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Military Briefing: Persons with Disabilities and Armed Conflict

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Armed conflict has a disproportionate and devastating impact on persons with disabilities. However, little attention is paid by many militaries to the impact of their operations on persons with disabilities. This military briefing is designed to introduce militaries to the topic. It provides a clear and concise overview of what is meant by 'disability' and how armed conflict affects persons with disabilities. It aims to enhance the inclusion of persons with disabilities as a feature of operational planning and conduct. It can be used as a training tool and should be read in conjunction with the more in-depth Academy Briefing Disability and Armed Conflict.

The briefing begins by exploring the meaning of disability and the incorrect understandings that must be avoided. A brief overview of the impact of armed conflict on persons with disabilities is provided, before the protections afforded to persons with disabilities under the general international humanitarian law (IHL) provisions of humane treatment and the prohibition of adverse distinction are highlighted. Effective advance warnings and the treatment of detainees with disabilities are selected to demonstrate what is at stake when militaries do not take a disability inclusive approach, and how equality in the application of IHL can be achieved.

Each section of this briefing opens with the key take-away points, followed by a more in-depth discussion. In researching this briefing, a wide variety of military manuals were reviewed and interviews were conducted with a number of officials from various armed forces as well as the International Committee of the Red Cross. The author is grateful to all of those who shared their experience and expertise during interviews.

1. UNDERSTANDING DISABILITY

- Disability is the interaction between an individual's condition (for example, having a visual impairment) and environmental factors (for example, living in a displacement camp with no clear footpaths and no accessible information for persons with a visual impairment), which together affect the ability of that person to be able to access society on an equal basis with others. By way of example, if information on collecting humanitarian food packages are displayed visually on a small notice board within the displacement camp, a person with a visual impairment will likely remain unaware of how to access this essential service and be reliant on others within the camp for food.
- In other words, persons with impairments are disabled by societal and environmental barriers, not by their impairments. Disability is an evolving concept that changes across both contexts and time.
- Barriers that prevent a person with an impairment accessing society might include physical, attitudinal and organizational barriers.
- Impairments are all part of the diversity of human bodies, they are not something that needs 'fixing', rather society needs to change to ensure that it is accessible to all persons, including those with impairments.
- Disability is diverse and not limited to physical impairments. A person may have one or more sensory, physical, psychosocial or intellectual impairments.

Historically, disability was understood as a medical condition that required treatment to make the person 'normal'. This approach has now been accepted as discriminatory and

incorrect. It has been abandoned and disability is now understood as the interaction between an individual's impairment and environmental factors, which together affect the ability of that person to be able to access society on an equal basis with others. This approach is called the social-model understanding of disability.

The social-model understanding of disability differentiates impairment from disability. Impairment is a condition of the body or mind, whereas disability is the way society and the environment does or does not respond to that impairment. As such, disability is context-specific. Within this framework, it is easy to see how two people with the same impairment are likely to face differing levels and manifestations of disability depending on where they live. The level of disability a wheelchair user living in California experiences will be wholly different to a wheelchair user in Gaza for example. Where environmental barriers are removed – installing braille signs in a refugee camp, providing walking aids such as canes and having clear and accessible pathways, for example – a person's disability may be eliminated or reduced. Other factors, such as a person's gender, age and socioeconomic status can exacerbate or alleviate the level of disability a person experiences. For example, a female who is deaf who is prevented from accessing education because of her gender will be further ostracized and prevented from accessing society compared to a male with the same impairment who does have access to education.

A. INCORRECT UNDERSTANDINGS OF DISABILITY THAT MUST BE AVOIDED

1. THE CHARITY MODEL

According to the charity model, persons with disabilities are victims of their impairment and their situation is tragic. As such, persons with disabilities deserve pity and charity. They are assumed to be burdens on their families and on society. The charity model thereby exacerbates discriminatory prejudices towards persons with

disabilities and conceives them as being 'lesser' than persons without a disability. This model reinforces negative stereotypes and perpetuates the idea that persons with disabilities need special and separate treatment. Persons with disabilities viewed from the charity-model perspective are not seen as rights holders, but rather as passive recipients of charity, which is given out based on the good will of others.

2. THE MEDICAL MODEL

The medical model considers persons with disabilities as in need of cure and medical treatment to make them 'normal'. It is not dissimilar from the charity model in the prejudices and stereotypes that underlie it. The medical model disempowers persons with disabilities and reinforces discriminatory attitudes that they are somehow lesser. The assumption is that the problem and solution rest exclusively with the person with a disability. Following the logic of the medical model, a person with an impairment is abnormal and unable to function normally, such that medical professionals are permitted, and have a duty to step in and make decisions on the person's behalf, thereby denying the person autonomy and potentially resulting in serious human rights violations.

2. THE IMPACT OF ARMED CONFLICT ON PERSONS WITH DISABILITIES

- In every conflict setting the civilian population will include persons with disabilities.
- How persons with disabilities experience armed conflict, and the harm they may

¹ World Health Organization (WHO), *World Report on Disability*, 2011, pp 11 and 12.

experience, will differ from a person without a disability.

- Persons with disabilities are entitled to the same IHL protections as persons without disabilities.
- A person with a disability is more vulnerable to death or injury during armed conflict because of inaccessible warnings, evacuation procedures and shelters.

A. AT LEAST 15 PERCENT OF THE CIVILIAN POPULATION WILL BE PERSONS WITH DISABILITIES

An estimated 15 percent of the world's population, approximately 1 billion people, have some form of disability, involving sensory, physical, psychosocial and/or intellectual impairments.¹ However, given that impairments are often not reported (owing to prevalent discriminatory attitudes and social stigma), or not recorded (owing to inadequate data collection), this figure is likely to be much higher. The figure is also likely to be higher in places of protracted armed conflict where persons may have become disabled as a result of the hostilities. A recent study found that an average of 36 percent of displaced persons (DPs) within Syria have a disability, this figure goes up



to 41 percent of female displaced persons and to 85 percent for persons aged over 55.²

B. IMPACT

Armed conflict has a particularly devastating impact on persons with disabilities in all its phases and consequences: for persons in conflict zones; for those fleeing conflict; and for those in post-conflict situations or dealing with the aftermath of conflict. In the conflict setting, persons with disabilities are the subject of targeted killings;³ ‘clustered settlements’ of persons with disabilities (including psychiatric institutions, orphanages and care homes) are used as human shields;⁴ women and girls with disabilities are at increased risk of sexual and gender-based violence (SGBV),⁵ including through the use of SGBV as a strategy, tactic or policy in war;⁶ persons with disabilities are more likely to be killed or sustain serious injury as a result of inaccessible civilian protection mechanisms (such as effective advanced warnings before attacks); inaccessible evacuation procedures (including transport and emergency information) result in them being left behind;⁷ inaccessible humanitarian assistance (including food, water and shelters) can have a catastrophic impact on the health of persons with disabilities; those with existing impairments risk secondary and preventable conditions owing to the interruption or

deterioration of medical care; and the destruction of infrastructure and assistive devices can create physical barriers, preventing persons with disabilities from accessing their places of education and/or employment.⁸

The true scale and impact of armed conflict on persons with disabilities is unknown owing to an acute lack of data that is reliable, comprehensive and disaggregated by age and gender on the impact of armed conflict on persons with a range of impairments. Where data sets do exist, they are often under-inclusive, relying on a narrow, medical-model understanding of disability. Where this data is used to justify budget allocations, develop policy and operational planning, it exacerbates the exclusion of persons with unrecognized disabilities and leads to further discrimination.

C. THE FORGOTTEN VICTIMS OF ARMED CONFLICT

Persons with disabilities are the largest minority group in the world.⁹ Despite this, and the severe consequences that armed conflict has on them, persons with disabilities remain the ‘forgotten victims of armed conflict’.¹⁰ ‘Disability’ is still widely considered a niche issue, particularly in the conflict setting. Small and recent steps have been taken to include disability in the conflict setting within the international agenda. The UN Security Council

² Humanitarian Needs Assessment Programme (HNAP) Syria, IDP Report Series 2020, Disability Prevalence and Impact, January 2021.

³ Committee on the Rights of Persons with Disabilities (CtteeRPD), Concluding Observations on the Initial Report of Colombia, UN doc CRPD/C/COL/CO/1, 30 September 2016, §24.

⁴ UNICEF, *Children with Disabilities in Situations of Armed Conflict*, November 2018, p 4, https://www.unicef.org/disabilities/files/Children_with_Disabilities_in_Situations_of_Armed_Conflict-Discussion_Paper.pdf (last accessed 16 February 2020).

⁵ Amnesty International, *Excluded: Living with Disabilities in Yemen's Armed Conflict*, December 2019, p 23, <https://www.amnesty.org/download/Documents/MDE3113832019ENGLISH.PDF> (last accessed 16 February 2020).

⁶ Ibid. See also E. J. Wood, ‘Conflict-Related Sexual Violence and the Policy Implications of Recent Research’, 96 *International Review of the Red Cross* 894 (2014).

⁷ Human Rights Watch, ‘Central African Republic: People with Disabilities Left Behind’, 28 April 2015. Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN doc A/HRC/12/48, 25 September 2009, §§1286–1288.

⁸ Syria Relief reported that four out of five children living in conflict-affected areas of Syria did not have access to education. Syria Relief, *Children Living with Disabilities Inside Syria*, 2018, p 23.

⁹ UN Enable, Fact Sheet on Persons with Disabilities, n.d.

¹⁰ CtteeRPD, ‘Persons with Disabilities “Forgotten Victims” of Syria's Conflict – UN Committee’, press release, 17 September 2013.

adopted Resolution 2475 in June 2019, which calls on parties to armed conflict to protect persons with disabilities, take measures to eliminate discrimination and marginalization of persons on the basis of disability in situations of armed conflict and ensure that persons with disabilities have access to justice, basic services and unimpeded humanitarian assistance.

A review of military manuals and interviews with representatives of a number of armed forces indicates that little attention is given to the responsibility of militaries towards persons with disabilities nor the interpretation of IHL norms in a disability inclusive manner.¹¹ In contrast, the age and gender impact of these norms is given some consideration in several military manuals. The Danish Military Manual is one notable exception and does expressly recognize its responsibilities towards persons with disabilities. The manual affirms the application of the UN Convention on the Rights of Persons with Disabilities (CRPD) to the conduct of the Danish Armed Forces, and reiterates its obligation to ensure and promote the full realization of human rights for all persons with disabilities (though it does not expressly state how Denmark interprets the provisions of the CRPD in relation to the conduct of hostilities or the treatment of detainees). Notably, the manual states that ‘in cases in which extraterritorial jurisdiction is not established, the Convention must also be respected by the Danish armed forces to the extent possible and appropriate in

the context of the tasks assigned to the force on a particular mission’.¹² The manual concludes that in situations of risk, including armed conflict, persons with disabilities may need ‘special support’. Denmark takes the position that although this ‘support must be provided primarily by the territorial State there may be situations in which the Danish armed forces should be attentive to the specific needs of persons with disabilities. This applies, for instance, in evacuation situations in which impaired mobility can be remedied or in communications with the civilian population in which steps must be taken to ensure that persons with disabilities are capable of engaging in dialogue with the Danish armed forces’.¹³

Gathering disability inclusive data and increasing expertise on disability rights and the diversity of disability within militaries would increase the attention paid to ensuring that IHL is applied in an inclusive and non-discriminatory manner. In the interim, while we wait for such data to be gathered, the well-founded minimum estimate that 15 percent of every population will be persons with disabilities should steer policy and practice.¹⁴ Routinely and meaningfully consulting persons with disabilities living in the particular conflict setting, as well as their representative organizations, is also essential to ensuring that policies adopted to overcome discriminatory barriers are effective and

¹¹ Including, but not limited to, Australia’s Law of Armed Conflict (LOAC) Manual, Australian Defence Force Doctrine, 2006; Canada’s Law of Armed Conflict at Operational and Tactical Level, 2001; France’s *Fiche de Synthèse sur les Règles Applicables dans les Conflits Armés*, 432/DEF/EMA/OL.2/NP, 1992, and *Manuel de droit des conflits armés*, Ministère de la Défense, Direction des Affaires Juridiques, Sous-Direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armés, 2001; Ireland’s Basic Guide to the Law of Armed Conflict, TP/TRG/01-2005, Director of Defence Forces Training, Department of Defence, 2005; Israel’s Rules of Warfare on the Battlefield, Military Advocate-General’s Corps Command, IDF School of Military Law, 2006; New Zealand’s Manual of Armed Forces Law: Law of Armed Conflict, vol 4, New Zealand Defence Force, 2017; Sweden’s International Humanitarian Law in Armed Conflict, Swedish Ministry of Defence, January 1991; Ukraine’s

Manual on the Application of the Rules of International Humanitarian Law in the Armed Forces of the Ukraine, Manual Order 400, Ministry of Defence, September 2004; the United Kingdom’s The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, as amended in May 2013 by Amendment 7; Switzerland’s Regulation on Legal Bases for Conduct During an Engagement, 2005; and the Danish Military Manual on International Law Relevant to Danish Armed Forces in International Operations, 2016. Note that the majority of these manuals were drafted before the CRPD, which may in part explain their failure to address disability.

¹² The Danish Military Manual, *supra* fn 12, p 109.

¹³ *Ibid.*

¹⁴ WHO, *World Report on Disability*, *supra* fn 2, p 29.

reflective of persons with disabilities' lived experience.¹⁵

D. PREVENTION OF PRIMARY IMPAIRMENT IS NOT PART OF DISABILITY RIGHTS

States often confuse prevention of primary impairment with disability rights. Prevention of primary impairment is part of the general right to the highest attainable standard of health. It is not part of the rights of persons with disabilities. It is of concern that the two are muddled, as resources and finances are, as a consequence, often dedicated to primary impairment prevention at the expense of giving effect to the rights of persons with disabilities. Within the armed conflict setting, this confusion is evident in states' inclusion of weapons control and disarmament strategies within disability discourse.

Although some weapons law treaties expressly add to disability rights discourse and provide for specific reparations and support that should be available to survivors,¹⁶ it is not their focus on preventing primary impairment that is of relevance to disability rights. Rather, it is equal access to the provisions of these texts that is of concern. The Mine Ban Treaty, for example, includes provisions concerning mine awareness activities and the marking of mined areas to ensure the 'effective' exclusion of civilians.¹⁷ Reading these provisions from a disability inclusive perspective, the marking of mined areas should be in accessible formats and mine awareness activities should include providing mine education that is tailored to members of the community who have sensory and intellectual impairments. This would ensure that persons with existing impairments receive the benefit of

these provisions and would reduce the risk of death or serious injury from mines.

3. THE LEGAL FRAMEWORK

- The UN Convention on the Rights of Persons with Disabilities (CRPD) underscores that persons with disabilities are full and equal rights holders. Denial of the full enjoyment of any human right based on a person's real or perceived impairment amounts to unlawful discrimination.
- The CRPD applies in situations of armed conflict, alongside IHL.
- States, in accordance with their obligations under IHL and the CRPD, are obligated to take 'all necessary measures to ensure the protection and safety of persons with disabilities' in situations of armed conflict.

A. THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The 2008 CRPD cements, in a widely endorsed international human rights law (IHRL) treaty, the undeniable fact that persons with disabilities are full and equal rights holders by virtue of being human. Therefore, no characteristic, including having any form of impairment, prevents a person from being a full rights holder. This recognition is significant in its own right, since it is a position that was not obvious to many

¹⁵ States Parties to the CRPD are obligated to 'closely consult with and actively involve persons with disabilities' in the development and implementation of legislation and policy, Art 4(3), CRPD. For guidance on implementation of this provision see CtteeRPD, *General Comment No 7 (2018) on the Participation of Persons with Disabilities, Including Children With Disabilities, Through Their Representative Organizations, in the Implementation and Monitoring of the Convention*, UN doc CRPD/C/GC/7, 9 November 2018.

¹⁶ E.g., the 2008 Convention on Cluster Munitions expressly recognizes the rights and dignity of victims of cluster munitions as well as the risk of discrimination based on impairment that they face (Preamble and Arts 2 and 5).

¹⁷ Arts 6(7)(d) and 5(2), Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction.

actors, and still today remains unapparent to some.

The CRPD is binding on the 182 states that have ratified it. States parties are obligated to ‘respect’, ‘protect’ and ‘fulfil’ the rights it enshrines. The purpose of the Convention, according to Article 1, is to ‘promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’.¹⁸ To achieve its purpose, the treaty enshrines eight guiding principles:

1. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons
2. Non-discrimination
3. Full and effective participation and inclusion in society
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
5. Equality of opportunity
6. Accessibility
7. Equality between men and women
8. Respect for the evolving capacities of children with disabilities and respect for the rights of children with disabilities to preserve their identities

B. DISCRIMINATION

Discrimination – meaning differential treatment of persons with disabilities is prohibited under the CRPD. The CRPD also introduces the concept of ‘reasonable accommodation’, that is ‘necessary and appropriate modification and adjustment not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to

persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.¹⁹ Failure to provide reasonable accommodation amounts to unlawful discrimination. Reasonable accommodation applies in a particular situation and in a particular context, often, but not necessarily upon the request of the person with a disability. For example, if a person who wishes to use a public library finds that the loan of books is only for two-week periods but she or he, owing to a learning impairment, needs three weeks to read a book and is granted a three-week loan, this would be a reasonable accommodation.

The right to equal access is one of the key principles of the CRPD and an essential precondition for the effective and equal enjoyment of human rights by persons with disabilities. To enable persons with disabilities to participate fully in all aspects of life, states parties are obligated to take appropriate measures to ensure access on an equal basis with others to ‘the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to facilities and services provided to the public’.²⁰ Denial of access constitutes discrimination.²¹ The duty to implement accessibility is unconditional.²²

The right to equal access of all services provided to the public is of particular relevance when considering the provision of humanitarian protections and services in the conflict setting, such as emergency information, evacuation procedures and shelters. It means that militaries in their operation planning and delivery should take all appropriate measures to ensure that persons with disabilities have equal access to the protections afforded under IHL during the conduct of hostilities (see the following section) as well as humanitarian services delivered during relief and peacekeeping operations. This

¹⁸ Art 1, CRPD.

¹⁹ Art 12, CRPD.

²⁰ Art 9, CRPD.

²¹ CtteeRPD, *General Comment No 2: Article 9. Accessibility*, UN doc CRPD/C/GC/2, 22 May 2014, §13.

²² *Ibid*, §25.

will include all operations in relation to COVID19 response and recovery.

C. THE CRPD APPLIED TO THE CONFLICT SETTING

Article 11 of the CRPD expressly states that it applies during armed conflict. States parties are obligated to take ‘in accordance with their obligations under international law, including IHL and IHRL, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including of armed conflict, humanitarian emergencies and the occurrence of natural disasters’.²³ The extent that the CRPD will apply to the conduct of a military will be context dependent and influenced by a number of factors including whether the conflict is taking place on the state’s territory or extraterritorially (meaning within the territory of a foreign state).

1. AN ARMED CONFLICT IN THE TERRITORY OF A STATE PARTY

The CRPD applies to all persons within the territory of a state party, irrespective of their nationality. This is not a point of controversy and is the case for all human rights treaties. All militaries of States Parties to the CRPD, as state agents, are therefore bound by the obligations contained in the CRPD when operating within their territory.

2. AN ARMED CONFLICT OUTSIDE THE TERRITORY OF A STATE PARTY

When the military of a State Party to the CRPD is acting outside their territory, their CRPD obligations will follow them and apply extraterritorially. However, the extent to which these obligations will apply will be dependent on many contextual factors, including the level of

control the military has over the persons and/or territory affected, the other actors involved in the armed conflict, the rights engaged and, if IHL is applicable, the relationship it has with the CRPD obligation(s) in the particular situation.

The Committee on the Rights of Persons with Disabilities (CtteeRPD) is the treaty body made up of independent experts who are mandated to monitor states parties’ implementation of the CRPD. All states parties are obligated to report to the Committee on how they are implementing their CRPD obligations. The Committee also receives shadow reports from non-governmental organizations (NGOs) on a state’s performance and, upon reviewing the information at hand, will issue recommendations to the state concerned. With regard to states that have ratified the Optional Protocol to the CRPD, the Committee is also authorized to receive individual complaints from persons who allege a state has violated their rights under the CRPD. When reviewing state reports and individual complaints, the Committee is required to ask whether the state is taking all necessary measures in accordance with their obligations under IHL and human rights law to ensure the safety and protection of persons with disabilities in situations of risk including armed conflict and humanitarian emergencies. This question will clearly require the conduct of the state’s military to be considered.

E. INTERNATIONAL HUMANITARIAN LAW

- The protections offered by IHL apply equally to all civilians. Persons with disabilities are entitled to the same IHL protections that are afforded to all other persons, including rules that relate to treatment of civilians and persons *hors de combat*, as well as the rules that relate to the conduct of hostiles.
- Differential treatment may be required to ensure that the applicable IHL protections are applied in a non-discriminatory

²³ Art 11, CRPD.

manner and are accessible to all persons with disabilities.

- Not all persons with disabilities are ‘wounded and sick’.

IHL, the set of rules that for humanitarian reasons seek to limit the effects of armed conflict, govern the conduct of militaries and other parties to a conflict. The core treaties of IHL include, but are not limited to, the 1907 Hague Regulations; the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 relating to the protection of victims of armed conflict; the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, plus its two protocols; the 1972 Biological Weapons Convention; the 1980 Convention on Certain Conventional Weapons and its five protocols; the 1993 Chemical Weapons Convention; the 1997 Ottawa Convention on anti-personnel mines; and the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Many IHL rules have crystallized into rules of customary international law.²⁴ It is this entire body of law, both treaty and customary, that the CRPD refers to when it states in Article 11 that states parties ‘shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict’.

When viewed as a whole, IHL largely reflects the medical and charity approaches to disability by framing persons with disabilities as passive,

weak, defective and vulnerable and, as such, in need of special, paternalistic protection. This is unsurprising considering the time at which most IHL instruments were drafted, long before disability rights discourse had begun to develop. The outdated approaches to disability reflected across IHL are not a fatal flaw. IHL has successfully been interpreted to take into account other issues and developments unforeseen by its drafters. A dynamic and evolved interpretation of IHL is also necessary and possible with respect to disability. As militaries become sensitized to disability, and incorporate disability into their military manuals and training materials they must ensure that they do not repeat the outdated approaches of the past and instead reflect the social model understanding of disability.

1. HUMANE TREATMENT

In accordance with the general provisions of IHL, civilians and persons *hors de combat* because of sickness, injury, detention or other causes must be treated humanely.²⁵ ‘Humane treatment’ is not explicitly defined within IHL. The lack of definition is deliberate as the meaning and content of ‘humane treatment’ will be context-specific, its understanding developing over time with changes in society.²⁶ The foundational principles underlying humane treatment are respect for human dignity and for a person’s physical and mental integrity.

The principles’ meaning has been clarified and influenced by a rich body of standards and jurisprudence at global, regional and national levels.²⁷ Thus, a person’s characteristics –

²⁴ The International Committee of the Red Cross (ICRC) has identified 161 rules of customary IHL, which can be found at ihl-databases.icrc.org

²⁵ The requirement of humane treatment is contained in Common Art 3 to the four Geneva Conventions, as well as specific provisions within the Geneva Conventions and Additional Protocols I and II. Art 12, GCI, first paragraph; Art 12, GCII, first paragraph; Art 13, GCIII; Arts 5 and 27, GCIV, first paragraph; Art 75(1), API; Art 4(1), APII. The

obligation is also a norm of customary international law, ICRC Customary IHL Study, Rule 88.

²⁶ ICRC Customary IHL Study, Rule 87.

²⁷ See e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT), International Covenant on Civil and Political Rights (ICCPR), especially Arts 7 and 10; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UNGA Res 3452, 9 December 1975;

including any impairment, gender and age – as well as the environmental and social context will shape the meaning and content of ‘humane treatment’. In practical terms, this means that treatment that may not be considered inhumane, such as prohibiting animals from passing through checkpoints, might nevertheless be considered inhumane when its impact is considered from the perspective of a person with a disability, for example where a person with a visual impairment is dependent on a guide dog and wishes to cross a checkpoint to reach a safe zone.

2. ADVERSE DISTINCTION

All IHL protections afforded to civilians and persons rendered *hors de combat* must apply equally to persons with or without a disability by virtue of the prohibition of adverse distinction. In the provisions and application of IHL norms, any adverse distinction founded on race, colour, religion, faith, sex, birth or wealth or ‘any other similar criteria’ is prohibited.²⁸ Although disability is not explicitly mentioned as a prohibited ground, a complementary approach to the interpretation of IHL demands that disability be treated as falling under ‘any other similar’ criteria. The CRPD, as well as other human rights law texts, also prohibit ‘adverse distinction’ under the equivalent principle of non-discrimination.

Only *adverse* distinction is prohibited. Differential treatment that is necessary to respond to the specific needs of a particular individual or group, including persons with disabilities, will be lawful and may even be required. The Third Geneva Convention (GCIII),

for example, allows for ‘privileged treatment’ to be given to prisoners of war owing to their ‘state of health’, sex or age,²⁹ such as repatriation of seriously wounded prisoners of war.³⁰

In accordance with the IHL prohibition of adverse distinction and the CRPD right to non-discrimination and equal access, persons with disabilities are entitled to the same IHL protections that are afforded to all other persons, including rules that relate to the treatment of civilians and persons *hors de combat*, as well as rules that relate to the conduct of hostiles, for example precautions in attack. Furthermore, differential treatment, including reasonable accommodation, may be required to ensure that the applicable IHL protections are applied in a non-discriminatory manner and are accessible to all persons with disabilities.

3. PERSONS WITH DISABILITIES ARE NOT ALL ‘WOUNDED AND SICK’

Persons considered ‘wounded and/or sick’ are afforded a host of special protections under IHL. Persons who are *hors de combat*, including ‘anyone who is defenceless because of ... wounds or sickness’ may not be attacked.³¹ Parties to a conflict must take all possible measures to search for, collect and evacuate the wounded and sick.³² The wounded and sick must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.³³ This is to name but a few of the protections afforded under IHL. Persons with disabilities are often considered to fall within the category of ‘wounded’ and/or ‘sick’ and thus entitled to the benefits of the associated protections.³⁴ However, although it may be

Human Rights Committee (HRCttee), *CCPR General Comment No 20. Article 7 (Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992; HRCttee, *CCPR General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, replacing *General Comment No 9* concerning humane treatment of persons deprived of liberty.

²⁸ Common Art 3; Art 16, GCIII; Art 13, GCIV; Art 75(1), API; Art 4(1), APII; ICRC Customary IHL Study, Rule 87.

²⁹ Art 16, GCIII.

³⁰ Art 109(3), GCIII.

³¹ ICRC Customary IHL Study, Rule 47.

³² *Ibid*, Rule 109; Common Art 3; Art 15, GCI; Art 18, GCII; Art 16, GCIII; Art 10, API; Art 8, APII.

³³ ICRC Customary IHL Study, Rule 110.

³⁴ E.g., France’s military manual states ‘[o]ut of concern for their protection ... the disabled ... are included in the same

beneficial to some individuals with a disability to be afforded the protections offered, this is not a perfect fit and caution should be taken when assumptions are made that all persons with disabilities are either ‘wounded’ or ‘sick’.³⁵

The qualification of a person as ‘wounded or sick’ requires the fulfillment of two cumulative criteria: a person must require medical care and must refrain from any act of hostility. It is the first of the two that is particularly problematic for numerous, interlinked reasons. Firstly, it does not capture the vast number of persons with disabilities whose impairment does not require a medical response, for example a person with an untreatable blindness. Secondly, it only envisages a medical response, whereas other responses may be required to meet the protection needs of a person with a disability, including economic and other forms of assistance (for example, the provision of emergency material in braille or on voiced apps for a person who is blind). Furthermore, as ‘medical care’ is not defined under IHL, it is unclear if non-lifesaving or non-urgent care should be provided. These could include, for example, the provision of medical equipment such as catheters or services such as physiotherapy, which might not be an immediate medical need but would make the life of a wheelchair user more comfortable and prevent health complications in the future. Lastly, the protection of the ‘wounded or sick’ is granted only for so long as the person requires medical care, meaning that once the person with a disability’s medical needs have been met they will fall outside of the protections granted to the wounded and sick.

category as the wounded and sick under humanitarian law’, *Manuel de droit des conflits armés*, supra fn 11, p 32; Art 8(a), API considers that the protection and care due to the wounded and sick is *also* due to persons with a disability and to ‘other persons who may be in need of immediate medical assistance or care, such as the infirm ... and who refrain from any act of hostility’.

³⁵ The qualification of a person as ‘wounded or sick’ does not impact upon their status under the CRPD, or vice versa.

³⁶ Art 57 (2)(c), API; ICRC Customary IHL Study, Rule 20.

F. ACCESSIBLE ADVANCE WARNINGS

Militaries involved in armed conflict are obligated to give ‘effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit’.³⁶ The aim of this provision is to provide the civilian population with an opportunity to move away from a pending attack or at least take measures to protect themselves. An advance warning will not be required when circumstances do not permit. In deciding whether circumstances permit, the military commander should consider the ‘vital humanitarian duty to spare lives and avoid unnecessary suffering’,³⁷ whether or not the element of surprise is essential to the success of an operation or to the security of the attacking forces, and whether or not the military force has the resources or time necessary to communicate with the civilian population. Advance warnings may, for example, take the form of loud siren alerts, radio broadcasts, leaflet drops or text messages. The key element of this IHL protection, especially when read alongside the CRPD, is that it must be ‘effective’.

An ‘effective’ warning will be one that is clear and ‘comprehensible’ to those most directly affected by the attack,³⁸ and delivered in such a way as to reach those most likely to be directly affected. The warning should be in a ‘language that the civilian population understands’.³⁹ It must give sufficient time to react to the warning and clearly explain what the affected populations should do to avoid harm.⁴⁰

³⁷ New Zealand, Manual of Armed Forces Law: Law of Armed Conflict, supra fn 12, §8.7.23

³⁸ United Kingdom Ministry of Defence, The Manual of the Law of Armed Conflict, supra fn 12, §5.32.8.

³⁹ K. Dörmann, ‘Obligations of International Humanitarian Law’, 4 *Military and Strategic Affairs* 2 (2012) 19.

⁴⁰ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, supra fn 7, §530.

1. RECOMMENDATIONS

A review of military manuals and interviews with stakeholders, including persons who have been in the vicinity of armed attacks, indicates that parties to conflicts are not at present considering whether or not the advance warnings they give are accessible to persons with disabilities. When considering how this relates to persons with disabilities, and the implications of the CRPD, if it is known or ought to be known to the attacking party that a person or persons with disabilities are within the vicinity of the legitimate military target, and where circumstances permit, *accessible* warnings must be provided.⁴¹ Accessible formats may include leaflets drops in braille and large print, alerts through apps and assistive devices, as well as radio and televised warnings where available. Crucially, this would also include allowing sufficient time for persons with disabilities within the vicinity of the attack to act on the warning – through evacuation or seeking shelter.

Failure to provide accessible warning, where it is feasible to do so, would arguably amount to discrimination based on impairment and a violation of states parties' obligations to take all necessary measures to ensure the safety of persons with disabilities in situations of armed conflict,⁴² as well as resulting violations of the rights to life,⁴³ physical and mental integrity, highest attainable standard of physical health and mental health and freedom of access to information.⁴⁴ This failure would also arguably amount to a violation of IHL when considering the duty to provide effective warning alongside

the prohibition of adverse distinction, which, as discussed, requires differential treatment that is necessary to respond to the specific needs of a particular individual or group, including persons with disabilities.

G. TREATMENT OF INTERNEES AND PRISONERS OF WAR WITH A DISABILITY

IHL provides the framework under which persons can be detained as prisoners of war or internees,⁴⁵ as well as special protections for those detained and the minimum requirements for detention conditions. IHRL will also be applicable to the conditions and treatment of detainees.⁴⁶ Where a State Party to the CRPD holds a person with a disability as a prisoner of war or internee, the CRPD will apply. The extent and exact application of the CRPD to internees and prisoners of war will be dependent on the context and the norms engaged.

Of particular concern to the detention of a person with a disability are the CRPD prohibitions on 'arbitrary detention' and the deprivation of liberty based on impairment (Article 14(1)(b), CRPD), and the equality of guarantees and protections for those deprived of liberty (Article 14(2), CRPD).⁴⁷ Below, consideration is first given to the general conditions as well as the health and security provisions that should be provided for prisoners of war and internees with a disability. The isolation of persons with psychosocial or intellectual disabilities and repatriation of persons with disabilities are then discussed

There is an acute lack of data on persons with disabilities detained as internees or prisoners of

⁴¹ Arts 5(3), 9, 11 and 21, CRPD.

⁴² Art 11, *ibid*.

⁴³ Art 25, *ibid*.

⁴⁴ Art 21(a), *ibid*.

⁴⁵ Note that prisoner of war status is restricted to situations of international armed conflict. See Art 4, GCIII, regarding prisoners of war, and Arts 42 and 78, GCIV, regarding internment.

⁴⁶ See, amongst others: HRCtee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN doc CCPR/C/GC/35, 16 December 2014, §64; ECtHR, *Hassan v the UK*, Judgment, App no 29750/09, 16 September 2014.

⁴⁷ Issues concerning the application of guarantees for persons deprived of their liberty concerns not only Article 14(2) of the CRPD, but also Article 14(1)(b), since the failure to adhere to such guarantees might render a person's detention arbitrary.

war. Without an understanding of the numbers and individual needs of persons with disabilities detained, the necessary policies and practices to ensure their enjoyment of IHL protections and human rights cannot be developed. Militaries holding detainees must collect disability disaggregated data on persons within their detention. Screenings should take place immediately after a person is detained and thereafter on a regular basis. The Washington Group Short Set of Questions on Disability is a useful tool that militaries could use for collecting disability data.⁴⁸

1. HUMANE TREATMENT, SAFE AND SANITARY CONDITIONS OF DETENTION AND THE PROVISION OF MEDICAL ASSISTANCE

The IHL protections afforded to internees and prisoners of war relate mainly to the humane treatment of detainees, safe and sanitary conditions of detention and the provision of medical assistance. The CRPD complements many of these IHL norms and may make a significant contribution to interpreting and applying these norms in a disability inclusive manner.

In accordance with both IHL and IHRL, prisoners of war and internees must be treated

humanely at all times,⁴⁹ and without adverse distinction.⁵⁰ Any unlawful act or omission that causes death or seriously endangers the health of the detainee is prohibited.⁵¹ The Detaining Power must take ‘all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and prevent epidemics’, including through the provision of baths and/or showers.⁵² Medical inspections must be undertaken ‘at least once a month’ to assess ‘the general state of health, nutrition and cleanliness of prisoners and to detect contagious diseases’.⁵³ Internees and prisoners of war must be provided with water and food of sufficient ‘quantity, quality and variety’ to keep them in good health.⁵⁴ Open spaces and equipment should be provided to ensure detainees can exercise and undertake recreational and educational pursuits.⁵⁵ All of these protections and guarantees apply equally to all internees and prisoners of war regardless of disability.

Measures should be taken by the Detaining Power to enable all detainees with disabilities to attain and maintain maximum independence, and full inclusion and participation in all aspects of life within the place of detention, on an equal basis with others.⁵⁶ In practical terms, this means that all *feasible* measures should be taken to ensure that sanitary facilities are designed, or adapted, to ensure that they are accessible.⁵⁷ Ramps, handrails and wide corridors and

⁴⁸ The Washington Group Short Set are six questions that were developed to enable quick data collection on disability. The questions and guidance on their use can be found at www.washingtongroup-disability.com

⁴⁹ Common Art 3; Art 10(1), ICCPR. The HRCttee has confirmed that ‘article 9 [right to liberty and security of the person] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable’ and ‘[t]reating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’, HRCttee, *General Comment*

No 35, supra fn 47, §64, and HRCttee, *General Comment No 21*, supra fn 28, §4.

⁵⁰ Art 16, GCIII.

⁵¹ Art 13, GCIII.

⁵² Art 29, *ibid*.

⁵³ Art 31, *ibid*.

⁵⁴ Art 26, *ibid*; GCIV, Chapter III.

⁵⁵ Art 38, GCIII.

⁵⁶ Arts 5, 9, 11 and 14(2), CRPD, as well as the IHL guarantee of humane treatment and the prohibition of adverse distinction.

⁵⁷ As affirmed in the ICRC’s *Commentary to GCIII of 2020*, ‘to ensure equal treatment of prisoners with disabilities in relation to prisoners without disabilities, specific measures may be required to make camp services and facilities

doorways should be integrated throughout the place of detention to ensure wheelchair users and those with physical and sensory impairments can move about independently and freely. All information provided to detainees, and in particular emergency information concerning evacuation plans, should be in accessible formats including through the use of sign language, large print, braille and assistive devices.⁵⁸ Those managing and working within the place of detention should be trained in the rights of persons with disabilities and the diversity of disability. The Detaining Power should meaningfully consult with detainees regarding their needs and how to ensure their equal access to all the detention facilities and services provided.⁵⁹

The Detaining Power must also provide medical care, without charge, to all prisoners of war and internees to the degree required by their state of health.⁶⁰ This will include mental health and psychosocial support services. Specialist facilities must be provided for the healthcare and rehabilitation of persons with disabilities, ‘in particular the blind’.⁶¹ Although those with visual impairments are singled out, the principle of non-discrimination demands that specialist facilities and rehabilitation services must be *equally* accessible to all internees and prisoners of war with a disability, irrespective of the type of impairment.⁶²

The CRPD explains that persons with disabilities have the right to the highest attainable standard of health without discrimination on the basis of disability, and that persons with disabilities should be provided

with the same range, quality and standard of healthcare and programmes as provided to other persons.⁶³ Failure to provide adequate healthcare may lead to the exacerbation of an existing impairment or the development of a secondary one. Furthermore, healthcare professionals working in detention camps should be trained in disability rights and ethics and should provide healthcare on the basis of free and informed consent in conformity with the human rights, dignity, autonomy and needs of the person.⁶⁴

Failure to ensure that internees and prisoners of war with disabilities have equal access to health care and detention facilities and services (including through the provision of reasonable accommodation), will constitute discrimination based on impairment, and may amount to torture, cruel, inhuman or degrading treatment as prohibited under both IHL and IHRL.⁶⁵ Where it is not feasible to make prison facilities and services (including healthcare and rehabilitation services) accessible to a prisoner of war or an internee with a disability, repatriation should be considered, even if the person might not be considered ‘seriously wounded’ or fall within the other bases of repatriation (see Repatriation below).

2. ISOLATION BASED ON IMPAIRMENT

Article 30 of GCIII provides that ‘isolation wards shall, if necessary, be set aside for cases of contagious or *mental disease*’ (emphasis added), thereby allowing prisoners of war to be held in isolation based on their impairment. This aspect

accessible for them, such as presenting information about those services and facilities in accessible formats or making adjustments to infrastructure’. §1761

⁵⁸ Art 21(a), (b) and (e), CRPD.

⁵⁹ Art 4(3), CRPD; for guidance on implementation of Art 4, see CtteeRPD, *General Comment No 7*, supra fn 16, §§15–33.

⁶⁰ Arts 15 and 30, GCIII; Art 81, GCIV.

⁶¹ Art 30, GCIII.

⁶² Arts 5 and 9, CRPD.

⁶³ Art 25, CRPD.

⁶⁴ Art 25(d), CRPD. ICRC, Commentary to GCIII of 2020, §2232.

⁶⁵ Discrimination based on impairment is prohibited under IHL under the prohibition of adverse distinction (Common Art 3; Art 16, GCIII; Art 13, GCIV; Art 75(1), API; Art 4(1), APII; ICRC Customary IHL Study, Rule 87) and under IHRL (Arts 5 and 9, CRPD). Torture, cruel, inhuman or degrading treatment is prohibited under IHL (Common Art 3; Art 12, GCI; Art 12, GCII; Arts 17, 87 and 89, GCIII; Art 32, GCIV; Art 75(2), API; Art 4(2), APII) and IHRL (Art 15, CRPD; Art 7, ICCPR; and CAT, amongst others).

of Article 30 of GCIII is an example of where IHL is at odds with the CRPD, which expressly prohibits discrimination based on impairment.⁶⁶ Where two bodies of law are conflicting, consideration should be given to which offers the greatest protection and to whether one has been superseded by a newer norm.

This discriminatory assumption has been proven wrong.⁶⁷ On the contrary, evidence shows that persons with psychosocial impairments are more likely to be victims of violence than to commit a violent act.⁶⁸ Isolating a detainee on the basis that they pose a perceived risk to others contradicts the general presumption of innocence, is arbitrary and unjust. Likewise, no disciplinary action should be taken on the *basis* of disability. Isolating a detainee for the safety of other detainees will only be lawful when applied within punitive measures applicable to all detainees and not when it is pre-emptive and based on a person's real or perceived impairment.

It may be argued that isolating a detainee is necessary for their own safety, either because they pose a danger to themselves or because other detainees pose the treat.⁶⁹ With regard to

the 'danger to self' argument, any resulting isolation will still be arbitrary as it disproportionately applies to persons with psychosocial or intellectual impairments.⁷⁰ It may result in the denial of a person's legal capacity to decide on their own treatment and care.⁷¹ It may also violate rights to personal integrity and freedom from torture and ill-treatment.⁷² Furthermore, it is likely that the isolation of a person based on the perceived threat they pose to themselves will do more harm than good to their mental health and wellbeing. There is a significant body of evidence 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'.⁷³ The effects are 'particularly harmful' in cases of persons who have a pre-existing psychosocial or intellectual impairment,⁷⁴ and in some cases leads to self-harm and suicide.⁷⁵

It should be borne in mind that Article 30's provision on isolation where 'necessary' must be

⁶⁶ Art 5, CRPD.

⁶⁷ J. P. Stuber, A. Rocha, A. Christian and B. G. Link, 'Conceptions of Mental Illness: Attitudes of Mental Health Professionals and the General Public', 65 *Psychiatric Services* 4 (2014).

⁶⁸ Report of the Special Rapporteur on the Rights of Persons With Disabilities, UN doc A/HRC/40/54, 11 January 2019, §27; S. L. Desmarais, R. A. Van Dorn, K. L. Johnson, K. Grimm, K. S. Douglas and M. S. Swartz, 'Community Violence Perpetration and Victimization Among Adults With Mental Illness', 104 *American Journal of Public Health* 12 (2014).

⁶⁹ The 2017 New Zealand Manual of Armed Forces Law: Law of Armed Conflict, supra fn 12, for example, expressly states that 'vulnerable persons', defined to include persons who have a 'mental or other disability', are to be 'segregated from other persons deprived of their liberty' if the 'safety of such people cannot be guaranteed in any other way', §12.10.62.

⁷⁰ As there is no definition of 'isolation wards' within IHL, the level of isolation and confinement that a detainee may face is unclear. However, the terms 'isolation', 'solitary confinement', 'segregation' and 'separation' are widely used to describe the same phenomena. Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, UN doc A/66/268, 5 August 2011, §§26 and 76; Report of the Special Rapporteur

on torture, and other cruel, inhuman or degrading treatment or punishment, UN doc A/HRC/31/57/Add.1, 25 February 2016, §21.

⁷¹ Art 12(2), CRPD.

⁷² Arts 15 and 17, CRPD.

⁷³ Amnesty International, *Entombed: Isolation in the US Federal Prison System*, 2014, p 31, <https://www.amnestyusa.org/wp-content/uploads/2017/04/amr510402014en.pdf> (last accessed 16 February 2020).

⁷⁴ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment, 21st General Report, 11 November 2011, §53; S. Grassian, 'Psychiatric Effects of Solitary Confinement', 22 *Washington University Journal of Law & Policy* 325 (2006); P. Scharff Smith, 'The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature', 34 *Crime and Justice* 1 (2006); Amnesty International, *Entombed*, supra fn 77, pp 31–32.

⁷⁵ Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, supra fn 66, 74 August 2011, §68.

read in light of the detaining powers other obligations. These obligations include the provision of mental health and psychosocial support services that respond to the needs of the detainee. As observed by the ICRC, mental health services and psychosocial support are essential to ensuring detainees health and are effective in decreasing behavior that is deemed disruptive by the detaining power – thereby avoiding the perceived need for isolation.⁷⁶ Furthermore, where the detaining power cannot provide mental health and psychosocial support for the person with an impairment it must repatriate or accommodate the person in a neutral country.⁷⁷

The Detaining Power, where it knows or ought to know that there is a ‘real and immediate risk’ to a detainee’s safety owing to a threat posed by other detainees, is obligated to take reasonable steps to eliminate that risk.⁷⁸ Where the safety of the detainee is under threat from other detainees, repatriation, and not isolation, should be considered, even if the person might not be considered ‘seriously wounded’ or fall within the other bases of repatriation (see the section on ‘Repatriation’ below).

In sum, isolation is a further restriction on the liberty of the internee or prisoner of war, and where this is based on actual or perceived disability, it will contravene the prohibition of adverse distinction,⁷⁹ constitute discrimination

based on disability,⁸⁰ arbitrary deprivation of liberty⁸¹ and may amount to torture, cruel, inhuman or degrading treatment as prohibited under both IHL and IHRL. The provision allowing isolation based on real or perceived impairment within GCIII has been superseded by the CRPD and should be interpreted as such.

3. REPATRIATION

IHL provides for repatriation of prisoners of war and internees based on ill health.⁸² The repatriation should be direct for those ‘incurably’ or ‘gravely’ wounded or sick, or to a neutral country where the prospects of a speedy recovery are higher, or when a prisoner’s mental or physical health is seriously threatened by continued captivity.⁸³ A special agreement may be reached between the parties to the conflict to define the categories and modalities of detainees to be repatriated. A model agreement is annexed to GCIII, which provides a non-exhaustive list of examples of medical conditions that must lead to direct repatriation. As has been argued elsewhere, this model agreement should be revised in light of current medical knowledge,⁸⁴ and contemporary understandings of disability as enshrined in the CRPD. Any ‘wilful’ and unjustified delay in repatriation of detainees amounts to a grave breach under Additional

⁷⁶ 2020 Commentary to GCIII, §2246

⁷⁷ GCIII Arts 109 and 110.

⁷⁸ ECtHR, *Premniny v Russia*, Judgment, App no 44973/04, 10 February 2011, §§73 and 84; IACtHR, *Ituango Massacres v Colombia*, Judgment, 1 July 2006, §161; IACtHR, *Case of the Pueblo Bello Massacre*, Judgment, 31 January 2006, §120.

⁷⁹ Note that Art 16, GCIII, states: ‘Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or *any other distinction founded on similar criteria*’ (emphasis added).

⁸⁰ Art 5, CRPD.

⁸¹ Art 9, ICCPR; Art 14, CRPD. The Special Rapporteur on the rights of persons with disabilities has confirmed that deprivation of liberty will be ‘arbitrary when it is imposed

in a manner that is inappropriate, unjust, disproportionate, unpredictable, discriminatory or without due process’, Report of the Special Rapporteur on the rights of persons with disabilities, supra fn 74, §39. The CtteeRPD has stated that the prohibition on unlawful and arbitrary deprivation of liberty applies when additional factors are used to justify the deprivation of liberty, such as being a ‘danger to self or others’, CtteeRPD, Guideline on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons With Disabilities, 2015, §6.

⁸² Art 109 GCIII.

⁸³ Art 110, GCIII; Art 132, GCIV.

⁸⁴ M. Sassóli, ‘Release, Accommodation in Natural Countries, and Repatriation of Prisoners of War’, in A. Clapham, P. Gaeta and M. Sassóli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, p 1042.

Protocol I,⁸⁵ and will constitute an arbitrary deprivation of liberty.

The grounds for repatriation should be interpreted in light of the prohibition of torture, cruel, inhuman or degrading treatment (contained in the CRPD as well as other human rights law treaties) as well as the principle of equality and non-discrimination, and considered as a measure of reasonable accommodation.⁸⁶ This interpretation would also be in conformity with IHL's own guarantee of human treatment as well as the prohibition of adverse distinction. There may be instances where, owing to the Detaining Power's inability to secure the rights of the detainee with a disability to equal access to health and rehabilitation, and/or their safety (discussed above), failure to repatriate may amount to torture, cruel, inhuman or degrading treatment and/or discrimination through failure to provide reasonable accommodation.

persons with disabilities themselves and their representative organizations that will be best placed to identify barriers and the steps needed to overcome these. Therefore, persons with disabilities should be regularly and meaningfully consulted on military doctrine, education, training, planning and the conduct of operations.

4. RECOMMENDATIONS

In accordance with Article 11 of the CRPD, militaries are required to take 'all necessary measures' in accordance with their obligations under IHL to ensure the safety and protection of persons with disabilities in situations humanitarian emergencies, including armed conflict. To ensure militaries are interpreting their IHL obligations in a disability inclusive manner, particularly within the conduct of hostilities, a better understanding of who the 'civilian population' is and its non-homogenous nature is necessary. The availability of disability inclusive data, disaggregated by age and sex, as well as trained military commanders who have an understanding of the diversity of disability, will strengthen militaries' ability to ensure that their policies and operations are accessible and not discriminatory. Furthermore, it is

⁸⁵ Art 85(4)(b), API.

⁸⁶ The CtteeRPD has confirmed that reasonable accommodations should be applied in the detention

context. CtteeRPD, Concluding Observations on the Initial Report of Mongolia, UN doc CRPD/C/MNG/CO/1, 13 May 2015, \$25.

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Disability and Armed Conflict

This Working Paper forms part of our research on disability and armed conflict, which aims to ensure better protection of persons with disabilities in situations of armed conflict and in its immediate aftermath.

Our publication *Disability and Armed Conflict* brings attention to the devastating impact conflict has on persons with disabilities and, crucially, highlights that many of the key international humanitarian law (IHL) provisions that serve to minimize the impact of armed conflict – such as the proportionality assessment and advanced effective warnings – are not being applied in a disability inclusive manner, resulting in persons with disabilities being killed, seriously injured or left behind as families flee armed attacks.

This Working Paper is designed to introduce militaries to the topic.

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