

STRENGTHENING THE RECOGNITION OF THE RIGHTS OF PHYSICALLY CHALLENGED PERSONS UNDER INTERNATIONAL HUMANITARIAN LAW: MOVING BEYOND HUMANITARIAN PARADIGM

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Abstract

Arguably the adoption of the Convention on the Rights of Persons with Disabilities represents an important progressive development in the protection framework accorded to physically challenged persons under International Humanitarian Law. The objective of this paper is to examine the extent of protection accorded to physically challenged persons from harm in situations of risk consistent with International Humanitarian Law. The paper argued that examining the applicable legal and policy framework aimed at protecting the rights of physically challenged persons under international humanitarian law is not only a programmatic goal to be attained in the long term, but rather an immediate task on Countries to adopt measures in this without delay. This is against the backdrop driven by the desire to create stability between the rules of International Humanitarian Law(IHL) and the Convention on the Rights of Persons with Disabilities(CRPD) both in times of peace and armed conflict. It is therefore important to reiterate the fact that if the future of physically challenged persons must be guaranteed, the need to take cognizance of their peculiarities must not be overlooked. It is therefore advanced that the continued neglect of peculiarities of physically challenged persons both under the Convention and International Humanitarian Law portends a clog in the general protection against the effects of armed conflict or humanitarian emergencies. This paper adopts an analytical and qualitative approach and built its argument on existing literature which is achieved by a synthesis of ideas. Nevertheless, this article provides some recommendations that will guarantee special protection to physically challenged persons derivable from the principle of humanity.

Keywords:

Physically Challenged, Persons, Rights, International, Humanitarian Law.

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1. Introduction

The manner in which Physically Challenged Persons continued to suffer from all forms of discrimination, especially in armed conflict situations has been a global concern because of its attendant consequences. It is of course, at the heart of this need that this paper evaluates the strength and weaknesses of the rules of International humanitarian law, particularly, the entire provisions of the Convention on the Rights of Persons with Disabilities⁸⁵ and its Optional Protocol⁸⁶ which contains important protections provoked by the vulnerable nature of the physically challenged persons. Further, an analysis of the obligation to protect physically challenged persons is one that is entrenched in Article 11 of the Convention on the Rights of Persons with Disabilities.⁸⁷ The obligation to protect physically challenged persons is then analyzed against its relationship with the international humanitarian law responsibility in the protection regime. The important factor to be noted is that Article 11 of the Convention imposed an obligation on States to protect physically challenged persons at all times.⁸⁸ It may be argued that although the United Nations can be held responsible for failure to protect physically challenged persons, the ensuring decision cannot be upheld against due to the absolute immunity that it possessed under international law.

More specifically, it must be emphasized that the entire provisions of the Convention on the Rights of Persons with Disabilities⁸⁹, however, ensures that State parties are under an obligations to promote, protect and/or provide necessary facilities that will guarantee adequate and equal protection and enjoyment of inalienable rights and fundamental freedoms meant for all physically challenged persons, as well as their right to health, and to increase respect for their inalienable rights and inherent dignity⁹⁰. Further, it should be noted that the principle of non-discrimination and equality⁹¹ has an important implication for the specific application of international humanitarian law to the situations of physically challenged persons in armed conflict situations.⁹² In this sense, as International Humanitarian Law is responsible for the regulation of international and non-international armed hostilities, it must be acknowledged that the main essence of the law of armed conflict is to protect human rights and respect for parties to a conflict, or are no longer directly involved in an armed conflict situation or to restrict the means of combat or instruments of warfare or to expect combatants in armed hostilities desirable special respect and protections for persons with disabilities and partake in ensuring their inclusion in any human rights programs capable of recognizing their vulnerabilities⁹³.

⁸⁵ See the *Convention of the Rights of Persons with Disabilities* adopted 13 December, 2006.

⁸⁶ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 2006.

⁸⁷ *Convention on the Rights of Persons with Disabilities* adopted 13 December 2006, Article 11.

⁸⁸ Available at: <<https://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/ihl-human-rights/index-jsp>> accessed 12 July 2022.

⁸⁹ Ibid.

⁹⁰ *Convention on the Rights of Persons with Disabilities*, 2006, Article 3.

⁹¹ Ibid, Article 5.

⁹² J.E. Lord and M.A.Stein, "Implications of the United Nations Disability Convention for Refugees and Internally Displaced Persons," *Arizona Journal of International and Comparative Law*, (2012) 27, 401.

⁹³ See ICJ Advisory Opinion on the Legality of the Threat or use of Nuclear Weapons, *ICJ Reports* (1996) P. 226, Para 7.

On the basis of the foregoing, it must be stressed that the perceived barriers that physically challenged persons experienced during peacetime in accessing education, employment, health services, and rehabilitation are intensified in times of armed conflict or humanitarian emergencies.⁹⁴ Indeed, an understanding of international humanitarian law through a Disability lens enabled the identification of ill-treatment rooted in the disability experience, such as physical and sexual abuse, inhuman living conditions, and isolation and neglect. In light of the above, the paper is structured as follows: It started with an overview of the analytical framework of the status of physically challenged persons under international humanitarian law.

Thereafter, the paper examined the basic concepts, and does not attempts to resolve the controversies between international humanitarian law and international disabilities rights, but found out that the disability rights paradigm extant in the Convention on the Rights of Persons with Disabilities, by contrast, breaks free from paternalistic models of protection evident in international humanitarian law instruments and requires law and policies to be animated by a social model understanding of disability, as opposed to medicalized conception, and informed by principles of autonomy, non-discrimination, Independence, inclusion and equality of opportunity.⁹⁵ Subsequently, it elaborated on the humanitarian protection within the 1949 Geneva Convention and 1977 Additional Protocols. This is followed by a detailed insight into the tension inherent in the protective models of international humanitarian law and international disabilities rights. The paper concludes by considering whether and how the future development and understanding of an international humanitarian law disability perspective will contribute to the resilience and overall effectiveness of international humanitarian law in the area of strengthening the protection of physically challenged persons through addressing their specific needs during and after an armed conflict. The paper adopts the doctrinal method of research.

2. Disabilities Rights

From a scholarly perspective, it is generally acknowledged that disability rights are basic human rights of physically challenged persons who are beneficiaries of development and are entitled to adequate protection at all times given their vulnerabilities. According to the definition of disability' rights, as provided under the African Charter on Human and People's Rights, Disability's rights is the right of those persons with disabilities who deserves or entitled to certain basic rights or adequate protection at all times given their vulnerabilities to attacks in line with their basic needs.⁹⁶

Also, in defining disability rights, this paper only offers a broad overview in order to provide the necessary understanding of the term with regard to the subject matter. Importantly, in order to gain a full understanding of the concept of disability rights, it must be emphasized that the basis for establishing treaty-based protection is well-known and arose out of the concern for seriously wounded soldiers left to die on the battlefield and war veterans experiencing a traumatic injury. Thus, the first-hand observation of Henry Dunant on the Battlefield of Solferino who witnessed soldiers left unattended and unassisted on the battlefield provided the impetus for

⁹⁴ Ibid.

⁹⁵ R. Kayess and P. French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities," *Human Rights Law Review* 1, 8 (2008): 1-34.

⁹⁶ *African Charter on Human and People's Rights*, 1979, Article 18 (4).

the establishment of what ultimately became the International Committee of the Red Cross.⁹⁷ In this context, disability's rights will be better understood from the definition of the word "Disability" as provided in several literature or organizations. However, the Disability Discrimination Act⁹⁸ perceived those with disabilities as persons with "a physical or mental impairment" which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. In a similar fashion, the World Health Organization⁹⁹ (WHO) defines disabilities as a "universal concept encompassing impairment, restrictions, and a level of incapacitation from doing or performing an act". It is important to acknowledge that the concept "disability" is a complex issue, looking at the interactions with the features of a person's body as well as the societal features in which he or she lives. In another vein, it must be stressed that the United Nations Convention on the Rights of Persons with Disabilities (CRPD) provides that, disability is an evolving concept.¹⁰⁰ It provides thus:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

In contemporary usage, despite several and multi-dimensional approaches to the definition of disability's rights, its fluidity allows several understandings of disability and/or impairment. But however, defining the concept "disability" as an interaction, has made it simple in such a manner that disability cannot no longer be seen as part of a person, but as a situation where a person is physically challenged by one ailment or the other.¹⁰¹ In light of the above definition of disability, it should be noted that the most important rights for a disable person is otherwise called disability's rights. It is with this in mind that this study maintained that the concept "disability" is a human rights issue since persons with disabilities experience unfair treatment and marginalization, are perceived as violations of human dignity, and oftentimes are denied autonomy. However, this assertion is thus related to a potential United Nations Obligation to ensure respect for persons with disabilities. Also, while there is real scope for this argument on positive obligations, it is complicated and requires disentangling of a range of legal issues which arises within the scope of the basic human rights of persons with disabilities. As a normative guide, several international documents and regional legal documents such as the World Programme of Actions concerning Disabled persons, the Convention on the Rights of the Child,¹⁰² and more importantly, the Standard Rules on the Equalization of Opportunities for People with Disabilities have shown that disability is, however, a human rights issue.¹⁰³

In this sense, it may be argued that, in the context of the United Nations, understanding the interpretative approach on disability rights stems from the perception that the Convention on the Rights of Persons with Disabilities(CRPD) applies human rights concept to disabilities as a way of associating general human rights specifically to physically challenged persons, persons

⁹⁷ H. Dunant, 1862, accessed 15 July 2022, <https://www.icrc.org/icrc-062-0361>.

⁹⁸ Ibid.

⁹⁹ World Health Organization (WHO) *Understanding Disability*, 2011, p.5.

¹⁰⁰ *Convention on the Rights of Persons with Disabilities*, 2006, Article 1.

¹⁰¹ Ibid.

¹⁰² The Convention on the Rights of the Child 1989(adopted by the UNGA Res.44/25 of 20 November 1989 and entered into force 2 September 1990).

¹⁰³ The Standard Rules on the Equalization of Opportunities for people with Disabilities (1993).

with ailments or any form of disorder¹⁰⁴ in buttressing what is particularly the common definitions of disabilities rights which may be viewed as a natural development in the fulfillment of certain obligations of International human rights law which, however, rests heavily on the Charter of the United Nations and regional frameworks. However, it is important to emphasize that the fact that the inherent powers of this International Organizations informed the Ministerial Declaration¹⁰⁵ on July 2010 that recognizes the disability concept as “cross-cutting” issues necessary for the realization of the Millennium Development Goals (MDG) points to the fact that there is now need to protect women and girls with disabilities from any unpleasant or unwarranted punishment that will amount to discriminatory practices or be excluded from participating in the execution of the agenda of the Millennium Development Goals.¹⁰⁶

As part of the efforts to ensure adequate protection and recognition of disability rights, emphasis was laid by the United Nations on women who are physically challenged as a result of one ailment or the other.¹⁰⁷ Notably, at the conceptual level, it should be pointed out that Article 7 of the Convention on the Rights of Persons with Disabilities (CRPD)¹⁰⁸ however, encourages Member States to ensure that all necessary precautions or measures in ensuring that, there is the full enjoyment of rights of children with disabilities as well as other human rights and fundamental freedoms in such a manner that guarantees equality with other children. Addressing this concern, it is important to emphasize that in every measure bothering on physically challenged children, the best interest of such children should be a primary consideration. The principle of non-discrimination is a common phenomenon in international human rights law. Also, state parties should ensure that physically challenged children have the right to express their views freely on all matters in their best interest. In this case, such children's views should be attended to and taken into the cognizance of their age and maturity on an equality with other children of similar age, as well as provisions of adequate protection, support, and adequate assistance that will guarantee his enjoyment of his human rights.¹⁰⁹

In addition, placing the above descriptions within the context of Article 2 of the Convention on the Rights of the Child 1989(CRC) obliges member States to endeavor to provide adequate protection for the children which will guarantee their enjoyment the rights provided under the Convention on the Rights of the Child devoid of any form of discriminatory practices against the Child. Moreover, in appreciation of what adequate protection and humanitarian assistance implies in the purview of other international instruments, it is pertinent to note that while several of grounds for discrimination as provided under the Convention on the Rights of the Child have an affinity with that found in the human rights treaties that have preceded it, it is, however, different in many ways. Consequently, it can be deduced using human rights frameworks as the fundamental underpinning approach to disability need not undermine the validity of conceptualizing disability or a physically challenged person's rights and freedoms in

¹⁰⁴ F. Megret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disable Rights”, *Human Rights Quarterly*, 30 (2008): 494-516.

¹⁰⁵ See “The Ministerial Declaration of the United Nations”, accessed on June 28- July 2, 2010, available at: <<https://www.un.org/julyhis/pdf10>.

¹⁰⁶ See “The Ministerial Declaration Report on Millennium Development Goals (MDG)” 2015, accessed July 15, 2022, <https://www.un.org/pdf/MDG2015>.

¹⁰⁷ *Convention on the Rights of Persons with Disabilities*, 2006, Articles 6, (1) and (2).

¹⁰⁸ *Convention on the Rights of Persons with Disabilities*, 2006, Articles 7(1) (1) and (3).

¹⁰⁹ *Ibid.*, Article 3.

other ways that have proved significant to physically challenged persons. It may be argued that the social model and a human rights approach are mutually reinforcing.¹¹⁰ A further argument in this regard is that the cumulating of this human rights and social model approach was the United Nations Convention on the Rights of Persons with Disabilities which came into force in May 2008. Article 11 of the Convention specifically outlined the obligations of national States to physically challenged persons to ensure their human rights and protection during situations of armed conflict or humanitarian emergencies.¹¹¹

2.1. The Phenomenon of International Humanitarian Law

According to Jennifer Moore,¹¹² the law of armed conflict is agnostic as to the rationales for armed hostilities and unimpressed by its purported justifications. In this sense, what it implies is that instead of trying to show a distinction between what is lawful from an unlawful conflict, the law of armed conflict is determined to guarantee adequate measures that will ensure that all violence of any sort is less dangerous to humanity. However, the widely accepted view of humanitarian law in this context implies that no conflict or violent act should be ignored or disregarded to amount to a lawless zone. However, it may be argued that while it is conceded that the essence of humanitarian law is to regulate the means of combat and instruments of war as well as reducing dehumanization of individuals, it must be emphasized that such rules may be viewed as reinforcing the idea that war is an acceptable or unavoidable aspect of human relations and however, its occurrence and possible reoccurrence makes it a subject of relevance worthy of academic attention. Moreover, the fact that International Humanitarian Law is also referred to as the "Laws of war", the "Laws and Customs of War" or the "Law of Armed Conflicts" makes it more necessary for legislative actions both at the international, regional and national levels of operations on the subjects in order address subsisting inconsistencies in its application.

International Humanitarian Law focused on ensuring human protection to persons rendered disabled during armed conflict and as well aimed at preventing unnecessary suffering.¹¹³ Additionally, international humanitarian law instruments accorded protection to persons affected by the effects of armed conflict, for instance, the wounded or sick combatants, and later increased its emphasis on civilian populations.¹¹⁴ In this sense, physically challenged persons are protected in general terms under the principle of international humanitarian law that is aimed at shielding all persons not actively engaged in hostilities from harm and under specific rules specifically protection on account of being physically challenged.¹¹⁵ Importantly, it should be noted that under the rules of international humanitarian law, physically challenged persons are entitled to the same protection accorded to all persons under both the rules pertaining to treatment and protection as well as the rules relating to the means and methods of warfare. In this respect, it may be argued that while disability is not specifically mentioned as a prohibited

¹¹⁰ J. Bickenbach, "Disability Human Rights, Law and Policy," in G. Albrecht, et al. (eds), *The Handbook of Disability Studies* (Thousand Oaks, CA: Sage 2001).

¹¹¹ Accessed on July 13, 2022, <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

¹¹² J. Moore, *Humanitarian Law in Action within Africa*, (Oxford: Oxford University Press, 2012), 53-54.

¹¹³ M. Sasoli and A.A. Bouvier, *How Does Law Protect in War?* (Geneva: International Committee of the Red Cross, 2006)1: 2, 219.

¹¹⁴ Geneva Convention of 1864.

¹¹⁵ D.M Greig "The Underlying Principles of International Humanitarian Law," 9 *Australian Yearbook of International Law*, (1985): 696-85.

ground of adverse distinction, it would be covered under other status and in the light of developments in international law that amplifies disability status as worthy of protection against the discriminatory practice.¹¹⁶ Apparently, one may further argue that the idea of adverse distinction centres on the notion of positive discrimination in contemporary human rights law.¹¹⁷ By extension, this does not in any way suggests otherwise, but the basis for this line of argument is that positive discrimination holds that specific measures necessary to advance or achieved equality of historically marginalized groups, such as physically challenged persons, or women should not be considered discriminatory practice.¹¹⁸ In this same line of argument, the principle of humanity in international humanitarian law animated the formulation of a wide range of both general and particular rules.¹¹⁹ The above reason implies that the general protections of International humanitarian law reflecting the principle of humanity applied equally to physically challenged persons and additionally, international humanitarian law specific rules of special protection for physically challenged persons.

2.2. Humanitarian Protection Within The 1949 Geneva Conventions and The 1977 Additional Protocols

Basic knowledge of humanitarian protection from the provisions 1949 Geneva Conventions, and its Additional Protocols of 1977 is really of great assistance and must be extensively understood in order to conscientiously appreciate its relevance in an armed conflict situation. Against this background, the question is: How does the law of armed hostilities specifically contribute to ensuring adequate protective measures for physically challenged persons in armed conflict situation?. That said, it must be emphasized that beyond the specific obligation it imposes on State parties to Additional Protocol 1, it has shown that the rules of international humanitarian law with regard to the conduct of hostilities contributed to the prevention and minimization of harmful practices to physically challenged persons. As a matter of fact, it is pertinent to state that the general rules of armed conflict bothering the regulations of armed hostilities prohibit direct attacks,¹²⁰ unwarranted attacks,¹²¹ and disproportionate attacks.¹²² It is against the foregoing, that we affirm that strict adherence to the rules of armed conflict may prevent, and minimize harmful practice to physically challenged persons as non-combatants who deserves adequate protection.

At the same time, it could be noted that the responsibilities of combatants in armed hostilities are to take precautions measures in attack, and against the effects of combatants' operations which are specifically important in the circumstances. In other words, it emerges that with respect to precautions in attack, effective restrictions must be placed on unwarranted attacks which may be harmful or injurious to civilian populations or to their objects, unless in unavoidable situations.¹²³ In this sense, it implies that proper implementation of the above

¹¹⁶ ICCPR 1966, Article 7 and CRPD 2006, Articles 5 and 2.

¹¹⁷ CRPD 2006, Article 5 and CEDAW 1979, Article 2.

¹¹⁸ CRPD 2006, Article 5(4).

¹¹⁹ R. Coupland, "Humanity: What It is and How Does it Influenced International Law?" *International Review of the Red Cross* 83, (2001): 844, 969-90.

¹²⁰ Additional Protocol 1 1977, Article 51(2).

¹²¹ Additional Protocol 1 1977, Article 51 (4).

¹²² Additional Protocol 1 1977, Article 51(5)(b).

¹²³ Additional Protocol 1 1977, Article 57(2)(C).

obligation to issue effectively a pre-restriction notice suggests that the prospective persons is likely to receive the notice and would be able to appreciate the reason behind the pre-restriction notice on time in order to comply with it. That is to say be able to vacate or be able to be evacuated from the danger zone.

Indeed, it is worth asserting that this marks the beginning of the presentation of valuable information that will be accessible to physically challenged persons as well as avoid any form of discriminatory practices against them. Having examined the extent of the normative provisions, it should be asserted that the above would also be relevant under the provisions of the Convention on the Rights of Persons with Disabilities.¹²⁴ For purposes of examining humanitarian protection of physically challenged persons within in line with the provisions of the 1949 Geneva Conventions, and the 1977 Additional Protocols, it must be acknowledged that Common Article 3 is significant in another regard, for codifying, in a humanitarian law treaty, a number of non-derogable human rights norms, which includes the restrictions against torture, inhuman and degrading treatment, and arbitrary execution.¹²⁵

Given the overall purpose of the Four Geneva Conventions of 1949, it is unquestionable that the First Geneva Convention of 1949 predominantly focuses on the protective measures accorded to the wounded and sick soldiers in the war zone.¹²⁶ However, a remarkable point to note is that First Geneva Convention, unlike the other three of the four conventions, have been universally ratified. That being said, Article 12 maintains that all combatants “shall be respected and protected in all circumstances.” In a similar manner, the second Geneva Convention extends the full protections accorded to wounded soldiers under the First Geneva Convention to wounded and shipwrecked sailors as well.¹²⁷ Having established that, it should be noted that, the Third Geneva Rules of 1949 otherwise known as the “Prisoners of War Convention” also protect casualties of war in situations of armed hostilities. Aside from the above provisions, one should bear in mind that Article 13 of Geneva Convention III provides for adequate safeguard for casualties of war at all times, and should be humanely treated or protected against situations of war, intimidations, assaults, degrading, and inhuman treatment.¹²⁸

In a similar situation, the Fourth Geneva Convention of 1949 otherwise known as the “Civilian Convention” protects civilians and is universally ratified like the other Conventions. Additionally, it is essential to note that the Fourth Geneva Convention specifically provides for the economic and social welfare of non-combatants who are not parties to the armed conflict. The importance of the civilian convention is that it focuses on additional protections for persons in custody who are deprived of their deserved protection as provided under the Casualties of War Convention. However, Article 37 of the Civilian Convention provides that “a person or persons

¹²⁴ *The Convention on the Rights of Persons with Disabilities*, 2006.

¹²⁵ *The Convention Against Torture, and Other Cruel, Inhumane or Degrading Treatment or Punishment* (adopted by the UNGA Res.39/46 of 10 December 1984 and entered into force 26 June 1987).

¹²⁶ *Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field*, 1949.

¹²⁷ GCII 1949, Article 12.

¹²⁸ *Geneva Convention Relative to the Treatment of Prisoners of War*, 1949, Article 13.

awaiting trial or have been sentenced for an offence involving loss of liberty, shall in the course of his incarceration be humanely and fairly treated".¹²⁹

Furthermore, it is an issue worth noting in light of the relevance of the provisions of Article 37 of the Civilian Convention. This Civilian Convention has provided essential protections for individuals detained without any reason in the War on Terror as well as ensured that there is no lawless zone between the due process protections of criminal law and the special humanitarian protections accorded to Prisoners of war. However, the above expressions, on the other hand, have shown the relevance of humanitarian protections as provided by the 1949 Geneva Conventions. Therefore, a specific question that arises in the protection of physically challenged persons with respect to evacuating them from a war zone as a precautionary measure bothers on whether international humanitarian law rules contain specific protections for this category of persons during an armed conflict. The answer is that, in situations of evacuation, or prohibited zones, certain non-combatants, like physically challenged persons who are vulnerable deserves adequate protections. Moreso, in recognizing the nature of these vulnerable persons, Article 2 of the Convention¹³⁰ provides that:

"State parties are obliged under International Humanitarian law and human rights law to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk and armed conflicts."

Undoubtedly, there are two notable observations from the above provisions of Article 2 of the Convention on the Rights of Persons with Disabilities which centers on the provisions of adequate protection during public emergencies or internal violence. Firstly, the provisions of the Convention doesn't have a derogatory clause allowing the suspension of certain human rights in a public emergency situation as provided under Article 4(1) of the International Covenant on Civil and Political Rights¹³¹ which provides thus:

In times of Public emergency that threatens the life of a nation and the existence of which is officially proclaimed, the states parties to the present covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their provisions under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

Secondly, it should be noted that the Convention on the Rights of Persons with Disabilities took a different dimension with respect to issues of protection of the rights of physically challenged persons in public emergency situations. This stems from the fact that its approach is different from other core human rights treaties by invoking rules guiding armed hostilities, and human rights norms and principles during armed conflicts. However, it must be acknowledged that on the contrary, it is only the Convention on the Rights of the Child that is the only core treaty of human rights that recognizes this situation.

Another remarkable issue worthy of mention is, Article 38 of the Convention on the Rights of the Child 1989 prohibits Member States from drafting any individual or individuals

¹²⁹ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1949, Article 37.

¹³⁰ *Convention on the Rights of Persons with Disabilities*, 2006, Article 2.

¹³¹ *International Covenant on Civil and Political Rights*, 1966, Article 4.

below the statutory age of 15 years into the armed forces.¹³² Basically, the object and purpose of International humanitarian law in general and in particular is to ensure that there is a threshold of violence for there to be an international armed conflict wherein provisions are made to avoid a gap in protection, particularly, the protection of persons with disabilities from the harmful effects of war. In this sense, it should be pointed out that:

"State parties shall take, in accordance with their obligations under international law, including international law, including international humanitarian law and international human rights law, all necessary precautions that will guarantee the protection and safety of persons with disabilities in situations of risk, armed conflict, humanitarian emergencies and or occurrence of natural disasters."¹³³

Looking at provisions of Article 11 of the Convention, it appears the most relevant human rights provisions in the Convention that its frameworks on protections extends to persons with disabilities. Also, considering the importance that member States attached to the protection of physically challenged persons in situations of armed hostilities, humanitarian emergencies, or natural disasters. It might well be the case, that physically challenged persons under international humanitarian law are already noted in the provisions of 1949 Geneva Convention as persons who deserves adequate protection due to their vulnerabilities to risk, breakdown in access to, and, accessibility of support structures.¹³⁴ However, despite the arguments in favour of expanding the type of protection giving to physically challenged persons in situations of risk, or armed hostilities, it must be stressed that, the possibility of evacuating this category of persons, who most times, are faced with particular barriers to fleeing to safety during armed conflict or internal violence, should, however, not to be abused in such a manner that it will amount to violations of other international humanitarian law prohibitions on forcible deportation, transfer, or displacement, other than their safety, or compelling military commands.¹³⁵ International Humanitarian law, like the general culture, associates disability with disease, defectiveness, or deformity. In this regard, disability as historically reflected in international humanitarian law is centered on the concept of the wounded and broken body, first in relation to the soldiers rendered inactive in combat and in need of protection and later more broadly to civilians and the concept of survivor assistance.¹³⁶

2.3. Mechanism for Monitoring the Protection of Physically Challenged Person's Rights in Situations of Armed Conflicts or Other Emergencies

Evidently, a number of International Humanitarian Law instruments recognized that special respect and protection are to be accorded to persons with disabilities and others whose status may render them vulnerable or disadvantaged without, however, articulating the parameters of such protection. In this sense, however, it may be argued that the language used to describe disadvantage on the basis of disability is not uniform and, not surprisingly given the era in which international humanitarian law instruments were drafted. However, this departs from modern conceptualizations of disability under human rights law. It is imperative to emphasize that the term "disabled" while appearing in the Geneva Conventions, is not used with consistency

¹³² *Convention on the Rights of the Child*, 1989, Article 38(3).

¹³³ *Convention on the Rights of Persons with Disabilities*, 2006, Article 11.

¹³⁴ *Geneva Convention (GC I) 1949*, Article 30 and *Geneva Convention (GC IV) 1949*, Article 16.

¹³⁵ *Geneva Convention (GCIV) 1949*, Article 49 and *Additional Protocol (AP I) 1977*, Article 17.

¹³⁶ R. Amundson "Disability, Handicap, and The Environment, *Journal of Social Philosophy* 23, 1 (1992): 105-119.

in international humanitarian law instruments or in national military manuals. In other words, physically challenged persons are severally captured in the provisions referencing the "infirm," wounded, sick, and disabled as exemplified in Article 1 of the Convention. However, it is useful to highlight that Additional Protocol 1 supports a broad-based approach and lends some definition to these various terms associated with disability.

A pertinent question at this juncture is to consider whether the existing legal frameworks on disabilities rights protection have been able to address the protection gap. To a large extent, the above question could be better addressed by looking at the relationship existing between particular norms of the Convention on the Rights of Persons with Disabilities, and the rules of the Law of Armed Conflict in specific Contexts. Thus, given the prevailing wide interpretation as well as the unique nature of the Convention, it can thus be argued that a specific rule of a convention may be applicable as a specialized rule to qualify, or displace a less favorable rule of international humanitarian law. However, while this might seem reassuring at first sight, it leaves the problem that whether or not, in its usage, certain questions may arise on, whether it is appropriate to see some rules of the convention of the law of armed conflict as the more distinctive regulations in the prevailing circumstances. Drawing from the above development, it can be most readily understood that the Convention on the Rights of Persons with Disabilities (CRPD) 2006 contains different forms of mechanisms used in monitoring and enforcing all inalienable rights provided in the aforesaid Convention. In this sense, monitoring of the extent of compliance with the provisions of the convention at the national level of all human rights treaties requires all Member States to adopt, or apply domestic measures in their national laws wherein binding, effective and accessible remedies are provided for individuals whose rights are breached. In furtherance of the above, it is worth noting that article 34 of the Convention on Physically Challenged Person's Rights,¹³⁷ however, expands the above provisions by introducing an international treaty body which is a body responsible for monitoring and supervising state's implementation of their respective Conventions obligations. Of even greater concern is that, unlike other treaty bodies, the authorizing body responsible for the protection of the rights of physically challenged persons lacks the basic power to issue legally binding decisions capable of addressing cases of violations of victim's rights, rather, they are seen to engage in dialogues with member states concern, in identifying the problems of implementation, as well as encouraging member States to harmonize their laws, and practices into line with the provisions of the Convention.

Conversely, while it would indeed be advantageous to enhance the protection of physically challenged persons in conditions of armed hostilities, it can also be assumed that Article 1 of the Optional Protocol to the Convention on Rights of Persons with Disabilities provides that "aggrieved persons may submit petitions on violation of their rights through a body responsible for that".¹³⁸ In doing this, and, with the aim to fully implement the provisions of the Convention, member States of the Convention on the Rights of Persons with Disabilities have been requested to, introduce measures capable of safeguarding the human rights of physically challenged persons without discrimination or harmful practice to them. However, these could be achieved by enacting anti-discrimination legislation or eliminating discriminatory laws and practices, or by adopting policies and programs, ensuring that goods, services, and facilities can

¹³⁷ *Convention on the Rights of Persons with Disabilities*, 2006, Article 34.

¹³⁸ *Optional Protocol to the Convention on the Rights of Persons with Disability*, 2006, Article 1.

be easily accessible to physically challenged persons, as well as creating a national monitoring mechanism that will complement the existing frameworks. On the other hand, while it is understandable that the rules contain special provisions bothering on the roles of civil society in ensuring the proper execution of the convention. Further, Article 33 provides that “civil society shall be involved and participate fully in the monitoring process established by State parties”. Indeed, in order to submit individual's petitions, it should be noted that the Optional Protocol to the Convention, however, empowers the authorized body to examine petitions from individuals, or groups of individuals, with respect to the violations of the provisions of the rules by the Member States. That being said, there are, of course, situations where this authorized body may deem a petition unacceptable especially when:

- i. Such petition is anonymous,
- ii. Such petition has been determined by other authorized bodies, or has been, or is being scrutinized by the different procedure of international investigation or settlement approved to do so,
- iii. Other relevant domestic remedies have not been exhausted unless where the adoption of such remedies is unduly delayed, or may not give the desired results,
- iv. There is a clear manifestation of ambiguity or absurdity,
- v. When issues raised are the subjects of the petition that took place before the Optional Protocol becomes effective for the Member States, unless the issues remained operative after the said commencement date.

2.4. Reinforcement of Disabilities Specialized Protection

While the Law of Armed Conflict and the Convention on the Rights of Persons with Disabilities operates from different dimensions with significant commonalities that accommodates specific perception of physically challenged persons in situations of armed hostilities, it must be acknowledged that physically challenged persons deserve respect and protection in situations arising from international, or non-international armed hostilities or other humanitarian crises.¹³⁹ As an approach that is widely conceptualized, the International Committee of the Red Cross, a non-humanitarian organization believes that the Fourth Geneva Convention stipulates that “infirm persons” deserve adequate recognition given the fact that they are vulnerable and distinctive from others as well as are rights-bearing individuals.¹⁴⁰ The contention here is that the use of the word "respect" in this sense implies "to spare" and not "to attack". On the other hand, protection in this context implies defense or support given to such individuals.

Obviously, in reinforcing disability's specialized protection, it should be pointed out that the principle of protection or respect as applies to the law of armed hostilities contains specific responsibilities related to the physical health or safety of Physically challenged persons. In this regard, the Geneva Convention III Relative to the Treatment of Prisoners of War, however,

¹³⁹ J. Henckerts & L.D. Becks, “International Committee of the Red Cross”, *Customary International Humanitarian Law*, (Cambridge University Press, 2005).

¹⁴⁰ *Geneva Convention (GC IV) Relative to the Protection of Civilian Persons in Time of war*, 1949.

requires that special facilities must be put in place in areas where casualties of war are kept in order to take appropriate care of the physically challenged persons who may as well be kept their for resettlement.¹⁴¹

Also, in a similar vein, the Fourth Geneva Convention upholds the right of physically challenged persons in receiving medical treatment wherein restrictions are placed on armed attacks on convoys of vehicles, or vessels carrying people who may be sick as well as giving such people similar protection as civilians.¹⁴² It must be placed on record that the intent of the Fourth Geneva Convention is to show that the obligation to safeguard physically challenged persons, also includes the responsibility to prioritize the evacuation of physically challenged persons from war zones or unsafe areas.¹⁴³ One aspect of this development is that rights that are now enshrined in the Convention on the Rights of Persons with Disabilities such as the Right to Life provides that:

"States parties should 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 other".¹⁴⁴

Also, the right to respect others physical and mental integrity as well as the right to the enjoyment of the highest attainable standard of health has long been promoted through the rules of the law of armed conflict. A significant point to note herein is that, while the law of armed conflict bothers on the treatment or protection of civilians that largely relates to the charity and medical patterns of disability, the Rules on physically challenged persons instead advance the social pattern of disability. It must be acknowledged that one of the central features of this Rules on Physically Challenged Persons is that it contains certain basic rights that is beyond physical security and health, as well as basic rights that are far more than a mere guarantee provided in other human rights treaties. Arguably, one of the most important considerations which ultimately distinguished the convention from the law of armed conflict, in this respect, is that the Convention imposes on the Member States the duty to conduct programs that will create awareness on cases bothering physically challenged persons¹⁴⁵ as well as an emphasis on the continued existence of these rights even in emergency situations.¹⁴⁶ More specifically, as has already been mentioned, the Convention on the Rights of Persons with Disabilities has provided for adequate Protection of the right of physically challenged persons during armed conflicts which could not be found in other international human rights treaties. It can thus be said that the convention vested rights in individuals and, however, goes beyond the International humanitarian law paradigms that primarily impose duties on member States without recognizing personal rights. In light of the foregoing, it is important to stress that the Convention on the Rights of Persons with Disabilities ensures that additional avenues are provided wherein the rights of Physically challenged persons are implemented and monitored adequately as provided in its provisions. On the other hand, International humanitarian law frameworks, while ensuring that there is a minimum desirable standard of treatment which oftentimes does not usually confer

¹⁴¹ *GC III Convention Relative to the Treatment of Prisoners of War*, 1949, Article 30.

¹⁴² *GC IV* 1949, Article 21.

¹⁴³ *The Fourth Geneva Convention*, 1949, Article 17.

¹⁴⁴ *Convention on the Rights of Persons with Disabilities*, 2006, Article 10.

¹⁴⁵ *Ibid*, Article 8.

¹⁴⁶ *Ibid*, Article 11.

any procedural rights on individuals to seek remedies for international humanitarian law violations, or rather establish any enforcement mechanisms that will be necessary for the pursuit of such rights.¹⁴⁷ It is important to note that the entire provisions of the convention equally suggest its universal application which in Article 1 of the Convention, it is meant to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all physically challenged persons as well as promoting respect for their inherent dignity.¹⁴⁸

To explore this further, drawing from the Pictet theory may lead to a situation where the determination of whether a person is a “protected person” will be in conflict with the other test used in determining whether there is “an occupation”. This regime justifies several protective interests. However, it should also be noted in this context that the fact the convention clearly refers to situations of emergencies and armed hostilities without a distinction between nationals and aliens could raise doubt on whether a distinction could as well be made between civilians and non-civilians regarding situations in which they are to be protected. This approach, with due respect justify the assertions that States have universal obligations.¹⁴⁹ In addition, it could be argued that like its parent instrument, the Optional Protocol to the Convention on the Rights of Persons with Disabilities shows no demarcation between citizens and non-citizens as the case may be. Admittedly, in a similar fashion, it suggests that any person or persons have the right to bring a petition before the authorized body, as the committee provides that he or she is under the jurisdiction of the State with regard to the situations that gave rise to the petition.¹⁵⁰ Put differently, the above issues have raised questions on the extraterritorial applicability of the Convention. This critical and contextual prism can also be of help in assessing the level of application of the convention for the protection of those who are sick or wounded as provided in the Fourth Geneva Convention that could apply to persons within their territorial boundaries or foreigners in occupied territory. Also, given the question on the extraterritorial application of the Convention on the Rights of Persons with Disabilities, it is submitted that the convention is yet to incorporate in its provisions the geographical scope of application, but however, certain obligations provided apply implicitly to the territory of such State. On the contrary, it has been noted that the explicit application of the Convention to armed hostilities in Article 11 reinforces the argument as it is applicable to the conduct of the State abroad. More specifically, as has already been mentioned, the above view of course, conforms with the belief that certain responsibilities under the key United Nations Human Rights Treaties are applicable within the territory of the State or where such a State exercise control extraterritorially.¹⁵¹ However, it is important to bear in mind that the overall object or purpose of the Convention and the international humanitarian law rules is gears towards ensuring adequate protections for physically challenged persons in situations of armed conflict.

¹⁴⁷J.S. Pictet, “Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War”, 1949.

¹⁴⁸ *Convention on the Rights of Persons with Disabilities*, 2006, Article 1.

¹⁴⁹ See Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2 2008 (7).

¹⁵⁰ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 2006, Article 1(1).

¹⁵¹ *Democratic Republic of the Congo v. Uganda (Judgment)* [2005] ICJ Rep. 168, 242-3

3. Conclusion

This paper has attempted a survey on the commonalities and differences existing between the law of armed conflict and the rules regulating the rights of physically challenged persons which bothers on ensuring adequate protection of physically challenged persons in situations of armed hostilities or humanitarian crisis. As a way of emphasis, the entire provisions of Article 2 of the Convention on the Rights of Persons with Disabilities, (2006) that is regarded as a primary regulatory mechanism for physically challenged persons is in tandem with the rules of the law of armed conflict as well as the international human rights law respectively. Therefore, it is not wrong to submit that physically challenged persons are rights bearers who deserve adequate protection in an armed conflict situation or other humanitarian emergencies.

Additionally, given the humanitarian impact of armed conflicts on persons with disabilities, as well as their vulnerabilities, this paper argues that an examination of the applicable legal and policy frameworks meant to safeguard the rights of physically challenged persons in situations of an armed conflict is not only a programmatic goal to be attained in the long term but rather an immediate obligation on states to take steps in this regard without delay. More importantly, this paper has come to a conclusion that adequate safeguarding of physically challenged persons under the provisions of international humanitarian law emanates from the fact that international humanitarian law prescribed certain responsibilities on private military organizations and to armed forces of the State, whereas the Convention on the Rights of Persons with Disabilities is only applicable to Member States.

Ultimately, this paper appreciates the complementary or mutually reinforcing nature of the rules of International Humanitarian Law and that of the Rules on the Rights of Physically Challenged Persons, however, submits that the emergence of this Convention has contributed immensely to advancing the rules of international humanitarian law or human rights norms in its application to the rights of physically challenged persons in situations of armed hostilities or humanitarian emergencies. Be that as it may, recommendations are made to better enhance the adequate safeguard of physically challenged persons in situations of armed hostilities or other humanitarian emergencies.

Recommendations:

1. States parties should be responsible for the treatment of physically challenged persons humanely without any form of discrimination.
2. States parties are obliged to allow and or facilitate access to humanitarian reliefs to persons with disabilities during an armed conflict without any form of discrimination or harmful practices to them.
3. Also, in situations arising from international or non-international armed conflicts, physically challenged persons should not be denied access to any medical treatment or care because denial of this will amount to cruel or inhumane treatment.
4. State parties to the convention are required to take measures to ensure that physically challenged persons have access to mobility devices or rehabilitation services when the situation arises.
5. States should ensure that full and equal enjoyment of all human rights by physically challenged persons are addressed comprehensively in the Convention.

LIST OF REFERENCES

- Amundson, R. "Disability, Handicap, and The Environment". *Journal of Social Philosophy* 1, 23 (1992): 105-119.
- Bickenbach, J. "Disability Human Rights, Law and Policy," in G. Albrecht et al. (eds), *The Handbook of Disability Studies*. (Thousand Oaks, CA: Sage 2001).
- Coupland, R. *Humanity: What it is and How Does it Influence International Law?* (2001) 83 IRRC 844, 969-90.
- *Dunant, H (1862)*, available at: <https://www.icrc.org/icrc-002-0361>
- Greig, D.M "The Underlying Principles of International Humanitarian Law". *Australian Yearbook of International Law*, 9 (1989): 696-85.
- Henckerts, J. and Becks, L.D. 'International Committee of the Red Cross', *Customary International Humanitarian Law* (Cambridge University Press, 2005).
- Pictet, J. *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* 1949.
- Kayess, R and French, P. "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities". *Human Rights Law Review* 1, 8 (2008): 1-34.
- Lord, J.E and Stein, M.A "Implications of the United Nations Disability Convention for Refugees and Internally Displaced Persons". *Arizona Journal of International and Comparative Law* 27. (2012) 401.
- Megret, F. "The Disabilities Convention: Human Rights of Persons with Disabilities or Disable Persons Rights". *Human Rights Quarterly*. (2008): 494-516.
- Moore, J. *Humanitarian Law in Action Within Africa*. (Oxford: Oxford University Press, 2012) pp. 53-54
- Sasoli, M and Bouvier, A.A *How Does Law Protect in War?* (Geneva: International Committee of the Red Cross, 2006): 2, 219.

International Treaties/Conventions.

- *The Convention on the Rights of Persons with Disabilities* (adopted 13 December 2006).
- *The Convention On the Rights of the Child* (adopted by the UNGA Res.44/25 of 20 November 1989 and entered into force 2 September 1990).
- *Convention Against Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted by the UNGA Res.39/46 of 10 December 1984 and entered into force 26 June 1987).
- *United Nations Charter* adopted 24 October 1945, 1UNTS XVI, <<https://www.refworld.org/docid/3ae6b3930.html>>
- *United Nations General Assembly of Rome Statute of International Criminal Court* (adopted 17 July 1998).

- *International Covenant on Civil and Political Rights* (adopted by the GA Res.2200A (XXI) of 16 December 1966 and entered into force 23 March 1976).
- *Geneva Convention Relative to The Treatment of Prisoners of War*, 1949.
- *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949.
- United Nations General Assembly, *Standard Rules on the Equalization of Opportunities for People with Disabilities* (adopted by the GA, 20 December 1993, A/RES/48/96).
- *African Charter on Human and People's Rights* (adopted 27 June 1981 and entered into force 21 October 1986).
- World Health Organizations. *Understanding Disability Report* (2011).

Case Laws

- Democratic Republic of the Congo v. Uganda (Judgement) [2005] ICJ Rep. 168, 242-3.
- ICTY, The Prosecutor v. Dusko Tadic (Jurisdiction) IT-94-1-AR72 Appeals Chambers Decision (1995) Paras 67&70.