

A new understanding of disability in international humanitarian law: Reinterpretation of Article 30 of Geneva Convention III

Priscilla Denisse Coria Palomino*

Priscilla Denisse Coria Palomino is a Researcher at the Research Group on the International Protection of the Rights of Individuals and Peoples at the Pontifical Catholic University of Peru. She holds a BA in law from the Pontifical Catholic University of Peru.

Abstract

This paper examines whether the interpretation of Article 30 of Geneva Convention III that allows the use of solitary confinement for prisoners of war with psychosocial disabilities is still valid in light of the new standards of the Convention on the Rights of Persons with Disabilities. It proposes two alternative interpretations of Article 30 to demonstrate why isolation based on disability is unlawful and concludes that the use of solitary confinement on prisoners of war with psychosocial disabilities should be prohibited.

Keywords: solitary confinement, persons deprived of liberty, persons with psychosocial disabilities, inhuman and degrading treatment, torture.

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Introduction

Solitary confinement is the physical and social isolation of persons who are confined to their cells for 22–24 hours a day.¹ It is an ancient practice that has become part of the world's prison systems.² This measure was used in the Auburn and Pennsylvania prison models as a means of rehabilitation through isolation.³ Nowadays it is applied in a range of different settings, including prisons, prisoner of war (PoW) camps and psychiatric hospitals.

This paper analyzes the use of solitary confinement for PoWs with psychosocial disabilities in international armed conflict (IAC) by examining the normative development and approaches to the rights of persons with disabilities in international law throughout history and up to the Convention on the Rights of Persons with Disabilities (CRPD), which defines 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”.⁴ In particular, the paper looks at how the 1949 Geneva Conventions fit into the normative development of international law and the international landscape at the time the Conventions were written.

- 1 *Istanbul Declaration on the Use and Effects of Solitary Confinement*, 9 December 2007 (Istanbul Declaration).
- 2 Solitary confinement has been used by CIA: see George Tenet, “Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001”, *The Torture Database*, American Civil Liberties Union (ACLU), 16 August 2021, available at: <https://tinyurl.com/hyhf3jjh> (all internet references were accessed in March 2022). It has also been used by the KGB: see Lawrence E. Hinkle and Harold George Wolff, “Communist Interrogation and Indoctrination of ‘Enemies of the States’: Analysis of Methods Used by the Communist State Police (a Special Report)”, *AMA Archives of Neurology and Psychiatry*, Vol.33, No. 9, 1956. Solitary confinement has also been used in various countries: see Peru, Decree Law No. 25475, Art. 20 (this rule was in force until the approval of Supreme Decree No. 005-97-JUS, 24 June 1997); Pakistan Penal Code, Act XLV, 1860, Art. 73, available at: www.wipo.int/wipolex/es/text.jsp?file_id=315426; Law of Penal Execution of the Federative Republic of Brazil, Arts 53, 58, in *Penitentiary and Penal Enforcement Legislation in Comparative Law*, May 2005, available at: www.pj.gov.py/ebook/libros_files/coleccion_de_derecho_penitenciario_4.pdf; German Law on the Execution of Custodial Sentences and Custodial Measures for Improvement and Security, Art. 89, in *Penitentiary and Penal Enforcement Legislation in Comparative Law*, May 2005, available at: http://www.pj.gov.py/ebook/libros_files/coleccion_de_derecho_penitenciario_4.pdf; Penal Code of Austria, Art. 103(2)(4), in Weil, Gotshal and Manges, *Seeing into Solitary: A Review of the Laws and Policies of Certain Nations regarding Solitary Confinement of Detainees*, Weil, New York, 2016, p. 24; *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/64/215, 3 August 2009, para. 53.
- 3 See Norval Morris and David Rotham (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society*, Oxford University Press, Oxford, 1998; Peter Scharff, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature”, *Crime and Justice*, Vol. 34, No. 1, 2006, p. 441; Peter Scharff, “Solitary Confinement: History, Practice, and Human Rights Standards”, *Prison Service Journal*, No. 181, 2009, p. 3. See also Michael Foucault, *Discipline and Punish: The Birth of the Prison*, Vintage Books, New York, 1995; Mark Colvin, *Penitentiaries, Reformatories, and Chain Gangs: Social Theory and the History of Punishment in Nineteenth-Century America*, St. Martin's Press, New York, 1997; Peter Scharff, “A Religious Technology of the Self: Rationality and Religion in the Rise of the Modern Penitentiary”, *Punishment and Society*, Vol. 6, No. 2, 2004.
- 4 Convention on the Rights of Persons with Disabilities, UNGA Res. 61/106, 30 March 2007 (entered into force 3 May 2008), Art. 1.

The paper will analyze the terminology of and different approaches to disability and persons with disabilities in the instruments of international humanitarian law (IHL), in particular the Geneva Conventions. This will help to establish how disability was viewed at the time of the adoption of the treaties, which will in turn allow the paper to propose a new understanding of disability that will be essential to reinterpreting Article 30 of Geneva Convention III (GC III).

The paper will then examine whether the interpretation of the first paragraph of Article 30 of GC III that allows the use of solitary confinement⁵ for PoWs with mental or psychosocial disabilities⁶ is valid in light of the standards of the CRPD. Based on the medical model of disability, Article 30 of GC III was intended as a protective measure for third parties. However, since the emergence of the social and rights models of disability and the standards of the CRPD, the medical model and its interpretation are deemed outdated, as they are not responsive to or compliant with modern human rights standards.

Nonetheless, this need not necessarily imply that Article 30 should be deleted. On the contrary, this paper proposes that the provision should remain the same, but should be subject to reinterpretation and updating of the norm in accordance with the new *corpus juris* of persons with disabilities and the protected values of the humanitarian norm, the *pro persona* principle, the criterion of terminological coherence, and Article common 3 to the four Geneva Conventions.⁷

The evolution of disability in international law and its understanding in international humanitarian law

The history of treatment of persons with disabilities in international law

This section discusses how persons with disabilities were portrayed throughout history within the framework of the United Nations (UN). In 1971, the UN adopted the Declaration on the Rights of Mentally Retarded Persons, the first UN

5 At the level of conventional sources of international law, there is no universal definition of solitary confinement. On the other hand, soft-law instruments (declarations, resolutions and principles) have developed a wide legal framework on the use of solitary confinement. Thus, in the Istanbul Declaration, above note 1, solitary confinement is defined as the physical and social isolation of persons who remain confined to their cells for 22–24 hours a day. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment shares the definition of the Istanbul Declaration in the *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. 77; *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/66/268, 5 August 2011, para 25; *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/HRC/22/53, 11 February 2013. The present paper will follow the definition outlined in the Istanbul Declaration.

6 This paper recognizes the definition of person with a psychosocial or mental disability according to the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5); however, the paper will cover the legal angle of persons with psychosocial disabilities and not the mental health angle.

7 These concepts will be explained in later sections.

document to recognize the rights of persons with disabilities in the field of international human rights protection.⁸ While this document recognizes that persons with disabilities—at that time referred to as “mentally retarded persons”—should enjoy the same rights as other human beings, it represents a medical model of disability.⁹

Later, in 1975, the UN General Assembly adopted the Declaration on the Rights of Disabled Persons,¹⁰ in which persons with disabilities were referred as “the disabled”. This document recognizes several rights, such as the right of persons with disabilities to live with their families and not to be subjected to differential treatment.¹¹ These rights are intended to develop the skills of persons with disabilities to the maximum extent possible and to hasten the processes of their social integration or reintegration.¹²

In 1991, the General Assembly adopted the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles),¹³ which provided standards for treatment, living conditions within psychiatric institutions and protections against arbitrary detention in such facilities. It also established the basis for reports on the treatment of persons with disabilities and the conditions to which they are subjected in institutions.

Following the adoption of the MI Principles, the UN convened the World Conference on Human Rights in Vienna.¹⁴ At this conference, the UN promoted equal opportunities for persons with disabilities by encouraging the removal of all socially determined barriers, whether physical, economic, social or psychological, which prevented or restricted their full participation in society.¹⁵

To summarize, the Declaration on the Rights of Persons with Mental Retardation, the Declaration on the Rights of Persons with Disabilities, the MI Principles, and the Vienna Declaration Standard Rules highlight the UN’s commitment to protecting the rights of persons with disabilities in the decades prior to the drafting and entry into force of the CRPD. Although non-binding, these documents represent an attempt to set legal standards for the protection of persons with disabilities. In addition to adopting such disability-specific instruments, various UN bodies have issued interpretations of the general human rights treaties to explain how they can be applied to persons with disabilities.¹⁶

8 *Declaration of the Rights of Mentally Retarded Persons*, UN Doc. A/8429, 21 September–22 December 1971, p. 93.

9 *Ibid.*, preambular para. 1.

10 *Declaration on the Rights of Disabled Persons*, UNGA Res. 3447 (XXX), 9 December 1975.

11 *Ibid.*, Art. 9.

12 *Ibid.*, Art. 6. This article emphasizes the medical model of disability.

13 *Principles for the Protection of the Mentally Ill and the Improvement of Mental Health Care*, UN Doc. 46/119, 17 December 1991.

14 World Conference on Human Rights, Vienna, 14–25 June 1993. The conference produced the Vienna Declaration.

15 Standard Norm 64 of the Vienna Declaration. See also Regulations 63 and 65 concerning the rights of persons with disabilities.

16 See, for example, Committee on Economic, Social and Cultural Rights, “General Comment No. 5 (Persons with Disabilities)”, UN. Doc. E/C.12/1994/13, 25 November 1994.

In addition, in the six decades following the establishment of the UN, States adopted several core human rights treaties. These included the International Covenant on Civil and Political Rights (ICCPR),¹⁷ the International Covenant on Economic, Social and Cultural Rights,¹⁸ the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁹ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),²⁰ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²¹ the Convention on the Rights of the Child (CRC),²² the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,²³ and the International Convention for the Protection of All Persons from Enforced Disappearance.²⁴ Each of these treaties has some bearing, of course, on the rights of persons with disabilities as well.

Prior to the CRPD, however, almost none of these human rights treaties recognized persons with disabilities as a group needing specific legal protection. The exception was the CRC, which addressed children and parents with disabilities in its Articles 2 and 23, but did not specifically recognize the right of children with disabilities to be treated on equal terms with children with no disabilities. Although the rest of the core human rights treaties made no mention of disability, the principle of non-discrimination is contained in some of them.²⁵

In 2002, the UN General Assembly established an *ad hoc* committee to draft the CRPD, which was adopted on 13 December 2006. This document was the first instrument on the rights of persons with disabilities to be signed by UN member States, and remains the main such instrument in use today.

The evolution of models of disability

Throughout the development of the rights of persons with disabilities in international law, we have seen an evolution of disability models. First, disability was treated through the “dispensation model”, which understands disability as a

17 International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI), 16 December 1966 (entered into force 23 March 1976).

18 International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A (XXI), 16 December 1966 (entered into force 3 January 1976).

19 International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res. 2106A (XX), 21 December 1965 (entered into force 4 January 1969).

20 Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. 34/180, 18 December 1979 (entered into force 3 September 1981).

21 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. 39/46, 10 December 1984 (entered into force 26 June 1987) (CAT).

22 Convention on the Rights of the Child, UN Doc. 44/25, 20 November 1989 (entered into force 2 September 1990).

23 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN Doc. 45/158, 18 December 1990 (entered into force 1 July 2003).

24 International Convention for the Protection of all Persons from Enforced Disappearance, UN Doc. A/61/53, 29 June 2006 (entered into force 23 December 2010). Additionally, the International Labour Organization established its own treaty regarding persons with disabilities: Vocational Rehabilitation and Employment (Disabled Persons) Convention, No. 159, 20 June 1983 (entered into force 20 June 1985).

25 Alerne Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights*, Routledge, New York, 2015, p. 24.

burden to the community that must therefore be dispensed with.²⁶ The second iteration saw the “medical model”, which regards disability as a physical, mental, intellectual or sensory limitation that can and must be healed or repaired.²⁷ The medical approach to disability is based on the premise that “disability is considered exclusively a problem of the person, produced by an illness, accident or health condition that requires medical care provided by professionals in the form of individual treatment”.²⁸ According to Agustina Palacios, this approach dates back to the beginning of the twentieth century, specifically the end of the First World War. It persists to the present day, but its use is not recommended since the emergence of the social model in the last decades of the twentieth century.²⁹

Finally, the modern approach is the “social model”, which posits that disability is the result of the interaction between functional diversities and social barriers. This model is based on the intrinsic values underlying human rights – i.e., dignity, autonomy, equality and solidarity.³⁰

The medical and dispensation models had repercussions throughout the mid-twentieth century. This can be seen in the purpose of Article 30 of GC III, which states that the use of solitary confinement serves to protect PoWs with mental disabilities. Another example is Article 5(1)(e) of the 1950 European Convention on Human Rights, which allows the detention of a person who is “insane or of unsound mind”. Both instruments share the idea that excluding persons with mental disabilities is part of their protection.

The aforementioned normative interpretations concerning disabilities have changed over time. In the late 1980s, traditionally dehumanizing approaches were increasingly challenged, and international measures aimed at the equal treatment of persons with disabilities resulted in the identification and removal of external barriers involved in the social or legal exclusion of such persons.³¹ The *travaux préparatoires* of the CRPD suggested the need for a treaty on the rights of persons with disabilities to improve their protection and treatment.³² This implied revising the basis of the medical and dispensation models whose approaches constituted the scope of protection prior to the CRPD.³³ The CRPD

26 Agustina Palacios, “El modelo social de la discapacidad”, in Elizabeth Salmón and Renata Bregaglio (eds), *Nueve conceptos claves para entender la Convención sobre los Derechos de las Personas con Discapacidad*, IDEHPUCP, Lima, 2015, pp. 10–12.

27 Agustina Palacios, *El modelo social de discapacidad: Orígenes, caracterización y plasmación en la Convención Internacional sobre los Derechos de las Personas con Discapacidad*, Cinca, Madrid, 2008, p. 97.

28 *Ibid.*, p. 97.

29 *Ibid.*, p. 97.

30 Rafael de Asís Roig, “La incursión de la discapacidad en la teoría de los derechos: Posibilidad, educación, derecho y poder”, in Ignacio Campoy (ed.), *Los derechos de las personas con discapacidad: Perspectivas sociales, jurídicas y filosóficas*, Dykinson, Madrid, 2004, p. 62.

31 Carey Denholm, Phil McGowan and Peter Tatham, “Emerging from the Shadows: Fijian Children and Youth with Disabilities”, in David Baine, Roy I. Brown and Aldred H. Neufeldt (eds), *Beyond Basic Care: Special Education and Community Rehabilitation in Low Income Countries*, Captus Press, North York, 1996, p. 104.

32 Institute of Public Policy Research, *Equal Rights for Disabled People*, London, 1991, p. 104.

33 Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, “Letter Dated 7 October 2005 from the Chairman to All Members of the Committee”, UN Doc. A/AC.265/2006/1, 14 October 2005.

thus adopts the social model of disability, which is based on the intrinsic values that underpin human rights, namely:

dignity, freedom understood as autonomy (in the sense of development of the moral subject, which demands among other things that the person is the centre of the decisions that affect him/her), the inherent equality of every human being (including differentiation, which demands the satisfaction of certain basic needs) and solidarity.³⁴

Articles 14 and 15 of the CRPD, pertaining to the liberty and security of the person as well as protection from torture and other cruel, inhuman or degrading treatment or punishment, are the new standards for understanding the various forms of deprivation of liberty of prisoners with mental disabilities.

Disability, persons with disabilities, and their representation in international humanitarian law

In addition to the aforementioned evolution of international law regarding persons with disabilities, IHL contains its own set of references to related issues. In particular, persons with disabilities in IHL have been referred to as invalids, the infirm, blind, maimed or disfigured. Evidence of the use of this medically focused terminology can be found in the following articles, among others:³⁵

- Article 16 of Geneva Convention IV (GC IV) provides as follows: “The *wounded* and *sick*, as well as the *infirm*, and expectant mothers, shall be the object of particular protection and respect.”³⁶
- Article 17 of GC IV states: “The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of *wounded*, *sick*, *infirm*, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel.”³⁷
- Article 8(a) of Additional Protocol I to the Geneva Conventions (AP I) explains that “‘*wounded*’ and ‘*sick*’ mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care”.³⁸

The terms used in these articles reflect the medical model that framed persons with disabilities as passive, weak, defective and vulnerable, and as such, in need of special

34 R. de Asís Roig, above note 30, p. 62.

35 The present list is not exhaustive. See also 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. 110; 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), Arts 16, 21, 22, 27, 127. These articles reflect the same disability terminology as “invalid”, “sick”, “blind”, “mutilated” and “disfigured”.

36 GC IV, Art. 16 (emphasis added).

37 *Ibid.*, Art. 17 (emphasis added).

38 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. 8(a) (emphasis added).

and paternalistic protection. Along these lines, the perspective and obligations of IHL are structured within the paradigm of the need to treat and care for persons with disabilities.³⁹

IHL's understanding and treatment of persons with disabilities is limited, and this is largely attributable to the fact that the bulk of IHL was developed between the 1940s and 1970s, when the medical approach to disability remained dominant. The medical model is not without its uses, particularly given its role in referring to and identifying persons who acquire a disability as a result of armed conflict.

Still, IHL has yet to take on board more recent developments that have shaped a new understanding of disability, including the principles of equality and human dignity. To begin with, IHL lacks an adequate definition of disability, and this in turn creates ambiguities as to whether persons with physical, mental, psychosocial and/or intellectual disabilities should be protected – without discrimination and on equal terms – during and after armed conflicts.⁴⁰

In addition, the medical model implies a discriminatory distinction on the basis of disability. This discrimination has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with other people.⁴¹

Similarly, discrimination on the basis of disability is prohibited in IHL under the prohibition of adverse/unfavourable distinction, or the principle of equal treatment.⁴² The aforementioned normative provisions of IHL identify adverse distinction as any distinction based on race, colour, religion or faith, sex, birth, wealth or “any other similar criteria”. Although disability is not explicitly considered as a prohibited ground, it can be included in the category of “any other similar criteria” under a social model approach to disability.

Regarding the social model of disability, terms such as “sick” and “mental illness” should be understood as referring to persons with disabilities and persons with psychosocial disabilities respectively. Moreover, the terminology used in IHL treaties is outdated in light of the social model of disability (a human rights-based approach to disability), and thus we must take into consideration the importance of terminology in recognizing the dynamic interpretation of IHL norms in line with the new contemporary understanding of disability, which underwent various changes up to the adoption of the CRPD. This will allow us to introduce a new

39 Ivan Mugabi, “An Analysis of the Adequacy of Protection afforded by the Convention on the Rights of Persons with Disabilities (CRPD) in Situations of Armed Conflict”, *Societies*, Vol. 8, No. 2, 2018, p. 8.

40 *Ibid.*, p. 9.

41 This is defined in Articles 2, 5 and 9 of the CRPD, which address topics such as accessibility and measures against discrimination on the basis of disability.

42 See common Article 3; GC III, Art. 16; GC IV, Art. 13; AP I, Art. 75(1); 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 (1); 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 87, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

view of disability, which will be essential to reinterpreting Article 30 of GC III regarding the use of solitary confinement for PoWs with psychosocial disabilities.

The use of solitary confinement contained in Geneva Convention III

In order to reinterpret and update the content of Article 30 of GC III, it is necessary to begin with an interpretation of Article 30 in light of the context of GC III's adoption, which took place in 1949. Subsequently, the 2020 International Committee of the Red Cross (ICRC) Commentary on GC III concerning the use of solitary confinement for PoWs with a mental disability will be analyzed.

Article 30 and the context of its adoption

In IHL, the discussion of the use of solitary confinement on persons deprived of their liberty⁴³ in situations of vulnerability, and in particular on persons with disabilities,⁴⁴ is limited to the first paragraph of Article 30 of GC III:

Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. *Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.*⁴⁵

Analyzing the aforementioned paragraph reveals a conflict between this norm and the new *corpus juris* of the rights of persons with disabilities framed in the CRPD. This implies a new interpretation of Article 30 in light of the context of its adoption in 1949 based on three criteria: literal, systematic and teleological.

Firstly, a literal interpretation of Article 30 would state that the norm must be interpreted in such a way that its terms acquire specific meaning and significance. This entails understanding that States agreed to adopt measures for PoWs with mental illness or persons with disabilities recognized in GC III. Secondly, through

43 The use of solitary confinement can result in inmates experiencing hallucinations, dementia and other mental disorders. See P. Scharff, "Solitary Confinement: History, Practice, and Human Rights Standards", above note 3, p. 3; *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E. Méndez; *Observations on Communications Transmitted to Governments and Replies Received*, UN Doc. A/HRC/28/68/Add.1, 5 March 2015, para. 16; *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/66/268, 5 August 2011.

44 The use of solitary confinement for persons deprived of liberty with mental or psychosocial disabilities can cause severe psychological and physical effects, and often results in an aggravation of an existing mental condition. Sharon Shalev, *A Sourcebook on Solitary Confinement*, Mannheim Centre for Criminology, London, 2008, p. 10; ACLU, *Abuse of the Human Rights of Prisoners in the United States: Solitary Confinement*, 2011; Jeffrey L. Metzner and Jamie Fellner, "Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics", *Journal of the American Academy of Psychiatry and the Law*, Vol. 38, No. 1, 2010; Terry Kupers, "Waiting Alone to Die", in Hans Toch, James R. Acker and Vincent Martin Bonventre (eds), *Living on Death Row: The Psychology of Waiting to Die*, American Psychological Association, 2018, p. 56. Since the use of isolation for people with disabilities is very restrictive and may cause serious health effects, it amounts to cruel, inhuman or degrading treatment or punishment, and in some cases, it may constitute an act of torture.

45 GC III, Art. 30(1) (emphasis added).

a systematic interpretation, “norms must be interpreted as part of a whole, the meaning and scope of which must be determined in accordance with the legal system to which they belong”;⁴⁶ this would imply an interpretation in light of the new standards of the CRPD and the values protected by humanitarian norms. In the framework of a systematic interpretation of GC III, all of its constituent provisions, formally related agreements and instruments,⁴⁷ and supplementary means of interpretation, in particular the preparatory works of the treaty,⁴⁸ must be taken into account. Thirdly and finally, a teleological interpretation of Article 30 allows for an analysis of the object and purpose of the Convention as well as of the purpose of the norm.

Article 30 of GC III is based on the 1929 Geneva Convention relative to the Treatment of Prisoners of War.⁴⁹ Article 14 of the 1929 Convention provides for the use of isolation quarters for PoWs with contagious or infectious diseases.⁵⁰ Persons with disabilities were not considered therein, and neither were they included in the ICRC’s *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*.⁵¹ However, this report stated that confinement of PoWs as a security measure was not justifiable, as it could lead to abuse.

Subsequently, at the 1949 Diplomatic Conference of Geneva and in GC III, the terms “mental illness” and “disabled persons”⁵² were used in the drafting of Article 30 and in the Geneva Conventions, along with the term “visually impaired persons”, to help this population in their rehabilitation and reintegration into society.

It is important to analyze the entire normative content of Article 30, which provides:

Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. *Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.*

46 Inter-American Court of Human Rights (IACtHR), *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Series C, No. 205, 16 November 2009, para. 43.

47 Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980) (VCLT), Art. 31.

48 The preparatory works can be used to confirm the meaning resulting from the interpretation carried out in accordance with the methods indicated in Article 31 of the VCLT, insofar as they allow us to verify whether the interpretation made with respect to a specific norm or term is consistent with the meaning of other provisions. Cf. IACtHR, *Ownership of Rights of Legal Persons in the Inter-American Human Rights System*, Advisory Opinion OC-22/16, Series A, No. 22, 26 February 2016, para. 45.

49 Geneva Convention relative to the Treatment of Prisoners of War, 118 LNTS 343, 27 July 1929 (entered into force 19 June 1931) (1929 PoW Convention).

50 Article 14 states: “Each camp shall possess an infirmary, where prisoners of war shall receive attention of any kind of which they may be in need. If necessary, isolation establishments shall be reserved for patients suffering from infectious and contagious diseases. The expenses of treatment, including those of temporary remedial apparatus, shall be borne by the detaining Power.”

51 ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, Geneva, 14–26 April 1947.

52 See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 1, Section A, Federal Political Department, Berne, 1949.

Prisoners of war suffering from *serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care*, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future. *Special facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation.*

Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality.

Prisoners of war may not be prevented from presenting themselves to the medical authorities for examination. The detaining authorities shall, upon request, issue to every prisoner who has undergone treatment, an official certificate indicating the nature of his illness or injury, and the duration and kind of treatment received. A duplicate of this certificate shall be forwarded to the Central Prisoners of War Agency.

The costs of treatment, including those of any apparatus necessary for the maintenance of prisoners of war in good health, particularly dentures and other artificial appliances, and spectacles, shall be borne by the Detaining Power.⁵³

Through a literal, systematic and teleological interpretation of Article 30 of GC III, we can interpret the meaning of this norm, which has allowed the use of the solitary confinement regime for PoWs with mental disabilities since its entry into force. Based on the medical model of disability, this normative provision has two purposes: (1) rehabilitation and (2) use of isolation as a protective measure for third parties and not for persons with disabilities themselves. On the one hand, this measure acts as a means of neutralizing PoWs with a “dangerous” mental deficiency in order to ensure the physical and mental integrity of others. On the other hand, it would seek to cure those PoWs, who are considered seriously ill.

This interpretation is crystallized in the 1960 ICRC Commentary on GC III,⁵⁴ in which the author states that PoWs with serious illnesses are allowed to be treated in hospitals or establishments and the necessary special facilities shall be provided while they are under the guardianship of the Detaining Power.⁵⁵

Regarding the criterion of dangerousness, it may be argued that this is the criterion *par excellence* for the use of solitary confinement for prisoners with disabilities. In traditional forensic discourse, dangerousness or a propensity for violent crime has been treated as a trait inherent to the individual. That inherent trait has often, in turn, been linked to pathological mental health issues.⁵⁶ This reinforces the idea that violence is inherent to the person and considers people

53 GC III, Art. 30 (emphasis added).

54 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960.

55 *Ibid.*, p. 210.

56 Lucía Martínez Garay, “The Uncertainty of the Predictions of Dangerousness: Consequences for the Dogmatics of Security Measures”, *Indret: Revista para el análisis del derecho*, No. 2, 2014, p. 8.

with mental disabilities to be more dangerous than people without them. This criterion disadvantages persons with psychosocial disabilities, as it is used to validate their isolation and is therefore indirectly discriminatory. However, it is important to recognize that this criterion is a foundational element of forensic psychology practice and can be used in the assessment of an individual's aggressiveness within facilities.

The 2020 ICRC Commentary on GC III

The interpretation put forward in the 1960 ICRC Commentary made substantial changes, but they are not enough in light of the new standards of the CRPD. The ICRC's 2020 Commentary on GC III states that the use of solitary confinement on PoWs with mental health conditions may violate the prohibition of adverse distinction based on a mental health condition or psychosocial disability.⁵⁷ It also emphasizes that the use of any form of isolation, whether solitary confinement or any other form of closed confinement, on persons with mental health issues shall be prohibited under GC III if it amounts to adverse distinction or to torture or other ill-treatment.⁵⁸ In light of the above, the isolation of PoWs with disabilities may violate the prohibition on adverse distinction where a person is presumed to be dangerous on the basis of a mental health condition.

Although the 2020 Commentary has made advances regarding the discussion of the use of solitary confinement, it has not discarded the old interpretation of Article 30. For instance, it is mentioned that some States reserve the possibility of imposing closed confinement on PoWs, including persons "with mental health problems, where it is considered unavoidable in light of the danger such persons pose to themselves (including suicide) or to others".⁵⁹ Even in the new Commentary, the dangerousness criterion for the use of solitary confinement as a protective or security measure remains decisive.

Still, the 2020 Commentary argues that the possibility of isolating persons with mental health problems "if necessary" under Article 30 must be interpreted in the context of other obligations of the Detaining Power – i.e., physiotherapy, psychotherapy or psychosocial counselling, provision of assistive devices and repatriation. Implementing these obligations would provide alternatives to isolation and would help to avoid it being considered necessary. Moreover, the 2020 Commentary recognizes that PoWs with disabilities may have specific medical care needs and that, if required, specific measures should be taken to ensure access to those needs.⁶⁰

We can thus conclude that the use of solitary confinement for persons with disabilities, though deemed a last resort for the Detaining Power and only as a

57 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 2020 (2020 Commentary on GC III), para. 2241, available at: <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>.

58 *Ibid.*, para. 2242.

59 *Ibid.*, para. 2244.

60 *Ibid.*, para. 2256.

temporary measure, is still considered lawful even under more modern interpretations of GC III. Once the risk to the life and health of the other prisoners has been contained, the isolation of the PoWs concerned should be terminated.⁶¹

Article 30 continues to have two purposes since its adoption in 1949: (1) the use of the criterion of dangerousness as the criterion *par excellence* for employing solitary confinement for PoWs with disabilities as a protective or security measure, despite the challenges that arise regarding adverse distinction; and (2) the rehabilitation of PoWs with disabilities, which still reflects the backwardness of the medical model. The latter approach can be found in the 2020 Commentary: "... to enable them to achieve and maintain their optimal physical and mental functioning in interaction with their environment ...".⁶² Taking these two purposes into account, the current interpretation of Article 30 constitutes at the very least cruel, inhuman, or degrading treatment or punishment or an act of torture, as will be shown below. Both of these purposes are contrary to Article 3 common to the four Geneva Conventions.

As evidenced by the previous paragraphs, Article 30 of GC III needs to be reinterpreted and updated due to its current practice that violates the rights of persons with mental disabilities. In the following section, this paper will identify and develop the methods of interpretation of international law that can be used for this purpose.

Reinterpretation (and updating) of Article 30 of GC III

This section will present two interpretations of Article 30 following the *pro personae* principle, the criteria of dynamic interpretation and terminological coherence, and common Article 3, in order to update its content. These criteria will allow us to argue that the use of solitary confinement for PoWs with mental disabilities in the context of Article 30's adoption in 1949 did not consider the rights of people with disabilities. This was related to Article 30's two purposes: the first was rehabilitation, since Article 30 was based on a medical model of disability, and the second was the use of isolation based on the criterion of dangerousness as a measure of protection or security towards third parties and not towards people with disabilities themselves. Both purposes go against common Article 3.

Reinterpretation of Article 30

In order to reinterpret and update the content of Article 30, we must consider that the rules of IHL are rules of public international law more broadly, and thus their interpretation must comply with the main and complementary principles of interpretation contained in the 1969 Vienna Convention on the Law of Treaties

61 *Ibid.*, para. 2239.

62 *Ibid.*, para. 2260.

(VCLT), as well as the provisions established for treaties authenticated in several languages and other rules not contemplated in the VCLT.

The main general rule of treaty interpretation is found in Article 31 of the VCLT: good faith, in accordance with the ordinary meaning to be given to the terms employed by the treaty in question in their context and in light of the treaty's object and purpose. This rule of interpretation has been broadly accepted, as evidenced by the International Court of Justice:

According to customary international law, which has found its expression in Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms employed by the treaty in their context and in the light of its object and purpose.⁶³

In addition to the main rule for treaty interpretation set out in Article 31 of the VCLT, the following criteria of interpretation of international law will be used in the reinterpretation and updating of Article 30 of GC III: (1) the *pro personae* principle,⁶⁴ which will apply the most favourable, most extensive and broadest interpretation in order to protect the human rights implicit in Article 30; (2) the criterion of dynamic interpretation of the norm,⁶⁵ which is appropriate for interpreting Article 30 in accordance with the new *corpus juris* of persons with disabilities; and (3) the use of the criterion of interpreting terms⁶⁶ based on their ordinary meaning in order to interpret the values protected by the humanitarian norm.

Another criterion that will be used to update Article 30 is common Article 3. Common Article 3 sets out the obligation of providing humane treatment without any adverse distinction, and it prohibits violence to life, especially murder in all its forms,

63 International Court of Justice (ICJ), *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/ Chad)*, Judgment, *ICJ Reports* 1994, p. 22; IACtHR, *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, 9 May 1986, para. 13; IACtHR, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82, 24 September 1982, para. 33.

64 Cecilia Medina and Claudio Nash, *Manual de derecho internacional de los derechos humanos*, Centro de Documentación, Defensoría Penal Pública, Santiago de Chile, 2003, p. 22; Mónica Pinto, "El principio pro homine: Criterios de hermenéutica y pautas para la regulación de los derechos humanos", in Martín Abregú and Christian Courtis (eds), *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, Editores del Puerto, Buenos Aires, 2004, p. 163. For a deeper insight into the criteria, see ICCPR, Art. 5; CEDAW, Art. 23; CRC, Art. 41; American Convention on Human Rights, Art. 29 (b); European Court of Human Rights (ECtHR), *Loizidou v. Turkey*, Judgment, Series A, No. 310, 23 March 1995, para. 72; Zlata De Clément, "La complejidad del principio pro homine", *Revista Doctrina*, No. 12, 2015, p. 103.

65 C. Medina and C. Nash, above note 64, p. 22. See ECtHR, *Soering v. The United Kingdom*, Appl. No. 14038/88, Judgment, 7 July 1989, para. 87; ECtHR, *Dudgeon v. The United Kingdom*, Appl. No. 7525/76, Judgment, 27 October 1981; IACtHR, *The Interpretation of the American Declaration of the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion 10/89, 14 July 1989, para. 37; IACtHR, *Gender Identity, and Equality and Non-Discrimination for Same Sex Couples*, Advisory Opinion 24/17, 24 November 2017, para. 59.

66 VCLT, Art. 31. See IACtHR, Advisory Opinion OC-1/82, above note 63, para. 33; ICJ, *Territorial Dispute*, above note 63, p. 22.

mutilation, cruel treatment and torture. Each party to the conflict must comply to the obligations set forth in this article.

In order to reinterpret Article 30 of GC III, we need to understand the obligations arising from common Article 3. According to the ICRC's 2016 Commentary on Geneva Convention I (GC I),⁶⁷ the fundamental obligations established by common Article 3 are understood as follows.

The obligation to treat humanely

This obligation is inherent to the human being and can be found in several provisions of international law, both IHL and international human rights law (IHRL). Humane treatment is set out in common Article 3 and Rules 87 and 88 of customary IHL, as well as in certain rules of the Geneva Conventions and Additional Protocols I and II.⁶⁸ In accordance with the general provisions of IHL, civilians and combatants who are *hors de combat* due to illness, injury, detention or other causes must be treated humanely.

However, the meaning of "humane treatment" is not defined in common Article 3 or in any other provision of conventional IHL. That is why the ICRC's 2016 Commentary on GC I states that the meaning of humane treatment is context-specific and needs to be considered in the specific circumstances of each case, taking into account both objective and subjective factors (e.g., environment and the individual's mental and physical state, age, social, cultural, religious or political background, and past experiences). Furthermore, it is increasingly recognized that women, men, girls and boys are affected in different ways by armed conflict. Therefore, being aware of the inherent status, capacities and needs of each individual can contribute to an understanding of the notion of humane treatment in common Article 3.⁶⁹

Common Article 3 ensures that all persons who are not or are no longer taking part in hostilities are treated humanely by both State and non-State parties to non-international armed conflicts.⁷⁰ It emphasizes that "attacks on life and limb, hostage-taking, outrages upon personal dignity and sentences passed without trial are prohibited at any time and in any place". Persons protected by common Article 3 must never be treated as less than human, and their inherent human dignity must be respected and protected. No circumstances justify the

67 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); 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*, Geneva, 2016 (2016 Commentary on GC I).

68 GC I, Art. 12(1); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 12(1); GC III, Art. 13(1); GC IV, Arts 5, 27; AP I, Art. 75(1); AP II, Art. 4 (1); ICRC Customary Law Study, above note 42, Rules 87, 88.

69 2016 Commentary on GC I, above note 67, para. 553.

70 See also 1899 and 1907 Hague Regulations, Art. 4; Geneva Convention on the Wounded and Sick, 1929, Art. 1; 1929 PoW Convention, Art. 2. Today, see in particular GC I, Art. 12; GC II, Art. 12; GC III, Art. 13; GC IV, Art. 27; AP I, Arts 10, 75. For IACs, the principle of humane treatment was codified in the Hague Regulations of 1899 and 1907, the Geneva Conventions of 1949, and AP II.

non-application of this obligation since the fundamental standards set out in common Article 3 are recognized as the minimum floor governing all armed conflicts as a reflection of “elementary considerations of humanity”.⁷¹ By virtue of common Article 3 and Article 10(1) of the ICCPR, PoWs must be treated humanely at all times. Furthermore, the Human Rights Committee has noted that “treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule”.⁷²

The prohibition against unfavourable distinction

Persons protected under common Article 3 must be treated humanely in all circumstances “without any adverse distinction based on race, colour, religion or belief, sex, birth or wealth, or any other similar criteria”. However, the latter category is not specific enough, as it alludes to another type of unfavourable distinction based on criteria such as health, age, level of education etc.⁷³ This non-exhaustive list of prohibited criteria of adverse distinction also appears in the ECHR under the expression “any other status”.⁷⁴ Likewise, different committees of the universal system of human rights protection (the Human Rights Committee, the Committee Against Torture etc.) have expressed their concern regarding various situations of discrimination, and this has led to an exercise of interpretation of other prohibited criteria of discrimination.

Although the list of prohibited criteria does not explicitly mention disability as a prohibited ground, all IHL protections afforded to civilians and persons *hors de combat* apply equally to persons with and without disabilities by virtue of the prohibition on distinction of an adverse nature. A complementary approach to the interpretation of IHL would require that disability be included in “any other similar criteria”.

Another key normative instrument concerning the prohibition of distinction of any nature is the CRPD. Beyond being specific to disability, this treaty has been widely ratified, even more than many other human rights treaties.⁷⁵ This demonstrates a certain level of international consensus on the prohibition of any kind of unfavourable distinction and the *jus cogens* norm referring to the principle of non-discrimination, and is an indicator that States have accepted the differentiated treatment of persons with disabilities.

It should be highlighted that common Article 3 does not prohibit distinctions of a non-favourable nature – i.e., distinctions justified by the substantially different situations and needs of the protected persons. This allows for differential treatment that serves to ensure humane treatment through

71 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports* 1986, paras 218–219.

72 UN, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, paras 176–178.

73 2016 Commentary on GC I, above note 67, para. 321.

74 See ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Appl. No. 33290/96, 21 December 1999.

75 To date the CRPD has 184 States Parties, making it one of the most widely ratified human rights treaties.

adaptation to the specific needs of persons and/or groups of persons in vulnerable situations.

In compliance with IHL's prohibition against unfavourable distinction and the CRPD's right to equality and prohibition against discrimination, persons with disabilities are entitled to the same IHL protections afforded to all other persons. This would include rules related to the treatment of civilians and persons *hors de combat* and to the conduct of hostiles.⁷⁶ In addition, differential treatment, including reasonable accommodation, may be required to ensure that IHL protections are applied in a non-discriminatory manner to all PoWs with mental disabilities.⁷⁷

Considering the above, common Article 3 is strictly humanitarian in nature. It focuses exclusively on ensuring that each person who is not or is no longer taking part in hostilities is treated humanely⁷⁸ and that the protection of certain persons by a non-favourable distinction (e.g., pregnant or breastfeeding women in places of detention) should under no circumstances result in less humane treatment of other persons protected by the article.

In summary, these understandings of the core obligations of common Article 3 – humane treatment and the prohibition of unfavourable distinction – will be especially useful when updating Article 30 of GC III. On the one hand, the obligation of humane treatment allows PoWs with mental disabilities to be treated humanely by the Detaining Party regardless of the circumstances. On the other hand, the prohibition against unfavourable distinction would need disability to be included as a prohibited ground under “any other similar criteria” so as to complement the interpretation of IHRL. With regard to non-favourable distinction, common Article 3 does not prohibit differential treatment that serves to ensure humane treatment by accommodating the specific needs of the individual. This distinction will be taken into account to present reasonable accommodations for PoWs with mental disabilities later.

Following the criteria of dynamic interpretation, the *pro personae* principle, terminological coherence and common Article 3 and the values protected by humanitarian norms, two concurrent alternative interpretations of Article 30 of GC III will be developed below.

First reinterpretation

The first interpretation will analyze Article 30 through a dynamic interpretation, which understands the historical elements and concepts contained in the provision to be alive, open and dynamic. In this sense, the provision still has vestiges of a time where persons with disabilities were considered to have lives of less value and were not even included in treaties as groups in vulnerable situations – and before the meaningful developments of the past several decades

76 Alice Priddy, *Disability and Armed Conflict*, Geneva Academy Briefing No. 14, 2019, p. 55.

77 *Ibid.*, p. 55.

78 2020 Commentary on GC III, above note 57, para. 572.

concerning the rights of persons with disabilities under international law. In light of this, Article 30 is outdated in relation to the current standards developed in the *corpus juris* of the CRPD and the rights of persons deprived of liberty. Therefore, based on the dynamic interpretation, it is possible to reinterpret the concepts contained in the law in accordance with the new *corpus juris* of persons with disabilities as follows.

Firstly, the social model of disability demonstrates that disability is the result of the interaction between functional diversity and social barriers. Thus, PoWs with disabilities should be treated under this model, which is part of the normative framework of the CRPD.

Secondly, the CRPD principles of equality and non-discrimination state that disability is a prohibited ground of discrimination and imply that all human beings are equal in terms of dignity and rights regardless of any physical, mental or intellectual condition. States risk violating this right when prisoners with disabilities are placed in solitary confinement, since they are excluded from other prisoners due to their differences. As noted above, common Article 3 prohibits any adverse distinction based on “race, colour, religion or belief, sex, birth or wealth” or “any other similar criteria”.

Thirdly, Article 14 of the CRPD (“Liberty and Security of Person”) imposes an obligation on States Parties to ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily, and states that the existence of an impairment does not justify a deprivation of liberty. Article 14 also contains the right to respect for physical, mental and moral integrity. Integrity can be seen as a more general and positive expression of the right to be free from torture and cruel, inhuman or degrading treatment or punishment.⁷⁹

Fourthly, another criterion used in the reinterpretation of Article 30 is the *pro personae* principle. In the IHRL framework, this principle establishes that the most extensive interpretation must be applied when protecting human rights, such as the right to humane treatment and health, in accordance with the *corpus juris* of the CRPD (the social model and the principle of equality and non-discrimination) and of persons deprived of their liberty.⁸⁰

Furthermore, Article 14 of the CRPD, in the framework of the *pro personae* principle, is the norm that provides greater protection for PoWs with mental disabilities by stating that disability cannot be the sole justification or part of the rationale for detention.

Based on the criteria of dynamic interpretation, the *pro personae* principle and common Article 3, the first reinterpretation of Article 30 is that “persons with disabilities” shall be understood to mean persons with pre-existing or acquired

79 Tina Minkowitz, “The United Nations Convention on the Rights of Persons with Disabilities and the Right to Be Free from Nonconsensual Interventions”, *Syracuse Journal of International Law and Commerce*, Vol. 34, No. 2, 2007, p. 412.

80 IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, 13 November 1985, para. 52. See also IACtHR, *Loayza Tamayo v. Peru*, Judgment, 17 September 1997, para. 44; ECtHR, *Loizidou*, above note 64, para. 72.

mental disabilities resulting from armed conflict, persons with physical and/or motor disabilities, and persons with visual disabilities. These persons should be treated in a dignified manner without adverse discrimination of any kind in accordance with common Article 3.

Second reinterpretation

The above-mentioned criteria are also used in the second reinterpretation of Article 30 of GC III. For instance, the criterion of terminological coherence allows us to have a single definition of the term “torture” in international law. This term can be found in IHL (e.g., the Geneva Conventions and their Additional Protocols) and IHRL (e.g., the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Inter-American Convention to Prevent and Punish Torture) treaties. By applying the criterion of terminological coherence, the definition of torture must be the same in the scope of application of IHL and IHRL.

In IHRL, the definition of torture is found in Article 1(1) of the CAT. This article includes the requirement that torture be committed “by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity”,⁸¹ a requirement which is not necessary in IHL. In *The Prosecutor v. Zejnir Delalic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) determined that this definition was part of customary international law applicable in armed conflict.⁸² As a result, the Tribunal concluded that the definition of torture in humanitarian law did not include the same elements.

Despite this situation, this paper follows the definition of torture proposed by the CAT due to two reasons. Firstly, since the act of torture will be committed by State armed forces, there would be no major difficulty regarding the element of the presence of a “public official or other person acting in an official capacity”. Secondly, as the CAT is a UN treaty, it has a wider scope in many States than those that are part of regional human rights systems. Thus, through the *pro personae* principle, the CAT provision provides a more favourable meaning to the recipient of international protection.

The same reasoning will be used to analyse the term “cruel, inhuman or degrading treatment or punishment”, which has several definitions in the scope of application of IHL and IHRL. In the field of IHL, the Geneva Conventions and Additional Protocols do not define this term, but its definition and characteristics are established in its jurisprudential development.

In *The Prosecutor v. Dusko Tadić*, the ICTY concluded that the prohibition against cruel treatment in common Article 3 “is a means to an end, the aim of which is to ensure that persons taking no active part in hostilities are in all circumstances treated with humanity”.⁸³ As a result, the ICTY defined cruel treatment as

81 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46, 10 December 1984 (entered into force 26 June 1987), Art. 1.

82 ICTY, *The Prosecutor v. Zejnir Delalic et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, para. 111.

83 ICTY, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A. Judgment, 15 July 1999, para. 723.

[t]reatment that causes severe mental or physical suffering or constitutes a serious affront to human dignity, amounting to the crime of inhuman treatment under the grave breaches of the Geneva Conventions.⁸⁴

The reasoning described above has similarities with the definition of the term “cruel, inhuman or degrading treatment or punishment” in Article 16(1) of the CAT, but it is not as fully conceptualized and detailed as the notion of torture.⁸⁵ It is further developed under IHRL, where it is characterized as cruel or inhuman treatment that causes severe physical or mental suffering, intentionally or through negligence, and where a public official is directly or indirectly involved.⁸⁶

Considering the previously developed concept and through the *pro personae* principle, this paper follows the definition developed in IHRL, as it allows the term “cruel, inhuman or degrading treatment or punishment” to be broader or more extensive than those provisions that establish protection for persons within IHL. Therefore, by interpreting terms based on their ordinary meaning, we can reinterpret Article 30 of GC III, which qualifies as an act of discrimination, inhuman treatment and, in some cases, torture.

Implications of the reinterpretations

In addition, when the use of solitary confinement in PoWs with mental disabilities amounts to torture, we are faced with a *jus cogens* norm. The new reinterpretations of Article 30 of GC III can be summarized as follows:

1. First interpretation: The deprivation of liberty in Article 30 is based on the ground of disability; therefore, it is discriminatory and arbitrary.
2. Second interpretation: Deprivation of liberty under Article 30 amounts at least to cruel, inhuman or degrading treatment or punishment or torture.

Thus, with the two new proposed interpretations of Article 30, solitary confinement of PoWs with mental or psychosocial disabilities in international armed conflicts should not be used under any circumstances. It is important to mention which scenarios are possible for PoWs with mental disabilities in a PoW camp.

Considering that solitary confinement is a measure that is against human rights, there are two possible scenarios. First, if there is a genuine risk that the person concerned may harm third parties, regular sanctions should be applied. What is more, since deprivation of liberty is harmful, retention should be

84 ICTY, *Delalic*, above note 82, para. 551.

85 The term “cruel, inhuman or degrading treatment or punishment” captures acts which are legally and morally reprehensible but fall short of the specific crime of torture. See Manfred Nowak and Ralph R. A. Janik, “Torture, Cruel, Inhuman or Degrading Treatment or Punishment”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 317–342.

86 ICRC, “What is the Definition of Torture and Ill Treatment?”, Geneva, 15 February 2005, available at: www.icrc.org/en/doc/resources/documents/faq/69mjxc.htm.

considered for certain behaviours.⁸⁷ Second, if the person does not pose a risk to himself/herself or to third parties, solitary confinement or detention should not be considered under any circumstances. In both cases, repatriation is recommended. Where it may not be possible to repatriate a PoW to their country of origin because there is a risk to their life or integrity, and they cannot be transferred to a neutral country, detention in PoW camps will be feasible in accordance with the minimum standards of treatment of persons deprived of their liberty and the minimum guarantees contained in common Article 3.

Finally, it has been proven in our research that solitary confinement of PoWs with mental disabilities in IAC should be prohibited. Moreover, following the analysis in this paper, the interpretation of Article 30 has been updated to the international standards contained in the CRPD.

Alternatives to the use of solitary confinement

This section will discuss two possible alternatives to the use of solitary confinement: repatriation and retention. It will do so by first laying out where in the relevant sources of law we find references to or obligations of repatriation and/or retention. Next, it will explain several core principles relating to the treatment of persons with disabilities, including reasonable accommodation, universal design, and accessibility. Finally, it will analyze repatriation and retention in light of those principles.

Repatriation and retention under existing IHL

Repatriation of PoWs is set out in Part IV of GC III and Rule 128 of customary IHL.⁸⁸ Article 109 of GC III states that

throughout the duration of hostilities, the Parties to the conflict shall endeavour, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of ... sick and wounded prisoners of war ... [and] conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

Furthermore, Article 110 of GC III indicates that the persons who shall be repatriated are the incurably wounded and sick whose intellectual or physical

87 It should be noted that to date there is no international standard for the use of restraint to restrict the right to liberty of persons with mental disabilities, but in any case, any restraint must be very specific and short. Thus, we agree with Renato Constantino's idea that "this action would only consist of the limitation of locomotor freedom in a reduced space". See Renato Antonio Constantino Caycho, "¿Hogar, dulce hogar? La privación de libertad de personas con discapacidad en casa particulares a partir de la sentencia Guillén Domínguez del tribunal constitucional peruano", Pontifical Catholic University of Peru, available at: <https://tinyurl.com/yckhdfsr>.

88 GC III, Part IV; ICRC Customary Law Study, above note 42, Rule 128.

aptitude appears to have suffered considerable diminution, who are not expected to recover in the course of a year, or who have recovered but whose intellectual or physical aptitude appears to have suffered a considerable and permanent diminution.

Concerning direct repatriation, Part IV, Section I of GC III addresses topics such as internment in neutral countries, the rights of prisoners to be examined by joint medical commissions, the costs of repatriation, and activity after repatriation.

Another provision related to repatriation is Article 132 of Geneva Convention IV (GC IV), which states that

[t]he Parties to the conflict shall ... endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

Repatriation is an obligation for the Parties to the conflict, and thus PoWs with mental disabilities fit into Article 110 of GC III. According to the contemporary understanding of disability enshrined in the CRPD, the aforementioned article should clearly include persons with mental, physical, intellectual or psychosocial disabilities who appear to have suffered considerable and permanent impairment or whose condition requires treatment.

The grounds for repatriation for PoWs are not sufficient as stipulated in GC III, but there may also be cases where it is not feasible for the Detaining Power to guarantee the rights to equal access to health and rehabilitation of a detainee with a disability and/or their safety when the facilities do not include adequate health services for PoWs with mental or psychosocial disabilities.⁸⁹ In such cases, repatriation may be considered as a reasonable accommodation that would constitute a less harmful alternative to solitary confinement.

Reasonable accommodation, accessibility and universal design

Reasonable accommodation is not only a measure that aims to adapt the environment, goods and services to the specific needs of a person, but also a “right that serves to satisfy the content of the good protected by the right to accessibility and, thus, can also be considered as a measure of that principle or that right”.⁹⁰ This adaptation has an individual scope for each case and is often confused with accessibility (the right to adapt the environment) and universal design (a way of designing the environment taking into account all forms of human diversity).

89 A. Priddy, above note 76, p. 72.

90 Rafael de Asís, “Lo razonable en el concepto de ajuste razonable”, in E. Salmón and R. Bregaglio (eds), above note 26, p. 104.

According to the Committee on the Rights of Persons with Disabilities, accessibility is a precondition for persons with disabilities to live an independent life and to be able to participate fully and equally in society.⁹¹ It is a right that persons with disabilities can demand, and its application is mainstreamed in the exercise of all rights.⁹² According to Article 2 of the CRPD, the concept of universal design is understood as “the design of products, environments, programmes and services that can be used by all people, to the greatest extent possible, without the need for adaptation or specialised design”. Universal design aims to achieve universal accessibility and is aimed at all persons as stated in Article 4(1)(f) of the CRPD.

In addition to accessibility and universal design, there is the concept of reasonable accommodation, which can be defined as the “unequal treatment of persons because they may find themselves in a situation of difference or inequality, which is unfavourable or detrimental to them”.⁹³ Reasonable accommodation has an individual scope for each specific case of a person with a disability and is applied *ex post*: “only when the special situation of a person with a disability is ascertained should a differentiated measure be applied to ensure the enjoyment of rights under equal conditions”.⁹⁴

Reasonable accommodation goes beyond the general areas of accessibility and universal design: it generates obligations on the State or the private sector and can only be provided in certain sectors such as health, care services and medication. It is important to highlight that it does not replace the accessibility obligation.

To determine the validity of a reasonable accommodation, it is important to take into consideration that accessibility implies “(i) universal design, which functions as a general principle [and] source of specific obligations; (ii) accessibility measures, which appear when universal design is not satisfied; [and] (iii) reasonable accommodation, which arises when it is justified that accessibility is not universal”.⁹⁵ In the case of PoWs with mental disabilities, universal design is not feasible due to the limitations concerning their situation. Moreover, appropriate adjustments would be needed for each one of them. Accessibility measures are also not feasible in this context: even if they reach all PoWs with disabilities, there will be cases where certain adjustments will be necessary in order to guarantee the PoW’s rights, especially during the repatriation procedure.

Reasonable accommodation guarantees the rights of access to health and medical care, and bodily and mental integrity, among others. It is important to highlight that its implementation is done through the criterion of reasonableness,

91 Committee on the Rights of Persons with Disabilities, General Comment No. 2, “Article 9: Accessibility”, UN Doc. CRPD/C/GC/2, 22 May 2014, para. 1.

92 Renata Bregaglio, “El principio de no discriminación por motivo de discapacidad”, in E. Salmón and R. Bregaglio (eds), above note 26, p. 91.

93 *Ibid.*, p. 93.

94 Marcial Rubio Correa, Francisco Eguiguren Praeli and Enrique Bernales Ballesteros, *Los derechos fundamentales en la jurisprudencia del Tribunal Constitucional: Análisis de los artículos 1, 2 y 3 de la Constitución*, 1st ed., Fondo Editorial de la PUCP, Lima, 2011, p. 146.

95 R. de Asís, above note 91, p. 105.

which implies the requirements of non-discrimination, proportionality and acceptability.

The requirement of non-discrimination refers to the right to equality and non-discrimination. In order to comply with the non-discrimination mandate, it is necessary not to differentiate; however, there is an obligation to differentiate persons with disabilities so as to allow for the adequate exercise of their rights.⁹⁶ This mandate thus prohibits equal treatment without justification and allows for unequal or different treatment. To ensure equality and non-discrimination, reasonable accommodation will be used to guarantee the right of access to appropriate medical care in a neutral country or in the person's country of origin.

The requirement of proportionality can be determined by means of the proportionality test, which contains the principles of appropriateness, necessity and proportionality.⁹⁷

The requirement of acceptability is related to the need to satisfy the reasonable expectations of the community. The reasonable decision must be the one that is presumably most acceptable within the framework of what is expected by those to whom it is addressed.⁹⁸

Applying the requirements of non-discrimination, proportionality and acceptability in the context of PoWs with disabilities and presenting the minimum parameters of retention

Assessing the potential of repatriation

First, the rule of non-discrimination for PoWs with mental disabilities means that the appropriate adjustments will need to be made to guarantee the right of access to suitable medical care in a neutral country or in the individual's country of origin, with equal treatment and without adverse distinction. Regarding equal treatment, PoWs in different situations and with different needs may need to be treated differently in order to achieve substantive equality of treatment.⁹⁹ In relation to discrimination, the prohibition in Article 16 of GC III provides a number of grounds on which adverse differentiated treatment is prohibited: "race, nationality, religious belief or political opinions, or any other distinction based on similar criteria".¹⁰⁰ Adverse distinctions founded on other grounds, such as disability, would equally be prohibited.

Second, taking into account the principles contained in the proportionality test mentioned in the previous section, repatriation would need to consider the following arguments:

96 R. Bregaglio, above note 92, pp. 94–95.

97 Robert Alexy, *Teoría de los derechos fundamentales*, trans. Ernesto Garzón Valdés, Centro de Estudios Constitucionales, Madrid, 1997, p. 100.

98 R. de Asís, above note 90, p. 113.

99 GC III, Art. 14; 2020 Commentary on GC III, above note 57, para. 1658.

100 GC III, Art. 16; AP I, Arts 9(1), 75(1). See also ICRC Customary Law Study, above note 42, Rule 88.

1. The principle of appropriateness determines whether the limitation to a right must be appropriate in relation to a constitutionally valid end. The adjustment of repatriation thus could be given considering a constitutional end such as the right to health and access to medical care.
2. The principle of necessity determines whether there are other alternative measures that could have been chosen to achieve this end. For instance, repatriation is the least harmful measure for PoWs with mental disabilities since the application of solitary confinement is not possible. The principle of proportionality analyzes whether the satisfaction of the constitutionally legitimate aim is greater than or equal to the effect on the opposing principle or right. In the case at hand, repatriation allows for greater satisfaction of the right to health and access to medical care for PoWs with mental or psychosocial disabilities than solitary confinement.

Finally, we must assess acceptability. Repatriation could be considered as an indeterminable cost, as it will take into account changes in practices or procedures and therefore does not necessarily constitute an undue burden *per se*. In order to know whether it is undue, it will be necessary to assess how much the adjustment actually costs, a point that will not be developed here as it is not the subject of this research.

After having carried out the analysis of non-discrimination, proportionality and acceptability, the reasonableness of the accommodation is evident when talking about the repatriation of PoWs with psychosocial disabilities. This adjustment is made from the social model as a modification or adaptation of repatriation to guarantee the full exercise and rights of persons with disabilities in the context of an IAC.

Assessing the potential of retention

In certain cases, it is not possible to repatriate PoWs to their country of origin – including when there is an imminent risk of human rights violations against PoWs with psychosocial disabilities or when the rights guaranteed in common Article 3 may be violated. In those circumstances, it may be feasible to hold such individuals in PoW camps under certain parameters.

If retention is applied, it would have to be in accordance with the minimum guarantees contained in common Article 3. Any retention should bear in mind the obligation to treat PoWs humanely, which is paramount in the treatment of persons deprived of their liberty. During retention, medical, psychological and/or neurological care, if needed, should be provided to a PoW with a mental or psychosocial disability who is in a psychiatric crisis or in a seriously and severely debilitating situation.

The purpose of the retention is for the Detaining Party to opt for the transfer of the PoW with a disability. If the Detaining Party chooses to transfer the PoW with a psychosocial disability to a psychiatric hospital within its territory, it must take into account the possibility of human rights violations.

However, this will not be addressed under Article 30, but from a human rights perspective of the Detaining Party.

During retention, it will be necessary to consider the minimum parameters for the treatment of persons deprived of their liberty (the right to life, personal integrity, health etc.). All these rights are set out in the UN Standard Minimum Rules for the Treatment of Prisoners, today known as the Mandela Rules, and the UN Basic Principles for the Treatment of Prisoners. Several of these rights are also set out in human rights treaties or covenants for persons deprived of their liberty such as the ICCPR, the American Convention on Human Rights and the European Convention on Human Rights.

As a final note, it should be emphasized that these two alternatives to the use of solitary confinement for PoWs with psychosocial disabilities have not been further detailed in the present article since this was not the aim of this research.

Conclusion

Since the entry into force of GC III, the interpretation of Article 30 has not changed at all. Although there have been advances in its understanding, as seen in the latest ICRC Commentaries, there has been no interpretation in accordance with the new CRPD standards, and Article 30 perpetuates the use of solitary confinement for prisoners with mental disabilities based on the criterion of dangerousness.

To update the rules contained in Article 30, it is necessary to use certain methods of interpretation of international law. The interpretation criteria used in this paper provide us with two reinterpretations which conclude that solitary confinement of PoWs with mental or psychosocial disabilities in IACs should not be used under any circumstances. Regarding this situation, there are two possible solutions: repatriation or retention. Whereas repatriation can be used as a reasonable accommodation for PoWs with mental disabilities, retention must be carried out in accordance with the minimum standards of treatment of persons deprived of their liberty.