



ICRC

How law protects persons with disabilities in armed conflict

Introduction

Armed conflict poses particular challenges and risks for persons with pre-existing impairments. Accessing basic services like water, sanitation, food, shelter or health care, benefiting from humanitarian relief efforts, and fleeing to safety from the dangers of military operations – to name a few – can be more complex and risky for persons with disabilities. In addition, people may also acquire new impairments as a result of armed conflict.

Several bodies of international law, including international humanitarian law (IHL) and international human rights law (IHRL) complement each other in aiming to protect persons with disabilities in armed conflict. Article 11 of the Convention on the Rights of Persons with Disabilities (CRPD), the IHRL treaty specifically dedicated to promoting the full and equal enjoyment of human rights by persons with disabilities, explicitly recognizes this complementarity. Specific rules in both bodies of law strive to ensure respect for the lives, dignity, physical and mental integrity of persons with disabilities, and to ensure their access to essential services on an equal basis with others. IHL and the CRPD also specifically accommodate persons with disabilities, in recognition of their distinct experiences resulting from their impairment in interaction with their environment.

Yet, IHL and the CRPD apply differently. IHL only applies in international armed conflict between States or non-international armed conflict between a State and one or more organized non-state armed groups, or between such groups themselves. It thus imposes obligations on both States and organized armed groups to spare and protect persons – including persons with disabilities – against risks arising from armed conflict (provided that they do not or no longer directly participate in hostilities). These risks include harm resulting from military operations, as well as the challenges for their survival and for ensuring their humane treatment when they find themselves under the control of an adversary in an armed conflict. In contrast to IHL, the CRPD binds only those States that are party to it, but not armed groups.

Taking IHL as a starting point, this paper will identify commonalities between IHL and the CRPD and emphasize certain specific contributions of IHL to the protection of persons with disabilities in armed conflict. It is hoped that this legal analysis will contribute to current efforts by the ICRC and the International Red Cross and Red Crescent Movement, as well as other actors, to operationalize better inclusion and participation of persons with disabilities in carrying out humanitarian activities in armed conflict.

What do IHL and the CRPD have in common?

IHL and the CRPD take the specific perspective of persons with disabilities into account in the assessment whether certain conduct amounts to prohibited inhuman acts.

The obligation to treat civilians and persons *hors de combat* humanely (including detainees, combatants having surrendered, wounded and sick persons), without adverse distinction,

when in the power of a party to a conflict¹ is based on the respect for the individual human being's dignity and for his/her physical or mental integrity. The term "humane treatment" is not defined in IHL. However, this lack of a definition is deliberate, as the meaning is context specific. It takes into account not only factors such as a person's individual condition, including his/her impairment, but also his/her age, social, cultural, religious or political background and past experiences, as well as how his/her capacities and needs differ due to social, economic, cultural and political structures in society.

This understanding demands sensitivity to factors of diversity, including age, gender and disability. Thus, IHL, like the CRPD, recognizes disability as one form of human diversity. This interpretation allows for a disability-specific contextualization of the concept of humane treatment that is equivalent to the "social model" underpinning the CRPD, which characterizes disability by the interaction between a person's impairment (including physical, mental, intellectual or sensory impairments) and a variety of barriers that prevent his/her full and effective participation in society on an equal basis with others.²

The interpretation of prohibited inhuman acts under IHL also takes into account the actual adverse impact of such acts on persons with disabilities. For instance, the assessment of the seriousness of the physical or mental consequences of a conduct on a person so as to amount to torture or cruel treatment will take into consideration the personal circumstances of an individual, including those resulting from diversity factors such as those listed above, as well as the fact that the suffering inflicted on a person as a result of torture or cruel treatment can be exacerbated by social and cultural conditions.³

IHL and the CRPD require specific measures for persons with disabilities under the power or control of an adverse party to a conflict, based on principles of non-adverse distinction or positive discrimination.

Under IHL, the prohibition of adverse distinction applies across all cases where persons are in the power of a party to a conflict or where they are under the territorial control of a party to a conflict.⁴ "Disability" is not explicitly mentioned as a prohibited ground of adverse distinction under IHL. However, adverse distinction based on "any other similar criteria" to those explicitly enumerated is equally prohibited; this includes adverse distinction based on disability.⁵ This IHL prohibition can be viewed as converging with the explicit prohibition of all discrimination on the basis of disability under the CRPD.⁶ Further, as IHL only prohibits "adverse" distinction, differentiated measures and/or prioritizing protection of persons with disabilities on account of

¹ See, for instance, Common Art. 3, 1949 Geneva Conventions (GCs); Art. 75, 1977 Additional Protocol I (API); Art. 4, 1977 Additional Protocol II (APII); Rule 87, ICRC Customary IHL Study. For a database compiling all rules identified as customary IHL by the ICRC as well as related State practice, see <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

² 2016 Commentary on GCI, commentary on common Article 3, para. 553. Both the 2016 commentary, as well as the original 1952 commentary on GCI are available at <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>. For a description of the concepts of "disability" and "persons with disabilities" in the CRPD, see Preambular para. (e) and Art. 1(2), CRPD.

³ 2016 Commentary on GCI, paras. 634-635 (with further references). See also Art. 15, CRPD.

⁴ See, for instance, Common Art. 3 GCs; Arts. 69-70, 75, 1977 API; Arts. 4, 18(2), APII; Rule 88, Customary IHL Study.

⁵ Prohibited grounds of adverse distinction include race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status. See common Art. 3 GCs; Art. 75(1) API; Art. 4(1) APII; Rule 88, Customary IHL Study.

⁶ Art. 5, CRPD.

their specific needs is expressly allowed and may be even required.⁷ This is equivalent to the obligations to advance de facto equality of persons with disabilities like the duties of reasonable accommodation or those related to accessibility under the CRPD.⁸ The prohibition of adverse distinction is reflected in various areas of IHL, including pertaining to the provision of health care, humanitarian assistance and victim assistance, as will be explained in the following sections.

IHL and the CRPD require specific measures addressing the accessibility of health care and rehabilitation services for persons with disabilities.

Under IHL, all wounded and sick persons, whether civilian or military, must receive the medical care and attention they require to the best degree possible in the circumstances of an armed conflict. This applies both to persons whose health-care needs are caused by a conflict, as well as to those whose needs predate the conflict and who see their access to continued health-care services affected by a conflict, as long as such persons refrain from hostile acts.⁹ No distinction may be made among wounded and sick persons on any grounds other than medical ones.¹⁰ While the kind and quality of medical attention that must be provided in armed conflicts depends upon what could reasonably be expected in light of varying medical capacities and security conditions, in the ICRC's view, health care must not be restricted to only the minimum necessary for a person's survival. Furthermore, the entitlement to care does not depend on the severity of a person's health condition or whether such condition is acute or chronic. Care in this context can also entail providing rehabilitation for persons with disabilities.¹¹

Persons with disabilities could be injured as a result of armed conflict or have specific health-care needs pre-dating a conflict, including access to certain medication or to other ongoing medical attention or rehabilitation. Therefore, persons with disabilities may qualify as "wounded and sick" in either of these situations. IHL provides that persons with disabilities must receive prioritized attention if their health condition or the risk of losing access to health and rehabilitation services they require – even when that need is ongoing – is more urgent than that of other persons. IHL also recognizes that persons with disabilities may benefit from specific health-care services, including mental health care or rehabilitation, and that such services may even be required.

A specific example of this is the obligation to afford specific facilities for health care and rehabilitation of prisoners of war (POW) with disabilities.¹² This has been the basis for ICRC delegates to demand POW camp authorities, for instance, to provide for therapies necessary for their rehabilitation, adjustments to camp infrastructure like extra stools for amputees or making relevant information better accessible to them, such as through the use of Braille. IHL also contains specific obligations equivalent to the CRPD obligations related to mobility and

⁷ This specification will also justify favourable treatment of other persons in light of specific capacities and needs, like children and women.

⁸ Arts. 2 and 5, CRPD. The CRPD defines "reasonable accommodation" as "necessary modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

⁹ Art. 8(a) API; 2016 Commentary on common Article 3 GCs, paras. 736-749.

¹⁰ See Articles 12 GCI and GCII; 10 API; Art. 7 AP II; Rule 110 Customary IHL.

¹¹ 2016 Commentary on common Article 3 GCs, paras. 741, 763-766; 2016 Commentary on Article 12 GCI, para. 1383.

¹² Art. 30(2), GCIII.

availability of assistive technologies for prisoners of war and civilian internees who must benefit from “any apparatus necessary for their maintenance in good health” free of charge.¹³ These rules may accordingly be considered as IHL equivalents to CRPD obligations on positive discrimination and accessibility.

IHL and the CRPD require specific measures for persons with disabilities in humanitarian relief and assistance.

The requirement that parties to armed conflict must meet essential humanitarian needs of affected populations under their territorial control without adverse distinction also accommodates specific humanitarian relief services for persons with disabilities as parts of affected populations or priority of persons with disabilities in humanitarian relief efforts.¹⁴ In order to accord priority to persons with disabilities in humanitarian relief efforts, specific measures are needed to ensure that persons with disabilities can access and benefit from relief efforts. This may include, for example, ensuring physical accessibility of water and sanitation facilities, providing support to transport food and non-food relief items, or designing and adapting shelter to be accessible to persons with physical impairments. IHL also recognizes the necessity to proactively identify persons with disabilities in the distribution of humanitarian relief where impartial humanitarian organizations assist parties to armed conflicts in meeting their obligations.¹⁵ This responds to one of the key expectations on humanitarian organizations to collect disability disaggregated data in needs assessments as formulated, for instance in the *Charter on Inclusion of Persons with Disabilities in Humanitarian Action*,¹⁶ and complements obligations of States parties to the CRPD related to data collection.¹⁷ Recognizing that impartial humanitarian organizations may also offer humanitarian assistance beyond urgent relief, the 31st International Conference of the Red Cross and the Red Crescent also emphasized that humanitarian assistance be accessible to persons with disabilities in areas like education, transportation, communication or socio-economic inclusion.¹⁸

IHL and the CRPD require specific measures of assistance to persons having acquired impairments as a consequence of the use of certain weapons in armed conflict.

Some treaties enshrine obligations to assist persons with disabilities whose impairment was caused by weapons used in the armed conflict. These treaties recognize the variety of short and long-term specific needs of these persons and set down obligations in relation to medical care, rehabilitation, psychological support and their socio-economic inclusion.¹⁹ While these treaties deal with specific subgroups of persons with disabilities, they do not aim to create specific privileges only for this group. This is especially visible in the Convention on Cluster Munitions (CCM), which enshrines a robust guarantee of non-discrimination in relation to persons having acquired impairments through other causes and integrates these specific

¹³ Arts. 30(5) GCIII; 91(5) GCIV; Arts. 20, 26, CRPD.

¹⁴ See, in particular, Article 70, API.

¹⁵ Commentary on Art. 70 API, paras. 2816-2817.

¹⁶ The Charter on Inclusion of Persons with Disabilities in Humanitarian Action, which has been signed by a number of States, UN agencies, NGOs, organizations of persons with disabilities, the IFRC and the ICRC at the 2016 World Humanitarian Summit is available at <http://humanitariananddisabilitycharter.org/>

¹⁷ Article 31 CRPD.

¹⁸ Resolution 2, Annex, 4-year Action Plan for the implementation of international humanitarian law, 31st International Conference of the Red Cross and the Red Crescent, Objective 2.3, para. 4.

¹⁹ See, for instance, Art. 6(3), Anti-Personnel Mine Ban Convention; Article 8(2), Protocol V to the Convention on Conventional Weapons (CCW); Art. 5, Convention on Cluster Munitions.

assistance efforts within more global national disability frameworks.²⁰ The CCM, which is explicitly based on IHL and the CRPD, also details how the obligations it creates are to be implemented through measures closely aligned with the CRPD, including disability-aggregated data collection, the adoption and implementation of national laws and policies, the development of national plans and budgets, and the requirement to ensure effective participation of cluster munition victims and their representative organizations.²¹

How does IHL specifically contribute to the protection of persons with disabilities in armed conflict?

The rules on the conduct of hostilities may contribute to preventing or minimizing harm to persons with disabilities.

The general IHL rules on the conduct of hostilities, notably the prohibitions of direct attacks,²² indiscriminate attacks,²³ and disproportionate attacks,²⁴ may prevent or minimize harm to persons with disabilities when they are civilians or other protected persons. The obligations of parties to armed conflict to take feasible precautions in attack and against the effects of military operations are particularly important in this context. For instance, with regard to precautions in attack, effective advance warning must be given for attacks which may affect the civilian population, unless circumstances do not permit.²⁵ The implementation of the obligation to issue effective advance warnings would generally require that the intended recipient is likely to receive the warning and would understand it in sufficient time to be able to act on it (for instance to vacate, or be evacuated from a certain area).²⁶ This is an entry point for presenting such potentially life-saving information in a manner as to be accessible to persons with disabilities, which would also be required under the CRPD.²⁷ With regard to precautions to protect against the effects of attack, this includes the obligation, to the maximum extent feasible, to remove the civilian population under a party to a conflict's control from the vicinity of military objectives.²⁸

IHL contains specific protections for persons with disabilities relating to evacuations for their own safety from certain areas.

In evacuations from areas of risk of attack, certain civilians, like persons with disabilities, should be prioritized. This is recognized in the Fourth Geneva Convention, according to which opposing parties to armed conflict must endeavour to conclude local agreements to remove particular civilians, including persons with disabilities, from besieged or encircled areas.²⁹ Thus, under IHL, persons with disabilities were recognized already in 1949 as requiring specific protection due to the increased risk to which they are exposed as a result of the breakdown in access to - and accessibility of - support structures.³⁰ The possibility to evacuate persons with disabilities, who often face particular barriers to flee to safety, must, however, not be abused

²⁰ See, in particular, Art. 5(2)(e), CCM.

²¹ This closely tracks several CRPD provisions, including its Arts. 4(3) and 31-33.

²² Art. 51(2), API; Rule 1, Customary IHL Study.

²³ Art. 51(4) API; Rules 11-13, Customary IHL Study.

²⁴ Art. 51(5)(b), API; Rule 14, Customary IHL Study.

²⁵ Art. 57(2)(c), API; Rule 20, Customary IHL Study.

²⁶ *Tallinn Manual on the International Law Applicable to Cyber Warfare*, 2013, commentary on Rule 58, p. 173.

²⁷ See Art. 9, CRPD.

²⁸ Art. 58 (a), API; Rule 24, Customary IHL Study.

²⁹ Art. 17, GCIV.

³⁰ See also Art. 16 GCIV; Art. 30 GCIII; and Rule 138, Customary IHL Study.

so as to violate other IHL prohibitions on forcibly deporting, transferring or displacing them for any other reasons but their own security or imperative military reasons.³¹ When such evacuations are lawful under IHL, 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.³² In this regard, the specific needs of persons with disabilities must be taken into account when evaluating what is satisfactory from their perspective.³³ The reference to avoiding separation of families upon evacuation is also crucial for persons with disabilities in many situations of armed conflict, as family members on whose support persons with disabilities may depend have often not seen any other choice than leaving them behind when moving to safer places.

Conclusion

While IHL and the CRPD come from different starting points, they share significant commonalities in accommodating the specific capacities, experiences and perspectives of persons with disabilities in armed conflict. This can be seen particularly in the assessment of prohibited inhuman acts as well as the demand that specific positive measures for persons with disabilities be taken to ensure that they effectively access services on an equal basis with others. Such measures may include the adaptation of infrastructure and information on available vital services relating to water, food, sanitation, shelter, health care and rehabilitation, the facilitation of support to transport food and non-food relief items, the continued provision of specific services required by persons with disabilities or assistance to victims of the use of certain weapons in armed conflicts. Additional protection of persons with disabilities under IHL stems from the fact that IHL imposes obligations on organized non-state armed groups in addition to State armed forces, whereas the CRPD binds only States party to it. IHL may further prevent or minimize harm to persons with disabilities resulting from specific risks for them in armed conflict. Appreciating the complementary and mutually reinforcing nature of IHL and the CRPD may facilitate current efforts aiming to operationalize better inclusion and participation of persons with disabilities in humanitarian activities in armed conflict. The ICRC is committed to this aim in its own humanitarian activities and it stands ready to constructively engage with other stakeholders in this regard.

³¹ Art. 49 GCIV; Art. 17 APII; Rule 129, Customary IHL Study.

³² Art. 49(3) GCIV; Art. 17(1) APII; Rule 131, Customary IHL Study.

³³ See, for instance, Art. 9(2), AU Convention on Internally Displaced Persons; Principles 4(2) and 19(2), UN Guiding Principles on Internal Displacement; Commentary on Rule 131, Customary IHL Study, pp. 466-467.

Note on IHL terminology

IHL treaties use the terms “infirm”, “wounded and sick” (see e.g. Arts. 16, 17, 18, 20, 22 GCIV; Art. 8(a) API) and “disabled” (see e.g. Art. 30(2) GCIII) to refer to “persons with disabilities” and the term “disablement” for “disability” (see Art. 110 GCIII). Injured and sick persons and older people can also be encompassed by these terms. IHL also refers to persons with specific impairments as “blind” (see e.g. Art. 30(2) GCIII) or persons with “mental disease” (see Art. 30(1) GCIII). While the terminology used was a product of the social and historical context of its time, and is certainly outdated in light of contemporary understandings of disability, this does not detract from the fact that already in 1949 and subsequently in 1977, persons with disabilities were recognized as requiring protection under IHL. This reflects an acknowledgement of their specific needs and the barriers they may face, as well as the specific risks to which they are exposed in their armed conflict environment. However, this should not be taken to imply that under a contemporary interpretation of IHL persons with disabilities are seen as mere objects of pity or passive victims in need of protection rather than agents of their own destiny.