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# An Analysis of the Adequacy of Protection Afforded by the Convention on the Rights of Persons with Disabilities (CRPD) in Situations of Armed Conflict

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**Abstract:** This essay aims to describe the contrasting approaches to disability described by international humanitarian law (IHL) and international human rights law (IHRL) with the aim of pointing out the approaches/models of disability underpinning two legal regimes. The limits of those approaches/models in the treatment and protection of persons with disabilities shall be investigated and established. Ultimately, the paper considers the possibility of recommending a unified approach/model that should underpin both IHL and IHRL in addressing aspects of disability.

**Keywords:** person with disabilities; international humanitarian law; international human rights law

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## 1. Introduction

The paper analyses the practical challenges that relate to the obligation of protecting persons with disabilities in situations of armed conflict as envisaged under Article 11 of the Convention on the Rights of Persons with Disabilities (CRPD) [1]. In carrying out this analysis, this study draws upon discourses meant to advance the growing reasoning that state actors should uphold the same nature and standard of human rights obligations in times of armed conflict as those that they are meant to uphold in times of peace [2]. In some of those cases, jurisdiction-centered arguments are increasingly proving a means of extending the scope of human rights in states' obligations from situations of peace to those of armed conflict [3] (p. 7). That increasing reference to jurisdiction as the basis of enforcing the state's responsibilities must have resulted from the desire to strengthen compliance with obligations enshrined in human rights instruments in relation to armed conflicts which are fought outside their jurisdiction, rather than limiting these to obligations in situations of armed conflict happening within a state's territorial boundaries [4]. Accordingly, in cases of belligerent occupation that may arise during armed conflict, the territory [5] (paragraphs 60–64) in which the armed conflict is located [6] (p. 4), nor the nationalities or citizenship of the affected individuals [7] (p. 37) exonerate the state from the extraterritorial scope of their human rights obligations. Therefore, there is a chance to improve the protection of rights, considering the jurisdiction method of enforcing the rights of individuals with disabilities [8] (p. 735).

This paper shall mostly examine four questions. Firstly, which sources of law can support the extraterritorial application of the Convention on the Rights of Persons with Disabilities (CRPD) in times of armed conflict? What similarities and inconsistencies in conceptualising the standards of protecting persons with disabilities can be inferred from treaties of international human rights law (IHRL) and those of international humanitarian law (IHL) if treaties from both legal regimes are concurrently applied to situations of armed conflict? How have the differences in time scales when specific models of disability have emerged and are underpinned by a recent treaty of IHRL or of IHL been a driving factor in accounting for the likely variance in the standards of conceptualising the protection underpinning IHL and IHRL treaties, especially the CRPD, when it comes to persons with disabilities? What arguments can be used in enhancing complementarity between IHL and relevant IHRL sources, in particular the CRPD, so as to harmonise the protection these two regimes of public law can afford to persons with disabilities in cases where they are in situations of armed conflict?

In responding to the above concerns, the essay shall be investigating and analyses how the conceptualisation of disability-related obligations under the CRPD treaty and the conceptualisation of similar obligations under IHL might have some contradictions [9] (p. 54). This analysis contends that such contradictions could arise from the likelihood of having irreconcilable inconsistencies in models and approaches to the understanding of disability and disabling factors in the two treaty regimes [10].

In such a case, it is arguable that there is a strong possibility for these two legal regimes to be fairly irreconcilable in their objectives towards persons with disabilities and the standards of protection that the respective regimes avail to them [11]. Under IHL treaties the framing of obligations associated with disability remains founded upon underpinnings of a medical model of disability [12], in contrast with those of IHRL treaties like the CRPD [13] (p. 219), whose disability-related obligations are framed upon underpinnings and approaches of a social model [14] (p. 11). It is imperative to note that the social model is also characterised by an outward-looking approach known for blaming the causes of disability on external factors [15] (p. 12). Thus, the model advances the argument that problems of

persons with disabilities necessitate adaptation of measures that are externally supportive to persons with disabilities rather than focusing on their impairments [16] (pp. 3–16).

The above view is acutely contrastable with the inward-looking approach of the medical and individual models that attribute the impairment of a body that must be rehabilitated [17]. The causes and consequential implications of those contradictions seem to be often overlooked by contemporary legal scholars of human rights who blame the inadequacy of the model that has always underpinned IHL obligations, thereby affording some degree of justification for mainly preferring and prioritising the universalised internationalisation of the social model of disability that underpins most disability-related obligations of IHRL treaties such as the CRPD. However, some proponents have pointed out concerns relating to the reliability of human rights obligations that have been framed upon underpinnings of social models in regulating actions of state actors in either situations of armed conflict or those of belligerent occupation [18] (paragraphs 60–64). It is vital to state that although where other treaties of IHRL that enshrine considered rights-based obligations similar to those of the CRPD shall be afforded consideration in the subsequent discussions of this essay, it is worth reiterating that attention shall be centred on analysing the consequences and implications of the differences in models or approaches through which the CRPD (as the only specifically disability-oriented IHRL treaty) and IHL treaties, especially the four Geneva Conventions of 1949 and their Additional Protocols, either portray disability or present their obligations of addressing the causes as well as the manifestation of disabling environments. That analysis is important in appreciating the criticisms of emerging proponents that contest the growing tendency to use the CRPD for developing obligations owed to individuals with disabilities in contexts that are either oblivious or dismissive of disabling surroundings as experienced or for characterising conflicted states as well as post-conflict states. This essay considers as important the idea of armed conflict and the inherent nature of its disabling environments in supporting the need to maintain the variances in the manner in which disability-related obligations under the above IHL treaties interact with aspects of disability. In that way, this study notes and argues that the relationship of causality that situations of armed conflicts have with disability, particularly in the context of war-related disabilities, might have greatly influenced IHL's conceptualisation of disability, a trend that may partly account for the inward-looking approach of medical and individual models of disability in IHL's conceptualisation of disability and, consequently, its underpinning of disability-related obligations. The paper envisages the need to use models of disability to revisit how the nature and context of disability-related obligations could vary according to the paradigms of "jus ad bellum", "jus in bello" and "jus post bellum". It is the lack of such a correlated preview of disability that may account for some of the inadequacies in the protection envisaged under Article 11 of the CRPD concerning persons with disabilities (an article whose minimalist protection appears to be more limited to states that deal with disability in an ongoing armed conflict, "jus in bello" [19] (paragraph 16), rather than dealing with issues incidental to disability in the aftermath of the armed conflict, jus post bellum or a post-conflict state). Additionally, Article 11 of the CRPD infers the concurrent import of obligations from the two regimes (IHL alongside IHRL) which are both comprised obligations, underpinned by almost irreconcilable conceptualizations of disability [20]. Subsequently, the disability obligations of those two legal regimes are portrayed in ways that are not only aimed at achieving different objectives but also tend to contradict each other on matters of disability according to Article 8 of Additional Protocol 1 and Article 68 of Geneva Convention III [21].

In analysing IHL, this study argues that there is neither concrete evidence of instances where IHL provisions explicitly cover persons with disabilities nor an elaborate definition of what constitutes disabilities or disability [22]. That challenge is compounded by evidence of where IHL appears to underestimate the importance of specifically rendering distinct protection to persons with disabilities by parties taking part in an armed conflict, whereby IHL emphasises the mainstream trend of using a two-fold categorisation of legal protection centred upon civilian and combatant classification [23] (p. 1275). The classification overshadows the need for promoting the distinctiveness and visibility of persons with disabilities. Under IHL, such a distinction is much more likely to extend greater protection

to persons with disabilities either as civilians or as combatants who might have become disabled by way of experiencing the disabling nature of collateral damage that is peculiar to environments of conflicted and post-conflict state actors [24] (p. 97).

Therefore, the research explores the solution by considering the possibility of harmonising the protection afforded to the disabled by extending the CRPD's definition of disabilities to IHL. That harmonisation assists in demonstrating to IHL that the vulnerability, identity, diversity and humanity of individuals with disabilities matters when planning protective measures for non-combatants during and after an armed conflict.

The study advances a view that such harmonisation ought to be encouraged as a means of filling the gaps subsisting in IHL as one of the protective fields of public international law during armed conflicts after reconciling its inconsistencies with the CRPD [25]. In essence, complementarity should be encouraged wherever harmonisation is attainable in order to harmonise and strengthen the protection rendered to persons with disabilities by combining the legal regimes of IHL and those of the CRPD in situations of armed conflict [26].

In some ways, this research builds upon the work of Hart et al. [12,26] who observed that IHL's medical model of conceptualising disability is outdated in relation to the social model that underpins the CRPD regime of protecting persons with disabilities. Finally, it should be mentioned that although physical, mental and intellectual disabilities are different types of disability, as mentioned in Article 1 of the CRPD, the terms 'mobility disabilities' and 'communication disabilities' shall be used when illustrating the nature of problems faced by persons with disabilities which the CRPD's social model could, in some respects, address [27] (p. 17).

## **2. International Humanitarian Law (IHL) and International Human Rights Law (IHRL) in Situations of Armed Conflict**

### *2.1. The Complementarity of and Contrasts between IHL and IHRL*

Traditionally, IHRL and IHL have been two distinctive branches of public international law ([9], [28] (p. 311)). The International Law Commission's report mentioned that IHRL relates to the protection of individual rights from the abusive behaviours of state actors [29], whereas IHL aims to minimise unnecessary suffering inflicted on non-combatants and those combatants that have withdrawn from taking part in armed hostilities [30] Common Article 3. Another distinguishing aspect is derived from the fact that IHRL is applied vertically (between a state actor and individuals) while IHL is applied horizontally (either between one state and another state, or a state and belligerents) [31] (p. 143).

In spite of those differences, in terms of protection recent developments in disability law have increasingly acknowledged the evidence of protective overlaps in the humanity-based values underpinning the objectives of IHL and IHRL. Perhaps those overlapping values founded upon humanity account for the importance of strengthening the shared elements underpinning the fundamental principles of IHL and IHRL for the sake of ensuring complementarity in the protective frameworks of these two legal regimes [28,32]. Among others, examples of those values driven by elements of humanity include the theoretical assumptions underlying the role of law in protecting human life as an integral ingredient of human dignity in times of peace as well as in situations of armed conflict [33] (Preamble), (p. 84). Those overlapping attributes might account for the concurrent application of human rights alongside humanitarian law by the United Nations Security Council [34] General Assembly, and the International Court of Justice (ICJ) when dealing with the consequences of armed conflict [35] (paragraph 25).

### *2.2. The Problem of Varied Standards under the Convention on the Rights of Persons with Disabilities (CRPD) and IHL*

In terms of illustrating that the inadequacies and inconsistencies in legal regimes could be associated with the varied standards of protective aspirations under the provisions of the CRPD

and IHL, the research refers to Article 10 of the CRPD if read in conjunction with Article 11. In that context, the former provision relates to the state party's obligation of ensuring the equal protection and enjoyment of the right to life, while the latter asserts that the state's protective duties in IHL and IHRL must be respected even during situations of natural and manmade disasters such as those of armed conflict [35]. Therefore, the subsequent paragraphs shall elaborate in detail some of the problems of applying IHRL alongside IHL rules of proportionality in situations of armed conflict as provided under (Article 51(5) (b) and 57(2) (a) (iii) and (b) of Additional Protocol ii to the 1949 Geneva Conventions) [36]. Identifying those problems is vital to understanding the complications that might arise from the concurrent enforcement of IHL and IHRL when protecting persons with disabilities during armed conflict.

In that regard, the right to life's usefulness lies in being a practical example of those rights and undergoes the impact of the varied protective standards regulating aspects of human rights and humanitarian law, especially if those aspects result in instances where IHRL and IHL are consecutively applied during an armed conflict [37]. In those instances, state actors are required to concurrently respect the obligations of IHRL as well as those of IHL treaties where those obligations are logically impracticable or inconsistent if contextualised in situations of an armed conflict [38] (p. 129).

It is paramount to examine and critically analyse the evidence of the varied extent to which the right to life is controversial under the treaty sources of IHL and IHRL. However, the research notes that in the course of resolving armed conflict-related problems, the sources of laws that are often relied upon by most human rights courts save for the Inter-American Commission on Human Rights, are in most cases derived from treaties of IHRL rather than IHL [39] (Article 2) For example, the European Court of Human Rights (ECtHR) has had a tendency to refer to IHRL with the exception of its decision in *Hassan v. United Kingdom* [40] (paragraph 6), Such a trend of resorting to IHRL occurs in a number of ECtHR's decisions such as that of *Al-Skeini v. United Kingdom* [41] (paragraphs 162–164). In *Al-Skeini*, the court accepted a claim that was based on Article 2 of the European Convention on Human Rights (ECHR) concerning the UK's failure to respect its human right obligation. This decision invoked that concept of the State Agency authority jurisdiction as it had been applied in the case of *Cyprus v. Turkey* [42]. Based on that concept the obligation in Article 2 required the state party to investigate the circumstances during an armed conflict during which the applicants' relatives had lost their lives in circumstances that are similar to those in the case of *Medvedyev and others v. France* [43] Similarly, the ICJ has also increasingly drawn from sources of IHRL treaties when discussing the legitimate means and methods of warfare, as exemplified in the ICJ's advisory opinion on the use of nuclear weapons [44] (p. 101). The Court also take a legal position similar to that in the case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [hereinafter *Palestinian Wall*] by observes that the protection of the International Covenant on Civil and Political Rights [ICCPR] does not cease in times of war, except by operation of Article 4 whereby certain provisions of the ICCPR could be derogated from in a time of national emergency [45].

It is highly likely that the increasing awareness of the overlapping aspects in motives of IHL and IHRL by the enforcement agencies may account for the increase in their concurrent application in situations of armed conflict [46] (p. 91). However, that concurrent application might be problematic and unrealistic due to the unlikelihood of applying same legal principles in situations of peace and those of armed conflict. That problem is attributable to the varied thresholds by which the protective obligations that relate to aspects of humanity in relation to the IHRL treaties such as the CRPD and those of IHL, respectively [47]. Take for example the duty to protect as envisaged by Article 11 of the CRPD, which might be problematic in relative to IHL's principle of proportionality [48]. That principle permits civilian casualties and collateral damage caused by the lawful use of force as long as the force is proportionate to attaining a legitimate military objective [49] (p. 3). It is possible, because of the manner in which those rules of proportionality are used during situations of armed conflict that it becomes likely that life will be lost and thence unlikely that Article 10 of the CRPD can be upheld and enforced at the same standards as those that are envisaged in times of peace. As such, in situations

of armed conflict there is a need for enforcement agencies to face the reality by accepting different yardsticks in interpreting and applying the state's obligations to protect or promote some rights such as disability rights in the context of this paper [50].

In spite of those criticisms, in terms of improving the protection of persons with disabilities the overlaps in the duties imposed by IHL and IHRL might become essential in justifying the role of IHRL instruments such as the CRPD when influencing and subsequently improving the IHL's protection to persons with disabilities. In that context, the overlapping attributes of the CRPD in particular are of instrumental value in advancing the need for equal humanitarian protection through encouraging dignified treatment to all non-combatants. For the purposes of this study, a tangential issue might be analyzing whether the CRPD can promote equal access to humanitarian protection between non-combatants with disabilities on the one hand and combatants with disabilities on the other [1,51] Article 1(1) does not discriminate regardless of their classification in IHL that are no longer taking part in armed hostilities, most probably due to war-related disabilities [52].

That argument is based on the view that individuals with disabilities (whether classified as combatants or non-combatants) might be prone to a higher risk of suffering from instances of armed violence than individuals of the same sex or age group without disabilities, if exposed to the same armed conflict [53] (p. 14, paragraph 25). Therefore, this study argues that relying on some of the protective entitlements as provided by the CRPD regime might assist in justifying the need to revisit the extent of legal protection that IHL affords to persons with disabilities. Fortunately, the CRPD is among those IHRL treaties that explicitly remind state parties of their protective obligations to persons with disabilities during times of armed conflict [54] CRPD's approach is worth contrasting with other human rights treaties that permit state parties to derogate from some of their obligations during times of armed conflict.

### *2.3. Specialised Treaties: Duty to Protect in Armed Conflicts*

Chronologically, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention against Racial Discrimination (CERD) are among the earliest examples of specialised treaties that sought to protect the rights of women and racial minorities, respectively [55] (Article 3). Those two treaties on the rights of specified groups can be considered in relation to the Convention on the Rights of the Child (CRC) and the Convention on the Rights of People with Disabilities in [56] Article 38 (4), [1] Article 11 respectively.

In spite of the CEDAW, CERD, CRC and CRPD all providing for the rights of specific groups, the CRC and the CRPD exhibit a common characteristic of providing for their continued application in times of armed conflict [56]. In contrast, there are derogation provisions in the event of armed conflicts for treaties such as the ECHR Article 52 and ICCPR [57,58]. Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter CERD) obliges state parties to undertake feasible measures to protect to children if faced with situations of armed conflict [59]. Similarly, Article 11 of the CRPD also requires that relevant IHL and human rights must be applied simultaneously to protect persons with disabilities in situations of armed conflict [60]. It is worth restating that the duty under Articles 11 of CRPD and 38(4) of CRC is subject to the usual reservations and declarations whose disadvantageous impacts on the protectiveness of state duties are contained in subsequent sections of this study [3,7,61]. The CRC and CRPD portray a common trend for supporting the continuity of the state's duties to protect human rights even in situations of armed conflict. Perhaps that trend is attributable to increasing awareness and a better understanding that these special groups of people are more prone to instances of violence during situations of armed conflict and, thus, their rights are usually violated in the event of an armed conflict.

### *2.4. CRPD's Social Model, IHL's Medical Model during Armed Conflicts*

It is worth recalling that the Introduction of this paper has already given a brief account of some theoretical differences in the models and approaches to disability which are underlying the

conceptualisation or composition of environments causing disabling experiences, thus informing in different ways the obligations owed to persons with disabilities under the CRPD and treaties of IHL. The armed conflict and its disabling relationship could be one of the factors accounting for the above conceptual differences that also depict a varied understanding of disability protection under the obligations of IHRL in relation to those of the CRPD: namely, the medical and charity model in IHL and the social model in IHRL [62] (p. 439). Ultimately, those models account for the contrasts in the legal nature of obligations owed to persons with disabilities under the instruments of IHL and the CRPD.

The fact that IHL and the CRPD have different models of perceiving disabilities might partly account for some of the complexities and challenges that are presently encountered by states experiencing situations of armed conflict [62] (paragraphs 9–10). There is a need to reach a universal understanding in the perception of the threshold of legal protection rendered to persons with disabilities where state actors are applying their obligations to regimes of human protection in relation to armed conflict states and states undergoing effective occupation [63]. Therefore, the underpinning of the medical model of disability in public laws that are conventionally most suited to states of “jus in bellum” must help in appreciating the significance of armed conflict-disabling trends in shaping the disability-related obligations of state and non-state actors across the spectrum of “jus ad bellum”, “jus in bello” and “jus post bellum”. Such a perspective is important for analysing the role of protective obligations under international disability law that are tailor-made for solving the varied trend of problems when it comes to persons with disabilities before, during and after situations of armed conflict [9,64].

In analysing the problem of disabled people and their protection during armed conflicts, the different models of disability under the CRPD and instruments of IHL were found to be one of the causes of the complications in the first year of this project to comprehend diversity existing among disabilities and different categories of persons with disabilities that might arise in post conflict contexts because of the impacts from armed conflicts [65] (p. 135). Moreover, observations regarding the impacts and implications of those different models became even more authoritative after Hart et al. made similar observations in their work (2014) [14,66]. Subsequent to the CRPD, one conventional approach to disability was the ‘medical model’, which views persons with disabilities through an inward-looking approach in terms of their medical profile and medical needs. The charity model that portrays persons with disabilities as recipients of welfare and passive protection. In which case under both of those approaches, persons with disabilities are disempowered objects of treatment and protection [14,67].

Those different models of disability that are exhibited by the relevant instruments of IHL and the CRPD tend to affect variably how the two regimes of international law define who is entitled to legal protection, why they must be protected and, most importantly, how that protection must be applied during armed conflicts.

Secondly, differences in IHL and the CRPD’s models of disability are the sole cause of the inadequacy in the protection of individuals with disabilities, without acknowledging the contribution of other factors such as the different periods in which the relevant IHL and IHRL international instruments came into place. It is, therefore, unsurprising that Hart et al. have partly attributed the differences in treaties of IHL and IHRL to the growing popularity of a social disability model [68], hence enabling approaches of a social model of disability to attract comparably more support than at the time the CRPD was pronounced in 2008, while leaving the 1944 and 1970 treaty sources from IHL stuck in a legal history that conceptualises disability upon medical and individual models that are much older than the former. In that context, the understanding of disability according to IHL instruments such as Additional Protocol 1 dates back to 1977, while the current definition of disability and major disability civil movements developed in the 1990s and never became part of international law until after the year 2000 [69]. Nonetheless, for the purposes of enhancing the protection afforded to persons with disabilities, it might be necessary to consider the role of the CRPD in interpreting

and understanding IHL's exclusion of disabled individuals by practitioners, experts, students and policymakers. Such consideration would be vital, since the CRPD remains the most recent of all the human rights treaties for the protection of special groups. Thus, the Convention brings with it a new perspective that adds positive attributes to aspects of disability.

“The CRPD reorients and transforms the protections offered [to persons with disabilities] through IHL by casting them in the language of ‘rights’” [14,70].

In situations of armed conflict, those obligations under the CRPD, interestingly draw upon the legal framework of IHL's protective duties imposed on states and non-state actors. This is in spite of some research suggesting a likelihood of divergence in models upon which duties of IHL treaty and of human treaty bodies in representing the extent of protection owed to persons with disabilities CRPD Article 26. Treaties of IHL continue to maintain the inward-looking approaches of the medical/individual, while treaties of most human treaty bodies are increasingly tending towards the outward-looking approaches of conceptualising disability and disabling aspects.

Furthermore, some commentators contend that IHL's perspective and protective obligations are structured on the paradigm of the physical need to treat and take caring of bodies with disabilities rather than instilling a legal tradition based on receptiveness and respectfulness of the humanity and the dignity of persons with disabilities.

Perhaps IHL's objective of minimising the disabling and devastating nature of armed conflict environments could also account for its tendency to draw the underpinnings of its duties from the inward-looking approach of the medical model. That could also explain why IHL and the underpinning of its protective disability-related duties have generated criticism because of the mainstream generalised minimalist protection to persons with disabilities In that case, individuals and especially those with war-related disabilities can be termed as the injured or the wounded and probably identified as patients. That pattern of equating every person with disabilities to an injured patient might, in itself, be problematic and somehow misleading for the following reasons:

- (i) It portrays obligations under treaties of IHL as a legal regime of public law that are founded on assumptions of outdated welfare-centred models, partly because of the models and inward-looking approach of IHL tending to create an impression that the problems of protecting persons with disabilities are only resolvable through provision of physical attention [71]. In which case the rules [of IHL] are directed towards addressing the need for rendering either medical treatment or physical protection. In situations of armed conflict, where law and safety are deemed scarce while the minimalist framework under contemporary IHL rules seems unlikely to sufficiently prioritize the interests of persons with disabilities [72].
- (ii) The pattern also appears to mislead the agenda of protecting persons with disabilities by emphasising the complexity of problems that persons with disabilities are likely to experience due to the causal impacts of the armed conflict–disability relationship [73] that are meant to subsist across the sequence of the “jus ad bellum”, “jus in bello”, “jus post bellum” cycle.
- (iii) The pattern seems to be distracting legal scholars from establishing if there is compatibility the between the models of disability and the laws stipulating obligations that parties must apply within armed conflict and post-conflict states that are affected by the armed conflict–disability relationship that remains inescapable from the “jus ad bellum”, “jus in bello”, “jus post bellum” cycle [74].

It is doubtful that such assumptions associated with the medical model of IHL treaty obligations are bound to portray it as a legal regime that is incapable of extending ideas of dignified treatment or the enjoyment of equal protection of ([71], [75] (pp. 220–225)), to the persons with disabilities, particularly in relation to activities that transpire during an armed conflict. Such activities encompass the inclusion of the disabled in peacebuilding, resettlement and rehabilitation forums. In essence, IHL's view of disability is in some respects contrary to the norms of equality in respecting the humanity,

dignity and integrity of persons with disabilities. In spite of the above norms being fundamental in realising the obligations of the disability treaty, such contradictions compromise the dignity and integrity of persons with disabilities by denying them explicit inclusion on IHL's list of persons entitled to special protection in situations of armed conflict [76] (paragraph 25).

Furthermore, the lack of awareness that IHL treaties have in relation to persons with disabilities in relation to equal human dignity might be attributable to the fact that the process of identifying persons with disabilities as another vulnerable and marginalised group began gaining a platform in the early 1990s [77] whereas a substantial part of IHL's present instruments that consider issues of disability such as the Geneva Conventions and their Additional Protocols [78–80] had developed by 1945 and 1977, respectively, a period long before the marginalisation and vulnerability of persons with disabilities had become officially recognized under international law.

Arguably, previous perspectives of disability might have influenced the current legal regime of IHL and its entire conceptualisation of disabilities, as noted by Hart et al. [14,79] Hart, Crock and McCallum's work attracts criticisms for affirming IHL has an outdated inward-looking medical model of dealing with disability ([81], [82] (pp. 7–10)) The commentators advocate for IHL's model of protection by highlighting IHL as sufficient, although without sufficient scrutiny of how the sole reliance on the medical model may lead to insufficiencies in the protection afforded to persons with disabilities [83]. It is on that basis that the present research differs from the work of Hart, Crock and McCallum by adopting a different approach to analyzing the problems of persons with disabilities. The analysis involves identifying the legal implications of inconsistencies on theoretical underpinnings of the models, as used by the two these two branches of public law. With specific reference to the obligations under CRPD and relevant Geneva laws of armed conflicts [84] (Article 68).

Additionally the research observes that the inconsistencies in IHL and the CRPD might compromise IHL's ability to strengthen the protection afforded by other fields of international law as mentioned in Article 11 of the CRPD. This, study therefore, contends that IHL's limitations may necessitate respecting AP4 aimed at adding persons with disabilities to IHL's list of persons that must be afforded special protection [85]. Moreover, the concurrent application of IHL and the CRPD obligations might be equally problematic since the CRPD's definition of disability is irreconcilable with its perception under the instruments of IHL, as explored further in the subsequent section.

### 3. Varied Standards of Protection in IHRL and IHL

#### 3.1. Right to Life in Situations of Armed Conflicts

Before proceeding with this right Additional Protocol 1 Article 51(5) (b) and 57(2) (a) (iii) and (b) [86], it is imperative to note that human rights law has a different standard of protecting the right to life in relation to that of IHL [47,87]. In the context of IHL, treaties the parties that are engaged in armed conflict are permitted to use potentially deadly force as long as those parties are compliant with the rules of proportionality ([88], [22] (8 Article)). Arguably, in those circumstances collateral damage and loss of life are likely to result from that use of such force. The legality of that force is based on targeting a definite military objective. There are varied standards of protecting to the right to life in situations of armed conflict. For example, it is purely on the basis of IHL's combatant–non-combatant classification that the lawfulness of an individual's death and their entitlement to civilian or combatant protection is determined. Accordingly, if a person with disabilities is classified as a combatant rather than a non-combatant they can be a legitimate military objective and, hence, could be lawfully targeted [89]. In practice, in some cases it is hard to secure and preserve evidence to ascertain whether the targeted item was a military objective.

The permissible exceptions under IHL about collateral damage are unlikely to be construed at the same magnitude if perceived through the prism of IHRL [88–90]. The unlikelihood of reconciling this exists even for IHRL treaties like the CRPD that lack provisions for derogations in times of armed conflict. In contrast, IHRL treaties such as the ECHR and the ICCPR have exceptional considerations

for state parties to derogate from some of the stringent human rights obligations in the event of emergencies considering the likelihood of instances where some of the persons with disabilities have taken part in active combat against their States or other opponent States [91,92]. Consequently, in terms of the extent of protecting the right to life, there are purely divergent positions between IHL and the CRPD. That divergence results from the variances in ascertaining the expected level of protection of the right to life, especially if both IHRL and IHL apply to situations of armed conflict [93] (p. 47).

Perhaps the absence of a derogation clause under the CRPD could support the above view. Instead, the CRPD has Article 11 that reiterates the concurrent application of its protection with IHL during situations of armed conflict [94]. Accordingly, the protective measures for supporting the respectful and dignified treatment of persons with disabilities must remain in force even in times of armed conflict. The CRPD approaches these problems in terms of controversial rights such as the right to life, as discussed further.

### 3.2. *The Right to Life in the Context of IHRL*

In the context of human rights, the constituents of the “right to life” have been described as: “a supreme right”, “one of the most important rights”, the foundation and the cornerstone of other rights”, the “prerequisite of other rights” [95], “one of the rights that constitute the irreducible core of human rights” [96] and even more so, “a right which is basic to all other rights”, but, at the same time, intangible in scope and indeed difficult to define with precision.

The earliest recognition of the right to life appears in the Magna Carta [97]. A number of other human rights instruments have codified the right to life. For instance, the Universal Declaration on Human Rights (UDHR) and the ICCPR. Additionally, several regional human rights instruments also provide for the right to life. Examples of such regional human rights instruments include: the ECHR Article 2(2) [98], the American Convention on Human Rights [99] and the African Convention on Human and People’s Rights (ACHPR) [100]. The most important for the purposes of this study is the CRPD, which has rightly stipulated the right to life under its Article 10, stating:

“States parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others” [1] (Article 10).

### 3.3. *The Right to Life in the CRPD: Armed Conflict (Articles 10 and 11)*

As mentioned earlier, according to the *travaux préparatoires* of the CRPD, that Article 11 should refer to armed conflicts in the context of protecting persons with disabilities was suggested by Costa Rica following an ongoing the debate on the right to life [101,102].

It is imperative to highlight that by Article 11 of the CRPD referring to obligations arising from IHL and IHRL during armed conflicts,

“[ . . . ]in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to [ . . . ]” [1] (Article 10).

That combined reference to IHL and IHRL illuminates a scenario in which the overlaps in the protection of humanity alongside the contradictions from the varied thresholds of protection can lead to interpretative difficulties as courts interchangeably refer to both IHL and aspects of IHRLs in resolving legal issues related to problems of armed conflict as seen in the ICJ’s decision [103]. There are authoritative decisions from the ICJ in its advisory opinions on the use of nuclear weapons that suggest that the position taken in IHRL and IHL varies regarding the extent to which the right to protect life should extend in situations of armed conflict.

“The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant

whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities" [35,104].

Those complications caused by the varied standards of protection are mentioned earlier in the previous sections of this paper. In this regard, the protection afforded to the right to life during armed conflict can be highly controversial [105]. It seems the idea of human rights is reinstating the concept of non-derogation by condemning arbitrary violence. The efforts to condemn arbitrariness and violence illuminates the way in which IHRL might influence the interpretation of the right to life as well as informing expertise in IHL that the right to life must be observed so as to protect vulnerable groups in times of armed conflict [106].

However, in practice, death rates that have hardly spared these protected groups in times of armed conflicts might be a ground for questioning the suitability of human rights-centred approaches that would expect the right to life to be protected at the same standards in times of armed conflict and in times of peace whenever IHL and IHRL are concurrent. A strict interpretation of IHRL treaties such as the CRPD without considerable flexibility towards the changed and challenging nature of armed conflicts might risk placing the threshold of the expected protection too high and make it irrational to reconcile it with principles of IHL regulating the conduct of armed hostilities [2,107].

Despite the above criticism, it remains true that in most of the decisions made by the European Court of Human Rights [108] illustrate that the overlaps in IHRL and IHL are likely to have influenced the ECHR [42,109]. That influence has led to courts referring to IHRL as the preferred source of law when interpreting the state's obligations in situations of armed conflict. Those trends may come with a cost of setting the expected yardstick of the protection too high in times of armed conflict, or even of exaggerating the extent of human rights duties that an occupying power can afford to enforce.

#### *3.4. Right to Life for Persons with Communication Disabilities in Armed Conflicts*

Visual, hearing and speech impairments are basic examples of communication disabilities [110]. According to the analysis of this paper 'communication disabilities' must be understood as those disabilities which arise from the tendencies of the public and its establishments to either knowingly or unknowingly refuse to communicate in languages that persons with disabilities are able to understand. Consequently denying them an opportunity of receiving messages or even failing to interpret and understand them [111] In light of the above, there is a high likelihood that persons with disabilities will experience even more vulnerability than other special groups during armed conflicts, especially because of exclusionary communication environments whose tendencies are to make them physically invisible by refusing to communicate with them.

Evidence to illustrate the vulnerability of persons with communication disabilities also appeared in the news following the armed conflict in Kosovo [112]. A deaf Albanian is alleged to have been killed during the Kosovo armed conflict in 1999. It is alleged from the reports that his death was partly attributed to his refusal of salute the armed forces. His failure to comply was a result of his inability to understand the verbal instructions because of his deafness. It is also reported that his wife, in spite of her deafness and their children, was able to survive and is the source of the reported account.

It is imperative to clarify it is increasingly unlikely that IHL will abandon its medical model of rendering protection instantly. However, it is worthwhile suggesting that the challenges of conflicted and post-conflict states tend to justify the need to maintain the medical model, and where needs be the above model might occasionally benefit from the positive attributes that the CRPD obtains from conceptual underpinnings of the social model and its outward-looking approach to the origins of disability [113]. Such complementarity should be aimed at a goal of minimising the inhumane and undignified treatment of persons with disabilities [114]. Such undignified treatment is a likely outcome of IHL's medical model [115], which tends unacceptably to reduce the interests of persons with disabilities to dehumanising medication and physical care [116]. In that case, the positive attributes of the CRPD would require that humanitarian services ought to be delivered in an inclusive manner

that acknowledges the interests of persons with disabilities [117]. Such acknowledgement would also imply the rethinking of measures of proactive protection that are specifically suitable for persons with disabilities in armed conflicts [118]. Those measures might be framed easily upon the theoretical framework of the social model that is more relevant in ensuring that persons with disabilities are treated with equal humanity and dignity like other human beings [119].

#### 4. Reconciling IHL with Modern Disability

##### 4.1. Definition of Disabilities and Persons with Disabilities (CRPD)

Traustadottir points out that defining disability has been a contentious issue in disability studies and related fields. Nevertheless, for the purposes of this study the definition given by the CRPD shall be used, according to which [1] (Article 1(2)),

“Persons with disabilities’ include those [with] 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” [1,120].

It is imperative to restate that the above definition constitutes a hybrid concept of the inward-looking medical approach and outward-looking approach of the social model. However, historically treaties of IHL only relied on the former rather than the latter that had barely emerged [121–123]. Although the outward-looking approach of the social model might have a role to play in addressing issues of disability inclusion and participation within settings of armed conflict and post-conflict states, neither should the centrality of relying on the medical model and its inward-looking approach must be overlooked or underestimated, given the disabling nature of armed conflict in the above states. Perhaps IHL’s overreliance on the medical model is more than just a historical manifestation of legal exclusion, since the underpinning of that model seems useful to addressing the disabling nature and impacts of armed conflicts [11,16,124]. Of course this argument is neither a defence of IHL’s shortcomings nor a dismissive attempt to propose where it ought to emulate CRPD by extending the application of the outward-looking approach and models to armed conflict and post-conflicts state but should be limited to instances when such efforts are deemed appropriate.

Bearing in mind that expressions are likely to affect obligations under international law [125], the CRPD’s approach to disability marks a landmark change from using “disability” alone to one that joins it with the expression “persons “as per Articles, 2, 3(d) 4 of CRPD (1). That change is of fundamental importance in the present context for the following reasons: firstly, the change signifies that the CRPD’s language makes individuals with disabilities constitute a recognisable group of people identifiable from their disabilities while in post conflict context such recognition and identity seem to be over shadowed by more emphasis on the presence of war related disabilities that might be consequential to the collateral damage often associable with armed conflict related wounding [126–130] (paragraphs 23, 58). Furthermore, the CRPD represents “persons with disabilities” in a language that addresses them as human beings as opposed to the dehumanising perspectives of equating them as infirm and as disabled, helpless objects. It is worth bearing in mind that the appropriateness of referring to “persons with disabilities” has also been criticised by proponents contending that it embodies attributes of the medical model [128,131]. This draws attention to unsettled controversies surrounding the aspect of suitable references.

In spite of the above controversy, the expression “persons” as used by the CRPD could illuminate the need to prioritize the personal identity, integrity and dignity of individuals with disabilities rather than expressions that emphasize references to them by their disabilities. Perhaps those elements of identity, integrity and dignity may partly explain why the CRPD refers to “persons with disabilities” rather than disabled people [132]. Accordingly, persons with disabilities must enjoy equal protection to human rights and equal respect for their human dignity both in times of peace and in situations of armed conflict [1] CRPD Article 11.

By contrast, the IHL approach to disability is another fundamental aspect of this study. That requires analysing IHL's definition and characterisation of disability. In that context, there is a tendency for IHL treaties that refer to "disability" but without explicitly referring to "persons with disabilities" as an identifiable group of people in the same or similar context to the manner in which they are represented under the CRPD.

Take for instance Article 8 (a) Additional Protocol I (API) that states;

"Wounded and sick means 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 [ . . . ]".

This quote reflects a problem that the term disability is not just used to cover what disables someone, whether the body or society or both, but also with the meaning of impairment, disorder and disease as in a deviant form from expectations and norms of bodily ability.

Moreover, many disabilities are not necessarily a result of sicknesses or injuries, bearing in mind that some of them have been attributed to weight [133], age [134] or even genetically inherited factors such as muscular dystrophy [135].

In other cases, IHL's framework continues to perceive persons with disabilities as the "disabled" instead of "persons with disabilities" [136–138]. Accordingly, the treaty sources of IHL are nearly insufficient in representing persons with disabilities as part of the special and vulnerable groups of people that are exposed to higher chances and challenges of abuse during or after times of armed conflict [53,76,139] in spite of evidence of such challenges that has continuously appeared in news reports [140]. Conceivably, by including persons with disabilities on IHL's list of individuals entitled to special protection that evidence can be used [141].

Another aspect peculiar to the disability approach in IHL is the trend of framing obligations owed to persons with disabilities based on the influences of civilian–combatant related categorization [142]. Evidence of such obligations is illustrated under Article 68 of Geneva Convention III in which it is stated that,

"Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends [ . . . ]" [140–143].

Thus, in the context of IHL treaties, there are surely ambiguities in relation to disabilities due to the lack of definitive clarity as to who are "persons with disabilities", in situations of armed conflict [23,144].

This study appreciates the importance of exploring the link between disability and considerations of jus post bellum obligations for post-conflict states. That could imply extending human rights obligations in bridging the above gaps. That is simply because persons with disabilities are either unrepresented or inappropriately represented in IHL in relation to the CRPD. Those ambiguities make persons with disabilities feature as inaccurately represented in treaties of IHL [145]. As such, it is doubtful and perhaps misleading to assume that earlier IHL treaties had envisaged "persons with disabilities" would ever constitute a distinctive and vulnerable group of individuals that must be afforded special protection. In fairness, there are traces of evidence suggesting that the Convention on Cluster Munitions is apparently the IHL treaty that acknowledges persons with disabilities as a distinctive group that has been identifiable with rights under the CRPD. As such, where most IHL treaties are attempting to protect "persons with disabilities", they are doing so using an outmoded and inappropriate approach.

#### 4.2. Absence of a Definition of Disability in IHL

Firstly, the CRPD definition and provisions use the term disabilities in the pluralist sense rather than disability in its singular form, as it appears to be often used under IHL [1] Article 1 [146]. Defining disabilities in a pluralist sense could show the benefits of inclusiveness by acknowledging

the diversity that persons with disabilities appear to exhibit [147]. The approach of inclusive pluralism and diversity of disability is likely to imply that the standards of protection rendered to persons with disabilities should neither differ nor deteriorate based on variances in the circumstances causing the disabilities. In that case, an inclusive definition could imply that states and non-state actors involved in situations of armed conflict should refrain from having a narrow-minded perspective of the protection they owe to persons with disabilities, especially during and after situations of armed conflict [148]. Firstly, the narrow-minded perspective of the disability protection in the jus post bellum context might result in measures that seek to afford greater emphasis on persons with physical disabilities while overlooking persons with mental disabilities. Secondly, outcomes of a casual discriminative tendency is another likely consequence of the above narrow-minded perspective in terms of the scope and standard of protection in the jus post bellum context of many post-conflict states, whereby jus post bellum concerns of disability might result from the high likelihood of post-conflict states rendering preferential treatment to persons with war-related disabilities over persons whose disabilities are without a war-related connection, perhaps because of identifying and associating their identity with war-related disabilities. It is highly probable that the CRPD is unlikely be the best source of jus post bellum law on disability, especially in post-conflict cases where states are practising intersectionality in providing and protecting those rights. Such intersectionality can lead to tendencies of divisive fractions and discriminative trends towards persons with disabilities during and after situations of armed conflict [149]. One must bear in mind according to the protection rendered under the CRPD this seems founded on assumptions that appear to have underestimated the effects of armed conflict-disabling environments on conceptualisations of homogeneity and diversity in relation to post-conflict states. Disability ought to be revisited as a jus post bellum concept given the uniqueness of challenges likely to arise in relation to protecting persons with disabilities in such states. Post-conflict states should consider ways of safeguarding against tendencies that promote narrow-minded perspectives of fractionalising the protection afforded during and after situations envisaged under Article 11 of the CRPD in order to be universal than causal-centred or type-centred. Causal-centered state actors tend to vary their level of responsiveness depending on whether or not a person's disability is identifiable as war-related in nature. Similarly, post-conflict states tend to show lesser protective interest in disability in combatants with war-related disabilities as compared to combatants with war-related disabilities [23,150].

Additionally for purposes of streamlining disability and its obligations under these fields of public international law, having similar approaches to disability remains an area of law that IHL and the CRPD might need to address for future complementarity between IHRL and IHL [9]. Certainly, the research foresees a need for complementarity in defining disability as part of the solutions to the problems facing persons with disabilities during and after armed conflicts.

Additionally by improving its clarity on the protections of persons with disabilities, IHL will place persons with disabilities in a better position to enjoy the protection envisaged by the CRPD Article 11 [1,151]. In that context, there might be a need to investigate whether IHL treaty sources emulate the CRPD's conceptualisation of disabilities whereby aspects of disability are conceivably one of those jus post bellum subjects likely to arise in post-conflict states, in spite of several protagonists in disability studies suggesting that the conceptualisation of disability under the CRPD is more inclusive than that of IHL treaty sources in including persons with different types of disabilities [1] (Article 1 paragraph 2) regardless of the variances in situation in which those disabilities might have been caused [152]. Such comprehensiveness is instrumentally essential in ensuring that persons with mental, physical and intellectual disabilities are all considered in planning protective and humanitarian measures in situations of armed conflict.

By comparing divergent approaches in conceptualisations of disability that subsist between the CRPD and Geneva treaties as well as protocols of IHL, it must be possible to identify likely implications of such divergent approaches in terms of limitations that are subsequently addressed. Perhaps because IHL regulates armed conflicts that are conceived to be part of potentially disabling situations, the legal

regime has in many respects maintained an outdated pattern of portraying disability as a dangerous outcome that arises from amputations, bodily injuries and other infirmities under Article 30 of Geneva Convention 11 and Rule 138 of IHL [74,153]. That pattern permeates the legal framework of IHL treaties referring to disability in terms of their obligations. Such a pattern is in evidence in obligations concerning the prioritisation of certain detainees such as detainees with war-related disabilities who might be repatriated first during an armed conflict not because they are persons with disabilities but because they are injured, wounded or have undergone amputations Articles 109–117 [56,154]. Moreover, the reasons underlying the assumptions for IHL's protection might contradict those of the CRPD, whereby CRPD is founded upon an underpinning subjecting people with disabilities to equal rather than inferior treatment [155]. Ultimately, whenever applied in situations of armed conflict, Article 11 of the CRPD seeks to ensure that disabled individuals enjoy the right of equal protection like other non-combatants when experiencing armed conflict regardless of how their disabilities were caused ([14] (p. 11), [156]).

Furthermore, the study also observes that IHL's conceptualisation of disability shows a degree of mismatch in relation to the way disabilities are defined and conceived under the CRPD [157]. For the purposes of improvement, the legal protection afforded to persons with disabilities during armed conflicts is important for ensuring that, wherever possible, IHL's perspective of disability alongside the context of its obligations becomes harmonised with obligations in the CRPD, hence bringing it closer to possible complementarity [158,159]. The harmonisation process will enhance protective overlaps across the above two regimes, and thus a complementary relationship between IHL and the CRPD when dealing with persons with disabilities in times of armed conflict.

Arguably, harmonisation can deal with cases where IHL's conceptualisation of disability-related obligations rule 138 of the ICRC commentary [160], seems restricted to persons (who are either combatants or non-combatants) with disabilities, [161] and whose disabilities are associated with war, infirmity or old age [162–164]. For example, taking disability under Article 8 (a) of API which states that the “wounded and sick means persons, meaning civilian or combatants, with [ . . . ] disability and in need of medical assistance or care [ . . . ]” [165]. The approach used in the provisions of IHL treaties suggests a narrow perspective of disabilities. Such a perspective is likely to have stemmed from the medical model, although it is misguided if compared with the CRPD's language of disability. Technically, all persons with one or more of the disabilities in Article 1 are entitled to the state's protection under Article 11 [1] Article 1 Paragraph 2 in combination with Article 11 [166].

IHL's perspective on disabilities under rule 138 of the ICRC commentary could be improved by broadening the scope of its disability protection to encompass other forms of disabilities [160,167].

In as much as such the medical model of disability protection remains useful in referring to persons that may have been disabled as a result of armed conflict, it is unlikely to take into account how recent developments have shaped the understandings of disabilities. IHL continues to lack a suitable definition for disabilities, a fact that leads to ambiguities as to whether persons with physical, mental or intellectual disabilities must be protected during and after the occurrence of armed conflicts. Moreover, there is a lack of clarity under the IHL regime in terms of what the obligatory protection of persons with physical, mental or intellectual disabilities should comprise, respectively.

Additionally, in resolving the limitations of IHL's protectiveness to persons with disabilities, it shall be necessary for the legal regime to define disability and try associating it with identifying a group of people [168]. In that context, IHL must acknowledge that disability has changed from meaning a condition to becoming a representative characteristic of a diverse group of individuals. Although that group-based identity has its complexities, it nonetheless remains a useful way of improving IHL's role in affording special protection to persons with disabilities as individuals who might face distinctive problems during times of armed conflicts [169] (p. 95).

In summary, the disparities between IHL and CRPD in the conceptualisation of disability are part of the cause of the inadequacies in the legal protection that is expected to be rendered by states and non-state actors in times of armed conflict. This research argues that reforming IHL's perspective of

disability is long overdue. Such reforms remain crucial to improving the state of protection rendered under IHL, since they would clarify to the parties involved in armed conflicts the entitlements that IHRL treaties, particularly the CRPD, afford to persons with disabilities who must be protected according to Article 11 of the CRPD. It is possible that harmonisation of these two fields of international law might be a central role of Additional Protocol IV (APIV) that was proposed earlier.

## 5. The Protection of Disability Rights

### 5.1. *The Origins of the Rights of Persons with Disabilities*

Before the CRPD came into force, there were pre-existing IHRL treaties dating back as far as 1966 pertaining to the duty of the state to respect individual rights under IHRL such as the International Convention on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture (CAT) (these apply internationally), European Convention on Human Rights (ECHR), African Charter on Human and People's Rights (ACHPR) (these apply regionally), CRC and CEDAW (applied to specific groups such as children and women for the CRC and CEDAW, respectively). Although none of the earlier IHRL treaties was designed in particular to address discriminative tendencies that were encountered by persons with disabilities.

Therefore, until such time as the CRPD ascribed persons with disabilities to constitute a respectable unit of human identity that represented what was a marginalised group, it is evident that IHL was already among those legal regimes of international law that had blamed the problems of persons with disabilities on their infirmity [170], that is, the wounded and injured status of their bodies [171]. That is still in evidence in the way IHL treaties continue to perceive problems of persons with disabilities to be resolvable by supplying them with medicine [172] (p. 303). Conceivably, that perspective of disability has denied impact [173] and, consequently, the continued invisibility and subtle exclusion of persons with disabilities from sufficient protection in times of armed conflicts [53,174].

In other communities, persons with disabilities have been referred to religious leaders to receive spiritual healing [175] it is imperative to note that the approach perceiving individuals with disabilities as subjects for spiritual healing is contrary to embracing them as constituting a part of the human race. Eventually, such stereotypically oriented assumptions may constrain the protection intended by Article 11 of the CRPD.

### 5.2. *International Law on Disability after the 1980s*

From the late 1980s, traditionally dehumanising approaches were increasingly challenged and international measures geared towards equal treatment of persons with disabilities were truly being transformed from their formative stages. This remarkable landmark development meant identifying and eliminating those external barriers that led to the social or legal exclusion of persons with disabilities [176]. The *travaux préparatoires* of the CRPD [177,178] suggest the necessity to establish a treaty on the rights of persons with disabilities to improve the protection and treatment [179]. That improvement involved revisiting underpinning of the medical and individual models whose inward-looking approaches had constituted the scope and extent of protection [180].

In the early 1990s, progressive activities towards disabilities led to a reshaping of the rights of people with a disability under the prisms of equality, humanity and personal dignity [181]. It is because of such a growing momentum that by 1992 the General Assembly of the United Nations (GA) adopted the World Programme of Action Concerning Disabled Persons The World Programme of Action eventually drafted the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities [182]. Thereafter, the World Programme of Action called upon the GA and the Economic and Social Council (ECOSOC) during the 37th session to adopt the drafted Standard Rules, which were subsequently adopted in December 1993 [183].

In 2002, another result of this process was the establishment by the UN General Assembly of an ad hoc committee to draft the CRPD [184]. Furthermore, unlike IHL that allowed rebel groups also participating as observers rather than voters, the CRPD was achieved through a consensual process of consultative sessions with various disability movements [181,185]. Because the CRPD was designed as a purely human rights instrument, there is a difference in its composition of consultative sessions from those of IHL. According to the CRPD's *travaux préparatoires* [155,186] negotiations referred to the Security Council resolutions that had identified persons with disabilities as a distinctively distinguishable group that had encountered special problems [187]. On 13 December 2006, the UN General Assembly adopted the CRPD, and its optional protocols eventually entered into force on 3 May 2008. The CRPD remains the first and only international instrument that protects the rights of persons with disabilities.

In terms of the background of the CRPD and its applicability to situations of armed conflict [188], Article 11 explicitly refers to situations of armed conflict and was first proposed by Costa Rica following a discussion on the right to life [189]. There was also a discussion on whether the situations of risks that were envisaged under Article 11 must be specified and exemplified [190]. It is imperative to note the reference to "armed conflict" led to a controversial human rights-based debate due to some members expressing discomfort with the overlap that exist between "armed conflict" and "foreign occupation" [191]. Additionally, in the UN's terms, the term foreign occupation was also a code for the Israel–Palestine conflict [192].

## 6. Extraterritoriality of CRPD Obligations in Armed Conflicts

The issue of jurisdiction and extraterritoriality is directly linked to the question raised by Crock et al. as to whether the CRPD can protect individuals against violations by a state of which they are not citizens, which is a common risk in international conflicts [178,193]. This discussion envisages an international armed conflict (IAC) or internationalised armed conflicts where two or more CRPD states are involved, thence leading to a situation of belligerent occupation. In that case, extraterritoriality is a viable option, if the state party in question also became party to the CRPD–optional protocol and without making a reservation or declaration under Article 11 of the CRPD. However, this section is apparently affected by the absence of decisions where the CRPD has applied extraterritorially to an armed conflict. Nonetheless, the procedure and its considerations are explained further in the subsequent sub-sections.

### 6.1. Applicability of the CRPD to Some Situations of Armed Conflict

Before examining the relevant provisions of the CRPD, the primary issue that this research shall deal with here is advancing arguments that support the applicability of the CRPD. Where applicable, the optional protocol (OP) to the CRPD to protect and promote the individual rights of persons with disabilities thus recognizes them as another special category of a vulnerable group during and after situations of armed conflict [194] (p. 219).

As noted earlier, instances of armed conflict have led to instances in which some states have obtained control over weaker states leading to situations termed "belligerent occupation". Acts associated with the violation of individual rights have been rampant in the course of belligerent occupation in as much as international law has continued to struggle to ensure accountability for such human rights violations [195]. As a result, the prevalence of human rights violations in cases of belligerent occupation has necessitated the extraterritorial application of treaties of IHRL as a response to the emergent need of regulating abusive behaviours of states and their representatives or their agencies in times of armed conflict [8,196]. However, in practice there may be procedurally related limitations to enforcing extraterritorial accountability since the availability of factual evidence regarding the state's violations is often fragile, and in other cases difficult to prove [197].

For the purposes of this research, the application of CRPD in situations of armed conflict is based on cases where states and non-state actors are alleged to knowingly target properties of persons with

disabilities or properties supporting their wellbeing during situations of either NIAC or IAC armed conflicts. For instance, such an incident was exemplified by the attack on residential homes used by persons with disabilities during the armed conflict in Lebanon. Similarly, in 2014 Yolande, reporting for the BBC, broadcast Israel's armed forces allegedly attacking a disability centre in the course of the armed conflict with the Palestinians [198]. Moussa reports another incident in Old Aleppo regarding residential facilities for accommodating persons with mental disabilities that were shelled during the course of the armed conflict [199].

Arguably, regardless of the nationality of the disabled individual, the presence of Article 11 of the CRPD ought to be used to make states accountable for either destroying properties or breaching the rights of persons with disabilities.

“State 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” [200] (Article 11).

Therefore, with increasing cases of armed conflict, extraterritorial accountability of the CRPD would ensure that the practical benefits of Article 11 are enhanced, hence minimising instances where state actors are acting contrary to their disability obligations [8,201]. Similarly, references might be made to role of Article (1) of the OP, which applies in cases where the state concerned is also a party to the OP; its violation of Article 11 of the CRPD can be communicated to the CRPD committee [202], although the eligibility to the CRPD committee's redress is subject to fulfilling the conditions which are outlined in Article 2 of the OP [203].

Furthermore, the presence of the earlier evidence from media reports confirming the special cases in which events of armed conflict have disproportionately affected persons with disabilities may also be another justification for the extraterritorial application of the CRPD in situations of armed conflict. Perhaps the extraterritorial application of the CRPD would strengthen the protection rendered to those individuals with disabilities during armed conflicts. Such accountability must be encouraged even if the disabled individuals whose rights have been contravened are neither nationals of the concerned occupying state [204–206] nor residents in the territory of the occupying state [4,207]. Therefore, the subsequent sections of this research explain how the jurisdiction approach has been useful in ensuring better accountability for acts of human rights violations made by state parties during times of armed conflict [208].

## 6.2. The Jurisdiction Clause under the Optional Protocols to the CRPD

Firstly, if violations of disability rights result from belligerent occupation by another occupying power, that power being a state party to the CRPD and its OP then Article 1(1) of the OP (subject to fulfilling the conditions provided under Article (2) of the [209] permits sending communications to the CRPD Committee regarding the state's failure to comply with its CRPD obligations as seen in *HM v. Sweden* [210] For example, if the state violates its obligations enshrined under Article 11 regarding the protection of persons with disabilities [211] Article 1(1) states that,

“A state party to the present protocol (“State Party”) recognizes the competence of the Committee on the Rights of Persons with Disabilities (“the Committee”) to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that state party of the provisions of the Convention” [212].

Clearly, Article 1(1) also permits the communication of petitions individually or in a representative capacity for and on the behalf of individuals with disabilities [213] that are subject to the jurisdiction of the state party [214]. For cases of jurisdiction arising from belligerent occupation, the communication

may not lead to the state party complying with public international laws meant to protect persons with disabilities [215]. Complaints could relate to acts that may require further inquiries into alleged violations of the CRPD in the context of belligerent [216].

It is also imperative to mention the limitations to the Committee that might potentially arise from Article 1(2) of the OP [217]. Article 1(2) of the OP states that the admissibility of all petitions must ensure that the state responsible for the alleged violations is also a party to *both* the CRPD and its OP [218].

“No communication shall be received by the Committee if it concerns a state party to the Convention that is not a party to the present protocol” [219].

Accordingly when communicating a petition concerning a violation of Article 11 of the CRPD, whereby such a violation by an occupying power that is a party to the CRPD rather than its OP [220], a lack of concurrent membership to both disability instruments would detrimentally influence the admissibility of the petition to the CRPD Committee [221]. It appears that Article 1(2) is problematic for two reasons. Firstly, it poses enforcement limitations to the scope of state parties against whom persons with disabilities can apply the approach of extraterritorial jurisdiction in times of belligerent occupation. Article 1(2) can also constrain persons with disabilities from accessing the right to a hearing [222]. A constraint is partly attributable to some of the state parties to the CRPD withholding their membership to the OP [223].

Accordingly, Article 1(1) of OP could deny persons with disabilities room for redress as a majority of the states that are not parties to the OP are the same states that are likely to be in contravention of their CRPD duties in the process of exerting extraterritorial jurisdiction.

### 6.3. European Convention and Extraterritorial Jurisdiction

The European Court of Human Rights is an example of an enforcement institution which has encouraged a jurisdictional-based extraterritorial accountability for violation of obligations as imposed on state parties on the basis of Article 1, which extends its application wherever a state assumes external territorial control during belligerent occupation [224]. Article 1 of the ECHR also provides that:

“The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” [225].

The use of “jurisdiction” in Article 1(1) of the OP to the CRPD, therefore [226], might appear to have similar interpretative and enforcement implications as those evidenced in Article 1 of the ECHR, even though evidence from the available cases law suggests that the ECtHR uses the concept of jurisdiction in a broader context than how it is applied according to this research [227]. This study is strictly referring to the ECtHR’s jurisdiction-based decisions only in so far as those decisions relate to acts in which states violate their human rights obligations during situations of armed conflicts or belligerent occupation [228].

The ECHR’s model might be worth emulating by other regional conventions considering the efficiency of its mechanisms, as evidenced by decisions of the European Court of Human Rights (ECtHR) in terms of the extraterritorial enforcement of human rights obligations such a practice of referring to extraterritorial jurisdiction to enforce human rights has been exemplified in a number of ECtHR rulings, most of which have held states accountable for the violation of human rights obligations based on spatial jurisdiction during armed conflict [229,230].

### International Covenant on Civil and Political Rights (ICCPR) and Jurisdiction in Armed Conflicts

Article 2(1) of the ICCPR has also defined jurisdiction such that state parties are expected to,

“[ ... ] ensure to all individuals within [their] territory and [those] subject to [their] jurisdiction the rights [that are] recognized in the present Covenant [....]” [231] (paragraph 62).

In view of the above, it is imperative to note that during the drafting conferences of the ICCPR, the US proposed that the original language of Article 2(1) of the ICCPR be modified in order to require proof that the victims affected by human rights violations were not only subjected to the “state’s jurisdiction” but also ascertaining their physical presence “within the state’s territory”. “State’s jurisdiction” refers precisely to the instances of an armed conflict during which State A occupies territory of State B [232]. The study notes that the interpretation of those two phases has stirred controversial debates while applying the ICCPR to the acts of state actors during times of armed conflict [7,233]. However, for the purposes of using the ICCPR for combating the state’s acts of armed conflict violence, encouraging the phrase “within their jurisdiction” would be of greater importance in justifying the extraterritorial application of the ICCPR alongside other human rights treaties in cases of belligerent occupation [234]. Moreover, with reference to the ICCPR’s legal history, there is evidence from its *travaux préparatoires* that the expression “jurisdiction” was aimed at emulating the approach that had been taken by the ECHR [235].

#### 6.4. The International Court of Justice (ICJ) and Its Reference to Jurisdiction in Situations of Armed Conflict

The ICJ’s decisions have also made reference to the extraterritorial nature of human rights treaties in the expression of its support for a jurisdiction-based approach in armed conflicts [236]. For example, the ICJ also confirmed the jurisdictional approach in addressing accountability for human rights violations in times of belligerent occupations as seen in *DRC v Uganda* [237–240]. The case relates to Uganda’s occupation of Ituri region in DRC [241,242]. Uganda was found to be in breach of its obligations on human rights in the event of belligerent occupation. The ICJ’s advisory opinions and case law on issues of armed conflict are increasingly complementing IHL with sources from IHRL where necessary. Such complementarity would strengthen the legal protection rendered to persons with disabilities. In situations of armed conflict, complementarity in the protection of the CRPD obligations can be particularly in cases where the reliance on IHL seems inadequate. As such, the CRPD might respond to some of the difficulties of persons with disabilities; for example, the limited access to accommodation and health services, among other resources, considering the competitiveness the limited resources in the likely event of displacement [243]. Commentators have further observed that human rights (including rights under the CRPD) are increasingly applicable to parties in situations of armed conflict alongside IHL [243].

##### 6.4.1. Recommendations from the CRPD Committee on Article 11 in Armed Conflict

Similar to earlier recommendations made by human rights committees [244], the CRPD Committee has the same mandate of making instructive recommendations that state parties must respect their obligations even in situations of armed conflict. A classic example of an armed conflict during which a recommendation framed upon that obligation was exemplified during the armed conflict in Syria [245]. This conflict is alleged to have displaced more than two million people by November 2013. According to the latest statistics, the figures of displaced persons and the death toll resulting from the armed conflict in Syria has tremendously increased over recent years. As estimated 200,000 people have lost their lives, with 7.6 million being displaced from their homes to other locations inside the country, while 3.2 million have been registered as refugees fleeing the country [246]. The Syrian crisis is proving to be the world’s longest humanitarian disaster. Related to Syrian context, reports from humanitarian organizations rendering conflict and post armed conflict humanitarian services appear unclear as to whether the impacts and experiences of armed conflict occurrences are the same for persons with war related disabilities that are disabled in the course of the armed conflict and persons that are already persons with disabilities prior the occurrence of the armed conflict [247]. “I have been the Chairman of the Chechen Committee of the Red Cross since January 1995. We worked together with the ICRC, taking care of 15,000 elderly and disabled persons in Chechnya... From 1 October 1999 we had to close the food centres since electricity and gas had been cut off, but we continued to bake bread using diesel fuel and to distribute it to 12,000 elderly persons... Starting from 20 October 1999

Grozny came under heavy air bombardment, and on 27 October we stopped all programmes, because it was impossible not just to work, but to stay there. We started to prepare to evacuate, and I informed the ICRC Office in Nalchik [Kabardino-Balkaria] of this fact.

The aforesaid clarity seems important in establishing if the concerns associated with the seemingly varied armed conflict experiences and impacts of the persons with disabilities the above two categories might inform the nature and framing of protection that those humanitarian organizations and post conflict state actors, must have to the diverse populations of persons with disabilities.

In view of the above, it is evident that the armed conflict must have had a devastating impact upon persons with disabilities and on their properties [248]. As a result, during its tenth session, the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) produced a recommendation in which it implored all those concerned to uphold the protection of persons with disabilities. In its recommendation, the Committee mentioned that,

“Syria is a state party to the Convention on the Rights of Persons with Disabilities [CRPD]. Article 11 of the Convention says that a state party is obliged under international humanitarian [IHL] and human rights law [IHRL] to take all necessary measures [in order] to ensure the protection and safety of persons with disabilities in situations of risk, including [those of] armed conflict” [249].

The above quotation not only sheds light on what the CRPD Committee envisaged as the role of Article 11, but also shows that the Committee expects state parties to continue complying with their obligations in situations of armed conflict [250] (Paragraph 48).

#### 6.4.2. Extending the Jurisdiction Approach to the CRPD during Belligerent Occupation

Accordingly, the fact that Article 1(1) of the OP to the CRPD uses the same expression of jurisdiction with reference to the state’s jurisdiction signifies that in cases where Article 1(1) of the OP is applicable, then the CRPD applies to those situations of armed conflicts. Subsequently, in some cases, individual complaints might be sent and received by the CRPD Committee in the event that the protections afforded by the CRPD are violated, after ascertaining the admissibility considerations of the OP and the CRPD’s membership requirements [251].

In summary, there is evidence suggesting that the CRPD’s obligations are expected to apply to state actors in times of armed conflict. Its applicability is subject to some conditions, such as the state concerned being a party to the Convention without having made a reservation on the application of the CRPD in situations of armed conflict [252].

In situations of belligerent occupation, where the occupying power is a state party to the CRPD and its OP and it thereafter assumes jurisdiction of another territory, then an individual or representative complaint to the CRPD Committee concerning the violated rights is admissible, subject to fulfilling the conditions under Article 2 of the OP to CRPD. Those conditions include the exhaustion of domestic remedies [253]. The issue of exhausting domestic remedies can pose limitations to receiving immediate redress from human rights committees and other international mechanisms by the victims of armed conflict violence [254]. Details of limitations are analyzed further with more illustrative examples in a subsequent paper dealing with issues of access to justice in the aftermath of armed conflict.

The evidence for supporting the application of the CRPD and its OP can also be convincingly used in arriving at a conclusion that a social model of the CRPD must be used in interpreting the protection for persons with disabilities in situations of armed conflict [7,255]. The social model could also enhance the protection rendered to properties of persons with disabilities [256]. There is still a lacuna in IHL, however, since the CRPD is only meant to apply vertically between the rights of individuals and the acts of states. This makes the CRPD insufficient to apply to situations of armed conflict in which IHL’s horizontal relationship would be more appropriate in regulating the actions of both states and non-state actors [31,257], as opposed to solely relying on Article 11 of the CRPD that applies through a

vertical relationship of a state party's obligation to protect its subjects with disabilities within a state's territory or those under its extraterritorial control through belligerent occupation [258].

That said, the need for Additional Protocol IV (APIV) as a vital measure should neither be disregarded nor underestimated [259]. The proposed APIV would embrace the merits of the social disability model and purposely extend those merits to constitute part of the protective obligations imposed on rebel groups, among other non-state actors, to whom the CRPD and its OP obligations can never apply.

#### 6.4.3. Reservations to the Application of the CRPD in Situations of Armed Conflict

The point of reservation declaration made to the application of Article 11 of the CRPD is worth giving some attention to. In analysing the obligations that are imposed on states in armed conflicts to persons with disabilities, it is worth highlighting that those obligations have been impacted by international law on treaty reservations. Law that regulates reservations in the context of international law applies to the obligations that are imposed by Article 11 of the CRPD in the same way that the law has applied to other treaties that are regulated by the Vienna Convention on the Law of Treaties (VCLT) [260].

That international law on reservations as it applies to CRPD obligations is provided under the 1969 VCLT [261], in which case a reservation refers to a unilateral statement made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, in which that state party opts to exclude or modify the legal effect of certain provisions of the treaty in their application to that state [262]. Similar to reservations are declarations according to which states make clarifications and qualifications as to how they will interpret and apply a specific obligation.

Smith notes that reservations could be a symbolic representation of the differences between cultural, religious or pre-existing national legal regimes that subsist within states [263] (p. 66). That might be worth respecting for the obligations to be compatible. By nature, the reservations are contestable and in other cases can be withdrawn after other state parties can express their objections [264]. In cases where a reservation has not been objected to and withdrawn, then it becomes possible for other state parties to sever only the obligation against that reservation and then consider the state as bound by the rest of the human rights treaty.

As far as reservations are concerned, particularly in the context of the CRPD obligations, attention is primarily centred on the reservations and declarations that were made against Article 11 of the CRPD. The government of Mauritius signed the CRPD subject to the reservation that it does not consider itself bound to take measures specified in Article 11 unless Mauritius' domestic legislation expressly provide for the taking of such measures. Azerbaijan also made a declaration that it was unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia until the occupation territories are liberated Article 11 of the CRPD [265]. The research shall not delve into the details of this, although it suffices to mention that the Azerbaijan made a declaration about Article 11 of the CRPD. That declaration relates to the Nagorno-Karabakh ongoing border conflict with Armenia [266]. In view of Mauritius' reservation and Azerbaijan's declaration, it is evident that in both cases accountability in respect of the protective obligations under Article 11 of the CRPD is not absolute since that obligation is either subject to the fulfilment or removal of certain conditions [267]. More comprehensive work on problems of reservations in relation to human rights treaties as elaborated by the International Law Commission (ILC) whose details are contained in the Guide to Practice on Reservations to Treaties [268,269]. It is unacceptable for a reservation to defeat the essence of the treaty [270]. In that case, it is worthwhile mentioning that reservations have in some circles emerged as a subject of criticism due to the discontent they might cause in enhancing effective compliance with human rights treaties as noted from ICJ's advisory opinion on reservations against the Genocide Convention [271].

In essence it is unsurprising that some commentators have asserted that the reservations made against human rights provisions (like the CRPD in this study) such as that made by Mauritius

against Article 11 of the CRPD, might occasionally undermine the principles of universality in the enforcement of human rights [272]. Considering the beneficiaries of the individual–state nature of the obligations imposed through that vertical relationships of human rights treaties, the ICCPR Committee’s obligations are worth highlighting. That is to say, the VCLT might compromise the benefit of individual rights following the possibility of the contracting party selectively exonerating themselves of certain duties using the VCLT [273,274].

The above criticism becomes more convincing considering that the VCLT’s provisions relate to reservations structured upon a paradigm of multilateral treaties between states [275] (p. 161). In essence, unlike the effects of reservations made against human rights treaties [276], the aim of reservations in the context of multilateral treaties protecting the best interests of states parties in relation to those of other member states [277]. It is useful to note that, apart from human rights treaties, obligations from other multilateral treaties are unlikely to affect the interests of third parties.

Moreover, the above problem of reservations is compounded by the ambiguities in the way some of the states try to disguise some of the reservations as declarations. The court points out this controversy in the case of *Belilos v. Switzerland* [278] (paragraphs 49–50).

“The question whether a declaration described as interpretative must be regarded as a reservation is a difficult one, [ . . . ] in the instant [ . . . ] because the Swiss government [has] made both reservations and interpretative declarations in the same instrument of ratification. [ . . . ] Only reservations are mentioned in the Convention, [even though] several states have also or only made interpretative declarations without [ . . . ] making a clear distinction between the two [..]” [278,279].

In a practical context, there might be a problem in distinguishing treaty declarations from treaty reservations. That problem of distinctiveness is attributable to state parties dealing with a treaty declaration in the same way they would like to respond to a treaty reservation [263,280].

## 7. Ideal Disability Rights Practices

### 7.1. The CRPD Committee and Its Contribution to Ideal Practices

Bearing in mind that the CRPD Committee lacks the power to make binding decisions, it could consider alternative institutions in enhancing implementation of the protection. In that regard, identifying other proactive bodies could contribute to improving the interactions between parties to armed conflicts and the protection of persons with disabilities. The CRPD Committee ought to streamline guidelines for protecting persons with disabilities that must apply to armed conflicts. Preferably, those guidelines can clarify how persons with disabilities must be protected during situations of armed conflict. Additionally, those guidelines would make the Committee contribute to the improvement of IHL through the drafting of Additional Protocol IV.

In terms of influencing national polices, the Committee may recommend CRPD member states better domestic legislation that is similar to section 146 of the UK’s Criminal Justice Act [280]. Essentially, that section is part of the protective measures that are used in the UK’s domestic laws to protect persons with disabilities. This ideal practice uses criminal law to promote the CRPD by instilling a sense of awareness that dignified treatment must be rendered to persons with disabilities [281]. Section 146 classifies an offence as aggravated and subjects such an offence to a higher criminal sentence, as long as such an offence was committed against a person on the grounds of their disability identity [282]. There is a possibility that even in times of armed conflict, persons with disabilities could face even greater levels of victimisation and, therefore, need greater protection to take into account their vulnerability. For example, it might not only be easier but also safer to rape blind women as compared to women with no visual impairment considering the latter is more likely to recognise the offender or identify the available escape routes than the former [91,283].

In such situations, international bodies ought to request those states demonstrate a higher commitment by persuading them to emulate legislative practices that may have proved more efficient

in protecting CRPD rights within other jurisdictions [284]. The emulation of those ideal legislative practices could increase the value attached to aspects of disability awareness in times of peace and in times of armed conflict. Subsequently, this will improve the protection that is afforded to persons with disabilities. That would involve reshaping some of the undesirable attitudes that might be created by IHL's medical- and charity-oriented models, which surround persons with disabilities with a sense of worthlessness and inferiority.

Another ideal practice can be developed from the Marrakesh Treaty [285]. The Marrakesh Treaty refers to an international treaty that permits the translation of copyrighted works to formats that can be accessed by persons with disabilities. This would be helpful for persons with disabilities by encouraging reproduction of accessible formats for IHL-related literature including accessibility of IHL content on the ICRCs' free online database. Accessible formats of IHL treaties are necessary since Article 11 of the CRPD refers to both IHRL and IHL, irrespective of the laws and literature materials of the latter being oriented towards outmoded notions and, thus, too inadequate to promote the dignity and respect of persons with disabilities during armed conflicts.

This suggestion seeks to promote literacy skills among disabled people with a view to creating awareness of the problems that underlie the assumptions of IHL obligations. Through translation, there is a likelihood that persons with disabilities might be knowledgeable about the problems after availing themselves of IHL information in formats that are accessible, readable and understandable by them [286] (p. 737). This ideal practice has a legal backing since such translations are permissible according to the treaty [287]. This initiative is useful in enhancing the abilities of visually impaired persons to access for themselves the sufficiency and extent of protection that IHL renders [286,288]. It is highly probable that after that assessment it might be easier to involve persons with disabilities in supporting APIV, thus improving the position of IHL on disability.

### *7.2. Non-State Actors and the Sufficiency of the CRPD Obligations*

Any discussion related to ideal practices might be inadequate without highlighting ways of sensitising non-state actors to be aware of the protection they ought to provide to persons with disabilities. It must be reiterated that non-state actors are major parties to NIAC and bear duties and rights of combatant's privilege from IHL treaties that are applied to such armed conflicts. Nonetheless, those non-state actors are neither subjects of international law nor bearers of duties under international law from any of the obligations imposed by human rights treaties. That exclusion of non-state actors from such duties includes the lack of responsibility for respecting or complying with obligations under Article 11 of the CRPD.

In consideration of that state-centred nature of human rights treaties, some commentators have been cautious to embrace the increasing application of obligations from human rights treaties to situations of armed conflict. Those proponents attribute their suspicion to the risk of imposing the protective duties during an armed conflict in a state-centred manner while excluding the non-state actors from those duties [288]. Contrarily, reciprocity duties to parties in an armed conflict must be broadly encompassing when it comes to refraining from or undertaking reasonable measures for preventing any person (whether representing a state or a non-state actor) from acts that cause unnecessary suffering and loss of life to protected persons [289].

It has been noted that state-based mechanisms for protective and deterrence measures might be compromised in the event of an armed conflict in which non-state actors have succeeded in overpowering the state machinery within a particular region. Such instances are peculiar to cases of armed conflicts with an element of NIAC in which rebel groups are involved [290–293]. Unless future amendments of IHL are supported through the proposed APIV and, backing up that amendment some of the ideal practices explained above on collaborative arrangements are adopted, it is unlikely that the current legal regime of IHL has what it takes to extend the protection of persons with disabilities in these cases.

For the purposes of extending that protection envisaged under Article 11 of the CRPD to those rebel groups in situations of NIAC [294], it is essential for the Committee to establish and maintain future collaborative arrangements with non-governmental organisations (NGOs) such as Geneva Call, among others. These collaborative arrangements must be aimed at assisting these organisations to include disability issues in some of their future training sessions [295]. In fairness, the relentless efforts made by organisations like Geneva Call deserve special tribute in consideration of the commendable work they have undertaken in training and informing armed rebel groups of their protective obligations under IHL. In fulfilling those commendable endeavours, it is unsurprising that Geneva Call has on many occasions engaged with rebel groups to promote compliance with the protection of vulnerable groups of civilians, although none of its work has been directed to protecting persons with disabilities [296,297]. The research notes that Geneva Call should start to consider persuading those non-state actors to undertake a deed of commitment with respect to the protection of persons with disabilities. This is exemplified in its reports where a formal commitment was made by five armed non-state actors after negotiation for a couple of years [298]. It is remarkable to note that Geneva Call's work culminated in a deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination and Deed of Commitment for the Protection of Children from the Effects of Armed Conflict [299].

This approach of building an awareness of disability-protective obligations through NGOs might yield faster results, partly due to the presence and expertise of NGOs such as Geneva Call, which are already imparting knowledge-based training of IHL obligations to the non-state actors. That training can help better inform these actors about their accountability for the violation of the legal protection that is meant to be rendered to special groups. Moreover, if joint collaborative partnerships are made, these might champion efforts to create new educational materials to improve the ways in which training in IHL portrays disabilities [300].

That measure could create forums for revisiting IHL's content and contexts of disability, considering the outdated teaching upon which the obligations for protecting persons with disabilities are based in IHL. In addition to experts working together to reconcile and complement IHL's teachings on obligations to those with disabilities, and bringing this in line with those of the CRPD, state parties must also be encouraged to cooperate with organisations like Geneva Call in the course of their preparation to train non-state actors, rather than frustrating the efforts of such organisations. Allowing the entry of training associations such as Geneva Call, complying with ceasefire conditions in the event of training, aiding access for the training agencies to the correct the localities of non-state actors by giving them the relevant information and directions where needed, are some of the ways by which a state's cooperation with the training bodies could be demonstrated.

## 8. Conclusions

There are different perspectives and approaches to disability in most of the IHL treaties in comparison to the CRPD in as far as the recognition, inclusion and protection of persons with disabilities are concerned. The study noted that those inconsistencies are partly attributable to the differences in the levels of popularity that public law has accorded to particular models of disability across the varied time frames within which the framing of treaties for the different legal regimes of public law has occurred, apart from those instruments that have been developed by the CRPD [198,301]. Whereas the inward-looking approach of the medical model and individual models had greater popularity in the course of framing most IHL treaties, such as the four Geneva Conventions of 1949 (in the aftermath of the Second World War) and the 1979 Additional Protocols, the outward-looking approach of the social model has attained considerable popularity from the late 1980, influencing the CRPD and the contemporary underpinnings of other UN treaty systems. The variance in time frames during which treaties of IHL and the CRPD were framed, coupled with the differences in the levels of popularity associated with those models of disability, seem important factors in explaining the present limitations in content and contexts of the scope of obligations of treaties of IHL and IHRL if

applied concurrently when protecting persons with disabilities in situations of armed conflict [14,302]. Conventionally, those situations of armed conflict were solely governed by IHL, primarily because of its “lex specialis” and, thus, aimed at regulating the conduct of the parties involved in armed conflict to avoid causing unnecessary suffering to protect and vulnerable groups [23]. IHRL evolved in the aftermath of the Second World War, as already noted, although it was primarily and solely applied to times of peace [14,303].

The research has also noted that the CRPD entered into force shortly after the institutions of IHRL had increasingly changed their conventional trend of restricting the application of the duties enshrined in the then pre-existing human rights treaties to times of peace and thus to permitting their continued application to situations of armed conflict. This paper perceives the continuity in protective obligations as not only signifying a suggestive trend of an overlapping discourse in the objectives of IHRL and IHL [5,19,304] but also understands continuity to be symbolic of importance for the following reasons.

Firstly, in disability contexts that continuity of obligation from treaties of IHRL leads to state actors concurrently applying obligations from IHL alongside those of the treaties from IHRL, thus further raising interesting questions on the standards and objectives of protection from both legal regimes.

Secondly, the above continuity stimulates the use of models of disability as a means of investigating whether a trend of expecting states to concurrently comply with protective obligations from both legal regimes is either complementing, or compromising, the protection that those states are rendering to persons with disabilities in situations of armed conflict [34,37,305]. Arguably, in times of armed conflict, the proposed APIV of IHL would cover situations which the CRPD is unlikely to address [270,306], in which case the study has noted the need for complementarity with a view to supporting the implementation of IHRL treaties (such as the CRPD) where IHL is silent or inadequate, and vice versa [307].

Furthermore, the CRPD is not exceptional to the inherent limitations of other treaties of IHRL containing state-centred obligations pertaining to respecting and protecting persons with disabilities [47,308]. Those limitations lead to the lack of mutual reciprocity in terms of compliance considering that state-centred nature of the CRPD’s obligations [309]. In that context, state actors are the legitimate subjects under international law, against whom the enforcement of CRPD obligations can be effected as opposed to non-state actors such as rebel groups [3] (p. 7).

The study has, therefore, noted that the state-centred approach undermines the application and, subsequently, the enforcement of the CRPD obligations as envisaged under Article 11 where non-state actors are involved since the behaviour of those non-state actors can be equally detrimental to persons with disabilities, especially in the context of NIAC [261,309]. That problem of the state-centred obligations under the CRPD might be resolved by introducing Additional Protocol IV for imposing the mutually binding obligations to both parties involved in NIAC so as to improve the protection rendered to persons with disabilities. That measure would ensure the presence of a binding instrument to both parties during armed conflict situations [310].

Considering that the CRPD committee has limitations to recommendations [310], it might be necessary where practicable for actions to addressing violations of disability rights through alternative conventions that have developed better enforcement mechanisms than those of the CRPD Committee [311]. Thus, it would be logical for a lawyer representing victims whose CRPD rights were violated to consider two issues. Firstly, whether the occupying power is a member to the ECHR. Secondly, to establish whether the CRPD right that was violated by the state party is also provided under the ECHR. If the responses to both of those questions are affirmative, it might be faster to proceed by lodging the complaint at Strasbourg than through the CRPD Committee for the purposes of better enforcement.

The impacts and implications of reservations and interpretative declarations in relation to Article 11 could be limitations to the application of the CRPD during armed conflicts [263,312]. In that case, it has been identified that the state-centred nature of the CRPD could suffer failures in case a state’s machinery loses or lacks effective governance and control over certain parts of its territory due

to belligerent occupation [266,313]. This is exemplified well by Azerbaijan declaring its inability to meet its obligations envisaged by Article 11 within the occupied region of Nagorno-Karabakh as a result of the former's lack of effective control over that region [314]. That lack of control is a result of Nagorno-Karabakh being under belligerent occupation by Armenia [315].

The study has also noted how recent years have seen growing momentum on issues of disability. This momentum may have resulted from increased research on the types and causes of disabilities. It is noted that ideas based upon the CRPD's latest approach should constitute a model framework of the APIV upon which parties to armed conflicts perceive their protective obligations to persons with disabilities. Therefore, IHL laws using an approach modelled upon the CRPD could enhance the ways in which the planning and implementation of equal protection is understood and, consequently, alleviate the problems of persons with disabilities in situations of armed conflict.

The research has used ideas from normative humanist concepts such as those related to notions of IHL and IHRL evolved from the legal jurisprudence of postmodern natural scholars that conceive of protection of the value of humanity as a central, overarching pillar upon which the norms of IHL and IHRL derive their rationalization [19,316]. Thus, advancing the argument that tendencies which encourage unequal entitlement to protections against abuses of human dignity by capitalising on the vulnerability of persons with disabilities should be strongly condemned and discouraged. Equal protection must be rendered to all persons including those with disabilities, who deserve indiscriminate entitlement to be protected against the violation of their rights to life based on universal norms of humanity [53,317], especially where their inability to enjoy human dignity and equal respect to life is blamed upon bodily abnormalities rather than IHL's legal inadequacies. The argument has been made that, in some respects, IHL's legal regimes and its medical model of perceiving disabilities might limit the protection to medical care or assistance without obligating the parties concerned to respect the human dignity and life of persons with disabilities [318]. Moreover, in other cases that same medical model excludes some persons with disabilities, especially where they are classed as non-combatants in relation to the 1949 Geneva Conventions and API, which impose protective obligations based on the civilian and combatant dichotomy.

Furthermore, it has been established that the CRPD's definition is more inclusive of the various types and forms of disabilities, whereby the CRPD has been accredited for presenting disability upon the concept of social disablement in relation to all types and forms of disabilities [76,175,319]. Although the instrument remains discredited for its lack of inclusiveness, various types and forms of social disablement that exist alongside the disabling environments in armed conflict experiences [64]. Hence, the study has observed how contemporary trends in the understanding of disabilities have improved in the subsequent period of the CRPD being in force. Thus, IHL's future framework needs to emulate the CRPD by demonstrating awareness and acceptance of the varied forms of disabilities that could exist within civilian populations. Perhaps a related issue could be the protection rendered through the obligations of IHL by highlighting the need to start using the disabling nature of the armed conflict environment within post-conflict societies and state actors affected by armed conflict to appreciate the importance of allowing post-conflict states to have disability-related obligations that are underpinned by the inward-looking approach of the medical model. This is especially so when conceptualising ways in which the impact of the characteristics of the armed conflict–disability relationship might inform regional variances in the causes of disablement. Thus, armed conflict-affected states (in which the obligations of IHL have always applied) and post-conflict states (to which the obligations of IHL may have previously applied) can still greatly benefit from the inward-looking approach given the usefulness of the armed conflict–disability relationship in shaping the changing contents and contexts of disabilities across states or regions whose states are experiencing disability-related discourses of the “*jus ad bellum*,” “*jus in bello*” and “*jus post bellum* sequence.” A better understanding of disabilities could be a compelling factor in the development of better practices providing more suitable ways of dealing with the varied concerns of persons with disabilities before, during and after situations of armed conflict and disasters or emergency situations [320].

### *Observations and Areas for Future Research*

There is a likelihood that the more the customs and treaties of human rights laws are applied in times of armed conflict, the more protective international law might become to the most vulnerable groups if faced with situations of armed conflict [321]. This study recommends, therefore, that as long as a need to strengthen the protection of humanity is necessary, then the application of specialised IHRL treaties such as CRPD should be deemed to constitute one of the inherent aspects of the peremptory norms when resolving the problems of armed conflict. A peremptory norm refers to a long-term tradition or practice of states that has attained a legally compelling force of international law. Critics like Christoffersen [7,322], however, highlight that such a trend encouraging the application of IHRL in situations of armed conflict might be inappropriate considering the state-centred orientation of human rights obligations under international law [47,323].

Bearing in mind that some types of armed conflict such as NIACs might be crucial for regulating the activities of non-state actors in international law [324–326], in so far as that criticism sounds well-founded in the context of non-state actors whose acts would need to be regulated by law ([327], [308] (p. 33)). It is unlikely to justify overlooking the improvements in legal protection that could be attained as a result of enforcing human rights treaties for the purposes of enhancing the protection rendered to vulnerable groups who are unprotected, under-protected or inappropriately protected by the IHL regime.

Furthermore, the more the enforcement institutions show a willingness to adopt interpretive trends that encourage the enforcement of human rights obligations on the basis of extraterritorial jurisdiction in relation to the state's affiliated acts of human rights violations, the more those enforcement institutions are likely to increase the means of strengthening the accountability of state parties that are engaged in NIAC or IAC during which that state's representatives are neither protecting nor respecting fundamental rights. Some of those fundamental rights are engraved in the CRPD [1,328]. Therefore, for the purposes of encouraging a more extraterritorial approach in enforcing the protection of rights, including disability rights, the study recommends that enforcement bodies must be supportive of the implementation of individual rights for special groups based on jurisdictional control [3,38,329].

Furthermore there are articles that, instead of permitting the state parties to derogate, unlike human rights treaties such as the CRPD and CRC [56,330], provide for the continued imposition of human rights obligations [1] Article 11. There is a need for enforcement agencies to develop interpretative models that would ensure that treaty obligations are continuously respected by the state parties concerned in times of armed conflict and especially in the event of belligerent occupation [331]. Nonetheless, the limitation that human rights obligations are hardly enforceable in respect to rebel groups continues to apply.

Additionally, this research has noted that expressions of language have a role to play in shaping obligations under public international law [127,332]. Moreover, the language in which disability is explained and its obligations are expressed in the CRPD remains largely incompatible with the way it is currently understood under IHL [9]. According to the CRPD, "disability" is usually referred to in conjunction with the expression "persons with", hence the phrase "persons with disabilities". In contrast with the context of IHL, it has been noted here that "disability" is portrayed as a kind of abnormal bodily condition, and perhaps that explains why IHL finds no justification in combining disabilities "with persons" [160,333]. That incompatibility depicts some degree of inconsistency in the way the two fields of public international law perceive and understand issues of disability and eventually the impact on the conceptualisations of the legal obligations that arise. It has been observed during the study that difference constitutes a substantial part of the problem. In IHL, persons with disabilities are not understood as persons with rights but as sickly patients or elderly individuals with dreadful bodily limitations, physical infirmities or mental disorders.

Additionally, apart from the preamble of the Convention on Cluster Munitions [198,334] there is hardly sufficient evidence under most treaties of IHL to suggest that persons with disabilities are an

identified group of persons that ought to be included on the list of persons deserving special protection during armed conflicts. That exclusion of persons with disabilities from the list of vulnerable groups could be attributable to perceiving disability through the prism of either combatants or non-combatants who have been injured [251,335]. The injured. The presumed conditions of injuries and war-related disabilities are misleading, since they restrict the protection of disabled people to the provision of medical or physical care rather than to an equal entitlement to health services [336].

It is, therefore, unsurprising that such a perspective of disability permeates that teaching of IHL. Although this observation points out the problem, there is hardly a direct and immediate solution to these legally contradictory approaches in defining and protecting persons with disabilities [337,338]. Nevertheless, the contradiction suggests that in future, there might be a need of harmonizing the definitions and interpretations of disability in IHL in order to make it consistent with that of the CRPD. Such a harmonisation could also ensure consistency in the manner in which protecting and respecting the dignity of disabled individuals is perceived by students, practitioners and scholars, among other stakeholders, in IHRL and IHL as the relevant regimes of public international law.

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