

93 Human Rights Committee, *Hamilton v Jamaica*, 66<sup>th</sup> sess, UN Doc CCPR/C/66/D/616/1995 (23 July 1999) [3.1].

94 *Ibid* [8.2] (emphasis added).

95 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

96 *Price v United Kingdom* (European Court of Human Rights, Chamber, Application No 3394/96, 10 July 2001).

97 *Ibid* [30].

98 *Nasri v France* (European Court of Human Rights, Chamber, Application No 19465/92, European Court of Human Rights, 13 July 1995).

family in France would violate his human rights.<sup>99</sup> The Court also addressed the case of a man diagnosed with a chronic mental disorder and a personality disorder who hanged himself while in solitary confinement.<sup>100</sup> It found that when assessing whether conditions of detention violated the prohibition on inhuman treatment, it should, ‘in the case of mentally ill persons ... take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment’.<sup>101</sup> It concluded that the failure to accord specific monitoring and other protections to this psychologically impaired detainee was ‘not compatible with the standard of treatment required in respect of a mentally ill person’.<sup>102</sup>

Allegations of inhumane treatment of persons with disabilities have also arisen in the Inter-American human rights system. In one case before the Inter-American Commission on Human Rights, a man with a mental disability had died in solitary confinement.<sup>103</sup> The Commission found that although solitary confinement ‘can in itself constitute inhumane treatment’ for any detainee, keeping a person with a mental disability in such conditions ‘could involve an even more serious violation of the State’s obligation to protect the physical, mental and moral integrity of persons held under its custody’.<sup>104</sup> In another case, the Inter-American Court of Human Rights addressed whether ill-treatment in detention amounted to torture.<sup>105</sup> The Court found that when assessing the suffering endured by the victim, it must ‘take into account the specific circumstances of each case, in view of objective and subjective factors’ relevant to each individual, including his or her ‘age, gender, health condition, and any other personal circumstance’.<sup>106</sup> The victim’s vulnerabilities in this case — evidenced in the fact that he required ongoing psychiatric and psychological treatment ‘for life’ after his incarceration — grounded a finding of torture.<sup>107</sup>

Following the contextual approach to the identification of ill-treatment evident in the human rights cases above, the CRPD Committee could complement and elaborate on the fundamental guarantees under IHL in a manner which is tuned to the protection needs of persons with disabilities. That is, the prohibitions on torture and other mistreatment, the protections accorded to displaced persons, and the protections for people in detention — be it penal or administrative detention for civilians, or detention as prisoners-of-war for combatants — should be applied with the particular needs and vulnerabilities of persons with disabilities in mind,

99 Ibid [46].

100 *Keenan v United Kingdom* (European Court of Human Rights, Chamber, Application No 27229/95, 3 April 2001).

101 Ibid [111].

102 Ibid [116].

103 *Rosario Congo v Ecuador* (Inter-American Commission on Human Rights, Case 11.427, Report 63/99, 13 April 1999).

104 Ibid [58].

105 *Bueno-Alves v Argentina (Judgment)* (Inter-American Court of Human Rights, 11 May 2007).

106 Ibid [83].

107 Ibid [83]–[86].

to ensure that these individuals substantively and meaningfully enjoy the same level of protection as others.

## V RESTRICTIONS ON THE USE OF WEAPONS DURING ARMED CONFLICT

Article 35 of the *First Additional Protocol* provides that '[i]n any armed conflict, the right of the Parties ... to choose methods or means of warfare is not unlimited', and establishes a prohibition on using 'weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'. This rule has crystallised into a customary norm.<sup>108</sup> One difficulty with this rule is its vagueness: views differ on how a party to a conflict — or a tribunal after a conflict — can assess whether a weapon violates this rule.<sup>109</sup> Even in its commentary on the *First Additional Protocol*, the ICRC acknowledged that '[u]nnecessary suffering is a term implying numerous medical parameters', and that it is 'impossible ... to objectively define suffering or to give absolute values permitting comparisons between human individuals'.<sup>110</sup>

There are two main tests for whether a weapon causes superfluous injury or unnecessary suffering. The first is whether its use will render death inevitable.<sup>111</sup> The second is whether its use would inevitably result in serious permanent disability.<sup>112</sup> This test is enunciated in numerous domestic sources of law. For example, the United States' *Air Force Pamphlet* states that the prohibition on poison is based on 'the inevitability of ... permanent disability', and that any new weapon should be tested against the same standard.<sup>113</sup> During discussions of the Ad Hoc Committee on Conventional Weapons in 1974, the representative of Poland stated that the use of weapons 'which caused ... disablement', such as blinding, should be restricted or forbidden.<sup>114</sup> The United Kingdom's *Manual of the Law of Armed Conflict* states that weapons 'with a low probability of ... permanent injury' should always be preferred to 'those that cause permanent harm'.<sup>115</sup> Colombia's *Basic Military Manual* prohibits employing weapons that 'cause ... extensive, lasting and serious damage to people'.<sup>116</sup> Côte d'Ivoire and Sierra Leone outlaw the use of weapons that 'cause injuries that are impossible

108 Henckaerts and Doswald-Beck, above n 19, 237–44.

109 Ibid 240.

110 International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Geneva, 1987) 408.

111 Henckaerts and Doswald-Beck, above n 19, 241.

112 Ibid.

113 Department of the Air Force, *Air Force Pamphlet 110-31, International Law – The Conduct of Armed Conflict and Air Operations* (1976) §§ 6-4f, 6-7a (United States).

114 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts' (vol XVI, CDDH/IV/SR.1, 13 March 1974) 13 [27].

115 Ministry of Defence (UK), *The Manual of the Law of Armed Conflict* (2004) [6.18.1]–[6.18.3].

116 Ministerio de Defensa Nacional, *Derecho Internacional Humanitario – Manual Básico para las Personas y las Fuerzas Armadas de Colombia* (1995) 49–50.



to treat'.<sup>117</sup> Upon acceptance of the 1995 *Protocol IV on Blinding Laser Weapons to the Convention on Certain Conventional Weapons*,<sup>118</sup> Sweden declared that any weapon causing 'permanent blindness' violated the prohibition on means and methods of warfare which cause unnecessary suffering.<sup>119</sup> This State practice suggests that any weapon calculated to cause a serious permanent disability is prohibited under IHL. However, many weapons with an accepted military utility necessarily still cause grave disabilities, from explosives to nuclear weapons.

Helpfully for interpreting the general norm, the international community has concluded a number of treaties establishing prohibitions or restrictions on the use of a suite of different weapons, many of which have developed into more specific customary rules. Such weapons include poison, biological weapons, chemical weapons, expanding bullets, exploding bullets, weapons primarily injuring by non-detectable fragments, booby-traps, landmines, incendiary weapons and blinding laser weapons.<sup>120</sup>

Rules on the use of particular weapons during armed conflict are significant for persons with disabilities because they contribute to the prevention of disabilities in armed conflict. *Protocol IV to the CCW* prohibits 'laser weapons [which are] specifically designed ... to cause permanent blindness',<sup>121</sup> and demands that States Parties 'take all feasible precautions to avoid the incidence of permanent blindness' when using other laser systems.<sup>122</sup> The 1997 *Anti-Personnel Mine Ban Convention*<sup>123</sup> expresses a determination 'to put an end to the suffering and casualties caused by anti-personnel mines, that ... maim hundreds of people every week'.<sup>124</sup> The 2008 *Convention on Cluster Munitions*<sup>125</sup> requires States to conduct risk education programmes and awareness activities in order 'to reduce the incidence of injuries ... caused by cluster munitions remnants'.<sup>126</sup>

Interestingly, the *CRPD* itself does not refer to the prevention of disabilities, other than in the art 25 right to health where it requires States to provide 'health services ... designed to minimize and prevent further disabilities'. More extensive

117 Ministère de la Défense, Forces Armées Nationales, *Droit de la guerre, Manuel d'instruction, Livre III, Tome 1: Instruction de l'élève officier de 1ère année, Manuel de l'élève* (November 2007) 12–14 (Côte d'Ivoire); Armed Forces Education Centre, *The Law of Armed Conflict: Instructor Manual for the Republic of Sierra Leone Armed Forces (RSLAF)* (September 2007) 44 (Sierra Leone).

118 *Protocol on Blinding Laser Weapons (Protocol IV to the Convention on Certain Conventional Weapons)*, opened for signature 13 October 1995, 35 ILM 1218 (entered into force 30 July 1998) ('*Protocol IV to the CCW*').

119 *Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects: Declarations and Reservations (Sweden)* vol 1380, CCW/CONF.I/16 Part I (15 January 1997).

120 See generally Henckaerts and Doswald-Beck, above n 19, 251–96.

121 *Protocol IV to the CCW* art 1.

122 *Ibid* art 2.

123 *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, opened for signature 18 September 1997, 2056 UNTS 211 (entered into force 1 March 1999) ('*Anti-Personnel Mine Ban Convention*').

124 *Ibid* Preamble.

125 *Convention on Cluster Munitions*, opened for signature 3 December 2008, 48 ILM 357 (entered into force 1 August 2010) ('*Convention on Cluster Munitions*').

126 *Ibid* art 11(d).

obligations of prevention were discarded out of fear that, if such measures were directed to the general community, they would ‘risk deflecting attention and resources away’ from persons who already had disabilities.<sup>127</sup> For that reason, the *CRPD* adds little to the existing IHL provisions which are designed to prevent future disabilities by controlling unnecessarily injurious weapons.

Another important feature of some of these treaties is that they require States to provide assistance to victims of the weapons they regulate. The first instrument to impose such an obligation was the 1997 *Anti-Personnel Mine Ban Convention*. Its Preamble expresses a wish among States Parties ‘to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims’. Article 6(3) imposes on States Parties which are ‘in a position to do so’ an obligation to ‘provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs’. Since the treaty was concluded, States Parties and organisations have cooperated to bring a disability perspective to broad reconstruction frameworks on health, rehabilitation, education, employment and development, while prioritising approaches which are non-discriminatory, inclusive and participatory, and accommodate gender and diversity perspectives.<sup>128</sup>

The next instrument to incorporate an obligation to assist victims was the 2003 *Protocol V on Explosive Remnants of War to the Convention on Certain Conventional Weapons*.<sup>129</sup> Article 8(2) demands that States which are ‘in a position to do so shall provide assistance for the care and rehabilitation and social and economic reintegration of victims of explosive remnants of war’, providing a similar list of bodies which can contribute to those efforts. In 2008, in order to solidify this commitment, States Parties adopted a *Plan of Action on Victim Assistance*.<sup>130</sup> This plan set out obligations relating to providing ‘age and gender-sensitive medical care, rehabilitation, psychological support and ... assistance for ... inclusion’,<sup>131</sup> data collection,<sup>132</sup> cooperation with other States and organisations,<sup>133</sup> the development of national laws and policies for victim assistance; and consultations with victims and their representative organisations.<sup>134</sup>

Building on the developments in these two treaties, the 2008 *Convention on Cluster Munitions* included a far more extensive provision on victim assistance. The Preamble expresses a ‘need to coordinate adequately efforts undertaken

127 Disability-Inclusive Development Reference Group, ‘Communiqué’ (Second Meeting, Australian Agency for International Development, 2–4 November 2009) <<http://aid.dfat.gov.au/aidissues/did/Documents/drg2-nov09.pdf>> [33].

128 Anti-Personnel Mine Ban Convention Implementation Support Unit, ‘Assisting Landmine and other ERW Survivors in the Context of Disarmament, Disability and Development’ (Brochure, Geneva International Centre for Humanitarian Demining, June 2011) 10.

129 *Protocol V on Explosive Remnants of War to the Convention on Certain Conventional Weapons*, opened for signature 27 November 2003, 45 ILM 1348 (entered into force 12 November 2006) (*‘Protocol V to the CCW’*).

130 *Plan of Action on Victim Assistance Under Protocol V*, CCW/P.V/CONF/2008/12 (11 November 2008).

131 *Ibid* action 1.

132 *Ibid* action 2.

133 *Ibid* action 3.

134 *Ibid* action 4.

in various fora to address the rights and needs of victims of various types of weapons'. Article 2(1) defines 'cluster munitions victims' as 'all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions', making explicit the link between these weapons and disabilities. Article 5 directly incorporates all of the requirements of the *Plan of Action of Victim Assistance*.

The emphasis on victim assistance in the IHL weapons treaties aligns closely with many of the *CRPD* provisions. For example, art 25 of the *CRPD* articulates a 'right to the enjoyment of the highest attainable standard of health', and requires States Parties to 'take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation'. Under art 26, dealing with habilitation and rehabilitation, States Parties must 'take effective and appropriate measures ... to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life'. After an armed conflict, the realisation of all of the *CRPD*'s articles on social inclusion in the fields of education, employment and community life rely on effectively assisting victims of the conflict who have acquired disabilities. These weapons conventions make an important contribution to achieving this goal.

However, these treaties do not offer comprehensive rights protection, leaving some work to the *CRPD*. The treaty rules relating to victim assistance are a relatively new addition to the field of IHL. Although a rule of customary international law can crystallise within a short period of time, this will only occur if 'State practice, including that of States whose interests are specially affected, ... [is] both extensive and virtually uniform'.<sup>135</sup> Unfortunately, this threshold has not been reached with many of the weapons treaties. The *Anti-Personnel Mine Ban Convention* has 159 parties — making it the second most widely ratified weapons treaty, following the 1993 *Convention on Chemical Weapons*<sup>136</sup> — but *Protocol V to the CCW* has only 74 signatories, while the *Cluster Munitions Convention* has only 68. This places them in a markedly different position to the *Geneva Conventions*, which are universally ratified and reflected in customary international law virtually in their entirety.

Given that the weapons treaties do not exert such universally binding force, the *CRPD* can contribute to the field of victim assistance by inspiring and informing new treaties prohibiting or restricting the use of certain weapons and imposing obligations relating to victim assistance. The *CRPD* achieved 158 States Parties in a short period of time, although it too does not yet reflect customary international law. The *CRPD* provision on international cooperation (art 32) is especially likely to enhance victim assistance in armed conflicts. Article 32 requires States to

135 *North Sea Continental Shelf (Federal Republic of Germany v Denmark)* [1969] ICJ Rep 3, [74].

136 *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997).

act in partnership with other States, international and regional organisations and civil society to realise the purpose and objectives of the *CRPD*. This includes obligations to ensure that international development programs (including in the aftermath of situations of emergency) are ‘inclusive of and accessible to persons with disabilities’, to facilitate ‘capacity-building’ and research, and to provide ‘technical and economic assistance’.<sup>137</sup>

The impact of these provisions has already been felt in the weapons treaties. For example, the Preamble to the *Plan of Action on Victim Assistance* in relation to *Protocol V to the CCW* recalls the *CRPD* and its requirement that States ‘undertake to ensure and promote the full realisation of all human rights and fundamental freedoms of all persons with disabilities without discrimination’.<sup>138</sup> The same invocation is made in the Preamble to the *Cluster Munitions Convention*. These two instruments, inspired by the *CRPD*, contain the broadest formalised catalogue of measures necessary for victim assistance.

Secondly, given that not all States are parties to the conventions regarding particular weapons, the *CRPD* may provide a mechanism by which victim assistance obligations may be enforced among the States Parties to the *CRPD*. For example, even if a State is not party to the *Convention on Cluster Munitions*, it could be required to provide healthcare for victims of cluster munitions if it is a party to the *CRPD* (by virtue of any or all of art 25 on health, art 26 on rehabilitation, or art 32 on international cooperation). The fact that 158 States, and the European Union, had ratified the *CRPD* by September 2014 substantially expands the number of States that may be held liable for a failure to offer adequate assistance to victims of the use of certain weapons.

## VI THE PROHIBITION ON DISCRIMINATION

Eliminating discrimination on the basis of disability is one of the cornerstones of the *CRPD*. Happily, in the context of armed conflict, the protection against discrimination is already robust. Under treaty and customary international law, States are prohibited from drawing certain adverse distinctions in the application of IHL.<sup>139</sup> The precise grounds on which discrimination is prohibited differs between various articles of the *Geneva Conventions* and their *Additional Protocols*. Common art 3 of the *Geneva Conventions* bans discrimination ‘founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’. The prohibited grounds for distinction in medical attention under art 16 of the *Third Geneva Convention* are ‘race, nationality, religious belief or political opinions, or any other ... similar criteria’. Article 27 of the *Fourth Geneva Convention* outlaws ‘any adverse distinction based, in particular, on race, religion or political opinion’. Articles 9(1) and 75(1) of the *First Additional Protocol* and art 2(1) of

137 *CRPD* art 32(1)(a)–(d).

138 *Plan of Action on Victim Assistance Under Protocol V, CCW/P.V/CONF/2008/12* (11 November 2008) Preamble.

139 Henckaerts and Doswald-Beck, above n 19, 308–11.

the *Second Additional Protocol* list ‘race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or ... any other similar criteria’.

Two features of these provisions deserve attention. The first is the fact that none of the core IHL instruments expressly mention disability discrimination. This raises a question about whether these instruments do, in fact, outlaw adverse distinctions on this basis. The ICRC’s commentary on common art 3 states that the words ‘or any other similar criteria’ were included ‘to make sure that nothing was overlooked’.<sup>140</sup> The commentary on art 16 of the *Third Geneva Convention* makes clear that the enumerated criteria are ‘only by way of example’, and that ‘one might add many more criteria’.<sup>141</sup> And in relation to art 27 of the *Fourth Geneva Convention*, the ICRC explained that the listed grounds were ‘only given by way of example’ and that ‘any discriminatory measure whatsoever is banned’.<sup>142</sup> These excerpts recommend the widest possible interpretation of which grounds of discrimination are prohibited. Disability shares many of the characteristics of other prohibited grounds — such as race, gender, religion, political opinion, and birth — in that it is inherent, involuntary, pervasive to an individual’s lived experience, and fundamental to an individual’s identity. It is highly probable that disability is a prohibited ground of adverse distinction, despite there being no authoritative IHL instrument or commentary explicitly confirming that conclusion.

This approach is consistent with the interpretation of discrimination by UN human rights treaty body committees. The Committee on Economic, Social and Cultural Rights explained that a list of prohibited grounds of discrimination that included the words ‘or other status’ clearly encompasses discrimination on the basis of disability.<sup>143</sup> The Committee stated that the explicit inclusion of disability as a prohibited ground in more recent instruments (such as in art 2 of the CRC) indicates that it is now ‘very widely accepted’ that disability discrimination is impermissible.<sup>144</sup> In subsequent General Comments, the same Committee repeated its conviction that disability discrimination is outlawed.<sup>145</sup> Similarly, the Committee Against Torture has interpreted the ban on discrimination ‘of any kind’ as extending to persons with disabilities.<sup>146</sup> Regrettably, the Human Rights Committee’s *General Comment* on Non-Discrimination in 1989 did not address

140 Jean S Pictet (ed), ‘III Geneva Convention Relevant to the Treatment of Prisoners of War’ (Commentary, International Committee of the Red Cross, Geneva, 1960) (*‘III Geneva Convention Commentary’*) 27.

141 Ibid 154.

142 Pictet, *IV Geneva Convention Commentary*, above n 24, 206.

143 Committee on Economic, Social and Cultural Rights, *General Comment No 5: Persons with Disabilities*, UN ESCOR, 11<sup>th</sup> sess, UN Doc E/1995/22 (9 December 1994) [5].

144 Ibid [6].

145 Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN ESCOR, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000) [18]; UN Committee on Economic, Social and Cultural Rights, *General Comment No 13: The right to education*, UN ESCOR, 21<sup>st</sup> sess, UN Doc E/C.12/1999/10 (8 December 1999) [16(e)].

146 Committee Against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) [20].

whether disability was included.<sup>147</sup> In a number of Concluding Observations of State reports, however, the Committee has identified disability as a prohibited ground of discrimination.<sup>148</sup> Moreover, in its 1996 *General Comment* on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, the Committee found that it would not be reasonable to restrict the right to vote at elections and in referenda on the basis of physical disability.<sup>149</sup>

One contribution of the *CRPD* is to place beyond any doubt that disability is a ground on which discrimination is prohibited, despite it not being expressly enumerated in the IHL instruments. This is not a departure from, but the culmination of, an existing trend which has supported this conclusion.

The second significant feature of existing IHL non-discrimination protections is that they prohibit only ‘adverse’ distinctions. This rule implies that a distinction may be drawn to give priority to those who require care most urgently.<sup>150</sup> For example, art 12 of the *First Geneva Convention* and the *Second Geneva Convention* provides that persons who are wounded and sick must be respected and protected without adverse distinction, qualifying this rule with the statement that ‘[o]nly urgent medical reasons will authorize priority in the order of treatment to be administered’. Likewise, art 16 of the *Third Geneva Convention* provides that prisoners of war must be treated alike, ‘subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications’. The ICRC’s commentary on this provision reasons that ‘[a]bsolute equality might easily become injustice’ if it is applied without regard to such conditions.<sup>151</sup> The ICRC makes the same observation in relation to art 27 of the *Fourth Geneva Convention*.<sup>152</sup>

The human rights field similarly permits a distinction that is designed to overcome existing inequality. For example, the UN Human Rights Committee has stated that the enjoyment of rights and freedoms on an equal footing ‘does not mean identical treatment in every instance’.<sup>153</sup> Under some circumstances, the principle

147 Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.6 (10 November 1989).

148 Human Rights Committee, *Concluding Observations on Ireland*, UN Doc A/55/40 vol I at 61 (21 July 2000) [450(e)]; Human Rights Committee, *Concluding Observations on Panama*, UN Doc CCPR/C/PAN/CO/3 (17 April 2008) [8]; Human Rights Committee, *Concluding Observations on Sweden*, 95<sup>th</sup> sess, 2625<sup>th</sup> mtg, UN Doc CCPR/C/SWE/CO/6 (7 May 2009) [10]; Human Rights Committee, *Concluding Observations on Poland*, 82<sup>nd</sup> sess, 2251<sup>st</sup> mtg, UN Doc CCPR/C/POL/CO/6 (15 November 2010) [5]; Human Rights Committee, *Concluding Observations on Belgium*, 81<sup>st</sup> sess, UN Doc CCPR/C/BEL/CO/5 (16 November 2010) [11]; Human Rights Committee, *Concluding Observations on Mongolia*, 68<sup>th</sup> sess, 1835<sup>th</sup> mtg, UN Doc CCPR/C/MNG/CO/5 (2 May 2011) [10]; Human Rights Committee, *Concluding Observations on Dominican Republic*, 71<sup>st</sup> sess, 1291<sup>st</sup> mtg, UN Doc CCPR/C/DOM/CO/5 (19 April 2012) [9].

149 Human Rights Committee, *General Comment No 25: Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 57<sup>th</sup> session, 1510<sup>th</sup> mtg, UN Doc CCPR/C/21/Rev.1/Add.7 (7 December 1996) [10].

150 Henckaerts and Doswald-Beck, above n 19, 309.

151 Pictet, *III Geneva Convention Commentary*, above n 140, 154.

152 Pictet, *IV Geneva Convention Commentary*, above n 24, 206.

153 Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.6 (10 November 1989) [8].



of equality demands that States ‘take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination’.<sup>154</sup> As explained earlier, the *CRPD* is also welcoming of preferential treatment intended to overcome the inequalities encountered by persons with disabilities, evidenced in its ‘reasonable accommodation’ requirements.

## VII CONCLUSION: ENSURING EQUALITY IN TIMES OF CRISIS

Given the egregious human impacts of armed conflict on persons with disabilities, we argue that art 11 of the *CRPD* makes a profoundly important and novel contribution to both IHL and international human rights law as these affect persons with disabilities. It demands that such persons be seen as rights bearers and agents of their own destiny in armed conflicts and other emergencies. However worthy the objectives of the protective norms of IHL, it is no longer sufficient — if it ever was — to view persons with disabilities as mere objects of pity or passive victims in needs of protection.

The *CRPD* also allows a peak human rights body — the CRPD Committee — to apply and interpret provisions of IHL directly. This will help to enhance the protections available to persons with disabilities in armed conflict. It also has the potential to advance the field of IHL by developing a more sophisticated, cross-fertilised jurisprudence on IHL and human rights norms in their application to persons with disabilities in armed conflict.

The *CRPD* remains a ‘new’ Convention. In this article we have explored some of the ways in which it can operate to develop one specialised area of international law. It is our hope that this piece will encourage others to explore the potential that the Convention carries for the transformation of many other aspects of human rights law.

154 *Ibid* [10].