

# Disabled dead bodies: Marking the intersections of international humanitarian law and international human rights law

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## Abstract

*International human rights law (IHRL) provides extensive protections for the living, but little in the way of direct protections for the dead. International humanitarian law (IHL) has more detailed protections for the dead, but is only triggered during armed conflicts. At first glance, this seems to create a protection gap for the dead during peacetime. This article explores how the Convention on the Rights of Persons with Disabilities (CRPD) creates a connection between IHL, IHRL and transitional justice to fill in this perceived gap in protections for the dead. While the CRPD does not explicitly address the dead, IHL contains several specific rules to guide how dead bodies are to be handled. When read together with the CRPD framework, these rules provide ample guidance on the treatment of individuals with disabilities after death. Some IHL protections of the dead extend temporally beyond the conflict, when transitional justice mechanisms should be in play, although neither the CRPD nor IHL address with any specificity how the five pillars of transitional justice – truth, justice, reparation, memorialization and guarantees of non-recurrence – might apply in relation to IHL rules regarding dead bodies. Nonetheless, Article 11 of the CRPD forges a bidirectional link to IHL protections and obligations supporting transitional justice. Accordingly, there is a legal framework for examining the interrelationships between rules in the CRPD, IHL and human rights law writ large, and for how we think about dead bodies under the various regimes of international law. Each ought to inform the others if the implications of CRPD Article 11 are to be fully realized and the siloing and fragmentation of international law avoided.*

**Keywords:** international human rights law, international humanitarian law, transitional justice, protections for the dead, Convention on the Rights of Persons with Disabilities.

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## Introduction

The Convention on the Rights of Persons with Disabilities (CRPD) accords protection to persons with disabilities in all situations of risk, including armed conflict.<sup>1</sup> Its principles include respect for dignity, non-discrimination on the basis of disability, participation, and respect for difference.<sup>2</sup> These reflect core values in international disability rights law and are closely aligned with the values that underpin the rights of the living and the dead under international humanitarian law (IHL).<sup>3</sup>

Treatment of the dead was not a topic contemplated by the drafters of the CRPD, and there is no explicit reference to dead bodies in the CRPD text. Nor do

1 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008) (CRPD).

2 *Ibid.*, Art. 3.

3 For an overview of the most important customary IHL rules, 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), available at: <https://ihl-databases.icrc.org/en/customary-ihl/rules> (all internet references were accessed in February 2025).

other instruments of human rights law address dead persons in any detail. IHL, by contrast, contains multiple rules to guide how dead bodies are to be handled, and these should inform a human rights-based approach in respect of the treatment of the dead. Further, neither the CRPD nor IHL address with any specificity how the five pillars of transitional justice – truth, justice, reparation, memorialization and guarantees of non-recurrence – might apply in relation to IHL rules regarding dead bodies. Nonetheless, one of the more interesting and potentially transformative provisions in the CRPD, Article 11 on the protection of persons with disabilities in situations of risk, forges a bidirectional link to IHL protections and obligations supporting transitional justice, thereby providing a framework and entry point for integrating the rules in the CRPD, IHL and international human rights law (IHRL) and informing international law as it addresses dead bodies under various regimes.

This paper addresses, from an interdisciplinary perspective, IHL rules relating to dead bodies and the interrelationship between those rules and those set out in international disability rights law and IHRL generally. First, we interrogate disabled embodiment under critical disability studies and examine the implications of the social model(s) of disability and its reflection in IHRL for thinking about bodies.<sup>4</sup> We argue, *pace* some important voices in disability studies, that impairment and bodies must be brought back into focus for the purpose of thinking through the implications of embodiment. This position cuts against the grain of a radical social model of disability that rejects disabled bodies as a point of reference and instead foregrounds social barriers that inhibit disability rights.

Next, we address how we ought to think about dead bodies and the law in the context of persons with disabilities under both IHL and IHRL. An examination of historical and contemporary accounts reveals that the bodies of persons with disabilities have often received the kind of treatment that IHL condemns. With IHRL treaties silent on this issue, IHL informs efforts to expose the mutilation, hiding, cremation and related acts that have been carried out against the dead bodies of persons with disabilities who have experienced grave and systemic violations of their human rights in armed conflict and in peacetime. Finally, we bring into conversation ways in which human rights law principles can provide the basis for the protection made explicit under IHL. These include efforts to ensure that transitional justice arrangements in the aftermath of armed conflict or egregious violations of human rights law form part of healing.

## The problem of disabled embodiment

What counts as a legitimate body – a question variously posed by feminist and disability scholars alike<sup>5</sup> – has particular salience for critical disability studies discourse

4 *Ibid.*, Art. 3.

5 See e.g. Chris Shilling, *The Body and Social Theory*, Sage, London, 1993; Susan Bordo, *Unbearable Weight: Feminism, Western Culture, and the Body*, University of California Press, Berkeley and Los Angeles, CA, 1993.

and for thinking about disabled embodiment in IHRL and IHL. These insights are valuable for analyzing the construction of disability in IHL, its various designations of disability and its implications for addressing the dead bodies of persons with disabilities under both IHL and IHRL.

Disability studies theorists hold that the discounting of disabled bodies has wrought significant harm on persons with disabilities under traditional paradigms of disability.<sup>6</sup> The predominant conception of disabled corporeality is the medical model of disability.<sup>7</sup> That model conceives of the disabled body as abnormal and thus emphasizes medical intervention, correction and cure to the exclusion of any other considerations, including the multitude of barriers that may be far more pertinent to the life of a person with disabilities than any medical “fix”.

Illustratively, a deaf person may derive no benefit from medical treatment but, equally, may not regard their hearing impairment as being in need of any reversal. What may be deemed beneficial is communication access such as sign language interpretation, as when they need to access health care, education or employment. An individual with a spinal cord injury may primarily be in need of rehabilitation services and physically accessible spaces, including accessible evacuation during emergencies. The medical model is thus narrow in its orientation and can serve to reinforce the stigmatizing notion that disability is a medical issue and that persons with disabilities are “broken”.

Other conceptualizations of disability paint the person with disabilities as hapless and deserving of charity or as tragic and in need of correction. Disability theorists point out the undercurrents of these perspectives and employ the concept of ableism to expose their stigmatizing and dehumanizing effects. Ableism may be defined as

a network of beliefs, processes and practices that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then is cast as a diminished state of being human.<sup>8</sup>

This concept has application across the diversity of disability and recognizes that not all disabilities are manifest or outwardly visible in a corporeal sense, as with invisible disabilities or psychosocial or intellectual disabilities.

Confronting traditional models of disability (i.e., the medical, charity and personal tragedy models), the social model of disability is a move to recognize that individuals with disabilities are disabled not by their impairments but by the social

6 Rosemarie Garland Thomson, *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature*, Columbia University Press, New York, 1996; Barry Glassner, *Bodies: Overcoming the Tyranny of Perfection*, Lowell House, Los Angeles, CA, 1992; Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability*, Routledge, New York, 1996.

7 See Michael Ashley Stein, “Disability Human Rights”, *California Law Review*, Vol. 95, 2007, p. 75.

8 Melinda C. Hall, “Critical Disability Theory”, in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Winter 2019, available at: <https://plato.stanford.edu/archives/win2019/entries/disability-critical/>.

environments in which they live.<sup>9</sup> Social model theorists accordingly draw a sharp distinction between impairment on the one hand and disability on the other. Thus, the reconceptualization of disability away from socially constructed “abnormality” under traditional paradigms achieves a shift in narrative and performs the important function of focusing attention on the *barriers* in society that lead to exclusion, isolation and disability discrimination. Once the focus moves away from the body and its perceived “deficiencies”, it becomes possible, conceptually and practically, to advance a human rights framework addressing persons with disabilities as equal human beings and active agents. Recognition of the personhood and humanity of persons with disabilities also means accounting for other characteristics that shape human experience and may impact the enjoyment of human rights, such as gender, age, race, ethnicity or socio-economic background.

The social model paradigm, reflected not only in critical disability studies discourses but now also in IHRL and legal literature, thus helpfully departs from traditional conceptualizations that mark disabled bodies as abnormal, deviant and in need of physical or mental intervention to attain (imagined) “normalcy”.<sup>10</sup> In line with the traditional marking of disabled bodies as deficient, the corporeal existence of persons with disabilities is exposed by critical disability theorists for its conceptualization in literature, art, science and the law as a phenomenon to be reviled, corrected where at all possible, and where not, isolated and set apart.<sup>11</sup>

This predominant medical model of disability is written into law – disability becomes a marker of exclusion in many legal regimes – in electoral codes limiting or prohibiting voting on the basis of disability, guardianship regimes stripping away legal recognition and all attendant rights to render decisions, education statutes barring access to quality education, loss of child custody for parents with disabilities, and immigration laws excluding immigration based on disability, among other legislative examples.<sup>12</sup> These exclusions reach into the most personal, intimate and private spheres of life, and for women and girls with disabilities in particular, may especially

9 Rosemary Kayess and Philip French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities”, *Human Rights Law Review*, Vol. 8, No. 1, 2008, p. 6; Anita Silvers, “An Essay on Modeling: The Social Model of Disability”, in D. Christopher Ralston and Justin Ho (eds), *Philosophical Reflections on Disability*, Springer, New York, 2009, pp. 24–25.

10 See Anita Silvers, “Disability”, in Alison M. Jaggar and Iris Marion Young (eds), *A Companion to Feminist Philosophy*, Blackwell, Malden, MA, 1998; Lennard J. Davis, “Constructing Normalcy: The Bell Curve, the Novel, and the Invention of the Disabled Body in the Nineteenth Century”, in Lennard J. Davis (ed.), *The Disability Studies Reader*, 1st ed., Routledge, New York, 1997. The CRPD, above note 1, reflects the social model of disability in the language of preambular paragraph (e) and Article 1.

11 There are many examples of work that challenges traditional models of disability across different fields of study in the humanities and social sciences. See e.g. Colin Barnes, Geof Mercer and Tom Shakespeare, *Exploring Disability: A Sociological Introduction*, 1st ed, Blackwell, Malden, MA, 1999; R. Garland Thomson, above note 6; Rosemarie Garland Thomson, “Feminist Theory, the Body, and the Disabled Figure”, in L. J. Davis (ed.), above note 10.

12 See Janet E. Lord and Michael Ashley Stein, “The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities”, *Washington Law Review*, Vol. 83, No. 4, 2008, p. 449; Janet E. Lord, Deepti S. Raja and Peter Blanck, “Law and People with Disabilities”, *International Encyclopedia of the Social and Behavioral Sciences*, 2nd ed., Vol. 13, 2015.

and directly affect their physical bodies.<sup>13</sup> This tradition of exclusion and oppression prompted disability advocates to embrace a robust social model orientation that under some conceptualizations completely takes the disabled body (and mind) out of the picture.<sup>14</sup> In other words, the emphasis on social barriers, while much needed in reorienting attention to the real obstacles that make human rights enjoyment difficult or even impossible for persons with disabilities, can tend to push away the materiality of the body.<sup>15</sup>

Scholars working in the critical disability studies space have levelled a critique of the social model to the effect that the body has been largely excluded from disability discourse.<sup>16</sup> They have therefore problematized the hard and fast distinction between the medical model and the social model in order to bring the body back into focus. This conceptual move allows for a reconsideration of issues largely left out of or relegated to the margins of disability discourse in both IHL and IHRL, including rules relating to the dead, despoilment of dead bodies, and the fate of family members with disabilities who have died, often en masse in institutions.

## The treatment of disabled bodies in peacetime and in armed conflict

Persons with disabilities have been subjected to systemic violations of international legal norms in times of peace and armed conflict.<sup>17</sup> Many have been the victims of serious violations of IHRL and IHL, and many have died premature deaths as a result.<sup>18</sup> Following death, disabled bodies have been victimized, whether as a

13 Susan Brady, John Britton and Sonia Grover, *The Sterilisation of Girls and Young Women in Australia: Issues and Progress*, Australian Human Rights Commission, Sydney, 2001, available at: <https://humanrights.gov.au/our-work/disability-rights/projects/sterilisation-girls-and-young-women-australia-issues-and>; Open Society Foundations, *Against Her Will: Forced and Coerced Sterilization of Women Worldwide*, 4 October 2011, available at: [www.opensocietyfoundations.org/publications/against-her-will-forced-and-coerced-sterilization-women-worldwide](http://www.opensocietyfoundations.org/publications/against-her-will-forced-and-coerced-sterilization-women-worldwide).

14 R. Kayess and P. French, above note 9.

15 As noted by Loja, Costa, Hughes and Menezes, “[t]he [disability] movement has been recovering this lost corporeal space”. Ema Loja, Maria Emilia Costa, Bill Hughes and Isabel Menezes, “Disability, Embodiment and Ableism: Stories of Resistance”, *Disability and Society*, Vol. 28, No. 2, 2013, p 191. Also relevant here is the work of Zola, who, early on, recognized the need to “bring bodies back in”. Irving Kenneth Zola, “Bringing our Bodies and Ourselves Back In: Reflections on a Past, Present, and Future ‘Medical Sociology’”, *Journal of Health and Social Behavior*, Vol. 32, No. 1, 1991.

16 E. Loja, M. E. Costa, B. Hughes and I. Menezes, above note 15; Sally French, “Disability, Impairment or Something in Between?”, in John Swain, Vic Finkelstein and Sally French (eds), *Disabling Barriers – Enabling Environments*, 1st ed., Sage, London, 1993. For Meekosha, for example, the social model leaves “the impaired body untouched, unchallenged: a taken-for-granted fixed corporeality”. Helen Meekosha, “Body Battles: Bodies, Gender and Disability”, in Tom Shakespeare (ed.), *The Disability Reader: Social Science Perspectives*, Cassell, London, 1998, p. 175.

17 Helen Durham and Gerard Quinn, “Lifting the Cloak of Invisibility: Civilians with Disabilities in Armed Conflict”, *Humanitarian Law and Policy Blog*, 21 April 2022, available at: <https://blogs.icrc.org/law-and-policy/2022/04/21/civilians-disabilities-armed-conflict/>.

18 William I. Pons, Janet E. Lord and Michael Ashley Stein, “Disability, Human Rights Violations, and Crimes against Humanity”, *American Journal of International Law*, Vol. 116, No. 1, 2022, pp. 58–70; See also William I. Pons, Janet E. Lord and Michael Ashley Stein, “Addressing the Accountability Void: War Crimes

consequence of undignified burials, despoilment, mutilation and public display of remains, or disappearances about which we know very little. Documentation of serious violations perpetrated against persons with disabilities is now emerging, leaving a clearer picture of the risks they experience and the harms committed against them. Human rights organizations such as Disability Rights International<sup>19</sup> and Human Rights Watch<sup>20</sup> have documented serious violations of IHRL on the bodies of persons with disabilities across the globe, many of which were carried out during armed conflict.

Civilians with disabilities are more likely to face significant risk of harm in situations of armed conflict.<sup>21</sup> In Nazi Germany, the Hadamar killing centre, part of the Nazi “Action T4” euthanasia programme which exterminated thousands of persons with disabilities, institutionalized persons with disabilities and killed over 15,000 persons between 1941 and 1945. At first, the bodies of the victims were cremated and canisters of random ash were sent to family members. Later, the bodies of victims were placed in mass, unmarked graves. When the US 2nd Infantry Division captured the town of Hadamar in 1945, they uncovered 481 mass graves at the killing centre. The graveyard was enclosed by high walls constructed of concrete and topped with jagged glass. Each burial pit contained up to ten bodies.<sup>22</sup>

against Persons with Disabilities”, *International Review of the Red Cross*, Vol. 105, No. 922, 2022; Jae-Chun Won, Janet E. Lord, Michael Ashley Stein and Yosung Song, “Disability, Repressive Regimes, and Health Disparity: Assessing Country Conditions in North Korea”, *Hague Yearbook of International Law*, Vol. 27, 2014.

- 19 See e.g. Eric Rosenthal *et al.*, *Left Behind in the War: Dangers Facing Children with Disabilities in Ukraine's Orphanages*, Disability Rights International, Washington, DC, 5 May 2022. See also Eric Rosenthal *et al.*, *Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo*, Mental Disability Rights International, Washington, DC, 7 August 2002 (documenting harms to persons with disabilities during armed conflict, though not in relation to dead bodies as such).
- 20 Human Rights Watch, “*It Was Really Hard to Protect Myself*”: *Impact of the Armed Conflict in Syria on Children with Disabilities*, New York, September 2022 (documenting harms to children with disabilities, though not in relation to dead bodies).
- 21 Scholarship on the protection of persons with disabilities during armed conflict is emerging. See especially the thematic issue of the Review on “Persons with Disabilities in Armed Conflict”: *International Review of the Red Cross*, Vol. 105, No. 922, 2022. See also Gerard Quinn, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/76/146, 19 July 2021, paras 92–94.
- 22 Gedenkstätte-Hadamar, “Hadamar Memorial Museum”, available at: [www.gedenkstaette-hadamar.de/en/](http://www.gedenkstaette-hadamar.de/en/); United States Holocaust Memorial Museum, “Hadamar”, *Holocaust Encyclopedia*, available at: <https://encyclopedia.ushmm.org/content/en/article/hadamar>. On 9 December 1946, a US military tribunal opened criminal proceedings against twenty-three leading German physicians and administrators for their willing participation in war crimes and crimes against humanity in Case No. 1 of the subsequent Nuremberg Proceedings. See United States Holocaust Memorial Museum, “The Doctors Trial: The Medical Case of the Subsequent Nuremberg Proceedings”, *Holocaust Encyclopedia*, available at: <https://encyclopedia.ushmm.org/content/en/article/the-doctors-trial-the-medical-case-of-the-subsequent-nuremberg-proceedings>. Prior to the establishment of the Nuremberg Tribunal, US military officials could not try German nationals for murdering their fellow citizens. American prosecutors, however, were able to identify among the Hadamar victims 476 Soviet and Polish forced labourers, who, suffering from tuberculosis, had been sent to their deaths at the facility in the last months of the war. They opened proceedings against seven Hadamar defendants associated with the murders of the “Eastern workers”, leading to convictions. United States Holocaust Memorial Museum, “The Hadamar Trial”, *Holocaust Encyclopedia*, available at: <https://encyclopedia.ushmm.org/content/en/article/the-hadamar-trial>.



Beyond historical instances of mass killings by the Nazi regime, also reported are instances of targeted killings of persons with disabilities by the Khmer Rouge in Cambodia, summary executions of persons with disabilities by non-State armed groups in Colombia and mass killings of persons with psychosocial disabilities in the Rwandan genocide.<sup>23</sup> In many of these instances, the bodies of victims were left behind without burial, disposed of in mass graves to hide their fate, or despoiled.<sup>24</sup>

In contemporary armed conflict, persons with disabilities have endured significant harm. In the conflicts in Ukraine and Gaza, damage to key infrastructure, collapse of basic public services and often frantic evacuations have caused widespread civilian harm. The impact is often especially acute for persons with disabilities. Recent reports have chronicled a familiar pattern for persons with disabilities in both of these conflict zones: abandonment by evacuating caretakers,<sup>25</sup> being turned away from inaccessible shelters,<sup>26</sup> and the worsening of chronic health conditions due to a lack of essential medicine and medical services,<sup>27</sup> among many other harms.

Outside of armed conflict, persons with disabilities have likewise experienced mass atrocities in life and after death. From the 1880s to the 1960s, over 45,000 individuals with disabilities lived and died in state institutions in California.<sup>28</sup> Most were buried anonymously in unmarked or mass graves, identified only by numbers

23 W. I. Pons, J. E. Lord and M. A. Stein, "Addressing the Accountability Void", above note 18.

24 In 1996, the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia launched its first excavation of mass graves in five different sites in the former Yugoslavia. In one of the sites, the Ovčara farm, investigators found what were believed to be the remains of the 200 patients and staff from Vukovar Hospital. Médecins Sans Frontières, "The Missing and the Dead", *The Practical Guide to Humanitarian Law*, available at: <https://guide-humanitarian-law.org/content/article/3/missing-persons-and-the-dead/>. When the genocide began in Rwanda, Ndera Psychiatric Hospital was not immune to attacks: the building was destroyed, equipment pillaged and records disappeared, and the personnel, patients and locals seeking refuge in the hospital were massacred. Courtney S. Sabey, "Implementation of Mental Health Policies and Reform in Post-Conflict Countries: The Case of Post-Genocide Rwanda", *Health Policy and Planning*, Vol. 37, No. 10, 2022.

25 Amnesty International, *Ukraine: "They Live in the Dark": Older People's Isolation and Inadequate Access to Housing amid Russia's Invasion of Ukraine*, London, 1 December 2023, pp. 7–8. Page 2 of the same report includes a story of a person with a disability being left behind by her caretaker siblings after they were ordered to evacuate. See also E. Rosenthal *et al.*, *Left Behind in the War*, above note 19. For an earlier example, see E. Rosenthal *et al.*, *Not on the Agenda*, above note 19, pp. 9–11.

26 Amnesty International, above note 25, pp. 8–9.

27 Human Rights Watch, *"They Destroyed What Was Inside Us": Children with Disabilities Amid Israel's Attacks on Gaza*, New York, September 2024, p. 3. See also Peter Beaumont, "Disabled Palestinians Unable to Escape Israeli Air Strike", *The Guardian*, 12 July 2014, available at: [www.theguardian.com/world/2014/jul/12/disabled-palestinians-unable-escape-israeli-air-strike](http://www.theguardian.com/world/2014/jul/12/disabled-palestinians-unable-escape-israeli-air-strike); Communication of the Special Rapporteur on the Rights of Persons with Disabilities (and other mandates) to the Government of Israel, 9 October 2024, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=29381>.

28 Disability Rights California, "California Memorial Project: Remembering Those Who Were Forgotten", available at: [www.disabilityrightscalifornia.org/what-we-do/programs/california-memorial-project-cmp](http://www.disabilityrightscalifornia.org/what-we-do/programs/california-memorial-project-cmp).



that have long since vanished.<sup>29</sup> Another example is from Massachusetts, where the institution originally known as the “Massachusetts School for the Idiotic and Feeble-Minded Youth” and later the Metropolitan State Hospital were responsible in the period between 1947 and 1979 for burying 296 of their patients with disabilities in unnamed graves on a plot of former marshland.<sup>30</sup> These graves of individuals with disabilities were made of small concrete slabs with a “C” or “P” etched into the stone denoting religious status, Catholic or Protestant, and a number indicating the order in which they were buried.<sup>31</sup> These individuals with disabilities died in institutions without receiving the dignity, recognition and acknowledgment they deserved as human beings.

## International human rights law and disability

IHRL – rules emerging from treaties and international customary law – gives rise to individual and group rights that States are obliged to respect, protect and fulfil. The progressive development of modern IHRL since the founding of the United Nations (UN) has resulted in an increasingly articulate body of rules capable of addressing a wide range of protection issues in relation to some of the same groups that enjoy special protection under IHL. These include human rights conventions establishing human rights protections for women, children, and persons with disabilities.<sup>32</sup>

While IHRL provides a strong basis for human rights protections, the mainstream instruments rarely address rights in relation to dead persons,<sup>33</sup> and nor do the core human rights conventions explicitly provide for the right to know the fate of relatives. The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) is the partial exception, as it references the remains of victims of enforced disappearance in relation to the State obligations to “guarantee to any person with a legitimate interest in this information” access to information

29 Disability Rights California, “Restoring Dignity: The Mission of the California Memorial Project”, available at: [www.disabilityrightscalifornia.org/latest-news/restoring-dignity-the-mission-of-the-california-memorial-project-cmp](http://www.disabilityrightscalifornia.org/latest-news/restoring-dignity-the-mission-of-the-california-memorial-project-cmp).

30 The name was later changed to the Walter E. Fernald Developmental Center. For more on the impact of Fernald in creating a mass movement of institutionalization in the United States and beyond, see Alex Green, *A Perfect Turmoil: Walter E. Fernald and the Struggle to Care for America's Disabled*, Bellevue Literary Press, New York, 2025.

31 Asia London Palomba, *Below the Surface: A Special Report*, available at: <https://below-the-surface.github.io/main.html>.

32 Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990); Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13, 18 December 1979 (entered into force 3 September 1981); CRPD, above note 1.

33 The partial exception to the textual silence regarding the dead in IHRL treaties can be found in the International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010) (ICPPED), Arts 15, 17(3)(g), 18(1)(g), 24(3). There are other implied protections for the dead and their families that may be inferred from the right to life, as argued in Morris Tidball-Binz, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/56/56, 25 April 2024, paras 9–10.

about, “in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains”, among other things.<sup>34</sup>

Most relevant when considering individuals with disabilities and the inter-relationship between rights protecting them in life and death is the CRPD. That treaty, now nearing universal ratification, is first and foremost an instrument providing a major break with traditional conceptualizations of disability and, drawing on a paradigm shift embracing a social model understanding of disability, has made possible a human rights-oriented approach to protecting persons with disabilities.

## International human rights law, disability and dead bodies

The CRPD provides the most detailed international legal framework on the human rights of persons with disabilities. Now ratified by 191 States across the globe, the treaty clarifies that persons with disabilities are one among many specific groups entitled to specific human rights protection in all circumstances, including in armed conflict.<sup>35</sup> Notably, though comprehensive in its scope, the CRPD makes no mention of the treatment or disposition of dead bodies, whether in peacetime or in the context of armed conflict. Yet the CRPD framework is pertinent in several important respects to sorting through the rights of persons with disabilities while they are living, and the treatment and disposition of their remains after death.

The CRPD affirms that States are obligated to protect persons with disabilities in all situations of risk, and that they bear additional duties to investigate and prosecute perpetrators of human rights violations against such persons. Article 11 provides:

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.<sup>36</sup>

Several important observations should be made in relation to the implications of Article 11 for rights relating to dead persons. First, Article 11 of the CRPD specifically obliges States to protect persons with disabilities from harm in situations of risk, consistent with IHL and IHRL. The necessity of such protection is recognized at first instance in the CRPD's preamble, which proclaims that “the observance of

34 ICPPED, above note 33, Art. 18(1)(g). See also Working Group on Enforced or Involuntary Disappearances, General Comment No. 10, “General Comment on the Right to the Truth in Relation to Enforced Disappearance”, in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011, para. 39.

35 CRPD, above note 1, Art. 11.

36 *Ibid.*

applicable human rights instruments [is] indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation”.<sup>37</sup> Second, Article 11 embraces complementarity not only between IHL and human rights law but across all domains of international law wherein protection is pertinent and where risk to persons with disabilities is apparent. In this sense, Article 11 plays a unifying role in drawing together obligations to safeguard and protect persons with disabilities in both peace and conflict situations. As such, the provisions of human rights law and IHL can be read bidirectionally, each informing the other, reflecting the principle of integration and fully consonant with the Vienna Convention on the Law of Treaties, which recognizes, in Article 31(1)(c), that treaty interpretation may take into account “any relevant rules of international law applicable in the relations between the parties”.<sup>38</sup>

Beyond Article 11, several provisions in the CRPD directly relate to serious harms and prescribe obligations to protect persons with disabilities against the occurrence of harms. From these provisions we can infer obligations in respect of deceased persons, their remains, and the rights of their families to know their fate. The CRPD recognizes the right to life for persons with disabilities (Article 10); prohibits torture or other cruel, inhuman or degrading treatment (Article 15), as well as exploitation, violence and abuse (Article 16), in respect of persons with disabilities; and protects the physical and mental integrity of persons with disabilities (Article 17).<sup>39</sup>

It follows that these protections are hollow absent protection after their violation. In other words, where violations of these obligations result in the death of an individual with a disability, dignity – one of several core principles of the CRPD – necessitates that their bodies are respected. Trenchantly, Article 16 of the Convention contains an explicit provision that implicitly covers rights in relation to dead persons and requires States to undertake measures “to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted”.<sup>40</sup> Victims of potentially unlawful killings or other types of prohibited harms are protected under this provision. The protection also extends beyond the immediate victim to family members. The investigative obligation would have little meaning if it neglected to address the circumstances surrounding an unlawful death, the final disposition of the victim’s human remains, and the ways in which the rights and interests of families are also impacted.<sup>41</sup>

37 *Ibid.*, Preamble.

38 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 31(1)(c).

39 CRPD, above note 1, Arts 10, 15–17.

40 *Ibid.*, Art. 16.

41 See M. Tidball-Binz, above note 33, para. 10: “In situations of violations of the right to life, the search for the deceased, the identification of human remains and their return to relatives for dignified burials according to the family’s customs and beliefs can be a means to advance the right to remedy. Additionally, the prohibition against torture and ill-treatment requires ensuring that the remains of a deceased person are treated with dignity and protected, to prevent the infliction of severe harm and suffering on the relatives of the deceased.”

The CRPD provides no explicit protection in relation to the rights of relatives of persons with disabilities to know the fate of their family members. The drafters of the CRPD opted with intentionality to maintain a sharp focus on persons with disabilities themselves and not the rights of their families or caregivers. That said, human rights treaty bodies have inferred the right to know – for example, reading into the right to a remedy the requirement for States to provide information about the violations of human rights and where a victim dies, as well as the location of the burial site of the deceased.<sup>42</sup> While the CRPD provides no specific right to a remedy, this right is easily inferred from the rights accorded to persons with disabilities under Article 13, the provision on equality and non-discrimination in accessing justice.<sup>43</sup> Finally, Article 16 of the CRPD and its provision on the duty to investigate and prosecute wrongdoers who have harmed persons with disabilities links to the right to know. As one commentator has noted, “one can only ‘know’ what happened if and when the facts surrounding the death are established, and often this information only follows from an investigation”.<sup>44</sup>

The foregoing demonstrates the connectivity of the CRPD to domains beyond IHRL, including IHL. Its general principles are especially capable of informing other protection regimes within a disability-competent frame. That said, the CRPD does not in specific terms address obligations relating to dead bodies in the way that IHL does. Accordingly, this gap affords the opportunity to understand how the two regimes interact in respect of persons with disabilities and IHL rules relating to dead persons. Whereas the emphasis in the literature on Article 11 of the CRPD is almost exclusively focused on how the CRPD ought to inform *other* domains of international law, especially those that lack a disability sensibility, the present focus offers the opportunity to demonstrate how the linkages are bidirectional and how other domains like IHL can inform the CRPD and IHRL through Article 11.

## International humanitarian law and disabled bodies

IHL consists of treaty- and custom-based international law focused on regulating the methods and means of warfare as well as providing protections for the victims of war.<sup>45</sup> Unlike IHRL, most of IHL does not formally apply outside of armed

42 Human Rights Committee, *Staselovich v. Belarus*, Communication No. 887/1999, UN Doc. CCPR/C/77/D/887/1999, 3 April 2003, para. 11. Moreover, in the ICPPED, above note 33, Art. 24, a victim is not only the person who is subjected to enforced disappearance but “any individual who has suffered harm as the direct result” of the crime. As a consequence, the family and the community to which the disappeared person belonged can all be regarded as victims under the ICPPED.

43 CRPD, above note 1, Art. 13. See also UN Office of the High Commissioner for Human Rights, *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, August 2020.

44 Daniela Gavshon, “The Dead”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 284.

45 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996 (Nuclear Weapons Advisory Opinion), para. 75.

conflicts.<sup>46</sup> IHL norms are often the *lex specialis* of armed conflict,<sup>47</sup> though it has been widely accepted that IHRL treaties also apply in armed conflict to the extent that they do not conflict with IHL.<sup>48</sup> While less of a focus, IHL standards may also inform IHRL in areas insufficiently developed under the human rights framework. The CRPD itself lends support for this proposition in that Article 11 of the Convention is explicitly bidirectional and interactional – its application requires that the Convention’s provisions inform and are informed by other protection regimes of international law.<sup>49</sup> In many regards, therefore, these two regimes – IHRL and IHL – are complementary and mutually reinforcing. Illustratively, much like IHRL, IHL is animated by a concern for the fundamental humanity of those people falling within its purview. For example, some of the key values embodied in IHL are closely aligned with the CRPD core principles noted above, including the Convention’s respect for dignity, non-discrimination on the basis of disability, and respect for difference.

IHL’s connection to “dignity” is clear through the wording of Article 3 common to the four Geneva Conventions (common Article 3), which is permeated with concerns about human dignity and, moreover, expressly prohibits “outrages upon personal dignity”.<sup>50</sup> This aligns with Article 3 of the CRPD, wherein dignity is a general principle of the treaty. Common Article 3 is of special importance in the realm of IHL, as it has been found to represent the “elementary considerations of humanity” which constitute the minimum yardstick for the rules that apply in all armed conflicts, regardless of classification.<sup>51</sup> The core of common Article 3 is an obligation to

46 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); 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). Common Articles 2 and 3 to the Geneva Conventions provide the basis for determining when the Conventions apply; some obligations arising during armed conflict do extend beyond the conclusion of the conflict, including some of the duties relating to the handling of dead bodies. See e.g. the obligations in Article 17(3) of GC I and Article 120 of GC III regarding the marking and maintenance of gravesites so that they can “always be recognized”. Other IHL provisions, such as dissemination obligations, expressly apply during times of peace as well as during armed conflict. See e.g. GC I, Art. 47.

47 See Nuclear Weapons Advisory Opinion, above note 45, para. 25. Here, the ICJ explains that although the protections against arbitrary deprivation of life found in the International Covenant on Civil and Political Rights (ICCPR) do not cease in time of war, the test to determine if the right is violated requires looking at “the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities”.

48 See e.g. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004* (Wall Advisory Opinion), paras 105–106.

49 CRPD, above note 1, Art. 11.

50 See Claire Moon, “What Remains? Human Rights after Death”, in Kirsty Squires, David Errickson and Nicholas Márquez-Grant (eds), *Ethical Approaches to Human Remains*, Springer, Cham, 2019, pp. 47–50.

51 ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, *ICJ Reports 1986*, para. 218.

provide humane treatment to those not or no longer actively participating in hostilities.<sup>52</sup> Many other provisions throughout the Geneva Conventions are also clearly concerned with dignity, such as the prohibitions against “inhuman”, “degrading” and “humiliating” treatment.<sup>53</sup>

Other IHL concepts track with the CRPD’s core value of non-discrimination on the basis of disability and respect for difference. Multiple IHL treaty provisions either prohibit adverse distinctions or require heightened protections on the basis of specific differences. For example, parties to an international armed conflict (IAC) are prohibited from making adverse distinctions “on race, religion, or political opinion” in their treatment of the civilians of an adverse party to the conflict.<sup>54</sup> Common Article 3 applies an even broader prohibition on adverse distinction to any person not or no longer taking active part in hostilities, requiring that parties provide such persons with humane treatment “without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”. Additionally, such parties are required to provide special protections to women, children, the wounded and sick, the infirm and expectant mothers.<sup>55</sup>

These IHL articles often do not specifically mention persons with disabilities, and when they do they rely on antiquated terminology such as “infirm”.<sup>56</sup> However, the open-ended nature of the “other similar criteria” wording of common Article 3 and the overarching humanitarian impulse of IHL protections supports the inference that discriminating on the basis of disability is similarly prohibited.<sup>57</sup> The provisions of CRPD Article 11, discussed above, reinforce these protections and make them explicit.<sup>58</sup>

The protections afforded by IHL for dead bodies contain no textual references to disability – however, the dead persons who are protected by various IHL protections are very often rendered disabled before passing away. In one of the early

52 Common Article 3 establishes the obligation of humane treatment and provides a non-exhaustive list of inhumane actions which are prohibited.

53 See e.g. GC I, Art. 50; GC II, Art. 51; GC III, Arts 52, 89; GC IV, Arts 95, 119, 147. These words are also interspersed throughout common Article 3.

54 GC IV, Art. 27.

55 *Ibid.*, Arts 16, 24, 27, 38, 50.

56 For a sampling of this language, see e.g. GC I, Arts 16–18, 20–21.

57 ICRC, *How Law Protects Persons with Disabilities in Armed Conflict*, Geneva, 2017, p. 2, available at: [www.icrc.org/sites/default/files/document/file\\_list/how\\_law\\_protects\\_persons\\_with\\_disabilities\\_in\\_war.pdf](http://www.icrc.org/sites/default/files/document/file_list/how_law_protects_persons_with_disabilities_in_war.pdf). This report states: “Disability’ is not explicitly mentioned as a prohibited ground of adverse distinction under IHL. However, adverse distinction based on ‘any other similar criteria’ to those explicitly enumerated is equally prohibited; this includes adverse distinction based on disability.” See also ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), para. 605: “As is evident from the addition of the concluding phrase ‘or any other similar criteria’, this list is not exhaustive but only illustrative. Adverse distinction founded on other grounds, such as age, state of health, level of education or family connections of a person protected under common Article 3 would therefore equally be prohibited.”

58 The other IHRL treaty to make such an express connection is the Convention on the Rights of the Child, above note 32. Additionally, notwithstanding the lack of a similarly direct statement in the ICCPR, the ICJ has repeatedly found that the ICCPR applies in armed conflict, though its interpretation is subject to the application of IHL as the *lex specialis* of armed conflict. Nuclear Weapons Advisory Opinion, above note 45, para 25; Wall Advisory Opinion, above note 48, paras 105–106.

IHL codification efforts, the 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (St Petersburg Declaration), States acknowledged that disabling the armed forces of the opposing State is the primary means by which States pursue their “only legitimate object” during war: to “weaken the military forces of the enemy”.<sup>59</sup> The St Petersburg Declaration provides that to accomplish war’s sole legitimate objective, “it is sufficient to *disable* the greatest possible number of men”.<sup>60</sup> This is a reminder that IHL accepts that parties to a conflict intentionally create widespread disability, though IHL provides various limits on the methods, means and lawful targets of these efforts to disable. Of course, many of those persons disabled in armed conflict end up dying.

Thus, the graves of those killed in armed conflict often hold disabled bodies, at least as disability is understood under IHL: persons who have physical disabilities, such as amputees, older persons with disabilities (the “infirm”), children with disabilities, and individuals with intellectual, mental or sensory disabilities. The bodies of these casualties of war are necessarily marked by various forms of severe trauma. While some may have started the conflict with pre-existing disabilities, a great many more acquired impairments during the conduct of hostilities. These bodies are not merely war dead – they are victims of armed conflict that were disabled so severely that they ultimately succumbed to the final and complete disability of death. When we speak of the bodies destroyed by war, then, we are generally speaking, in the most literal sense, of disabled bodies. Thus, though IHL treaty protections of the dead do not make explicit textual references to disability, this may be due to the fact that the disabled status of the dead is so obviously linked to the entire endeavour of armed conflict that it would have been redundant to make separate provisions for dead bodies of persons with disabilities. Indeed, the very nature of war is such that most of the bodies of the dead in armed conflict would fall within the category of disabled bodies.

## Specific protections for the dead arising under IHL

IHL imposes detailed requirements relating to the proper treatment of dead bodies. These obligations are infused with a respect for individual human dignity and a pragmatic concern with easing the transition to peaceful post-conflict relations between adversaries. This makes the IHL protections for the dead an ideal lens through which to consider how IHL, IHRL and transitional justice inform and reinforce each other. These IHL protections for the dead can be roughly grouped into three related categories requiring parties to recover, respect and record information about the bodies of those killed in armed conflict. Each of these categorical groupings of protections is examined in more depth below.

59 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 29 November/11 December 1868 (St Petersburg Declaration).

60 *Ibid.*, Preamble (emphasis added).



## Recover

Parties to an IAC have long been obligated to search for and collect the bodies of those killed in hostilities.<sup>61</sup> These protections are premised on the importance of respecting the dignity of the dead and to avoid people going missing.<sup>62</sup> Both of these concerns directly correlate with issues addressed in human rights treaties adopted many years after the 1949 Geneva Conventions, including the CRPD and the ICPPED. Though the text of common Article 3<sup>63</sup> does not by itself create an obligation to search for the dead in a non-international armed conflict (NIAC), this obligation was expressly stated in Article 8 of Additional Protocol II (AP II),<sup>64</sup> which applies to some NIACs. Some scholars have also concluded that the rule has the status of customary international law in all armed conflicts regardless of classification.<sup>65</sup>

## Respect

The obligation to search for the dead in the Geneva Conventions is directly coupled with an obligation to respect the bodies recovered.<sup>66</sup> This is sometimes phrased in these treaties as preventing “despoilment”<sup>67</sup> or “pillage and ill-treatment”.<sup>68</sup> Additional Protocol I (AP I) broadens the obligation to be one of “respect”.<sup>69</sup> The 2016 Commentary on Geneva Convention I (GC I) by the International Committee of the Red Cross (ICRC) emphasizes that a key reason for requiring recovered bodies

61 See GC I, Art 15(1), stating: “At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to ... search for the dead and prevent their being despoiled.” See also the 1929 predecessor to GC I, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, Art. 3, stating: “After each engagement the occupant of the field of battle shall take measures to search for the wounded and dead, and to protect them against pillage and maltreatment.” Though the protections of GC I are generally limited to the “wounded and sick of the armies in the field”, similar obligations are created regarding the bodies of shipwrecked sailors and civilians in GC II, Art. 18(1), and GC IV, Art. 16(2).

62 ICRC, *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*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), para. 1508.

63 Common Article 3 includes the requirement that the “wounded and sick shall be collected and cared for”, though this has not been understood to extend the obligation to the dead. However, Rule 12 of the ICRC Customary Law Study, above note 3, suggests that this obligation has the status of customary international law even in NIACs on the basis of the text of Additional Protocol II (AP II) and State practice.

64 Protocol Additional (II) to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 8; ICRC Commentary on GC III, above note 57, para. 797.

65 ICRC Customary Law Study, above note 3, Rule 112; ICRC Commentary on GC III, above note 57, para. 797.

66 GC I, Art. 15(1).

67 *Ibid.*

68 GC IV, Art. 16(2).

69 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 12 July 1978) (AP I), Art. 34(1).

to be treated with respect is to avoid setting off a “cycle of barbarity”.<sup>70</sup> This is a concern that overlaps with one of the key purposes of transitional justice, which will be explored further in the next section. This obligation of respect for the dead has been found to extend to NIACs through common Article 3’s prohibition against “outrages upon personal dignity, in particular humiliating and degrading treatment”,<sup>71</sup> as well as the text of AP II Article 8 obligating parties to “search for the dead, prevent their being despoiled, and decently dispose of them”.

There are also a number of protections under IHL relating to the respectful internment of dead bodies. Generally, bodies must be respectfully and honourably buried or cremated,<sup>72</sup> individually<sup>73</sup> and in accordance with the religious rituals to which the person belonged.<sup>74</sup> Gravesites are also required to be respected and properly maintained.<sup>75</sup> The purpose behind these obligations is the “preservation of the dignity of the dead”.<sup>76</sup> As with many other obligations arising under IHL regarding the dead, the obligation to respectfully inter the dead has been interpreted to extend to NIACs through the text of AP II Article 8 and as a matter of customary international law.<sup>77</sup>

## Record

The obligations of parties to an IAC to identify, record and share information regarding the dead are one of the first duties<sup>78</sup> to attach in an IAC and one of the last IHL obligations to expire.<sup>79</sup> From the outset, parties are required to record data about the

70 ICRC Commentary on GC I, above note 62, para. 1508.

71 The 2016 Commentary on GC I cites the International Criminal Court *Elements of Crimes* to support interpreting the extension of this clause to cover dead bodies. ICRC Commentary on GC I, above note 62, para 608. See also Article 8(2)(c)(ii) of the *Elements of Crimes*, which states that “[f]or this crime, ‘persons’ can include dead persons”. International Criminal Court, *Elements of Crimes*, The Hague, 2013, Art. 8(2)(c)(ii) (“War Crime of Outrages upon Personal Dignity”) fn. 57, available at: [www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf](http://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf).

72 There are significant limitations on the use of cremation, discussed in more depth below.

73 See ICRC Commentary on GC I, above note 62, para. 1648.

74 GC I, Art. 17(3); GC II, Art. 20; GC III, Art. 120(4); GC IV, Art. 130(1); ICRC Customary Law Study, above note 3, Rule 115.

75 GC I, Art. 17(3); GC II, Art. 20(2); GC III, Art. 120(4); GC IV, Art. 130; AP I, Art. 34; ICRC Customary Law Study, above note 3, Rules 115–116.

76 ICRC Commentary on GC I, above note 62, para. 1634. It should also be noted that the foundational international law text, *De jure belli ac pacis*, by Hugo Grotius, declares that the right of burial of the dead is part of the law of nations. Hugo Grotius, *De jure belli ac pacis libri tres*, 1646, in James B. Scott (ed.), *Classics of International Law*, Vol. 2, trans. Francis W. Kelsey et al., William S. Hein, Getzville, NY, 1995, Book II, Chap. 19, section I, para. 1.

77 ICRC Customary Law Study, above note 3, Rule 115.

78 See ICRC Commentary on GC I, above note 62, Art. 17, para. 1701: “there is a practical need to make preparations for a graves registration service in peacetime”.

79 See *ibid.*, para. 1702, which notes that with regards to GC I Article 17, “[t]he article does not stipulate an end date for the operations of the graves registration service. Given its functions, it is evident that the service does not – indeed cannot – cease to exist at the conclusion of the conflict. Exhumation and possible repatriation of bodies may take place more frequently after a conflict than during it. For this reason, graves registration services created during the First World War, such as the Commonwealth War Graves Commission (previously the Imperial War Graves Commission) exist to this day.”

dead bodies that they recover, including such details as the deceased's name, date of birth and date of death, as well as information about the cause of death.<sup>80</sup> In instances where the deceased's identity is not known, all information capable of assisting with identification is needed. All four of the Geneva Conventions also include requirements to share this information along with the location of the deceased's remains as soon as possible during the conflict.<sup>81</sup> The Geneva Conventions further require the establishment of a Graves Registration Service<sup>82</sup> and Information Bureau<sup>83</sup> in each country that is a party to an IAC in order to facilitate this process of information collection and exchange.

There are heightened requirements for records related to cremation as a result of the strong preference<sup>84</sup> in the Geneva Conventions for burial<sup>85</sup> of bodies rather than cremation. The default method under IHL for disposing of bodies is via a respectful burial, with cremation only permitted "for imperative reasons of hygiene or for motives based on the religion of the deceased".<sup>86</sup> When a cremation does occur, parties are required to provide detailed records regarding "the circumstances and reasons" of the cremation.<sup>87</sup> This stems, in part, from concerns that cremation makes it easier to obscure evidence of war crimes.<sup>88</sup>

Cremation is also linked to historical atrocities against persons with disabilities, including the systematic execution and cremation of persons with disabilities by the Nazis starting as early as 1939 with the "Action T4" programme. This notorious programme was used by the Nazi regime to kill approximately 80,000 former patients of German mental hospitals and institutions. Victims were killed in gas chambers

80 GC I, Art. 16; GC II, Art. 19. See also GC IV, Art. 130, listing the information required to be retained and shared for dead internees; GC II, Art. 20, requiring, when possible, a medical examination "with a view to confirming death, establishing identity and enabling a report to be made"; and GC III, Art. 120, with nearly identical wording regarding a medical examination of the body to identify the deceased and make a report.

81 See GC I, Arts 16–17; GC II, Arts 19–20; GC III, Art. 120; GC IV, Art. 130.

82 GC I, Art. 17; GC III, Art. 120.

83 See GC I, Art. 16; GC II, Art. 19; GC III, Art. 122; GC IV, Art. 136.

84 ICRC Commentary on GC I, above note 62, para. 1647, referring to Article 17 of GC I and stating: "Although the first paragraph refers to 'burial or cremation', it is clear from the second paragraph that the two options are not equal and that the Parties to the conflict are not able to choose freely between them. Burial is the preferred option, while cremation is allowed only in exceptional circumstances."

85 Burial generally means placing the body "in the earth or a tomb". *Ibid.*, para. 1646, quoting a standard dictionary definition for the term "burial". Under GC II, however, burial at sea is permitted provided the vessel from which the burial is conducted is at sea rather than in port. GC II, Art. 20.

86 GC I, Art. 17(2). See also GC III, Art. 120(5), and GC IV, Art. 130(2), both of which use similar wording to that used in GC I, but which add provisions allowing cremation based on the express wish of a deceased prisoner of war (PoW) or protected person respectively.

87 GC I, Art. 17(2); GC III, Art. 120; GC IV, Art. 130(2).

88 The *Stalag Luft III* case provides an example from World War II of cremation being used to hide evidence of the execution of PoWs by the Gestapo. After escaped Allied PoWs were recaptured by the Gestapo, many were executed and their bodies were cremated to hide the evidence of the crime. British Military Court, Hamburg, *Trial of Max Wielen and 17 Others (Stalag Luft III Case)*, Case No. 62, Judgment, 3 September 1947, available at: [www.legal-tools.org/doc/49610d/pdf/](http://www.legal-tools.org/doc/49610d/pdf/).

before having their bodies dissected for medical training or to remove gold teeth, and then all were cremated.<sup>89</sup>

An important purpose animating these recording requirements is to facilitate the termination of hostilities and the subsequent ability of the groups or nations involved to achieve a stable peace.<sup>90</sup> This noble goal is furthered by the mandated compilation of information that can (eventually) be used by grieving families to honour the graves of their loved ones, or in some cases to exhume remains for investigatory purposes or for reburial in the home country of the deceased.<sup>91</sup> The concern exhibited by these IHL provisions with providing closure to families of the fallen has clear parallels with the “truth” pillar of transitional justice and IHRL.

While the rights of the family are not mentioned in the actual text of the 1949 Geneva Conventions, a family’s right to know is mentioned in AP I Article 32, which observes that States implementing AP I’s requirements governing the missing and the dead should be “prompted mainly by the right of families to know the fate of their relatives”. This requires, as part of the obligation, the undertaking of all feasible means to identify dead persons.<sup>92</sup> This right of families to know is both an important principle of IHRL and an essential component of achieving the goals of transitional justice, a connection that will be explored more thoroughly in the next section.

## Addressing undignified treatment of disabled dead bodies through transitional justice processes

Transitional justice addresses the legacy of serious IHRL and IHL violations. The various mechanisms of transitional justice confront past abuses and are also regarded as an integral component of major political reform.<sup>93</sup> Transitional justice at its best places victims at the centre and strives to ensure acknowledgement, accountability and redress for those who have suffered wrongful acts.<sup>94</sup> The five pillars of transitional justice – truth, justice, reparation, guarantee of non-repetition and

89 Richard J. Evans, *The Third Reich at War*, Penguin, New York, 2009, pp 82–90.

90 See Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), para. 4657; Cordula Droege, “International Humanitarian Law and Peace: A Brief Overview”, *International Review of the Red Cross*, Vol. 106, No. 927, 2025, pp. 998–1001.

91 GC I, Art. 17(3); GC III, Art. 120(6); GC IV, Art. 130(2); AP I, Art. 34.

92 See ICRC Commentary on the APs, above note 90, para. 1216, stating that “[t]he right of families mentioned here consists of knowing ‘the fate of their relatives’, i.e., all possible steps should be taken to inform them of such a fate (but no one can be held to do the impossible)”; AP I, Art. 33(2)(b), requiring parties to the conflict, “to the fullest extent possible, [to] facilitate and, if need be, carry out the search for and the recording of information concerning such [missing] persons if they have died in other circumstances as a result of hostilities or occupation”; and AP I, Art. 33(4), requiring parties to “endeavor to agree on arrangements for teams to search for, identify, and recover the dead from battlefield areas”.

93 We understand transitional justice in broad terms, to encompass all processes and mechanisms that a society uses to address a history of large-scale abuses, aiming to ensure accountability, deliver justice and achieve reconciliation. See *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, para. 8.

94 *Ibid.*

memorialization – are complementary and interrelated in order to ensure the most effective means of justice and accountability.<sup>95</sup>

Persons with disabilities are often overlooked among the overall victims of conflict, and the transitional justice movement has lacked integration of a disability perspective.<sup>96</sup> The reference point for transitional justice too often falls short of integrating the voices of persons with disabilities and their families;<sup>97</sup> this is increasingly understood as a major gap.<sup>98</sup> Notably, UN Security Council Resolution 2475 affirms that persons with disabilities are disproportionately impacted in situations of armed conflict. Further, it recognizes the indispensable role that persons with disabilities play in conflict resolution, prevention and reconstruction processes and thus supports transitional justice as a process that must be non-discriminatory, accessible and facilitative of the participation of persons with disabilities.<sup>99</sup> Additional support for inclusive transitional justice mechanisms is found in Article 11 of the CRPD and its mandate for States to protect persons with disabilities from harm in situations of risk and humanitarian emergencies.<sup>100</sup> Article 11 unifies State obligations to safeguard and protect persons with disabilities in both peace and conflict situations, and obligates States to undertake measures to that end and consistent with their international law obligations writ large.<sup>101</sup> As such, Article 11's protection ambit ought to be read in connection with the mechanisms of transitional justice – and any such reading should include accounting for violations perpetrated on the bodies of persons with disabilities.<sup>102</sup>

The protection of the dead and the concomitant right of families to know the fate of their disabled family members is beginning to be addressed from the

95 Fabián Salvioli, *International Legal Standards Underpinning the Pillars of Transitional Justice: Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/54/24, 10 July 2023, para. 16.

96 Janine Natalya Clark, "Transitional Justice and Inclusiveness: Where Does Disability Fit In?", *Journal of Intervention and Statebuilding*, Vol. 18, No. 2, 2024, pp. 139–160. Survivor populations in post conflict areas have not focused on persons with disabilities. Illustratively, the UN General Assembly published a report on the five pillars of transitional justice in 2023, highlighting the importance of an integrated approach, but made no mention of disability. See F. Salvioli, above note 95, paras. 16 and 53.

97 The research of Hollander and Gill in relation to the "marked" bodies of persons from northern Uganda in post-conflict situations is a rare example of accounting for persons with disabilities in transitional justice processes. The work recognizes the perspectives of fourteen survivors whose bodies were "marked" due to injuries sustained during the conflict between the Lord's Resistance Army and the government forces of Uganda. Theo Hollander and Bani Gill, "Every Day the War Continues in My Body: Examining the Marked Body in Postconflict Northern Uganda", *International Journal of Transitional Justice*, Vol. 8, No. 2, 2014.

98 J. N. Clark, above note 96. See also Janet E. Lord and Michael Ashley Stein, "Peacebuilding and Reintegrating Combatants with Disabilities", *International Journal of Human Rights*, Vol. 19, No. 3, 2015; Minerva Rivas Velarde, Janet E. Lord, Michael Ashley Stein and Thomas Shakespeare, "Disarmament, Demobilization, and Reintegration in Colombia: Lost Human Rights Opportunities for Ex-Combatants with Disabilities", *Journal of Human Rights*, Vol. 21, No. 1, 2021.

99 UNSC Res. 2475, 20 June 2019.

100 CRPD, above note 1, Art. 11.

101 Janet E. Lord, "Accounting for Disability in International Humanitarian Law", *International Review of the Red Cross*, Vol. 105, No. 922, 2022.

102 Gerard Quinn, *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/78/174, 13 July 2023, paras 16, 75; UNSC Res. 2475, 20 June 2019, para. 2.

perspective of disability rights. Advocates from the disability rights community are highlighting specific instances of how the bodies of persons with disabilities subjected to unlawful killings were subjected to undignified treatment following premature death. This stems in part from an increasingly well-documented history in many countries of failures to advance the respect, protection and preservation of the remains of persons with disabilities who have died – very often prematurely due to violence or neglect in institutions. Yet it is also reflected in efforts to expose other types of abuses, such as the non-consensual use of the bodies of deceased disabled individuals for medical science or display in museums, or instances of undignified burials in unmarked graves of enslaved persons found to have had disabilities when disinterred by archaeologists.<sup>103</sup> This is important for establishing accountability and for allowing families and societies to heal. Likewise, there is a prevention element insofar as safeguarding bodies of deceased persons serves to combat enforced and involuntary disappearances. This includes the dignified management of remains, proper final disposition and memorialization, and respect for the rights of the families and their communities. The discussion that follows analyzes how the various pillars of transitional justice can be harnessed to redress and account for violations of IHL rights and serious violations of IHRL in relation to deceased individuals with disabilities.

## Transitional justice pillar 1: Truth-seeking

Truth-seeking, the first pillar of transitional justice, includes various mechanisms to determine the facts, causes and consequences of past systemic violations of international human rights and IHL.<sup>104</sup> Truth mechanisms are imperative for discerning the facts surrounding premature and suspicious deaths of individuals with disabilities, particularly civilians who die in armed conflict and those who die during peacetime, whether in disasters or in institutions and prisons. The UN Human Rights Committee's General Comment No. 36 on the right to life underscores that States "must take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life".<sup>105</sup> This has come to be known as the

103 Roisin Mackie, "Overlooked but on Display: Disability and Human Remains in the British Museum", in Alexandra F. Morris and Hannah Vogel (eds), *Disability in Ancient Egypt and Egyptology*, Routledge, London, 2025. Enslaved ironworkers were buried in unmarked graves near the site of the Catoctin Iron Furnace between the 1770s and 1840. The finding of a burial site during road construction during the 1970s is believed to have resulted in the taking of some remains to the Smithsonian without the consent of descendants. Analysis of the remains of these enslaved persons "provide[s] deeper understanding of the pain endured by these people during their lifetimes, including birth defects, sickle cell disease arthritis, dental decay and spinal injuries from overworking". Mackenzie River Foy, "Our Legacy is the Living-Preserving the History of the Catoctin Ironworkers", *Baltimore Beat*, 9 October 2024, available at: <https://baltimorebeat.com/our-legacy-is-the-living-preserving-the-history-of-the-catoctin-ironworkers/>.

104 F. Salvio, above note 95.

105 Human Rights Committee, "General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life", UN Doc. CCPR/C/GC/36, 3 September 2019, para. 28.

human right to truth,<sup>106</sup> which is similar yet distinct from the right of families to know the whereabouts of their relatives that animates core IHL protections for the dead.<sup>107</sup>

Transitional justice truth-seeking mechanisms often take the form of truth commissions – official, non-judicial or quasi-judicial bodies established during periods of political change, often in the aftermath of armed conflict.<sup>108</sup> Truth commissions and other truth-seeking mechanisms place priority on putting victims at the centre of the truth-seeking process and work to protect, acknowledge and empower both victims in their death and survivors and their families.<sup>109</sup> They give visibility to victims and ensure that victims participate in transitional justice processes.<sup>110</sup> While there is an emphasis on the importance of including marginalized groups in truth-seeking processes, persons with disabilities and their families are often forgotten as victims.<sup>111</sup>

The framework established in the CRPD shores up the human rights that give rise to truth-seeking as a transitional justice measure. According to Article 21 of the CRPD, States Parties must ensure that persons with disabilities have equal rights to freedom of expression, opinion and access to information.<sup>112</sup> This includes ensuring that persons with disabilities can express their opinions and ideas and access information in various alternative and accessible formats.<sup>113</sup> The voices and experiences of persons with disabilities who have lost their lives during conflict are crucial to truth-seeking processes, and their inclusion in such processes is guaranteed under the CRPD.<sup>114</sup> To ensure that persons with disabilities are represented, truth-seeking mechanisms must incorporate the perspectives of families and friends of persons with disabilities in their fact-finding processes.

106 HRC Res. 21/7, 10 October 2012, para. 1. See also the *Quinteros v. Uruguay* communication, wherein the UN Human Rights Committee confirms the prohibition of deliberate withholding of information on missing relatives from families. It also states that disappearances gravely violate the rights of the disappeared person's family, who suffer severe and often prolonged periods of mental anguish owing to uncertainty about the fate of their loved ones. Human Rights Committee, *Quinteros v. Uruguay*, Communication No. 107/1981, UN Doc. CCPR/C/OP/2, 1990, p. 224.

107 AP I, Art. 32.

108 Ruth Teitel, "Human Rights in Transition: Transitional Justice Genealogy", *Harvard Human Rights Journal*, Vol. 16, 2003.

109 *Ibid.*

110 Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/67/368, 13 September 2012, para. 32.

111 In his peacebuilding report, the Special Rapporteur notes that "truth telling is a way of rebuilding trust and is linked to a fair accounting of the past. Truth is a foundation on which old enmities can at least be acknowledged and addressed, creating space for new political realities and institutions to evolve." G. Quinn, above note 102, para. 10.

112 CRPD, above note 1, Art. 21.

113 Accessibility measures in relation to the effective exercise of these rights are set out in Article 9 of the CRPD, above note 1.

114 Article 29 of the CRPD, above note 1, mandates States Parties to ensure that persons with disabilities have the opportunity to equally participate in political and public affairs, an obligation that is articulated as a general principle of the CRPD under Article 3 and, further, is defined as a general obligation in broad terms in Article 4(3).



In as much as persons with disabilities must be afforded the opportunity to participate in transitional justice processes relating to truth-seeking, so too must families of the dead be able to seek the truth. For these families, the truth-seeking function of transitional justice is significantly advanced by the obligations arising under IHL for the maintenance and sharing of detailed records relating to the identity and cause of death of the deceased, as well IHL's strong preference for individual burials over cremation or mass graves. In this way, IHL's protections for the dead lay the foundation for transitional justice truth-seeking efforts related to discovering the whereabouts of the dead and the circumstances surrounding their deaths.

## Transitional justice pillar 2: Criminal prosecution

Justice, and specifically the legal obligation to prosecute and punish violations of IHRL and IHL, is a second pillar of transitional justice that seeks to ensure accountability for wrongful actions.<sup>115</sup> Identifying and prosecuting perpetrators of serious violations of international human rights and IHL is essential for societal repair and for reparation of victims. Transitional justice processes support accountability and non-recurrence.<sup>116</sup>

Despite the emphasis on accountability and prioritizing victims in such processes, persons with disabilities and their family members are often excluded from being recognized as victims and thus do not take part in the justice process. Here, Article 13 of the CRPD provides that persons with disabilities must have equal access to justice and that administrators of the State justice system must take positive steps to ensure that access, with support where needed.<sup>117</sup> Implicit in this obligation is the need to ensure that families of persons with disabilities also have rights in relation to seeing justice served.

States have legal obligations to prosecute and punish human rights and IHL violations, ensuring that no obstacles impede this duty.<sup>118</sup> Scholars have demonstrated, however, that these obligations, equally applicable to persons with disabilities, are little enforced in practice. Barriers catalogued by scholars in this context include ableist understandings about disability and lack of understanding about how ill-treatment manifests against persons with various disabilities and how protection, investigation and prosecution must respond to the specific circumstances of persons with disabilities.<sup>119</sup>

115 F. Salvioli, above note 95, paras 37–45.

116 *Ibid.*, para. 37.

117 CRPD, above note 1, Art. 13.

118 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948 (entered into force 12 January 1951) (Genocide Convention), Arts I, IV–V; ICPPED, above note 33, Art. 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987) (CAT), Art. 4.

119 W. I. Pons, J. E. Lord and M. A. Stein, "Disability, Human Rights Violations, and Crimes Against Humanity", above note 18.

One example of these obstacles in practice is the failure of investigators and prosecutors for the Special Court for Sierra Leone to pursue atrocities likely committed against residents of Kissy Mental Home in 1999. After being ordered to attack civilians in Freetown, where Kissy Mental Home was located, members of the Revolutionary United Front committed a wide range of atrocities. While several prosecutions were conducted in response to those actions, the only war crimes at the Kissy Mental Home that were prosecuted were the murders of eight nuns,<sup>120</sup> despite the facility having approximately 400 residents who were reportedly chained to their beds and would have been unable to protect themselves from the rebels, who had been ordered to “amputate up to 200 civilians.”<sup>121</sup> Commentators have criticized the lack of investigation and prosecution of abuses to which the disabled residents of Kissy Mental Home were almost certainly exposed during the onslaught.<sup>122</sup>

The obligation to prosecute is essential for achieving equitable, just and lasting reconciliation for victims. Prosecutions of perpetrators are expected to be prompt and achieve the most desirable outcome for victims while ensuring the right to a fair trial.<sup>123</sup> Punishment for serious human rights violations is mandatory under international law, and it is the responsibility of States to ensure that this obligation is fulfilled.<sup>124</sup> In order to comply with international standards of justice, States must adopt and enforce safeguards to ensure that the rule of law is not abused. All victims of gross violations of IHL and IHRL should have equal access to effective judicial remedies.<sup>125</sup>

Although access to justice is a fundamental right and is essential for the enjoyment of all other rights, the participation of persons with disabilities in justice systems worldwide is limited, and persons with disabilities frequently face challenges in obtaining access to justice.<sup>126</sup> Persons with disabilities face significant barriers

120 Kate McInnes, “Justice for Persons with Disabilities at the Liberia War Crimes Court: Learning from Missed Opportunities at the Special Court for Sierra Leone”, *EJIL: Talk!*, 28 June 2024, available at: [www.ejiltalk.org/justice-for-persons-with-disabilities-at-the-liberia-war-crimes-court-learning-from-missed-opportunities-at-the-special-court-for-sierra-leone/](http://www.ejiltalk.org/justice-for-persons-with-disabilities-at-the-liberia-war-crimes-court-learning-from-missed-opportunities-at-the-special-court-for-sierra-leone/).

121 Special Court for Sierra Leone, *The Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-2004-16-T, Open Session (Trial Chamber II), 16 September 2005, p. 53, available at: [www.rscsl.org/Documents/Transcripts/AFRC/AFRC-091605.pdf](http://www.rscsl.org/Documents/Transcripts/AFRC/AFRC-091605.pdf).

122 K. McInnes, above note 120.

123 Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico*, Judgment, 23 November 2009, paras 191–192, 201.

124 Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, 17 July 1998 (entered into force 1 July 2002), Art. 78; GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; Genocide Convention, above note 118, Art. V; ICCPD, above note 33, Art. 7; CAT, above note 118, Art. 4(2).

125 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res. 60/147, 21 March 2006 (Basic Principles), para. 12. These principles are also known as the Van Boven/Bassiouni Principles.

126 For a comprehensive report on access to justice by persons with disabilities, see Julinda Beqiraj, Lawrence McNamara and Victoria Wicks, *Access to Justice for Persons with Disabilities: From International Principles to Practice*, International Bar Association, October 2017, available at: [www.biicl.org/documents/1771\\_access\\_to\\_justice\\_persons\\_with\\_disabilities\\_report\\_october\\_2017.pdf](http://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf).

within the justice system, including denial of legal capacity and multiple barriers to accessing courts (or other, quasi-judicial bodies) and essential information.

Article 13 of the CRPD affirms that persons with disabilities must have equal access to justice.<sup>127</sup> This includes ensuring that persons with disabilities are not excluded from the justice system based on legal capacity, as Article 12 of the CRPD makes clear that persons with disabilities have full legal capacity.<sup>128</sup> Despite the clarity of the latter provision, domestic law often holds the position that persons with disabilities lack legal capacity, thereby foreclosing equal participation in the justice process. With such high hurdles for living persons with disabilities, achieving justice for the dead through criminal prosecution is doubly challenging. Nonetheless, IHL's detailed record-keeping and grave registration obligations create an opportunity for future investigations to piece together evidence of crimes. In this way, IHL's protections for the dead contribute in a small but important way to the potential for criminal accountability where appropriate.

### Transitional Justice Pillar 3: Reparations

The obligation to make reparation is triggered on the occurrence of a human rights or IHL violation and implies a duty on the part of the State to make reparation and the possibility for victims to seek redress from the perpetrator.<sup>129</sup> The right accrues to the victim or their beneficiaries and notably may also amount to collective forms of redress, beyond making restitution for individual victims.<sup>130</sup> Reparations processes must be accessible to victims, and this means the procedures by which reparations are sought must be readily available, timely and effective.<sup>131</sup>

The CRPD sets out principles that should guide reparations procedures in relation to access by persons with disabilities. First, like all victims, persons with disabilities and their representative organizations should play a meaningful role in the design and implementation of reparations programmes.<sup>132</sup> This requires specific measures to ensure that persons with disabilities and other groups subject to

127 CRPD, above note 1, Art. 13.

128 *Ibid.*, Art. 12.

129 *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (Updated Principles), Principle 31, providing that "[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator". See also ICRC Customary Law Study, above note 3, Rule 150, which provides that "[a] State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused".

130 Basic Principles, above note 125, para. 8, referencing victims as "persons who individually or collectively suffered harm". Reparations may therefore have individual as well as collective effects. See also Updated Principles, above note 129, Principle 32.

131 Basic Principles, above note 125, Annex, paras 2(c), 11(b), 15.

132 CRPD, above note 1, Art. 4(3).

exclusion have the opportunity to participate in public consultations aimed at developing, implementing and assessing reparations programmes. Second, the principle of accessibility must both guide equal access to decision-making on reparations at all levels, including applicable international and regional procedures, and address more broadly the accessibility needs of persons with disabilities as beneficiaries of reparations.<sup>133</sup>

There are numerous ways in which decisions on reparations can impact persons with disabilities and their families, but such decisions have too often neglected the disability dimension of programming. This is beginning to change, at least in terms of reparations for violations against persons with disabilities who have died untimely deaths in institutional care in some countries.<sup>134</sup> At the design stage of a reparations programme, measures to facilitate access for persons with disabilities and to gather disability-specific information in order to guide the programme downstream should be undertaken. The participation of persons with disabilities in programme design should be secured – their presence might be crucial if decisions about criteria of access (including, importantly, application deadlines and evidentiary thresholds) are to be taken in ways that increase the likelihood that they will be appropriately served by an eventual reparations programme.

In the selection of rights whose violation triggers reparations, it is important for benefits under a reparations programme to account for the specific and diverse needs of persons with disabilities. Though the dead will not directly benefit from any reparations regime, their harms must still be factored into any reparations,<sup>135</sup> additionally, the families of dead disabled persons are often victims in their own right.<sup>136</sup> Absent the participation of persons with disabilities in designing the reparations scheme, it will be difficult or impossible to ensure that the kinds of violations perpetrated against persons with disabilities are included.<sup>137</sup> Requiring those responsible for the design of reparations programmes to articulate the principles or reasons underlying the selection of “repairable violations” may have a positive impact from the standpoint of disability, by preventing gratuitous exclusions.

133 *Ibid.*, Art. 9.

134 See Linda Steele *et al.*, “Reparations for People Living with Dementia: Recognition, Accountability, Change, Now!”, *Dementia*, Vol. 22, No. 8, 2023; Linda Steele and Kate Swaffer, “Reparations for Harms Experienced in Residential Aged Care”, *Health and Human Rights*, Vol. 24, No. 2, 2022.

135 See Updated Principles, above note 129, Principle 34, laying out the scope of the right to reparation and providing that the “right to reparation shall cover all injuries suffered by victims .... In the case of forced disappearance, the family of the direct victim has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person, and in the event of decease, that person’s body must be returned to the family as soon as it has been identified.”

136 *Ibid.*; see also UNGA Res. 40/34, 29 November 1985, defining victims of crime as including “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering ... or substantial impairment of their fundamental rights .... The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim.”

137 Updated Principles, above note 129, Principle 32, providing that “victims shall have access to a readily available, prompt and effective remedy”, that victims and civil society should have the opportunity to play a meaningful role in the design and implementation of reparations programmes, and that affirmative action should be taken to ensure that women and minority groups participate in developing, implementing and assessing such programmes.

## Transitional justice pillar 4: Guarantees of non-recurrence

The fourth pillar of transitional justice is guarantees of non-recurrence.<sup>138</sup> Guarantees of non-recurrence or non-repetition help respond to systemic and structural inequalities that serve as barriers to the enjoyment of human rights and fundamental freedoms.<sup>139</sup> Such guarantees can take various forms, including institutional reforms such as the establishment of independent human rights mechanisms, legal reforms such as the repeal of discriminatory laws and the enactment of human rights standards, and administrative reforms that give voice to affected persons.

States are under an obligation to ensure that international human rights and IHL violations do not recur and to guarantee the protection of victims from future violations. To achieve this, States must implement mechanisms for preventing and resolving social conflicts, inclusive of institutional reforms and other measures to uphold the rule of law, promote human rights and restore public trust in government institutions. Here too it is crucial to have adequate representation of persons with disabilities in order to guarantee that specific violations of their rights do not recur. Several elements of this transitional justice pillar show promise for identifying and combating the kinds of barriers that can make recurrence of wrongs against persons with disabilities more likely.

### *Education and awareness-raising*

One of the key methods by which States can prevent the recurrence of past abuses is through effective and comprehensive education about disability, using a social model and a human rights orientation towards disability. States party to the CRPD are under an obligation to adopt effective and appropriate measures to raise societal awareness about persons with disabilities, fostering respect for their rights and dignity, as set forth in Article 8.<sup>140</sup> Measures should aim to combat stereotypes, prejudices and harmful practices related to persons with disabilities while promoting awareness of their capabilities and contributions. Raising awareness at all educational levels is essential and should begin in early education, continuing through higher education. This also includes educating officials in the public sector and at all levels of governance, and those in the media.

### *Institutionalization*

Article 19 of the CRPD mandates that States Parties recognize the equal right of persons with disabilities to live in the community.<sup>141</sup> Persons with disabilities must have equal opportunity to choose where and with whom they live. Throughout the world, the practice of placing persons with disabilities into institutions presents a barrier

138 F. Salvioi, above note 95, para. 70.

139 *Ibid.*

140 CRPD, above note 1, Art. 8.

141 *Ibid.*, Art. 19.

to the exercise of the rights contained in Article 19. Institutions operate in isolation, restrict the autonomy of individuals and commonly do not provide adequate care for persons with disabilities. As a result of institutionalization, premature deaths of persons with disabilities are common, leading to the mass production of dead bodies.

Guarantees of non-recurrence may have a collective impact, as reflected in the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*<sup>142</sup> and in court-mandated measures. Illustratively, in the *Plan de Sánchez Massacre* case (2004), the Inter-American Commission on Human Rights recommended that individual reparations be combined with community-level reparations and other measures to avoid recurrence.<sup>143</sup> In that case, the investigation into a massacre of nearly 300 civilians which occurred during an internal armed conflict was severely complicated by violations of IHL protections for the dead, including burning the bodies and burying them in unrecorded mass graves.<sup>144</sup>

## Transitional Justice Pillar 5: Memorialization

Memorialization, the fifth pillar of transitional justice, encompasses the various methods by which the memory of persons who have fallen victim to violations of IHRL or IHL is sustained.<sup>145</sup> Memorialization thus serves as a tribute, acknowledgment and recognition of victims of international human rights and humanitarian law violations.<sup>146</sup> It aims to preserve and transmit accurate accounts of past human rights and IHL violations, inform society, restore a victim's dignity and identity, promote healing and reconciliation, and prevent future wrongs. Such processes of transitional justice, whether addressing violations committed in the recent or distant past, are intended to address systemic human rights violations or wrongs committed during the conflict. Forms of memorialization include museums, public acknowledgement, renaming of public facilities, reburials, memory projects, and creative and academic publications.

There are examples of such practices in relation to persons with disabilities who have died, often in the context of human rights and humanitarian law violations. At Hadamar, the site of the mass murder of persons with disabilities by the Nazi regime, now stands the Hadamar Memorial Museum,<sup>147</sup> with the mission of commemorating the victims of the euthanasia programme and recognizing the suffering of persons with disabilities who lost their lives there.

<sup>142</sup> Basic Principles, above note 125.

<sup>143</sup> Inter-American Court of Human Rights, *Plan de Sánchez Massacre v. Guatemala*, Judgment, 29 April 2004, para. 9.

<sup>144</sup> *Ibid.*, paras. 42(15)–(48), 48.

<sup>145</sup> *Ibid.*, para. 24.

<sup>146</sup> *Ibid.*, paras 20, 30, 32.

<sup>147</sup> Gedenkstätte-Hadamar, “Liberation of the Killing Centre (1945)”, available at: [www.gedenkstaette-hadamar.de/en/history/liberation-of-the-killing-centre-1945/](http://www.gedenkstaette-hadamar.de/en/history/liberation-of-the-killing-centre-1945/).

In 2002, California Senate Bill 1448 (Chesbro)<sup>148</sup> addressed the conditions of the state institution gravesites, providing support for the disability community, and that same year, three organizations for persons with disabilities (OPDs) – Disability Rights California’s Peer Self-Advocacy Program, People First of California and the California Network of Mental Health Clients – launched the California Memorial Project (CMP). The Bill’s co-sponsor emphasized that “restoration of state hospital and developmental center graveyards is a priority because, ‘How we are treated in death is indicative of the way we were valued in life.’” The CMP has since erected monuments to honour those who lost their lives in California state-run institutions and has held ceremonies for individuals with disabilities who died in such institutions to honour their memory and preserve their dignity.<sup>149</sup>

For persons with disabilities who have lost their lives due to violations of IHRL or IHL, memorialization is a vital tool to honour them and to remember and account for past harms. According to one OPD supporting memorialization,

when we dishonor deceased institutionalized persons by inadequately remembering them in death, we are also making a statement: people with severe mental illness don’t count, they are not worth remembering. By restoring honor to the dead, we bring honor to the living.<sup>150</sup>

While adhering to the social model of disability – which focuses less on the disabled body – within the context of memorialization, the disabled body must be brought back into the picture. Memorialization often portrays the normative able-bodied victims but does not make any mention of persons with disabilities.<sup>151</sup> Disabled bodies are portrayed with the erasure of impairment in memorials, which may take away from the identity of the victims. The way in which a person is treated in death is indicative of how a person is treated during their lifetime.

The IHL protections for dead bodies capture both sides of this issue, requiring respectful internment of bodies in a manner that can itself be considered a form of memorialization of the dead,<sup>152</sup> while remaining mostly silent on the details of

148 California Senate Health and Human Services Committee, Staff Analysis of Senate Bill 1448 (Chesbro), 2002, available at: [http://leginfo.ca.gov/pub/01-02/bill/sen/sb\\_1401-1450/sb\\_1448\\_cfa\\_20020401\\_161337\\_sen\\_comm.html](http://leginfo.ca.gov/pub/01-02/bill/sen/sb_1401-1450/sb_1448_cfa_20020401_161337_sen_comm.html).

149 Disability Rights California, above note 28. Two memorial stones at the Stockton facility in California bear epitaphs acknowledging that individuals in these facilities were buried in anonymous mass graves and include a statement that reads “Let no person ever again be removed from the community by reason of disability”, emphasizing the project’s mission to prevent such injustices in the future. *Ibid*.

150 California Senate Health and Human Services Committee, above note 148. See also Zosha Stuckey, “Race, Apology, and Public Memory at Maryland’s Hospital for the ‘Negro’ Insane”, *Disability Studies Quarterly*, Vol. 37, No. 1, 2017.

151 Steven Lubar, “Memorializing Disability: Lessons for Museums”, *Medium*, 17 August 2018, available at: <https://lubar.medium.com/memorializing-disability-lessons-for-museums-b50e5e03bc27>.

152 The work of the Commonwealth War Graves Commission is an example of how the recording obligations of IHL blend with the memorialization function of transitional justice. The Commission is a continuation of the Graves Registration Commission founded in the UK during World War I, and much of its work involves memorialization efforts in the form of maintaining cemeteries and other memorials as well as facilitating events honouring the dead. See Commonwealth War Graves Commission, “Who We Are”, available at: [www.cwgc.org/who-we-are/](http://www.cwgc.org/who-we-are/).



the person's disability beyond requiring the documentation related to the cause of death.<sup>153</sup> Here it bears repeating that a major focus of IHL is to take steps to identify deceased and missing persons, or to ensure the future possibility of scientific identification as soon as is practically possible. The scientific process for identification, which relies upon anthropology and genetic comparison with relatives, places a strong focus on the physical body. Key questions asked in this context focus on specific characteristics of a person, which can facilitate the identification process. It thus warrants consideration whether a transitional justice and disability rights lens in the process of preservation, protection and identification of deceased persons can honour the diversity of persons, and of disabled bodies. Lessons are starting to emerge from the work of identifying the remains of enslaved persons at the Catoctin Iron Furnace in Maryland, whose hard labour caused disabling conditions or aggravated existing ones. These conditions were identified by anthropologists and made part of the enslaved persons' story in transitional justice efforts to reclaim the past.<sup>154</sup>

## Summing up transitional justice, disability and accounting for wrongs

Transitional justice processes play important roles in fostering the transition to a sustainable peace.<sup>155</sup> Where such mechanisms appropriately account for all those affected by serious violations of international human rights and IHL, they can serve to affirm the humanity and human dignity of both victims and survivors, including persons with disabilities. Article 11 of the CRPD is the springboard for a disability-inclusive approach in such processes. This provision seeks to ensure that the rights of persons with disabilities are realized in every domain, with a protection remit and across all five pillars of transitional justice. IHL protections relating to dead persons shore up principles of humanity and dignity and provide concrete rules establishing that dead persons must be respected and protected, and their dignity fulfilled. The IHL protections for the dead are also unique relative to other IHL protections in that some of these obligations extend well beyond the end of the armed conflict, thus overlapping both substantively and temporally with the traditionally post-conflict transitional justice process. This feature of the IHL protections for the dead thus extends the reach of both transitional justice and IHL beyond their traditional spheres, supporting transitional justice efforts from the very start of hostilities and continuing IHL protections for the dead many decades beyond the end of those

153 See e.g. AP I, Art. 34(1); AP II, Art. 8; GC I, Art 16.

154 M. R. Foy, above note 103.

155 See *Report of the Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, paras 2–8; *Guidance Note of the Secretary General: Transitional Justice: A Strategic Tool for People, Prevention and Peace*, 2023, p. 2, available at [www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/2023\\_07\\_guidance\\_note\\_transitional\\_justice\\_en.pdf](http://www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/2023_07_guidance_note_transitional_justice_en.pdf); Luke Moffett and Nikihil Narayan, "Provisional Justice in Protracted Conflicts: The Place of Temporality in Bridging the International Humanitarian Law and Transitional Justice Divide", *International Review of the Red Cross*, Vol. 106, No. 927, 2012, p. 1224.

hostilities. What is clear is that far more work is required to address the five pillars of transitional justice for persons with disabilities who have died or have been disappeared during armed conflict.

## Conclusion

The disabled body has been the subject of a host of serious violations of IHRL and IHL. These have occurred during conflict and in peacetime, during life and after death. The shift away from the medical and tragedy models of disability to the social model of disability serves to render persons with disabilities more visible in relation to serious violations of human rights law and IHL. This shift has helped bring into focus the myriad of societal barriers that oppress and make human rights violations more likely against persons with disabilities. The social model of disability has upended traditional models, and the CRPD is effecting dramatic change across legal frameworks worldwide given its near-universal ratification. That said, understanding the dead under human rights and humanitarian law requires a shift away from conceptualizing disability as exclusively a problem of social barriers. Achieving justice for persons with disabilities whose bodies have been treated and disposed of in ways that contravene the principles set out in IHL, and whose bodies are indirectly protected by IHRL, requires visibility. Bringing disabled bodies back into focus is necessary for ensuring that transitional justice is served for persons with disabilities who have perished at the hands of State or non-State actors, and for their families. These are bodies that should not be buried in transitional justice mechanisms.