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Persons with disabilities in armed conflict
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Increasing visibility of persons with disabilities in armed conflict: Implications for interpreting and applying IHL

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Abstract

While persons with disabilities are protected under existing international humanitarian law (IHL), the specific risks and barriers to which these persons are exposed during armed conflict must be better factored into the interpretation and implementation of these rules. The complementarity between IHL and the Convention on the Rights of Persons with Disabilities (CRPD) may make an important contribution towards a more disability-inclusive implementation of IHL. This article focuses on two major areas addressed by IHL – namely, the conduct of hostilities and detention – against the backdrop of the concept of and agency associated with disability enshrined in the CRPD. This analysis is based on the lived experiences shared by persons with disabilities in consultations co-organized in 2022 by the UN Special Rapporteur on the Rights of Persons with Disabilities,

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the International Committee of the Red Cross, the International Disability Forum, the European Disability Forum and the Diakonia IHL Centre.

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Introduction

Armed conflicts across the world exacerbate pre-existing barriers that persons with disabilities face with regard to access to services and support in many domains, including food, water, shelter, sanitation, health care, education, rehabilitation and transportation.[1] In addition, new barriers may arise from armed conflicts and result in specific risks for persons with disabilities, who are estimated to make up at least 15% of any given population; this percentage is likely to be higher in conflict-affected territories.[2] Barriers may be physical, such as when essential infrastructure is destroyed, or when there are increased difficulties in reaching such facilities due to long distances, inaccessible routes or terrain, or the loss of assistive devices. But barriers may also be related to flaws in communication, attitudes, or institutions. Communication barriers include a lack of accessible information on evacuation routes, available shelter or other humanitarian relief, or lack of accessible advance warnings. Attitudinal barriers include negative attitudes or misconceptions about persons with disabilities, assumptions that providing specific accommodations for persons with disabilities would be unrealistic or too high a burden in armed conflict, or denial of participation by persons with disabilities in humanitarian activities because of the prejudiced view that persons with disabilities cannot communicate their own wishes and needs or contribute to the design of humanitarian responses. Finally, institutional barriers include a lack of consideration of persons with disabilities in military doctrine, training, planning or conduct of operations, or more generally a lack of quality data on which disability-inclusive strategies or programmes could be based.[3]

These kinds of barriers result in higher probability of risk or harm for persons with disabilities compared to other civilians or persons *hors de combat* in armed conflict. Reports consistently show that persons with disabilities face

1 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflicts on the 70th Anniversary of the Geneva Conventions*, Geneva, 2019, p. 41.

2 *Protection of Civilians in Armed Conflict: Report of the Secretary-General*, UN Doc. S/2021/423, 3 May 2021, para. 34.

3 ICRC, above note 1, p. 41; Helen Durham and Gerard Quinn, "Lifting the Cloak of Invisibility: Civilians 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/ (all internet references were accessed in November 2022); Inter-Agency Standing Committee (IASC), *Guidelines on Inclusion of Persons with Disabilities in Humanitarian Action*, 2019, available at: https://interagencystandingcommittee.org/iasc-task-team-inclusion-persons-disabilities-humanitarian-action/documents/iasc-guidelines.

specific risks of being incidentally harmed by attacks because they face greater difficulties than other civilians with regard to fleeing areas where military operations take place or hiding in safe shelter, or because they are left behind by family members or other support persons.[4] Persons with disabilities, especially children and women with disabilities, are also at a higher risk of violence, including sexual and gender-based violence.[5] Due to the inaccessibility of humanitarian relief – for instance, water, sanitation, health infrastructure or food distribution – persons with disabilities may face increased health risks or inadequate and undignified living conditions.[6] This may be the case when persons with disabilities are detained or displaced, and also when they are more generally part of the affected civilian population. Persons with disabilities are disproportionately affected, and at the same time are among the groups of persons most excluded by armed conflict.

International humanitarian law (IHL) provides for a variety of rules which could contribute to avoiding or minimizing conflict-specific harm or inadequate detention conditions. However, persons with disabilities are largely "invisible" in the implementation of rules regarding the general protection of civilians and persons *hors de combat*, and sufficient guidance as to the disability-inclusive implementation of such rules is lacking. The invisibility of persons with disabilities is the most important challenge to untapping the full protective potential of IHL. In particular, there has been no general awareness by parties to armed conflict of the relevance of the general rules on the conduct of hostilities, especially precautions, for avoiding or minimizing the greater risk of incidental harm to persons with disabilities. Similarly, there is room for exploring further what the IHL principles of humane treatment and non-adverse distinction concretely entail for contributing to more accessible detention conditions for detainees with disabilities.

A second group of challenges relates to the terminology and conceptualization associated with the IHL rules which specifically refer to persons with disabilities. The terminology used in the rules of specific protection has fuelled criticism that IHL reflects medical (in terms of only viewing disability through a medical response) and charity (viewing persons with disability as weak and passive victims) approaches to disability. While these are important concerns, they should not be regarded as an insurmountable obstacle to broadening the

4 See e.g. *Protection of Civilians in Armed Conflict*, above note 2; *Protection of Civilians in Armed Conflict: Report of the Secretary-General*, UN Doc. S/2020/366, 6 May 2020, paras 27–28; *Protection of Civilians in Armed Conflict: Report of the Secretary-General*, UN Doc. S/2019/373, 7 May 2019, para. 49.

5 *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/77/203, 20 July 2022, para. 67; *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc A/76/146, 19 July 2021, para. 34.

6 For a comprehensive analysis of barriers as well as existing legal and policy frameworks in humanitarian activities, including across different humanitarian protection and assistance domains, see Janet Lord, *Desk Review on Humanitarian Action Inclusive of Persons with Disabilities*, prepared for the IASC Task Team on Inclusion of Persons with Disabilities in Humanitarian Action, 1 March 2018, available at: https://interagencystandingcommittee.org/iasc-task-team-inclusion-persons-disabilities-humanitarian-action/documents/desk-review-humanitarian.

traditional narrow medical and charity models. Moreover, specific protections should be understood against the general rationale of recognizing that within the civilian population enjoying general protection, there are some groups who face specific barriers and risks; thus, these rules are inherently linked to the general protections under IHL.

It is in relation to these challenges that the complementarity between IHL and international human rights law (IHRL) – and especially the Convention on the Rights of Persons with Disabilities (CRPD), for States party to that treaty[7] – can make a contribution. Efforts to examine this complementarity have only recently become more detailed and systematic against the general backdrop of contributing to a disability-inclusive legal and policy environment in armed conflict among States, humanitarian organizations, human rights actors and academia, together with persons with disabilities and their representative organizations.[8] The International Committee of the Red Cross (ICRC) has also progressively increased its engagement in this regard, together with other components of the International Red Cross and Red Crescent Movement. In 2020 the ICRC adopted its Vision 2030 on Disability, which is designed to help the organization become more disability-inclusive in its protection and assistance activities for the people that it serves, as an employer, and in its legal and policy work.[9]

The ICRC's efforts to contribute to a disability-inclusive interpretation and implementation of IHL, in complementarity with the CRPD, form part of Vision 2030. Complementarity means that while IHL and CRPD norms may reveal certain differences, they may generally be interpreted with a view to their harmonization.[10] Article 11 of the CRPD provides an explicit legal basis for implementing this complementarity by making a general *renvoi* to international legal obligations of States party to the Convention under international law, including IHL and IHRL, and explicitly stating the Convention's applicability in

7 At the time of writing, the CRPD is one of the most widely ratified universal IHRL treaties, with 185 States Parties.

8 These efforts intensified around and after the World Humanitarian Summit in 2016. For outputs of these broader efforts, see UNSC Res. 2475, 20 June 2019; Charter on Inclusion of Persons with Disabilities in Humanitarian Action, 2016, available at: https://reliefweb.int/report/world/charter-inclusion-persons-disabilities-humanitarian-action-update-progress-world. For analysis of the complementarity between IHL and the CRPD more specifically, see *Report of the Special Rapporteur*, 2022, above note 5, paras 7–32; *Report of the Special Rapporteur*, 2021, above note 5; Office of the UN High Commissioner for Human Rights (UN Human Rights), *Thematic Study on the Rights of Persons with Disabilities under Article 11 of the Convention on the Rights of Persons with Disabilities*, UN Doc. A/HRC/31/30, 2016; Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), Geneva, 2019, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2014-interactif.pdf; Alice Priddy, *Military Briefing: Disability and Armed Conflict*, Geneva Academy Working Paper, Geneva, 2021, available at: www.geneva-academy.ch/joomlatools-files/docman-files/working-papers/Military%20Briefing%20Persons%20with%20Disabilities%20and%20Armed%20Conflict.%20.pdf.

9 ICRC, *The ICRC's Vision 2030 on Disability*, July 2020, available at: www.icrc.org/en/publication/4494-icrcs-vision-2030-disability.

10 ICRC, above note 1, pp. 42–43.

situations of armed conflict.[11] This means that IHL's general protections can be interpreted and applied with a view to increasing the visibility of specific risks and barriers faced by persons with disabilities in their diversity by using the contemporary social and human rights model and the active agency of persons with disabilities underlying the CRPD. This approach is indispensable for creating awareness among parties to armed conflicts of these disability-specific risks. The CRPD also contains among its general principles and fundamental obligations that persons with disabilities must be able to participate in and be consulted and actively involved in all decisions concerning them.[12] Participation requires that there must be a procedure through which persons with disabilities themselves can bring their perspectives and experiences to how IHL rules relevant to them should be interpreted and applied. Giving due recognition to the collective voice of persons with disabilities was also a leitmotiv behind the ICRC's joint efforts in 2022 with the UN Special Rapporteur on the Rights of Persons with Disabilities, the International Disability Alliance (IDA), the European Disability Forum (EDF) and the Diakonia IHL Centre to bring persons with disabilities and their representative organizations together with military representatives for a series of joint consultations on civilians with disabilities and military operations in armed conflict.[13]

This article will examine two major areas of IHL – the conduct of hostilities and detention – of particular relevance for persons with disabilities, in an effort to increase the visibility of persons with disabilities in the interpretation and implementation of these general IHL rules. While it aims to make a contribution to the mainstreaming of disability in IHL core areas, in harmony with the CRPD, it cannot provide an exhaustive treatment of this matter.[14]

11 The CRPD is the only universal IHRL treaty which has a provision explicitly covering situations of armed conflict, apart from the Convention on the Rights of the Child (Articles 38 and 39) and its Optional Protocol on the Involvement of Children in Armed Conflict, which is sometimes referred to as a hybrid IHL–IHRL treaty. It should also be noted that – unlike, for instance, the International Covenant on Civil and Political Rights – the CRPD does not contain a derogation clause. The general *renvoi* to obligations is without prejudice to general differences in scope of application between IHL and IHRL. This includes the extraterritorial applicability of IHRL and whether and how IHRL applies to non-State armed groups. Complementarity with the CRPD should also not be interpreted to mean new protected groups under IHL. For a specific exploration of the respective general scope of application of IHL and the CRPD, see A. Priddy, 2019, above note 8, pp. 34–46. For the most recent expression of ICRC views on the applicability of IHRL to non-State armed groups, see ICRC, above note 1, p. 54.

12 See Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 24 January 2007 (entered into force 3 May 2008) (CRPD), Arts 3, 4(3).

13 While these consultations were conducted under Chatham House rules, the content of challenges and potential recommendations will be reflected throughout this article. Salient findings from these consultations were also presented in the 2022 report by the UN Special Rapporteur on the Rights of Persons with Disabilities, Mr Gerard Quinn, on the implementation and application of obligations under IHL towards persons with disabilities during the conduct of hostilities. See *Report of the Special Rapporteur*, 2022, above note 5, paras 64–74.

14 Many other areas could be examined in this regard – for instance, IHL rules in relation to displacement, to preventing and clarifying the fate of missing persons, or to humanitarian access. A detailed intersectional analysis of specific barriers and risks between disability, age and gender is equally beyond the scope of this article, as is an analysis of the interlinkages between victim assistance provisions in weapons treaties and the CRPD.

IHL rules on the conduct of hostilities: General protections including for civilians with disabilities

It is perhaps stating the obvious to note that persons with disabilities, especially when they are civilians and unless they directly participate in hostilities, enjoy general protection under the rules on the conduct of hostilities as much as civilians without disabilities. However, while they are generally included as civilians, the challenge is precisely to interpret and implement the IHL principles of distinction, proportionality and precautions in a manner that takes into account the specific risks to civilians with disabilities.

The principle of distinction

The IHL principle of distinction requires that the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants, and correspondingly, attacks must not be directed against civilians, unless and for such time as they directly participate in hostilities.[15] Even for civilians without disabilities, fleeing from an area where hostilities are taking place can be fraught with risk of being subject to attacks while moving. This risk is especially great in dynamic and fluid situations like large-scale population movements.

Persons with disabilities – for instance, those with psychosocial or sensory disabilities – may be at even greater risk where their behaviour is misjudged by combatants as directly participating in hostilities or somehow indicating membership in a non-State armed group, which could in turn lead to direct attacks against them.[16] Against that background, ICRC recommendations to military commanders specifically made for urban warfare are particularly relevant, including that training scenarios and doctrine not only reflect the operational setting and likely conduct of an enemy, but also include realistic civilian presence (by age, gender, disability and number) and activity, the risks civilians face, and their actions and reactions, so as to familiarize and condition troops prior to deployment.[17] Furthermore, all those involved in targeting procedures (both pre-planned and dynamic) should receive comprehensive training and take part in related exercises which include a range of different aspects that help ensure targeting is lawful.[18] One aspect of such training should be the positive identification of targets to verify with reasonable certainty that, for instance, a person to be attacked constitutes a lawful target in accordance with

15 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 7 December 1978) (AP I), Art. 48; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 1, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1.

16 OPD testimonies, joint consultations on persons with disabilities and military operations in armed conflict, May 2022.

17 ICRC, *Reducing Civilian Harm: A Commander's Handbook*, Geneva, 2021, p. 25.

18 *Ibid.*, p. 27.

IHL; such identification is derived through observation and analysis of target characteristics.[19] Training scenarios and doctrine should reflect the reality that persons with sensory, psychosocial or intellectual disabilities may not be able to understand or react to hostilities occurring around them. This specific awareness of potential behaviour by persons with sensory, psychosocial and intellectual disabilities should also feed into the analysis of target characteristics and therefore help to avoid any mistaken presumptions that these people, because of their behaviour, would be targets. To create such specific awareness, the involvement in such trainings of persons with disabilities and organizations of persons with disabilities (OPDs) should be explored.

The principle of proportionality

IHL prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof that would be excessive in relation to the concrete and direct military advantage anticipated.[20] It requires military commanders to make that assessment at the planning stage before deciding upon an attack, and to cancel or suspend an attack if it becomes apparent during the attack that it would cause excessive incidental civilian harm.[21] Key to that proportionality evaluation is the determination of what incidental harm to civilians is foreseeable based on all information from all sources reasonably available to the commander in the circumstances, including military but also civilian sources.[22]

Particularly in urban and other populated areas, due to the intermingling of military objectives with civilians and civilian objects, it is critical that the information collected in the planning process does not only focus on target verification, including to rule out mistaken determinations that civilians with disabilities would constitute lawful targets; it should also serve to assess the incidental civilian harm expected to result from the attack.[23] In this assessment, the fact that in many contexts barriers prevent civilians with disabilities from fleeing or being evacuated from areas where hostilities are taking place must be taken into account. Practices such as the assessment of realistic civilian presence, as well as assuming civilian presence in every civilian building unless proved otherwise, would help to take these disability-specific risks of incidental harm into account.[24]

Incidental civilian harm would not only include incidental loss of civilian life, injury to civilians or destruction to civilian objects but also indirect or reverberating effects, often also known as "second- and third-order", "knock-on" or "long-term"

19 *Ibid.*, p. 20.
20 AP I, Art. 51(5)(b); ICRC Customary Law Study, above note 15, Rule 14.
21 AP I, Arts 57(2)(a)(iii), 57(2)(b); ICRC Customary Law Study, above note 15, Rules 14, 18, 19.
22 ICRC, *Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas*, Geneva, 2022, pp. 97–98.
23 ICRC, above note 1, p. 18.
24 *Ibid.*

effects. In the ICRC's view, such effects must also be taken into account in the proportionality assessment and in precautions in attack insofar as they are reasonably foreseeable.[25] For example, incidental damage to critical civilian infrastructure, such as vital water and electrical facilities and supply networks, will likely entail reverberating effects on other essential services, like health-care services, water distribution, power supply and sanitation, which depend on such infrastructure.[26] This in turn may lead to further deaths or disease among civilians. This is especially relevant in urban warfare, where military objectives are intermingled with civilian objects and where critical civilian infrastructure and essential service systems are largely interconnected and interdependent.

What is reasonably foreseeable varies depending on the circumstances of the attack, but patterns of incidental civilian harm can be foreseen based on past experience.[27] Foreseeability will be informed and will evolve in particular through analysis of the effects of past attacks, including through the collection of sex-, age- and disability-disaggregated civilian casualty data; studies on the effects of conflicts; better modelling of weapons' effects; better understanding of the infrastructural set-up and interdependency between services; and new technologies to better assess the presence of civilians and the condition or status of infrastructure and service delivery during the conflict.[28]

In this regard, what has been emphasized by the ICRC for specific gendered impacts of attacks is equally true for disability-specific impacts of attacks; while there is some general understanding of the barriers and risks faced by civilians with disabilities, there is a lack of data on the specific impacts of attacks on such civilians.[29] For States party to the CRPD, this more granular analysis of barriers and risks faced by persons with disabilities resulting from specific attacks entails an obligation to collect disaggregated data to guide that analysis.[30] By that token, the foreseeability of disability-specific harm could be improved by military decision-makers.

For civilians with disabilities, there could be specific articulations of such reverberating effects of attacks – for instance, where hospitals or rehabilitation centres, which may more often be needed by certain civilians with disabilities than by others, become fully or partly dysfunctional, or where damage to electricity networks affects the operation of assistive or medical devices, such as wheelchairs, scooters, communication devices, dialysis machines, ventilators or oxygen concentrators, which may be vital for the daily functioning of some civilians with disabilities.[31]

25 *Ibid.*, p. 20.
26 ICRC, above note 22, p. 98; ICRC, above note 17, p. 27.
27 ICRC, above note 1, p. 18. See also ICRC, *Gendered Impacts of Armed Conflicts and Implications for the Application of International Humanitarian Law*, Geneva, 2022, p. 16.
28 ICRC, above note 1, p. 18; ICRC, *Gendered Impacts*, above note 27, p. 16.
29 See H. Durham and G. Quinn, above note 3. Regarding the data gap on specific gendered impacts of attacks, see ICRC, *Gendered Impacts*, above note 27, p. 16.
30 CRPD, above note 12, Art. 31.
31 Joint consultations on persons with disabilities and military operations in armed conflict, April and May 2022.

A disability-inclusive analysis of specific attacks may also inform the value assigned to particular civilian uses when confronted with the general challenge of contemporary warfare that many objects are used simultaneously for military and civilian purposes in the assessment of incidental harm.[32] For instance, if certain objects, such as bridges, were to be attacked because by their purpose or use they have become military objectives, and the remaining evacuation options for civilians will result in alternative routes over difficult terrain with numerous physical obstacles, this would mean that some civilians, especially those with physical disabilities, will be more likely not to be able to use these routes, and as a consequence, they may have a higher likelihood of being left behind in an area where hostilities are ongoing, with greater risk of being incidentally harmed.[33] If this specific foreseeable harm is omitted from the proportionality assessment, or is not accorded enough priority in that calculus, the fact that the death or injury which may foreseeably result from taking the more difficult route or from staying in the area of hostilities because the evacuation route is not accessible to certain individuals will likely not be considered in the assessment of incidental harm.

While omitting specific foreseeable disability-specific incidental harm confirms the general problem of lack of awareness of disability-specific impacts of the conduct of hostilities, not according priority to such harm where there might be awareness highlights in this specific context the general challenge of inherent value judgements in the application of the principle of proportionality.[34]

The principle of precaution

In addition to the principles of distinction and proportionality, IHL also imposes the obligation on attackers to take constant care to spare the civilian population in all military operations. Parties must take "all feasible precautions" in attack in order to avoid or at least minimize incidental civilian harm (active precautions), and must protect civilians under their control from the effects of attacks (passive precautions).[35] "Feasible" entails what is possible in practice, taking into account all of the humanitarian and military considerations that prevail at the time; this may be dynamic and may evolve with time, including as a result of past practice and lessons learned.[36]

It is submitted that with this dynamic understanding of evolving information on barriers and risks faced by persons with disabilities, information provided by persons with disabilities themselves, by OPDs and/or by impartial humanitarian organizations should also feed into the considerations on which precautions are based.

32 On this general challenge, particularly in urban warfare, and the ICRC's legal position, see ICRC, above note 1, p. 19.
33 Joint consultations on persons with disabilities and military operations in armed conflict, April and May 2022.
34 For an exploration of this issue though a gender lens, see ICRC, *Gendered Impacts*, above note 27, p. 16.
35 AP I, Arts 57–58; ICRC Customary Law Study, above note 15, Rules 15–24.
36 ICRC, above note 1, p. 17.

The general obligation to take constant care supplements the basic rule of distinction. It applies to the entire range of military operations and not only for attacks within the meaning of IHL. The term "military operations" encompasses "any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat" or "related to hostilities".[37]

The obligation of constant care is an obligation of conduct, to mitigate risk and prevent harm. It applies constantly in the planning or execution of any military operation. As a general rule, the higher the risk for the civilian population in any given military operation, the more will be required in terms of care. The requirement to take constant care extends to every aspect of military operational training, planning and mission execution, and is interpreted by some as demanding that soldiers be trained and directed to instinctively endeavour to mitigate civilian risk in all situations.[38]

For instance, in troop movements with a view to attacking military objectives in a town or village, there is a high risk that persons with sensory disabilities will be unable to hear the presence of armed forces. In this regard, in certain contexts, deaf persons have been shot from behind and killed because they did not realize that military personnel were advancing and they were wrongly associated with an adversary in an armed conflict.[39] What has been observed above regarding positive identification of targets with reasonable certainty is *mutatis mutandis* relevant here – namely, that specific awareness by parties to armed conflict in such situations may contribute to correctly appraising the behaviour of, and thereby avoiding or mitigating harm to, certain civilians with disabilities. In this context, parties to armed conflict should be alert to attempts by persons with sensory disabilities to communicate to them that a person is not a lawful target. For instance, a deaf person might wave their hand, or a piece of cloth, tree branch or handkerchief, to combatants to express this.[40]

Active precautions include those that can be taken in the choice of means and methods of attack with a view to avoiding, or in any event minimizing, incidental civilian harm.[41] Generally, this includes consideration of the timing of attacks in order to choose a moment for attacking military objectives when there are fewer civilians present, such as at night rather than in the middle of the day.[42] Given that civilians with disabilities face specific difficulties with regard to leaving the vicinity of military objectives for safer spaces, considerations of the timing of attacks are especially relevant; it appears that parties to armed conflict

37 Yves Sandoz, Christophe Swinarski and Bruno Zimmmerman (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), p. 680, para. 2191.
38 ICRC, above note 22, p. 102 (with further references).
39 OPD testimony, joint consultations on persons with disabilities and military operations in armed conflict, May 2022.
40 *Ibid.*
41 AP I, Art. 57(2)(a)(ii); ICRC Customary Law Study, above note 15, Rule 17.
42 See ICRC Commentary on the APs, above note 37, p. 682, para. 2200.

have delayed military operations because the military objective was surrounded by civilians, including civilians with disabilities.[43]

Another active precaution that is particularly relevant for civilians with disabilities is that parties to armed conflicts must give effective advance warnings of attacks that may affect the civilian population, unless the circumstances do not permit.[44] The effectiveness of a warning should be assessed from the perspective of the civilian population that may be affected. It should reach and be understood by as many civilians as possible who may be affected by the attack, and it should give them time to leave, find shelter or take other measures to protect themselves.[45] The general planning considerations for commanders for implementing effective advance warnings include varied formats of communication, ensuring that the content of messages is clear and easy to understand, what constitutes sufficient notice for the civilian population to react to the warning, and whether the population is free to react to the warning.[46]

These considerations should be appropriately contextualized in order to render them inclusive for persons with disabilities as part of the civilian population. For instance, issuing such warnings in a disability-inclusive manner requires presenting accessible information in a variety of formats that takes into account the diversity of impairments of persons with disabilities. Radio messages alone will not be heard by persons with hearing impairments, who would need the information to be presented to them in sign language. Leaflets or other exclusively visual forms of warning will not be seen by persons with visual impairments. Complex instructions and warnings, if not simplified, will not be understood by persons with intellectual impairments.[47] Exploring options to equip parties to armed conflict with certain language competences, such as the local sign language, by relying either on already existing skills within a party to a conflict or on external experts (including civil authorities and OPDs), would help in the diversification of formats of communication and would increase the range of means of communication in a more disability-inclusive manner.[48]

Civilians with disabilities may need more time to leave an area of impending military operations, and this aspect should also be taken into account in informing the decision by attackers as to when a warning should be issued and how much time will be granted to the civilian population until the warning expires.

In terms of passive precautions for defenders, these may include the construction of safe shelters, the withdrawal of the civilian population to safer

43 Testimony by State armed forces, joint consultations on persons with disabilities and military operations in armed conflict, May 2022.
44 AP I, Art. 57(2)(c); ICRC Customary Law Study, above note 15, Rule 20.
45 ICRC, above note 1, p. 17.
46 For planning considerations for issuing effective advance warnings to the civilian population, see ICRC, above note 17, pp. 48–49. On timing aspects in relation to advance warnings, see also Jean-François Quéguiner, "Precautions Under the Law Governing the Conduct of Hostilities", *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 808.
47 H. Durham and G. Quinn, above note 3.
48 This was suggested by military representatives participating in the joint consultations on persons with disabilities and military operations in armed conflict, April and May 2022.

places, or temporary evacuations to allow civilians to leave for safer areas by their own free will while military operations are ongoing.[49] Forcible evacuations, on the other hand, are prohibited as forcible transfers, deportations or displacement, unless they are undertaken for the security of civilians themselves, including that of civilians with disabilities, or are dictated by imperative military necessity.[50] To ensure that evacuations are not forced or unlawful, they must remain limited to the time required by the circumstances. When those circumstances cease to exist, displaced persons, including displaced persons with disabilities, have a right to voluntary return in safety to their homes or places of habitual residence.[51]

Taking passive precautions in a disability-inclusive manner means, for instance, ensuring that safe shelters are physically accessible to wheelchair users or that information on their location is accessible for those with intellectual disabilities. It means giving specific consideration during evacuations to identifying persons with disabilities, ensuring accessible means of transport, allowing for their personal assistants and caretakers to accompany them, and ensuring that they are able to keep assistive devices with them or have access to suitable alternatives in case those devices have been lost or damaged.[52]

Finally, it must be emphasized that even if civilians are not able to act on an effective advance warning, cannot access safe shelter and cannot be part of temporary evacuations, they continue to benefit from all general protections afforded to civilians, including the principles of distinction, proportionality and precaution.[53] This is absolutely crucial for civilians with disabilities in light of their specific barriers to accessing warnings, shelter or evacuation operations, and/or their lack of willingness to leave their habitual homes, especially older civilians with disabilities. As a result of these factors, many will continue to be present in danger zones.

Specific protection of persons with disabilities

A disability-inclusive interpretation and implementation of IHL is also reinforced by specific protections for persons with disabilities as part of civilian populations. These specific protections do not exist in isolation from the general protections for civilians; rather, they are a recognition of the specific risks, including from

49 For examples of precautions against the effects of attacks, see ICRC Customary Law Study, above note 15, commentary on Rule 22, which constitutes customary IHL in both IAC and NIAC. For in-depth planning considerations for military commanders related to evacuations of civilians, see ICRC, above note 17, pp. 55–56.

50 See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 49; 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. 17; ICRC Customary Law Study, above note 15, Rule 129.

51 GC IV, Art. 49(2); ICRC Customary Law Study, above note 15, Rule 132; ICRC, above note 1, p. 40.

52 H. Durham and G. Quinn, above note 3.

53 ICRC, above note 1, p. 17; ICRC, above note 22, p. 104.

military operations, faced by certain groups within the civilian population like persons with disabilities, but also older persons, women and children.

The terminology used in provisions of the Geneva Conventions (including Geneva Convention IV (GC IV)) to describe persons with disabilities, like "infirm",[54] and the notion that persons with disabilities deserved specific protection because they were thought to be in a state of weakness due to their physical or mental condition, were a product of the social and historical context at the time.[55] It is well understood today that these terms and concepts, which narrowly focus on the individual condition of the person with disability through a medical perspective and arguably view them as weak and passive victims in need of protection, are certainly outdated in light of contemporary understandings of disability.[56] Although we can and must move beyond such terms and notions, we must not discard the important recognition already present in the minds of the drafters of the Geneva Conventions that certain groups of civilians, including civilians with disabilities, require specific consideration.[57]

The gist of specific protections under IHL is encapsulated by the obligation that persons with disabilities are entitled to special respect and protection. This obligation, which is enshrined in treaty law applicable to international armed conflicts (IACs) in GC IV and in customary IHL for all types of armed conflict,[58] requires that parties to armed conflict refrain from attacking, otherwise harming or ill-treating persons with disabilities, and that those parties take active measures to assist and protect such persons from harm. The obligation to "assist and protect" is to be broadly interpreted to cover protection or support from a wide range of harms or dangers. The harms or dangers from which persons with disabilities are to be protected include those arising from hostilities; from violence, exploitation or ill-treatment, both by combatants and by civilians; and

54 See e.g. GC IV, Arts 16–18, 20–22.

55 *Ibid.* "Infirm" means "not physically or mentally strong, especially through age or illness", and stems from the Latin word *infirmus*, which means weak or not strong. See "Infirm", *Cambridge Dictionary*, available at: https://dictionary.cambridge.org/dictionary/english/infirm. While this term is often closely associated with older persons, the drafting history of GC IV provides evidence that the term was understood to encompass persons with disabilities, especially persons with physical impairments, during the drafting process. See, for instance, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2.B, Federal Political Department, Berne, 1949, p. 471 (the French delegate is quoted as saying that the term "infirm" dealt with the protection of persons with disabilities); Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (1958 Commentary on GC IV), pp. 125 (clarifying that despite the fact that they are not explicitly mentioned, persons with physical impairments would also qualify for specific protection of groups of civilians who could be accommodated in hospitals or safety zones), 146 (mentioning in the context of civilian hospitals that "homes for the blind or the deaf and dumb" could qualify as civilian hospitals, "provided that the inmates are receiving care").

56 See ICRC, *How Law Protects Persons with Disabilities in Armed Conflict*, Geneva, 2017, available at: www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict.

57 1958 Commentary on GC IV, above note 55, p. 134.

58 GC IV, Art. 16(1); ICRC Customary Law Study, above note 15, Rule 138.

from the risk of exacerbation of an existing impairment or secondary impairment if existing medical services or support become inaccessible.[59]

Therefore, specific protection is applicable to the conduct of hostilities but also when the person concerned is under the control of a party to a conflict.[60] Further rules address certain aspects of the implementation of this obligation, such as the obligation under GC IV to facilitate steps taken to assist civilians (other than wounded or shipwrecked civilians) in grave danger.[61] The kind of measures to be facilitated would be similar to the feasible precautions taken to protect civilians under the control of parties to armed conflict from the dangers of military operations and may concern, for instance, evacuating persons with disabilities or providing accessible temporary safe shelters.[62]

From a contemporary perspective, the main challenge is to consider the diversity of impairments of persons with disabilities and the variety of barriers faced by different persons with disabilities, and tailoring measures to address these barriers in the interpretation and implementation of specific protections.

The complementarity between IHL and the obligations of States party to the CRPD assists in this regard. Article 11 of the CRPD is an explicit expression of this complementarity, as it obligates States Parties to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of armed conflict, in accordance with their obligations under international law, including IHL and IHRL. A contemporary interpretation of IHL can be based on the social and human rights model of disability and the evolving concept of disability underlying the CRPD, and includes among persons with disabilities those with physical, psychosocial, intellectual or sensory impairments that – in interaction with various barriers, be they physical, communication, attitudinal or institutional – result in specific risks from military operations and prevent such persons from accessing protections under IHL.

Reading the IHL obligation of "special" respect and protection of persons with disabilities in light of the complementarity with the CRPD presupposes that not only persons with physical disabilities are identified as such but also those with less visible disabilities, including persons with sensory, intellectual or psychosocial disabilities. Identifying the location and diversity of persons with disabilities raises the issue of implementation of the obligation to collect publicly available disability-disaggregated data of sufficient quality under the CRPD as a basis for inclusive interpretation and implementation of specific protections

59 For a similar interpretation of the various dangers or harms covered by the obligation to protect, see 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 (2016 Commentary on GC I), para. 1361.

60 See e.g. Belgium, *Droit des conflits armés*, 2009, chap. V, p. 3; Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, 2nd ed., 2020, p. 247; Peru, *International Humanitarian Law Manual for the Armed Forces*, 2004, para. 84 (b).

61 GC IV, Art. 16(2).

62 See e.g. Denmark, above note 60, p. 208; Norway, *Manual of the Law of Armed Conflict*, 2013, p. 86, para. 4.54.

under IHL.[63] The involvement of civilian actors, including civil authorities, OPDs and impartial humanitarian organizations, may enable parties to armed conflicts to obtain more precise information on persons with disabilities when conducting their military operations and may help to temporarily remedy gaps or errors on data available in a given State. Still, coordination and centralization of the data from various sources will be necessary to ensure that the information is accurate and reliable.[64]

The complementarity between IHL and the CRPD also means that the nature and variety of the barriers faced by diverse persons with disabilities must be effectively addressed by measures other than the provision of medical services. It is important to affirm a broader approach of IHL to persons with disabilities, since IHL has been repeatedly criticized as taking an outdated, medicalized approach to such persons, focusing merely on the person's individual condition (i.e. the impairment) that requires medical treatment.[65] In particular, as already mentioned, a person with a hearing impairment or a visual impairment will face specific communication barriers, which, if unaddressed, will lead to specific risks of that person not accessing information permitting their protection during hostilities. To address such communication barriers, it is not medical care or a medical competence which is primarily needed, but rather competence in sign language or Braille. To avoid or minimize the risk of wrongful attacks or violence against persons with psychosocial or intellectual disabilities due to misjudging their behaviour, whether in hostilities or in situations where persons with psychosocial or intellectual disabilities come under the control of combatants, it is not mental health services that would address this challenge. Rather, in attacks or troop movements, and in screening operations at military checkpoints or during house-to-house searches, more specific awareness by weapons bearers of potential reactions to their presence by persons with psychosocial or intellectual disabilities should be raised through training, and some basic guidance on appropriate military behaviour when encountering persons with psychosocial or intellectual disabilities should be provided.

The variety of lived experiences of persons with disabilities may also be captured when IHL-specific protections are complemented by the CRPD. For instance, negotiators of the 1949 Geneva Conventions had in mind the scenario of civilians trapped in air raid shelters as a particular example of persons in grave danger requiring the facilitation of specific measures to assist them.[66] However, the wording of "other persons exposed to grave danger" and the intention of the drafters make it clear that this is to be viewed as a catch-all category aimed at ensuring that the groups of civilians explicitly mentioned would not be

63 CRPD, above note 12, Art. 31.
64 OPD testimony, joint consultations on persons with disabilities and military operations in armed conflict, May 2022.
65 See ICRC, above note 1, p. 42. This criticism is often based on the mention of "disability" in the definition of "wounded and sick" persons who may be in need of medical assistance or care under Article 8(a) of AP I.
66 1958 Commentary on GC IV, above note 55, p. 136.

understood as a restrictive list.[67] The complementarity with the CRPD, which expressly recognizes the diversity of persons with disabilities in light of their lived experiences, reinforces an interpretation of this provision that covers persons with disabilities or older persons who may not be trapped in shelters but in their homes and who are therefore at grave risk because they cannot or do not intend to flee military operations.[68]

In order for parties to armed conflict to effectively facilitate steps taken to assist civilians with disabilities in grave danger from military operations, operational cooperation and coordination between parties to armed conflict, civil authorities and other actors like OPDs and impartial humanitarian organizations are crucial. Such cooperation and coordination may also render the implementation of feasible precautions for the general protection of civilians more effective, such as evacuations. This reflects the reality that often measures like evacuations will actually be performed by actors other than parties to the armed conflict, and these actors will thereby support parties to armed conflicts in implementing their IHL obligations.[69]

Mechanisms of coordination and cooperation should be put in place in advance before an armed conflict occurs due to the fact that during an armed conflict, the obligation to facilitate steps taken by other actors than a party to a conflict itself are subject to the caveat "as far as military considerations allow". What is feasible in terms of precautions also hinges upon military considerations besides humanitarian concerns.[70] Military considerations like ongoing hostilities or the necessity of establishing military positions without revealing them to civilian actors, including those with enemy nationality, may temporarily prevent allowing such stakeholders to access certain areas.[71]

A specific way to implement precautions both in attack and against the effects of attack in besieged and encircled areas, as well as the specific protections applicable to groups of civilians provided by GC IV, is to draft local agreements between belligerents in order to allow those groups of civilians, including persons with disabilities, to be evacuated.[72] Such agreements should cover, generally, details like the number of people to be evacuated, the beginning and duration of any truce to enable the evacuation to proceed, the means of transport, and the route to be taken.[73] In order for persons with disabilities to be part of such

67 *Ibid.*
68 H. Durham and G. Quinn, above note 3.
69 That said, parties to armed conflict, including non-State parties, have proceeded with evacuations of civilians with disabilities themselves, such as in one NIAC where one non-State party to the conflict reportedly evacuated civilians with disabilities based on its information on the population in areas under its control, in accordance with its religious values. This was shared in an OPD testimony at the joint consultations on persons with disabilities and military operations in armed conflict, May 2022.
70 GC IV, Art. 16(2).
71 1958 Commentary on GC IV, above note 55, pp. 136–137; see also *Final Record*, above note 55, p. 392.
72 GC IV, Art. 17.
73 1958 Commentary on GC IV, above note 55, p. 139. See also ICRC, above note 17, pp. 55–56, which contains a detailed planning checklist for military commanders as a useful resource for informing the details of evacuation agreements.

evacuations, the specific considerations already elaborated above in relation to feasible precautions should also be included.

IHL and persons with disabilities in the power of a party to a conflict, with specific focus on detainees with disabilities

The preceding section dedicated to specific protections for persons with disabilities under IHL has already mentioned scenarios where persons with disabilities may come within the power of a party to a conflict, including screening operations at checkpoints. Persons may come within the power of a party to a conflict to varying degrees, from scenarios which involve control over individual persons, including movement restrictions or deprivations of liberty, or when persons with disabilities are wounded or sick, to situations where they are part of affected populations in territory controlled by a party to a conflict.

Humane treatment

In all of the aforementioned situations of being in the power of a party to a conflict, persons with disabilities benefit from certain fundamental guarantees; above all, they must be treated humanely, without any adverse distinction.[74] This obligation is based on respect for a person's physical and mental integrity and their inherent dignity. However, the meaning of humane treatment is not defined under IHL. This omission is deliberate, as the definition is context-specific. Today, the ICRC understands this obligation to require parties to armed conflict to consider an individual's identity, including their age, sex, impairment, and social, cultural, religious or political background. Their past experiences and how these experiences, along with the person's risks or needs, are shaped by environmental factors, notably the socio-cultural, economic and political structures in place, must also be taken into account.[75] Therefore, the meaning of what constitutes humane treatment is inherently dynamic and subject to changes in society.[76]

Specific acts of ill-treatment

While humane treatment carries an independent meaning, IHL also prohibits specific acts of ill-treatment, such as torture and other cruel, inhumane or degrading treatment or punishment. For evaluating whether specific conduct amounts to prohibited ill-treatment, the specific individual circumstances of the person ill-treated must be taken into account, including their physical or mental condition, their gender, age, social, cultural or religious background, and their

74 Common Art. 3; AP I, Art. 75; AP II, Art. 4.
75 2016 Commentary on GC I, above note 59, para. 553; ICRC, above note 56; ICRC, above note 1, pp. 41–43.
76 See ICRC Customary Law Study, above note 15, commentary on Rule 87.

past experiences, as well as environmental factors such as prevailing social and cultural conditions.[77]

The prohibition against adverse distinction, *de facto* equality and complementarity with CRPD obligations related to accessibility and reasonable accommodation

The obligation of humane treatment must also be considered together with the prohibition against adverse distinction. "Disability" is not explicitly mentioned as a prohibited ground of adverse distinction under IHL, but it is nevertheless encompassed by the prohibition, as adverse distinction based on "any other similar criteria" as those explicitly listed is equally prohibited.[78] Therefore, the IHL prohibition against adverse distinction can be interpreted as converging with the prohibition against discrimination on the basis of disability which is explicit in the CRPD.[79]

Since only "adverse" distinction is prohibited, measures of differentiation or prioritization which take into account the specific risks faced by persons with disabilities may not only be allowed but may even be required. Thus, non-adverse distinctions may actually be necessary to ensure humane treatment in the different situations in which persons with disabilities may find themselves.[80]

This may require the taking of all feasible measures to remove and prevent the raising of any barriers that persons with disabilities might face in gaining equal access to services or protections provided under IHL compared with other civilians or persons *hors de combat*. When interpreted to include these positive obligations, IHL converges with obligations to advance the *de facto* or substantive equality of persons with disabilities under human rights law, in particular the CRPD.[81]

Central to ensuring substantive equality between persons with disabilities and other persons are obligations under the CRPD to ensure accessibility of the physical environment, information, communications and services, as well as the provision of reasonable accommodations in individual cases when needed.[82] With regard to taking positive appropriate measures related to accessibility, the CRPD

77 See, for instance, ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (2020 Commentary on GC III), para. 465.

78 See common Art. 3; 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), Art. 16; GC IV, Art. 27; AP I, Art. 75; AP II, Art. 2; ICRC Customary Law Study, above note 15, Rule 88; 2020 Commentary on GC III, above note 77, paras 26–27.

79 ICRC, above note 56; CRPD, above note 12, Art. 5(2).

80 See in this sense, see 2020 Commentary on GC III, above note 77, paras 610–616. See also ICRC, *Detention by Non-State Armed Groups: IHL Obligations and NSAG Practices to Implement Them*, Geneva, forthcoming, Rules 1, 4–5 and commentaries thereto.

81 ICRC, above note 1, p. 42; CRPD, above note 12, Art. 5(4).

82 CRPD, above note 12, Arts. 5(3). 9. According to Article 2 of the CRPD, "reasonable accommodations" are "necessary modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

explicitly includes the identification and elimination of barriers to accessibility, be they physical, communicative, attitudinal or institutional.[83]

Screening operations

The inherently dynamic interpretations of humane treatment and the prohibition of adverse distinction under IHL, in harmony with the CRPD, allow for disability-specific contextualizations in a range of situations in which persons with disabilities are in the power of a party to a conflict.[84] For instance, these considerations allow us to appreciate the importance of assistive devices for respecting the dignity of persons with disabilities whose movement is restricted, such as when they are at checkpoints or detained. If assistive devices that have supported a person's functioning for a long time are damaged, or are confiscated and not returned, the harm to a person's dignity becomes clear when it is understood that, for persons with disabilities, assistive devices are not simply objects but are extensions of their bodies.[85] In a similar vein, refusing to allow a person with a disability to be accompanied through checkpoint controls by their support person, personal assistant or caretaker could also encroach on that person's dignity.[86]

In screening operations where parties to armed conflict aim to control large population movements, a disability-inclusive implementation of the obligation to treat civilians and persons *hors de combat* humanely and without adverse distinction would emphasize appropriate measures to ensure accessibility to information on the process of such operations.[87] These measures would go some way to reducing the potential for violent encounters and inappropriate behaviour, including cruel, inhuman or degrading treatment by parties to armed conflicts and their representatives towards persons with disabilities.[88]

Detention conditions

In situations of conflict-related detention, specific conduct and detention conditions which have already been held by the International Criminal Tribunal for the former

83 CRPD, above note 12, Art. 9(1).
84 ICRC, above note 56.
85 OPD testimony, joint consultations on persons with disabilities and military operations, April 2022; CRPD Committee, "General Comment No. 6 on Equality and Non-Discrimination", UN Doc. CRPD/C/GC/6, 2018, paras 24, 31; Amanda Keeling, "Commentary on Article 16: Freedom from Exploitation, Violence and Abuse", in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford University Press, Oxford, 2018, p. 483.
86 OPD testimony, joint consultations on persons with disabilities and military operations, April 2022; A. Priddy, 2019, above note 8, p. 54.
87 ICRC, above note 17, p. 60.
88 However, it has been observed that in such operations little specific consideration has been given to persons with disabilities, among other groups facing specific risks. See Laurent Saugy and Tilman Rodenhäuser, "5 Operational Realities of Detention in Contemporary Armed Conflict", *Humanitarian Law and Policy Blog*, 30 November 2018, available at: https://blogs.icrc.org/law-and-policy/2018/11/30/5-operational-realities-detention-contemporary-armed-conflict/.

Yugoslavia (ICTY) to constitute torture or cruel, inhuman or degrading treatment would be specifically relevant for detainees with disabilities. Such conditions include lack of adequate medical attention;[89] more broadly inhumane living conditions in places of detention with regard to adequate food, water, clothing, medical care, shelter or contacts with the outside world;[90] and solitary confinement, in view of its strictness, its duration and the objective pursued.[91]

The ICTY drew on the case of a detainee with a psychosocial impairment among a group of several others with mental health conditions in determining detention conditions that amount to cruel treatment in violation of Article 3 common to the four Geneva Conventions. It invoked the very restrictive detention environment of the detainee, who had no possibility of taking outdoor walks to relieve his psychological stress, leading him to adopt self-harming behaviour such as cutting off his ear and fingernails. The effects of that environment were exacerbated by the severe lack of food, which provoked extreme hunger, causing the detainee to eat insects when he caught them. Finally, the guards were aware of the existence of a group of detainees with psychosocial impairments but did not take any positive action to accommodate those detainees.[92] The ICTY relied on these facts to establish the severity of physical and mental consequences suffered by this person with a psychosocial disability necessary for concluding that cruel treatment had been committed.[93]

Severe beatings and the refusal to urgently transfer a detainee with a hearing impairment to an external hospital outside of a detention camp, whereupon this detainee died, were at the core of another finding of cruel treatment by the ICTY in the context of a non-international armed conflict (NIAC).[94] However, what received less attention by the judges was the testimony by a witness who believed that the guards beat this detainee even more than other detainees without disabilities. This was allegedly because the guards thought that the detainee was refusing to answer their questions, but in fact his lack of response was due to his hearing impairment and inability to speak, of which they were unaware.[95] This demonstrates the risk of ill-treatment as a reaction to persons with psychosocial or sensory disabilities when there is a lack of awareness on the part of Detaining Powers faced with such persons within their detainee population.

In another case, severe and repeated beatings which caused a detainee with physical and psychosocial disabilities to lose consciousness numerous times formed the main basis for a determination of cruel treatment, in the same way as repeated

89 ICTY, *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1, Judgment (Trial Chamber), 27 September 2007, para. 517.
90 ICTY, *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, paras 530, 554–558; ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25, Judgment (Trial Chamber), 15 March 2002, paras 128–173.
91 ICTY, *Krnojelac*, above note 90, para. 183.
92 *Ibid.*, para. 148.
93 *Ibid.*, para. 146.
94 *Ibid.*, para. 159.
95 *Ibid.*, Testimony of Witness FWS-111, 27 November 2000, p. 1230, available at: www.icty.org/x/cases/krnojelac/trans/en/001127ed.htm.

beatings constituted cruel treatment for detainees without disabilities. In addition, however, the ICTY also found that the detainee with disabilities was subjected to beatings which specifically targeted his impaired limbs.[96] Witness testimonies further specified that this detainee had wandered off from the place of detention when going to the toilet, unaware of his surroundings and probably believing he was going home, and that the guards found him, brought him back and thereafter targeted his limbs specifically.[97]

These cases illustrate that general conditions of detention, to which persons without disabilities are also exposed, can have a specific impact on detainees with disabilities. That impact needs to be taken into account when evaluating humane treatment; the specific consequences may include an exacerbation of the impairments of detainees with disabilities. This also underscores the importance of positive measures of accessibility and, where necessary in individual cases, of specific targeted measures of reasonable accommodation, in order to ensure that detainees with disabilities have humane detention conditions, without adverse distinction, and are not exposed to ill-treatment.

In its most recent Commentary on Geneva Convention III (GC III), the ICRC emphasized that support services in camps must be available to all prisoners of war (PoWs), including those with disabilities, and that to ensure equal treatment, the specific needs and risks of individual prisoners must be identified, assessed and provided for. This in turn requires appropriate planning and preparatory measures.[98]

Aspects related to accessibility and reasonable accommodations are also highlighted in the ICRC's interpretations of specific provisions of GC III. For instance, in relation to the obligations related to toilet facilities for the use of all PoWs, day and night, the ICRC stressed that in combination with the requirement of equal treatment under GC III, "accessibility also implies that all prisoners of war, without any adverse distinction, for example based on other factors such as age or disability, have constant and easy access to toilet facilities".[99] It then shared as an example observed from its own detention visits the fact that some Detaining Powers had made structural adjustments to sanitary facilities in order to accommodate certain PoWs with disabilities, for instance by equipping those facilities with extra stools.[100]

Other feasible measures in relation to physical infrastructure may include the construction of ramps, handrails or wider corridors and doorways.[101] In relation to medical care and rehabilitation of PoWs, the ICRC emphasized measures of information accessibility for PoWs with visual impairments in order to include diverse communication methods, ranging from Braille to audio and

96 ICTY, *Prosecutor v. Naser Orić*, Case No. IT-03-68, Judgment (Trial Chamber), 30 June 2006, para. 466.
97 *Ibid.*, Testimony of Ilija Ivanovic, 25 January 2005, pp. 4068–4069, available at: www.icty.org/x/cases/oric/trans/en/050125IT.htm.
98 2020 Commentary on GC III, above note 77, paras 26, 28, 29, 1761, 2258.
99 *Ibid.*, para. 2207.
100 *Ibid.*
101 See A. Priddy, 2021, above note 8, p. 13.

large print.[102] Finally, formulations like taking all necessary measures to ensure "adequate premises" and the "necessary equipment" lend themselves to a harmonized reading with obligations related to accessibility and reasonable accommodation under the CRPD; one example of this are the obligations related to the pursuit of intellectual, educational or recreational activities, which also recognize explicitly the individual agency of prisoners, as the "individual preferences" of prisoners must be respected.[103]

Specialized health-care and rehabilitation services are also recognized for PoWs with disabilities in GC III. Article 30(2) of GC III provides that special facilities shall be afforded for the care of prisoners with disabilities, in particular prisoners who are blind, and for their rehabilitation.[104] While the explicit mention of prisoners with visual impairments was included as a result of the specific experience during the Second World War, the prohibition against adverse distinction would preclude giving priority to one group of persons with specific types of impairments over others.[105] On this basis, the ICRC has monitored whether therapies such as physiotherapy, psychotherapy and psychosocial counselling, if necessary for prisoners with disabilities, have been provided so that these prisoners might attain and maintain their optimal physical and mental functioning in interaction with their environments.[106] Geneva Conventions III and IV also contain specific obligations in relation to assistive devices, whereby PoWs and civilian internees must benefit from "any apparatus necessary for their maintenance in good health" free of charge.[107] "Maintenance in good health" would include avoiding the risk of an exacerbation of an already existing impairment of a PoW or civilian internee in the absence of the availability of assistive devices.[108]

Similar issues would also arise in NIAC-related detention – for instance, rendering infrastructure providing "safeguards of health and hygiene" accessible to detainees with disabilities.[109] In the context of the provision of food, suggested accessibility measures and reasonable accommodations relevant for certain detainees with disabilities include longer times to eat, support with eating meals, and adapted meals.[110] Should it be necessary to evacuate detainees in order to remove them from the danger of military operations, similar considerations to those described above in relation to the rules on the conduct of hostilities pertaining to evacuations would also be relevant here.[111] As in the case of

102 2020 Commentary on GC III, above note 77, para. 2259.
103 GC III, Art. 38; 2020 Commentary on GC III, above note 77, para. 2471.
104 GC III, Art. 30(2).
105 2020 Commentary on GC III, above note 77, para. 2257; A. Priddy, 2019, above note 8, p. 68.
106 2020 Commentary on GC III, above note 77, para. 2260.
107 GC III, Art. 30(5); GC IV, Art. 91. See also 2020 Commentary on GC III, above note 77, paras 2277–2282.
108 Cf. A. Priddy, 2019, above note 8, p. 68.
109 AP II, Art. 5; ICRC Customary Law Study, above note 15, Rules 121, 138. See also Sandesh Sivakumaran, "Armed Conflict-Related Detention of Particularly Vulnerable Persons: Challenges and Possibilities", *International Law Studies*, Vol. 94, 2018, p. 53.
110 S. Sivakumaran, above note 109, p. 53.
111 See the discussion on precautions in the conduct of hostilities above; and see S. Sivakumaran, above note 109, p. 53.

detention related to IACs, the importance of the staff of Detaining Powers communicating orders and instructions in an accessible manner has also been highlighted.[112]

Furthermore, consultations held by the ICRC with States on strengthening legal protections for persons deprived of their liberty, in particular in NIACs, confirmed the need for specific differentiated measures for detainees with disabilities in order to ensure humane conditions of detention for them. While the operational circumstances of NIAC-related detention may be different, these consultations also stressed the importance of advance planning for implementing specific measures in favour of detainees with disabilities, including the preparation and training of forces to identify and engage with such detainees and consideration of the specific skills necessary to identify, anticipate and address their specific needs.[113]

The need for positive measures for ensuring substantive equality, including through reasonable accommodation regarding detention conditions, is also specifically reflected in Article 14(2) of the CRPD on the right to liberty and security, and the interpretation of this provision provided by the CRPD Committee.[114] The CRPD Committee and other IHRL bodies and experts have also supported the position that a lack of measures of accessibility and/or reasonable accommodation for persons with disabilities, as well as the exacerbation of their impairments in detention, may amount to prohibited ill-treatment.[115]

Prevention of arbitrary or unlawful deprivation of liberty of persons with disabilities

Apart from the necessity of ensuring humane treatment, including accessible detention conditions and reasonable accommodations in detention, it is also necessary to ensure that persons with disabilities are not arbitrarily or unlawfully deprived of their liberty in armed conflicts in the first place. In this regard, the challenge already observed in relation to armed forces misinterpreting behaviour, especially by civilians with sensory, psychosocial or intellectual disabilities, has

112 S. Sivakumaran, above note 109, p. 53.

113 See ICRC, Resolution 1, "Strengthening Legal Protection for Victims of Armed Conflicts", 31st International Conference of the Red Cross and the Red Crescent, 2011, op. para. 3; ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report*, 32IC/15/19.1, 32nd International Conference of the Red Cross and the Red Crescent, 2015, pp. 26, 47.

114 CRPD Committee, *Guidelines on the Interpretation of Article 14 of the CRPD*, 2015, paras 17–18, available at: www.ohchr.org/Documents/HRBodies/CRPD/14thsession/GuidelinesOnArticle14.doc.

115 See CRPD Committee, *X v. Argentina*, Individual Communication No. CRPD C/11/D/8/2012, 18 June 2014, paras 8.4, 8.5; CRPD Committee, *Al Adam v. Saudi Arabia*, Individual Communication No. CRPD C/20/D/38/2016, 24 October 2018, paras 11.2, 11.3; Human Rights Committee, *Hamilton v. Jamaica*, Views on Communication No. 616/1995, CCPR/C/66/D/616/1995, adopted on 28 July 1999, paras 3.1, 8.2; *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/63/175, 28 July 2008, para. 53; European Court of Human Rights, *Bayram v. Turkey*, Appl. No. 7087/12, Judgment, 4 February 2020, paras 51–63.

also led to detention of such persons by armed forces because of the erroneous association with non-State armed groups or interpretation of their conduct as threatening.[116]

In order to prevent arbitrary or unlawful conflict-related detention, international law requires grounds and procedures established by law. Regarding grounds for conflict-related detention, IHL recognizes that a person may be deprived of their liberty in connection with a criminal process,[117] because of their status as a PoW (in IACs only), or as a measure of control to mitigate a security threat posed by the person to an opposing party to the conflict.[118]

In IACs, PoWs are presumed to represent *per se* a security threat to opposing armed forces under GC III, and Article 21 of GC III reflects the agreement of States that internment on the basis of their status is permitted.[119]

In contrast, under GC IV, internment of civilians in IACs represents an exceptional measure where the security of the Detaining Power makes it "absolutely necessary",[120] or for "imperative reasons of security".[121] While for NIACs IHL mentions that internment may also occur in such situations, it does not specify the grounds or procedures for internment. Although PoW and combatant status do not exist in NIAC, in the context of the ICRC consultations with States on strengthening legal protection for persons deprived of their liberty there was some debate on whether a factual finding of membership in a non-State armed group would constitute in and of itself a sufficient ground for internment, or whether there must be an individualized determination of a specific imperative threat to security posed by that person to the Detaining Power.[122]

In any event, non-compliance with military instructions by persons with sensory, psychosocial or intellectual disabilities or the existence of an impairment would not be sufficient to assume that a ground for internment exists, be that PoW status, membership in a non-State armed group or an imperative threat to the security of the Detaining Power.

Combatant membership in State armed forces giving rise to PoW status, as well as membership in non-State armed groups, must be positively verified under IHL and not just lightly presumed. This is evident in IHL rules relating to the determination of PoW status in situations of doubt by a competent tribunal, which would also include situations where a captured person would claim not to have that status, bearing in mind the general implication of internment until the end of active hostilities.[123]

Further, even if one were to support the view that membership in a non-State armed group is sufficient as a ground for internment, as has been observed

116 OPD testimony, joint consultations on persons with disabilities and military operations in armed conflict, May 2022.
117 See common Art. 3(1)(d); AP I, Art. 75(3); AP II, Art. 6.
118 See GC III, Arts 21 ff.; GC IV, Arts 42, 78.
119 GC III, Art. 21.
120 GC IV, Art. 42.
121 *Ibid.*, Art. 78.
122 ICRC, *Strengthening International Humanitarian Law*, above note 113, p. 28.
123 GC III, Art. 5(2); see also 2020 Commentary on GC III, above note 77, paras 1114, 1121.

in the consultations led by the ICRC with States on strengthening legal protections of persons deprived of their liberty, detention resulting from unverified or mistaken identity may be deemed arbitrary.[124] This would also be relevant in the case of civilians with disabilities whose conduct is wrongly assumed to be indicative of membership in a non-State armed group or direct participation in hostilities.

Generalized assumptions based on an incorrect understanding of conduct of persons with disabilities or on the existence of a disability as justification for internment and the finding that an imperative threat to security exists would also be arbitrary. This is because of the fact that the determination of such a threat is subject to an individualized assessment, without discrimination.[125] In this regard, both State military manuals and international jurisprudence clarify that a person's identity or state of belonging to a certain group of persons, including on the basis of nationality, age or political beliefs, are not, on their own, sufficient grounds justifying internment.[126]

It is submitted that the same reasoning should be applied to persons with disabilities, including persons with sensory, psychosocial or intellectual impairments. In this regard, the CRPD absolutely prohibits deprivations of liberty based on the existence of an impairment because such deprivations of liberty have been held to be discriminatory.[127] Generally, assuming that a person with a disability constitutes an imperative threat to security because that person cannot comply with military instructions would disproportionately and adversely affect persons with certain types of impairments compared to persons without disabilities; it would not take into account the inaccessibility of those instructions and would lead to a wrong conclusion. Such an assumption would therefore be discriminatory. The same would be true where a threat is simply presumed on the basis of an impairment, as this would affect persons with certain impairments specifically and adversely compared to persons without disabilities.

This does not mean that persons with disabilities may never be interned in an armed conflict. They could be interned if the determination of their membership in armed forces or their constituting an imperative threat to security (as a ground justifying the internment) is not based on their disability, directly or indirectly, and is made objectively and on an equal basis for each individual.[128]

124 ICRC, *Strengthening International Humanitarian Law*, above note 113, p. 16.

125 The ICRC upholds this requirement for internment both in IAC and NIAC. This was laid down in the ICRC institutional position entitled "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence". This ICRC position was published as Annex 1 in ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007. See Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", *International Review of the Red Cross*, Vol. 87, No. 858, 2005, pp. 381–382, available at: www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf.

126 ICTY, *Delalic*, above note 90, para. 577; Belgium, above note 60, p. 22; Denmark, above note 60, p. 493, para. 5.2.2; United Kingdom, *The Manual of the Law of Armed Conflict*, 2004, para. 9.3.1.

127 CRPD, above note 12, Art. 14(1)(b); CRPD Committee, above note 114, paras 6–10, 13–15.

128 A. Priddy, 2021, above note 8, p. 70.

In line with the general recognition that the alleged commission of a crime may provide a ground for deprivation of liberty, it is also not precluded that persons with disabilities may be detained on that basis. When the alleged crime has a sufficient nexus to an armed conflict, the treatment of the detainee is governed by IHL.[129] In any event, procedural safeguards as well as fair trial guarantees constitute a necessary guarantee against arbitrariness of deprivations of liberty and ensure that grounds of internment or the commission of a crime are substantiated in specific cases.

In terms of internment, procedural safeguards include the guarantees found in GC IV and Additional Protocol I (AP I) to prompt access to information about the reasons for internment; the right to have the initial decision to intern reviewed; and the periodic reassessment of the continued necessity to intern.[130] In the ICRC's view, these and other procedural safeguards should also be applied – as a matter of law and policy – in internment occurring in NIACs.[131]

As regards judicial or fair trial guarantees against the arbitrariness of detention for criminal charges related to an armed conflict, these include the right of the accused to be informed of the reasons for their arrest as well as the nature and cause of the alleged offence;[132] the right to be promptly brought before a judicial authority at the pre-trial stage;[133] the right to challenge the lawfulness of detention before a court (*habeas corpus*);[134] the right to be tried before a regularly constituted, independent and impartial court;[135] necessary rights and means of defence;[136] and the right to be advised of one's judicial and other remedies and the time limits within which they may be exercised,[137] given that convictions for a crime will often carry the imposition of deprivation of liberty as a sentence.

Ensuring that detained persons with disabilities have access, without adverse distinction/discrimination, to the same procedural or fair trial guarantees as detainees without disabilities in armed conflicts may allow for and even

129 For a detailed discussion of the nexus requirement, see Tilman Rodenhäuser, "The Legal Protection of Persons Living under the Control of Non-State Armed Groups", *International Review of the Red Cross*, Vol. 102, No. 915, 2021, pp. 1000–1009.

130 GC IV, Arts 43, 78; AP I, Art. 75(3).

131 J. Pejic, above note 125, p. 381.

132 See e.g. AP II, Art. 6(2); AP I, Art. 75(3–4); 2020 Commentary on GC III, above note 77, para. 685.

133 International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (ICCPR), Art. 9 (3); ICRC Customary Law Study, above note 15, commentary on Rule 99. IHL does not contain general rules on the judicial supervision and control of pre-trial detention; however, Article 75(8) of AP I, which is considered customary IHL applicable in all types of armed conflicts, includes a general saving clause according to which the minimum fundamental guarantees may not be construed as "limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law", which includes IHRL. See Jelena Pejic, "The Protective Scope of Common Article 3: More than Meets the Eye", *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 212–214.

134 ICCPR, above note 133, Art. 9(4); ICRC Customary Law Study, above note 15, commentary on Rule 99; J. Pejic, above note 133. In this regard, the right to challenge the lawfulness of detention has been deemed as non-derogable by the Human Rights Committee. See Human Rights Committee, General Comment No. 29, "States of Emergency (Article 4)", UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

135 Common Art. 3(1)(d); GC III, Art. 84(2); AP II, Art. 6(2); AP I, Art. 75(4).

136 GC III, Arts 84(2), 96(4); GC IV, Arts 72(1), 123(1); AP I, Art. 75(4); AP II, Art. 6(2).

137 GC III, Art. 106; GC IV, Art. 73(1); AP I, Art. 75(4); AP II, Art. 6(3).

require specific measures of accessibility or procedural accommodations. One key area in this regard is information accessibility. The initial information provided to a person deprived of their liberty on the reasons for the detention and the nature and cause of the alleged offence must be conveyed in a language that the person understands; thereby, detainees are enabled to challenge the lawfulness of their detention and to exercise any necessary rights and means of defence.[138] For detainees with disabilities, the necessary accessibility and procedural accommodations should be made to ensure their fair trial guarantees.

Specific issue: Norm conflict between IHL allowing for isolation of prisoners of war and civilian internees with psychosocial or intellectual disabilities versus CRPD prohibition of detention based on impairment

Article 30 of GC III and Article 91 of GC IV provide for "isolation wards" which shall be "set aside" for cases of "mental disease". These provisions are placed under chapters dealing with the hygiene and medical attention devoted to PoWs and civilian internees respectively. These are restrictions to liberty additional to what would be permissible by the fact that the detainees are combatant members of the armed forces (in the case of PoWs) or are deemed to represent an imperative threat to security to the Detaining Power (in the case of civilian internees in IACs under GC IV).[139]

While there is no definition of what "isolation wards" precisely entail, in its ordinary meaning in a health context, this term usually refers to a specific room or section of a health-care facility "where people with a contagious disease are kept separate from people who are not infected".[140] As such, this form of further restriction of liberty may be necessary on the basis of containing an overriding risk of infection for other patients (or, in the case of a detention facility, other detainees), and ultimately, an epidemic that could spiral out of control.[141] This kind of measure may also be based on other obligations of the Detaining Power related to the prevention of epidemics and the safeguarding of health and hygiene in conflict-related detention.[142] Thus, the character of this additional deprivation of liberty from internment is based strictly on health grounds (medical isolation) and is therefore distinct from additional deprivations of liberty as a penal or disciplinary punishment, including solitary confinement (i.e., detention in a single

138 See AP I, Art. 75(3–4); J. Pejic, above note 125, p. 384. Articles 5, 9, 13 and 14(2) of the CRPD (above note 12), on reasonable accommodations and accessibility, both general and specific, provide further guidance for interpreting IHL procedural safeguards and fair trial rights, including against arbitrary deprivations of liberty, so that detainees with disabilities may effectively enjoy them, without adverse distinction.

139 See 2020 Commentary on GC III, above note 77, para. 2238.

140 See e.g. "Isolation Ward", *Collins Dictionary*, available at: www.collinsdictionary.com/dictionary/english/isolation-ward.

141 See 2020 Commentary on GC III, above note 77, para. 2240.

142 See GC III, Art. 29; GC IV, Art. 85; AP II, Art. 5; ICRC Customary Law Study, above note 15, Rule 121. With regard to GC III, the predecessor 1929 Geneva Convention on Prisoners of War already contained a similar provision.

cell for very long periods of the day without meaningful human contact)[143] or any other form of confinement, like close confinement.[144]

However, isolation on the ground of "mental disease" is a completely different case, despite it being regulated in the same provision as isolation for contagious diseases. Neither Article 30 of GC III nor Article 91 of GC IV offer a definition of what isolation because of a mental health condition or psychosocial disability means, or the rationale for such isolation. The drafting history shows that "mental disease" was added very late in the negotiations at the 1949 Diplomatic Conference; it was inserted first in the Draft Third Convention upon the proposal of one delegation and then for consistency purposes also in the Draft Fourth Convention, and subsequently adopted with no further discussion.[145]

The 1958 Commentary on GC IV Article 91 justified the insertion of "mental disease" as a further ground for isolation; while the Commentary recognized that "segregation may seem somewhat cruel in this case, especially when it is remembered that internment itself may have been the cause of mental affliction (or have aggravated an already disturbed mental condition)",[146] it asserted that the "crowded living conditions" made such isolation "absolutely necessary in the interests of the internees as a whole".[147]

From this passage in the Commentary, it is not entirely clear what would make isolation absolutely necessary, nor what segregation would precisely consist of; still, it may be discerned that even in 1958, segregation was already seen as harmful for the person with a psychosocial disability. This did not rule out forms of deprivation of liberty similar or equal to solitary or close confinement imposed as a punishment, however, and in this case the interests of the other internees were perceived as overriding the individually harmful impacts of isolation.

This precedence accorded to the interests of other detainees over the individual impact on the detainee with a psychosocial disability suggests that isolation would be based on the presumption that the detainee is perceived to represent a danger to the rest of the camp population. This general presumption has been proven wrong, however, with evidence showing that persons with

143 See 2020 Commentary on GC III, above note 77, para. 3711. This understanding of "solitary confinement" is based on the non-legally binding Rule 44 of the 2015 UN Standard Minimum Rules on the Treatment of Prisoners (Mandela Rules), which define solitary confinement for the purpose of the Rules as "confinement of prisoners for 22 hours or more a day without meaningful human contact".

144 See 2020 Commentary on GC III, above note 77, paras 2238, 3753–3757. On the necessity of the distinction between medical isolation and confinement as a penal or disciplinary punishment in criminal detention settings, specifically in the COVID-19 context, see Centers for Disease Control and Prevention, "Guidance on Prevention and Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities", 3 May 2022, available at: www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#Medical_Isolation.

145 See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2.A, Federal Political Department, Berne, 1949, pp. 259, 800, 810, 838.

146 See 1958 Commentary on GC IV, above note 55, p. 399.

147 *Ibid.*

psychosocial disabilities are more likely to be victims of violence than perpetrators of it.[148]

Still, this general assumption of dangerousness associated with persons with psychosocial disabilities as a whole is deeply entrenched and constitutes a key attitudinal barrier. When analyzed against the stringent wording of Article 14(1)(b) of the CRPD for States party to the Convention, the absolute prohibition on deprivation of liberty based on an impairment would even be violated if the element of perceived dangerousness were to be invoked as an allegedly objective ground while in fact, it would primarily affect persons with psychosocial (or intellectual) impairments. In light of this, it would constitute prohibited discrimination based on impairment under Article 5 of the CRPD, whatever the form of the additional restriction of deprivation of liberty.[149] Despite this interpretation, some States explicitly reserve the possibility, for instance, of imposing isolation on PoWs or civilian internees with mental health conditions or psychosocial disabilities where this is deemed unavoidable in light of the danger that those persons pose to themselves or to others.[150]

Thus, *prima facie*, a norm conflict exists, especially for States party to the CRPD, between Article 30 of GC III and Article 91 of GC IV, on the one hand, allowing for isolation based on mental health conditions or psychosocial disabilities, as retained by some State practice, and Article 14(1)(b) of the CRPD, on the other, absolutely prohibiting any detention based on impairment. However, the IHL provisions must also be interpreted in their context, including fundamental obligations which constitute a reference for understanding these specific provisions, other obligations of the Detaining Power contained in the same provision, and other relevant obligations governing release, repatriation, return to place of residence or accommodation in a neutral country.

As regards fundamental IHL obligations which guide the interpretation of specific provisions, these include the prohibition on adverse distinction, as well as the obligations of humane treatment and related prohibitions on torture and other ill-treatment.[151] Firstly, the aforementioned convergence between the IHL prohibition and the explicit prohibition of non-discrimination based on impairment under the CRPD, due to the open-ended list of grounds of adverse distinction under IHL, makes a dynamic interpretation of the prohibition on adverse distinction as encompassing disability-specific deprivations of liberty in

148 *Report of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/HRC/40/54, 11 January 2019, para. 27; S. L. Desmarais *et al.*, "Community Violence Perpetration and Victimization among Adults with Mental Illness", *American Journal of Public Health*, Vol. 104, No. 12, 2014.

149 See 2020 Commentary on GC III, above note 77, para. 2242; CRPD Committee, above note 114. See also UN Human Rights, above note 8, paras 10, 47, 55; A. Priddy, 2021, above note 8, p. 15.

150 See e.g. New Zealand, *Manual of Armed Forces Law: Law of Armed Conflict*, 2017, para. 12.10.62; United Kingdom, *Joint Doctrine on Captured Persons*, 2015, p. 10-8, para. 1009; United States, *Medical Support to Detainee Operations*, 2007, p. 4-10, para. 4-51, and p. 4-12, para. 4-64. Beyond situations of armed conflict, mental health legislations of many States still provide for deprivation of liberty of persons with disabilities, especially persons with psychosocial or intellectual disabilities, based on the perceived dangerousness to themselves or others, or the necessity of involuntary care or treatment. See, for example, *Report of the Special Rapporteur*, above note 148, para. 15; CRPD Committee, above note 114, paras 6, 13.

151 See e.g. GC III, Arts 13–16; GC IV, Art. 27; ICRC Customary Law Study, above note 15, Rule 88.

armed conflict possible.[152] Secondly, in this context, invoking obligations of humane treatment and related prohibitions – equally amenable to a dynamic understanding – is especially relevant. This is because of the reality that in certain contexts, the ICRC has observed that solitary confinement, at times for prolonged periods, has been used as a disciplinary punishment for actual or perceived non-compliance with disciplinary rules by PoWs or internees with psychosocial disabilities. These detainees would violate such disciplinary rules more easily than other detainees, as their behaviour, an outward manifestation of their psychosocial disabilities, was perceived to be disruptive or dangerous. Where such confinement was imposed, mental health services in detention facilities were often inadequate.[153] Thus, it appears that in practice, isolation does at times amount to solitary confinement – although perhaps called by a different name.

While solitary confinement, especially where it is prolonged, has been documented to negatively affect the mental health of any person subjected to it, the impact on persons with pre-existing mental health conditions when imposed for any duration is especially severe.[154] It may even amount to cruel, inhuman or degrading treatment or punishment, as it often leads to psychotic symptoms and/or significant functional impairments, self-harm or even suicide.[155] Furthermore, given the fact that it is resorted to where mental health services in detention facilities are inadequate, as well as for prolonged periods, it seems to be imposed not only exceptionally but rather as a result of a general sense of no other options being available.[156]

This in turn raises doubts in practice in this context about the implementation of isolation, including solitary confinement, purported to be a last resort with procedural safeguards. This makes a discussion of a Detaining Power's other obligations all the more compelling, as these obligations would

152 See e.g. the 2020 Commentary on GC III, above note 77, para. 1770, which states that the drafters "rightly anticipated a dynamic evolution of the catalogue of prohibited criteria".

153 See e.g. *ibid*., para. 2243.

154 This was already recognized at the 1949 Diplomatic Conference. See *Final Record*, above note 145, p. 490 (United Kingdom).

155 See the 1958 Commentary on GC IV, above note 55, p. 399 (with accompanying fn. 91). Human rights experts, such as the UN Special Rapporteur on Torture, are of the view that solitary confinement of any duration imposed on persons with mental health conditions constitutes cruel, inhuman or degrading treatment or punishment: see *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/66/268, 5 August 2011, paras 67–68, 78. See also Article 45(2) of the non-binding Mandela Rules of 2015, which provides that solitary confinement should not be applied to detainees with "mental or physical disabilities" when their condition would be exacerbated by such measures. During ICRC consultations with States on strengthening legal protection for persons deprived of their liberty, the ICRC presented to States a number of provisions for NIACs "drawn from existing international law", including a prohibition on solitary confinement as a disciplinary punishment for persons with mental disabilities. See ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Thematic Consultation of Government Experts on Conditions of Detention and Particularly Vulnerable Detainees*, 29–31 January 2014, p. 38.

156 See in this regard similar ICRC observations from a study of several Council of Europe criminal detention facilities – while not necessarily from armed conflict settings – in which it was found that solitary confinement or other forms of restrictive detention regimes were anything but exceptional. See ICRC, *Restrictive Regimes in Places of Detention*, Geneva, 2018, p. 12.

point to alternatives which would help to avoid situations where Detaining Powers may perceive the necessity of resorting to isolation, including solitary confinement.

In particular, according to Article 30(1) of GC III and Article 91(1) of GC IV, PoWs and internees shall have the medical attention they require in PoW or internee camps. Medical attention includes appropriate mental health services which respect applicable standards of medical ethics, including the principle of voluntary and informed consent to any medical decision that may affect the individual in question.[157] As the ICRC has observed, counselling and other appropriate therapies such as psychotherapy – when employed to deal with a mental health condition or psychosocial disability rather than just the associated disruptive behaviours – can be effective in decreasing such behaviours and thus avoiding the perceived need for isolation.[158]

To implement this obligation, advance planning to secure the availability of appropriate mental health professionals, to identify any mental health and psychosocial needs, and to secure voluntary and informed consent for any mental health intervention may be useful to avoid situations where isolation may be perceived to be necessary.

Both Article 30 of GC III and Article 91 of GC IV, as well as associated provisions, may be interpreted to promote such preparations before actual or perceived emergency situations concerning detainees with psychosocial disabilities arise. In terms of the availability of appropriate mental health professionals, medical professionals with mental health experience should either be available on-site or made available through regular visits to the detention facility.[159] Where the necessary specializations are not available through these means, the two provisions also contemplate transfers for detainees with a medical condition, including a mental health condition, in order to receive the required specialized treatment from external services.[160] Such transfers should only take place where the treatment in the external environment would be more favourable for the detainee concerned in light of their health condition, in accordance with applicable standards of medical ethics.[161] In complementarity with the CRPD, this should preclude involuntary transfers to institutions where there would be a risk that the very practices which appropriate mental health services would seek to avoid, including isolation or involuntary treatment of detainees with psychosocial disabilities, would occur.[162]

To identify any mental health and psychosocial needs as early as possible, while not explicitly foreseen by Article 30 of GC III and Article 91 of GC IV, some

157 See 2020 Commentary on GC III, above note 77, para. 2245.
158 *Ibid.*, para. 2246.
159 See *ibid.*, para. 2229.
160 GC III, Art. 30(2); GC IV, Art. 91(2).
161 GC III, Art. 30(2); GC IV, Art. 91(2); see also 2020 Commentary on GC III, above note 77, para. 2249.
162 See Priscilla Denisse Coria Palomino, "A New Understanding of Disability in International Humanitarian Law: Reinterpretation of Article 30 of Geneva Convention II", *International Review of the Red Cross*, Vol. 104, No. 919, 2022, pp. 1453–1454 (pointing out that if a Detaining Power opts to transfer a person with a psychosocial disability to a psychiatric hospital, the risk of potential IHRL violations committed there must be taken into account).

State practice envisages initial medical examinations of PoWs and/or civilian internees upon their arrival at a detention facility.[163] During internment, PoWs and civilian internees also have the right to present themselves for medical examinations.[164] Finally, both GC III and GC IV also obligate the Detaining Power to conduct regular medical inspections at least once per month.[165]

As with all medical procedures, these medical examinations and inspections are subject to applicable standards of medical ethics and in that regard must be conducted with the voluntary and informed consent of the person subjected to them; in fact, these medical examinations and inspections also present opportunities to obtain either consent or refusal for certain types of treatment in advance.[166] In line with Article 12 of the CRPD, which enshrines the right of persons with disabilities to equal recognition before the law, effective measures should support the exercise of their legal capacity to express their will and preferences in relation to any future medical treatment, including regarding mental health.[167]

Other alternatives to isolation because of the existence of a psychosocial disability are release, repatriation, return to place of residence or accommodation in a neutral country on humanitarian grounds. These types of measures are already contemplated by GC III and its Annex I, as well as GC IV.[168] Prisoners with a serious mental health condition that is either of an indeterminate character or will not be successfully treated within one year, or where their continued internment would further undermine their physical or mental health, must be repatriated or accommodated in a neutral country, unless such repatriation is against their will or accommodation in a neutral country would not improve their condition.[169] GC IV contemplates special agreements between the parties to IACs for certain groups of civilian internees for release, repatriation, return to place of residence or accommodation in a neutral country on humanitarian grounds; wounded and sick internees and internees who have been detained for a long time are explicitly listed.[170]

In this regard, it has been suggested for PoWs that these IHL obligations should be read in light of obligations under the CRPD and that the scope of the grounds of repatriation or accommodation in a neutral country should be broadened – that these grounds should go beyond an assessment of the severity of an impairment so as to be applicable whenever basic humane conditions of

163 See e.g. Canada, *Prisoner of War Handling Manual*, 2004, p. 3F-9, para. 3F08(6); Japan, Act on the Treatment of Prisoners of War and Other Detainees in Armed Attack Situations, 2004, Art. 31(1); United Kingdom, *Joint Doctrine on Captured Persons*, 2020, p. 88, para. 3-9(b).

164 GC III, Art. 30(4); GC IV, Art. 91(4). These rights also extend to those PoWs or civilian internees who are undergoing disciplinary punishments: see GC III, Art. 98(4); GC IV, Art. 125.

165 GC III, Art. 31; GC IV, Art. 92.

166 See e.g. 2020 Commentary on GC III, above note 77, paras. 1731–1733, 2297–2298.

167 See also CRPD, above note 12, Art. 25(1)(d), which requires States Parties to provide health-care services to persons with disabilities of the same quality as to others, including on the basis of free and informed consent.

168 See e.g. GC III, Arts 109–110 and Annex I; GC IV, Art. 132.

169 GC III, Arts 109–110 and Annex I, Part I, section A.

170 GC IV, Art. 132.

detention, in particular accessibility of health care and rehabilitation, cannot be guaranteed by the Detaining Power. In this sense, repatriation or accommodation in a neutral country should be understood as a specific example of a reasonable accommodation in accordance with the CRPD.[171]

As opposed to IHL in IAC, IHL in NIAC does not contain an explicit rule which provides for isolation, including solitary confinement, for detainees with mental health conditions or psychosocial disabilities. Therefore, this issue must be resolved with reference to the generally applicable fundamental guarantees already analyzed above, namely humane treatment and the prohibition on adverse distinction, as well as the customary IHL obligation to afford specific respect and protection to persons with disabilities. In fact, in the implementation of these rules, it is interesting to observe that the ICRC has found that certain non-State armed groups in NIAC-related detention have refrained from detaining persons with disabilities in the first place, for humanitarian and/or operational reasons. Moreover, where detentions of persons with disabilities has taken place under their supervision, some non-State armed groups have ordered their members to release detainees as soon as possible after their capture.[172] These few examples indicate that alternatives to deprivations of liberty based on impairment, whether by refraining from deprivations of liberty of persons with disabilities in the first place or through early release based on humanitarian grounds, are not merely theoretical options in conflict-related detention.

Conclusions and recommendations

This article has attempted to provide indications as to what increased visibility of persons with disabilities in the interpretation and implementation of IHL would look like. As this analysis shows, there is no need for legal gymnastics; a broadened understanding of the barriers and risks that persons with disabilities in their diversity face in armed conflict can feed into the implementation of general and specific protections under IHL rules on the conduct of hostilities as well as in the various situations where persons with disabilities may find themselves in the hands of parties to armed conflict. The CRPD provides an important complementary tool to IHL to enrich that understanding through compelling a granular awareness of these barriers and risks and engaging the participation of persons with disabilities as to how their specific situation is factored into the implementation of IHL.

Such granular awareness of the barriers and risks facing persons with disabilities is still lacking among parties to armed conflict. A first step to improving it is to open channels of communication between persons with disabilities, OPDs and parties to armed conflict. This is precisely the value of consultations like the one co-organized in 2022 by the UN Special Rapporteur on

171 See A. Priddy, 2019, above note 8, p. 72; P. D. C. Palomino, above note 162, pp. 1450–1453.
172 ICRC, above note 80, commentary on Rule 5.

the Rights of Persons with Disabilities, the IDA, the EDF, the Diakonia IHL Centre and the ICRC on civilians with disabilities and military operations in armed conflict. For persons with disabilities, this direct communication is an opportunity to make their voices heard in discussions on the implementation of IHL and for parties to armed conflict to learn first-hand from the lived experiences of persons with disabilities affected by their actions, rather than through an intermediary such as a humanitarian organization like the ICRC. The input of persons with disabilities and OPDs should be actively sought in these efforts and treated as an underlying consideration in any of the following recommendations.

The analysis provided in the present article of the IHL principles on the conduct of hostilities, as well as these consultations, have demonstrated that specific sensitization of State armed forces on the specific risks faced by civilians with disabilities, including in those forces' regular IHL training, is necessary to inform a disability-inclusive implementation of IHL. This sensitization may be usefully conducted around specific scenarios. It should cover persons with disabilities in their diversity of impairments, especially impairments that may be less visible, like psychosocial, intellectual or sensory impairments. Indeed, a lack of understanding of the barriers and risks faced by civilians with such disabilities appears to be a significant source of unlawful attacks, violence and detention in this context. Sensitization campaigns and materials (such as videos and radio programmes) for armed forces could assist in this regard.

Specific sensitization is also necessary to inform more inclusive data on the presence, barriers and risks of persons with disabilities, also disaggregated by age and gender. Where data is possessed by OPDs, it should be checked against the data available to governments; hence, there is also a need to centralize this data.

Beyond specific sensitization of State armed forces, the population at large should also be educated on disability. There is still often a lack of understanding of the barriers that persons with disabilities face as well as the diversity of persons with disabilities, which may result in their stigmatization in society. Education should thus instil in the population at large certain values of acceptance and inclusion towards persons with disabilities. This recommendation is consistent with both IHL obligations in relation to dissemination of IHL as widely as possible to the civilian population at large, beyond training of armed forces,[173] and the CRPD obligations related to awareness-raising, including to raise awareness throughout society regarding persons with disabilities and to combat stereotypes, prejudices and harmful practices affecting them.[174] More broadly, the ICRC has found that while IHL is vital in imposing restraints on behaviour, dissemination of the law combined with its underlying values is most effective, as encouraging individuals to internalize its values through socialization is a more durable way of promoting respect for the law.[175]

173 See in particular GC I–IV, Arts 47/48/127/144; AP II, Art. 19; ICRC Customary Law Study, above note 15, Rule 143.
174 CRPD, above note 12, Art. 8.
175 ICRC, *The Roots of Restraint in War*, Geneva, 2018, p. 65.

Disability-inclusive interpretations of IHL should also be included in military manuals on the law of armed conflict. With a few notable exceptions,[176] military manuals do not address persons with disabilities in any significant manner. It is part of the regular work of the ICRC to provide technical assistance to State armed forces when drafting these manuals. When a process of revision of such manuals is under way, consideration should be given to how the specific barriers and risks faced by civilians with disabilities could be integrated therein.

Specific guidance for military behaviour in interactions with persons with disabilities, like those occurring at checkpoints, should be incorporated in standard operating procedures. Such guidance should cover elements like how to communicate with persons with disabilities and how to handle assistive devices which are of crucial importance for such persons.

There should not be a misunderstanding that the content of military doctrine or standard operating procedures must necessarily be very detailed and technical. In fact, it is one of the key attitudinal barriers that to be more disability-inclusive, one would need sophisticated guidance that only very few State armed forces could produce and implement. In fact, simple questions or checklists could be a useful starting point to help avoid unnecessary confrontations between civilians with disabilities and armed forces.

Preparing for operational interactions with persons with disabilities also means exploring options to render within armed forces the necessary competence in accessible forms of communication, such as sign language, available. This could be achieved in a variety of ways apart from relying directly on OPDs (subject to their capacities), including through reliance on staff with such competences from civil governmental departments accompanying or creating specialized departments within armed forces.

Protection and inclusion of civilians with disabilities should also be integrated into sustainable operational coordination mechanisms between the military and OPDs and other civilian actors, as well as between military and civil governmental authorities.

More broadly, given the importance of disability-inclusive data and IHL dissemination, training and education at the national level, the role of domestic implementing legislation, especially on Article 11 of the CRPD, as well as national mechanisms on IHL implementation and on implementation of the CRPD to ensure the necessary coordination at the national level, should be further explored. In this regard, synergies between existing national IHL committees and CRPD governmental focal points and coordination mechanisms,[177] with the active involvement of person with disabilities and their representative organizations, should be sought.

Apart from engaging with State armed forces and State authorities, efforts towards ensuring disability-inclusive IHL implementation should also engage with non-State armed groups. Although non-State armed groups are not legally bound by

176 See Denmark, above note 60; Norway, above note 62.
177 See CRPD, above note 12, Art. 33.

the CRPD, and the applicability of IHRL to them more generally is unsettled, a thematic engagement on IHL and disability could be examined. The ICRC has successfully done so on other themes.[178]

The ICRC could further help advance disability-inclusive implementation of IHL at various levels. Firstly, it could co-host further expert meetings like the ones organized on civilians with disabilities and the conduct of hostilities, such as on detention, which could bring together persons with disabilities, military and other experts, and relevant authorities. Secondly, where aspects related to protection and inclusion of persons with disabilities under IHL and/or IHRL are addressed in the framework of broader discussions, for instance on detention, the ICRC should ensure participation by persons with disabilities and their representative organizations.[179] Thirdly, such participation should also be encouraged in mainstream IHL discussions where there is no specific focus on disability, for instance in IHL-related discussions at the International Conferences of the Red Cross and Red Crescent or the Council of Delegates.

Moreover, a disability perspective could be integrated within existing ICRC legal workstreams; this is already occurring, including in the context of work on updating the Commentaries to the Geneva Conventions, on the conduct of hostilities, on weapons issues, on internally displaced persons, and on the missing and their families, to name just a few. Such mainstreaming should be seen not as an additional burden but rather as an opportunity to strengthen legal positions.

More broadly, transversal implementation of the ICRC's Vision 2030 on Disability across different professional backgrounds of ICRC staff and strengthening engagement with OPDs in that process will be crucial for including a disability perspective and changing attitudes towards persons with disabilities throughout the ICRC's protection and assistance work.

178 For instance, on the protection of health care and on detention. See e.g. ICRC Health Care in Danger, *Safeguarding the Provision of Health Care: Operational Practices and Relevant International Humanitarian Law Concerning Armed Groups*, Geneva, 2015; ICRC, above note 80. Furthermore, the interplay between IHL and Islamic law may be of particular relevance for some of these groups: see the article by Ahmed Al-Dawoody and William I. Pons in this issue of the *Review*.

179 For instance, as mentioned, discussions conducted by the ICRC in the past on strengthening legal protection for persons deprived of their liberty included consideration of detention conditions in relation to detainees with disabilities.