



Human Rights Law Clinic Papers 2016

THE PROTECTION AND SAFETY OF PERSONS WITH DISABILITIES IN ARMED CONFLICT

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This memorandum was produced for the Geneva Academy of International Humanitarian Law and Human Rights as part of its project, 'Improving Protection of Persons with Disabilities during Armed Violence', a multi-year project that aims to provide academic and policy communities, states, intergovernmental and non-governmental organisations, armed non-state actors, humanitarian organisations and persons with disabilities with analysis, information and recommendations for ensuring better protection of and assistance to persons with disabilities in situations of armed conflict or its aftermath.

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Introduction

Armed conflict is a distressing and harrowing experience, while living with a disability often leads to a life fettered with complications, vulnerabilities and exclusion from society. Merging these two produces a situation whereby the discrimination already faced by persons with disabilities on a daily basis is exacerbated and intensified, with the disparate impact of armed conflict on this group of people being starkly clear. Despite this, the international community has only recently demonstrated an awareness of the heightened vulnerability of persons with disabilities in armed conflict and States have been demonstrably reluctant to explicitly extend robust human rights protection into these realms. The Convention on the Rights of Persons with Disabilities¹ (CRPD) contains a provision, Article 11, which directly alludes to a link between international human rights law and international humanitarian law (IHL) with regard to the protection of persons with disabilities in armed conflict.

This memorandum explores the impact of armed conflict on persons with disabilities and then considers the ways in which the CRPD has added to or modified the protection afforded to these persons under IHL. It is contended that the mutually reinforcing relationship between these two bodies of law has led to the creation of a consolidated, contemporary and progressive network of protection. Nevertheless, there remain some areas of concern, which are also highlighted.

Left behind in law, left behind in reality

Vulnerabilities of persons with disabilities in armed conflict

Armed conflict has a devastating effect on communities, and those individuals with characteristics that render them vulnerable will inevitably fare the worst. There have been numerous reports that have depicted scenarios which reveal the struggles encountered by persons with disabilities in the context of armed conflict. For example, whilst discussing the conflict in the Central African Republic, Human Rights Watch described the experiences of an elderly man who had lost both his hands and feet to leprosy and was found abandoned in his home following a massacre; and that of a young boy with polio who was found hiding after having also been left behind.² Abandonments such as these are underscored as a prevalent issue for people with disabilities in such situations, as family members are often left to choose between fleeing to save themselves and risking their lives by attempting to assist the individual with a disability.³

Another issue that has been highlighted with regard to the heightened difficulties faced by those with disabilities in armed conflict is the inaccessibility of crucial information for those with hearing, visual or intellectual impairments.⁴ The consequences of this lack of accessible

¹ General Assembly Resolution 61/106, UN Doc A/RES/61/106 (2007).

² Human Rights Watch, 'Central African Republic: People With Disabilities Left Behind' <<https://www.hrw.org/news/2015/04/28/central-african-republic-people-disabilities-left-behind>> (accessed 24 March 2016).

³ Ibid.

⁴ Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Thematic study on the rights of persons with disabilities under article 11 of the Convention on the Rights of Persons with Disabilities, on situations of risk and humanitarian emergencies', UN Doc A/HRC/31/30 (2015), p. 28.

information include individuals not being aware of evacuation strategies, being unable to fully understand the gravity of the situation and not recognising warning signals. In Myanmar, for example, intellectually disabled persons were amongst those killed at an internally displaced persons camp due to their inability to understand the imperative to flee.⁵ Moreover, it has been documented in Iraq that those with hearing or visual impairments could not hear or see warning shots made by soldiers at checkpoints.⁶

These examples demonstrate how persons with disabilities are at an increased risk of coming to harm in situations of armed conflict, due to the deficiency of protection mechanisms able to assist those who have disabilities. The recognition encapsulated by the CRPD that social structures need to be modified to accommodate those of varying abilities, and the extension of this protection in situations of armed conflict, to some extent alleviates this problem. By recognising the need to show greater concern for the world's largest minority,⁷ and doing so in a manner that does not cast these individuals as being weak and defenceless, the CRPD can ensure that scenarios such as those detailed above will not be as prevalent as they have been thus far. The appreciation of the need to accommodate those with disabilities who are caught up in armed hostilities should cause a shift in the meaning of the 'norm', from signifying the 'able-bodied' to instead representing persons with a diverse range of capabilities whose safety should not be compromised.

Multidimensional vulnerabilities

For older people, children and women with disabilities, their vulnerability is elevated further. The multidimensional discrimination suffered by such persons is something that is being increasingly recognised by the international community.⁸ Such heightened awareness should be welcomed; persons with disabilities belonging to such groups have needs that are specific and diverse, due to the additional layer of potential discrimination, thus leading to their enhanced vulnerability. For example, women with disabilities are at a greater risk of gender-based and sexual violence in peacetime, and this risk is significantly amplified in times of armed conflict due to the inherent insecurity of such situations.⁹ Some convincing justifications that have been presented as to why the vulnerability of women with disabilities to sexual abuse include that they are seen as sexually abnormal, inferior and as victims.¹⁰ The CRPD contains a provision which demonstrates awareness of this form of multidimensional vulnerability and potential discrimination: Article 6. This provision directly recognises the multiple discrimination felt by women and girls with disabilities,¹¹ and obliges States parties to take measures to ensure the full advancement and empowerment of women.¹² The gendered lens adopted by the CRPD can also be noted in its preamble,¹³

⁵ Burke, M. and Vicentic, L. P. (2013) 'Protecting Persons with Disabilities in Armed Conflict' in Casey-Maslen S. (ed.) *The War Report 2013* (Oxford: Oxford University Press, 2014), p. 399.

⁶ *Ibid.* p.394.

⁷ Kayess, R. and French, P. (2008) 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' 8 *Human Rights Law Review* 1, p. 4.

⁸ See, for example, CRPD, Article 6.

⁹ Lord, J. E. (2014) 'Persons with Disabilities in International Humanitarian Law – Paternalism, Protectionism or Rights?' in Gill, M. and Schlund-Vials, C. J. (eds.) *Disability, Human Rights and the Limits of Humanitarianism* (Surrey: Ashgate Publishing, 2014), p. 156.

¹⁰ Kingston, D., CRPD Committee Member. Human Rights Council 31st Regular Session Side Event.

¹¹ CRPD, Article 6(1).

¹² CRPD, Article 6(2).

where there is explicit recognition of the elevated risk of violence towards women with disabilities and other similar provisions.¹⁴

Such provisions in the CRPD, and their attachment to IHL under Article 11, are a welcome contribution to international protection in this area as the intersection between disability and gender has not been widely acknowledged in IHL thus far. The protection that has been afforded to women has been similar to that which has been made available to persons with disabilities in that IHL adopts a paternalistic and protective position regarding this ‘weak’ group, rather than one that seeks to eliminate those social constructs that lead to their vulnerability and consequent discrimination. Like individuals with disabilities, women’s vulnerability is seen to stem from their status as females rather than the prejudiced manner in which their external environment is constructed. An example of the patronising attitude towards women in IHL is the requirement for differentiated treatment of female prisoners of war.¹⁵ Such differentiation is said to be based on their status as the weaker sex, their ‘honour and modesty’, and for reasons relating to pregnancy and childbirth.¹⁶ How this is paralleled with the paternalistic treatment accorded to persons with disabilities by IHL is discussed in due course.

The transformative potential of the CRPD: an overview

The fundamental functions of IHL include ensuring humane treatment for those rendered *hors de combat* as a result of conflict, and preventing unnecessary suffering.¹⁷ There are two potential ways in which persons with disabilities can be protected: first, disabled persons are protected by the general provisions which are designed to protect all individuals in armed conflict; and secondly, there are various special protection measures that may be seen to especially apply to persons with disabilities.¹⁸ There are, however, numerous criticisms that have been made of these latter measures, such as that disability is never explicitly mentioned as a ground on which adverse distinction cannot be drawn,¹⁹ and where persons with disabilities are alluded to, this is done so in a manner which focuses on their individual impairments.

In contrast, the CRPD is said to have marked a paradigm shift in this area,²⁰ transforming the ways in which protection is afforded to persons with disabilities. The social model approach adopted by the CRPD is in this context discussed at length in the following sections of this memorandum. The Convention has also improved the protective landscape in terms of some more practical issues that should be briefly highlighted. It must first be underscored that, contrary to other human rights instruments,²¹ the CRPD does not contain a derogation clause for times of emergency. Indeed, the very nature of Article 11 requires that it

¹³ CRPD, preambular para (q).

¹⁴ E.g., CRPD, Article 3 (g), recognising the need for equality between women and men.

¹⁵ Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 12 August 1949, 75 UNTS 135, Article 14(2).

¹⁶ Pictet, J. (1952) ‘Commentary on the Geneva Conventions of 12 August 1949: Volume III’, p. 146.

¹⁷ Op. cit., Lord, J. E. (2014), p. 157.

¹⁸ Op. cit., Burke, M. and Vicentic, L. P. (2013), p. 390.

¹⁹ Op. cit. Lord, J. E. (2014), p. 158.

²⁰ Op. cit. OHCHR, p. 3.

²¹ For example, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, Article 4.

continues to apply during these periods. Secondly, the Convention initiates methods for monitoring and enforcing these rights, by requiring States to implement its provisions through dialogue with the Committee on the Rights of Persons with Disabilities and to provide binding, effective and accessible remedies.²² Thirdly, and following on from this last point, the CRPD marks a shift in the direction these situations are approached. Where under the traditional IHL approach States hold obligations and are held responsible where they fail to meet these, under the CRPD it is now the individuals themselves that hold rights which they can assert, rather than enforcement taking place through the challenging of wrongdoers by prosecutors.²³ There is a marked sense of empowerment here, which is revolutionary both practically and symbolically.

Article 11 was introduced by Costa Rica with very little resistance, and it is thought that the 2004 Asian tsunami, fresh on States' minds, was a prominent reason for their eagerness to provide protection.²⁴ It can be suggested that States intended for this provision to be primarily used for humanitarian emergencies and other such situations, and did not fully appreciate the potential implications the provision could have with regard to armed conflict. In the Human Rights Council's 31st regular session in March 2016, for example, while significant emphasis was placed on States' protection of persons with disabilities in earthquakes, tsunamis and floods, very little attention was accorded to their protection in armed conflict. States would perhaps be reluctant to concede that such robust and holistic protection as is afforded by the CRPD would apply in times of conflict. Although there is room for a considerable discussion as to the interaction between IHL and international human rights law in this context, this examination will proceed on the basis that the CRPD, as a highly specialised instrument, should be considered the *lex specialis* and IHL the *lex generalis* regarding the protection of persons with disabilities in armed conflict.²⁵ The complementary and mutually reinforcing nature of the relationship between the two bodies of law forms the basis for the following analysis.

The medical and social models of disability

As alluded to, the CRPD has been praised for its departure from the previously medicalised approach to persons with disabilities towards a more social understanding. This latter approach considers how society is constructed in a way which renders some individuals less able to carry out daily activities than their counterparts living without disabilities. The recognition in the preamble to the CRPD that disability is an evolving concept that results from an interaction between the individuals and their environment exemplifies this novel approach.²⁶ This involves a reorientation away from the previous stance that solely considered medical impairment, and where the contribution that the environment played in a person's disability was essentially invisible to the legal regime. An illustration of the position previously adopted can be found in the provisions of IHL which employ terminology

²² Hart, N., Crock, M., McCallum, R. and Saul, B. (2014) 'Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflict' Sydney Law School Legal Studies Research Paper No. 14/106, p. 4.

²³ *Ibid.*, p. 6.

²⁴ Crock, M., Hart, N. and McCallum, R. (2014) 'War, Law and Disability: Ensuring Equality in Situations of Crisis' in Mitchell, D. and Karr, V. (eds.) Crises, Conflict and Disability: Ensuring Equality. (Oxon, Routledge, 2014), p. 9.

²⁵ *Ibid.*, p. 4.

²⁶ CRPD, preambular para (e).

such as the “wounded and sick”,²⁷ “mutilation”,²⁸ and the “infirm”.²⁹ Aside from the fact that these terms ignore the social structures which are an inherent part of the disability, they also serve to dehumanise persons with disabilities by categorising them solely according to their impairments. The term “persons with disabilities” rectifies this by explicitly referring to these individuals’ humanity before alluding to their impairments.

The CRPD requires law and policy to be underpinned by some general principles, including autonomy,³⁰ non-discrimination,³¹ inclusion³² and equality of opportunity.³³ This holistic approach has the capacity to inform how IHL is to be interpreted and applied in practice. Rather than looking for medical issues which need to be treated, attention can instead be turned to providing assistance to those with disabilities in order to provide them with the same opportunities as others. This can still incorporate the protection of wounded soldiers and civilians that were covered by the former approach adopted by IHL, and it can additionally include those who may not be in need of urgent medical attention but nonetheless require the restructuring of forms of assistance.³⁴ For example, in the context of armed conflict, resources can be concentrated on finding a solution for deaf persons to access emergency information, where radio messaging is unavailable to them.

Treatment-oriented and preventive objectives

Another way in which the social model can be advantageous for the protection of persons with disabilities in armed conflict is that it represents a shift away from attempts to ‘rectify’ disabilities. A primary focus of IHL instruments has been to identify the disability and then attempt to ‘cure’ or ‘treat’ this. For example, Article 110(2) of the Third Geneva Convention provides that prisoners of war should be repatriated if their condition requires treatment. Although it can be argued that this is not necessarily a negative measure – these are provisions aimed at ostensibly treating prisoners with illnesses – the undertones of this approach can be damaging to the manner in which persons with disabilities are treated. It is suggested that the focus on curing ailments carries strong implications that people with disabilities are in an undesirable state and that they need to be assimilated into the ‘able-bodied’ milieu.³⁵ This then perpetuates the stigma accorded to persons with disabilities that the CRPD aims to eliminate.

The Convention takes an alternative position. Instead of facilitating the treatment of disabilities, the provisions aim to create a society in which those individuals with disabilities are respected and accommodated for. This is achieved through a wide range of provisions, such as the obligation to raise awareness of persons with disabilities,³⁶ ensure the provision

²⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 12 August 1949, 75 UNTS 287, Article 16.

²⁸ Geneva Conventions I-IV of 1949, Common Article 3.

²⁹ Geneva Convention (IV), Article 17.

³⁰ CRPD, Article 3(a).

³¹ CRPD, Article 3(b).

³² CRPD, Article 3(c).

³³ CRPD, Article 3(e).

³⁴ Op. cit., Lord (2014), p. 160.

³⁵ Op. cit. Kayess, R. and French, P. (2008), p. 5.

³⁶ CRPD, Article 8(a).

of reasonable accommodation,³⁷ and enable access to their physical environment.³⁸ By shifting protection in this direction, the CRPD changes the view propagated by IHL of persons with disabilities as victims, who are lesser people unless and until they reach the capability level of their 'able-bodied' counterparts.

The concept of removing the stigma associated with persons with disabilities is also reflected in the lack of provisions in the CRPD designed to *prevent* actions being carried out that have a disabling impact. There is one loose reference, in the provision relating to the right to health,³⁹ which can be linked to the prevention of disabilities. At first sight, this could appear to be one way in which IHL is more progressive, but upon closer analysis it emerges that there are valid reasons that can be put forward for this seeming deficiency.

As was the case with provisions relating to the treatment of disabilities, preventive provisions could be seen to perpetuate a hierarchy whereby those who are able-bodied are posited as the norm, and resources and attention should be concentrated on preventing people deviating from this norm, rather than on those who already have impairments.⁴⁰ Furthermore, those Hague Conventions and 'weapons law' instruments which do serve to prevent the disabling impact of warfare tend to focus on visibly horrific types of disability such as being blinded by lasers⁴¹ or mutilation.⁴² This can lead to a situation where some more hidden disabling impacts such as those felt by victims of persistent sexual violence or the psychological impacts of warfare on persons are pushed to the periphery and are not deemed to be as objectionable.⁴³ Such disabling impacts could include the long-term and persistent scarring that sexual abuse can, and usually does, incur. This scarring may not be physically discernible, but may be more permeating, and less easily treated, than visible scars. Finally, it must be mentioned that although restrictions on the methods of warfare do exist in IHL, the disabling impact of warfare is by no means proscribed in totality, but merely regulated.⁴⁴ It would therefore be an exaggeration to suggest that IHL provides comprehensive protection from the carrying out of disabling actions. This would also involve a misleading perception of the nature of IHL; a body of law that regulates, and thus indirectly advocates, the use of force.

Pragmatism: the respective roles of the two bodies of law

Some commentators have suggested that the deficiencies of the IHL regime with regard to the protection afforded to groups such as persons with disabilities are due to its narrowly defined objectives of regulating the means of warfare and protecting those who are most

³⁷ This concept is defined in CRPD Article 2.

³⁸ CRPD, Article 9.

³⁹ CRPD, Article 25(b).

⁴⁰ Op. cit., Lord (2014), p. 167.

⁴¹ 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 (CCW), as amended 21 December 2001, 10 October 1980, 1342 UNTS 137, Protocol IV, Article 1.

⁴² Geneva Conventions I-IV, Common Article 3.

⁴³ Op. cit., Lord (2014), p.166.

⁴⁴ For example, see Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 35(2) – which only prohibits methods of warfare that cause 'unnecessary suffering'.

vulnerable.⁴⁵ For example, it is arguably difficult in the panic and confusion of armed conflict to adopt a wider view of disability that is not focused on those characteristics which are immediately obvious, such as disfigurement. It can be contended that the primary objective of IHL cannot be effectively fulfilled where the specific needs of individuals are not capable of being immediately identified.⁴⁶ The social model encapsulated by the CRPD has the potential to include a far superior number of people than the medical model, and it may be unrealistic to expect the protection of IHL to extend this far.

On face value, this argument can appear to be valid. However, firstly, this again perpetuates a hierarchy whereby those with more visibly discernible injuries are posited above those with less visible, but equally destructive impairments. It has already been discussed that those with hearing impairments would not fit the traditional IHL lexicon, but would nonetheless face heightened difficulties in armed conflict.⁴⁷ Furthermore, those with intellectual difficulties may not appear to be physically different from those who do not have such challenges, but will experience a significantly disparate impact from the effects of armed conflict. These individuals are often specifically targeted or have a reduced ability to protect themselves. For example, in Aleppo in Syria, a psychiatric hospital was attacked and the patients who had mental disabilities were left without staff, and were targeted by snipers.⁴⁸ Therefore, although it may be practically easier to carry out the aims of IHL by adopting the medical model of protection, it is a misplaced argument to suggest that this would lead to improved protection. It is arguably where the disability is rendered invisible that the individual is more vulnerable, and thus the added layer of protection afforded by the CRPD initiates a progressive development in this area.

Adverse distinction and reasonable accommodation

From formal equality to reasonable accommodation

The adoption of a formal equality stance is one that has been widely criticised, and such criticism has been levied at IHL.⁴⁹ This 'formal equality' stance can be generally explained as treating all individuals alike with a policy of absolute non-discrimination.⁵⁰ One justification for this has already been broached: that one should not exceed one's expectation of a body that is regulating activity in an area that is at the vanishing point of law.⁵¹ This concept derives from the idea that IHL, despite its faults, is a mechanism that provides protection to individuals in precarious and volatile situations where little attention appears to be paid to the parameters of the law. Moreover, as a justification for the formal equality stance that IHL has been accused of adopting, the circumstances in which the Geneva Conventions were adopted cannot be ignored. They were introduced after the Second World War, where

⁴⁵ Op. cit., Lord (2014), p. 168.

⁴⁶ Op. cit., Lord (2014), p. 164.

⁴⁷ Ibid.

⁴⁸ Op. cit., Burke, M. and Vincentic, L. P. (2013), p. 400.

⁴⁹ Durham, H. and O'Byrne, K. (2010) 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law' 92 *International Review of the Red Cross* 877, p. 34.

⁵⁰ See generally for an exploration of formal and substantive equality: Fredman, S. (2005) 'Providing Equality: Substantive Equality and the Positive Duty to Provide' 21 *South African Journal on Human Rights* 2, pp. 163-190.

⁵¹ Lauterpacht, H. (1952) cited in: op. cit., Lord (2014) p.168.

discrimination brought about unspeakable tragedies.⁵² The desire to adopt a neutral stance can therefore be understood.

However, it can be argued that the criticism that a formal stance is adopted cannot be entirely substantiated. As has been discussed, a paternalistic approach has been taken with regards to women in IHL provisions. Despite its flaws, this differentiated treatment represents an approach that does not abide by the absolute equality principles enshrined by formal equality. In addition to this, there are numerous provisions throughout the Geneva Conventions which proscribe discrimination “without adverse distinction” based on various enumerated grounds.⁵³ This incorporates the concept that it is sometimes admissible to discriminate against an individual, provided that such discrimination has a reasonable and objective basis, such as that it is conducive to their well-being.⁵⁴ This notion is one that exists in human rights law as ‘positive discrimination’, or ‘affirmative action’ which may be a more appropriate term. The CRPD contains a provision, in Article 5, which expressly provides for action to be taken that can be seen as discriminatory, where its aim is to promote equality. It does this by expressing that those measures which are deemed necessary to achieve de facto equality shall not be considered discrimination, thus allowing for affirmative action.⁵⁵

The Convention goes further than this by providing for ‘reasonable accommodation’, the denial of which constitutes a violation of the prohibition of discrimination.⁵⁶ Reasonable accommodation involves the notion that States owe an obligation to a person with disabilities to make appropriate modification and adjustments, such that the person can enjoy rights on an equal basis with all others.⁵⁷ The addition of this concept to IHL has the potential to dramatically change the protective landscape for persons with disabilities in armed conflict.⁵⁸ This potential derives from the fact that States, whilst contemplating warning devices or the treatment of prisoners of war, must take potential disabilities into account and adapt their strategies accordingly. States must acknowledge the expansive range of potential manifestations of disabilities, and be aware of the ways in which they can mitigate the effects of these. This is a welcome contribution. Although commentators such as Hart have praised IHL for already providing a robust protection against discrimination,⁵⁹ it will be seen that with regard to persons with disabilities there is a significant deficit in this protection.

Grounds of discrimination

Another flaw in the approach taken by IHL that reflects incoherence is the language with which it approaches discrimination, especially with regards to persons with disabilities. Again, this is an area in which the CRPD provides consistency and uniformity. Throughout the various provisions of IHL which prohibit discrimination “without adverse distinction”,

⁵² Clapham, A., Gaeta, P. and Sassòil, M. (2015), ‘The 1949 Conventions: A Commentary’ (Oxford: Oxford University Press, 2015), p. 191.

⁵³ For example, Common Article 3 provides for humane treatment ‘without adverse distinction’.

⁵⁴ Op. cit., Clapham, A., Gaeta, P. and Sassòil, M. (2015), p. 192.

⁵⁵ CRPD, Article 5(4).

⁵⁶ CRPD, Article 2.

⁵⁷ Ibid.

⁵⁸ Op. cit., Kayess, R. and French, P. (2008), p. 9.

⁵⁹ Op. cit., Hart, N., Crock, M., McCallum, R. and Saul, B. (2014), p. 6.

various grounds are categorised on which this discrimination may not take place. However, these grounds vary dramatically between each provision, and often without any identifiable justification.⁶⁰ For example, Article 12 of the First Geneva Convention provides that wounded soldiers must be cared for without adverse distinction founded on “sex, race, nationality, religion, political opinions, or any other similar criteria”.⁶¹ By contrast, Common Article 3 of the Geneva Conventions provides that individuals be treated humanely without any adverse distinction founded on “race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”.⁶² The divergence between the grounds specified in these provisions is something which is repeated throughout the IHL provisions. This has led to criticism that the non-discrimination lexis is both “vague and internally inconsistent”.⁶³

Discrimination against disability *per se* is not a ground that is explicitly enumerated in any of the IHL provisions. This may not have significant practical implications, due to the fact that disability can be implied as a prohibited ground of discrimination. It has been suggested that disability can be read into the term “any similar criteria”,⁶⁴ as having a disability is both inherent and involuntary, akin to the other characteristics mentioned in the provisions.⁶⁵ A more simple explanation could be that disability is another characteristic which renders an individual vulnerable, particularly in times of armed conflict. Despite these potential implications, the fact that disability is not explicitly mentioned can receive similar criticisms to those broached by a feminist critique, where it is suggested that the failure to mention a protected group can be important in terms of the overtones.⁶⁶ Such implications could be that these groups of people are considered to be of less importance than others, or that the discrimination they face is not deemed as comparatively objectionable. The CRPD has alleviated the problem in this area in two ways. Firstly, it has been used as a demonstration of a trend within international law to confirm that disability is a status on which discrimination is prohibited,⁶⁷ meaning the aforementioned inferences can be arrived at with ease. Secondly, it has confirmed in explicit terms, using Article 11, the connection between its provisions – which expressly prohibit discrimination based on disability – and those of IHL.

The potential transformation of IHL

The CRPD has transformative potential, even where IHL has adopted a medical model. There exist numerous IHL provisions which provide for non-adverse distinction, or positive discrimination, to be made on archaic, medicalised grounds that can be linked with disability. For example, Article 16 of the Third Geneva Convention provides that prisoners of war may receive privileged treatment based on their status of health. Although while taking into account the overall way in which IHL has perceived disability one may assume that this provision is directed at those with visible injuries in need of urgent medical attention such as disfigurement, when read alongside the CRPD a different approach could be taken.

⁶⁰ Op. cit., Clapham, A., Gaeta, P. and Sassòil, M. (2015), p. 192.

⁶¹ First Geneva Convention, Article 12.

⁶² Common Article 3.

⁶³ Op. cit., Clapham, A., Gaeta, P. and Sassòil, M. (2015), p. 192.

⁶⁴ Present in many provisions such as Common Article 3, subsequent to the enumerated grounds.

⁶⁵ Op. cit., Hart, N., Crock, M., McCallum, R. and Saul, B. (2014), p. 17.

⁶⁶ Op. cit., Clapham, A., Gaeta, P. and Sassòil, M. (2015), p. 204.

⁶⁷ Ibid.

Taking into consideration the social model of disability, “status of health” could be read according to this more novel approach, which looks at the interaction between the individual and their environment. Furthermore, “privileged treatment” could be understood to require the application of reasonable accommodation, as provided for by the CRPD.

This interpretation could manifest itself by requiring parties to an armed conflict to adopt a wide range of measures with regards to their warning systems, or conditions of places of detention, in order to ensure that persons with a range of varying capabilities are provided for. For example, States could no longer rely on leaflets or phone calls⁶⁸ in order to warn them of impending bombings, as those with psychosocial, visual or hearing impairments would not be given the same opportunities to escape. This is a further illustration of how the complementary relationship between the two bodies of law can be translated into practice in a manner that transforms the protection accorded to persons with disabilities in harmony with the more progressive approach towards this group of individuals. IHL should not be viewed as a static body of law that is incapable of evolving with societal attitudes. Instead, States engaged in hostilities should interpret their obligations according to both bodies of law simultaneously.

Regarding the transformation of IHL with regards to the CRPD, the notion of humane treatment has been said by the ICRC to be an overarching concept that is not strictly defined and has evolutive potential.⁶⁹ Like privileged treatment, the concept of humane treatment can be read simultaneously with the rights enshrined in the CRPD to initiate protection that coincides with contemporary thought. The CRPD attaches the obligation to provide reasonable accommodation to many of its central provisions which, although being important for everyone involved in armed conflict, are especially vulnerable to being violated in the case of persons with disabilities.⁷⁰ Some such guarantees include the right to life,⁷¹ the right to liberty and security of the person,⁷² and freedom from torture or cruel, inhuman or degrading treatment.⁷³ By attaching the obligation to provide reasonable accommodation to these provisions, and generally to the provisions of IHL, the CRPD can significantly elevate the protection afforded to persons with disabilities.

Hart has exemplified the manner in which this enhancement can take place through *Jamaica v Hamilton*.⁷⁴ In this case, the applicant was incarcerated, and due to the fact that he was paralysed from the waist down he was only able to leave his cell if his cellmates assisted him, amongst various other challenges he faced.⁷⁵ On the facts of the case, the Human Rights Committee found a violation of the right to be treated with humanity and with respect for the inherent dignity, but what is significant is that they did so by taking into

⁶⁸ An example of a system allegedly employed by Israel. New York Times, <http://www.nytimes.com/2014/07/09/world/middleeast/by-phone-and-leaflet-israeli-attackers-warn-gazans.html?_r=0> (accessed 10 April 2016).

⁶⁹ ICRC rules, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule87> (accessed 23 March 2016).

⁷⁰ Op. cit., Hart, N., Crock, M., McCallum, R. and Saul, B. (2014), p. 6.

⁷¹ CRPD, Article 10.

⁷² CRPD, Article 14.

⁷³ CRPD, Article 15.

⁷⁴ *Jamaica v Hamilton*, Human Rights Committee Communication 616/1995, UN Doc CCPR/C/66/D/616/1995 (1999).

⁷⁵ *Ibid.*, para 3.1.

account “the difficulties he has encountered as a disabled person”.⁷⁶ Here, Hart reasonably comments that such an approach could be taken with regard to the guarantees of IHL, when taking the CRPD in to account.⁷⁷ By recognising that there was a violation of the claimant’s rights, *taking into account the difficulties he encounters as a disabled person* it is acknowledged that the default method of treating prisoners must be adapted for a prisoner with disabilities, and this adaptation should be specific to the needs of the prisoner. For example, in this case, the State should have provided a system whereby the prisoner’s cell was cleaned and he was assisted in leaving the cell. For a prisoner with visual impairments, however, entirely different adaptations would be necessary. Failing to take adequate account of the capabilities of the particular prisoner would lead to the finding of a violation.

However, it must be underscored here that there is a potential caveat with regard to the application of reasonable accommodation. This obligation is first qualified in its very title: its application must be ‘reasonable’. This adjective has the potential to be interpreted expansively due to its subjectivity. There is a further qualification whereby the reasonable accommodation cannot impose a “disproportionate or undue burden”.⁷⁸ These terms have the potential to be as equally vague as the word ‘reasonable’, and so they are similarly open to an expansive interpretation. In times of armed conflict, where it has already been stated that the legal regime is almost at its vanishing point,⁷⁹ it is anticipated that States are likely to take advantage of this, and attempt to argue frequently that it would be inefficient with regards to cost and time to ensure that reasonable accommodation is provided.

Further, it has been suggested that the term ‘burden’ was an unfortunate choice of lexis by the drafters of the CRPD, as the Convention was seemingly drafted precisely to eliminate the concept that persons with disabilities are indeed a ‘burden’.⁸⁰ These factors represent two relatively minor flaws in an otherwise robust and improved system of protection, and it is hoped that such concerns are not substantiated with regards to the potentially expansive interpretation highlighted above.

Concluding comments

The CRPD is a revolutionary and welcome addition to the network of protection afforded to persons with disabilities in armed conflict. It must be conceded that there is a clear tension between IHL and human rights law, but this need not be considered a flaw, as both bodies of law can, it has been argued, fulfil their respective roles, simultaneously, and in a manner which is both progressive and in line with contemporary thinking. The archaic, medical model which speaks of the infirm, the wounded and the sick can be gradually eradicated, and in its place people with disabilities should be seen as just that: *people* with disabilities. Those IHL norms with which the international regime has become accustomed, such as humane treatment, need not be eliminated, but merely adapted to coincide with novel but highly advantageous concepts such as reasonable accommodation. Despite the fact that the extent of the implications of Article 11 has not, it appears, been recognised by States, this provision has the potential to be the most radical with regard to persons with disabilities

⁷⁶ Ibid., para 8.2.

⁷⁷ Op. cit., Hart, N., Crock, M., McCallum, R. and Saul, B. (2014), p. 12.

⁷⁸ CRPD, Article 2.

⁷⁹ Lauterpacht (1952) cited in: Lord (2014), p.168.

⁸⁰ Op. cit., Hart, N., Crock, M., McCallum, R. and Saul, B. (2014), p. 27.

that has been introduced thus far. This statement is arguably true of situations of peace, but is indisputably so concerning armed conflict.