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DISSERTATION TITLE

-----Move towards expansion of Special Protection under IHL to include other  
vulnerable groups-----

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Supervisor: Noam Lubell

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## Introduction

Protection of civilians under International Humanitarian Law (IHL) is provided through two ways one is through restriction on the conduct of hostilities<sup>1</sup> and second through respect and protect provisions.<sup>2</sup> The respect and protect provisions apply to civilians<sup>3</sup> as long as they do not directly participate in hostilities. Besides the general protection available to all civilians, certain provisions are reserved for certain categories of civilians. There are some provisions reserved for only those civilians falling in enemy hands<sup>4</sup> these are given based on nationality and location of the civilian. Similarly, there exists another set of protection provision granted to certain individuals based on their personal characteristics or profession, known as Special Protection.

Special Protection, in the absence of a formal definition, is construed as a complementary protection which is provided over and above the general protection, either about the vulnerability of the population or on account of the function they perform.<sup>5</sup> These provisions are in addition to the general protection laws applicable to all individuals not directly participating in hostilities.<sup>6</sup> It has been reserved in IHL for the women, children, wounded, sick and shipwrecked, medical and religious personnel, elderly, civil defence personnel and to certain specific objects and areas under the Geneva Conventions (GC) and Additional Protocols(AP).<sup>7</sup>

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<sup>1</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (adopted on 8 June 1966, entered into force on 7 December 1978 ) 1125 UNTS 3, (AP-I) Art 48, 51(2) API, 85(3) of AP-I, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977( adopted on 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 609 (AP-II), Art 13

<sup>2</sup> Egs. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted on 12 August 1949, entered into force on 21 October 1950 ) 75 UNTS 31( GC I) Art 23 , Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted on 12 August 1949,entry into force on 21 October 1950) 75 UNTS 287(GC IV)Art 14, Art 15 GC IV, Art 59 AP-I and Art 60 AP I, Article 75 AP-I, Art 4 of AP-II, Article 3 of GC

<sup>3</sup> Some provisions are only applicable in International Armed Conflict

<sup>4</sup> Eg. Art 4 of GC IV, All provisions in GC IV except part II

<sup>5</sup> Fritz Kalshoven, 'On – Combatant Persons: A Comment to Chapter 11 of the Commander's Handbook on the Law of Naval Operations', *Reflections of the Law of War Collected Essays* (Nijhoff 2007).

<sup>6</sup> Michael Bothe and others, 'Part IV: Civilian Population', *New Rules for Victims of Armed Conflicts Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2 edn,Nijhoff 2013).

<sup>7</sup> For eg Children: GC IV Articles 23–24,38,50,76; AP-I 89;AP-II Article70(1), 77(1), 4(3)

Medical : GC I Articles 24–26; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force on 10 October 1950) 75 UNTS 85 (GC II) Article 36, GC-IV Article 20; AP-II Article 9(1)

Religious: Article 24 GC I, Article 36 GCII, Article 15(5) AP-I, Article 9(1) AP-II

Women :GC-I, Article 12(4);GC-II, Article 12(4); Geneva Convention Relative to the Treatment of Prisoners of War , 12 August 1949, 75 UNTS 135,(GC III) Article 14(2); GC IV Article 27(2); AP-I, Article 76(1)

Elderly:GC III Articles 16, 44–45 and 49 ;GC IV Articles 17, 27, 85 and 119.

Wounded and Sick :GC III Articles 16, 30, 44–45, 49 and 110; GC IV Articles16–17, 21–22, 27,85,119 and127

Providing protection to certain groups of people on account of their membership of an occupational or social group is not a new phenomenon. In the eleventh century for instance 'Peace of God' protected clerics, merchants and the poor on the ground of their specific role in society.<sup>8</sup>

The reason behind the need for Special Protection changed over time. To illustrate the same one can see the change behind the reasoning behind providing special protection to women. At first, it was on account of the laws of war being based on chivalry, humanity and religious values.<sup>9</sup> Which entailed a need to protect non-combatants, who at the time mainly comprised of women, children and old men.<sup>10</sup> The need to protect women and children was on account of their view as intrinsically weak.<sup>11</sup> Which led to the presumption of their being incapable of bearing arms and committing acts of hostility.<sup>12</sup> Women were especially considered 'vulnerable' and 'helpless'.<sup>13</sup> Their attributed innocence and vulnerability led to the need to protect them deeming them powerless.'<sup>14</sup> Later on, the differential treatment between the sexes was attributed besides the weakness, to the honour and modesty of the women.<sup>15</sup> The vulnerability was then understood as a consequence of social, cultural and political factors not on biology<sup>16</sup> as was the case initially. Only recently were the special provisions justified on account of women's specific needs and particular physical and psychological risks.<sup>17</sup>

Along with the reasoning behind it the nature of Special Protection has developed over time. At first, specific provisions provided extra protection on account of weakness or inherent vulnerability, but it evolved into provisions accommodating the special needs of certain populations where general protection was inadequate. A change in society's perception of the women and the change in the roles in armed conflict, i.e. taking an active part in hostilities,<sup>18</sup> led to a shift in the understanding of these special provisions.

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<sup>8</sup>Amanda Alexander, 'The Genesis of the Civilian' (2007) 20 Leiden Journal of International Law 359.

<sup>9</sup>Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 The American Journal of International Law 239.

<sup>10</sup>*ibid.*

<sup>11</sup> Medina Haeri and Nadine Puechguirbal, 'From Helplessness to Agency: Examining the Plurality of Women's Experiences in Armed Conflict' (2010) 92 IRRC 103.

<sup>12</sup> Meron (n 9).

<sup>13</sup> Haeri and Puechguirbal (n 11).

<sup>14</sup> *ibid.*

<sup>15</sup> GCI Art 12(4), Knut Dörmann, Jean-Marie Henckaerts and International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*.

<sup>16</sup> Haeri and Puechguirbal (n 11).

<sup>17</sup> Robin Geiss, Helen Durham and International Committee of the Red Cross, 'Protection and Care of the Wounded and Sick', *Commentary on the First Geneva Convention* (CUP 2016).

Art 12(4) GC-I

<sup>18</sup> Charlotte Lindsey, 'Women Facing War: ICRC Study on the Impact of Armed Conflict on Women'..

Despite the change in the perception of women's vulnerability the requirement for the special protection persists, more than before.<sup>19</sup> As there is now an increasing understanding that women experience armed conflict differently than men.<sup>20</sup> The experience of men is seen as the starting point for the formulation of IHL.<sup>21</sup> In a world where the position of men and women are not the same,<sup>22</sup> and women experience the same conflict differently formulation of laws from the experience solely of men would be unfair<sup>23</sup> and inaccurate. This conclusion is not only relevant for men and women but can be extrapolated to other vulnerable categories of civilians. For instance, the Special protection afforded to children means that children should be treated differently compared to the ordinary rules of IHL.<sup>24</sup> Thus it is required for IHL to adequately respond to different categories of people according to their lived experience and requirements.<sup>25</sup> This is where Special Protection can play a role as it applies to different groups of individuals.

It is not only women, children and other categories mentioned above that have specific needs and requirements during an armed conflict but also the disabled, elderly and LGBTI community among others who would benefit from similar specific protection. This thesis proposes to expand Special Protection to include other vulnerable groups of people. Granting these groups special protection would not take away from their or other civilian's general protection<sup>26</sup> but be in addition to the existing general protection. The proposal of the expansion of Special Protection to include other vulnerable groups draws influence from human rights law where there has been a shift from universal laws for everyone to more special category-based laws.<sup>27</sup> This shift would allow for tailored protection for the vulnerable groups of individuals that would incorporate their lived experiences and specific requirements during an armed conflict.

The usage of the term vulnerable is not meant that the members are necessarily weak or innocent. As members of vulnerable groups are known to actively partake in active hostilities. The existence of

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<sup>19</sup>Geiss, Durham and International Committee of the Red Cross (n 17).

<sup>20</sup> Judith Gardam and Hilary Charlesworth, 'Protection of Women in Armed Conflict' (2000) 22 Human Rights Quarterly 148.

<sup>21</sup> *ibid.*

<sup>22</sup> Fernando Tesón, 'Feminism and International Law: A Reply' (1993) 33 Virginia Journal of International Law 647.

<sup>23</sup> Gardam and Charlesworth (n 20).

<sup>24</sup> Carolyn Hamilton and Tabatha Abu EL Haj-, 'Armed Conflict: The Protection of Children under International Law' (1997) 1 International Journal of Children's Rights 1.

<sup>25</sup> Alice Priddy, 'Disability and Armed Conflict' Geneva Academy <[https://www.geneva-academy.ch/joomlatools-files/docman-files/Academy Briefing 14-interactiv.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2014-interactiv.pdf)>.

<sup>26</sup> Sandesh Sivakumaran, 'Sexual Violence against Men in Armed Conflict' (2007) 18 Eur J Intl L 253.

<sup>27</sup> Convention on the Elimination of All Forms of Discrimination Against Women,(Adopted on 18 December 1979, entered into force, 3 September 1981) 1249 UNTS 13,(CEDAW); Convention on the Rights of the Child,(Adopted on 20 November 1989, entered into force on 2 September 1990) 1577 UNTS 3, (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,(Adopted on 18 December 1990,entered into force 1 July 2003) 2220 UNTS 3 (CMW); Convention on the Rights of Persons with Disabilities (Adopted on 24 January 2007, entered into force 3 May 2008) 2515 UNTS 3(CRPD)

specific rules for such groups who are inherently different from one another is partly on account of their being more susceptible to abuse.<sup>28</sup> The development of IHL reflects in part which populations require particular help depending on the nature of the conflict, the degree of awareness and concern for specific needs.<sup>29</sup> These particular rules are designed in a manner to reduce the likelihood of abuse and based on notions of justice, equality and dignity.<sup>30</sup>

To expose the lacunae in the existing protection under IHL for vulnerable groups, I have chosen as examples disabled, elderly and LGBTI people. Although the elderly have existing special protection under two provisions of IHL, which regard to evacuation<sup>31</sup> and creating safety zones<sup>32</sup>. I shall argue for more holistic protection. The reason behind choosing these three groups as examples is elaborated below.

There is a pattern among humanitarian documents of persistently equating the vulnerability of women, children and the elderly during armed conflict describing them to be in need of protection. For instance, the 2008 Annual ICRC report stated that 'civilians population becomes increasingly caught up in armed conflict, specific problems may engender or exacerbate vulnerability among women, children, the elderly or minorities.'<sup>33</sup> 'This reveals a thread of victimization where those social groups are considered vulnerable where there is a pre-existing risk of exploitation or marginalization such as in the case of women, children, the elderly and disabled'.<sup>34</sup> As war is known to exacerbate the pre-existing inequalities prevailing in societies.<sup>35</sup> The vulnerability of these groups during armed conflict would only worsen their already problematic state during peacetime. Moreover, the ICRC in their customary IHL study has endorsed the Special Protection of elderly and disabled during both International and non-international armed conflicts.<sup>36</sup> Along with the elderly and disabled, the LGBTI group also need special protection during armed conflict. As the LGBTI are already particularly vulnerable during peacetime but during conflicts, they become one of the least protected with no proper nonformal means of protection.<sup>37</sup>

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<sup>28</sup> Louise Doswald-Beck, 'Vulnerable Groups during Armed Conflict and Other Violence', *Human Rights in times of conflict and terrorism* (2011).

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> Article 17, GC IV

<sup>32</sup> Art 14, GC IV

<sup>33</sup> ICRC, Annual Report, May 2009 <https://www.icrc.org/en/doc/resources/documents/annual-report/icrc-annual-report-2008.htm>

<sup>34</sup> Haeri and Puechguirbal (n 11).

<sup>35</sup> Judith Gardam, 'Women, Human Rights and International Law' (1998) 38 IRRC 421.

<sup>36</sup> Jean-Marie Henckaerts and others, *Customary International Humanitarian Law* (CUP 2005) Rule 138.

<sup>37</sup> Alon Margalit, 'Still a Blind Spot: The Protection of LGBT Persons during Armed Conflict and Other Situations of Violence' [2019] IRRC 1.



It is essential to note at this point that people who identify as members of these three groups may appear in the IHL context as either civilians or as combatants / directly participating in hostilities. This thesis shall exclusively be dealing with these three categories in the capacity of civilians.

This thesis shall first discuss the interplay between IHL and International Human Right Law (IHRL) specifically focusing on how IHRL has influenced IHL in the past, IHRL can be read into existing IHL provisions and later on to supplement existing IHL framework. The next section will then examine each above-mentioned group i.e. disabled, elderly and LGBTI during armed conflict. It shall first assess if they are vulnerable during armed conflict, then inspect the existing IHL provisions, and later the IHRL provisions and assess whether these provisions can together provide adequate protection to these vulnerable groups. The last section shall explain how to expand the Special Protection to other vulnerable groups is in line with IHL basics principles and there needs to be a move towards more group-based protection akin to human rights law. For these vulnerable groups to be able to equally enjoy and access the same level of protection given to general civilians.

## **I. IHRL interaction with IHL**

### **I.1 Movement of IHRL towards category-based rights**

Human Rights was traditionally focused on universal being wherein every person by virtue of their being human have rights.<sup>38</sup> Every person no matter their social, economic or political background have the same rights. This system failed to take into account that all human beings do not enjoy these rights equally or in a similar manner. This was often on account of their membership of a particular social group which were entrenched in social prejudices which led to their marginalization and exclusion.<sup>39</sup> Differences may be rooted in biology or socially, but the devaluation of the social group is a social devaluation.<sup>40</sup> To ensure that the differences are celebrated and not denigrate, law was used to remedy the situation.<sup>41</sup> This is what led to the shift in human rights discourse from universal being to that of vulnerable social groups.

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<sup>38</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)

<sup>39</sup> Marc Bossuyt, 'Categorical Rights And Vulnerable Groups: Moving Away From the Universal Human Being' (2016) 48Geo Wash Intrn'l LR 717.

<sup>40</sup> John Okore Ogbonnaya, 'Human Rights of the Less Privileged Groups: Jurisprudential and Legal Issues in Global Human Rights' (2016) 53 Journal of Law, Policy and Globalization 30.

<sup>41</sup> Bossuyt (n 39).

They are termed vulnerable by institutionalized and traditional social expulsion, stereotyping, disadvantage and prejudice on account of group characteristics.<sup>42</sup> On account of this vulnerability they are unable to equally enjoy their universal human rights. In the last few decades, there has been a shift in the human rights discourse to categorical rights which can be witnessed by the adoption of treaties on the rights of women, children, migrant workers and persons with disabilities.<sup>43</sup>

This thesis shall argue for a general shift towards more category-based protection in IHL similar to IHRL. But first, we shall delve into how the two bodies of law interact with each other on a historical and practical level.

## I.2 History of IHRL influencing IHL

Human rights law and humanitarian law only began to co-relate and interact after World War II.<sup>44</sup> The unprecedented atrocities of World War II shocked the people's moral conscience. It led to the development of international human rights instruments along with greatly humanizing the law of war.<sup>45</sup> The adoption of the Fourth Geneva Convention (GC IV) responsible for the Protection of Civilians and Common Article 3 of the Geneva Convention initiated the process of bringing humanitarian law closer to human rights law.<sup>46</sup> As the GC IV dealt with the laws regarding the civilian detention, also governed by human rights law, and Common Article 3 dealt with the treatment of nationals of the state which is the dominion of the human rights law.<sup>47</sup>

With the rise in civil wars, member states at the UN started acknowledging the applicability of human rights in armed conflict.<sup>48</sup> The Tehran International Conference on Human Rights in 1968 was a concrete step in that direction. Which is evident from the first resolution of the conference 'Respect and enforcement of human rights in occupied countries.'<sup>49</sup>

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<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 310.

<sup>45</sup> Meron (n 9).

<sup>46</sup> Droege (n 44).

<sup>47</sup> *ibid.*

<sup>48</sup> Robert Kolb, 'Human Rights and Humanitarian Law' (2012) IV *The Max Planck Encyclopaedia of Public International Law* 1041.

<sup>49</sup> 'Proclamation of Tehran', Final Act, International Conference on Human Rights, Tehran, 22 April-13 May 1968, UN Doc A/CONF. 32/41

The conference was followed by resolutions from the UN General Assembly, the Resolution 2444 titled 'Respect for Human Rights in Armed Conflict' affirmed the application of humanitarian principles even during armed conflict.<sup>50</sup> The reason behind the convergence of the two bodies of law was the recognition of the inherent worth and dignity of the human person and the inalienable rights accorded to each individual.<sup>51</sup> The Resolution prompted two reports by the Secretary-General on the protection of all individuals in times of armed conflict.<sup>52</sup> The reports concluded that human rights instruments especially International Covenant on Civil and Political Rights afforded more comprehensive protection to persons in times of armed conflict than the Geneva Conventions did on its own.<sup>53</sup> It also recognized the continuance of fundamental human rights during armed conflict. Despite the law of war and human rights stemming from different historical and doctrinal roots did not prevent the principle of humanity becoming the common denominator of both systems.<sup>54</sup>

The UN process led to the development of humanitarian law at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law from 1974 to 1977.<sup>55</sup> The ICRC revisited the enhancement of protection of the civilians in international and non-international armed conflict during this conference. The Conference and the two Additional Protocols of 1977 are indebted towards the human rights instruments.<sup>56</sup> For instance, some rights which are derogable under human rights law are made non-derogable under APs.<sup>57</sup> Both APs accept the applications of human rights in armed conflict.<sup>58</sup>

Human Rights law has also greatly influenced the formation of customary rules of humanitarian law which is discernible from the jurisprudence of courts and work of international organizations.<sup>59</sup> This

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<sup>50</sup> UN General Assembly, *Respect for human rights in armed conflicts*, 19 December 1968, A/RES/2444.

<sup>51</sup> Katarina Månsson, 'The Principle of Humanity in the Development of "Special Protection" for Children in Armed Conflict' in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (CUP 2012)

<sup>52</sup> UN General Assembly, *Respect for human rights in armed conflicts*, 9 December 1970, A/RES/2677

UN. Secretary-General, *Respect for human rights in armed conflicts*, 18 September 1970, A/8052

<sup>53</sup> Ibid, A/Res/2677

<sup>54</sup> Meron (n 9).

<sup>55</sup> Droege (n 44).

<sup>56</sup> Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 IRRC 501.

<sup>57</sup> Yves Sandoz and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross : Martinus Nijhoff Publishers ; Distributors for the United States and Canada, Kluwer Academic Publishers 1987).

<sup>58</sup> Ibid.

<sup>59</sup> Meron (n 9).

started with the Nuremberg cases<sup>60</sup> and continued on to ICJ in the Nicaragua case,<sup>61</sup> the Nuclear Advisory case<sup>62</sup> and the *Ad hoc* Criminal tribunals of Former Yugoslavia and Rwanda.

The concept and expansion of 'Special Protection' for children illustrate the influence of human rights law on the development of international humanitarian law. <sup>63</sup>Through acknowledgement of the impact of human rights instruments in the development of customary international law and the process of analogy and osmosis has affected the humanitarian law and its interpretation. <sup>64</sup> Along with Human Rights, freedom of choice and personal autonomy has played a role in influencing the later drafting of humanitarian norms and also their ongoing interpretation. <sup>65</sup>

In the areas of the prohibition of torture and cruel, inhuman or degrading treatment and punishment, arbitrary arrest detention, discrimination as well as guarantees of due process of law, human rights have exercised vast influence on humanitarian law by drawing parallelism between norms and the measures of convergence in their applicability. <sup>66</sup>Thus, it is seen that human rights have since World War II led to the development through influence, the parallelism of norm of humanitarian law.<sup>67</sup> Along with being used interpret pre-existing laws and norms of humanitarian law.

### I.3 IHRL in Armed Conflict

Historically there was a marked separation between in IHL and IHRL as the law of peacetime and the law of war, seen as two distinct legal regimes. <sup>68</sup>But with the Judgement of the ICJ Advisory Opinion on Nuclear Weapons<sup>69</sup> elucidating that human rights apply during armed conflict IHL being the *lex specialis*, in fact, displace it.<sup>70</sup> Later in the Wall opinion,<sup>71</sup> the ICJ held that they applying concomitantly, and finally in DRC vs Uganda were said to be used to interpret each other. Although how the two

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<sup>60</sup> Nuremberg judgment, France and ors v Göring (Hermann) and ors, Judgment and Sentence, ICL 243(IMTN 1946)

<sup>61</sup> Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States, Judgment on Jurisdiction and Admissibility ICGJ 111 (ICJ 1984)

<sup>62</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ GL No 95, [1996] ICGJ 205 (ICJ 1996) [Nuclear Advisory]

<sup>63</sup> Månsson (n 51).

<sup>64</sup> Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1991).

<sup>65</sup> Meron (n 9).

<sup>66</sup> *ibid.*

<sup>67</sup> *ibid.*

<sup>68</sup> GIAD Draper, 'The Relationship between the Human Rights Regime and the Law of Armed Conflicts' (1971) 1 *Isr. Y.B. Hum. Rts.* 191.

<sup>69</sup> Nuclear Advisory (n 62) at para. 25

<sup>70</sup> Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 *IRRC* 737.

<sup>71</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion ICGJ 203 (ICJ 2004)

bodies of law co-apply have differing theorizations, there is a consensus that human rights apply during armed conflict.<sup>72</sup> This position is held by most international human rights bodies.<sup>73</sup>

### I.3.1 How IHL and IHRL work together

Before elucidating some of the different co-application approaches of the two laws it is necessary to understand the core differences between the two bodies of law. They have differing scopes,<sup>74</sup> IHRL recognizes that all human beings have inherent rights. While IHL aims to limit the excesses of war whilst still prioritizing military necessity. One has conditional applicability while the other has a ubiquitous application. IHL applies horizontally and applies obligation on both the State and Non-State Armed Groups while IHRL applies obligations vertically with states on individuals within their territory.<sup>75</sup> These conceptual differences lead to differing approaches and consequently differing meanings of similar terms.<sup>76</sup>

For instance, 'Protection' is understood by the legal frameworks differently. Protection under IHL is a balance between humanitarian ideals and military necessity.<sup>77</sup> It only prevents the targeting of civilians directly and excessive deaths in the principle of proportionality. Any law which allows for the loss of civilian's life as collateral damage, but not excessive in number although permissible under IHL is still contrary to IHRL.<sup>78</sup>

#### A. *Integration*

This approach is a testament to the movement towards a hybrid version of 'human rights applicable in time of armed conflict' which started at the Tehran Conference on Human Rights in 1968.<sup>79</sup> The idea was to extend the protection of IHRL to enhance the protection given to civilians detainees in situations

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<sup>72</sup> Noam Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate' (2007) 40 Israel Law Review 648.

<sup>73</sup> For eg. Human Rights Committee, General Comment 29: States of Emergency (article 4), 3, UN Doc. CCPR/C/21/Rev. 1/Add. 11 (July 24, 2001).

<sup>74</sup> Noam Lubell and Nancie Prud'homme, 'Impact of Human Rights Law' [2016] Routledge Handbook of the Law of Armed Conflict 106.

<sup>75</sup> Françoise Hampson, 'The Relationship between International Humanitarian Law and International Human Rights Law' (2015) 90 Routledge Handbook of International Human Rights Law 549.

<sup>76</sup> Lubell (n 70).

<sup>77</sup> Hamilton and Abu EL Haj-(n 24).

<sup>78</sup> *ibid.*

<sup>79</sup> Human Rights in Armed Conflicts, Resolution XXIII adopted by the International Conference on Human Rights, Teheran (12 May 1968), available at <<http://www.icrc.org/ihl.nsf/FULL/430?Open+Document>>

of armed conflict.<sup>80</sup> This led to a plethora of international texts<sup>81</sup> which formulated a body of law applying human rights to armed conflict and emergency situations.<sup>82</sup>

The merger between the two bodies of law is partial. It is mostly a summation of the contents of the two branches of law.<sup>83</sup> Integration would not mean the loss of distinctive character of the two bodies of law.<sup>84</sup> Each field of law would be modified to take account of the other in a 'principle of systemic integration'.<sup>85</sup> The challenges raised by this system would be to take into account the rationale, assumption and function of each system of law before determining the rules in practice.<sup>86</sup> The ICRC fears that the merge between the two areas of law would lead to the detriment of the legal obligations contained in the other.

<sup>87</sup> This body of law did lead to an emergence of minimum humanitarian standards.<sup>88</sup>

The CRPD<sup>89</sup> along with the CRC<sup>90</sup> with their explicit provisions of applicability during armed conflict alongside IHL<sup>91</sup> are examples of the integrationist approach.

## *B. Complementarity*

Complementarity approach entails that the reinforcement of human rights law and humanitarian law with each other instead of contradiction.<sup>92</sup> This approach is based on the principle of complementarity codified in Article 31(3)(c) of the Vienna Convention of the Law of Treaties on the rules of interpretation of international treaties.<sup>93</sup> This theory propounds that IHRL and IHL are not identical but recognises the

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<sup>80</sup> Robert Kolb and Richard Hyde, 'The Relationship Between the LOAC and Human Rights Law', *An Introduction to the International Law of Armed Conflicts* (1st edn, Hart Publishing 2008)

<sup>81</sup> UN General Assembly, Respect for Human Rights in Armed Conflict, UNGA Res 2444(XXIII)(19December1968); UN General Assembly Basic Principles for the Protection of Civilian Populations in Armed Conflicts UNGA Res 2675 (XXV) (9 December 1970)

<sup>82</sup> Kolb and Richard(n81).

<sup>83</sup> *ibid.*

<sup>84</sup> Hampson (n 75).

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> UN Economic and Social Council, Promotion and Protection of Human Rights, E/CN.4/2000/94(27 December 1999),

<sup>88</sup> 'Declaration of Minimum Humanitarian Standards Adopted by an Expert Meeting Convened by the Institute for Human Rights, Åbo Akademi University, 2 December 1990.

<sup>89</sup> Art 11, CRPD

<sup>90</sup> Art 38(1), CRC

<sup>91</sup> Naomi Hart and others, 'Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts'(2014)40 Monash University Law Review 148.

<sup>92</sup> Droege(n 44).

<sup>93</sup> *Vienna Convention on the Law of Treaties*, (Adopted on 23May1969, entered into force on 27 January 1980) 1155 UNTS 331

overlap. They complement each other yet remain distinct.<sup>94</sup> The ICRC supports this<sup>95</sup> promotion of co-application of both bodies of law. This complementary approach can manifest in various ways two of which are detailed below.

#### i. Mutual Reinforcement

IHRL steps in where IHL's rules limit have been reached. It fills the gap in protection left by the lack of regulation of the law of armed conflict.<sup>96</sup> IHL can benefit from the increasingly specific and refined body of jurisprudence of IHRL.<sup>97</sup> IHRL is always applicable even when IHL ceases to be. There are many instances where the two bodies of law regulate different aspects of a situation or, regulate in more or less detail.<sup>98</sup> They can, therefore, be used to reinforce each other.

#### ii. Mutual Interpretation

The Law of Armed Conflict makes an indirect reference to IHRL as a guide to interpretation. This can also be reversed where LOAC is used to interpret IHRL rules. For instance, IHL would be used to interpret the term 'arbitrary' in arbitrary deprivation of life. This approach does not place one legal framework at a higher pedestal than the other, rather they work in a complementary fashion for a context-appropriate interpretation. This approach is mainly used when the protection concerns are governed by both bodies of law.

To determine the protection of human beings during armed conflict, it is necessary to supplement IHL with IHRL as stated by ICJ in its advisory opinion.<sup>99</sup> Both bodies of law need to be harmonized into a single unit.<sup>100</sup> However, during this harmonization process, it is necessary to apply human rights in a qualified manner.<sup>101</sup> To be applicable during armed conflict Human Rights needs to be inserted in a

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<sup>94</sup> Hans-Joachim Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' (2004) 86IRRC789.

<sup>95</sup> David Forsythe, '1949 and 1999: Making the Geneva Conventions Relevant after the Cold War' (1999) 81 IRRC 265.

<sup>96</sup> 'Lindsay Moir, *The Law of Internal Armed Conflict*, 328(2003) 16 L Jur Int'l L 945.

<sup>97</sup> Droege(n 44).

<sup>98</sup> *ibid.*

<sup>99</sup> Heintze(n 95).

<sup>100</sup> *ibid.*

<sup>101</sup> Michael J Matheson, 'The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons' (1997) 91 Am Jur Intl L 417.

sensitive manner into the structure of IHL.<sup>102</sup> It is important to note which all human rights obligations continue to apply during armed conflict, i.e. some rights are derogable during emergency situations such as in ICCPR.

Thus, in conclusion, there is a co-application of both bodies of law whilst determining the protection of human beings in armed conflict. Through various methods, the two bodies of law can co-apply. Not only do they apply simultaneously but human rights have influenced the development of humanitarian law towards a more humanitarian protectionist regime.

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<sup>102</sup> *ibid.*



## II. Vulnerable Groups during Armed Conflict

In this chapter, we shall see the co-application of both bodies of law to determine if the adequacy of the current framework in protecting vulnerable groups.

### II.1 Persons with disabilities

#### II.1.1 What does 'persons with disabilities' mean?

There is no definition for 'disability' or 'persons with disability' under the IHL framework in light of the previous chapter we look towards IHRL. Article 1(2) of the Convention on the Rights of the Persons with Disabilities (CRPD) describes 'Persons with Disabilities' to include those 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.<sup>103</sup> Persons with disabilities are the largest minority group in the world.<sup>104</sup> Over the years in order to understand disability many theoretical models have been proposed we shall briefly touch upon the ones relevant for our analysis.

#### *A. Charity Model*

One of the first models developed it viewed persons with disabilities as objects of charity.<sup>105</sup> Under this model they are seen as victims of their impairment, their situation evokes pity and charity from the abled-bodied members of society. They are considered to be a burden on their families and society as a whole.<sup>106</sup>

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<sup>103</sup> Camilla Parker and Luke Clements, 'The UN Convention on the Rights of Persons with Disabilities : A New Right to Independent Living?' [2008] Eur HRLRev.

<sup>104</sup> Paras Shah, 'U.N. Security Council Resolution on Protecting People With Disabilities in Armed Conflict' (*Lawfare*, 2019).

<sup>105</sup> Kishore Bhanushali, 'Changing Face of Disability Movement : From Charity to Empowerment' [2007] SSRN .

<sup>106</sup> *ibid*.

## *B. Medical Model*

This model views persons with disabilities in need of medical treatment and cure to bring them to normalcy.<sup>107</sup> This model carries forward the same prejudices and stereotypes associated with the charity model whilst perpetuating the hierarchy between them and others. The medical model disempowers the persons with disabilities reinforcing discriminatory behaviour towards them.<sup>108</sup>

As IHL was drafted long before the rights discourse on disability was formulated it reflects the medical and charity-based model of disability. It associates persons with disability as weak, defective, vulnerable and in need of paternalistic protection.<sup>109</sup>

## *C. Social Model*

This model developed as a critique to the Charity and Medical model. It identifies disability as a social construct that is borne out of discrimination and oppression.<sup>110</sup> Impairment is differentiated from disability.<sup>111</sup> Impairment is the condition of the body or the mind whilst the disability results on account of the societal and environment perception or treatment of the impairment.<sup>112</sup> Impairment is viewed as part of the diversity of human beings<sup>113</sup> and not something evoking sympathy or a cure. The social model is outward focusing, meaning society rather than the impairment places' barriers on the individual.

The CRPD adopts a social model of understanding disability. It recognizes disability as an evolving concept enhancing its relevance over time and differing contexts.<sup>114</sup>

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<sup>107</sup> Jerome Edmund Bickenbach, 'The Biomedical Model of Disablement', *Physcial Disability and Social Policy* (UTP 1993).

<sup>108</sup> *ibid.*

<sup>109</sup> Priddy (n 25).

<sup>110</sup> Theresia Degener, 'Disability in a Human Rights Context' *Laws* 2016, 5(3), 35 <https://doi.org/10.3390/laws5030035>

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

## II.1.2 Persons with disability under IHL

IHL, unlike CRPD, does not use 'persons with disabilities' rather refers to them as 'disabled'.<sup>115</sup> Moreover, the term 'disabled' has not been consistently applied within the IHL instruments.<sup>116</sup> They have been variously addressed with terminology such as 'infirm', 'wounded', 'sick' and 'disabled'. While certain groups within the category have been specifically highlighted such as people who are 'blind', 'maimed' or 'disfigured'.<sup>117</sup>

Commentary of Art 8(a) of AP-I tries to broaden the understanding of 'wounded' and 'sick' but only talks of those requiring medical care and assistance.<sup>118</sup> This expansion of the terms fails to account for those impairments which are not a result of sickness or injuries, but on account of genes, weight or age.<sup>119</sup> The Convention on Cluster Munition is one of the only IHL instrument which portrays persons with disabilities as an identifiable group of persons, who ought to receive special protection during armed conflict.<sup>120</sup>

## II.1.3 Are persons with disability a vulnerable group during armed conflict?

Armed conflict has a disproportionate effect on persons with disabilities in all phases of the conflict i.e. in conflict zones, whilst fleeing the conflict, in post-conflict situations and in the aftermath of the conflict.<sup>121</sup> The discrimination and isolation they routinely face exacerbate during an armed conflict.<sup>122</sup> The disability is often coupled with other vulnerable statuses such as gender, poverty, ethnicity, etc. which furthers their susceptibility to harm. For instance, women with disabilities who are at a high risk of sexual violence during peacetime, are at an even higher risk during conflict situations.<sup>123</sup>

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<sup>115</sup> Henckaerts and others (n 36), Rule 138

<sup>116</sup> Priddy (n 25).

<sup>117</sup> *ibid.*

<sup>118</sup> Sandoz (n 57), Art 8(a) AP-I.

<sup>119</sup> Ivan K Mugabi, 'An Analysis of the Adequacy of Protection Afforded by the Convention on the Rights of Persons with Disabilities (CRPD) in Situations of Armed Conflict' Societies 1, <https://www.mdpi.com/2075-4698/8/2/28>.

<sup>120</sup> *ibid.*

<sup>121</sup> Report of the Secretary General, S/2019/373, Protection of civilians in armed conflict, 7 May 2019, <https://undocs.org/S/2019/373>

<sup>122</sup> Priddy (n 25).

<sup>123</sup> Report of the Secretary General (n 122)

Persons with disability living in conflict zones face threats to their physical and mental wellbeing, which is aggravated by pre-existing disability. These circumstances may also lead to secondary disabilities.<sup>124</sup> Viewing armed conflict through the perspective of persons with disabilities enables the identification of mistreatment stemming from the disability such as physical and sexual abuse, inhuman living conditions, isolation, neglect, forced sterilization, medical experimentation, forced treatment without consent and involuntary confinement, etc.<sup>125</sup> Persons with disability are victimized twice first by the conflict and then by the failure of the humanitarian infrastructure to protect their rights<sup>126</sup>

They are often more restricted in their mobility in times of conflict as they may face additional barriers to physical and communication barriers in accessing emergency information in conflict.<sup>127</sup> They also may not be able to attract attention to their specific needs in conflict situations.<sup>128</sup>

The barriers that persons with disabilities face during peacetime in accessing education, employment, health and rehabilitation and an adequate standard of living are intensified during armed conflict.<sup>129</sup> In addition to the secondary effects of the conflict, persons with disabilities have been victims of targeted attacks by state and non-state armed groups. For example, in 2014 in Yoalnde there was a report of Israeli armed forces allegedly attacking a disability centre in the course of the conflict with the Palestinians.<sup>130</sup> In Syria, a residential facility accommodating persons with mental disabilities were shelled during the course of the armed conflict.<sup>131</sup> Areas where clustered settlement of persons with disabilities reside have been used as human shields.<sup>132</sup>

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<sup>124</sup> Janet E Lord, 'Persons with Disabilities in International Humanitarian Law-Paternalism, Protectionism or Rights?' in Michael Carl Gill and Cathy J Schlund-Vials (eds), *Disability, human rights and the limits of humanitarianism* (2014) <<https://www.taylorfrancis.com/books/e/9781315577401>>.

<sup>125</sup> *ibid.*

<sup>126</sup> Israel Biel Portero and Tania G Bolaños Enríquez, 'Persons with Disabilities and the Colombian Armed Conflict' (2018) 33 *Disability & Society* 487 <<https://doi.org/10.1080/09687599.2018.1423914>>.

<sup>127</sup> Priddy (n 25).

<sup>128</sup> Mugabi (n 119).

<sup>129</sup> Janet Lord and M Ashley Stein, The Domestic incorporation of Human Rights Law and the United Nations Convention on the Rights of the Persons with Disabilities. *University of Washington Law Review* 83: 449-480(2008)

<sup>130</sup> Medical Aid for Palestinians, Voices from Gaza: Living with a disability under blockade, 21 July 2017 <https://www.map.org.uk/news/archive/post/699-voices-from-gaza-living-with-a-disability-under-blockade>

<sup>131</sup> BBC, Aleppo battle: 'Forgotten' civilians moved from Syria frontline, 8 December 2016 <https://www.bbc.co.uk/news/world-middle-east-38248558>

<sup>132</sup> UNICEF, Children with Disabilities in Situations of Armed Conflict, November 2018, [https://www.unicef.org/disabilities/files/Children\\_with\\_Disabilities\\_in\\_Situations\\_of\\_Armed\\_Conflict-Discussion\\_Paper.pdf](https://www.unicef.org/disabilities/files/Children_with_Disabilities_in_Situations_of_Armed_Conflict-Discussion_Paper.pdf)

Persons with disabilities do not automatically fall under the category of civilians, ex-combatants with disabilities face difficulties in reintegration within society.<sup>133</sup> However, combatants with disabilities are less vulnerable as compared to their civilian counterparts.<sup>134</sup> Despite the severe effects of armed conflict on persons with disabilities they remain the ‘forgotten victims of the armed conflict’.<sup>135</sup>

#### II.1.4 IHL laws for Persons with Disabilities

IHL treaties were conceived out of the concern for seriously wounded soldiers left to wait for their death in the Battle of Solferino.<sup>136</sup> The oldest IHL instrument requires protection to be afforded to combatants affected by the disabling effect of armed conflict, which was later on extended to the civilians. One of IHL’s core functions is, therefore, to ensure the humane protection of wounded and sick or *hors de combat* as a result of combat and to prevent unnecessary suffering.<sup>137</sup>

As aforementioned, IHL designates certain groups, such as the disabled, as highly vulnerable during armed conflict and in need of special protection to shield them from the excesses of war.<sup>138</sup> In 1949 disabled were recognized as requiring specific protection due to the increased risk to which they are exposed as a result of the breakdown in access to and accessibility of support structures.<sup>139</sup> The principle of special protection for the ‘wounded and sick’ were incorporated through multiple provisions in the GC IV. For example, in Article 16 of GC IV bestows particular protection and respect on the wounded, sick and infirm. Article 30 of the GC III provides that “special facilities shall be afforded for the care to be given to the disabled in particular the blind and for their rehabilitation”. Similarly, Art 17 of GC IV requires “The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm.” The GC III (Art 16, 44, 45, and 49) provides for the treatment of the prisoners of war their state of health should be assessed. Whilst similar

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<sup>133</sup> Lord (n 124).

<sup>134</sup> Ivan Mugabi, Protection of Vulnerable Groups during Armed Conflicts, 11 US-CHINA L. REV. 1273 (2014).

<sup>135</sup> UN News, Persons with disabilities ‘forgotten victims’ of Syrian conflict – UN committee, **17 September 2013** <https://news.un.org/en/story/2013/09/449192-persons-disabilities-forgotten-victims-syrian-conflict-un-committee>

<sup>136</sup> Henry Dunant, ‘A Memory of Solferino’.

<sup>137</sup> Marco Sassòli, Antoine A Bouvier and Anne Quintin, *HOW DOES LAW PROTECT IN WAR? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law General Bibliography*, vol I (3rd edn, ICRC 1994). 219

<sup>138</sup> Lord (n 124).

<sup>139</sup> ICRC, How law protects persons with disabilities in armed conflict, 13 December 2017 <https://www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict>

provisions on the status of health of protected persons are governed by GC IV (Art 27, 85 and 119) Similar provisions of protection of disabled persons are also present in instruments governing NIACs.<sup>140</sup>

### II.1.5 IHL inadequacies with regard to persons with disabilities

IHL demonstrates an understanding that persons with disabilities require special protection during an armed conflict. However, the exact scope of the protection required by them needs to better be developed.<sup>141</sup> Several provisions accord special respect and protection to persons with disabilities but do so without ever drawing out the exact parameters of what that protection entails.<sup>142</sup> The protection that is provided is focused on medical attention which fails to acknowledge supplementary protection<sup>143</sup> such as economic and social assistance such as allowing for braille or voiced emergency messages for the blind.

In order to avoid discrimination based on disability along with the mainstream services, there should be services specifically targeted towards the needs and requirements of the persons with disabilities.<sup>144</sup> For example the training and education programme in sign language for the auditory impaired.

IHL has maintained an outdated depiction of disability as a dangerous outcome caused by conflict and other factors.<sup>145</sup> The medical model on which disability is understood in IHL, relays disability as a singular experience which is uniformly dreadful.<sup>146</sup> It renders them helpless. IHL not only associates disability with defectiveness, deformity and diseases it does so in juxtaposition to the abled-bodied hyper-masculine combatant.<sup>147</sup> It disregards a holistic perspective as understood by the social model which views disadvantages associated with disability as a social phenomenon.<sup>148</sup>

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<sup>140</sup> Article 3 GC-I, Art 7&8 AP-II

<sup>141</sup> Lord (n 124).

<sup>142</sup> *ibid.*

<sup>143</sup> Hart(n 92).

<sup>144</sup> Priddy(n 25).

<sup>145</sup> Mugabi(n 120).

<sup>146</sup> Lord (n 124).

<sup>147</sup> *ibid.*

<sup>148</sup> *ibid.*

The usage of prejudicial terminology has the effect of reinforcing the stereotypes in contravention to the human rights of the individual addressed.<sup>149</sup> For instance, persons with disabilities are considered to fall under the categories of 'wounded' and/ or 'sick'.<sup>150</sup> It harks back to the medical model of viewing disability in need of medical care and where people with disabilities can be 'fixed' and normalized.<sup>151</sup> It also requires people with a disability to get medical care even if they do not require or want it.<sup>152</sup>

It fails to appreciate the diversity within the category of persons with disabilities as it does not acknowledge within its description those persons with disabilities whose impairment does not require medical care.<sup>153</sup> This description is therefore inadequate in including all categories of persons with disabilities.

Further adding to the inadequacy of the description there is a lack of definition of 'medical care' and it remains unclear whether those who do not require immediate medical attention would be protected under the terms.<sup>154</sup> Moreover, the protection afforded to those 'wounded and sick' lasts only as long as they require medical attention, that means that the moment there is no need for medical treatment the protection ceases.<sup>155</sup>

The IHL provisions addressing disability focuses mainly on physical and sensory impairments to the exclusion of persons with psychological and intellectual impairments.<sup>156</sup> This skewed perception results in the services in conflict settings to be concentrated towards the rehabilitation of persons with physical and impairments.<sup>157</sup> The needs of those with mental disabilities are ignored and absent. The services provided also do not provide for broader rights-based needs of persons with disabilities such as access to reproductive health services especially for SGBV survivors or mental health services to deal with psychological trauma.<sup>158</sup>

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<sup>149</sup> *ibid.*

<sup>150</sup> Priddy (n 25).

<sup>151</sup> *ibid.*

<sup>152</sup> *ibid.*

<sup>153</sup> *ibid.*

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid.*

<sup>156</sup> Except Art8(a) AP-I

<sup>157</sup> Priddy (n 25).

<sup>158</sup> *ibid.*

As mentioned above IHL does not have an adequate definition of disability or persons with disability. This lack of definition leads to ambiguities as to whether the entire spectrum of people covered under persons with disability under IHRL are also protected during armed conflict.<sup>159</sup> This confusion permeates in determining the obligatory protection for persons with disabilities during armed conflict.

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As mentioned in the previous section IHRL continues to apply during armed conflict along with IHL. In order to offset the failings of IHL for the persons of disabilities IHRL can be used.

## II.1.6 Impact of using IHRL to interpret IHL in context of Persons with Disabilities

As mentioned in the previous chapter the CRPD would not apply the same way as it would during peace time although there is no derogation clause. The interpretation of the state obligation towards the CRPD would have to be adapted to the realities of conflict setting.<sup>161</sup> In order to be feasible and relevant during an armed conflict. As long as the interpretations remain in compliance with the core purpose of the CRPD.

There would be many improvements in the protection of persons with disabilities by reading the CRPD along with the existing IHL provisions. By using the social model of understanding disability rather than the medical model, humanitarian organizations would be better able to analyze the unique disadvantages that are experienced by the diverse spectrum of persons with disabilities.<sup>162</sup>

In line with this, the CRPD's definition of disabilities is understood in a pluralistic rather than a singular form which is often the case in IHL framework. Employing a pluralistic definition allows for the benefit of inclusiveness, as it allows for the diverse range of persons under this category to be acknowledged under the definition.<sup>163</sup> It illustrates that impairment is only one part of their identity and that the persons with disabilities are not one homogenous group of people.<sup>164</sup>

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<sup>159</sup> Mugabi (n 119).

<sup>160</sup> *ibid.*

<sup>161</sup> Priddy (n 25).

<sup>162</sup> Lord (n 124).

<sup>163</sup> Mugabi (n 119).

<sup>164</sup> Priddy (n 25).



CRPD recasts the protection offered to the language of rights rather than charity or on account of the individuals' deficit.<sup>165</sup> It serves to recast the protection framework under IHL in light of the human rights treaty such as CEDAW and CRC inform the women and child specific provisions in IHL.<sup>166</sup> Reading CRPD into IHL framework allows it to break free from the paternalistic model of protection under IHL and reinforces the principle of autonomy, equality of opportunity, independence, inclusion and non-discrimination.<sup>167</sup> As IHL framework was created long before the discourse of disability rights there is a lot of scope for CRPD to transform the protection framework in its application.<sup>168</sup>

The co-application of CRPD should ensure the minimisation of inhumane and undignified treatment of persons with disabilities.<sup>169</sup> As the medical model adopted by IHL could potentially present undignified treatment of the individuals by dehumanizing them and reducing them to their impairment.<sup>170</sup> The implementation of the CRPD would encourage the rethinking of proactive protection measures suitable for persons with disabilities in armed conflict.<sup>171</sup>

The CRPD approach would challenge IHL's interpretation of disability from a condition to a representative characteristic of diverse set of individuals.<sup>172</sup> This reconceptualization would assist in improving how special protection is afforded to persons with disabilities during armed conflict.

These reforms on the state of protection under IHL are vital, especially as they would lay down clearly the protection standards that persons with disabilities are entitled through the CRPD amid the armed conflict.

IHL norms of humane treatment and prohibition of adverse distinction, which are detailed in the next section, need to be read in light of CRPD norms. As well as the CRPD norms of equal access and non-discrimination should be read into the IHL protection framework for persons with disabilities.<sup>173</sup> That

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<sup>165</sup> Lord (n 124).

<sup>166</sup> *ibid.*

<sup>167</sup> Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 Human Rights Law Review 1.

<sup>168</sup> Lord (n 125).

<sup>169</sup> Steve Estey and Mary Ennis Cassandra Phillips, 'The Convention: On Paper and in Practice' [2008] FMR 23.

<sup>170</sup> Parker and Clements (n 104).

<sup>171</sup> Mugabi (n 120).

<sup>172</sup> *ibid.*

<sup>173</sup> Hart and others (n 92).

means that whilst interpreting humane treatment as per IHL, the meaning would be shaped by the characteristics of the person including disability and the prohibition of adverse distinction.<sup>174</sup> Moreover when the IHL norms of provisions of humane treatment and prohibition of adverse distinction are read with CRPD fundamental norms of equal access and non-discrimination, persons with disabilities become entitled to the same IHL protections that are afforded to all other persons.<sup>175</sup>

### II.1.7 Critique of the co-application of IHL and IHRL for Persons with Disabilities

As mentioned in the previous chapter, IHRL cannot apply in an unqualified manner in armed conflict context. However, CRPD, unlike other IHRL treaties, does not possess any derogations clauses<sup>176</sup> for which it would be difficult to differentiate between the feasible protection expectations during peacetime and during armed conflict. It would be difficult for States parties to the conflict to discern the difference in their obligations towards persons with disabilities during peacetime and during armed conflict making their actions arbitrary.

There are some instances where one body of law is silent on a matter, where according to the principle of complementarity the other body of law can be read into it. However, on account of the differing purposes of the two bodies of law and operating in different environments, the automatic application of the secondary law cannot be understood and has to be weighed in.<sup>177</sup> For instance IHL is silent on the manner of delivering warnings. CRPD would demand a more inclusive manner of communicating to ensure the visually impaired, the auditory impaired and psychologically impaired can properly understand and react. Although more protective in nature this might not always be feasible during an armed conflict set up.

Moreover, there are some instances wherein there exists a clash between the two bodies of law with regards to the protection standards. For example Art 30 of GC III allows for prisoners suffering from 'mental diseases' to be isolated.<sup>178</sup> Whilst CRPD prohibits any discrimination based on impairment.<sup>179</sup>

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<sup>174</sup> Priddy(n 25).

<sup>175</sup> *ibid.*

<sup>176</sup> Mugabi(n 120).

<sup>177</sup> Priddy (n 25).

<sup>178</sup> Art 30 GC III.

<sup>179</sup> Art 2, CRPD.

Moreover the application of CRPD within the IHL context presents a unique challenge. It presents the challenge of incorporating the progressive understanding of disability while retaining the protective functions of IHL which can realistically be implemented.<sup>180</sup> 'The social construction of disability as in the CRPD , is a major advancement in the conceptualization of disability and like gender the full implications of social construction cannot be fully realized within the narrow parameters of IHL.'<sup>181</sup>

All these conceptual and practical problems in co-application of the two bodies of law may lead to confusion and uncertainty of the obligation to be fulfilled by the parties to the conflict . A need arises to ensure the clear and precise protection standards while retaining the maximum protective nature whilst still accounting for the realities of conflict. The existing Special Protection meted out to a few categories within the spectrum persons with disabilities can be expanded both to include the entire spectrum of the social group and conceptually to take into account their specific needs and requirements.

## II.2 Older Persons

In order to discuss whether older persons are vulnerable during armed conflict one needs to discuss who comprises of the social group of the older persons and whether that is the official term used.

### II.2.1 Who are considered Older Persons?

International law has used various terminology addressing this population group some of which include "older persons", "the aged", and "the elderly."<sup>182</sup> As IHL mostly uses the term elderly and IHRL mostly uses older persons<sup>183</sup> we shall use those terms respectively while referencing the relevant sections.

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<sup>180</sup> Helen Durham and Tracey Gurd, *Listening to the Silences: Women and War* (Brill | Nijhoff 2005).

<sup>181</sup> Lord (n 124).

<sup>182</sup> UN Human Rights Committee (HRC), *CCPR General Comment 6: Article 6 (Right to Life)*, 30 April 1982

<sup>183</sup> Ibid

The UN system generally associates aged persons as 60 and above whilst the European Union also conforms to 65 years.<sup>184</sup> IHL has not specified at what age it considers people to fall under the category of elderly. The Diplomatic Conference of Geneva which was responsible for the drafting of the GC IV intentionally refrained from setting a fixed age in order to leave it to the discretion of the State parties.<sup>185</sup> IHL specifically mentions the elderly in two provisions Art 17 and Art 14 of GC IV. The commentary of Article 17 states that the criterion to determine whether someone is aged is the 'unfitness to take part in military operations'.<sup>186</sup> Whilst the commentary of Art 14 sees 65 as a reasonable age limit. 65 is justified as the age limit as it is often cited as the age of retirement and is also the age where civilian internees have usually been released from internment by belligerent powers.<sup>187</sup>

Old age has been understood from different view points, including chronologically, physiologically and social age.<sup>188</sup> Chronological is simply biological age. Physiological age relates to the loss of functional capacities, whilst social age refers to the attitudes and behaviours that are regarded as appropriate by society for the given chronological age group.<sup>189</sup>

Although, the thesis shall be reverting to the chronological age as the indicator for the elderly, it is important to note the physiological and social indicators generally accompany the chronological age.<sup>190</sup> 'Elderly' draws under one group, people of vastly different characteristics.<sup>191</sup> Additionally people age differently with some facing few health problems and others suffering from multiple.<sup>192</sup> However the "loss of physical capabilities, mental capacity and greater economic vulnerability"<sup>193</sup> are unique to the aging population banding them within a social group, requiring special recognition.<sup>194</sup>

## II.2.2 Are elderly a vulnerable group during armed conflict?

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<sup>184</sup> Ibid

<sup>185</sup> Françoise Krill, *The elderly in situations of armed conflict*, (ICRC, 2001) <https://www.icrc.org/en/doc/resources/documents/misc/57jx9.htm>

<sup>186</sup> Pictet (n 144) Art 17

<sup>187</sup> Ibid, Art 14

<sup>188</sup> Adrienne Komanovics, "Age Discrimination: A Normative Gap in International Human Rights Law" (2013) 79 *Studia Luridica Auctoritate Universitatis Pecs Publicata*.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Lawrence A. Frolik & Alison McChrystal Barnes, *Elder Law: Cases And Materials* 3 (4th Ed. 2007).

<sup>192</sup> Jaclynn Miller, 'International Human Rights and the Elderly' (2010) 11 *Marquette Elder's Advisor*.

<sup>193</sup> Frolik and Barnes (n 191).

<sup>194</sup> Miller (n 192).

The particular needs of elderly differ from the younger members of the population specifically in the field of mental and physical health, nutrition and access to essential services.<sup>195</sup> They are often less able to adapt to difficult new environments and face obstacles to secure relief, social services, etc.<sup>196</sup> Elderly like the physically disabled, are likely to have the disadvantage of limited mobility which impairs their ability to seek shelter and safety by fleeing conflict areas.<sup>197</sup> They are therefore prone to being left in isolation on account of either having lost contact with relatives or by refusing to uproot themselves from their habitual place of living.<sup>198</sup> All this is often accompanied with limited literacy which may lead to a lack of understanding of their entitlements. This may manifest into practical difficulties in accessing aid resources.<sup>199</sup>

Along with facing differing problems on account of the indirect consequences of armed conflict older persons are also at heightened risk to the direct consequences of conflict. They may be subjected to all sorts of abuse such as looting, threats, destruction of property, physical violence, murder etc.<sup>200</sup> As aforementioned the elder are not a homogenous group and often they are coupled with other vulnerable states such as gender, race, minority status, disability, etc. which elevates their risk.<sup>201</sup>

As life expectancy of men and women differ the elderly are a gendered population with older women constituting an increasingly large proportion of the population over 65 years.<sup>202</sup> Older women have their own risks as they are disproportionality victims of sexual assault.<sup>203</sup> They are at risk of exploitation and abuse from their own family members for requirement of care increases their risk of exploitation or abuse.<sup>204</sup> On account of social or religious reasons their movement, speech and public exposure may be restricted even during emergencies.<sup>205</sup> They may also be excluded from communal shelters on account of the living arrangements not adhering to their social or religious requirements.<sup>206</sup>

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<sup>195</sup> Jo Wells, Protecting and assisting older people in emergencies, Humanitarian Practice Network, Number 53 (December 2005)

<sup>196</sup> <https://odihp.org/wp-content/uploads/2005/12/networkpaper053.pdf>

<sup>197</sup> Global Action on Aging, 'Older Persons Caught in Armed Conflict and Other Emergency Situations' (2004) <<http://globalag.igc.org/armedconflict/index.htm>>.

<sup>198</sup> Ibid.

<sup>199</sup> Krill, (n 192)

<sup>200</sup> The HelpAge International Team in Bogota, 'The Displaced and Invisible Elderly in Colombia' (*Commission, European*). [https://ec.europa.eu/echo/blog/displaced-and-invisible-elderly-colombia\\_en](https://ec.europa.eu/echo/blog/displaced-and-invisible-elderly-colombia_en)

<sup>201</sup> Krill (n 192)

<sup>202</sup> Komanovics (n 188).

<sup>203</sup> UN, 'World Population Ageing', ST/ESA/SER.A/397, (2017)

<sup>204</sup> [https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017\\_Highlights.pdf](https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017_Highlights.pdf)

<sup>205</sup> <https://odihp.org/wp-content/uploads/2005/12/networkpaper053.pdf>

<sup>206</sup> WHO, 'Abuse of the Elderly', (World Report on Violence and Health), [https://www.who.int/violence\\_injury\\_prevention/violence/global\\_campaign/en/chap5.pdf](https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap5.pdf)

<sup>207</sup> Wells (n 202)

<sup>208</sup> Ibid.

The elderly are not only care receivers but also care givers especially during conflict. They provide care to children orphaned by war, or act as traditional birth attendants and possess knowledge about alternative or complementary medicine and nutrition. <sup>207</sup>

Elderly persons are likely to have disabilities. <sup>208</sup>Those older people affected by disabilities face the additional difficulties as mentioned in the previous section i.e. facing physical barriers, discrimination, and institution barriers<sup>209</sup> especially during conflict.

Lack of age segregated data contributes to the neglect of older people during emergencies. <sup>210</sup> Their contribution of skills, experience, local knowledge and coping strategies are often undervalued and unrecognized. <sup>211</sup>They are often excluded from rehabilitation programmes as poor investments and their rarely consulted about decisions regarding them, their families or communities. <sup>212</sup>

There is a need to make older people 'visible' to ensure their specific needs for protection and assistance are met. <sup>213</sup>

### II.2.3 Protection under IHL

Protection afforded to elderly under IHL, besides general protection, is two pronged, one by way of special protection, and second by age based laws which may benefit them.

#### *A. Special protection*

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<sup>207</sup> Ibid.

<sup>208</sup> Grigor Simonyan , 'Conflict in eastern Ukraine is a reminder that older people are especially vulnerable in emergencies' 4 June 2019(the bmjopinon) <https://blogs.bmj.com/bmj/2019/06/04/conflict-in-eastern-ukraine-is-a-reminder-that-older-people-are-especially-vulnerable-in-emergencies/>

<sup>209</sup> Ibid

<sup>210</sup> The HelpAge International (n 206)

<sup>211</sup> UN office of the Coordination of Humanitarian Affairs, 'Protection of Civilians in Armed Conflict : Older Persons' (*Glab Action on Aging*).

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

The elderly are provided Special Protection in IHL only as civilians. The rationale behind providing them Special Protection was on account of their 'weakened condition' and 'their inability of contributing to their country's war efforts'.<sup>214</sup> It was assumed that the recruitment of old people would not be a concern.<sup>215</sup> There only two special provision on the elderly are found in GC IV.

Article 14 allows for the State Parties to establish safety zones, localities and hospital areas to protect, among others, the elderly from the ill effects of war. <sup>216</sup>The object of this provision is to protect the categories of civilians mentioned in this section from the effects of the war. The effects from which the civilians are to be protected are firstly direct harms such as aerial bombardment, long range artillery fire, and also fighting at close range. <sup>217</sup> This article also intends to covers the indirect effects of war such as shortage of food, clothing, medical supplies health centre by the concentration of people in an area to be able to stock and supply these essentials. <sup>218</sup>The protection under Article 14 is listed to the hospital and safety zones. The persons are supposed to be protected independently of the zones <sup>219</sup>but there is no mention of how the protection would be maintained outside the zone.

The other provision granting special protection to the elderly is Article 17 of GC IV. It encourages State parties to make local agreements about the removal of the aged along with other vulnerable categories of people, from besieged or encircled areas.

Besides these two specific provisions Customary International Humanitarian law Rule 138 grants special respect and protection to the elderly among others. This rules manifests itself in the Geneva Conventions through the above mentioned provisions.<sup>220</sup> There are also provisions about the elderly in military manuals and also application of these provisions in non-international armed conflict. <sup>221</sup>

Thus the two aspects where the vulnerability of elderly during armed conflict is specifically highlighted is during evacuation of siege areas and allowance in safety zones near hospital area.

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<sup>214</sup> Krill (n 192)

<sup>215</sup> Ibid.

<sup>216</sup> Art 14 GC IV

<sup>217</sup> Pictet (n 186).Art 14

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Art 14, GC IV; Art 17, GC IV

<sup>221</sup> For eg.LOAC Manual (2006) The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006.

## *B. Aged Based provisions*

Most of the age based provisions are a consideration to be applied before assessing the treatment towards Prisoners of War in GC III. As this thesis is only focusing on these groups as civilians it shall only highlight the provisions in the GC IV.

Art 27 establishes the humane treatment to be meted out to protected persons when they are in the hands of the enemy. It states that this treatment should be meted out without prejudice to the age among other characteristics, and without adverse distinction on the basis of race, religion or political opinion. Whilst the remaining two provisions which require age to be considered when providing suitable bedding for the civilian internees<sup>222</sup> and when deciding the disciplinary punishment to such detainees.<sup>223</sup>

Art 27 is the basis of the general protection provided to civilians in the hands of the adverse party to the conflict. It demands the respect of protected persons physical, moral and intellectual integrity. And the respect of their honour against actions affecting ones reputation as well as safeguarding the familial ties. It also underlies two of IHL's basic principles i.e. the principle of humane treatment and the prohibition of adverse distinction.

Humane treatment has not been defined anywhere but has been known to include the dignity of an individual while prohibiting ill treatment.<sup>224</sup> It applies to all persons and extends in all circumstances to persons who do not take active part in hostilities. The obligation is absolute and prohibits murder, torture, and outrages upon personal dignity, humiliating and degrading treatment at all times.<sup>225</sup>

The meaning of humane treatment is context specific and has to be considered in the concrete circumstances of each case, taking both the subjective and objective elements into consideration such as the mental, physical condition of the person, the social, cultural political background and past

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<sup>222</sup> Article 85, GC IV

<sup>223</sup> Article 119, GC IV

<sup>224</sup> Henckaerts and others (n 36), Rule 87

<sup>225</sup> Article 3, GC-I



experiences.<sup>226</sup> There is a need for the sensitivity towards the individuals' inherent status, capacities and needs to understand what contributes to humane treatment.<sup>227</sup> The meaning of humane treatment develops over time under the influence of the changes in society.<sup>228</sup>

Adverse distinction is the equivalent of the principle of non-discrimination in International human rights law.<sup>229</sup> IHL prohibits the unfavourable discrimination based on race, gender, nationality, religious belief, political opinion or any other similar criteria.<sup>230</sup>

The usage of the term adverse distinction implies the allowance of favourable distinction which allows for priority to those in most urgent need of care. Distinctions aimed at affording more favourable treatment are justified by different characteristics and certain protected persons specially the vulnerable ones.<sup>231</sup> In light of their condition certain distinction may be requires precisely to ensure that protected persons are treated fairly and humanely.<sup>232</sup> In particular a person's state of health, age or sex is traditionally recognized as justification for requirement of differential treatment .<sup>233</sup>

#### II.2.4 Applicable IHRL

Unlike with persons with disabilities there is no international human rights convention explicitly detailing the human rights of the elderly. Moreover besides some age related aspects international human rights law are deemed to be age-blind.<sup>234</sup>

However the existing human rights framework does apply to the elderly which would continue to apply during situations of armed conflict. Not every applicable human rights law would be mentioned below only some of the relevant ones during an armed conflict context.

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<sup>226</sup> ICRC, (n 143)

<sup>227</sup> Article 3, International Committee of the Red Cross, *Commentary on the Second Geneva Convention* (CUP 2017)

<sup>228</sup> Henckaerts and others (n 36), Rule 87

<sup>229</sup> Henckaerts and others (n 36).Rule 88.

<sup>230</sup> GC IV, Article 13 and GCIV Article27(3)

<sup>231</sup> Cross (n 227).

<sup>232</sup> *ibid.* para597–598

<sup>233</sup> *ibid.*

<sup>234</sup> Komanovics (n 188).

The Universal Declaration of Human Rights although not a binding legal instrument on its own accord many of its provisions are considered customary international law.<sup>235</sup> Art 1 on the Freedom of Dignity and Article 2 on the Enjoyments of Rights without distinction would be particularly applicable to the elderly even during an armed conflict. These two laws draw a parallel to the two principles of IHL addressed in the previous section.

Additionally, Art 25(1) specifically mentions old age. It upholds the right to a standard of living to include food, clothing, housing, medical care and necessary social services in the event of old age, and other situations. The right has also been interpreted by the Vienna International Plan of Action on Ageing,<sup>236</sup> the first international instrument on ageing, and endorsed by the General Assembly in 1982. The Vienna Plan recommended that in addition to providing shelter, adequate standard of living has a social and psychological significance as well.<sup>237</sup> This is of special importance when placed in the context of armed conflict as the psychological ramifications and social situation of the elderly as explained in the above section is unique.

When implementing the ICCPR in the context of conflict, derogations on the laws would apply despite that some provisions are non derogable.<sup>238</sup> Non-discrimination, and prohibition against torture and cruel and inhumane and degrading treatment are both non-derogable rights.

In the principle of non-discrimination even though age is not expressly mentioned among the criteria the usage of the term 'such as' denotes a non-exhaustive list which could include age in the 'other status'.<sup>239</sup> Moreover, the Convention the Protection of the Rights of all Migrant Workers and Members of their Families is the only IHRL Convention to specifically refer to old age in its non-discrimination provision<sup>240</sup>.

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<sup>235</sup> Resolution adopted by the International Law Association, reprinted in: "International Law Association, Report of the Sixty-Sixth Conference" (International Law Association, 1994), p. 29.

<sup>236</sup> World Assembly on Ageing, Vienna International Plan of Action, 1982

<sup>237</sup> Ibid, Recommendation 19.

<sup>238</sup> CCPR General Comment No. 29 (n 74),

<sup>239</sup> Frederic Merget, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11 Human Rights Law Review 37.

<sup>240</sup> Article 7, CMW

The prohibition against torture and cruel and inhuman and degrading treatment when interpreted for the elderly includes treatment which may not fall under this prohibition for other populations but has a specific effect on the elderly involving their vulnerabilities. For instance it may involve neglect insufficient medical care, malnourishment, psychological abuse such as intimidation and humiliation which may involve forms of infantilization.<sup>241</sup> May also involve sexual abuse.<sup>242</sup>

The ICESCR has core minimum standards which apply without exceptions<sup>243</sup> and therefore would apply during armed conflict context as well. Some of the examples of the applicable obligations are adequate standard of living,<sup>244</sup> and the right to physical and mental health.<sup>245</sup> The core obligations of right to health continue to apply during armed conflict . One of the core obligations of States is to ensure equitable distribution and access to health facilities, goods and services on a non-discriminatory basis especially of the vulnerable or marginalized.<sup>246</sup> States are required to ensure the availability, accessibility and accessibility of good quality health facilities goods and services.<sup>247</sup> In order to ensure that the state is providing essential health services in a non-discriminatory manner it requires to take efforts to ensure that the elderly are able to access health facilities taking into account the possibility of weakened vision and restricted mobility<sup>248</sup> and are not left isolated and without support during armed conflicts. What would constitute essential medicine would also need to be interpreted according to the core needs of the elderly to be able to access and avail their basic necessities.

CEDAW has taken note of the gendered nature of aging in society as a disproportionate amount of elderly comprise of women.<sup>249</sup> The impact of gender inequalities become more pronounced in old age where the discrimination that older women is multidimensional and often based on deep rooted cultural

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<sup>241</sup> Jim Ife, 'Human Rights: Beyond Traditional Formulations', *Human Rights and Social Work* (Cambridge University Press 2008)

<sup>242</sup> Jeary, 'Sexual Abuse of Elderly People: Would We Rather Not Know the Details?' 6 *The Journal of Adult Protection* 21 (2004)

<sup>243</sup> Committee on Economic Social Cultural Rights, General Comment No. 3, E/1991/23, 14 December 1990; Committee on Economic, Social and Cultural Rights, Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights (E/C.12/2001/10), para. 18.

<sup>244</sup> Art. 11 (1), International Covenant on Economic, Social and Cultural Rights, (Adopted on 16 December 1966) 993 UNTS 3

<sup>245</sup> CESCR, General Comment. 14: The Right to the Highest Attainable Standard of Health (Art.12 of the Covenant), 11 August 2000, E/C.12/2000/4,

<sup>246</sup> Ibid

<sup>247</sup> Ibid

<sup>248</sup> Office of the High Commissioner for Human Rights, Protection of Economic, Social and Cultural Rights During Armed Conflict, 2015 <https://www.ohchr.org/Documents/Issues/ESCR/E-2015-59.pdf>

<sup>249</sup> CEDAW, General recommendation 27 on older women and protection of their human rights, 16 December 2010, CEDAW/C/GC/27

and social norms.<sup>250</sup> This observations of the committee highlight that the problems faced by women does not end with their reproductive age, which is critiqued below.

The CRPD includes references to elderly people in its provision on health and adequate standards of living and social protection to age sensitive measures of protection for instance freedom from exploitation violence and abuse.<sup>251</sup>

Supplementing International Human Rights treaties there exists soft international law instruments for the elderly. In 1991 the UN General Assembly adopted the UN Principles of Older Persons encouraging governments to incorporate the principles of independence, participation, care, self-fulfilment and dignity into their national programmes. This was further elaborated on by the Madrid International Plan of Action on Ageing(MIPPA). It promoted the recognition of older persons as citizens with full rights and assured people the ability to age with dignity and security. It recognised older people as contributors and not just beneficiaries of economic and social development. And also highlighted the importance of equality of access to basic emergency services and the need for concrete measures to protect and assist older people in situations of armed conflict. At the same time recognizing the contributions older persons can make to the rebuilding social fabric in emergencies.

## II.2.5 Critique of the IHL and IHRL laws apply to elderly during armed conflict

The Human Rights of the elderly although exist in the universal human rights framework have been criticized as having left a normative gap in rights of the elderly.<sup>252</sup> The absence of a broad protective human rights framework to fill in the gaps of IHL provisions the protection needs and rights of the elderly during armed conflict would be lacking.

As aforementioned the older population is a gender- skewed with disproportionality more women who are elderly than men. IHL has Special protection provisions for women it does not adequately address the needs and requirements of the elderly women. This is because the IHL provisions inherently

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<sup>250</sup> Ibid

<sup>251</sup> Art 16, CRPD

<sup>252</sup> Komanovics (n 188).

emphasize the reproductive and mothering roles of women.<sup>253</sup> With elderly women having surpassed the reproductive age the applicability of these IHL provisions is limited. Although they fall out of the ambit of IHL protection they are still subjected to the same if not more entrenched, gender based social construction. Which is only exacerbated by social, economic and structural inequalities<sup>254</sup> which seen as beyond the scope of IHL would be necessary to provide adequate protection to them during conflict.

IHL needs to interpret its existing practises in an age sensitive manner, for instance during conduct of hostilities in situations where State parties are to give 'effective warnings'<sup>255</sup> to civilians they need to take into consideration if the elderly reside there. Similar to persons with disabilities<sup>256</sup> the elderly might have restrictions in mobility, which may be accompanied by weakening eyesight, often if left in isolation in their residential homes they might be lacking in support to evacuate in a timely manner.

As aforementioned, the elderly are not a homogenous group they include women, men, other sexual and gender based minorities, ethnic minorities, persons with disability etc. Similarly, they have varying levels of dependency and mobility or visibility restrictions. In light of the soft law instruments such as MIPPA on the elderly, there is a need to rid the notion of elderly solely as passive dependent recipients of assistance. The laws governing them must be replaced with a new approach.<sup>257</sup>

Elderly population have valuable resources during armed conflicts. They are a valuable resource for advice, transmitters of culture, skills and traditional knowledge of the area they live in. In situations of armed conflict where the middle generation are often actively involved in the active hostilities, they are often the care takers of the children and other dependants.<sup>258</sup> It is only in the final stages are they victims of frailty, disability and illness.<sup>259</sup>

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<sup>253</sup> Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' 46 International and Comparative Law Quarterly 55.

<sup>254</sup> Karima Bennoune, 'Do We Need New International Law to Protect Women in Armed Conflict' (2006) 38 Case W. Res. J. Int'l L. 363.

<sup>255</sup> Article 57(2)(c) AP-I, Henckaerts and others (n 36).Rule 20.

<sup>256</sup> Priddy (n 25).

<sup>257</sup> Huenchuan Sandra and Rodriguez-Piñero(United Nations), 'Ageing and the Protection of Human Rights: Current Situation and Outlook' (2011), [https://social.un.org/ageing-working-group/documents/ECLAC\\_Ageing%20and%20the%20protection%20of%20human%20rights\\_current%20situation%20and%20outlook\\_Project%20document.pdf](https://social.un.org/ageing-working-group/documents/ECLAC_Ageing%20and%20the%20protection%20of%20human%20rights_current%20situation%20and%20outlook_Project%20document.pdf)

<sup>258</sup> UN High Commissioner for Refugees (UNHCR), UNHCR's Policy on Older Refugees, 19 April 2000, EC/50/SC/CRP.13, Annex II

<sup>259</sup> Ibid

Moreover like disability, the experience of the elderly is as much constructed by social, economic, and political factors as of old age itself.<sup>260</sup> For instance it isn't old age that renders participation in society difficult but the denial of the full enjoyments of their rights but the society of which they are a part. Moreover adequate resources are not allotted to healthcare need of the elderly as it is not seen as a beneficial societal investment and is of low priority in society compared to healthcare needs of others. This is contrary to treating the elderly with dignity and respect and isn't a matter of the difficulty of old age. The minimum core obligations in human rights have to be read into the provisions of providing protected persons with humane treatment and dignity.

IHL needs to be reinterpreted taking into considerations the experiences of the elderly, similar to the disability and gender critique. Moreover, they need provisions which are tailored to their specific needs and experiences during conflict without taking away agency.

#### II.2.6 How would Special Protection benefit them?

As critiqued above the Special protection although provided to the elderly does so in a limited fashion catering only to evacuation and with their presence in safety zones. Besides an age sensitive approach in IHL, there is a need for detailing a more holistic regime of provisions for the elderly taking into account their lived experiences during armed conflicts. Special Protection would provide a human rights approach to the existing framework of protection.<sup>261</sup>

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<sup>260</sup> Graham Fennell, 'The Sociology of Old Age / Graham Fennell, Chris Phillipson, Helen Evers'.

<sup>261</sup> Karima Bennouna, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003' [2004] U.C. Davis Journal of International Law & Policy Vol11 171.

## II.3 LGBTI

### II.3.1 Who are LGBTI?

LGBTI stands for lesbian, gay, bisexual, transgender and intersex.<sup>262</sup> All of these groups of people are gender and sexual minorities who face similar treatment from the cisgender and heteronormative society.<sup>263</sup> They are therefore often clubbed together under the umbrella acronym.

There exists no legal instrument which defines these above-mentioned terms. It is pertinent to note that gender and sexuality are both social constructs and are governed by the norms that permit and constrain certain forms of social and sexual expression.<sup>264</sup> These norms are governed by socio-political factors.<sup>265</sup>

### II.3.2 What makes them vulnerable during armed conflict?

LGBTI are a vulnerable group during peace time, but their vulnerability is heightened during armed conflict.<sup>266</sup> As they are at heightened risk of being targeted on account of their sexual and gender based identity.<sup>267</sup> The levels of violence and exclusion faced by them are beyond that bourn by other individuals in similar contexts.<sup>268</sup> In lawless situations and pressures on scarce resources homophobia is known to surface and become amplified.<sup>269</sup>

Crimes committed based on sexual orientation have been documented across many conflicts over time from Germany during the Holocaust, South Africa during apartheid to Peru during its armed conflict.<sup>270</sup>

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<sup>262</sup> Pascha Bueno-Hansen, 'The Emerging LGBTI Rights Challenge to Transitional Justice in Latin America' (2017) 12 International Journal of Transitional Justice 126 <<https://doi.org/10.1093/ijtj/ijx031>>.

<sup>263</sup> *ibid.*

<sup>264</sup> Marie-Anne Valfort, 'LGBTI in OECD Countries: A Review, Working Paper No.198' (2017) DELSA/ELSA/WD/SEM(2017)4.

<sup>265</sup> *ibid.*

<sup>266</sup> Kyle Knight, LGBT People in Emergencies – Risks and Service Gap, Human Rights Watch, <https://www.hrw.org/news/2016/05/20/lgbt-people-emergencies-risks-and-service-gaps> 20 May 2016

<sup>267</sup> News Deeply, LGBT Community the Forgotten Targets of Columbia's Civil War, 27 Nov 2017 <https://www.newsdeeply.com/womenandgirls/articles/2017/11/27/lgbt-community-the-forgotten-targets-of-colombias-civil-war>

<sup>268</sup> Human Dignity Trust, Criminalising Homosexuality and LGBT Rights in Times of Conflict, Violence and Natural Disasters <https://www.humandignitytrust.org/wp-content/uploads/resources/8.-Criminalisation-Conflict-and-Natural-Disasters.pdf>

<sup>269</sup> *ibid.*

<sup>270</sup> Colombia's LGBTI Community Claims Its Space in Country's Search for Truth, 21 April 2015, <https://www.ictj.org/news/colombia%E2%80%99s-lgbti-community-claims-its-space-country%E2%80%99s-search-truth>

A high level of impunity attached<sup>271</sup> to crimes committed against LGBTI people often with governmental endorsement places them in a precarious situation. Besides targeting the community members, themselves fail to prevent crimes against the LGBTI people from occurring and do not take appropriate accountability measures through investigation or prosecution.<sup>272</sup> Not only are members of the LGBTI community targeted but also those who are perceived to be LGBTI have also been attacked. As seen in the 2016 Special Rapporteur on Torture's report "torture and ill treatment of persons on basis of their actual or perceived sexual orientation or gender identity is rampant in armed conflict and perpetrated by State and non-State actors alike, with rape and other forms of sexual violence sometimes being used as a form of moral cleansing of the lesbian, gay, bisexual and transgender persons."<sup>273</sup>

LGBTI persons are among the least protected groups during armed conflicts, when there is a breakdown of institutions the community generally steps up, but LGBTI people have little communal support or protection from family, tribal or community members.<sup>274</sup> As often family members are complicit in abuses against them.<sup>275</sup>

LGBTI people's experience in emergencies are under-researched and misunderstood which leads to significant protection gaps.<sup>276</sup>

Beyond being targeted directly, on account of their non-conformity to social norms, they fall through the cracks of humanitarian assistance. The lack of ID reflecting their gender identity<sup>277</sup> or inability to be allocated a gender specific relief provisions<sup>278</sup> means they are doubly at harm, first through the insecurities of the conflict and second through the lack of access to the humanitarian assistance.

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<sup>271</sup> Outright Action International, Outright Action International, When Coming Out is a Death Sentence: Persecution of LGBT Iraqis, November 2014, [www.outrightinternational.org/sites/default/files/ComingOutDeathSentence\\_Iraq\\_0.pdf](http://www.outrightinternational.org/sites/default/files/ComingOutDeathSentence_Iraq_0.pdf), p. 10; Nick Duffy, "Russian Police Won't Protect Gay People from Violent Threats", Pink News, 19 September 2018, available at: [www.pinknews.co.uk/2018/09/19/russia-police-homophobic-hate-speech/](http://www.pinknews.co.uk/2018/09/19/russia-police-homophobic-hate-speech/).

<sup>272</sup> Iraqueer et al., Iraqueer et al., Dying to Be Free: LGBT Human Rights Violations in Iraq, 2015, p. 4, [www.law.cuny.edu/academics/clinics/hrj/publications/ICCPR-Iraq-Shadow-Report-LGBT-ENG.pdf](http://www.law.cuny.edu/academics/clinics/hrj/publications/ICCPR-Iraq-Shadow-Report-LGBT-ENG.pdf);

<sup>273</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016, para 51

<sup>274</sup> Ibid

<sup>275</sup> Outright Action International, Exposing Persecution of LGBT Individuals in Iraq, 19 November 2014, [www.outrightinternational.org/content/exposing-persecution-lgbt-individuals-iraq](http://www.outrightinternational.org/content/exposing-persecution-lgbt-individuals-iraq).

<sup>276</sup> Ibid

<sup>277</sup> Human Rights Watch, (n 275)

<sup>278</sup> International Plan Parenthood Federation, Delivering Transgender Dignity Kits in Disasters, 25 June 2019 <https://www.ippf.org/blogs/sri-lanka-transgender-dignity-kits-humanitarian>

<sup>279</sup> The New Humanitarian, Lost in the chaos - LGBTI people in emergencies, 14 August 2014 <http://www.thenewhumanitarian.org/analysis/2014/08/14/lost-chaos-lgbti-people-emergencies>



### II.3.3 IHL laws applicable to LGBTI

The Geneva Conventions were codified when criminalization of homosexuality was the norm.<sup>279</sup> Therefore there are no provisions in IHL expressly protecting the LGBTI population. However the principles which govern IHL and its provisions on protection of protected persons would be applicable to LGBTI members namely the principle of humane treatment and the prohibition of adverse distinction.<sup>280</sup>

The obligation of humane treatment is a requirement under IHL, it is an overarching principle and applies in all circumstances and extends to all those not taking part in active hostilities.<sup>281</sup> The meaning of humane treatment as mentioned in the previous section is context specific and needs to consider the circumstances of each case taking into account the environment, physical and mental condition of the person, along with the age, social, cultural, religious, political background and past experiences.<sup>282</sup>

It is essential while determining humane behaviour for someone means taking into account their inherent status, capacity and needs and how these differ among people of different gender.<sup>283</sup> As women, men, girls and boys are affected by armed conflicts in different ways.<sup>284</sup> Thus while assessing the humane treatment of the LGBTI it is essential to account for the vulnerability and needs and pay regard to their unique past experiences.

Even though what constitutes humane treatment has not been fully defined, what is expressly prohibited has been explained. Under this obligation there is an express prohibition of any acts of violence or

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<sup>279</sup> Human Dignity Trust, Criminalising Homosexuality and LGBT Rights in Times of Conflict, Violence and Natural Disasters <https://www.humandignitytrust.org/wp-content/uploads/resources/8.-Criminalisation-Conflict-and-Natural-Disasters.pdf>

<sup>280</sup> GC IV, Article 27

<sup>281</sup> Margalit (n 37).

<sup>282</sup> Cross (n 234), Article 3

<sup>283</sup> Ibid

<sup>284</sup> Charlotte Lindsey-Curtet, Florence Tercier Holst-Roness and Letitia Anderson, 'Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document'. [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0840\\_women\\_guidance.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0840_women_guidance.pdf)

intimidation not motivated by military necessity or desire of security but by hatred.<sup>285</sup> The provision not only confines itself to the prohibition of these acts but also stipulates on states an obligation to take all precautions in their power to prevent such acts and assist victims.<sup>286</sup> This provision should ensure that LGBTI are not targeted on account of their sexual orientation and gender and identity whilst also imposing a duty on the parties to the conflict to ensure that such acts of violence are prohibited.

The principle of humane treatment is supported by the prohibition of adverse distinction.<sup>287</sup> Although the ground of sexual orientation and gender identity is not expressly mentioned as a criteria in the list of adverse distinctions, the list is not an exhaustive one.<sup>288</sup> Human rights treaty bodies have interpreted 'sex' to include sexual orientation.<sup>289</sup> The prohibition of adverse distinction applies to the entire population of the countries in conflict.<sup>290</sup>

The prohibition is on 'adverse' distinction and does not prohibit differential treatment that is necessary in order to achieve humane treatment.<sup>291</sup> Thus the aim of the favourable treatment may be justified by the different characteristics, needs and vulnerabilities of the civilians.<sup>292</sup> Such distinction may be required in order to ensure the LGBTI people are treated fairly and humanely.

#### II.3.4 IHRL laws applicable to LGBTI during Armed Conflict

There is no provision among the universal international human rights treaties which explicitly mention the LGBTI people. However there has been a shift in the acceptance that the human rights belong to everyone inclusive of LGBTI people.<sup>293</sup> There also exists a compilation of non-binding, but well established principle of international law on the application of IHRL in relation to sexual orientation and gender identity.<sup>294</sup> Although unlike any other vulnerable group, the acts integral to being LGBTI are

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<sup>285</sup> Pictet (n 186).Article 27

<sup>286</sup> Ibid

<sup>287</sup> Cross (n 234)Article 3.

<sup>288</sup> Ibid

<sup>289</sup> Toonen v Australia, Merits, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, (1994)

<sup>290</sup> Art 13, GCIV

<sup>291</sup> Margalit (n 37).

<sup>292</sup> Cross. (n 234). Art 3

<sup>293</sup> E.g., ECtHR, Lustig-Prean and Beckett v. UK, Appl. No. 31417/96, 27 September 1999, Human Rights Committee, General Comment 28, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 May 2000,

<sup>294</sup> ICJ, Yogyakarta Principles-Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, (hereafter "Yogyakarta Principles"), March 2007

criminalized in 72 countries with a possibility of death penalty in 6.<sup>295</sup> This list of applicable human rights is not exhaustive but explanatory.

Discrimination on the basis of sexual orientation and gender identity (SOGI) has been interpreted as a ground of discrimination by many Human Rights Treaty Bodies.<sup>296</sup> Discrimination in this context includes distinction, exclusion, restriction or preference based on SOGI with the purpose or effect of nullifying the principle of equality before the law and equal protection of the law.<sup>297</sup> Discrimination can manifest directly or indirectly, either in practise or through a source of law.<sup>298</sup> The criminalization of homosexuality is particularly discriminatory in nature.<sup>299</sup> The equal protection of the law and recognition as a person before the law is the most basic aspect of dignity and freedom.<sup>300</sup>

Right to life protects the lives of LGBTI people from arbitrary deprivation of life , which includes the imposition of the death penalty by domestic criminal laws.<sup>301</sup> The right also protects the individual from use of lethal force on the basis of real or perceived SOGI as well as prevention of deportation to a State where there is torture or death penalty on account of SOGI.<sup>302</sup>

The Special Rapporteur on Torture notes that members of sexual minorities are disproportionately subjected to torture, cruel, inhuman and degrading treatment on account of their failing to conform to socially constructed gender expectations.<sup>303</sup> Criminalization relating to SOGI promotes torture and ill-treatment as a non-conforming sexual orientation may be treated as a problem that needs to be corrected, or used to legitimize violence against these individuals.<sup>304</sup> These laws contribute to an environment that condone abuse against LGBTI people.<sup>305</sup> LGBTI people are disproportionality affected by rape, which has been recognized as a form of torture.<sup>306</sup> Rape is used to intimidate, humiliate,

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<sup>295</sup> Human Dignity Trust, 'Map of Countries That Criminalise LGBT People' (2019) <<https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>>.

<sup>296</sup> Toonen, (n 298) ; General Comment 14 (n254), CEDAW , General Recommendation No. 28 on the Core Obligations of States Parties, 16 December 2010, CEDAW/C/GC/28

<sup>297</sup> Yogyakarta Principles (n 303)

<sup>298</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Ninth annual report, CAT/OP/C/57/4 22 April 2016

<sup>299</sup> Ibid

<sup>300</sup> Yogyakarta Principles (n 303)

<sup>301</sup> HRC, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings, UN Doc. A/HRC/ 35/23, June 2017, paras 45, 47–48.

<sup>302</sup> HRC, General Comment 36, UN Doc. CCPR/C/GC/36, 30 October 2018, paras 30, 36.

<sup>303</sup> Subcommittee (n 307)

<sup>304</sup> Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/14/20, (27 April 2010), para. 23

<sup>305</sup> Subcommittee (n 307)

<sup>306</sup> Aydin v. Turkey, 57/1996/676/866, Council of Europe, European Court of Human Rights, 25 September 1997, para. 83.

punish, control the person in order to violate their dignity.<sup>307</sup> Non-consensual medical and scientific experimentation is also identified as a form of torture or inhuman treatment. Forced medical treatment on intersex individuals in order to attain 'normalcy' would fall under this.<sup>308</sup>

The right to freedom from arbitrary deprivation of liberty although not a derogable right, the derogation even in armed conflict cannot exceed those strictly required by exigencies of the actual situation.<sup>309</sup> Arrests made on the basis of SOGI cannot be required by the exigencies of conflict, it is arbitrary.<sup>310</sup> There exists within detention facilities a strict hierarchy with LGBTI detainees ranking in the bottom facilitating multiple levels of discrimination within the facilities.<sup>311</sup> Protective measures to separate LGBTI people such as administrative segregation or solitary confinement results in severe psychological harm.<sup>312</sup>

The Right to health which is enshrined in ICESCR, although subject to progressive realization has a minimum level of protection which has to be fulfilled without exemption.<sup>313</sup> The core obligations ensure access to health facilities in a non-discriminatory basis especially for vulnerable or marginalized groups and ensures equitable distribution of all health facilities and services.<sup>314</sup> Denial of gender appropriate medical treatment, public humiliation in health care setups, psychiatric valuations, sterilization, genital normalizing surgeries under the semblance of 'reparative therapies' are violation of the right to health.<sup>315</sup> Moreover community ostracism which is often long term with impunity can often lead to damaging mental health implications for those targeted.<sup>316</sup> Being compelled to conceal one's SOGI may also result in significant psychological harm.

### II.3.5 How these laws are inadequate?

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<sup>307</sup> The Prosecutor v. Jean-Paul Akayesu (Appeal Judgment), ICTR-96-4-A, International Criminal Tribunal for Rwanda, 1 June 2001, <http://www.unhcr.org/refworld/docid/4084f42f4.html>, para. 687.

<sup>308</sup> UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01,

<sup>309</sup> General Comment No. 29 (n 74) para 4-5

<sup>310</sup> Yogyakarta (n 303)

<sup>311</sup> UNHCR guidelines (n 317)

<sup>312</sup> Ibid

<sup>313</sup> General Comment 14 (n254)

<sup>314</sup> Ibid

<sup>315</sup> Subcommittee(n 307)

<sup>316</sup> UNHCR guidelines (n 317)

A major impediment in the protection of LGBTI people is the criminalization of their practises coupled with community harassment and social exclusion leading to increased difficulties in accessing humanitarian services. Unlike the wounded, women and children they do not have any specific provisions allowing for priority in evacuation<sup>317</sup> or in entrance into safety zones.<sup>318</sup> Their vulnerability does not always garner automatic societal acceptance such as the women, children, persons with disabilities. Moreover their societal and institutional exclusion and discrimination may act as an impediment towards access to basic needs and services. For instance lack of ID , or ID not adequately reflecting their identity has led to denial of essential services<sup>319</sup>

Moreover there is a general level of impunity which is imagined with regard to violations and abuses committed against LGBTI individuals which inadvertently promotes these violations. Provisions in the Rome Statue for instance which are instituted to provide accountability of grave crimes during conflict, defines gender<sup>320</sup> in a very restrictive manner<sup>321</sup> and therefore excludes many gender based crimes targeted against members of the LGBTI community.

The critique mentioned with the previous vulnerable is also applicable with LGBTI, the special provisions for women only highlight women's roles as reproductive agents and carers of children.<sup>322</sup> However these stereotypical roles may not necessarily apply to lesbian women or transgender women, thus would end up acting in exclusionary manner from their protection.

The lack of any express provision may infer a lesser entitlement to protection.<sup>323</sup> The LGBTI population would remain at risk and invisible without targeted efforts addressing their vulnerabilities.<sup>324</sup> As their experiences in emergencies are often misunderstood, under researched <sup>325</sup> and their vulnerabilities are

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<sup>317</sup> Art 17, GC IV

<sup>318</sup> Art 14, GC IV

<sup>319</sup> *The New Humanitarian*, (n 287)

<sup>320</sup> Article 7(3), Knut Dörmann, 'Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary'.

<sup>321</sup> Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* 335 (2000).

<sup>322</sup> Gardam and Charlesworth (n 20).

<sup>323</sup> M O'Flaherty and J Fisher, 'The Yogyakarta Principles' (2008) 8 Human Rights Law Review 207

<<http://hrlr.oxfordjournals.org/cgi/doi/10.1093/hrlr/ngn009>>.

<sup>324</sup> UN High Commissioner for Refugees (UNHCR), *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015

<sup>325</sup> Human Rights Watch, (n 275)

often overlooked.<sup>326</sup> The international community has tailored other specific responses to other vulnerable groups such as women and children they must also do the same for LGBTI people.<sup>327</sup>

Their express recognition for protection does not require a recognition of same sex couples in domestic law as these would only be applicable during armed conflict situations.<sup>328</sup> Moreover it becomes easier to justify these provisions as a need to comply with international law,<sup>329</sup> and the requirement of international community and aid support<sup>330</sup> which may abate the local opposition to such provisions. Moreover the humanitarian organization can assist the implementation of these obligations to an extent relieving states from the backlash of the local sentiment.<sup>331</sup> There is proof that legal recognition can enhance protection for LGBTI in emergencies. As seen with Nepal's recognition of the third gender it led to better protection.<sup>332</sup>

Strengthening the legal protection of LGBTI people during armed conflict would not eradicate the vulnerability of LGBTI people but could help in reducing the vulnerability.<sup>333</sup> As it would expressly signal to both state and non- state actors that targeting LGBTI people is illegal.<sup>334</sup> Thus expansion of Special protection expressly including LGBTI people would re-instate their inclusion within the protective framework of IHL and IHRL and may lead to more accessible and adequate protection during conflict.

All the three vulnerable groups mentioned in this chapter have differing levels of express protection in both IHL and IHRL framework.

For the persons with disability the co-application between the two frameworks might need more clarification . There is also a need for the Special Protection to include the entire spectrum of individuals covered by persons with disabilities.

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<sup>326</sup> Kyle Knight and Richard Sollom, 'Making Disaster Risk Reduction and Relief Programmes LGBTI-Inclusive: Examples from Nepal' (*Humanitarian Practise Network*, 2012) <<https://odihpn.org/magazine/making-disaster-risk-reduction-and-relief-programmes-lgbti-inclusive-examples-from-nepal/>>.

<sup>327</sup> Human dignity trust (288)

<sup>328</sup> Margalit (n 37).

<sup>329</sup> *ibid.*

<sup>330</sup> Aeyal Goss, 'Homoglobalism : The Emergence of Glabal Gay Governance' in Dianne Otto (ed), *Queering International Law : Possibilities, Alliances, Complicities, Risks* (Routledge 2017).

<sup>331</sup> *ibid.*

<sup>332</sup> Kyle Knight and Courtney Welton-Mitchell, 'Gender Identity and Disaster Response in Nepal' [2013] FMR 57.

<sup>333</sup> Human dignity trust (n288)

<sup>334</sup> UNHCR guidelines (n317)

The elderly although have express Special Protection in IHL need a more holistic protection which details their needs and requirements beyond the two mentioned provisions in a manner not to take away their agency. There is also a need to interpret the existing IHL provisions in an age sensitive manner to provide adequate protection.

Whilst with LGBTI, there is a need for a formal recognition of the individuals within the protection framework to ensure that they are not left invisible and overlooked. Moreover there is a need for a more gender inclusive approach. If Special Protection is provided to them their needs and concerns during armed conflict would be more clearly conceptualised and the parties obligation towards them would be more explicit.

As the need for Special Protection has been established in this chapter, the next chapter shall elucidate how the expansion of Special Protection is in line with IHL objective and development. It shall also present ideas on how it may be achieved.

### III. Expansion of Special Protection

As seen in the previous chapter the current framework of IHL and IHRL there are not adequately leading to the protection of vulnerable groups during armed conflict. IHL has been critiqued as insufficient in providing effective safeguards for the protection of the victims of armed conflict.<sup>335</sup> One of the ways of remedying the situation would be an expansion of Special Protection under IHL to move towards the inclusion of other vulnerable categories beyond the pre-existing groups.

The General Protection to civilians<sup>336</sup> under IHL does not (except women and children) take into consideration that civilians are not a homogenous entity.<sup>337</sup> The universal norms of IHL have been critiqued before as insufficiently accounting for cultural diversity.<sup>338</sup> The difference in the civilians inherent characteristics affects the manner in which they access and enjoy the guarantees and protections afforded to them.<sup>339</sup> In contrast IHRL has an understanding of the impact and interaction between an individual's inherent characteristics such as sex, age, ethnicity, disability etc. and their access to and enjoyment of their human rights.<sup>340</sup> In order to properly be in compliance with the principles of humane treatment and adverse distinction IHL needs to shift from purely status based protection<sup>341</sup> and imbibe from IHRL a focus on the inherent characteristics of the individual to whom it is providing protection. IHL needs to respond more adequately to the lived experiences of the person<sup>342</sup> with differing characteristic such as advanced age, mental or physical disability and differing sexual and gender based identity in the conflict situation. Expansion of Special Protection to include other vulnerable groups could provide a framework in which IHL's protection responses are better suited to the vulnerable civilian population. As aforementioned the understanding of Special Protection has developed from a paternalistic protection to a more a specific needs based one. Therefore the Special protection would formulate laws which were are better suited to the needs and lived realities of these vulnerable groups during armed conflict.

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<sup>335</sup> Gardam and Charlesworth (n 20).

<sup>336</sup> Refer to fn 1

<sup>337</sup> ICRC, Addressing the Needs of Women Affected by Armed Conflict, march 2004  
[https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0840\\_women\\_guidance.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0840_women_guidance.pdf)

<sup>338</sup> René Provost, 'The International Committee of the Red Widge? The Diversity Debate and International Humanitarian Law' (2007) 40 *Isr'l L Revw* 614.

<sup>339</sup> Priddy (n 25).

<sup>340</sup> Bossuyt (n 39).

<sup>341</sup> Gieseken and Ouellet-Decost, IHL & The Protection of Migrants Caught in Armed Conflict, ICRC, 4 June 2018

<https://blogs.icrc.org/law-and-policy/2018/06/04/ihl-protection-migrants-armed-conflict/>

<sup>342</sup> UN News, Civilian Experiences, Needs in Conflict Critical to Creating Protection, Accountability Frameworks, Speakers Tell Security Council, 23 May 2019, <https://www.un.org/press/en/2019/sc13822.doc.htm>



One of the first counter – arguments to expansion of IHL existing laws for the more enhanced tailored protection mitigating the socio-cultural-political factors leading to vulnerability would be beyond the mandate of IHL.<sup>343</sup> IHL has very precise boundaries. It seeks only to limit suffering during armed conflict and not to redress social inequalities or assist in rebuilding post conflict situations.<sup>344</sup> Its aims are solely focused on protecting persons and property that may be affected by armed conflict and limit the rights of parties to a conflict to use the means and methods of their choice.<sup>345</sup>

The response to which is, firstly although IHL is based on the balance between the principle of humanity and the principle of military necessity. There has been a gradual shift towards a more humanized view of war over the years.<sup>346</sup> Since the nineteenth century there has been a steady movement towards humanity and away from that of military necessity.<sup>347</sup> This can be traced through the treaty law of IHL. Initially when the treaties were formulated there was an emphasis of enhancing the protection of armed forces such as the 1856 Paris Declaration on maritime Law dealing with blockades, privateering, etc., 1868 St Petersburg Declaration on explosive projectiles. The World War II led to shift towards humanitarian protection of civilians.<sup>348</sup> In 1945 four Geneva Conventions were adopted with the GC IV exclusively dealing with protection of civilians.

Post war the law of weaponry which was initially only designed to limit the suffering of combatants reflect humanitarian concerns. For instance the Mine Ban Convention and Cluster Munition Convention did not only prohibit usage of these weapons but also designed a framework to clear contaminated areas, stockpile destruction and provide victims assistance.<sup>349</sup> As ICTY states that ‘a state sovereignty orientated approach has been gradually supplanted by a human being approach’.<sup>350</sup>

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<sup>343</sup> Helen Durham, 'Women, Armed Conflict and International Law' (2002) 84 IRRC 655.

<sup>344</sup> *ibid.*

<sup>345</sup> Jelena Pejic, 'Non-Discrimination and Armed Conflict' (2001) 83 IRRC 183.

<sup>346</sup> Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen, 'Introduction by the Editors' in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (CUP 2012).

<sup>347</sup> Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' 50 *Virginia Journal of International Law* (2010).

<sup>348</sup> *ibid.*

<sup>349</sup> Convention on Cluster Munitions (entered into force 1 August 2010) 2688 UNTS 39, Article 5

<sup>350</sup> *Prosecutor v. Tadic*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 98-99 (Oct. 2, 1995) Para 97.

This shift towards a more humanitarian approach is not only witnessed in treaty law but also directly seen on the battlefield. For instance in the ISAF operation in Afghanistan the media, civil society and public opinion considerations of the military advantage sought, may have influenced the conduct of the involved actors.<sup>351</sup> The international and national media as well as civil society pressure may influence the analysis of military necessity. In the modern battle of 'hearts and mind' avoiding negative media coverage and international critique has become an important target itself.<sup>352</sup>

Secondly, there is a change in the nature of the conflict over the years has led to an increase risk and harm to civilians. The conflicts are now mostly non international, protracted and in urban areas. In the past post World War II, many States felt that the changing nature of the conflict should lead to an evolution of the law. With the growing emergence at the time of guerrilla warfare and non-international armed conflict placed civilians and their property at risk.<sup>353</sup> Casualties in internal conflict tend to be higher because of the logistics for one the guerrilla fighters do not differentiate themselves from the civilians.<sup>354</sup> Conflicts in urban areas also place civilians at particular risk of lack of access to essential services, high population density and close proximity of civilians to military objectives.<sup>355</sup> Civilians face a greater burden and a higher casualty rate in protracted conflicts.<sup>356</sup> With the changing nature of the conflict there is a greater burden and higher casualty rate of civilians which requires a more enhanced level of protection of civilians.

Thirdly, as IHL is tailor made to the realities of armed conflict, it should be used to realize to adequately address the minimum obligations of human rights<sup>357</sup> during armed conflict. As can be seen humanitarian law already protect the human rights obligations to the level it can.<sup>358</sup> IHL tries to protect most fundamental human rights through its laws, for one right to life is preserved through its prohibition of targeting on wounded, sick hors de combatants,<sup>359</sup> civilians<sup>360</sup> and express prohibition of murder in

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<sup>351</sup> Larsen, Cooper and Nystuen (n 346).

<sup>352</sup> *ibid.*

<sup>353</sup> Schmitt (n 347).

<sup>354</sup> Louise Doswald-Beck, 'International Humanitarian Law: A Means of Protecting Human Rights in Time of Armed Conflict' *Afric'nJ. Int'l C L* 595.

<sup>355</sup> ICRC, Outcome Report When War Moves to Cities: Protection of Civilians in Urban Areas An International Committee of the Red Cross and InterAction Roundtable, May 2017

<https://reliefweb.int/report/world/when-war-moves-cities-protection-civilians-urban-areas-outcome-report-may-2017>

<sup>356</sup> Daniel Rothbart, Karina V. Korostelina And Mohamed Cherkaoui, 'The Place and Plight of Civilians In Modern War' In Daniel Rothbart, Karina V. Korostelina and Mohamed Cherkaoui (eds), *Civilians and Modern War: Armed conflict and the ideology of violence* (2012).

<sup>357</sup> General Comment 29, (n 74) and General Comment 3 (n 252)

<sup>358</sup> Doswald-Beck (n 354).

<sup>359</sup> Article 3(1) GC- II, Article 41(1) AP-I

Article 85(3)(e) AP-I,

Article 7(1) of the AP-II

<sup>360</sup> Articles 48, 51(2) and 52(2) AP-I; Article 13(2) of AP-II

international<sup>361</sup> and non-international armed conflict.<sup>362</sup> IHL reflects within its laws a prohibition against torture, as all four Geneva Conventions state a principle that persons must be treated humanely without discrimination and shall not be subjected to torture or to biological experiments.<sup>363</sup> The right to family life has been preserved by an attempt to keep families together,<sup>364</sup> right to religion is respected.<sup>365</sup> Humanitarian law plays an important role in fulfilment of these rights within the constraints of armed conflict.<sup>366</sup> Also a wide range of provisions adopted in the recent years in international humanitarian law seek to ensure human rights apply during armed conflicts.<sup>367</sup> It cannot achieve the level of respect for human rights obligations during peacetime but provides for maximum protection and respect possible within an armed conflict context.<sup>368</sup> Therefore in cases where human rights obligations exist but are not suited to the exigencies of armed conflict, or are derogable rights unable to adequately tailor itself to realities of armed conflict IHL should be able to take over, such as with the expansion of Special Protection.

Fourthly is the argument of fulfilling the prohibition of adverse distinction. The principle of adverse distinction in IHL which is equivalent to the principle of non-discrimination under IHRL,<sup>369</sup> underlies all of IHL.<sup>370</sup> As mentioned above the favourable distinction are justified by different situation and needs of persons it is protecting. It allows for differentiated treatment to realise a person's humane treatment<sup>371</sup> which may include providing differential treatment based on social, economic, cultural or political situation or status of an individual.<sup>372</sup> It means that in certain circumstances and depending on the needs of certain group of victim's preferential treatment may be granted. In light of this IHL contains many provisions which are designed to provide special protection for women and children during armed conflict. Favourable distinction acknowledges that women have specific needs and face particular risks for which blanket protection is inadequate.<sup>373</sup> These needs and risks may be physical, physiological or

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<sup>361</sup> Article 12 GCI and GC II, Article 13 GCIII Article 32 and Article 75 GC IV,.

<sup>362</sup> Article 3 of GC-II

<sup>363</sup> Article 3(1)(a) of GC-II, Article 12 GC-I ; Article 12 GC-II

Article 13 GC-III

Article 32 GC IV,

<sup>364</sup> For example AP-I Articles 4 (3) (b) and 5 4 (2) (a).

<sup>365</sup> Article 34 GC-III, Articles 33; 35 – 37 GC III, Articles 27 and 38 (3) GC IV.

<sup>366</sup> Doswald-Beck(n 363).

<sup>367</sup> Human Rights Sub-Commission, Report of the 41st Session of the Human Rights Sub-Commission. UN Doc. *E/CN.4/1990/25*

<sup>368</sup> Doswald-Beck (n 354).

<sup>369</sup> Henckaerts and others (n 36).Rule 88.

<sup>370</sup> Pejic (n 345).

<sup>371</sup> Dörmann and Henckaerts (n 15).Art 12

<sup>372</sup> *ibid.*

<sup>373</sup> *ibid.*

may be based on social, economic, cultural and political structures in society.<sup>374</sup> Traditionally it has been a person's state of health, age, sex which has justified differential treatment.<sup>375</sup> Therefore, for instance with the disabled, the elderly and the LGBTI community who as highlighted in the previous chapter, also have different needs risks based on the physical, physiological and social, economic, cultural and political structures of society would require specialised protection. As mentioned in the previous chapter the general protection is unable to properly highlight their needs and requirements.

In human rights law vulnerable groups have been given special measures of protection to ensure their enjoyment of human rights guaranteed universally to everyone.<sup>376</sup> This approach is based on the principle of equality before law enshrined in human rights treaties.<sup>377</sup> Thus a need for special provisions for vulnerable groups is seen as a solution to adequately address their specific needs and requirements. This could be similarly adopted to vulnerable groups during armed conflict. By providing vulnerable groups specialized group protection, based on the principle of favourable distinction should similarly assist in mitigating the barriers to enjoyment and access to the protection which arises due to their inherent characteristics of being elderly, disabled, or LGBTI, etc.

The question may arise as to why IHL should gravitate towards a group based protection for vulnerable communities when there are pre-existing IHL provisions allowing for individual protection such as principle of adverse distinction and humane treatment. As can be learnt by the example of the human rights law, which also started with universal laws for all humans, that the difficulty in access and enjoyment of the universal rights was on account of the social devaluation as a member of a particular social groups.<sup>378</sup> These groups were different on account of physiological or other factors but the common problem faced was social devaluation.<sup>379</sup> Thus in order to combat the problems of social devaluation faced by the vulnerable groups there was a focus on creating new laws to alleviate the barriers in accessing and enjoying these rights. Moreover, IHL already provides for group-based protection, as Special protection in the existing IHL is provided to women, children and other groups

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<sup>374</sup> *ibid.*

<sup>375</sup> *ibid.*

<sup>376</sup> David Weissbrodt and Mary Rumsey, *Vulnerable and Marginalised Groups and Human Rights* (Edward Elgar, 2011).

<sup>377</sup> *ibid.*

<sup>378</sup> Bossuyt (n 39).

<sup>379</sup> Ogbonnaya (n 40).

of people. It is important that while determining which groups to include in the vulnerable group IHL protection should start from a holistic analysis of the entire civilian population.<sup>380</sup>

What is required to be assessed is, how is the expansion of special protection to be realised, and whether it is specifically required to be stated when generalized protections such as principle of non-adverse distinction and humane treatment exist. As the shift from universal to group based laws have been made in IHRL in order to assess whether it is beneficial under IHL we shall look towards the arguments under IHRL.

Firstly, having specific provision for the protection of vulnerable groups in IHL would make their plight more visible. Having specific protection laws for the vulnerable group ensures that the parties obligated to protect the vulnerable groups do not overlook their obligations towards them.<sup>381</sup> For instance despite the ICCPR and ICESCR containing rights broad enough to cover the requirements of persons with disabilities. Yet a need was felt for the CRPD to ensure that states do not overlook their human rights obligations towards persons with disabilities.<sup>382</sup> Moreover spelling out the State obligations towards these vulnerable groups makes them a priority,<sup>383</sup> once the armed conflict commences.

The specific laws may allow for creating new legal dimensions which were not existing before. For instance the CRC created new rights, such as the right to protection, which was necessary to address a phenomena that disproportionally affected them with devastating impacts.<sup>384</sup> Similarly CEDAW, highlighted private discrimination as opposed to only public discrimination which added a new dimension to the State existing obligation.<sup>385</sup> The specific provision for these vulnerable groups in armed conflict will help highlight to parties to the conflict, the particular problems faces by groups of persons or what disproportionately affects them.

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<sup>380</sup> Eva Svoboda and Emanuela Chiara Gillard, 'Protection of Civilians in Armed Conflict Bridging the Gap between Law and Reality' (2015) <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9876.pdf>>.

<sup>381</sup> Ingrid Nifosi-Sutton, 'The Legal Protection of Vulnerable Groups Ass an Integral Component of the Scope of International Human Rights Law', *Protection of vulnerable groups under international human rights law* (Routledge 2017).

<sup>382</sup> *ibid.*

<sup>383</sup> *ibid.*

<sup>384</sup> *ibid.*

<sup>385</sup> 'Symposium: Dueling Fates: Should The International Legal Regime Accept a Collective or Individual Paradigm to Protect Women's Rights: Transcript' Michigan Journal of International Law 347.

The specific provisions tailor the existing laws to better suite their specific and unique protection needs.<sup>386</sup> This provides guidance on how to adequately ensure legal protection of the vulnerable group. For example the CRC reformulates the civil and political rights and the economic social and cultural rights to better meet the needs of the children. Similarly CRPD reinterprets the rights laid down in the ICCPR and ICESCR in their application to persons with disabilities, without discrimination based on disability but on an equal basis with others.<sup>387</sup> Thus the specific provisions aim to neutralize the detriment of social barriers on account of the societal devaluation of these vulnerable groups .

However it is to be noted that the situation of all members of the vulnerable group is not the same as some members are affected by the ill effects of war more than others. <sup>388</sup> It is therefore essential that the provision be provided to individual members of a vulnerable group, as is the case with women and children in the existing IHL laws.

Furthermore, there is a view among feminist critiques that IHL was formulated taking through a male perspective,<sup>389</sup> as men and women experience armed conflict differently that the law is manifestly unjust towards women. <sup>390</sup> This argument could be similarly analysed in the context any other vulnerable group, that IHL was not made age sensitive in its provisions, or that it is heteronormative law, or made by abled bodied men. Thus, when the law is made with a certain norm in mind it does not adequately account for the lived experiences and the needs of those who fall outside the norm. Therefore, to allow for the correction there is a need for specific provisions for these vulnerable groups.

There exist fears that the focus on particular groups risk fragmentating the response and overlooking civilians who do not fall under any of the vulnerable groups. It is therefore essential to note that first of all the generalized provisions of IHL allow for protection for all. Moreover, the proposal of expansion of special protection, is in addition to the existing general framework applicable to all civilians regardless of their vulnerability or inherent characteristics. It therefore does not negate the existing protectionist regime in place for all civilians but allows for one more sensitive to the diverse civilian population.

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<sup>386</sup> Nifosi-Sutton (n 381).

<sup>387</sup> *ibid.*

<sup>388</sup> *ibid.*

<sup>389</sup> Hilary Charlesworth, 'Feminist Methods in International Law ' *Studies in Transnational Legal Policy* 159.

<sup>390</sup> Gardam and Charlesworth (n 335).

The advantage sought by specific law have been elaborated but they could potentially be either within IHRL or IHL . Although there are advantages of increasing the protection in IHL. Firstly, IHL has been designed to be implementable in armed conflict whilst human rights is a more general law<sup>391</sup> . Secondly when IHL provisions impose responsibility on the perpetrators of breaches of the GCs and AP I as well as the commander superiors who knew or had reason to know the breach.<sup>392</sup> Thus making the provisions more enforceable and the parties to the conflict more accountable. And finally the provisions of IHL apply equally to all parties to a conflict, however the application of IHRL on Non-State Armed Groups is still being debated.

### 3.1 How to create the expansion of Special Protection laws?

In order to realize the expansion of Special Protection there exists three options each of which will be discussed. First is the formulation of new treaty law, second is interpreting existing provisions and thirdly is creation of soft law document.

The biggest hurdle with drawing up new legal provisions is the lack of political will among states. <sup>393</sup> Although the need for a new law to cope with changing nature of conflicts is debated, there is a near consensus of the practical impossibility of creating a new IHL treaty in this political climate. <sup>394</sup>

Therefore, the next option would be to advocate for the expansion of special protection while interpreting the existing legal framework. The inherent problem with reading special protection into the existing law is that the interpretation can only discover the existing law and does not create law itself.<sup>395</sup> There is however a general agreement that interpretative process helps shape the law. <sup>396</sup> For instance where there are multiple possible interpretations the decision in choosing one would be akin to creating treaty

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<sup>391</sup> Margalit (n 37).

<sup>392</sup> Art. 86(2) AP-I

<sup>393</sup> Marco Sassoli, *The Humanitarian Law Rules Controversies and Solutions to Problems Arising in Warfare*(Elgar Publishing) 2019

<sup>394</sup> Emily Crawford, *From Inter-state and Symmetric to Intrastate and Asymmetric: Changing Methods of Warfare and the Law of Armed Conflict in the 100 Years Since World War One*, 17 Y.B. INT'L HUMANITARIAN L. 95, 112 (2014).

<sup>395</sup> Sassoli(n402)

<sup>396</sup> Yahil Shereshevsky, 'Back in the Game: International Humanitarian Lawmaking by States' 37 Berkley Journal of International Law.

obligation.<sup>397</sup> Moreover interpretations have gained a lot of force in international legal community and actively referred to while interpreting treaty obligations, even when the interpretations have no binding force on state parties. Non state actors' methods of treaty interpretation involves identification of customary law and creation of soft law.<sup>398</sup> However it is difficult to remove an inherent bias within the existing legal framework through interpretation.<sup>399</sup>

The third option is the creation of soft law. As IHL is not a static law and new norms are regularly being adopted<sup>400</sup> some of which acquire the status of customary international law. The expansion of Special Protection to include other vulnerable groups could be formulated into a soft law instrument. Moreover as there is a shift in IHL from state centric approach to a more homo centric which has led to increased protection of individuals<sup>401</sup> the expansion of Special Protection would be in line this.

The development of soft law could fill in the gaps of the existing legal framework as over time in IHL there has been a blurring of the difference between binding and non-binding norms.<sup>402</sup> Despite its non-binding nature soft law has played an important role in formulation of customary international law.<sup>403</sup> It can act as a guide for policy matters. Soft law in IHL generally consists of hybrid soft law documents adopted by expert meetings or produced by ICRC that are deemed almost as important as the formal sources of law itself.<sup>404</sup> The formulation of soft law would thus be able to adequately fill the gap in the existing protection regime and should be feasible in the current political climate.

Thus, with IHL becoming more humanized and the nature of conflicts leading to a higher casualty rate of civilians it is in line with IHL trend to adopt more protection based provisions. These Special Protection provisions would assist in making the requirements of needs of the vulnerable groups during armed conflict more visible whilst clearly laying out the obligation required by the parties to the conflict. On

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<sup>397</sup> *ibid.*

<sup>398</sup> Sandesh Sivakumaran, 'Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law' *Columbia Journal of Transnational Law* 343.

<sup>399</sup> Gardam and Charlesworth (n 20).

<sup>400</sup> Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen, *Searching for a 'principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012).

<sup>401</sup> Meron (n 9).

<sup>402</sup> Shereshevsky (n 396).

<sup>403</sup> Joseph Gold, 'Strengthening the Soft International Law of Exchange Arrangements' (1983) 77 *The American Journal of International Law* 443.

<sup>404</sup> Sassooli (n 404)



account of the tense political climate the best way to realize this protection would be through the soft law instrument which if accepted over time could be incorporated into state practise.

## **Conclusion**

The protection of civilians to the maximum extent possible during armed conflict is one of the common principles of both IHL and IHRL. IHL has in the past provided this in a manner through Special protection. It provided enhanced protection to groups of people it assumed required it on account of their weakness and lack of military capabilities. This perception has changed over time with Special Protection catering to the differing needs and specific requirements of the populations it protects.

Vulnerable groups of individuals have more difficulty accessing and enjoying the same rights and benefits given to everyone. There has been a shift in Human Rights Law from universal laws to more category-based laws. Specific laws for certain vulnerable groups of individuals led to making their rights and needs visible in the international fora and also helped tailor the universal framework to their needs. This was in line with the principle of equality.

Even though International Human Rights law developed as a legal framework much after IHL, it has been instrumental in its development towards a more human centric approach which led to explicit provisions for the protection of civilians. This thesis proposes that IHL should again seek the influence of International Human rights law and further develop its protection framework towards civilians by expanding Special Protection to other vulnerable groups.

As human rights continue to apply during armed conflict this thesis first explored the co-application of both human rights and humanitarian law for the protection of vulnerable groups. By way of examples the protection regime of three different groups were explored the persons with disability, older persons and LGBTI. All three having differing needs and requirements during armed conflict with varying levels of protection under the existing IHL framework. As each group of individuals have specific requirements and different experiences during conflict there is a need to incorporate within IHL's provision the lived experiences of these groups. The expansion of Special Protection has been seen as a medium to

achieve this aim and provide a more expansive and clearly laid out protection framework while not disregarding the realities of conflict.

The expansion of Special protection towards group category based protection in addition to the general protection of civilians would provide a more comprehensive protection framework. It would highlight and make visible the needs and requirements of vulnerable groups in order not to be overlooked. Whilst also clearly laying out the minimum obligations to be met by all parties to the conflict.

This development of IHL protective regime is in line with its gradual shift towards humanization of the laws of war. With the greater harm to civilians and increase in number of casualties there is requirement for an enhancement in the protection regime. The shift towards this approach would guarantee equality in the accessibility and enjoyment of the general protection provisions by all vulnerable groups.

In order to realize this Special group-based protection there is a proposal for a soft law to adequately address and supplement the existing IHL framework. It is only with steps to provide tailor made and more comprehensive protection can there be a hope to alleviate the suffering of those during armed conflict.

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