

THE PROTECTION OF PERSONS WITH DISABILITIES IN INTERNATIONAL HUMANITARIAN LAW

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Abstract. The article addresses the issue of protecting persons with disabilities in the context of armed conflicts, analysing the effectiveness of international humanitarian law (IHL) in this regard. It highlights that persons with disabilities are particularly vulnerable to the effects of warfare, with their needs being often overlooked in the planning and implementation of humanitarian actions. The author discusses the evolution of the concept of disability and its various models, such as the charity, medical, social, and human rights-based models, emphasizing the need to reinterpret IHL provisions in accordance with modern human rights standards. The article notes that while IHL provides protection to persons with disabilities as civilians and as “wounded and sick”, it often uses terminology and approaches that are outdated by contemporary standards. Furthermore, it identifies practical challenges, such as the lack of adequate procedures and information, which can lead to the marginalization of these individuals in conflict situations.

Keywords: conflict; war; human rights; disability.

INTRODUCTION

The protection of persons with disabilities in the context of armed conflicts is one of the critical challenges faced by contemporary international humanitarian law (IHL). Persons with disabilities are disproportionately affected by the consequences of warfare, as confirmed by numerous reports and studies conducted by organizations such as the International Committee of the Red Cross (ICRC), the Geneva Academy of International Humanitarian Law and Human Rights, and the United Nations.¹ These reports emphasize

¹ ICRC, Frequently asked questions on the rules of war: Does IHL protect persons with disabilities? (07.03.2022), <https://www.icrc.org/en/document/ihl-rules-of-war-FAQ-Geneva-Conventions> [accessed: 10.08.2024]; ICRC, The ICRC’s Vision 2030 on Disability (06.08.2020), <https://www.icrc.org/en/publication/4494-icrcs-vision-2030-disability> [accessed: 10.08.2024]; ICRC, Advisory Service: International Humanitarian Law and Persons with Disabilities, (2017), https://www.icrc.org/en/download/file/56906/ihl_and_persons_with_disabilities_en_clean.pdf [accessed: 10.08.2024]; Human Rights Watch, Under Shelling in Kharkiv People with Disabilities Need to Evacuate Safely (07.03.2022), <https://www.hrw.org/news/2022/03/07/under-shelling-kharkiv> [accessed: 10.08.2024].

that support mechanisms and access to essential services, such as water, food, shelter, and healthcare, are often inaccessible to persons with disabilities during armed conflicts. Barriers include both physical obstacles and the lack of appropriate consultation during the planning and implementation of humanitarian actions. Persons with disabilities are also at a higher risk of injury or death, and their needs are regularly ignored within the framework of international humanitarian interventions. Additionally, armed conflicts exacerbate existing barriers faced by persons with disabilities, further hindering their access to essential services and support [Breitegger 2023, 100].

This article aims to examine whether the existing standards of International Humanitarian Law (IHL) effectively protect persons with disabilities, or whether they are merely a “set of pious wishes,” insufficient to bring about real improvements in the situation of these individuals. The analysis will explore both the theoretical legal frameworks and the practical challenges associated with implementing these norms in conflict zones. Attention will also be given to the compatibility between the International Convention on the Rights of Persons with Disabilities² (CRPD) and IHL in the context of protecting persons with disabilities during armed conflicts. Through a critical analysis of current regulations and their implementation, the article seeks to answer whether international humanitarian law can fulfill its obligations towards the most vulnerable groups in conflict situations, or whether further reforms and actions are necessary to enhance their protection.

1. THE CONCEPT OF DISABILITY IN INTERNATIONAL HUMANITARIAN LAW

As highlighted in the doctrine, the concept of disability has evolved over centuries and is subject to various interpretative changes driven by medical, social, sociological, and legal factors, making its conceptual scope ambiguous and multifaceted [Gielda 2015, 1]. This term is used to describe the consequences of a person's health condition and functioning, for the purpose of legally constituting their unique social situation [Fajfer-Kruczek 2015, 13]. In this context, we can identify four main models of understanding this phenomenon: the charity model, the medical model, the social model, and the human rights-based model. The first, the charity model, views disability as a personal tragedy or misfortune, where persons with disabilities are seen as victims of their impairments. To function properly, they are believed to require the goodwill of others, manifested in special social assistance programs. The second approach, the medical model, focuses on disability as a disease

² Convention on the Rights of Persons with Disabilities adopted by the UN General Assembly on 13 December 2006, Journal of Laws of 2012, item 1169.

or defect in the human body, which causes the person to deviate from the norm – becoming “abnormal” [Retief and Letšosa 2018, 5-6]. The third model is based on the view that disability is a socially constructed phenomenon arising from discrimination and oppression. In this perspective, it is important to distinguish between two concepts: impairment and disability. The difference between them lies in the fact that impairment refers to a condition of the body or mind, while disability is the way society responds to those impairments. This model emphasizes that societal barriers, rather than the impairments themselves, are the primary cause of the disadvantages faced by persons with disabilities [Priddy 2019, 19]. Thus, in this model, there is an emphasis on eliminating all barriers and forms of discrimination that may exclude persons with disabilities from full participation in social life. The focus is on ensuring that societal structures do not impose unnecessary restrictions on individuals with impairments, enabling them to engage equally in all aspects of society. The final model, the human rights-based model, underscores the agency of persons with disabilities, emphasizing the inherent dignity of every human being and the rights and freedoms that arise from this dignity. This approach centers on the idea that persons with disabilities are entitled to the same rights as all other individuals and should be empowered to claim those rights on an equal basis, without discrimination [Retief and Letšosa 2018, 5]. This model is reflected in the CRPD, which states 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.” According to the CRPD, persons with disabilities “include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” In this model, the world should be designed universally (inclusively) to eliminate all forms of discrimination and ensure that persons with disabilities have equal access to all human rights and freedoms stemming from the inherent dignity of the human person. This understanding represents the most holistic approach to disability issues, breaking away from stereotypical frameworks and viewing disability not merely as a statistical measure but as a progressive phenomenon [Rushing, Kabbara, Ngum Ndi, et al. 2023, 2].

When analyzing IHL, particularly Geneva law, it can be observed that it leans towards two of the models described above – the medical model and the charity model – treating persons with disabilities “as passive, weak, defective, and vulnerable and, as such, in need of special, paternalistic protection” [Priddy 2019, 52]. This is indicated by the terminology used, which in today’s context could be considered exclusionary, such as terms like “infirm,” “wounded and sick,” “disabled,” “injured,” “sick,” “blind,” or “mental

disease.” However, it is important to remember that the language used “was a product of the social and historical context of its time, and is certainly outdated in light of contemporary understandings of disability.” Despite this, it does not diminish the fact that as early as 1949, and subsequently in 1977, persons with disabilities were recognized as requiring protection under IHL [Breitegger 2017, 7]. Can IHL be criticized for adopting such an approach towards persons with disabilities? It seems not, as one must consider the context in which IHL was developed, as well as the *ratio legis* that underpinned it. This context and purpose explain the use of terminology and approaches that, while now considered outdated, were appropriate and necessary at the time of IHL’s formulation. The legal framework of IHL was designed to address the pressing humanitarian needs during and after conflicts, rather than to drive social change, which is the focus of more modern instruments like the CRPD [Priddy 2019, 52]. IHL becomes effective only during armed conflicts, and due to its specificity and intended audience, it must be characterized by a certain pragmatism and the rigorous legal language that may now seem archaic. However, this does not preclude the possibility of interpreting the specific terms used in Geneva law in the spirit of the social or human rights-based approach. While IHL was developed with the primary goal of providing immediate protection in the context of warfare, its provisions can and should be reinterpreted in light of contemporary understandings of disability and human rights. This re-interpretation allows for the adaptation of IHL to modern standards, ensuring that it remains relevant and inclusive, even if the original language may appear outdated [Breitegger 2023, 103]. However, caution must be exercised here to avoid an extreme approach that could lead to unexpected legal consequences. For example, applying a broad interpretation of disability as any kind of barrier or obstacle that may hinder or prevent proper functioning in society could imply that, at some point in life, everyone experiences such situations. This becomes even more relevant in the context of armed conflict. Such an approach could lead to unforeseen legal outcomes, as under IHL, persons with disabilities receive double legal protection – firstly as civilians and secondly as “wounded and sick,” which entails specific rights and obligations..

Is there a connection between the CRPD and IHL? This relationship was explained by Janet Lord, who stated that “CRPD is a new normative landscape against which IHL obligations must be assessed and accordingly refreshed” [Lord 2015, 172]. However, it is important to maintain the specificities of these two legal orders. The above statement is reinforced by Article 11 of the CRPD, which stipulates that “States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations

of risk, including situations of armed conflict, humanitarian emergencies, and the occurrence of natural disasters.” Thus, the CRPD becomes a specific interpretative directive for the provisions of IHL, under which the legal situation of persons with disabilities affected by armed conflict should be interpreted, particularly in the context of the principle of humane treatment of civilians. As highlighted in the ICRC report,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.” This means that the CRPD serves as a guiding framework for interpreting IHL, ensuring that the rights and needs of persons with disabilities are fully considered and protected during conflicts.

2. PROTECTIVE REGULATIONS IN IHL

Persons with disabilities who do not take an active part in hostilities under IHL possess a dual legal status, which grants them two types of legal protection. The first protection arises from their membership in the civilian population, and the second from their classification within the category of “wounded and sick,” thus falling under the group of individuals considered *hors de combat* (out of combat), which entails specific rights and obligations. This dual status is highlighted in Article 8 of Additional Protocol I⁴ to the Geneva Conventions (I AP), which states that “wounded” and “sick” mean persons, whether military or civilian, who, because of trauma, disease, or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility. The 1987 Commentary on Additional Protocol I emphasizes that when interpreting the category of individuals described as “wounded and sick,” one must look beyond the literal meanings of terms like “wounded” or “sick.” The definition provided in the Protocol is described as being “at the same time wider and narrower than the more common definition of these terms.” It is wider because it includes individuals who may not be considered wounded or sick in the usual sense but narrower because it only offers protection to such individuals if they abstain from all hostile acts (Commentary 1987, p. 117). A crucial criterion for obtaining this status is the need for medical assistance or care. However, the person’s condition does not necessarily have to

³ ICRC, How law protects persons with disabilities in armed conflict, p. 2.

⁴ 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.

require immediate medical attention at that moment but must be such that it could necessitate urgent medical care at any time. This aspect is particularly relevant for persons with disabilities, who may not require immediate care at all times but whose condition could quickly deteriorate, requiring medical intervention (Commentary 1987, p. 118).

3. GENERAL PRINCIPLES OF THE PROTECTION OF CIVILIANS

Under the concept of a civilian, as defined in Article 50, paragraph 1 of Additional Protocol I (AP I), it is understood to mean anyone who is not a member of the armed forces or a *levéé en masse*. Furthermore, this provision establishes a presumption that in case of doubt, a person should be considered a civilian. However, it is important to note that a civilian who takes a direct part in hostilities is not protected. Such a person does not lose their civilian status but temporarily loses their protection, becoming a legitimate target for the duration of their participation in hostilities [Grzebyk 2018, 112].

The general standard of protection for civilians is established by the fundamental principles of IHL, including the principle of humanity. Humanity is one of the key principles governing armed conflicts, emphasizing the prevention of human suffering and the provision of assistance to all those in need [Falkowski 2022, 22]. The principle of humanity seeks to protect values such as life, health, and human dignity, including the physical and mental integrity of individuals, which is particularly significant for persons with disabilities [Priddy 2023, 246]. The manifestation of the principle of humanity is twofold: on one hand, it prohibits the use of unjustified violence or inhumane treatment, and on the other, it ensures at least a minimum standard of life and dignity for those under the control of one of the parties to the armed conflict [Marcinko 2019, 8].

In non-international armed conflicts, the scope of humanity is outlined in Article 3 of the Fourth Geneva Convention⁵ (IV GC) – which is included in all the Geneva Conventions. According to this article, civilians must be treated humanely at all times during the conflict, which means that the following acts are prohibited: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording

⁵ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Commentary of 1958, <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949?activeTab=1949GCs-APs-and-commentaries> [accessed: 08.07.2024].

all the judicial guarantees which are recognized as indispensable by civilized peoples.” A similar provision can be found in Article 4 of Additional Protocol II to the Geneva Conventions.⁶ These provisions are fundamental in ensuring that even during the chaos of non-international conflicts, there are basic protections for civilians, reflecting the broader principle of humanity in IHL.

In the context of international armed conflicts, the Fourth Geneva Convention and Additional Protocol I provide a more detailed scope of protection grounded in the principle of humanity. According to Article 27 of the IV GC, “protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.” This provision guarantees the physical and intellectual integrity of protected persons (Commentary 1958, p. 202). It requires the parties to the conflict to treat all civilians equally, while also taking into account their health, age, and gender, which could be described as positive discrimination. IHL further prohibits the use of physical or moral coercion against protected persons (Article 31 of the IV GC), the use of measures that could cause physical or psychological suffering, such as murder, torture, corporal punishment, mutilation, medical or scientific experiments (Article 32 of the IV GC), the use of reprisals (Article 33 of the IV GC), and taking hostages (Article 34 of the IV GC).

To ensure the protection of the integrity of civilians, the parties to the armed conflict are obligated to protect civilian objects (Article 52 of I AP) and objects indispensable to the survival of the civilian population (Article 54 of I AP). The principle of humanity is also manifested in the possibility of creating demilitarized zones aimed at protecting protected persons from the dangers of combat (Article 15 of the IV GC). These provisions highlight the emphasis placed on safeguarding human dignity and the physical and psychological well-being of civilians during armed conflicts, consistent with the overarching principles of IHL. The fundamental principles that define the scope of protection also include the principle of proportionality (Article 57 of Additional Protocol I), the principle of distinction (Articles 48 and 51(5) (b) of Additional Protocol I), and the principle of military necessity, which establish the standards for conducting military operations. These principles apply to both international and non-international armed conflicts, as they have been recognized as customary norms.⁷

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁷ See: International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*,

The principle of proportionality refers to maintaining a specific balance, weighing the values and objectives that must be considered in planned military actions. It serves to determine the legality of an attack and “establish the relationship between the anticipated military advantage and the expected civilian casualties and damage to civilian objects” [Marcinko 2015, 184]. This principle imposes several restrictions on the parties to a conflict that should be considered when planning attacks, ensuring that actions are controlled and precise.

This aligns with the principle of military necessity, which dictates that force should be used “only to the extent necessary to achieve, in the shortest possible time, the partial or total submission of the enemy, and that the scope of force applied against the enemy is no greater than required to achieve this objective” [Idem 2019, 8]. Additionally, the principle of distinction, whose “essence lies in directing attacks during armed conflict only against legitimate military targets, such as combatants and objects considered military targets under IHL, while attacks on civilians and civilian objects are prohibited” [Falkowski 2022, 24], must also be adhered to.

However, applying this principle in the field can present challenges and requires military commanders to exercise excellent judgment and discernment.

4. SPECIAL PROTECTION FOR PERSONS WITH DISABILITIES

The special legal status of persons with disabilities, including their special protection, is addressed in Article 16 IV GC, which states that “the wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.” Individuals in this category cannot be attacked, and furthermore, the parties to the conflict are obligated to search for, collect, and evacuate them from areas affected by hostilities (Article 15 I GC⁸, Article 10 I AP, Article 8 II AP). This provision ensures that persons with disabilities, who may be more vulnerable during conflicts, receive the protection and assistance necessary to safeguard their well-being. The protection arising from belonging to the “wounded and sick” category is supplementary and strengthens the protection afforded to civilians. It is based on the obligation of the parties to the conflict to provide medical assistance and to create conditions that allow for the preservation of the physical and intellectual integrity of those in need. As part of fulfilling this obligation, the

Advisory Opinion, ICJ Reports 1996, par. 79; ICRS, Customary IHL Database, <https://ihl-databases.icrc.org/en/customary-ihl/v1> [accessed: 10.06.2024], chapter 1, 4 and 5.

⁸ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

parties to the conflict should strive to organize the evacuation of individuals in this category to areas where military operations are not taking place. There is also the possibility of establishing special sanitary zones where people in need of assistance can be gathered and, as far as possible, provided with access to basic healthcare services. These zones should be properly marked to ensure they do not become targets of attack.

5. CHALLENGES FACED BY IHL IN THE CONTEXT OF PROTECTING PERSONS WITH DISABILITIES

Knowing the theoretical foundations of the protection of persons with disabilities, it is worth examining the implementation of specific IHL norms in practice. It is useful to start with the issue of qualifying persons with disabilities for the group of the wounded and sick. As already mentioned, to belong to this category, individuals must meet two criteria – they must not be participating in ongoing military activities, and their condition must require medical care. This medical approach to the issue of disability may therefore exclude persons with disabilities who do not require immediate medical assistance but face other barriers to fully and properly functioning. Consequently, IHL does not fully recognize the diversity associated with the concept of disability [Priddy 2019, 56; *Idem* 2021, 11]. The issue may also be complicated by the lack of a defined concept of medical care. Does it refer exclusively to emergency situations, or does it also include access to services such as rehabilitation or other medical services that improve quality of life? [*Idem* 2019, 56].

Doctrine also highlights the issues related to the implementation of the principle of proportionality by parties to a conflict in the context of protecting civilians, particularly persons with disabilities [Breitegger 2023, 105-107; Priddy 2023, 248-50; Lord 2023, 76-77]. This is evident in the current situations during the ongoing conflict in Ukraine and in the Gaza Strip, with media reports of civilian casualties. Concerns arise from the military doctrine's view that civilians form a homogeneous group, which implies that they are assumed to have the same ability to understand and respond to danger [Priddy 2019, 61]. This approach fails to consider the needs of persons with disabilities, who, due to specific circumstances, may have different cognitive abilities.

For example, consider a situation where a military commander receives information that enemy forces and an arms cache are located in a residential building housing civilians. After conducting targeting and analyzing the situation, the commander may conclude that the military advantage outweighs civilian casualties and decides to carry out the attack. Adhering to IHL, the commander sends a voice warning to the building's residents two minutes before the attack, instructing them to evacuate as quickly as possible. Although the commander's actions may seem rational, they do not account for situations

where, for instance, deaf-mute individuals who cannot hear the warning or wheelchair users who cannot evacuate in such a short time are among the residents. Military procedures, as well as IHL itself, do not provide any specific guidelines for dealing with persons with disabilities in such scenarios.

The implementation of IHL may also be less effective in organizing the evacuation of persons with disabilities, setting up sanitary zones, and delivering humanitarian aid without prior consultation with those in need. These issues, however, do not stem from the lack of appropriate regulations in IHL but rather from the lack of goodwill on the part of one of the parties to the conflict or simply from a lack of information. This is because no registry of persons with disabilities is created, either in peacetime or during conflict. Without adequate information, it is difficult to plan effective interventions. Therefore, the lack of data regarding the number of persons with disabilities and the specific threats they face in armed conflicts also poses a significant challenge.

Should IHL be revised, or perhaps a new treaty should be adopted that specifically addresses persons with disabilities during conflicts? The answer to this question should likely be negative. As mentioned earlier, the purpose of IHL is not to reshape the world or alter reality. IHL has a clearly defined task – to legally regulate the conditions under which armed conflicts are conducted, with the greatest possible protection of civilians, but in a pragmatic manner that does not provoke objections from the state parties to the conventions.

We must remember that any change in IHL, to be effective and enforceable, requires acceptance and recognition by the individual states that are signatories. Moreover, there is a prevailing belief that “states believe that international law will in the future be overloaded with ineffective treaties, which in effect result in violations of international law norms, international liability, and ultimately a weakening of relations between states” [Kun-Buczko 2019, 49].

This perspective suggests that while there may be specific gaps or challenges in the application of IHL concerning persons with disabilities, the solution may not lie in creating new treaties but rather in enhancing the implementation and interpretation of existing norms [Al-Dawoody and Pons 2023, 354]. Improving data collection, promoting awareness, and ensuring that the principles of IHL are applied in a manner that fully considers the needs of persons with disabilities may be more effective strategies. These efforts could address the unique challenges faced by this group without the need for additional legal instruments, which might be difficult to achieve consensus on and could potentially dilute the strength of existing IHL provisions.

How, then, can the effectiveness of protecting persons with disabilities be increased? It appears that this goal can be achieved by interpreting of the existing legal framework in a way that adapts to contemporary realities and incorporates current perspectives. Soft law also has a role to play in this aspect. Although it does not binding on the parties, it points to the

directions of desired changes and highlights significant issues. Unlike treaty law, soft law can also be shaped by entities that do not have legal personality under international law [Kun-Buczko 2019, 49]. An example is the Security Council Resolution No. 2475, initiated by Poland, which calls for greater protection of persons with disabilities affected by armed conflicts. Additionally, there is a call for ongoing monitoring of the conditions in conflict-affected areas, for publicizing any irregularities, and for increasing the involvement of persons with disabilities in humanitarian efforts. Changes in military procedures and soldier training also seem important to raise awareness of the diversity encompassed by the concept of the civilian population.

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