

Protection of persons with disabilities in armed conflict under international humanitarian law and Islamic law

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Abstract

Article 11 of the Convention on the Rights of Persons with Disabilities requires that the rights and protections of the Convention not be derogated or suspended during “situations of risk, including situations of armed conflict”. Even so, persons with disabilities are still often the group most disproportionately impacted by armed

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conflict. This reality is not due to a failing of international humanitarian law to protect and consider persons with disabilities; rather, it is due to a failure to mainstream disability into the application of and approach to existing protection frameworks. Impactful mainstreaming of disability necessitates the inclusion of all relevant mutually reinforcing legal frameworks and traditions. By examining four main areas – military operations, evacuation, humanitarian assistance, and long-term assistance and services – this paper argues that the protection of persons with disabilities in armed conflict, and specifically within Muslim contexts, will be enhanced through the inclusion and consideration of Islamic law.

Keywords: IHL, Islamic law, disability, rights of persons with disabilities, protection of persons with disabilities, armed conflict, protection of civilians, CRPD.



Introduction

The Convention on the Rights of Persons with Disabilities (CRPD)¹ heralded a “paradigm shift” in the way the international community approaches and understands disability.² Eschewing the charity and medical models, which viewed persons with disabilities as lesser, defective, incapable and deserving of pity, the CRPD recognizes such persons as rights holders. Rather than the individual’s impairment, it is the environmental, social, attitudinal and policy barriers created by a society’s biases and prejudices towards persons with disabilities that need to be altered to allow for the full enjoyment of their rights, privileges and protections. The CRPD affirms that disability is part of human diversity and that like gender, age, race, religion and sexual orientation, among others, disability is an aspect of an individual’s identity. These aspects of an individual’s identity can and do intersect with each other to create complex forms of discrimination that form multifaceted barriers to the full enjoyment of a person’s rights.

Persons with disabilities consistently face certain risks and challenges during armed conflict, regardless of the geographic location or type of conflict. Inability to flee, abandonment, lack of accessible advance warnings, and inaccessible evacuation processes and shelters can all leave persons with disabilities at heightened risk of direct harm and death from hostilities. Those who manage to escape the fighting face barriers in accessing both short- and long-term humanitarian assistance and aid. Armed conflict also often exacerbates pre-existing impairments and leads to the emergence of secondary impairments, particularly for children with disabilities and people with psychosocial and intellectual disabilities. The loss of or damage to

1 Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 24 January 2007 (entered into force 3 May 2008) (CRPD).

2 Louise Arbour, statement to the UN General Assembly Ad Hoc Committee on the Convention on the Rights of Persons with Disabilities, 8th Session, New York, 5 December 2006.

assistive devices – common during armed conflict – amplifies existing barriers to accessing essential services. Moreover, the rate of disability in conflict-affected populations is much higher and includes individuals with newly acquired impairments, who face these risks and challenges without previous experience or understanding of inherent barriers.³

Armed conflict undoubtedly creates new barriers for persons with disabilities, but it also amplifies those barriers and inequities already existing within a society, leading to heightened risk of harm and death.⁴ Unlike other human rights treaties, the CRPD's Article 11 directs that the Convention be applicable alongside international humanitarian law (IHL) during armed conflict. States party to the CRPD, therefore, maintain an explicit obligation of non-discrimination by ensuring specific inclusion of persons with disabilities within their protection of civilians frameworks and the provision of access to basic needs such as food, water, shelter and sanitation.⁵ The United Nations (UN) Security Council has reinforced this interpretation of Article 11 in Security Council Resolution 2475, which urges Member States to “eliminate discrimination and marginalization of persons on the basis of disability in situations of armed conflict, particularly those who face multiple and intersecting forms of discrimination”.⁶ Notably, the UN Special Rapporteur on the Rights of Persons with Disabilities, in a report submitted to the UN General Assembly, noted the relevance of the CRPD across the entire peace continuum and specifically called for States to reframe their protection of civilians strategies to explicitly protect persons with disabilities.⁷

To appropriately protect persons with disabilities during armed conflict does not require the creation of new IHL rules, but instead calls for the inclusive application of the existing rules. The complementarity between IHL and the CRPD during armed conflict is clearly established by Article 11 of the CRPD and recognized by the International Committee of the Red Cross (ICRC).⁸ Although not directly referenced within IHL, persons with disabilities are protected and their specific needs considered by the existing IHL rules, albeit using outdated medical and charity model language. In particular, the concept of adverse distinction, prohibiting negative treatment of individuals based on a personal characteristic, necessarily includes persons with disabilities. Further, IHL recognizes that specific respect and protection is owed for “the disabled”, thereby

3 William Pons, “The Hidden Harm: Acquired Disability during Conflict”, Center for Civilians in Conflict, 1 August 2017, available at: <https://civiliansinconflict.org/blog/hidden-harm-acquired-disability-conflict/> (all internet references were accessed in September 2022).

4 *Protection of Civilians in Armed Conflict: Report of the Secretary-General*, UN Doc. S/2019/373, 7 May 2019, para. 49.

5 Committee on the Rights of Persons with Disabilities, “General Comment No. 6 (2018) on Equality and Non-Discrimination”, UN Doc. CRPD/C/GC/6, 26 April 2018, para. 43.

6 UNSC Res. 2475, 20 June 2019.

7 *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/76/146, 19 July 2021, para. 88.

8 ICRC, “How Law Protects Persons with Disabilities in Armed Conflict”, 13 December 2017, available at: www.icrc.org/en/download/file/62399/how_law_protects_persons_with_disabilities_in_war.pdf.

signalling a requirement to consider and address the barriers faced by persons with disabilities in armed conflict.⁹ Taken together, the IHL prohibition against adverse distinction and allowance for specific respect and protection can be seen as directly corresponding to the requirements of non-discrimination and reasonable accommodation found in the CRPD.

Islamic law has developed rules that regulate the rights and duties of different members of society, the relationship between the Islamic government and its citizens, and relations with other States. Situations of vulnerability and hardship are reflected in the development of Islamic obligations, as the fulfilment of Islamic obligations is conditioned upon the ability to fulfil them.¹⁰ Thus, Islamic law reflects both permanent and temporary disabilities. For example, a person travelling for a minimum of a certain distance is eligible for an exemption of certain religious obligations, such as the Friday congregational prayer, and is allowed to break fasting during Ramadan (the fasting can be redone at a later date). In other words, every single individual can experience a situation of permanent or temporary impairment and can therefore be exempt from some Islamic religious obligations and legal duties, thereby embodying the concept of reasonable accommodation.¹¹

Islamic legal provisions regarding persons with disabilities exist in many chapters of Islamic law books,¹² but not under one single chapter, nor dealt with under one term that encompasses all persons with disabilities.¹³ There are several terms used in classical Islamic law books that refer to various kinds of physical, intellectual and mental impairments. At present, there is a growing interest among Islamic scholars in disability studies, and many have called for the creation of a branch of Islamic law on persons with disabilities.¹⁴

Islamic law's influence on modern armed conflict cannot be overlooked, particularly because most conflicts take place in Muslim-majority contexts and a sizeable number of these conflicts involve non-State armed groups (NSAGs) that use Islamic law as their source of reference. Early Islamic sources have dealt with the topic of disability via a variety of scholarly disciplines, including the theological, legal, ethical, physical, medical and historical.¹⁵ Whilst stereotypes

9 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 138, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

10 See Qur'an 2:286, which states: "Allah does not lay a responsibility on anyone beyond his capacity." On the rights of persons with mental disabilities, see Muḥammad Fawzy Ḥasan 'Abdel-Hay, "Mental Disability in Islamic Jurisprudence from a Moral Perspective", *Journal of Faculty of Languages and Translation*, Vol. 15, No. 2, 2018.

11 See Mohammed Ghaly, "Disability in the Islamic Tradition", *Religion Compass*, Vol. 10, No. 6, 2016, p. 153.

12 *Ibid.*, pp. 155, 156.

13 Vardit Rispler-Chaim, *Disability in Islamic Law*, Springer, Dordrecht, 2007, p. 3; M. Ghaly, above note 11, p. 151.

14 M. Ghaly, above note 11, p. 149.

15 See *ibid.*, p. 149. On the physical and spiritual treatment of persons with disabilities in Islam, see Mohammed Ghaly, "Physical and Spiritual Treatment of Disability in Islam: Perspectives of Early and Modern Jurists", *Journal of Religion, Disability and Health*, Vol. 12, No. 2, 2008.

and biases towards persons with disabilities continue to cause further challenges to persons with disabilities in addition to those created by armed conflict, Islamic law remains a central framework that can positively impact societal attitudes towards persons with disabilities in Muslim contexts.¹⁶ This is affirmed by Vardit Rispler-Chaim in her book *Disability in Islamic Law*, in which she suggests that the treatment of persons with disabilities under Islamic law is important in Muslim contexts, despite the fact that it may not necessarily reflect or “provide an accurate picture of the social attitudes to the disabled at all points in time and at all geographic locations [in Muslim contexts]”.¹⁷

Nonetheless, Islamic law may contribute to efforts that aim at impactful mainstreaming of disability into humanitarian responses and the protection of persons with disabilities in armed conflict in Muslim contexts. This potential contribution is an important issue that still needs attention from modern Islamic jurists as well as humanitarian organizations working on the protection of persons with disabilities in armed conflict in Muslim contexts. Accordingly, as this paper examines the requirements of IHL in relation to persons with disabilities during military operations, evacuations, humanitarian assistance and long-term assistance and services, it will also discuss the related Islamic law, in an effort to provide recommendations to enhance the protection of persons with disabilities in armed conflict in Muslim contexts.

Protection for persons with disabilities during military operations

Despite the protections afforded to persons with disabilities in armed conflict under both IHL and Islamic law, the reality on the ground for these marginalized people is vastly different. Marcus Skinner notes that according to the World Health Organization’s (WHO) 2011 *World Report on Disability*, “15.3% of the world’s population has a moderate or severe disability and ... this proportion is likely to increase to 18–20% in conflict-affected populations”.¹⁸ Frequent discrimination and neglect, coupled with large percentages of persons with disabilities in war-stricken Muslim-majority contexts, are indicative of the need to better respect these protections. For example, after more than four decades of war, Afghanistan has one of the largest populations of persons with visual impairments and physical, mental and psychological disabilities *per capita* in the world.¹⁹ The authors of this paper have noticed that there are discrepancies in the statistics collected by different entities regarding percentages of persons with disabilities;²⁰

16 See V. Rispler-Chaim, above note 13, p. 17; M. Ghaly, above note 15, p. 106.

17 V. Rispler-Chaim, above note 13, p. 94.

18 Marcus Skinner, “The Impact of Displacement on Disabled, Injured and Older Syrian Refugees”, *Forced Migration Review*, No. 47, September 2014, p. 39.

19 Human Rights Watch, *Disability is not Weakness: Discrimination and Barriers Facing Women and Girls with Disabilities in Afghanistan*, 28 April 2020, available at: <https://hrw.org/node/341205>.

20 According data published by the Palestinian Central Bureau of Statistics (PCBS) in December 2019, about 93,000 members (2.1%) of the Palestinian population have a disability, and about one fifth of these are children under the age of 18. However, WHO estimates that 15% of every population comprises

while the ongoing efforts to collect data on persons with disabilities are encouraging, the information gained remains incomplete because such data collection processes around the world are in the early stages and often the innovative aspects of the CRPD are not captured by general data collection.²¹ With increasingly disconcerting reports that adults and children with disabilities are being used as suicide bombers²² and that facilities for persons with disabilities have been hit during hostilities, among other examples, collection of comprehensive data on persons with disabilities and the barriers and risks they face during armed conflict is essential.²³

Recognition of reality and the need to ensure sufficient protection of civilians and civilian objects in order to mitigate the impact of conflict is a cornerstone of IHL. Prior to and during the conduct of hostilities, IHL requires that parties to a conflict distinguish between civilians and military targets and take all feasible precautions to minimize injury to civilians, incidental loss of civilian life and damage to civilian objects during military operations.²⁴ The realities of warfare are such, however, that even when all precautions are taken, unintentional harm to civilians occurs. Yet the harm suffered by the civilian population is not uniform, as conflict inevitably amplifies existing inequalities and vulnerabilities, with persons with disabilities often being the segment of the population most severely impacted.²⁵

This disparity in harm suffered stems not from a deficiency in the IHL rules regarding the conduct of hostilities, but instead from a lack of consideration of the fact that very often, persons with disabilities are unable to flee combat zones or access warnings of an impending attack, and are often abandoned or left behind by their families. Articles 5, 10, and 17 of the CRPD require that persons with disabilities are ensured equal protection under the law, particularly including the protection of their physical and mental integrity, and importantly, their right to life.²⁶ The direct application of the CRPD and its complementary role with IHL

persons with disabilities, and in conflict zones this figure rises to 20%. Moreover, according to a report by the UN Relief and Works Agency (UNRWA), about 25% of the population above the age of 12 in Syria are individuals with disabilities, including Palestinian refugees, and this higher prevalence is connected with the ongoing conflict. See PCBS, untitled data sheet, 3 December 2019, available at: www.pcbs.gov.ps/portals/_pcbs/PressRelease/Press_En_3-12-2019-dis-en.pdf; WHO, *World Report on Disability*, 2011, available at: www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability; UNRWA, *Disability Inclusion Annual Report 2020*, 2020, available at: www.unrwa.org/resources/reports/disability-inclusion-annual-report-2020.

21 See *Statistics and Data Collection under Article 31 of the Convention on the Rights of Persons with Disabilities: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/49/60, 28 December 2021, available at: www.ohchr.org/sites/default/files/2022-06/G2139630-Accessible.pdf.

22 Cassandra Clifford, "The Continued Rise of the Child Suicide Bomber", 13 February 2008, available at: <https://foreignpolicyblogs.com/2008/02/13/the-continued-rise-of-the-child-suicide-bomber/>.

23 Human Rights Watch, "Yemen: Houthi Endangered School for Blind", 13 January 2016, available at: www.hrw.org/news/2016/01/14/yemen-houthi-endangered-school-blind.

24 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 75 UNTS 135, 8 June 1977 (entered into force 7 December 1979) (AP I), Arts 48, 51, 52, 57, 58.

25 *Protection of Civilians in Armed Conflict*, above note 4, para. 49.

26 CRPD, above note 1, Arts 5, 10, 17.

means that before military operations are conducted, there needs to be understanding and consideration of where persons with disabilities live, how they go about their daily lives, how they may react in the context of an attack, and the challenges they will likely face.

For example, people with visual impairments may require support from others to flee an impending attack, and persons with auditory impairments often cannot hear announcements or instructions related to a military operation. Persons with intellectual disabilities have difficulty understanding complex evacuation instructions, warnings of impending attacks, or what is occurring during a military operation. As a result of the violence of military operations, individuals with psychosocial impairments often have their mental health conditions exacerbated. Additionally, owing to stigma and bias, persons with disabilities are often the subject of violence and targeted killings by parties to the conflict.²⁷ Appropriate application of a disability-sensitive analysis to the rules of engagement, standard operating procedures and targeting assessments must reflect the reality of persons with disabilities.

Islamic law makes it abundantly clear that fighting on the battlefield must be directed only against enemy combatants²⁸ – civilians and non-combatants must not be intentionally harmed during hostilities. Qur'an 5:32 stresses the sanctity of human life as follows: "Whoso kills a human soul not in retaliation for [killing another] human soul or [commits] destruction in the land, it is as if he kills the entire humanity; and whoso saves a human soul, it is as if he saves the entire humanity." The protection of life (*hifz al-nafs*) is the first of the five ultimate objectives of Islamic law (*maqāsid al-sharī'ah*), along with the protection of religion, intellect, progeny and property.²⁹ Article 2(a) of the Cairo Declaration on Human Rights in Islam, adopted by foreign ministers of the Organization of Islamic Cooperation in 1990, affirms the right to life, stating that "life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to safeguard this right against any violation, and it is prohibited to take away life except for a shari'ah prescribed reason." Article 3(a) adds: "In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children. The wounded and the sick shall have the right to medical treatment."³⁰ This protection against the killing of non-belligerents and right to medical treatment includes persons with disabilities, although they are not explicitly listed.

To minimize harm to the civilian population, civilians and civilian objects, classical Islamic law prohibits the use of certain medieval and indiscriminate means

27 Human Rights Watch, "Persons with Disabilities in the Context of Armed Conflict: Submission to the UN Special Rapporteur on the Rights of Persons with Disabilities", 8 June 2021, available at: www.hrw.org/news/2021/06/08/persons-disabilities-context-armed-conflict.

28 Qur'an 2:190.

29 On the ultimate objectives of Islamic law, see, for example, Felicitas Opwis, "Maqāsid al-Shari'ah", in Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan (eds), *Routledge Handbook of Islamic Law*, Routledge, London and New York, 2019.

30 Cairo Declaration on Human Rights in Islam, 5 August 1990, available at: www.refworld.org/docid/3ae6b3822c.html.

and methods of warfare, except in cases of imperative military necessity. Nuanced deliberations took place among classical Muslim jurists about the permissibility of shooting mangonels or weapons tipped with fire, poison or oil, as well as the permissibility of engaging in hostilities during the night or shooting at a human shield.³¹ In short, the Islamic jurists who permit the use of these medieval indiscriminate means and methods of warfare grounded their opinions on military necessity. The underlying premise here is that persons with disabilities are included in this general protection for civilians and non-combatants – but the general protection afforded to civilians is not sufficient for persons with disabilities, and both IHL and Islamic law, as discussed below, require that additional attention be paid to ensure that sufficient protection of persons with disabilities is included in the analysis of proportionality, distinction and precautions.

Classical Islamic law books³² contain references to various categories of civilians who must not be intentionally harmed during hostilities. These include persons with disabilities – for example, the blind, *al-majnūn* (a person with psychosocial disability), *al-zzamnā* (the incapacitated) and *al-shaykh al-kabīr/al-shaykh al-fānī* (the aged – namely, one who is physically unable to fight because of age). *Al-zzamnā* is an archaic Arabic word “meaning those with chronic diseases and permanent disabilities. A *zamn* is a decrepit man in *zamana* (a state of deterioration), i.e. disability.”³³ However, concerning persons with temporary intellectual disability, Abū Ḥanīfah (d. 767), the eponymous founder of the Ḥanafī school of law, notes that such persons can be targeted only when they are not in this temporary state.³⁴ While the language is reflective of the time period, it is clear that Islamic law thinks deeply about persons with disabilities and the

- 31 See, for example, Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York, 2011, pp. 116–119, 122–126; Ahmed Al-Dawoody, “Islamic Law and International Humanitarian Law: An Introduction to the Main Principles”, *International Review of the Red Cross*, Vol. 99, No. 3, 2017, pp. 1004–1007; Sohail Hashmi, “Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation”, in Sohail H. Hashmi and Steven P. Lee (eds), *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*, Cambridge University Press, Cambridge, 2004, pp. 328–329; Najib al-Armanāzi, *Al-Shar’ al-Dawliyyah-Islām*, 2nd ed., Riad El-Rayyes Books, London, 1990 (first published 1930), p. 124; ‘Alī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sultāniyyah wa al-Wilāyāt al-Dīniyyah*, ed. Ahmad Mubārak al-Baghādī, Maktabah Dār ibn Qutaybah, Kuwait, 1989, p. 57; Ibrāhīm ibn ‘Alī ibn Yūsuf al-Shirāzī, *Al-Muḥadhdhab: Fī Fiqh al-Imām al-Shāfi’i*, ed. Zakariyyā ‘Imīrat, Vol. 3, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1995, p. 278.
- 32 See, for example, Muḥammad ibn Idrīs al-Shāfi’i, *Al-Umm*, 2nd ed., Vol. 4, Dār al-Ma’rifah, Beirut, 1973, p. 240; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar al-Kabīr*, ed. Ṣalāḥ al-Dīn al-Munjid, Vol. 4, Ma’had al-Makhtūṭāt, Cairo, p. 1415; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar*, ed. Majid Khadduri, Al-Dār al-Muttaḥidah, Beirut, 1975, p. 249; Mālik ibn Anas, *Al-Mudawwanah al-Kubrā*, Vol. 3, Dār Ṣādir, Beirut, pp. 6–7; Aḥmad ibn Idrīs al-Qarāfi, *Al-Dhakhīrah*, ed. Muḥammad Būkhūzah, Vol. 3, Dār al-Gharb al-Islāmī, Beirut, 1994, pp. 397–401; Muḥammad al-Ghazālī, *Al-Waṣīṭ fi al-Madhdhab*, Vol. 7, ed. Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmir, Dār al-Salām, Cairo, 1997, p. 19; Muwaffaq al-Dīn ‘Abd Allah ibn Aḥmad ibn Qudāmah, *Al-Kāfi fi Fiqh al-Imām Aḥmad Ibn Ḥanbal*, ed. Muḥammad Fāris and Mus’ad ‘Abd al-Ḥamid al-Sa’danī, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2004, Vol. 4, p. 125.
- 33 V. Rispler-Chaim, above note 13, p. 124. The most commonly used modern Arabic word for a person with disability is *mu’awwaq* (plural *mu’awwaqin*). For a number of euphemisms used in modern Arabic to refer to persons with disabilities, see M. Ghaly, above note 11, p. 151.
- 34 A. Al-Dawoody, *The Islamic Law of War*, above note 31, p. 114.

dangers armed conflict poses to them, and that the protections it provides are robust.

Most of the classical Islamic jurists agree that aged persons can be targeted if they enter the battlefield to support the enemy in planning war operations. This is based on the case of the killing of Durayd ibn al-Ṣūmmah, one of the most experienced and renowned warriors of the pre-Islamic and early Islamic eras, who allegedly fought in more than 100 battles. Ibn al-Ṣūmmah had a physical disability – he could not walk to the battlefield – and was brought onto the battlefield to support the Muslims’ enemies in planning the operations for the battle of Ḥunayn in 630, even though he was over 100 years of age at the time.³⁵ Although the few examples listed above indicate that there was a conscious recognition among classical Muslim jurists of the need to protect persons with disabilities in armed conflicts under Islamic law, the case of ibn al-Ṣūmmah demonstrates a recognition that persons with disabilities can and do directly participate in hostilities, thereby losing their protection against direct attack that they would otherwise be afforded as civilians.

Moreover, under Islamic law, persons with a visual impairment or mental or physical disabilities are exempt from the duty to participate in war.³⁶ Examples given by classical Muslim jurists for persons with disabilities exempt from the duty to participate in war include *al-’a’ma* (the blind), *al-’a’raj* (the lame) and *al-marīḍ* (the sick). This exception is based on the inability to take part in fighting, and this is why ibn Qudāmah (d. 1223) states that light sickness, such as a headache or toothache, and small degrees of lameness that do not prevent a person from walking or mounting an animal are not enough grounds for exemption from the duty to participate in war.³⁷ The exemption for persons with disabilities to participate in war makes them civilians who then cannot be targeted in conflict.

However, Islamic sources also record that ‘Amr ibn al-Jamūḥ, one of the chiefs of the tribe of Banū Salamah, and an old man with a partially lame leg, was eager to join the fighting in the battle of Badr in March 624, and that the Prophet Muhammad rejected his participation as he was exempt from this duty. But in the following year, ibn al-Jamūḥ insisted on joining the fighting in the Battle of Uḥūd in March 625, along with his three sons. Understandably, his sons were against their father’s wish, given that he was excused from the duty to fight. Ibn al-Jamūḥ expressed his wish to the Prophet Muhammad, who then told the sons to let their father have his wish.³⁸ This incident demonstrates that persons

35 See *ibid.*, p. 114; A. Al-Dawoody, “Islamic Law and International Humanitarian Law”, above note 31, p. 1004; Muhammad ibn ‘Alī ibn Muḥammad al-Shawkānī, *Nayl al-Awtār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akḥbār*, Vol. 8, Dār al-Jil, Beirut, 1973, p. 73.

36 V. Rispler-Chaim, above note 31, pp. 41–45.

37 See Muwaffaq al-Dīn ‘Abd Allah ibn Aḥmad ibn Muḥammad ibn Qudāmah, *Al-Mughnī*, ed. ‘Abd Allah ibn ‘Abd al-Muḥsin al-Turkī and ‘Abd al-Fattāḥ Muḥammad al-Ḥīlu, 3rd ed., Vol. 13, Dār ‘Ālam al-Kutub, Riyadh, 1997, p. 9.

38 ‘Abd Allah ibn al-Mubārak, *Al-Jihād*, ed. Nazīḥ Ḥammād, Al-Dār al-Tūnissiyah, Tunis, 1972, p. 69; Muḥammad ibn ‘Umar al-Wāqidī, *Kitāb al-Maghāzī*, ed. Marsden Jones, 3rd ed., Vol. 1, Dār al-‘Iamy, Beirut, 1989, pp. 164–165.

with disabilities have a recognized right to non-discrimination, effective participation and inclusion in Islamic society. It shows that while Islam does provide an exemption to military service for persons with disabilities, there are precedents and a recognition and acknowledgement that persons with disabilities can and do participate in armed conflict and will be treated as any other combatant.

Protection for persons with disabilities during evacuations

Evacuations of civilians from areas of active hostilities, although necessary to ensure safety, are often difficult ordeals for civilians wishing to flee. In areas at risk of attack, IHL obligates parties to a conflict to conclude agreements to prioritize evacuation of persons with disabilities – albeit through the use of outdated language to describe disability.³⁹ IHL also requires that extra protection and consideration be given to persons with disabilities owing to the fact that armed conflict places them in highly vulnerable situations, although again relying on outdated language.⁴⁰ These obligations mean that special protection, assistance and attention must be given to ensure that the evacuation routes and safe passages are accessible to persons with disabilities.

Consulting the CRPD adds details to and guidance on the IHL obligations by providing parameters on the concrete process of how to ensure accessibility to and inclusion of persons with disabilities. Articles 9 and 21 of the CRPD require that States take “appropriate measures” to guarantee that persons with disabilities have equal access to “the physical environment, to transportation, to information and communications ... and to other facilities and services open or provided to the public”, and to ensure that “information intended for the general public” is provided in an accessible format.⁴¹ Although not overly prescriptive, the requirements of the CRPD are easily transposed to the development of accessible evacuation processes that allow for full compliance with the above-mentioned IHL obligation. Even so, the on-the-ground reality is that persons with disabilities remain mostly invisible and forgotten during evacuation procedures, which is in large part due to a significant dearth of disaggregated data on persons with disabilities and their needs generally, but also specifically during evacuations.

For example, persons with disabilities must frequently abandon their technical aids and assistive devices in order to use evacuation procedures that have not accounted for the need to transport mobility devices (such as wheelchairs, scooters and crutches). Information on the location and process for evacuation is not communicated in accessible formats and thereby never reaches persons with sensory impairments or intellectual disabilities. For those who do evacuate, their assistive devices and technical aids are often damaged or

39 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 17.

40 *Ibid.*, Art. 16.

41 CRPD, above note 1, Arts 9, 21.

destroyed, further amplifying new and existing barriers. Very often, persons with disabilities decide to remain or are abandoned by family members or caretakers in the path of an impending attack because of inaccessible evacuations.⁴² Compliance with IHL obligations requires that authorities identify, consider and account for the needs of persons with disabilities and provide the necessary assistance required for them to access safe and inclusive evacuation procedures.

Interestingly, there were conscious and intrinsic choices made to ensure the safety of all civilians, obviously including persons with disabilities, by the conflicting parties in some of the earliest battles in Islamic history. These fighters chose to engage in hostilities outside of towns and populated areas. The prime examples here are the Battles of Badr in March 624, which took place near a well of the same name in the desert between Mecca and Medina, and the Battle of Uḥud in March 625, which took place near the mountain of Uhud.

Evacuations of the injured and the dead from these battlefields during the Prophet's lifetime, by women, are documented in the Hadith (reported sayings, deeds and tacit approvals of the Prophet Muhammad) collections and *Sīrah* (biographies of the Prophet Muhammad) literature. Part of the role of Muslim women in these earliest battles included "repatriating the injured and dead bodies [from the battlefield in the desert] back to Medina".⁴³

Under Islamic law, *amān* (quarter, safe passage) must be given if requested in any form by enemy belligerents. The Islamic jurists explain that the rationale of *amān* is *ḥaḡn al-dam* (prevention of bloodshed, protection of life). Accordingly, evacuations and safe passage to persons with disabilities are *a fortiori* obligations on Muslims. Negligence or failing to evacuate persons with disabilities (assuming the ability to do so) will be tantamount to endangering the lives and safety of those persons. One of the Islamic legal maxims states: *Mā lā yatim al-wājib ilā bih fahowa wājib* (Whatever is necessary to fulfil an obligation is an obligation in itself). In this case, the protection of the lives of persons with disabilities is an obligation, and to fulfil those persons' protection and safety during armed conflicts, evacuations become an obligation. Furthermore, in order to fulfil the obligation of the protection of the lives of persons with disabilities, information about the location of persons with disabilities and their respective needs must be prepared, and communication about the evacuation process must be shared in accessible ways. The fulfilment of this obligation is the responsibility of both the State authorities and the Muslim community.

There is no record known to the present authors of disaggregated data on persons with disabilities and their needs and barriers in Muslim-majority contexts that are collected for the purpose of evacuations during armed conflict. In many Muslim-majority States, due to tribal affiliations, extended family ties and the

42 Human Rights Watch, "South Sudan: People with Disabilities, Older People Face Danger: UN, Aid Agencies Should Improve Response to These Groups", 31 May 2017, available at: www.hrw.org/news/2017/05/31/south-sudan-people-disabilities-older-people-face-danger.

43 Ahmed Al-Dawoody, "Management of the Dead from the Islamic Law and International Humanitarian Law Perspectives: Considerations for Humanitarian Forensics", *International Review of the Red Cross*, Vol. 99, No. 2, 2017, pp. 672–673.

Islamic obligation of taking care of one's neighbours, persons with disabilities and their specific needs will be informally known to many members of the community. Apart from State authorities, civil society and NSAGs who control territories may have disaggregated data on persons with disabilities and their specific needs in Muslim-majority contexts that are collected for medical and social support purposes. Therefore, in addition to State authorities and the military, community leaders can be in a good position to facilitate both the identification and evacuation of persons with disabilities. Such cultural and traditional elements should be invoked to enhance the special protection and assistance afforded to persons with disabilities in armed conflict in Muslim-majority contexts.

Persons with disabilities are often abandoned or left behind by their own families during armed conflict (and in particular during evacuations), and parties to a conflict should therefore make agreements to give priority during evacuations to persons with disabilities.

The Islamic law part of this paper is particularly relevant to two categories of Muslims. The first category is Islamic NSAGs, which use Islamic law as their only source of reference and are not willing to abide by, or engage with, any other legal systems or frameworks. The second category is the Muslim-majority States and Muslim non-State actors who abide by Islamic law and at the same time acknowledge IHL obligations and are willing to respect them. Those actors that fall into the second category are obligated to respect IHL and make such agreements not only from the perspective of international law, but also from the perspective of Islamic law. *Pacta sunt servanda* is an Islamic principle enshrined in many Qur'anic texts (Qur'an 5:1, 16:91–94) and the Hadith of the Prophet Muhammad.⁴⁴ Under Islamic law, all treaties that Muslims lawfully enter into are binding except provisions that blatantly contradict the tenets of Islamic law,⁴⁵ which is not the case when it comes to IHL.⁴⁶ In order to ensure that agreements are made to give priority during evacuations to persons with disabilities, invoking Islamic legal and ethical arguments will be indispensable in the case of the first category and will constitute another layer of conviction in the case of the second category.

As for the conclusion of agreements, it is useful to invoke evidence from early Islamic history, which is replete with examples of agreements concluded

44 On the Islamic principle of *pacta sunt servanda*, see, for example, Hans Wehberg, "Pacta Sunt Servanda", *American Journal of International Law*, Vol. 53, No. 4, 1959, p. 775; Syed Sharifuddin Pirzada, "Islam and International Law", in Altaf Gauhar (ed.), *The Challenge of Islam*, Islamic Council of Europe, London, 1978, pp. 210–215; C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, Macmillan, Basingstoke, 1988, pp. 132–133; Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study*, Graham & Trotman, London, 1994, pp. 12–13; Javid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the "Clash of Civilizations" in the New World Order*, Hart Publishing, Oxford, 2005, p. 46; Emilia Justyna Powell and Sara McLaughlin "The International Court of Justice and the World's Three Legal Systems", *Journal of Politics*, Vol. 69, No. 2, 2007, pp. 400–401.

45 Ramin Moshtaghi, "Relation between International Law, Islamic Law and Constitutional Law of the Islamic Republic of Iran – A Multilayer System of Conflict", *Max Planck Yearbook of United Nations Law*, Vol. 13, No. 1, 2009, p. 420.

46 Niaz A. Shah, "Foreword", in Muhammad-Basheer A. Ismail, *Islamic Law and Transnational Diplomatic Law: A Quest for Complementarity in Divergent Legal Theories*, Palgrave Macmillan, London, 2016, p. xi.

during armed conflict between the Prophet Muhammad and the adversary to ensure, for example, the transfer of dead bodies, the release of detainees, and armistice. Harm to persons with disabilities as a result of failure to evacuate them while having the ability to do so can entail legal responsibility in this world, to be decided by the *qādi* (judge) in a court that applies Islamic law, and/or a divine punishment in the Hereafter. Additionally, Islamic ethical and traditional values, codes of honour and chivalry dictate protection and assistance to those in highly vulnerable situations, such as persons with disabilities. These Islamic legal, ethical and traditional values will be more likely to be adhered to by Muslims who use Islamic law as a/the source of reference that regulates their behaviour. However, this does not mean that the average practicing Muslim will be educated or knowledgeable about the rules under discussion in this paper regarding the protection of persons with disabilities, let alone the current challenges that leave them in such highly vulnerable situations.

Humanitarian aid for persons with disabilities

Humanitarian aid and assistance is vital for civilians displaced and affected by armed conflict. Given its importance, IHL recognizes that civilians have a right to receive humanitarian aid.⁴⁷ Parties to a conflict, therefore, must allow for and assist in the rapid and unobstructed delivery of that aid (food and water, medicine, medical equipment etc.), without adverse distinction, to civilians in need.⁴⁸ IHL also requires that parties to a conflict provide particularized treatment to individuals in need of specific humanitarian aid and services within the territory they control, again without adverse distinction.⁴⁹ This obliges parties to a conflict and humanitarian organizations to have health-care and other essential services address the needs of persons with disabilities, to provide information about assistance in accessible formats, to ensure that shelters, displacement camps and sanitation facilities are suitable for use by persons with disabilities, and to have humanitarian distribution locations made accessible. However, persons with disabilities continue to systematically struggle to meet their basic needs because of a failure to identify such persons through data collection and to consider the barriers they face in accessing aid, and a lack of targeted aid and support programming to address their specific needs.⁵⁰

For example, UN agencies have started to collect data on persons with disabilities displaced by armed conflict, but the approach lacks sufficient detail to fully account for the diversity of disability and the associated needs. Distribution

47 GC IV, Art. 23.

48 Common Art. 3.

49 AP I, Art. 70.

50 Human Rights Watch, *Leave No One Behind: Persons with Disabilities in Humanitarian Emergencies*, 19 May 2016, available at: www.hrw.org/news/2016/05/19/leave-no-one-behind; Amnesty International, *Excluded: Living with Disabilities in Yemen's Armed Conflict*, 3 December 2019, available at: www.amnesty.org/en/documents/MDE31/1383/2019/en/.

of humanitarian aid as such does not prioritize persons with disabilities, leaving them with inconsistent access to food, medicine and hygiene kits. Latrines and showers lack accommodations needed to allow persons with disabilities to access them, requiring in many cases that they crawl or rely on family members to take them. Inadequate health care and in particular mental health support combine to have a deleterious effect on an individual's existing impairment and raise their risk of obtaining a secondary impairment.⁵¹

When persons with disabilities do manage to flee to relative safety, they continue to be marginalized and forgotten – a reality in stark contrast to the fact that the majority of efforts to protect persons with disabilities in armed conflict focuses on the delivery of humanitarian aid. This gap between aspiration and reality when it comes to disability-inclusive humanitarian assistance can and must be bridged by referring to the corresponding CRPD obligations and guidance from the Inter-Agency Standing Committee (IASC). Articles 19, 21 and 26 of the CRPD direct States to ensure that persons with disabilities have equal access to “services and facilities” that are “responsive to their needs”, that information is provided to the general public in an accessible format, and that there is availability of “assistive devices and technologies, designed for persons with disabilities”.⁵² Providing practical advice, the IASC *Guidelines on the Inclusion of Persons with Disabilities in Humanitarian Action* emphasize the need to use a twin-track approach that includes, first, inclusive mainstream humanitarian programming (i.e., including persons with disabilities in whole-of-population programmes) and second, targeted interventions that specifically address the needs, risks and barriers faced by persons with disabilities.⁵³ Implementation of this twin-track approach requires – as does the CRPD – that persons with disabilities and their representative organizations be directly involved at all stages of the development, planning and implementation of humanitarian aid programming. To comply with IHL therefore requires States, humanitarian actors, donors and parties to a conflict to adjust their approach to humanitarian assistance to consider and include persons with disabilities as part of the overall population, but also to create particular programming to address their needs directly.

Humanitarian aid is an important part of Islamic faith,⁵⁴ law and culture. *Zakah* (also spelled *zakat*, compulsory alms giving) is one of the five pillars of Islam, in the sense that it is not left to the free choice of Muslims but is a core Islamic obligation⁵⁵ if its conditions are met. *Zakah* is to be spent in alleviating the suffering and satisfying the needs of individuals and society. Unlike *ṣadaqah*

51 Amnesty International, *Excluded: Living with Disabilities in Yemen's Armed Conflict*, 3 December 2019, available at: <https://www.amnesty.org/en/documents/mde31/1383/2019/en/>.

52 CRPD, above note 1, Arts 18, 21, 26.

53 IASC, *Guidelines: Inclusion of Persons with Disabilities in Humanitarian Action*, 19 November 2019, available at: <https://interagencystandingcommittee.org/iasc-guidelines-on-inclusion-of-persons-with-disabilities-in-humanitarian-action-2019>.

54 Jamal Krafess, “The Influence of the Muslim Religion in Humanitarian Aid”, *International Review of the Red Cross*, Vol. 87, No. 858, 2015, p. 327.

55 *Ibid.*, pp. 327, 335–337.

(optional charity), *zakah* has specific rules and regulations: for example, Muslims who possess a certain minimum amount of wealth must pay certain percentages of that wealth.⁵⁶ *Zakah* “is one of the largest forms of wealth transfer to the poor and needy in existence”, and its annual potential size was estimated “between US \$200 billion and US\$1 trillion, according to Obaidullah and Shirazi in 2015 and the World Bank and IDBG [Islamic Development Bank Group] in 2016”.⁵⁷

Zakah is indeed “a revolutionary concept with the potential to ease the suffering of [hundreds of] millions around the world”;⁵⁸ however, it is of paramount importance to stress here that the discussion of the Islamic short and long forms of humanitarian aid and assistance addressed in this paper – namely, *zakah*, *ṣadaqah* and *waqf* (endowments, trusts) – does not mean a return to the charity or medical models of disability. Indeed, on the one hand, these three forms can be used for charity purposes (i.e., to take care of someone who cannot care for themselves), but on the other – and here lies the intended meaning of the use of these forms – they can be also used to empower those people to support themselves, as in the example given from Indonesia below. Moreover, these forms of support or assistance can be given to the State or other entities for furthering society and/or supporting any laudable objective for the community at large, such as supporting the army financially, supporting cancer research, or activities that aim at the protection of the environment. In any case, consultation and engagement with persons with disabilities and their representative organizations should take place during the planning and use of such forms of humanitarian aid and assistance, and should be done in a manner that is not inconsistent with the CRPD.

In the Muslim-majority context, *zakah* and *ṣadaqah* are usually paid from the Muslim payees directly to the individual beneficiaries or local charities and entities concerned. In the West, the Muslim payees usually either pay *zakah* and *ṣadaqah* to local charities or transfer it to beneficiaries and charities in Muslim-majority contexts. Muslims may not necessarily be aware of how their *zakah* and *ṣadaqah* can be used for humanitarian aid and assistance for civilians displaced and affected by the atrocities of armed conflict; hence, if humanitarian needs and assistance are identified and made known to Islamic institutions and Muslim individuals and philanthropists, these individuals and organizations may be motivated to direct their *zakah* and *ṣadaqah* to easing the suffering of civilians displaced and affected by armed conflict. *Zakah* or *ṣadaqah* can be used for

56 *Zakah* is levied on specific categories of wealth, and is to be given to specific categories of recipients if the minimum amount of wealth is reached. A minimum of fixed rates that vary depending on the category of wealth must be paid: for example, 2.5% must be paid if the minimum amount of wealth has been in possession of the *zakah* payee for a lunar year, and 10% must be paid on agricultural income on naturally irrigated areas but 5% on artificially irrigated areas. See, for example, Timur Kuran, “Property”, *Encyclopedia of Islam and the Muslim World*, ed. Richard C. Martin, Macmillan Reference USA, New York, 2004, p. 553; J. Krafess, above note 54, p. 335.

57 Aamir A. Rehman and Francine Pickup, “Zakat for the SDGs”, 7 September 2018, available at: www.undp.org/blog/zakat-sdgs.

58 Islamic Relief, “Why Is Zakat Important?”, available at: www.islamic-relief.org.uk/about-us/what-we-do/zakat/why-is-zakat-important/.

providing humanitarian aid such as food, water, medicine and medical equipment for those displaced and affected by armed conflict in general, and also for shelters, displacement camps and sanitation facilities that are accessible to persons with disabilities in particular.

The main issue here is that IHL's requirement of the provision of humanitarian aid and services without adverse distinction to civilians in need may be in contradiction with an interpretation of *zakah* which states that it should be paid to Muslim beneficiaries. In fact, the fourth category of the eight eligible recipients of *zakah*, which refers *inter alia* to new Muslim converts, also includes (or for some, used to include) non-Muslims: the eight categories are (1) the poor, (2) the needy, (3) those who administer *zakah*, (4) those whose hearts are to be reconciled,⁵⁹ (5) for freeing slaves, (6) debtors, (7) for the cause of God, and (8) the stranded.⁶⁰ But *ṣadaqah* can be given to both Muslims and non-Muslims.

Even in the case of Muslim payees of *zakah* who would like to restrict its recipients to Muslims, adverse distinction in the distribution of humanitarian aid is sometimes not practically possible. For example, if *zakah* funds are given by a Muslim for building a hospital or for providing humanitarian aid such as food, water, medicine, assistive devices or medical equipment, the religious identity of the patients and recipients of humanitarian aid in the context of armed conflict cannot be usually known. Furthermore, it would be un-Islamic to contribute to human suffering by preventing humanitarian aid due to the fact of a recipient belonging to a different religion. The Dar al-Ifta of Egypt issued a fatwa answering positively the following question: "Can I give Zakah money to a hospital where patients are both Muslims and non Muslims?" However, the fatwa adds that under Islamic law, it will be mandatory to give from *ṣadaqah* (optional charity) to non-Muslims in order to fulfil their needs if no means are available.⁶¹

The use of Islamic finance models in the non-faith-based humanitarian sector is a relatively new issue for both international organizations and Muslim jurists, and the latter are confronted with new questions that they need to respond to from Islamic legal perspectives. It is worth referring here to the Office of the UN High Commissioner for Refugees' (UNHCR) pioneering project, the Refugee Zakat Fund. UNHCR assesses that refugees and internally displaced persons (IDPs) are eligible to receive *zakah*.⁶² This project reflects flexibility, pragmatism and innovation in the provision of funding to refugees, using alternative sources for funding while following a 100% *zakah* distribution policy.

59 This category refers to "persons who have recently been brought to Islam, or whose commitment to the faith and community needs to be reinforced, and individuals who can be prevented from harming the community, or who can benefit and defend the community". There is a disagreement among Islamic jurists as to whether this category is eligible to receive *zakah* after the death of the Prophet: see Yūṣuf al-Qaraḍāwī, *Fiqh Al-Zakah: A Comprehensive Study of Zakah Regulations and Philosophy in Light of the Qur'an and the Sunnah*, trans. Monzer Kahf, Islamic Books Trust, Kuala Lumpur, 2011, pp. 379–408.

60 Qur'an 9:60.

61 Dar al-Ifta al-Missriyyah, "Can I Give Zakah Money to a Hospital Where Patients Are Both Muslims and Non Muslims?", available at: www.dar-alifta.org/Foreign/ViewFatwa.aspx?ID=6391.

62 See the UNHCR Refugee Zakat Fund website, available at: <https://zakah.unhcr.org/en>.

The Refugee Zakat Fund has up to now received sixteen fatwas from more than ten Islamic institutions and individuals globally, endorsing UNHCR as a legitimate recipient of *zakah* funds.⁶³ These fatwas are issued by State fatwa institutions, muftis and Islamic world-leading scholars, Islamic international organizations, and international Islamic legal institutions, based both in Muslim-majority States and in the West. These include the Organization of Islamic Cooperation's International Islamic Fiqh Academy and the Muslim World League, both based in Saudi Arabia; the International Shariah Research Academy, based in Malaysia; the Senior Scholars' Council of Morocco; the Islamic Affairs and Charitable Activities Department of Dubai and the Tabah Foundation, both based in the United Arab Emirates (UAE); and Al-Azhar Islamic Research Academy and the Dar al-Ifta al-Missriyyah, both based in Egypt; as well as fatwas by the ex-mufti of Egypt, Dr Ali Gomaa, and the Mauritanian scholar Sheikh Abdullah bin Bayya, based in the UAE.⁶⁴

The Refugee Zakat Fund has launched an application on iOS and Android called GiveZakat that allows users to calculate the amount of their *zakah* and track their donation until it reaches the refugees and IDPs (beneficiaries). Such uses of modern digital technology are essential in responding to humanitarian needs and facilitating humanitarian aid. The creation of a similar application for humanitarian actors that collects disaggregated data on the location of persons with disabilities, the diversity of their disabilities and their specific needs could help, for example, in providing tailored accessible advance warnings of impending attacks, information about evacuation routes and safe passages that are accessible to persons with disabilities, and the numbers and quantities of specific services, medical equipment and assistive devices needed. In this way, technology could help ensure that persons with disabilities are not invisible and forgotten during evacuations. This is just an example to stress that the use of technology and social media is inevitable for States and even non-State actors, militaries and humanitarian organizations in their response to the needs of persons with disabilities during armed conflict in general and evacuations in particular.

Technology can be a powerful tool for advancing the protection and rights of persons with disabilities, but caution must be taken as it also raises a number of risks. Artificial intelligence and machine-learning technologies are being used to address the needs of refugees and IDPs, prevent human trafficking and combat child labour. However, the use of non-inclusive data sets that do not consider or account for persons with disabilities – owing to the inherent cultural, religious and societal biases and prejudices of software developers – will inevitably further increase the discrimination, marginalization and harm faced by persons with disabilities during humanitarian emergencies.⁶⁵ Overcoming this and other risks

63 See the UNHCR Refugee Zakat Fund “Fatawa” webpage, available at: <https://zakat.unhcr.org/blog/en/fatawa>.

64 *Ibid.*

65 *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/HRC/49/52, 28 December 2021.

requires consultation and engagement with persons with disabilities and their representative organizations in the development and implementation of such technology.

Long-term assistance and services for persons with disabilities

As conflicts take on a more protracted nature, adjustments need to be undertaken to appropriately address the long-term impact on the civilian population. IHL requires that if and when civilians are transferred or evacuated, the party to the conflict undertaking such actions must – to the extent possible – ensure that conditions of shelter, hygiene, health, safety and nutrition are satisfactory to the needs of the individuals involved.⁶⁶ What is considered to be satisfactory has been interpreted to rely on the specific needs of the individual, eschewing a one-size-fits-all approach.⁶⁷ This means that persons with disabilities must be given equal access to long-term assistance and services like medical care, socio-economic programmes, rehabilitation, education and psychological support that are tailored to their needs.

As we have seen, however, this is rarely the case in practice when authorities or humanitarian organizations provide short- and long-term assistance beyond the initial emergency, as persons with disabilities and their needs remain mostly unconsidered and invisible. Lack of comprehensive data on disability within humanitarian and development organizations makes implementation, monitoring and evaluation of inclusive long-term assistance and development programming difficult and means that the needs of persons with disabilities can never be sufficiently addressed. For example, children with disabilities are regularly denied access to education, and even when education is available, the lack of assistive devices and staff trained to provide education to such children makes access nearly impossible.⁶⁸

Lack of recognition of the diversity of disability and deficiency in the understanding of their long-term support needs often leaves persons with disabilities in highly vulnerable situations even after they have escaped active conflict zones. In instances of longer-term assistance, Articles 24, 25, 26 and 28 of the CRPD provide sufficient guidance by requiring that persons with disabilities be given access to education and health services “including health-related rehabilitation” and “adequate food, clothing and housing”, without discrimination and on an equal basis with others.⁶⁹ The practical goal at this stage is to ensure that individuals are able to begin re-stabilizing their lives, and this reality requires a disability-inclusive approach regarding medical care, socio-economic programmes, rehabilitation, education and psychological support to

66 GC IV, Art. 49.

67 ICRC Customary Law Study, above note 9, Rule 13.

68 Human Rights Watch, *Central African Republic: People with Disabilities Left Behind*, 28 April 2015, available at: www.hrw.org/news/2015/04/28/central-african-republic-people-disabilities-left-behind.

69 CRPD, above note 1, Arts 24, 25, 26, 28.

overcome not simply the new barriers imposed by armed conflict but also many of the barriers that existed in peacetime.

It is also worth noting that in the context of long-term assistance, many of the challenges regarding access are directly related to reinforced stereotypes and biases towards persons with disabilities due to lack of awareness, sensitization and training among staff. Many donor States and organizations that provide the funding for development programming within these protracted conflict settings lack a disability-inclusive approach requirement within their grant application selection criteria. Article 32 of the CRPD notes that States, through “partnership with relevant international and regional organizations” and specifically with organizations of persons with disabilities (OPDs), must ensure that their international cooperation efforts, “including international development programmes, [are] inclusive of and accessible to persons with disabilities”.⁷⁰ This obligation means that States must require the inclusion of a disability perspective as part of their international development grant-making and programming; it also directly mandates engagement with OPDs in order to overcome built-in exclusion and ensure complete accessibility.

Disability is a form of human diversity and is usually a permanent or prolonged condition, although it can be short-term and temporary in nature. Therefore, a disability-inclusive approach that considers long-term assistance and the specific needs of persons with disabilities is a must for responding to those needs both during armed conflict and in peacetime. At present, the world is a long way from achieving this objective in peacetime, let alone during armed conflict, with all the challenges, risks and impairments that are exacerbated by it. The disability-inclusive approach should be institutionalized and systematized by both State authorities and all relevant organizations and actors.

In Muslim contexts, it will be useful to partner with local, regional and international OPDs. These partnerships will facilitate and expedite cooperation in responding to the specific needs of persons with disabilities during armed conflict. Moreover, partnerships with academic and research institutions focusing on disability inclusion that can identify local challenges, biases and risks for persons with disabilities and suggest policy recommendations to address them are essential. It will also be helpful to use the Islamic system of *waqf* (endowments, trusts), which can immensely contribute to permanent or long-term assistance and services for persons with disabilities. Jamal Krafess writes:

In addition to emergency aid and other assistance, the Muslim religion also encourages humanitarian acts which will bring about lasting change in people’s lives. There are numerous hadiths on this subject, in one of which, according to Aicha (the Prophet’s wife), the Prophet says: “the good work which God likes the best is the one which lasts, even if it is small...” In another hadith he affirms the continuity of the reward even after death:

70 *Ibid.*, Art. 32.

“When a man dies his works stop bringing him a reward with the exception of three actions: continuous charity ...”⁷¹

The Islamic law of *waqf* is based not on the Qur’an but on the concept of continuous charity mentioned in this Hadith.⁷² *Waqf* is therefore called a *ṣadaqah jāriyah* (a continuous/recurring charity) because its benefit for the beneficiaries is designed to be permanent, long-term, stable and irrevocable. In fact, “[s]everal scholars of Islamic law have suggested that Islamic influence was prominent in the development of the English trust”.⁷³ There are two types of *waqf*, whereby Muslims can permanently endow property for any laudable objective related to (1) private/family (*waqf ahli*) or (2) public/religious (*waqf khayri*) dimensions. *Waqf* “was commonly used to endow mosques, colleges, hospitals, and other charitable institutions, and a complex body of law emerged to govern the creation and administration of these trusts”.⁷⁴ According to Haitam Suleiman,

Muslim society relied profoundly on the *waqf* for the provision of education at all levels, as well as cultural services, such as libraries and lecturing, scientific research in all material and religious sciences and health care, including the provision of services of a physician, hospital services and medicines. The evidence points to the substantial economic significance of the *waqf* system, and lies in the variety of services provided by the *waqf*. Therefore, because the *waqf* supported many economic sectors the evolution of Islamic civilisation is incomprehensible without taking account of [it].⁷⁵

Unlike *zakah*, *waqf* is voluntary and its beneficiaries can be Muslims and non-Muslims. Simply put, a person can donate a property or a (part of a) revenue from a property permanently for specific beneficiaries or goals. For example, a person can permanently donate a building or the revenue from a property or piece of land for research in disability studies, medical care or assistive devices, education of children with disabilities, or socio-economic programmes for persons with disabilities.

71 J. Krafess, above note 54, p. 334.

72 Haitam Suleiman, “The Islamic Trust *Waqf*: A Stagnant or Reviving Legal Institution?”, *Electronic Journal of Islamic and Middle Eastern Law*, Vol. 4, 2016, p. 30.

73 Monica M. Gaudiosi, “Influence of the Islamic Law of *Waqf* on the Development of the Trust in England: The Case of Merton College”, *University of Pennsylvania Law Review*, Vol. 136, 1988, p. 1232.

74 *Ibid.*, p. 1234. See also H. Suleiman, above note 72, p. 32.

75 H. Suleiman, above note 72, p. 32. Other examples of “projects financed by *waqf* have been very diverse, covering social, humanitarian, cultural and economic domains. They have included the sinking of wells, the construction of water fountains, the construction of homes for the poor unable to pay rent, free hostels and hotels for travellers, the maintenance of bridges and roads, the organization of funerals for the poor, the upkeep of cemeteries, help for the blind, the handicapped and the imprisoned, the financing of weddings for the unmarried poor, the construction and maintenance of orphanages, food centres serving free meals, the construction and maintenance of mosques, and the provision of milk for children. ... In the health sector, *waqf* allowed for huge innovations such as mobile hospitals which moved from village to village, as well as emergency teams in places where large meetings were held. There were fifty hospitals in the Cordoba region of Andalusia alone. The hospitals offered diverse services, for instance surgery, ophthalmology, traumatology and psychiatry.” See J. Krafess, above note 54, p. 338.

The system of *waqf* links Muslim individuals to the needs of their societies and motivates them to become positive and active participants in the service of bringing about welfare in society and responding to the needs of citizens. The system of *waqf* has contributed to the welfare of society throughout Islamic history, and as an indication of its current significance and the huge amount of wealth involved, there are ministries called the Ministry of Endowments and Religious Affairs in Muslim-majority States such as Oman, Qatar, the Sudan, Egypt, Syria, Somalia, Jordan, Kuwait, Morocco, Bahrain and Algeria. Other Muslim-majority States include the institution of *waqf* under other structures within the government, such as the General Authority of Islamic Affairs and Endowments in the UAE.

As an example of the use of *waqf* for the assistance of persons with disabilities in non-armed conflict contexts, the Indonesian Dompot Dhuafa Foundation provides capital assistance to empower persons with disabilities to run their own businesses through the Economic Empowerment Programme.⁷⁶ However, it is unfortunate that the potential of the *waqf* system has not been used in long-term assistance and services to persons with disabilities in armed conflict in particular.

It is of paramount importance to add here that persons with disabilities and their representative organizations should work with all relevant organizations to shape the approaches, responses and programmes that aim at fulfilling their needs. Indeed, throughout Islamic history disabilities have not prevented people from becoming leaders in society and in various academic disciplines such as Islamic law, theology and art. As far back as the ninth century, some works were devoted to the biographies and achievements of prominent persons with disabilities in Islamic civilization.⁷⁷ It is worth mentioning here the famous incident that took place with ‘Abd Allah ibn Umm Maktum, the first blind Muslim, who undertook the *hijrah* (flight) with the Prophet Muhammad from Mecca to Medina (about 450 kilometres) on 16 July 622. Chapter 80 of the Qur’an begins by admonishing the Prophet Muhammad for turning away from ibn Umm Maktum, who once came to the Prophet seeking religious guidance and obviously not knowing that the Prophet was in the middle of discussions and negotiations with a delegation of the leaders of Quraysh. The Islamic sources explain that the Prophet appointed ibn Umm Maktum several times as the leader of Medina in his absence.⁷⁸ Thus, ibn Umm Maktum was acting head of the city-State of Medina and also led the congregational prayer in the Prophet’s absence.

76 Andika Primasiwi, “Dompot Dhuafa Berdayakan Kaum Disabilitas Melalui Program Pemberdayaan Ekonomi”, *Suara Merdeka*, 5 December 2018, available at: www.suaramerdeka.com/nasional/pr-0478910/dompot-dhuafa-berdayakan-kaum-disabilitas-melalui-program-pemberdayaan-ekonomi. The authors thank Muhammad Fikri Pido for the translation from Indonesian.

77 M. F. H. ‘Abdel-Hay, above note 10, p. 388.

78 As noted by Brenton Kinker, ‘Abd Allah ibn Umm Maktum was “a blind man who achieved fame as an avid student, eventual governor of Medina, leader of prayer, and commander of military expeditions – appointed for all these tasks by Muhammad himself.” Brenton Kinker, “An Evaluation of the Prospects for Successful Implementation of the Convention on the Rights of Persons with Disabilities in the Islamic World”, *Michigan Journal of International Law*, Vol. 35, No. 2, 2014, p. 466.

This is an example of the exercise of the right of persons with disabilities to participate in political and public life, as provided in Article 29 of the CRPD, which requires States Parties to “guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others”. Nonetheless, two of the seven conditions stipulated by the renowned Islamic constitutional jurist al-Māwardī (d. 1058) for eligibility for the position of the caliph (head of the historical umbrella Islamic State government system) are being of sound hearing, sight and speech and being free from physical disabilities that prevent him from movement.⁷⁹ The point here is that the rights of persons with disabilities have been deliberated throughout Islamic history, and recalling Islamic law and early Islamic precedents can sometimes immensely influence behaviour and make positive societal change in relevant Muslim contexts.

Conclusion

The current state of international law and international society is State-centric, but the reality on the ground at the moment shows that the great majority of armed conflicts are non-international armed conflicts, and the majority of these conflicts include NSAG parties to the conflict who use Islamic law as their source of reference. The present study has shown that Islamic law can positively contribute to efforts that aim at impactful mainstreaming of disability and use of the twin-track approach to humanitarian responses and the protection of persons with disabilities in armed conflict in Muslim contexts. Nothing is more indicative of this protection than considering the protection of life (*ḥifẓ al-nafs*) as the first of the five ultimate objectives of Islamic law (namely life, religion, intellect, lineage and property),⁸⁰ and the Qur’anic emphasis on the preservation of human dignity (Qur’an 17:70; 2:30–33; 45:12–13).

The law, lawyers, legal concepts and legal doctrines must encompass innovative ways to enhance compliance with the law. Legal innovation when it comes to many contemporary humanitarian issues in relevant Muslim contexts means sometimes revisiting Islamic law provisions going back over a millennium, because these provisions have a huge impact on both State and non-State actors.

Persons with disabilities are protected and accounted for by IHL and Islamic law, which are further informed by the CRPD. Unfortunately, the lack of practical implementation of the obligations to provide specific protection, services and assistance to persons with disabilities means that the oversized impact that armed conflict has on such persons will continue to be a preventable truth. Overcoming this gap will require the collection of disaggregated data on disability, as is set forth in Article 31 of the CRPD, in order to ensure

79 ‘Ali ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sultāniyyah wa al-Wilāyāt al-Dīniyyah*, Dār al-Ḥadīth, Cairo, 2010, p. 19.

80 See, for example, F. Opwis, above note 29. For some Islamic scholars, the protection of life comes second after the protection of religion.

comprehensive information as to the location of persons with disabilities and the diversity of their disabilities and associated needs. This data can and must then be used to create accessible advance warnings of impending attacks, to adjust targeting algorithms and assessment tools to incorporate the patterns of life of persons with disabilities, and to revise military manuals and trainings for commanders and soldiers. Additionally, this data can and must be used to mainstream disability into the humanitarian response by developing accessible evacuation procedures, ensuring inclusive access to essential services and information, revising emergency response policies, and creating targeted programming to address the particular needs of persons with disabilities. As authorities undertake the development and implementation of changes to policies and procedures to be more inclusive of disability, it is imperative that persons with disabilities and their representative organizations are consulted and directly involved.

Beyond the collection of data, shifts need to occur within States, militaries and humanitarian organizations to sensitize their policies, rules, practices and staff to the needs of persons with disabilities, in both Muslim and non-Muslim contexts. Trainings directly addressing the legal requirements of IHL and the CRPD to account for and provide particular protection and support to persons with disabilities are essential. All of this must be done in close coordination with persons with disabilities, OPDs and their representative organizations. This sensitization is necessary to overcome inherent bias related to the perception of persons with disabilities. Including persons with disabilities requires changing entrenched discriminatory cultural, religious and societal norms and embracing persons with disabilities as just that – people who must be protected and respected as envisioned by IHL, Islamic law and the CRPD.

Islamic law provides a layer of support that Muslim cultures can easily and quickly comply with and then relate to the IHL requirements concerning persons with disabilities. The use of an inclusive approach that reflects all relevant mutually reinforcing legal frameworks and traditions is impactful and can influence human behaviour more easily. Clearly, Islamic law, IHL and the CRPD all work towards providing comprehensive and inclusive protections and rights for persons with disabilities during times of armed conflict; what remains to be achieved is a concerted approach translating these legal requirements into practical application in order to ensure that disability-inclusive protection is a reality.