

# The protection of women and girls with disabilities in armed conflict: Adopting a gender-, age- and disability-inclusive approach to select IHL provisions

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## Abstract

*The Convention on the Rights of Persons with Disabilities has brought about a major shift in our understanding of and approach to disability, not least in terms of its implications for other frameworks of international law. Yet, considerations with regard to disability in the context of international humanitarian law (IHL) remain the exception, meaning that persons with disabilities in practice often do not benefit from the same degree of protection as others who find themselves in situations of armed conflict. These shortcomings can be further exacerbated by an interplay between impairment and other individual characteristics such as gender and age, resulting in at times exceptional disadvantages faced by women and girls*

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*with disabilities. The present article therefore aims to propose ways in which our modern-day understanding of disability may inform the interpretation and application of IHL, as well as to showcase how the interaction between disability and other characteristics such as gender and age will shape said interpretation and application.*

**Keywords:** disability, gender, age, interpretation of IHL, inclusive approach, intersectionality.

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## Introduction

According to the World Health Organization's (WHO) 2011 *World Report on Disability*, 15% of the world's population is living with some form of disability.<sup>1</sup> Despite this evident prevalence of impairment around the world, persons with disabilities have long been subjected to continuous stigmatization, discrimination, and grave abuses of their fundamental human rights owing to outdated stereotypes, harmful practices and a general lack of awareness. Only recently, with the paradigm shift in how we view and approach disability brought about by the adoption of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD),<sup>2</sup> has the international community begun to pay dedicated attention to how disability may impact all aspects of life – including the enjoyment of fundamental guarantees of international law.

Yet, fourteen years after the CRPD's inception, there is much work left to be done in order to ensure equal access to these guarantees for persons with disabilities. With the adoption of the CRPD, it has become necessary to re-examine the existing framework of international law through the lens of disability, to understand the implications of different types of impairment when it comes to the interpretation and application of these frameworks, and to keep in mind that disability or impairment is not an isolated characteristic – rather, it stands in relation to other factors such as gender and age, which, separately or in their interplay with one another, may equally impact a person's individual experience. The present paper therefore aims to examine whether and how a disability-, gender- and age-inclusive approach to certain fundamental norms of international humanitarian law (IHL) could be adopted, and to showcase how

1 WHO, *World Report on Disability*, 14 December 2011, p. 27, available at: [www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability](http://www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability) (all internet references were accessed in October 2022).

2 Convention on the Rights of Persons with Disabilities, UN Doc. A/RES/61/106, 24 January 2007 (entered into force 3 May 2008) (CRPD). On the paradigm shift, see Office of the UN High Commissioner for Human Rights (UN Human Rights), "Statement by Louise Arbour, UN High Commissioner for Human Rights", 5 December 2006, available at: [www2.ohchr.org/english/issues/disability/docs/statementhcdcc06.doc](http://www2.ohchr.org/english/issues/disability/docs/statementhcdcc06.doc).

such an approach may serve as a basis to inform the interpretation and application of other more specific guarantees stipulated by this framework.

## The impact of armed conflict on women and girls with disabilities

Armed conflicts around the world have a devastating impact on everyone involved, but particularly on those already subjected to pre-existing inequalities. It therefore comes as no surprise that in recent years, the growing disability rights discourse has also shone a spotlight on the precarious circumstances faced by persons with disabilities who find themselves in situations of armed conflict, as they are among those most disproportionately affected by it.<sup>3</sup> Such extreme circumstances contribute to the exacerbation of difficulties that these individuals already experience in peacetime, placing them at increased risk of acute harm<sup>4</sup> and exposing them to gross violations of their human rights as well as their protections afforded by IHL.<sup>5</sup> Despite growing awareness, persons with disabilities thus remain the “forgotten victims” of armed conflicts,<sup>6</sup> as their rights are often considered a niche issue.<sup>7</sup> For example, persons with disabilities often get left behind when others flee to safety or are forced to put their lives in the hands of others,<sup>8</sup> and as a result, they are more likely to sustain serious injury, while also being exposed to disproportionate risk killings and at times even deliberate targeting.<sup>9</sup> During the 2014 Gaza conflict, for instance, the Israeli Defense Forces advised “individuals with limited mobility” to “prepare themselves

3 UNSC Res. 2475, 20 June 2019, p. 1; CRPD Committee, “Statement on Disability Inclusion for the World Humanitarian Summit”, September 2015, p. 1, available at: [www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDStatements.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDStatements.aspx).

4 See CRPD Committee, above note 3, p. 2.

5 During the 2011 earthquake and following tsunami in Japan, the death rate for persons with disabilities was double that of the general population: see UN Economic and Social Council (ECOSOC), *Panel Discussion on Disaster Resilience and Disability: Ensuring Equality and Inclusion: Report*, 10 October 2013, p. 10, available at: [www.un.org/development/desa/disabilities/resources/panel-discussion-on-disaster-resilience-and-disability-ensuring-equality-and-inclusion-10-october-2013.html](http://www.un.org/development/desa/disabilities/resources/panel-discussion-on-disaster-resilience-and-disability-ensuring-equality-and-inclusion-10-october-2013.html). See also *Report of the Fourth World Conference on Women*, UN Doc. A/CONF.177/20/Add.1, 17 October 1995 (Beijing Declaration), para. 131; Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights, April 2019, pp. 12–13.

6 CRPD Committee, “Persons with Disabilities ‘Forgotten Victims’ of Syria’s Conflict – UN Committee”, 17 September 2013, available at: <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13736&LangID=E>.

7 A. Priddy, above note 5, p. 14.

8 CRPD Committee, above note 3, p. 2; *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009, paras 1286–1288; Peter Beaumont, “Disabled Palestinians Unable to Escape Israeli Air Strike”, *The Guardian*, 12 July 2014, available at: [www.theguardian.com/world/2014/jul/12/disabled-palestinians-unable-escape-israeli-air-strike](http://www.theguardian.com/world/2014/jul/12/disabled-palestinians-unable-escape-israeli-air-strike). See also A. Priddy, above note 5, p. 12.

9 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/14/24/Add.2, 31 May 2010, para. 74. See also CRPD Committee, *Observaciones Finales Sobre el Informe Inicial de Colombia*, UN Doc. CRPD/C/COL/CO/1, 30 September 2016, para. 24: the Committee found that in at least ten cases, persons with disabilities had been targeted and killed in extrajudicial executions (“ejecutadas extrajudicialmente”) in what it found to be so-called “false positive killings”, with the victim’s bodies later falsely presented as those of “guerrilleros” (FARC-EP fighters).

to be carried by others” if they were otherwise unable to reach the nearest shelter in time;<sup>10</sup> a report published the following year by Israel’s Ministry of Foreign Affairs found that the conflict had been “especially difficult for the elderly and disabled populations, who struggled to seek shelter in the short time available between the sounding of warning sirens and the explosions from the rocket and mortar attacks”, and that more than a quarter of civilians injured over the course of the conflict were above the age of 65.<sup>11</sup>

Barriers encountered by persons with disabilities when attempting to flee the effects of hostilities furthermore range from lack of access to basic services or localities to the loss of assistive devices, becoming separated from friends and family, and having to leave behind familiar environments.<sup>12</sup> The CRPD Committee noted in 2013, for example, that persons with disabilities who had fled the armed conflict in Syria were “disproportionately at risk of being neglected, excluded or even abused because of their impairment and traumas”, and that women and children with disabilities were particularly at risk of such mistreatment.<sup>13</sup>

Indeed, these already dire conditions are further exacerbated where persons with disabilities face additional disadvantages stemming from multiple, intersectional discrimination based on other characteristics such as gender and age. Women and children in general have long been recognized as being among those most adversely affected by armed conflicts,<sup>14</sup> an already vulnerable position that is further amplified by the presence of disability. Consequently, women and girls with disabilities have been found to be especially affected by violations of both IHL and their human rights,<sup>15</sup> including a disproportionately high risk of being exposed to sexual and other gender-based violence.<sup>16</sup> A recent example of this can be found in

10 See Israeli Ministry of Foreign Affairs, *The 2014 Gaza Conflict 7 July–26 August 2014: Factual and Legal Aspects*, May 2015, para. 205 fn. 359, available at: <https://mfa.gov.il/protectiveedge/documents/2014gazaconflictfullreport.pdf>.

11 *Ibid.*, para. 205.

12 *Ibid.* See also A. Priddy, above note 5, p. 12; International Committee of the Red Cross (ICRC) Advisory Service, “IHL and Persons with Disabilities”, legal fact sheet, 4 October 2017, p. 1, available at: [www.icrc.org/en/document/ihl-and-persons-disabilities](http://www.icrc.org/en/document/ihl-and-persons-disabilities).

13 CRPD Committee, above note 6.

14 UNSC Res. 1325, 31 October 2000, p. 1.

15 Beijing Declaration, above note 5, para. 131; CRC Committee, General Comment No. 9, “The Rights of Children with Disabilities”, UN Doc. CRC/C/GC/9, 27 February 2007, para. 8. While General Comment No. 9 does not expressly mention armed conflict, it does refer to “indigenous girls with disabilities” and “children with disabilities living in rural areas”. Girls with disabilities living in areas affected by armed conflict will often be in an equally if not more vulnerable position based on the interplay between their age, gender and impairment and the dangerous environment they are living in.

16 CRPD Committee, above note 3, pp. 3 ff.; ICRC Advisory Service, above note 12, p. 1; *Report of the Special Rapporteur on Violence against Women on Her Mission to the Occupied Palestinian Territory*, UN Doc. A/HRC/35/30/Add.2, 8 June 2017, para. 43. See also Elisabeth Jean Wood, “Conflict-Related Sexual Violence and the Policy Implications of Recent Research”, *International Review of the Red Cross*, Vol. 96, No. 894, 2014, in particular pp. 427 ff.; Beijing Declaration, above note 5, paras 131, 135, 114–116 (stating that “grave violations of the human rights of women”, occurring particularly in times of armed conflict, include murder, torture, systematic rape, forced pregnancy and forced abortion, and that “female children and women with disabilities” are particularly at risk); UNICEF, *Children with Disabilities in Armed Conflict: Discussion Paper*, November 2018, pp. 8 ff., available at: [www.unicef.org/media/126116/file/Children-with-Disabilities-in-Situations-of-Armed-Conflict-Discussion-Paper.pdf](http://www.unicef.org/media/126116/file/Children-with-Disabilities-in-Situations-of-Armed-Conflict-Discussion-Paper.pdf); *Conflict-*

the reports on the precarious situation of children with disabilities living in Ukraine, which emerged soon after the outbreak of the country's international armed conflict with Russia.<sup>17</sup> Issues include grave shortcomings in the care of institutionalized children (not least due to a lack of appropriately trained staff), children being sent back from such institutions to communities which are unable to ensure their proper care, and the forced displacement of children from one institution to the next without providing information on their whereabouts to their families.<sup>18</sup>

## Gender, age and disability in IHL

IHL has long recognized and taken into account the particular risks faced by women and girls in situations of armed conflict – however, the same cannot be said for disability. While the disability rights discourse spawned by the adoption of the CRPD has had a significant impact on other instruments of the international human rights framework, IHL has so far remained largely uninfluenced by the rights that the Convention enshrines, which in turn has left persons with disabilities exposed to disproportionate risks such as those mentioned above. For women and girls with disabilities in particular, the lack of a disability-inclusive approach to IHL provisions means that the major impact of the interplay between their gender, age and impairment is yet to be recognized when it comes to their equal enjoyment of IHL guarantees.

## The social model and human rights based-approach of the CRPD

In order to understand why IHL needs to be re-examined through a disability lens, it is first necessary to understand why and how the approach to disability as stipulated by the CRPD has been so groundbreaking. Prior to the adoption of the Convention, persons with disabilities were largely viewed either as having a medical defect in need of fixing (the so-called medical model), or as passive victims of their impairment in need of pity and charity (the so-called charity model). Both approaches inherently viewed persons with disabilities as “less than”, thus contributing to their stigmatization, marginalization and discrimination by

*Related Sexual Violence: Report of the Secretary General*, UN Doc. S/2019/280, 29 March 2019, paras 11 ff., especially paras 17, 18.

17 See, for example, Fergal Keane, “Chaos, Upheaval and Exhaustion for Ukraine’s Disabled Children”, *BBC News*, 8 March 2022; Ivana Kottasová and Yulia Kesaieva, “Escaping the Horror in Ukraine is Not an Option for Many Disabled Children and Their Families”, *CNN*, 12 March 2022.

18 See, for example, CRPD Committee, “Chapter on the Situation of Persons with Disabilities in Ukraine and in Countries Where They Have Fled after 24 February 2022, as a Result of the Aggression against Ukraine by the Russian Federation – to Be Included in 27th Session Report”, paras 16(a), 27, available at: [www.ohchr.org/sites/default/files/documents/hrbodies/crpd/statements/2022-09-09/Situation-of-persons-with-disabilitie-in-Ukraine-in-CRPD-27th-session-Report.docx](http://www.ohchr.org/sites/default/files/documents/hrbodies/crpd/statements/2022-09-09/Situation-of-persons-with-disabilitie-in-Ukraine-in-CRPD-27th-session-Report.docx); UNICEF, “Ukraine War Response: Children with Disabilities”, 10 June 2022, available at: [www.unicef.org/emergencies/ukraine-war-response-children-disabilities](http://www.unicef.org/emergencies/ukraine-war-response-children-disabilities); UN Human Rights, “Ukraine: UN Experts Sound Alarm on Situation of Children with Disabilities”, press release, 11 August 2022, available at: [www.ohchr.org/en/press-releases/2022/08/ukraine-un-experts-sound-alarm-situation-children-disabilities](http://www.ohchr.org/en/press-releases/2022/08/ukraine-un-experts-sound-alarm-situation-children-disabilities).

reducing them to their impairment and considering their lives as less worthy of living.

The social model and human rights-based approach enshrined in the CRPD mark a significant shift away from these paternalistic and discriminatory models. The social model, on the one hand, recognizes that it is not impairment as such but the *interaction* between impairment and various physical, attitudinal, environmental and societal barriers which hinders the full and active participation of persons with disabilities in society,<sup>19</sup> meaning that the duty to overcome disabling barriers is placed on society rather than on the individual.<sup>20</sup> The human rights-based approach, on the other hand, forms the normative basis for the response to disability:<sup>21</sup> it emphasizes the inherent dignity of every human being and stipulates that no characteristic, including impairment, may prevent a person from being a full and equal rights holder, while also demanding that the multidimensional and intersectional discriminations faced by persons with disabilities be addressed (see further below).

The seismic shift in our understanding of and approach to disability thus lies in the recognition of disability as the result of an interaction between a person's impairment and an often non-responsive environment. Following this understanding, the major barriers still faced by person with disabilities when accessing rights and guarantees supposedly afforded to every human being – or, in the case of IHL, all persons protected under the respective conventions – can only be addressed if the social model and human rights-based approach enshrined in the CRPD are incorporated and reflected throughout the entire framework of international law.

## The interplay between disability, gender and age: Multiple and intersectional discrimination against women and girls with disabilities

Another major achievement of the CRPD has been the recognition of the intrinsic interplay between disability and a person's other individual characteristics, which at times may result in multiple and intersecting forms of discrimination based on the combination of overlapping, immutable and systemic factors.<sup>22</sup> Multiple and

19 Article 1(2) of the CRPD describes persons with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments which *in interaction with various barriers* may hinder their full and effective participation in society on an equal basis with others” (emphasis added). See also CRPD, above note 2, preambular para. (e), Art. 1; Emily Kakoullis and Yoshikazu Ikehara “Art. 1: Purpose”, 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. 54.

20 Rosemary Kayess and Philip French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities”, *Human Rights Law Review*, Vol. 8, No. 1, 2008, p. 6.

21 Theresia Degener, “A New Human Rights Model in Disability”, in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham, 2017, p. 20.

22 Roxanne Mykitiuk and Ena Chadha, “Art. 6: Women with Disabilities”, in I. Bantekas, M. A. Stein and D. Anastasiou (eds), above note 19, p. 184; CRPD Committee, General Comment No. 3, “Article 6: Women and Girls with Disabilities”, UN Doc. CRPD/C/GC/3, 2 September 2016, para. 2. See also Ad Hoc Committee on the CRPD, *Daily Summary of Discussions at the Sixth Session*, 2 August 2005, available at: [www.un.org/esa/socdev/enable/rights/ahc6sum2aug.htm](http://www.un.org/esa/socdev/enable/rights/ahc6sum2aug.htm); WHO, above note 1, p. 8.

intersectional discrimination in this sense refer to situations where discrimination against a person is based on two or more grounds, thus compounding or aggravating that discrimination, and where several grounds of discrimination – such as disability, gender and age<sup>23</sup> – operate and interact with each other at the same time in an inseparable manner.

Women and girls with disabilities are, for example, exposed to a heightened risk of sexual violence when compared to other groups of people,<sup>24</sup> and girls with disabilities in particular face additional barriers owing not only to their gender and impairment but also to their young age.<sup>25</sup> The at times exceptional disadvantages resulting from this interplay had been addressed before, but were mostly an afterthought, failing to address *both* gender and disability.<sup>26</sup> The CRPD finally explicitly acknowledges that women and girls with disabilities routinely experience such multiple and intersecting forms of discrimination,<sup>27</sup> while also emphasizing the need to continuously incorporate a gender- and age-sensitive perspective into the Convention's implementation.<sup>28</sup> Aside from other provisions throughout the CRPD,<sup>29</sup> this approach is most notably reflected in Articles 6 and 7 of the Convention: by dedicating individual provisions to the respective protection of women and children with disabilities, the Convention affirms that they are entitled to the full enjoyment of human rights on an equal basis with others,<sup>30</sup> while also expressly demanding a gender- and age-sensitive approach to disability<sup>31</sup> (including by directly referencing the Convention on the Rights of the Child (CRC)<sup>32</sup>).

23 CRPD Committee, General Comment No. 3, above note 22, para. 4. See also CEDAW Committee, "General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women", UN Doc. CEDAW/C/2010/47/GC.2, 19 October 2010, para. 18; CEDAW Committee, "General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19", UN Doc. CEDAW/C/GC/35, 14 July 2017, para. 12. These committees expressly mention gender, age and disability as grounds for multiple, intersectional discrimination.

24 Swantje Köbsell, "Gendering Disability: Behinderung, Geschlecht und Körper", in Jutta Jacob, Swantje Köbsell and Eske Wollrad (eds), *Gendering Disability: Intersektionale Aspekte von Behinderung und Geschlecht*, Transcript, Bielefeld, 2010, p. 21.

25 Beijing Declaration, above note 5, paras 32, 270, 278; CRC Committee, above note 15, paras 8, 10. The CRC Committee expressly states that "girls with disabilities are often more vulnerable to discrimination due to gender discrimination" and requires States Parties to take "the necessary measures, and when needed extra measures, in order to ensure that they are well protected, have access to all services and are fully included in society" (CRC Committee, above note 15, para. 10).

26 CRPD Committee, General Comment No. 3, above note 22, para. 3. See also "Chapter I: Matters Brought to the Attention of State Parties: General Recommendations: General Recommendation No. 18: Disabled Women", in *Report of the Committee on the Elimination of Discrimination against Women, UN GAOR 46th Session*, UN Supp No. 38, Doc. A/46/38, 1992; Beijing Declaration, above note 5, paras 60, 81, 82, 106, 109, 114–116, 124, 126, 175, 178, 206, 232, 233; "Chapter I.A.: General Recommendation 24: Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women: Women and Health", in *Report of the Committee on the Elimination of all Forms of Discrimination against Women, UN GAOR 21st Session*, Supp No. 38, UN Doc. A/54/38/Rev.1, 1999, paras 6, 24, 25.

27 CRPD, above note 2, preambular paras (p), (q). See also Rachele Cera, "Preamble", in V. Della Fina, R. Cera and G. Palmisano (eds), above note 21, p. 85; Beijing Declaration, above note 5, para. 32.

28 CRPD, above note 2, preambular para. (s).

29 *Ibid.*, Arts 8(b), 16(2), 16(5), 18(2), 23(1)(c), 23(3–5), 24, 25(a).

30 *Ibid.*, preambular paras (d), (r).

31 R. Mykitiuk and E. Chadha, above note 22, p. 171.

32 CRPD, above note 2, preambular para. (r).

## The CRPD as an interpretative tool for IHL

At the time of drafting the 1949 Geneva Conventions and their two Additional Protocols, a disability rights discourse had not yet developed within the international community.<sup>33</sup> This is evident in the outdated, often discriminatory medical and charity approaches which IHL generally adopts towards disability:<sup>34</sup> most notably, persons with disabilities are still widely assumed to qualify as “wounded” or “sick”, thus falling within the personal scope of application of Geneva Conventions I and II.<sup>35</sup> This assumption is problematic, to say the least. By far not all persons with disabilities will qualify as “wounded” and/or “sick” within the meaning of IHL,<sup>36</sup> and where they do, summarizing their protection simply as that afforded to the wounded and sick would also run counter to the social model and human rights-based approach enshrined in the CRPD. What can already be determined is therefore that the outdated approach to disability seemingly reflected by IHL has been superseded by this new framework.<sup>37</sup>

33 A. Priddy, above note 5, p. 52.

34 See, for example, Rule 138 of the ICRC Customary Law Study, which speaks of the “disabled”; Article 17 of Geneva Convention IV, referring to “the infirm”; and Article 30 of Geneva Convention III, referring to “cases of ... mental disease” and “the blind”. Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 138, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 17; 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. 30.

35 See, for example, ICRC Advisory Service, above note 12, p. 2, which dedicates an entire section to the protection of the “wounded and sick”; or ICRC, “Disability”, *How Does Law Protect in War?*, available at: <https://casebook.icrc.org/glossary/disability>, where a large part of the IHL provisions that are listed in relation to persons with disabilities are those referring to the “wounded”, “sick” and “infirm”. See also A. Priddy, above note 5, p. 56.

36 ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017, paras 1380–1382, available at: <https://ihl-databases.icrc.org/ihl/full/GCII-commentary>. Even though the ICRC adopts a broad interpretation of the terms “wounded” and “sick”, which goes beyond the ordinary (medical) meaning of these terms, it is made clear throughout the interpretation of these terms that *being in need of medical care* is the decisive criterion to qualify for the corresponding protections. By far not all persons with disabilities are in need of medical care however, meaning that in practice this approach would not only reflect outdated views on disability but would also fail to include many persons with disabilities altogether. See also A. Priddy, above note 5, pp. 56 ff; Naomi Hart, Mary Crock, Ron McCallum and Ben Saul, “Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts”, *Monash University Law Review*, Vol. 40, No. 1, 2014, p. 162.

37 *Thematic Study on the Rights of Persons with Disabilities under Article 11 of the Convention on the Rights of Persons with Disabilities, on Situations of Risk and Humanitarian Emergencies: Report of the United Nations High Commissioner of Human Rights*, UN Doc. A/HRC/31/30, 30 November 2015, para. 3. See also ICRC, “How Law Protects Persons with Disabilities in Armed Conflict”, 13 December 2017, p. 7, available at: [www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict](http://www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict): “Such terminology should not be taken to imply that under contemporary interpretation of IHL persons with disabilities are seen as mere objects of pity or passive victims in need of protection rather than agents of their own destiny.” And see A. Priddy, above note 5, pp. 52–53, pointing out that “language matters” since “it can feed and reinforce negative and discriminatory attitudes”.

This does not mean, however, that there is no room for IHL to take into account basic principles set forth in the CRPD. On the contrary, the core purpose of IHL is to ensure respect for elementary considerations of humanity and the human dignity of *all* persons. Its remarkable flexibility and ability to take into account new developments and changes in society thus provides ample opportunity for the adoption of a disability-inclusive perspective which also pays due regard to the interplay between other factors that inform a person's individual experience. In a broader sense, the principle of humanity permeating the whole body of IHL<sup>38</sup> already requires – albeit implicitly and indirectly – that persons with disabilities be afforded equal protection and respect. The basis for adopting such a disability-inclusive perspective can furthermore be found within the framework itself: Rule 138 of the International Committee of the Red Cross's (ICRC) Customary Law Study expressly states that the “disabled and infirm affected by armed conflict are entitled to special respect and protection”. Despite the outdated medical approach that has led to the inclusion of this rule,<sup>39</sup> it still provides a viable basis for determining what “special protection and respect” will entail for persons with disabilities<sup>40</sup> in the context of armed conflicts.

Finally, Article 11 of the CRPD likewise supports the view that the Convention can and should serve to inform the interpretation and application of IHL norms. In essence, this provision affirms that the rights of persons with disabilities continue to apply during armed conflict alongside IHL,<sup>41</sup> and that they cannot be suspended or derogated from in situations of humanitarian emergencies.<sup>42</sup> It should be emphasized that the extent to which the CRPD *directly* applies to an armed conflict will be context-dependent<sup>43</sup> and is not the subject of this paper. Rather, the direct reference to IHL also allows for the CRPD

38 Giovanni Distefano and Etienne Henry, “Final Provisions, Including the Martens Clause”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 184.

39 ICRC Customary Law Study, above note 34, pp. 490–491: persons with disabilities are lumped together with the “infirm”, and multiple references are made to their protection as the “wounded” or “sick”. See also Jean-Marie Henckaerts and Louise Doswald Beck (eds), *Customary International Humanitarian Law*, Vol. 2: *Practice*, Part 2, Cambridge University Press, Cambridge, 2005, pp. 3146–3151, which includes similarly outdated references, particularly in citing various military manuals which thoroughly reflect the medical and charity approaches.

40 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2016, p. 136; ICRC Advisory Service, above note 12, pp. 1–2. In the general context of IHL, the duty to “respect” denotes a duty to refrain from attack, abuse or any other act likely to cause danger or injury, while the duty to “protect”, on the other hand, implies a positive obligation to shield the person in question from harm and to proactively safeguard their rights in the form of help and support.

41 A. Priddy, above note 5, pp. 34–35.

42 ICRC Advisory Service, above note 12, p. 1; CRPD Committee, above note 3, p. 1. See also Article 38 of the CRC, which is the only other international human rights law instrument expressly affirming its applicability in armed conflict. Convention on the Rights of the Child, 20 November 1989 (entered into force 2 September 1990) (CRC), Art. 38.

43 See A. Priddy, above note 5, pp. 34 ff., 44 ff., 76, for a detailed analysis of the direct applicability of the CRPD to situations of armed conflict, alongside IHL. Factors that may determine its applicability include, but are not limited to, the extent to which a State party to the conflict exercises effective control over the territory in question, and for how long it has exercised such control.

to serve to inform, elaborate and contextualize the scope and content of IHL provisions with a view to better taking disability into account.

## **A disability-, gender- and age-inclusive approach to selected IHL norms**

The provisions chosen below are all of a fundamental nature, meaning that they will apply to all situations of armed conflict and will be binding to all parties involved<sup>44</sup> by way of customary IHL. This choice has been deliberate in that it serves to demonstrate that considerations regarding disability, as well as its interplay with characteristics such as age or gender, are equally fundamental as they will impact the very nature of a person's individual situation.

Before addressing individual provisions, it is important to note in this context that the gender identities of persons with disabilities can be as diverse as those among the general population. Assuming otherwise would deny persons with disabilities a fundamental aspect of their identity beyond their impairment, which in turn would run contrary to the ideas at the very basis of disability rights. It is therefore the view of the author that, in order to avoid marginalization and stigmatization of persons with non-cisgender identities, these considerations should always be made based on the *individual gender identity* of the person in question, as opposed to the biological sex assigned to them at birth.

### **The principle of humane treatment**

Most prominently enshrined in Article 3 common to the four Geneva Conventions,<sup>45</sup> the principle of humane treatment is arguably the most fundamental IHL provision for the purposes of this paper. It serves to safeguard the inherent dignity of all human beings against any type of abuse and can thereby provide a basis for other, more specific guarantees.

#### *Disability as a factor shaping the meaning and content of “humane treatment”*

Common Article 3 states that “persons taking no active part in the hostilities ... shall *in all circumstances* be *treated humanely*”.<sup>46</sup> The absolute nature of this provision leaves no doubt that no reasons or circumstances can possibly justify

44 In other words, they will apply to both international armed conflicts and non-international armed conflicts, while also being binding for both States and armed non-State actors (i.e. armed groups).

45 See also ICRC Customary Law Study, above note 34, Rule 87; GC III, Art. 13; GC IV, Art. 27; 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. 75; 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. 4.

46 Emphasis added. While the wording of other, similar provisions is slightly different, they share the same two essential elements of “treated humanely” and “in all circumstances” or “at all times”.

treatment that falls outside the “minimum standard” of being humane,<sup>47</sup> while the exact meaning of the term “humane treatment” itself is to be determined on a case-by-case basis. Such considerations must *inter alia* take into account subjective factors including a person’s state of health, age or gender.<sup>48</sup> While at first glance one may feel inclined to summarize disability under considerations made with regard to a person’s state of health, such an approach would not only fall short of recognizing impairment as going beyond a purely medical condition, but could itself result in inhuman treatment.<sup>49</sup> Rather than being summarized in this manner, an assessment in line with our current understanding of disability would thus seem to require that it be taken into account as a criterion of its own.

It is here that the CRPD can provide additional guidance by informing and elaborating on the meaning of “humane treatment” for persons with disabilities; following the social model and human rights-based approach, considerations such as their specific physical and mental condition<sup>50</sup> and existing physical or environmental barriers will have to play an important part in shaping the content and meaning of the term, as will the question of how their individual experience is impacted by the presence of impairment.<sup>51</sup> In other words, treatment that would not usually be considered to constitute a violation of this principle may nevertheless amount to inhuman or otherwise prohibited treatment when directed towards a person with an impairment.<sup>52</sup>

Common Article 3<sup>53</sup> also lists a number of explicit prohibitions which provide further substance to the fundamental guarantees offered to persons with

47 See ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), paras 595–600, available at: <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>.

48 Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1960 (1960 Commentary on GC I), p. 53; 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. 553, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>; ICRC Commentary on GC III, above note 47, para. 587; A. Priddy, above note 5, p. 54.

49 By way of example, the principle of humane treatment may in fact imply having to *refrain* from medical intervention if the person in question does not consent to it, even if such an intervention would generally be considered appropriate and would objectively have a chance of improving their physical or mental condition.

50 See ICRC Commentary on GC III, above note 47, para. 587.

51 A. Priddy, above note 5, p. 54; ICRC Advisory Service, above note 12, p. 2.

52 See for example Human Rights Committee (HRC), *Hamilton v. Jamaica*, Communication No. 616/1995, UN Doc. CCPR/C/66/D/616/1995, 6 January 1995, paras 3.1, 8.2: the Committee held that the conditions of detention of a prisoner who was paralyzed from the waist down had violated his “right to be treated with humanity and with respect for the inherent dignity of the human person” and specifically referred to the difficulties he encountered *as a disabled person*. These difficulties included having to pay other inmates to empty his slop bucket, and having to be carried by them in order to leave his cell. See also European Court of Human Rights (ECtHR), *Price v. United Kingdom*, Case No. 33394/96, Judgment (Third Section), 10 July 2001, in particular paras 28, 30: the Court found that the conditions of detention amounted to degrading treatment in the case of a woman with a severe mobility impairment, as she was “unable to go to the toilet or keep clean without the greatest of difficulty”; she was subjected to “extremely humiliating treatment”, with male officers having to assist in lifting her on and off the toilet; and the temperatures in her cell were “dangerously cold”. See also N. Hart *et al.*, above note 36, p. 165; A. Priddy, above note 5, p. 54.

53 See also ICRC Customary Law Study, above note 34, Rules 87–105.

disabilities in the armed conflict setting. These notably include the prohibitions against cruel and otherwise inhuman treatment; outrages upon personal dignity, in particular humiliating and degrading treatment;<sup>54</sup> and any other “serious attack on human dignity”.<sup>55</sup> Whether or not a specific treatment violates these prohibitions must again be determined on a case-by-case basis,<sup>56</sup> *inter alia* taking into account the physical, mental and moral effects of the act on the victim, as well as the latter’s personal circumstances such as their age and sex.<sup>57</sup> Additionally, a treatment must meet the threshold(s) of causing “serious mental or physical suffering”<sup>58</sup> or “serious humiliation or degradation”<sup>59</sup> to the victim.

The reference to human dignity and the inclusion of subjective factors in the assessment allow for a parallel to be drawn between these provisions and the CRPD.<sup>60</sup> The CRPD can thus provide further authoritative guidance on their interpretation from a disability-inclusive point of view,<sup>61</sup> in that assessing the level of suffering or pain caused by a specific treatment will require taking into account the existence of a disability.<sup>62</sup> In some cases, a person’s impairment will therefore result in a specific act constituting ill-treatment, even if it would not usually cross this threshold, as its impact from a disability point of view will cause serious mental or physical suffering to the individual.

As stated above, these considerations are fundamental in that they will have to be taken into account throughout the interpretation and application of all IHL provisions. In practice, this will for example require a Detaining Power to factor in disability when deciding on a punishment for a prisoner of war (PoW) who

54 Common Arts 3(1)(a), 3(1)(c). See also AP I, Arts 75(2)(a)(ii), 75(2)(b); AP II, Arts 4(2)(a), 4(2)(e); ICRC Customary Law Study, above note 34, Rule 90.

55 See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 551; ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 April 2008, paras 126 (“treatment which ... constitutes a serious attack upon human dignity”), 132 (act or omission “which would be generally considered to ... be a serious attack on human dignity”). See also ICTY, *Prosecutor v. Zejnil Delalić et al., Prosecutor v. Dragoljub Kunarac et al.*, Case Nos IT-96-23-T, IT-96-23/1-T, Judgment (Trial Chamber), 22 February 2001, para. 514.

56 ICTY, *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005, para. 232. See also ICTY, *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para. 369; Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: United States of America*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 13. As stated in the ICRC Commentary on GC III, above note 47, para. 658, the suffering caused may be of either a physical or mental nature, so long as it reaches a certain threshold.

57 ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment (Trial Chamber), 15 March 2002, para. 131; ICTY, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment (Trial Chamber), 25 June 1999, para. 56; ICTY, *Kunarac*, above note 55, para. 504.

58 See ICTY, *Delalić*, above note 55, para. 551; ICTY, *Haradinaj*, above note 55, para. 126.

59 See ICTY, *Kunarac*, above note 55, para. 514.

60 See, in particular, CRPD Article 15, stipulating the protection of persons with disabilities against cruel, inhuman or degrading treatment or punishment on an equal basis with others; Article 16, explicitly prohibiting all forms of violence, abuse and exploitation of persons with disabilities; and Article 17, aimed at the protection of their physical and mental integrity.

61 See *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. 44.

62 *Ibid.*, para. 47; see also ECtHR, *Nasri v. France*, Case No. 19465/92, Judgment (Court Chamber), 13 July 1995, paras 47, 48.

has committed an offence. Article 89(1)(4) of Geneva Convention III (GC III) generally allows for confinement to be used as a disciplinary punishment; such confinement can take different forms, most notably close confinement (uninterrupted detention in closed quarters, possibly together with other detainees) or solitary confinement (uninterrupted detention in closed quarters without any meaningful human contact).<sup>63</sup> However, in a reiteration of the general principle of humane treatment, the provision itself limits the applicability of confinement by prohibiting disciplinary punishments that are inhuman, brutal or dangerous to the health of a PoW.<sup>64</sup> The Detaining Power is therefore required to take into account the individual circumstances of the PoW in question<sup>65</sup> and how these are likely to influence his or her experience. Here, too, limiting the impact of disability to considerations made regarding the health of a prisoner would fall dramatically short of our current understanding of disability, although in this case such considerations should not be discarded altogether – where confinement would, for example, result in the denial of access to basic services required by a person’s specific impairment (such as therapy sessions or medication), another form of punishment should be chosen. However, the considerations made by the Detaining Power should also include whether or not confinement would be inhuman or brutal *as a result of impairment*: this would for example be the case if the PoW in question has a psychosocial impairment that would greatly increase the stress of being separated from other detainees with whom they have formed a personal relationship, if the nature of their impairment would expose them to a heightened risk of abuse by guards or by others detained in the same quarters, or if the confinement facility would not be equipped to accommodate the needs of a PoW with a mobility impairment. In sum, while certain forms of confinement would generally be permissible under IHL, they could nevertheless amount to inhuman treatment for PoWs with a disability.<sup>66</sup>

### *“Humane treatment” taking into account disability, gender and age*

The recognition that women and girls with disabilities may find themselves in particularly vulnerable situations means that, when considering the impact a certain treatment has on them, their gender, age and individual impairment will all constitute significant factors in determining whether or not said treatment meets the minimum standards of being humane.<sup>67</sup> Furthermore, the assessment

63 See ICRC Commentary on GC III, above note 47, paras 3754, 3756. It should be noted that due to the detrimental effects on a person’s mental and physical health, acceptance of solitary confinement as a permissible form of punishment has significantly decreased in recent years, both in theory and practice. See further below for further considerations regarding solitary confinement of PoWs with disabilities.

64 GC III, Art. 89(3).

65 ICRC Commentary on GC III, above note 47, para. 3761.

66 See further below regarding solitary confinement of women and girls with disabilities in particular.

67 ICTY, *Krnjelac*, above note 57, para. 131; 1960 Commentary on GC I, above note 48, p. 53; 2016 Commentary on GC I, above note 48, para. 553; ICRC Commentary on GC III, above note 47, para. 587; A. Priddy, above note 5, p. 54.

will have to include not only these characteristics as separate elements, but also the interaction between them. Certain types of ill-treatment may for example exacerbate the negative effects that an impairment has on the person's health. If that person is also of young age, these effects may in turn have long-term negative consequences for their development, meaning that the overall impact of the treatment in question would have to be considered much more severe than if it had been directed towards a child without an impairment, or an adult with an impairment.

The same is true for acts explicitly prohibited by common Article 3. Whether or not the treatment of an individual has breached the threshold of being cruel, inhuman or an outrage upon their human dignity will in no small part be influenced by their gender and age and by the presence of any impairment, as well as the interaction between these factors and how this may shape their experience. In other words, treatment that would generally be considered humane may nevertheless amount to inhuman treatment if the person in question holds two or more of these characteristics – i.e., young age, female gender, impairment – and/or where these characteristics interact with one another in such a way as to compound or aggravate the physical or mental effects that has on them.

Finally, the CRPD also expressly invokes the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the CRC, putting them in direct relation to the CRPD<sup>68</sup> and, by extension, to the relevant provisions of IHL. Both of these instruments will therefore provide valuable additional guidance alongside the CRPD when applying the principle of humane treatment to circumstances involving women and girls with disabilities.<sup>69</sup>

Coming back to the previous example, the gender of the PoW in question would have to further influence the Detaining Power's assessment: a female PoW with a mobility impairment may for example not be held in confinement in a facility where the female showers are not accessible to her. This will be the case even if one or more showers intended for use by male PoWs are accessible, as the female PoW may not lawfully be obliged to use those instead – doing so could expose her to humiliation by leaving her no choice but to strip naked in front of male detainees and guards, and would even place her at increased risk of sexual or other assault.<sup>70</sup> If there are no alternative facilities available that could accommodate her needs, it would have to be concluded that confinement will in no case be a suitable measure for her.<sup>71</sup>

To further illustrate the interplay between gender, impairment and age, consider the scenario of an evacuation of a child during armed conflict. It may be

68 CRPD, above note 2, preambular paras (d), (r).

69 See, in particular, CRC, above note 42, Arts 23, 37. See also CRC Committee, above note 15, paras 5, 7: the CRC Committee has adopted an approach that reflects the social model and human rights-based approach enshrined in the CRPD.

70 To reiterate what has been stated above, “female” and “male” in this context should be understood as referring to a PoW's *own* gender identity. Where this identity does not fall into a binary definition, in the author's view the deciding factor should be which facilities the person in question feels more comfortable using.

71 See further below regarding solitary confinement of women and girls with disabilities in particular.

permissible to separate a child from his or her parents for a limited amount of time during evacuation procedures, but if the child has a disability, separation from their primary caregivers, even if only for a short period of time, may have a compounded impact on their well-being, to the point of causing them severe psychological distress. Additionally, placing the child in the care of persons unfamiliar with their impairment – be it of a physical, mental or other nature – risks exposing them to various types of physical harm. If the child is also a girl, the party to the conflict undertaking the evacuation will furthermore have to keep in mind the increased risk of sexual abuse (and other types of gender-based violence) faced by girls with disabilities, which, if they occur in this or any other context, will constitute a violation of the prohibition on cruel, inhuman or degrading treatment. In sum, the combined characteristics of impairment, age and gender in a case like this would lead to the conclusion that this particular girl must not be separated from her parents, as doing so would be a violation of common Article 3 – even if the law at face value would not seem to contradict such a procedure.

### The prohibition on adverse distinction

The lack of awareness about the impact that disability has on a person's full and equal enjoyment of their fundamental rights continues to result in discrimination against persons with disabilities in all areas of life – both directly, through less favourable treatment based on impairment, and indirectly, through equal treatment where differential treatment would be necessary in order to ensure substantive equality.<sup>72</sup> In situations of armed conflict, this lack of awareness and the persisting negative attitudes towards disability mean that IHL provisions, designed to minimize the impact of armed conflicts on *all* people affected by them, are not being applied in a disability-inclusive manner<sup>73</sup>, which in turn can result in a severe discrepancy between the protections that persons with disabilities *should* enjoy, and those which they actually enjoy.

Conversely, the principle of humane treatment offers fundamental guarantees and protections to all persons affected by any armed conflict. Its absolute character is reinforced by the prohibition on adverse distinction,<sup>74</sup> which aims to ensure that the fundamental guarantees of IHL are applied in a truly – that is to say, substantively – equal manner to everyone affected by armed conflict. Like the principle of humane treatment itself, the prohibition on adverse distinction therefore holds particular significance for persons with disabilities. It allows for a closer examination of how impairment may prevent the enjoyment of

72 See also A. Priddy, above note 5, pp. 29, 32: this concept, also referred to as substantive equality, recognizes that differential treatment may in fact be necessary in order to redress existing inequalities. The counterpart to substantive equality, on the other hand, known as formal equality, requires that everyone be treated the same, regardless of individual circumstances. In practice, formal equality will often result in discrimination, as it fails to take into account the existing inequalities resulting from individual circumstances such as impairment. For persons with disabilities, formal equality can be particularly dangerous because it allows deliberate discrimination to masquerade as indifference.

73 See A. Priddy, above note 5, p. 74.

74 ICRC Commentary on GC III, above note 47, para. 604.

and/or access to IHL guarantees for persons with disabilities, and what measures are needed in order to eliminate such barriers.

### *Disability as grounds for prohibited adverse distinction*

Again most prominently enshrined in common Article 3,<sup>75</sup> the prohibition on adverse distinction aims to ensure that all protected persons receive the same standard of treatment<sup>76</sup> by requiring that all persons be “treated humanely, *without any adverse distinction*” (emphasis added). It is equally as fundamental and universal as the principle of humane treatment, meaning that it is never lawful to undertake such a distinction, regardless of the normative context.<sup>77</sup>

The human rights law equivalent to the prohibition on adverse distinction is the principle of non-discrimination,<sup>78</sup> which, due to its interconnectedness with human dignity and equality, is equally considered to be a cornerstone of all human rights treaties.<sup>79</sup> The CRPD is no exception, its core lying in the prohibition of discrimination against persons with disabilities in all areas of life.<sup>80</sup> Again referred to throughout the CRPD,<sup>81</sup> the principle of non-discrimination is expressly enshrined in Article 5, while Article 2 defines discrimination within the meaning of the Convention as

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Going back to IHL, some provisions list various criteria on which adverse distinction might be based.<sup>82</sup> None of these lists include disability, but as is evident from the inclusion of phrases such as “or any other similar criteria”, none of them constitute an exhaustive list.<sup>83</sup> On the contrary, adverse distinction founded on other grounds will be equally prohibited, unless it results from the application of the Geneva Conventions.<sup>84</sup> When read in line with the CRPD, the term “or any other similar criteria” must thus necessarily be understood to also include disability as grounds for prohibited adverse distinction. A complementary

75 See also GC III, Art. 16; GC IV, Art. 27(3); AP I, Art. 75(1); AP II, Art. 4(1); ICRC Customary Law Study, above note 34, Rule 88. Each of these provisions uses slightly different phrasing, but they all stipulate the same principle.

76 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, 1960 (ICRC Commentary on GC IV), p. 206.

77 See J. Henckaerts and L. Doswald-Beck (eds), above note 39, p. 309.

78 *Ibid.*

79 CRPD Committee, “General Comment No. 6 (2018) on Equality and Non-Discrimination”, UN Doc. CRPD/C/GC/6, 26 April 2018, paras 4, 5.

80 Markus Schefer and Caroline Hess-Klein, *Behindertengleichstellungsrecht*, Stämpfli, Bern, 2014, p. 8.

81 See, for example, CRPD, above note 2, Preamble, Arts 3(b), 4(1), 6(1), 23(1), 24(1), 25, 27, 28, 29.

82 Common Article 3 expressly lists race, colour, religion, faith, sex, birth and wealth.

83 ICRC Commentary on GC IV, above note 76, p. 206.

84 *Ibid.*; ICRC Commentary on GC III, above note 47, para. 605.

approach to IHL requires that its guarantees be applied equally to persons with disabilities,<sup>85</sup> that these guarantees be made accessible to such persons, and that disability within the sense of the CRPD – including environmental and other barriers – be taken into account when assessing compliance with the prohibition on adverse distinction.

### *The prohibition on adverse distinction, reasonable accommodation, and equal access*

Having established that all IHL protections must apply equally to persons with disabilities by virtue of the prohibition on adverse distinction,<sup>86</sup> we must then consider the question of how “equal application” is to be understood. In general, IHL only prohibits *adverse* distinction, which, according to the ICRC, is “[a]ny form of differentiation that is not justified by substantively different situations and needs”.<sup>87</sup> It logically follows that differential treatment which is justified by the substantively different situations and needs of protected persons will not only be lawful, but may even be required if serving the purpose of realizing a person’s humane treatment.<sup>88</sup> Similarly, the fact that *any* adverse distinction is prohibited allows for the conclusion that both direct and indirect discrimination must be considered unlawful under IHL – it is not only differential treatment that singles out certain persons based on unlawful criteria which must be considered to constitute adverse distinction, but also “seemingly neutral measures that have the effect of adversely affecting” those persons.<sup>89</sup> Other IHL provisions elaborate on this notion: Article 16 of GC III, for example, explicitly states that “privileged treatment” may be accorded to persons by reason of, *inter alia*, their state of health, age and/or sex, whereas Article 27(3) of Geneva Convention IV (GC IV) stipulates the obligation of equal treatment “without prejudice to the provisions relating to ... state of health, age and sex”.

In other words, where differential treatment is necessary in order to address existing inequalities, the prohibition on adverse distinction not only permits it, but in fact requires it. When these inequalities result from an impairment, the CRPD can provide further clarity on what such differential treatment may entail.

Aside from prohibiting all discrimination on the basis of disability, CRPD Article 5 also requires States Parties to provide *reasonable accommodation* in order to eliminate discriminations.<sup>90</sup> Reasonable accommodation is defined by CRPD

85 A. Priddy, above note 5, p. 55; Priscilla Denisse Coria Palomino, “A New Understanding of Disability in International Humanitarian Law: Reinterpretation of Article 30 of Geneva Convention III”, *International Review of the Red Cross*, Vol. 104, No. 919, 2022, p. 1444. See also CRPD Committee, above note 79, para. 43: the Committee has indeed confirmed States Parties’ obligations to ensure non-discrimination in situations of armed conflict. Crucially, it also did so in direct reference to their IHL obligations (“... based also on obligations *in international humanitarian law*” (emphasis added)).

86 A. Priddy, above note 5, p. 55.

87 ICRC Commentary on GC III, above note 47, para. 603; see also para. 605.

88 See, for example, ICRC Commentary on GC IV, above note 76, p. 206; A. Priddy, above note 5, p. 55.

89 ICRC Commentary on GC III, above note 47, para. 609.

90 CRPD, above note 2, Arts 5(2), 5(3).

Article 2 as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment of exercise on an equal basis with others of all human rights and fundamental freedoms”<sup>91</sup>. Finally, both Article 2 and Article 5 of the CRPD recognize the denial of reasonable accommodation as a form of discrimination against persons with disabilities.<sup>92</sup>

Both IHL and the CRPD thus recognize that it is not only the “classic”, direct form of discrimination in the form of *differential* treatment that constitutes unlawful discrimination, but also *equal* treatment at face value which fails to accommodate the needs of persons with disabilities and effectively results in the same denial of equal enjoyment of rights.<sup>93</sup> Both bodies of law therefore adopt the same approach of demanding differential treatment where it is necessary in order to ensure substantive equality. Considering CRPD Article 5 as complementary to the prohibition on adverse distinction, it notably includes the requirement to provide reasonable accommodation to persons with disabilities in cases where equal treatment at face value would result in them being denied equal protection. Wherever direct or indirect policy or treatment results in adverse distinction based on impairment, the absolute nature of this prohibition requires that the responsible party take all necessary measures to correct the situation – including reasonable accommodation, taking into account the specific needs resulting from a person’s impairment.

Another key principle of the CRPD that can be of significance in this regard is the right to equal access, also referred to as “accessibility”. Stipulated by Article 9 of the CRPD, this is another essential precondition to the effective and equal enjoyment of human rights by persons with disabilities<sup>94</sup> and requires States Parties to “take appropriate measures to ensure persons with disabilities access, on an equal basis with others”, to a wide range of aspects of life. The denial of access, just like the denial of reasonable accommodation, constitutes a discriminatory act.<sup>95</sup> Failure to ensure equal access (including failure to provide reasonable accommodation) to IHL protections may amount to discrimination on the basis of disability and a violation of associated rights and protections.<sup>96</sup> Unlike reasonable accommodation, which only applies *ex nunc* and to the extent that it does not cause an “undue burden”, the duty to implement accessibility

91 *Ibid.*, Art. 2(4).

92 *Ibid.*, Arts 2(3), 5(3).

93 ECtHR, *Thlimmenos v. Greece*, Case No. 34369/97, Judgment (Grand Chamber), 6 April 2000, para. 44: the ECtHR noted that the right not to be discriminated against is also violated “when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different” (emphasis added). See also *Report of the Office of the UN High Commissioner for Human Rights: Equality and Non-Discrimination under Article 5 of the Convention on the Rights of Persons with Disabilities*, UN Doc. A/HRC/34/26, 9 December 2016, para. 28; R. Kayess and P. French, above note 20, p. 27; A. Priddy, above note 5, p. 31.

94 A. Priddy, above note 5, p. 33.

95 CRPD Committee, General Comment No. 2, “Article 9: Accessibility”, UN Doc. CRPD/C/GC/2, 22 May 2014, para. 13.

96 See, for example, HRC, *Hamilton*, above note 52, paras 3.1, 8.2; A. Priddy, above note 5, p. 74.

applies *ex ante* and is unconditional.<sup>97</sup> persons with disabilities must have “equal access to all services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity”.<sup>98</sup>

By way of example, Article 41 of GC III obliges parties to a conflict to post the text of the Convention in PoW camps “at places where all may read them”. The wording of the provision makes it clear that every PoW must be able to access the text, a conclusion that is further supported by the object and purpose of the provision, which is to ensure that all PoWs can acquaint themselves with the contents of the Convention and their rights contained therein.<sup>99</sup> A person with a vision impairment, however, may not be able to access written materials on an equal basis with other detainees. While this person would not have been singled out for adverse distinction in such a scenario, the fact that the texts were posted in a manner inaccessible to them would nevertheless result in discrimination regarding their equal enjoyment of this guarantee. CRPD Article 9(1)(b) notably also requires that information, communication and other services, including emergency services, be made accessible to persons with disabilities.<sup>100</sup> When read in light of CRPD Article 5(4), the requirement to ensure equal access for persons with disabilities therefore obliges the Detaining Power to provide them with reasonable accommodation, for example by supplying the text of GC III in Braille, sign language or audio format.<sup>101</sup>

### *The prohibition on adverse distinction and the interplay between disability, gender and age*

As laid out above, individuals do not experience discrimination as members of a homogenous group, but as individuals with multidimensional layers of identities, statuses and lived circumstances.<sup>102</sup> This means that women and girls with disabilities can and will experience discrimination not only based on their impairment, but also based on their gender, their age and, most importantly, the interaction between these individual characteristics in a particular situation. As stipulated throughout the CRPD, and expressly stated in Articles 6 and 7, including a gender- and age-sensitive perspective is especially important when implementing the principle of non-discrimination for persons with disabilities.

Aside from the CRPD, the principle of non-discrimination<sup>103</sup> is also stipulated *inter alia* by Article 2 of the CRC relating to children, and by Article 2 of the CEDAW relating to women. The CEDAW does not make explicit references to disability, but it is invoked multiple times throughout the CRPD, most notably in Article 6, which expressly prohibits discrimination against

97 A. Priddy, above note 5, p. 34.

98 CRPD Committee, above note 95, para. 13.

99 ICRC Commentary on GC III, above note 47, para. 2504.

100 See also CRPD, above note 2, Art. 21; CRC, above note 42, Art. 13.

101 ICRC Commentary on GC III, above note 47, para. 2259; WHO, above note 1, p. 74.

102 CRPD Committee, above note 79, para. 16.

103 *Ibid.*

women with disabilities. It logically follows that States Parties' obligations stipulated by CEDAW Article 2 will have to factor into the interpretation and application of CRPD Article 6 as well, including the obligation to effectively protect women against any act of discrimination and to refrain from engaging in any act or practice of discrimination against women. When read in line with CRPD Article 6, these obligations will include any form of discrimination resulting from the interplay between a woman's gender and her impairment.

Article 2 of the CRC, on the other hand, does explicitly list "disability" as grounds for prohibited discrimination against children in the equal enjoyment of their human rights, and requires States Parties to prevent all forms of discrimination against children on the grounds of disability,<sup>104</sup> an obligation that is reinforced and further elaborated on by Article 23 of the CRC. The latter obliges States Parties to, *inter alia*, recognize the right of children with disabilities to special care and to encourage the extension of assistance appropriate to the child's impairment and the circumstances of his or her caregivers,<sup>105</sup> designed to ensure his or her access to the fullest possible social integration.<sup>106</sup> Moreover, the CRC Committee has specifically recognized that girls with disabilities may be more vulnerable to discrimination due to their gender, requiring States Parties to take "the necessary measures, and when needed extra measures, in order to ensure that they are well protected, have access to all services and are fully included in society".<sup>107</sup>

Both the CEDAW and the CRC therefore provide additional guidance on the rights of women and girls with disabilities as stipulated by the CRPD. Having drawn the parallel between the principle of non-discrimination and the prohibition on adverse distinction, it follows that the same must be true when it comes to the interpretation and application of IHL: a complementary approach to IHL – which takes into account the provisions of the CRPD, the CEDAW and the CRC – demands that disability, gender and age also constitute grounds for adverse distinction in the application of IHL rules. All IHL protections afforded to protected persons under the respective conventions must be applied equally to women and girls with disabilities,<sup>108</sup> and States Parties will be required to provide reasonable accommodation and ensure accessibility wherever necessary in order not to adversely distinguish between women and girls with disabilities and those who do not share these same characteristics. In other words, the particular needs of women and girls with disabilities will have to be considered throughout the interpretation and application of IHL provisions, taking into account their impairment, gender and age as well as the interaction between these characteristics.

Coming back to the example above regarding the evacuation of children, refraining from separating a girl with a disability from her parents for the purpose of evacuation would not constitute adverse distinction, but would rather

104 CRC Committee, above note 15, para. 8.

105 CRPD, above note 2, Art. 23(2).

106 *Ibid.*, Art. 23(3).

107 CRC Committee, above note 15, paras 8, 10.

108 A. Priddy, above note 5, p. 55.

be an accommodation necessary to ensure that she will not be subjected to inhuman treatment of any kind. On the other hand, whether or not said accommodation is reasonable will depend on a variety of factors. In a specific situation, one could, for example, argue that refraining from evacuating the child would pose a severe risk to her life. It would however be misguided to then simply assume that she may be separated from her family in order to be evacuated. If she must be evacuated, reasonable accommodation may also be provided by allowing her primary caregiver to join her on the evacuation; the party responsible will, wherever possible, be required to grant such an exception. In other words, all potential avenues to provide reasonable accommodation must be considered, and where such accommodation cannot be provided, an assessment must be made as to which procedure best reflects the best interests of the child. In a scenario such as that described above, separating a girl with a disability from her family in order to evacuate her would only seem permissible if there is an imminent risk to her life, if there is no alternative (such as another wave of evacuations scheduled soon after), and if substantial reasons do not allow her primary caregiver to join her. Even if a separation cannot be avoided, the party responsible will be required to take all necessary steps to ensure that it does not result in a violation of the principle of humane treatment: this includes making sure that the separation does not last longer than is absolutely necessary, that special care will be taken to protect the girl from any type of gender-based violence or other mistreatment, and that during the separation her basic needs are met, for example by designating a caregiver who is familiar with her impairment.

## Other IHL provisions of relevance to women and girls with disabilities

Other provisions contained in the Geneva Conventions and their Additional Protocols can provide a more concrete idea of how such a gender-, age- and disability-sensitive approach to the principle of humane treatment and the prohibition on adverse distinction could manifest in practice. Any rules of the CRPD, the CEDAW and the CRC which may be relevant to a particular situation can also provide additional clarity on the application of these provisions to women and girls with disabilities in particular.

### *Sexual and other gender-based violence*

Based on the general safeguards provided by the principle of humane treatment and the prohibition on certain types of ill-treatment, IHL also affords special protection to women and children. Among these special protections are safeguards against sexual violence, defined by international jurisprudence as “any act of a sexual nature committed against any person under circumstances which are coercive”.<sup>109</sup> Rule 93 of the ICRC Customary Law Study explicitly prohibits rape and other

<sup>109</sup> International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Chamber I), 2 September 1998, para. 688.

forms of sexual violence, and similar provisions can be found throughout other IHL instruments.<sup>110</sup> Aside from these explicit prohibitions, sexual violence is also considered to constitute inhuman treatment, including cruel and other inhuman or degrading treatment and torture, as well as outrages upon personal dignity.<sup>111</sup> It should be mentioned at this stage that sexual violence during armed conflicts does not only affect women and girls, but men and boys as well, and that the approach IHL takes in protecting women has increasingly been criticized as outdated.<sup>112</sup> Nevertheless, these provisions do serve to protect women and girls with disabilities in particular, who as mentioned above are often at risk of being disproportionately affected by acts of sexual violence both in peacetime and in times of armed conflict.<sup>113</sup>

Multiple provisions within the CRPD provide a further context on these norms with regard to disability. Article 15 requires States Parties to take effective measures to prevent the torture or cruel, inhuman or degrading treatment or punishment of persons with disabilities, while Article 16 stipulates their obligation to take all appropriate measures to protect persons with disabilities from all forms of exploitation, violence and abuse. Crucially, Article 16 also explicitly refers to the gender-based aspects of such abuse<sup>114</sup> and requires the provision of gender- and age-sensitive assistance and support for persons with disabilities, their families and their caregivers in order to prevent such ill-treatment, as well as the age-, gender- and disability-sensitiveness of protection services<sup>115</sup> and the adoption of women- and

110 See, for example, GC IV, Art. 27(2); AP I, Arts 75(2)(b), 76(1); AP II, Art. 4(2)(e): some of these norms explicitly list other forms of sexual violence such as enforced prostitution and “any other forms of indecent assault”.

111 ICTR, *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Judgment (Trial Chamber II), 12 September 2006, para. 528; ICTR, *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgment (Trial Chamber I), 18 December 2008, para. 2254; Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgment (Trial Chamber II), 18 May 2012, para. 432; ICTY, *Delalić*, above note 55, para. 495; *Report by the Special Rapporteur on Torture*, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119; CEDAW Committee, General Recommendation No. 35, above note 23, para. 16.

112 According to critics, the characterization of sexual violence as a particularly heinous act within IHL seems to be based more on a violation of the “honour” of women as opposed to the severe physical and psychological damage it causes. See, for example, Valerie Oosterveld, “Feminist Debates on Civilian Women and International Humanitarian Law”, *Windsor Yearbook of Access to Justice*, Vol. 27, No. 2, 2009, p. 392; Helen Durham and Katie O’Byrne, “The Dialogue of Gender Difference: Gender Perspectives on International Humanitarian Law”, *International Review of the Red Cross*, Vol. 92, No. 877, 2010, pp. 47–51; Charlotte Lindsey, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, ICRC, Geneva, 2001, p. 29, available at: <https://shop.icrc.org/women-facing-war-pdf-en>.

113 *Thematic Study on the Issue of Violence against Women and Girls and Disability*, UN Doc. A/HRC/20/5, 30 March 2012, paras 21–22, 26; CEDAW Committee, General Recommendation No. 35, above note 23, para. 14; CRC Committee, General Comment No. 13, “The Right of the Child to Freedom from All Forms of Violence”, UN Doc. CRC/C/GC/13, 18 April 2011, paras 16, 19, 23, 29, 72; Beijing Declaration, above note 5, para. 116. See also C. Lindsey, above note 112, pp. 29–30. The present article avoids referring to women and girls with disabilities as “particularly vulnerable” whenever possible, as the use of such language risks perpetuating negative, untrue stereotypes about women – with or without disabilities – being passive, weak and objects of paternalistic protection, as opposed to being active agents of their own destiny.

114 CRPD, above note 2, Art. 16(1).

115 *Ibid.*, Art. 16(2).

child-focused legislation and policies to ensure proper investigation and prosecution of such abuse.<sup>116</sup> Finally, Article 17 of the CRPD protects the physical and mental integrity of persons with disabilities. According to Articles 1 and 2 of the CEDAW, gender-based violence against women is a form of discrimination which impairs or nullifies their full enjoyment of human rights and fundamental freedoms, and which States Parties must therefore take all appropriate measures to prevent and eliminate.<sup>117</sup>

When read in light of these provisions, the protections that IHL affords to women against sexual violence should be interpreted as obliging parties to an armed conflict to ensure that women are under all circumstances protected against sexual violence, whether perpetrated by their own agents or by others,<sup>118</sup> and that the increased risks they face due to multiple, intersectional discrimination must be taken into account. Their particular situation will require dedicated attention and the adoption of specific measures aimed at their protection, in order to ensure that they can benefit from these IHL guarantees on an equal basis with others.

Girls furthermore benefit from additional protection through certain IHL provisions dedicated specifically to children. Article 24 of GC IV, Article 77 of Additional Protocol I (AP I), Article 4(3) of Additional Protocol II (AP II) and Rule 135 of the ICRC Customary Law Study are among the provisions which require that they be protected against any form of indecent assault. These protections are reinforced by the CRC. Article 19 of the CRC requires States Parties to take all appropriate measures to protect children from all forms of physical or mental violence and explicitly also refers to sexual abuse. Article 34 explicitly requires States Parties to protect children against all forms of sexual exploitation and sexual abuse, while Article 37(a) generally prohibits torture or other cruel, inhuman or degrading treatment or punishment of children. When read in relation to one another and within the context of Article 23 of the CRC, these norms equally oblige States Parties to take all appropriate measures to protect children, in particular girls and all children with disabilities, against all forms of physical or mental violence, torture or any other form of cruel, inhuman or degrading treatment.<sup>119</sup> IHL, the CRPD and the CRC thus all require that all appropriate measures be taken to protect children from all forms of sexual abuse and torture or other cruel, inhuman or degrading treatment.<sup>120</sup>

Sexual and other gender-based violence during armed conflict can take many forms, as indicated by the phrasing “and any other forms of indecent assault” used by various IHL provisions. Women and girls with disabilities in an armed conflict setting are disproportionately subjected to this array of acts that constitute sexual violence,<sup>121</sup> some of which shall be discussed in more detail here.

116 *Ibid.*, Art. 16(5).

117 “Chapter I: General Recommendations and Suggestions: General Recommendation No. 19: Violence against Women”, in *Report of the Committee on the Elimination of Discrimination against Women, UN GAOR 47th Session, Supp No. 38, UN Doc. A/47/38, 1993*, paras 1, 6, 7, 8, 10.

118 *Thematic Study*, above note 113, para. 11.

119 CRC Committee, above note 113, paras 19–22, 25, 26, 38–44.

120 *Ibid.*

121 Beijing Declaration, above note 5, para. 116.

It goes without saying that, as per the considerations above, women and girls with disabilities must be protected against rape and sexual abuse to the maximum extent possible, and that wherever necessary, additional measures must be put in place to ensure that their gender, impairment and age does not expose them to a risk higher than that faced by their peers who do not share one or more of these characteristics. Moreover, these characteristics will impact the qualification of certain acts as rape. As per Article 7 of the Rome Statute of the International Criminal Court, sexual violence includes situations where the perpetrator takes advantage of a person's inability to give genuine consent.<sup>122</sup> The inability to give consent may be based on a person's age (meaning that sexual acts performed on girls below the age of consent, with or without disabilities, will always constitute rape), but may also stem from other circumstances, such as certain types of psychosocial or psychological impairments.

Aside from rape, a particularly gruesome form of sexual violence is rooted in a deep disregard for the sexual and reproductive health rights of women and girls with disabilities. Forced sterilization, forced pregnancy, forced abortion, forced or coercive use of contraceptives and other similar treatment all constitute sexual violence disproportionately directed against them, with a long, disturbing history during armed conflicts.<sup>123</sup> These practices constitute grave violations of IHL itself, regardless of who they are perpetrated against. When directed against women and girls with disabilities, the view that they constitute cruel or inhuman treatment in violation of common Article 3, as well as a violation of the prohibition on sexual and other gender-based violence against women and girls,<sup>124</sup> is reinforced by various human rights provisions.

Forced pregnancy of women or girls with disabilities infringes upon their right to freely and responsibly decide on the number and spacing of children they may have and to access family planning methods, as stipulated by Article 23(b) of the CRPD and Articles 12 and 16(e) of the CEDAW respectively, among others. The CEDAW and CRPD Committees have consequently held that access of women with disabilities to safe and legal abortion constitutes a prerequisite for their freedom from discrimination, torture and ill-treatment, while also making it clear that they are protected against forced abortion, contraception and sterilization against their will or without their informed consent.<sup>125</sup> Article 24 of the CRC, which states that no child must be deprived of access to medical services necessary to acquire or maintain their highest attainable standard of health and requires that States Parties provide the necessary medical assistance and care to all children, further reinforces this perspective, especially when

122 ICC, *Elements of Crimes*, 2011, p. 8, in particular fn. 16.

123 See, for example, Constitutional Court of Colombia, *Prohibición de Anticoncepción Quirúrgica a Menores de Edad en Condición de Discapacidad*, Case No. C-131/14, Judgment, 11 March 2014.

124 Regarding forced sterilization, see, for example, Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Peru*, UN Doc. CAT/C/PER/CO/4, 25 July 2006, para. 23.

125 CEDAW Committee and CRPD Committee, "Guaranteeing Sexual and Reproductive Health Rights for All Women, in Particular Women with Disabilities", joint statement, 29 August 2018, p. 1. See also CRPD, above note 2, Art. 25(d).

considering the risks associated with child and teenage pregnancy. Forced sterilization, a particularly common practice in the context of disability even in peacetime, is explicitly prohibited by CRPD Article 23(c) and also constitutes physical violence against children prohibited by CRC Article 19,<sup>126</sup> as well as a violation of the reproductive health rights of women stipulated in CEDAW Article 16.<sup>127</sup>

### *Women and girls with disabilities deprived of their liberty*

Persons deprived of their liberty in the context of an armed conflict can find themselves particularly vulnerable to abuse, due to the near absolute power that the Detaining Party exercises over them. They may also face barriers in their access to essential services provided to fellow detainees, which is especially significant when considering that existing disabilities may be particularly prevalent in places such as PoW camps due to the effects of armed hostilities.<sup>128</sup> Women and girls with disabilities are exposed to a wide range of mistreatment in such cases due to their particular circumstances, but they also benefit from a variety of specific guarantees which, when approached from a disability-inclusive perspective, can serve to ensure their humane treatment equal to other detainees.

A good basis for ensuring the humane, equal treatment of women and girls with disabilities deprived of their liberty is GC III Article 14, which requires that women be treated with all regard due to their sex. When taking into account the prohibition on adverse distinction, it is the author's view that Article 14 should be understood as obliging the Detaining Power to ensure that women and girls with disabilities in particular are entitled to equal protection not only when compared to male detainees, but also in relation to their fellow female detainees. GC III Article 16, furthermore, explicitly allows for differential treatment based on characteristics such as age and sex; as per the previous considerations, this non-exhaustive list<sup>129</sup> also includes disability. While GC IV does not include parallel provisions for civilian internees, it flows from the considerations discussed in the above sections that the principle of humane treatment and the prohibition on adverse distinction (as stipulated by GC IV Article 27) effectively carry the same implications when it comes to the treatment and protection of female internees with disabilities. Here, too, the CRPD, CEDAW and CRC provide valuable additional input on shaping the meaning and content of provisions intended for the protection of such detainees, as the interaction

126 CRC Committee, above note 113, para. 23(a).

127 CEDAW Committee, General Recommendation No. 19, "Violence against Women", 1992, para. 22, available at: [www.refworld.org/docid/52d920c54.html](http://www.refworld.org/docid/52d920c54.html).

128 See ICRC Commentary on GC III, above note 47, para. 2257: this will not necessarily be the case, but certain types of impairments may be particularly prevalent among PoWs as a result of their direct participation in hostilities. Such impairments could include physical injuries like missing limbs, sensory disabilities like the full or partial loss of eyesight, or psychosocial impairments stemming from trauma associated with their experiences.

129 ICRC Commentary on GC III, above note 47, para. 1751.

between their impairment, gender and age may otherwise result in significant, unlawful disadvantages.

GC III Article 14 has been interpreted to include the adoption of measures to protect female PoWs from sexual assault, and to ensure that they have access to appropriate, gender-specific health care,<sup>130</sup> which can be of particular relevance in the case of female PoWs with an impairment. Measures to protect such detainees against sexual assault may include additional training of camp guards and administrators on the specific protection needs of women and girls with disabilities: aside from improving general awareness, this could entail sensibility training for staff members on how to ensure that certain activities, such as maintenance of personal hygiene or execution of disciplinary punishments, are handled in such a way as to retain the PoW's dignity; education on specific risks faced by female and/or underage PoWs with disabilities in certain situations and how these can be mitigated; the designation of properly trained personnel to engage in individual conversations with detainees (where appropriate) in order to identify potential issues; or dedicated training of staff members on how to spot signs of abuse, particularly in PoWs whose impairment impacts their communication abilities.

Where sexual assault has taken place and has resulted in pregnancy, the availability of reproductive health-care services<sup>131</sup> – either at the place of detention itself or at a health-care facility within reasonable distance from it – constitutes another measure necessary to comply with GC III Article 14; these services must furthermore be accessible to female PoWs with disabilities. Both GC III Article 30 and GC IV Article 91 would seem to support this view, as they oblige the Detaining Power to ensure that detainees receive the medical attention they require,<sup>132</sup> when read in line with the relevant human rights instruments, medical care within this sense would necessarily include reproductive care as well. Consequently, services available and accessible to women and girls with disabilities should include pregnancy and maternal care as well as access to safe abortion, the provision of accessible information in order for the woman or girl in question to make an informed decision on the services she wishes to use, and the presence of medical staff trained to provide these services in accordance with the law – namely, based on the free and informed consent of the female PoW, while also taking into account her impairment and gender (and in some cases her age) not only during but also before and after the administration of treatment.

130 *Ibid.*, para. 1684.

131 See also GC III Article 30 and GC IV Article 91 regarding medical attention.

132 With regard to GC III Article 30 and GC IV Article 91, see also A. Priddy, above note 5, pp. 69 ff. It is important to point out that these articles – namely, Article 30(1) of GC III and Article 91(2) of GC IV – also foresee isolation wards for persons with mental impairments. This reflects an outdated medical approach to disability in assuming that persons with psychological or psychosocial impairments can be a danger to themselves or others; furthermore, the isolation of a person based on their impairment would be in violation of various provisions contained within the CRPD (*inter alia* Article 14), the CRC, and IHL provisions such as the prohibition on adverse distinction. The author therefore shares the view that these respective provisions should be considered to have been superseded by newer international standards, and are thus no longer applicable.

Other than the physical safety of and relevant medical care for female PoWs, Articles 14 and 16 of GC III also apply to all aspects of the organization of a camp and to the overall conditions of internment,<sup>133</sup> while civilian detainees benefit from the same protections based on the principles stipulated in Article 27 of GC IV. Together, these provisions form a solid basis to allow for the assumption that places of detention should, to the maximum extent feasible, be constructed and administered in a manner that pays due regard to the specific needs of women and girls with disabilities wherever possible, and that the treatment of individual detainees must take into account their gender, age and impairment as well as the interaction between these individual characteristics.

Regarding the conditions of detention, the minimum standards of hygiene and health referred to in GC III Article 22 and GC IV Article 85 respectively should thus be applied in a manner that conforms to the adequate standard of living for persons with disabilities as stipulated by Article 28 of the CRPD, as well as the requirement of accessibility set forth in Article 9 of the CRPD, the gender- and age-sensitive approach referenced throughout the CRPD, and the requirements in connection with adequate standards of living for children contained in Article 27 of the CRC. Aimed at ensuring a reasonable level of personal hygiene,<sup>134</sup> the scope of GC III Article 22 and GC IV Article 85 would then include making available hygiene facilities that are accessible to persons with a wide range of disabilities, including (but certainly not limited to) showers and toilets which can independently be accessed and used by persons with mobility impairments. Both articles furthermore require separate facilities for the exclusive use of women,<sup>135</sup> meaning that in order to fulfil its obligations under IHL and the relevant human rights instruments, the Detaining Power will have to ensure that women and girls with disabilities are provided with accessible sanitary facilities which they do not have to share with men, including men with disabilities. Shared facilities may expose them to a heightened risk of sexual assault and other violations of their dignity and right to privacy as stipulated by both IHL and the CRPD.<sup>136</sup> This argument, however, should in no way be misconstrued as denying persons with disabilities and non-cisgender identities access to bathroom facilities that correspond to their individual gender identity. Ensuring the dignity of persons with disabilities should, in the author's view, also entail the recognition of their gender identity and the implications associated with it – including the prevention of discrimination based on gender identity under the veil of disability rights, or misguided interpretations of gender within the context of disability.

Given the realities on the ground, it would furthermore seem necessary to point out that *independent* access to and use of these facilities is a key component of all measures aimed at eliminating barriers faced by persons with disabilities, in places of detention and elsewhere. It unfortunately continues to be a common

133 ICRC Commentary on GC III, above note 47, para. 1687.

134 *Ibid.*, para. 2213.

135 *Ibid.*, paras 1687, 2215.

136 See CRPD, above note 2, Arts 3(a), 22; ICRC Commentary on GC III, above note 47, para. 1687.

occurrence that persons with disabilities are expected to rely on the assistance of others for their participation in daily life or activities, even if they would be perfectly capable of such participation without help if the necessary accommodation were provided. Accessibility that depends on the goodwill of third parties is not accessibility within the meaning of the CRPD – in fact, it is in and of itself a discriminatory act in violation of the Convention<sup>137</sup> and will often result in inhuman or degrading treatment of the person with a disability, and thus a violation of IHL. In the present context, such violations could for example take the form of exposing women and girls with disabilities to inadequate personal hygiene standards if the necessary facilities are not made accessible to them, or humiliating or even harmful procedures such as being washed by an untrained person of the opposite gender.

For girls with disabilities deprived of their liberty, Articles 27 and 37(c) of the CRC provide additional safeguards aimed at ensuring their well-being. An adequate standard of living for them will include an environment which, to the extent possible and feasible within the context of detention or internment, promotes or at least does not hinder their development, and they should be housed in a manner that pays due regard to their best interests. Article 37(c) in this sense requires that they be housed separately from adults, unless it is in the girl's best interest not to do so. Considerations in this regard may become relevant if, for example, her primary caregivers are detained with her, in which case it could be argued that it would be in her best interest to remain with them. Given that she would then potentially be housed with other adults,<sup>138</sup> it will in turn become necessary to ensure that measures are in place designed to protect her against abuse by the latter to the maximum extent possible. On the other hand, where a girl with a disability is not detained in the same facility as her parents or other primary caregivers, all available steps should be taken to ensure that she is separated from interned adults and that she has access to care provided by persons trained in working with children with disabilities.

The personal characteristics of female detainees with an impairment will have to be considered throughout the application of Geneva Conventions III and IV. While these instruments will often require the provision of reasonable accommodation in order to ensure accessibility and compliance with the prohibition on adverse distinction, in some cases they will also imply differential treatment. Aside from favourable measures, this may take the form of abstaining from certain treatment: GC III Article 49, for example, generally allows for the labour of PoWs to be utilized, but it also clearly states that the PoW's age, sex and physical aptitude are among the factors that need to be considered when assigning work. In combination with CRC Article 32, which protects children against performing any work that is harmful to their health or development, such considerations would most likely result in the conclusion that an underage girl with a disability must not be assigned work while she is detained, so as not to

137 CRPD, above note 2, Art. 9. See also CRPD Committee, above note 95, para. 13.

138 See also GC IV, Art. 82.

subject her to treatment that would be considered inhuman or otherwise in violation of either framework.

In terms of disciplinary action, GC III Article 88(2) prohibits punishment of female PoWs that is more severe than that of a female member of the armed forces of the Detaining Power who is being dealt with for a similar offence. When advocating for an age- and disability-inclusive approach to IHL, this provision should not be taken at face value. It is not only the punishment as such, meaning its form and modalities, but also the severity and impact that it has on the PoW in question which will determine whether or not it can be seen as equal to that of a female member of the armed forces of the Detaining Power.<sup>139</sup> As laid out above in the context of the principle of humane treatment, punishment that would usually be considered appropriate and in line with safeguards provided by IHL may amount to cruel, inhuman or degrading punishment if the female PoW in question has an impairment and/or is of a young age, as these characteristics will significantly influence her individual circumstances, including the effects said punishment has on her. Consequently, the effects of the same punishment will be more severe on her than they would be on a female member of the armed forces of the Detaining Power who does not have a disability and/or is not of a young age, meaning that in order to comply with the safeguards provided by GC III Article 88(2), she would have to be given a different punishment that does not disproportionately affect her, likely one that is less severe in its form and modalities.

Regarding the choice of disciplinary measures as already discussed above in the context of GC III Article 89,<sup>140</sup> GC IV Article 119 equally states that disciplinary penalties must in no case be inhuman, brutal or dangerous for the health of the internees and that the latter's age and sex are among the factors to be considered when making this assessment. As with GC III Article 88 and common Article 3, disability will have to constitute an additional factor in determining whether or not a particular disciplinary penalty will amount to inhuman or brutal treatment, or be dangerous for the internee's health. This will necessarily also include the detainee's mental health, which would for example make solitary confinement out of the question in the case of women and girls with psychosocial or other impairments due to which the deprivation of social contacts or external stimuli would result in severe psychological distress. There is a significant body of evidence to indicate that isolating any individual, even for a relatively short period of time, "can cause serious psychological and sometimes physiological harm, with symptoms including anxiety and depression, insomnia, hypertension, extreme paranoia, perceptual distortions and psychosis".<sup>141</sup> The effects are particularly harmful in cases of persons who have a pre-existing psychosocial or

139 See ICRC Commentary on GC III, above note 47, para. 3733. When assessing the severity of a particular punishment, regard must be paid to considerations such as age, gender and background of the PoW.

140 See above regarding disciplinary punishment in the context of humane treatment.

141 Amnesty International, *Entombed: Isolation in the US Federal Prison System*, 16 July 2014, p. 31, available at: [www.amnestyusa.org/reports/entombed-isolation-in-the-us-federal-prison-system/](http://www.amnestyusa.org/reports/entombed-isolation-in-the-us-federal-prison-system/).

intellectual disability.<sup>142</sup> The former UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment has similarly concluded that “solitary confinement often results in severe exacerbation of a previously existing medical condition”,<sup>143</sup> While the *UN Standard Minimum Rules for the Treatment of Prisoners* (as amended on 5 November 2015 by the General Assembly and readopted as the Mandela Rules) provide that “the imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures”.<sup>144</sup> The imposition of solitary confinement of any duration on persons with psychosocial or intellectual impairments will thus amount to cruel, inhuman or degrading treatment, more so if its effects would be further exacerbated by the young age of the person in question. This view is further supported by Article 37 (c) of the CRC, which requires that children deprived of their liberty shall be treated humanely and with respect for their inherent dignity.

Similar considerations will also have to be made with regards to Article 82 of GC IV, which allows for the temporary separation of interned children from their parents for reasons of employment, health or the enforcement of penal or disciplinary sanctions. As in cases of evacuation, the separation of children with disabilities from their parents, who will likely be their primary caregivers in this scenario, should be avoided to the maximum extent possible, even if it is just of a temporary nature. Penal or disciplinary measures in particular should be adjusted accordingly, so as to be enforceable without separating the internee from his or her child with a disability.

In sum, women and girls with disabilities deprived of their liberty must benefit from the same protection as other detainees, including specific protections for female detainees, and they must benefit from them to the same extent as others. They must be able to independently access and use facilities, including hygiene facilities, in the place of detention. Wherever feasible, reasonable accommodation must be provided in order to ensure their humane and equal treatment, their protection against any type of abuse, and an adequate standard of living. Reasonable accommodation in this sense can be provided in the form of accessible sanitation facilities separated by gender (with access based on the person’s own gender identity), the presence of specially trained staff, or the adjustment of (or refraining from) penal or disciplinary measures taking into account their individual circumstances. Lastly, where the humane and equal treatment of women and girls with disabilities cannot be guaranteed by the Detaining Power – be it due to a lack of resources or awareness, or other

142 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *21st General Report of the CPT*, 10 November 2011, paras 53 ff.; Stuart Grassian, “Psychiatric Effects of Solitary Confinement”, *Washington University Journal of Law & Policy*, Vol. 22, 2006, p. 382.

143 In reaching this conclusion, the Special Rapporteur used the Istanbul Statement on the Use and Effects of Solitary Confinement’s definition of solitary confinement as the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day.

144 *UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)*, UN Doc. A/RES/70/175, 8 January 2016, Rule 45.2.

circumstances – repatriation on the basis of disability should be considered as another form of reasonable accommodation.<sup>145</sup>

## Conclusion

As the above examples have shown, the flexibility of IHL and its shared nucleus of common characteristics with the CRPD allow ample room for considerations of disability to factor into the interpretation and application of IHL provisions. The same is true when it comes to the interplay between disability and other individual characteristics such as gender or age, in which case instruments like the CEDAW and the CRC will provide valuable, additional guidance on the scope, meaning and content of the IHL provision in question.

Said interplay will constitute a significant factor in the interpretation and application of fundamental IHL guarantees, most notably the principle of humane treatment and the prohibition on adverse distinction, which in turn can serve as a basis for the interpretation and application of other, more specific provisions. In this regard, the provisions considered above are but a small fraction of the norms with significance for persons with disabilities, and there is a long road ahead before a thoroughly disability-inclusive approach to IHL can take hold. Lastly, the interpretation of any body of law only becomes meaningful once it is put into practice: the arguably more significant challenge will thus be to ensure that disability-, gender- and age-inclusive considerations are applied by parties to armed conflicts in different settings. Only then will women and girls with disabilities be able to benefit from equal access to protection under IHL – access that is long overdue.

145 See A. Priddy, above note 5, pp. 72–73. See also CRPD Committee, *Concluding Observations on the Initial Report of Mongolia*, UN Doc. CRPD/C/MNG/CO/1, 13 May 2016, para. 25: the Committee confirmed the application of reasonable accommodation in the context of detention by recommending “the application of reasonable accommodation in prisons in order not to aggravate incarceration conditions for persons with disabilities”.