



GENDERED IMPACTS OF ARMED CONFLICT AND IMPLICATIONS FOR THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

GENDERED IMPACTS OF ARMED CONFLICT AND IMPLICATIONS FOR THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

Report drafted by Vanessa Murphy, Legal Adviser, International Committee of the Red Cross (ICRC), with significant contributions from Lindsey Cameron, ICRC.

Citation: International Committee of the Red Cross (ICRC), *Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law*, ICRC, Geneva, June 2022.

CONTENTS

Acknowledgements	3
Foreword.....	4
Introduction.....	6
Structure of the report.....	8
Key concepts.....	8
1. Gendered impacts of armed conflict: Exploring implications for IHL governing	
the conduct of hostilities	10
A. Cross-cutting issues.....	11
B. The principle of distinction	13
C. The principle of proportionality.....	15
D. The principle of precautions	17
E. Existing good practice and orientations for future work.....	20
Key takeaways.....	21
2. Gendered impacts of armed conflict: Exploring implications for IHL governing	
situations of occupation.....	22
A. Cross-cutting issues.....	23
B. Family rights and non-discrimination in Article 27 of the Fourth Geneva Convention.....	24
C. Navigating tensions between gendered harm and the limits on transformative occupation.....	26
Key takeaways.....	31
3. Gender and IHL: Limitations and opportunities.....	32
A. Historical context	33
B. The role of IHL: Leveraging complementarity and identifying added value	34
C. Neutrality and impartiality	35
D. Raising awareness and influencing behaviour through research, guidance and practical tools.....	37
E. Opportunities in the women, peace and security agenda.....	38
Key takeaways.....	39
Annex 1: List of participants.....	40

ACKNOWLEDGEMENTS

The present report is the outcome of an expert meeting held in June 2021 on gendered impacts of armed conflict and implications for the application and interpretation of IHL.

The conceptualization, drafting and publication of the report would not have been possible without the commitment and contributions of many individuals.

Our gratitude goes, first of all, to the experts who participated in a personal capacity and whose expertise, knowledge and contributions were essential for the content of this report. They shed light on the complex dynamics of gender in armed conflict and the implications for the assessment of the risk of civilian harm and the procedures and practices that might be employed to mitigate that risk, among a range of other issues. They are acknowledged in Annex 1.

We would also like to express our gratitude to Vanessa Murphy, Legal Adviser, who organized the meeting and is the author of this report; and Lindsey Cameron, Head of the Thematic Legal Advice Unit, who supported the organization of the meeting and the report's drafting.

We would like to thank: Ann Deer (Head of Operations and Deputy Permanent Observer, ICRC Delegation to the United Nations), Tristan Ferraro (Senior Legal Adviser), Pilar Gimeno (Head of the Protection of the Civilian Population Unit), Eirini Giorgou (Legal Adviser), Alexandra Jackson (Global Adviser on Child Protection), Kubo Mačák (Legal Adviser), Ariana Lopez Morey (Policy Adviser), Mikhail Orkin (Legal Adviser), Gergey Pasztor (Senior Inclusive Programming Adviser), Matt Pollard (Legal Adviser) and Abby Zeith (Legal Adviser), who contributed to the drafting of the report through their valuable comments and advice.

Our thanks also go to Rachael Kitching, Mathilde Piret and Victoria Riello, who at the time were Associates in the ICRC Legal Division, for support in the organization of the meeting and preparation of this report.



Dr Cordula Droege
Chief Legal Officer and
Head of the Legal Division
ICRC



Dr Helen Durham
Director of Law and Policy
ICRC

FOREWORD

Despite the guarantee of equal rights for women and men in international law, women and girls contend with gender inequality in every country worldwide. Reports indicate that in humanitarian settings, the situation is particularly grim: over 21 per cent of primary school-age girls are out of school compared to 15 per cent of boys, the percentage of households headed by women typically reaches 33 per cent and these households face higher risks of malnutrition and food insecurity, and less than 20 per cent of women are likely to be in paid work in countries experiencing protracted conflicts, compared to 66 per cent of men.¹ The actions of warring parties often cause further harm with gendered dimensions. Diverse women, men, boys and girls are impacted differently when hostilities kill and injure civilians, damage and destroy essential services, and contribute to population displacement. If war was not enough, the COVID-19 pandemic has widened the gender gap over recent years and any period of recovery is likely to bring a new set of challenges.

As young lawyers beginning our work on international humanitarian law in the 1990s and 2000s, we watched as civil society, humanitarian organizations and many states took significant steps towards aims to put an end to gender inequality and gendered violence in situations of armed conflict. Through the Beijing Platform for Action in 1995, 186 states agreed that the mainstreaming of a gender perspective should be promoted in decisions addressing armed conflict.² The UN Security Council adopted the first resolution on women, peace and security in 2000, commencing an ambitious agenda to ensure the participation of women in the maintenance and promotion of peace and security, as well as the protection of women and girls during and after armed conflict. The prosecution of sexual violence as a war crime at ad hoc international tribunals, and its criminalization in the Rome Statute of the International Criminal Court in 1998, marked a major milestone in international legal history.

As we write from the vantage point of 2022, we see that the momentum of that era has not brought all that is needed and indeed has, in many ways, stalled. On the current trajectory, it is estimated that it will now take 135.6 years to close the gender gap worldwide.³ In situations of armed conflict, gendered impacts of hostilities on civilians remain under-documented. Gendered harms including though not limited to sexual violence remain rife. While we need to be appreciative of the advances that have been made, we cannot help but feel that the international community must assertively recommit to advancing the situation of women and girls affected by armed conflict.

International humanitarian law (IHL) requires parties to armed conflict to assess and take steps to reduce expected civilian harm – which includes harm to diverse women, men, boys and girls – as part of the application of various IHL obligations. In 2021, in the spirit of contributing to progress and as part of its mandate to work for the understanding, dissemination of knowledge and faithful application of IHL, the International Committee of the Red Cross (ICRC) convened an expert workshop to scope gendered impacts of armed conflict and identify the potential implications of these for the application of IHL obligations related to the protection of civilians.⁴

One of the key findings of the rich discussions was that incorporating a gender perspective into the application and interpretation of IHL is a building block for progress towards the alleviation of gendered harm wrought by armed conflict.

1 Inter-agency Network for Education in Emergencies (INEE), *Mind the Gap: The State of Girls' Education in Crisis and Conflict*, INEE, New York, 2021, p. 14; UN Security Council, *Women and peace and security: Report of the Secretary-General*, UN Doc. S/2021/827, 27 September 2021, paras 43 and 63.

2 United Nations, *Beijing Declaration and Platform for Action*, adopted at the Fourth World Conference on Women, 27 October 1995, para. 141.

3 World Economic Forum (WEF), *Global Gender Gap Report 2021*, WEF, Geneva, 2021, p. 5: <https://www.weforum.org/reports/global-gender-gap-report-2021>, all web addresses accessed June 2022.

4 A related ICRC pledge is available online at: <https://rcrcconference.org/pledge/considering-different-impacts-on-diverse-women-men-girls-and-boys-when-applying-and-implementing-ihl/>.

In this respect, having women at the table makes a difference. The meaningful participation of women in the interpretation and application of IHL and in humanitarian action brings a broader scope of information into view and better serves our guiding principles of humanity and impartiality. The progress that the ICRC and the International Red Cross and Red Crescent Movement are making on gender parity is therefore critical to the humanitarian mission.⁵

We are grateful to the experts at the meeting for having shared their experience and expertise. The exchanges explored how international law requires states to end discrimination against women and girls and to alleviate gendered harm resulting from war through a plethora of obligations. Based on the meeting, we have concluded that incorporating a gender perspective into the interpretation of IHL will help pave the way, and we hope this report will assist states and parties to armed conflict to do so.

There is far to go to achieve these goals, and progress is slow. But when surrounded by the perseverance, resourcefulness and wit of the women and girls in conflict-affected communities, in the corridors of our organization and in our children's generation, our hopes are high. We count on the commitment – in words matched with deeds – of all.



Dr Cordula Droege
Chief Legal Officer and
Head of the Legal Division
ICRC



Dr Helen Durham
Director of Law and Policy
ICRC

⁵ In 2019, the 33rd International Conference of the Red Cross and Red Crescent Movement adopted a resolution entitled “Women and leadership in the humanitarian action of the International Red Cross and Red Crescent Movement”, urging the Movement to reach gender parity by 2030 at all levels. Progress will be reported to the 34th International Conference.



Mafraq governorate, Zaatari refugee camp. Women waiting in front of the tracing office opened by the ICRC to help Syrian refugees restore or maintain contact with relatives.

J. Tobais/ICRC

INTRODUCTION

Gender shapes an individual's experience of armed conflict in complex ways. Structural gender inequalities pre-exist armed conflict, gender roles and social power dynamics can shift and/or be exacerbated in the course of armed conflict, and gender intersects with other factors including age, class, disability, race, religion and sexual orientation to determine individual experiences. Gendered impacts of armed conflict vary accordingly across contexts and people: in one context, women and girls may face heightened barriers when accessing health care after an attack, while in another, men and boys of a particular race may too quickly be assumed to be combatants. In a place of detention, sexual violence might be targeted against persons of diverse sexual orientation or gender identity. Women of a particular ethnic group might be sold into sexual slavery, while men might be summarily executed. Traditional birth attendants may struggle to meet their community's needs as health systems buckle under conflict and other crises like COVID-19. Networks of women may come together to provide peer support to those with missing loved ones.⁶

Though the specific and situated gendered impacts of armed conflict vary, trends are predictable. Two generalizations are important starting points for practitioners assessing civilian harm. First, women and girls contend with structural gender inequality, including in conflict contexts. Women and girls have fewer financial resources, less access to essential services and less representation in decision-making bodies, including in armed forces.⁷ Military operations do not therefore take place on an "equal playing field" for women and girls. Second, gender analysis of the impacts of military operations can reveal significant variation in civilian harm. Illustrative examples include reports that men are the majority of casualties of certain types of attacks, and that women can be nearly twice as affected by the harmful health effects of certain weapons as men.⁸ Likewise, displaced populations show dramatically varied demographics.⁹ In other words, variation across gender can be significant and so should not be overlooked by practitioners concerned with the protection of civilians.

A gender perspective is therefore a relevant tool for practitioners seeking to understand and reduce civilian harm in armed conflict. IHL requires parties to armed conflict to assess expected civilian harm as part of the application of various IHL obligations. Expected civilian harm is more likely to be accurately assessed if it is considered from a gender perspective.

On 24–25 June 2021, as part of its mandate to work for the understanding, dissemination of knowledge and faithful application of IHL, the International Committee of the Red Cross (ICRC) convened an expert workshop to scope gendered impacts of armed conflict and identify potential implications of these for the application of certain IHL obligations related to the protection of civilians.¹⁰

With this expert workshop, the ICRC sought to engage in a critical reflection on the role of IHL in addressing gendered impacts of armed conflict. Conscious of the significant work that has been conducted on this topic by academia, civil society and international organizations, the meeting convened legal experts from these fields to take stock of existing analysis and inform the ICRC's future engagement. The workshop therefore did not involve state experts, who will be engaged at a second meeting.

6 For accounts of the experiences of different women, men, boys and girls caught up in conflict during the pandemic, see: ICRC, *As if the War was not Enough – Stories of hardship and resilience in times of COVID-19: A report on the pandemic's impact on the protection of people caught up in conflict*, ICRC, Geneva, 2021.

7 UN Security Council, 2021, paras 5, 42, 43, 51 and 63.

8 A.G. Dimmen, *Gendered Impacts: The humanitarian impacts of nuclear weapons from a gender perspective*, International Law and Policy Institute, Vienna, 2014, p. 2. By contrast, sex-disaggregated datasets set out that men and boys represent the majority of direct victims of landmines, though when injured, 43 per cent of women and girls will die of their injuries, compared to 29 per cent of men and boys; see: Cluster Munition Coalition, *Landmine and Cluster Munition Monitor: Fact Sheet*, Cluster Munition Coalition and the International Campaign to Ban Landmines, Ottawa, 2010, p. 1; PeaceWomen, *Women and Cluster Munitions*, Women's International League for Peace and Freedom (WILPF), Geneva, p. 1.

9 For example, UN Women reported that 76 per cent of internally displaced persons (IDPs) in Yemen were women and children; see: M. Butcher, *The Gendered Impact of Explosive Weapons Use in Populated Areas in Yemen*, Oxfam Briefing Paper, Oxfam International, Oxford, 2019, p. 9.

10 A related ICRC pledge is available online at: <https://rcrcconference.org/pledge/considering-different-impacts-on-diverse-women-men-girls-and-boys-when-applying-and-implementing-ihl>.

The workshop could not exhaustively explore gendered impacts of conflict and implications for IHL application, given the vastness of the topic. Rather, specific sub-areas of IHL were selected for discussion: the IHL rules governing the conduct of hostilities and the IHL rules governing situations of occupation. These were selected because they are areas of public international law where IHL is particularly specific, and because of their acute relevance to and quotidian influence on the lives of people living in contemporary conflicts. They have furthermore been highlighted in scholarship as areas in need of closer examination from a gender perspective.¹¹ During the workshop, emphasis was placed on the link between identified gendered impacts and the consequent implications for the application of relevant IHL provisions. For IHL practitioners, this link is crucial to determine practical implications.

This report aims to contribute to legal discourse on gender and IHL from an ICRC perspective, informed by the discussion at the expert workshop.

STRUCTURE OF THE REPORT

The report is divided into three sections, reflecting each of the three workshop sessions. Chapter 1 focuses on gendered impacts of the conduct of hostilities and implications for related IHL rules. Chapter 2 addresses gendered impacts of situations of occupation and implications for related IHL rules. Finally, Chapter 3 addresses bigger-picture questions regarding the role of IHL in addressing gendered harm in armed conflict. It places this report in a historical perspective, and identifies opportunities for and limitations of IHL on this topic. Each chapter concludes with the ICRC's key takeaways from the discussions.

The expert workshop was informed by a background paper, which was prepared with Prof. Helen Kinsella of the University of Minnesota to guide discussions on the three selected topics. While the various points made in the discussion summarized here are not attributed to the experts who made them, a list of participants is provided (Annex 1). An earlier draft of the present report was submitted to experts for comment prior to its publication.

KEY CONCEPTS

This report understands sex and gender to be two distinct concepts, in that sex is biologically determined whereas gender is socially constructed.¹² The report also refers to diverse women, men, girls and boys. This reference to diversity acknowledges that gender is one factor of a person's identity and position in society, interacting with other diversity factors including but not limited to age, disability, ethnicity, religion, nationality, migrant status, class, health, caste and sexual orientation.¹³

The report addresses gendered impacts of armed conflict on diverse women, men, boys and girls because gender can dramatically affect the experiences of all persons in armed conflict. At the same time, readers will observe that the report primarily, though not exclusively, focuses on gendered impacts on women and girls. The rationale for this focus is the global context of gender inequality and discrimination against women

¹¹ See, for example: J. Gardam, "The silences in the rules that regulate women during times of armed conflict", in F. Ní Aoláin et al. (eds), *The Oxford Handbook of Gender and Conflict*, Oxford University Press, Oxford, 2018, p. 43; F. Ní Aoláin, "The Gender of Occupation", *Yale Journal of International Law*, Vol. 45, No. 2, 2020, pp. 336–376, at p. 336.

¹² Gender refers to an aspect of people's socially determined identity that relates to masculinity and femininity. It is not binary. Social and structural expectations influence the roles, power and resources available to women, men and those of other gender identities in any culture. Gender roles are learned and changeable over time based on economic, political, cultural, religious and other environmental factors. The ICRC's definition is based on that used in the 2020 Gender and Diversity Policy of the International Federation of Red Cross and Red Crescent Societies (IFRC). It reflects the following key elements, namely that gender: (1) is socially constructed, (2) is non-binary – it does not refer only to "man" or "woman", (3) is complex, being influenced by cultural, religious, political and other factors, and, (4) can change over time and place. This understanding is reflected in the ICRC Inclusive Programming Policy.

¹³ The ICRC's approach to inclusive programming and how it takes the diversity of individuals into account is set out in: ICRC, *Accountability to Affected People Institutional Framework*, ICRC, Geneva, 2019, Section 5, p. 9.

and girls – in 2021, no country has yet achieved full gender parity.¹⁴ Women and girls worldwide continue to confront barriers of gender-based discrimination despite the guarantees of equal rights and protections for women and men in international law. The civilian harm that arises in armed conflict therefore takes place on gendered terrain, and this report seeks to better understand the interplay between the civilian harm caused by armed conflict and gender inequality. The application of a gender perspective to IHL is therefore coherent both with the purpose of uncovering of gendered harm against all persons and with the intention of addressing gender inequality.

¹⁴ The annual Global Gender Gap Index measures gender inequality across 156 countries based on 14 indicators. In 2021, no country has yet to achieve full gender parity across the indicators; see: WEF, 2021, p. 9.

Unity state, Pariang county, Wara village. Women and children carrying water. The ICRC supported in the construction of a water pump serving the area. It also assists in the maintenance of the pump.



T. Stoddart/ICRC

1. GENDERED IMPACTS OF ARMED CONFLICT: EXPLORING IMPLICATIONS FOR IHL GOVERNING THE CONDUCT OF HOSTILITIES

This chapter examines potential implications of gendered impacts of armed conflict for the application of certain IHL rules governing the conduct of hostilities. It highlights four cross-cutting issues before setting out gender perspectives on the principles of distinction, proportionality and precautions. In view of these reflections, the chapter concludes with examples of good practice and orientations to further the development of practical knowledge, skills and tools in this area.

A. CROSS-CUTTING ISSUES

Gender affects how civilians experience the effects of military operations in a number of ways, such that “civilian harm” is comprised of different impacts for diverse women, men, boys and girls.

The kind of gendered harms that people may experience as a result of the conduct of hostilities can arise from differences in biological sex as well as differences related to their socially ascribed roles and responsibilities. For example, sex-specific harms arise from the use of certain weapons, and gender analysis of civilian casualty data indicates that women, men, boys and girls are killed at different rates depending on the context and weapon used.¹⁵ Such harm can be both direct and indirect. Gendered direct effects can include, for example, loss of life and injury to women and girls resulting from an attack in a context where they had unequal access to medical care. Gendered indirect effects can include, for example, the increased caretaking and income-generating responsibilities for women when male relatives are killed or injured.

Four cross-cutting issues inform this examination of the implications of such gendered impacts for IHL provisions governing the conduct of hostilities.

Considering gender inequalities in situations of armed conflict. IHL practitioners should be aware that the gender inequalities embedded in contexts where hostilities occur are a factor that influences civilian harm. Gender inequality worldwide, including in countries affected by conflict, is well-documented and therefore foreseeable.¹⁶ UN reports indicate that in humanitarian settings, the percentage of households headed by women typically reaches 33 per cent and that they report higher risks of malnutrition and food insecurity, that women hold 18.9 per cent of parliamentary seats in conflict and post-conflict countries, and that only 44 per cent of women are likely to be in paid work in “fragile and conflict-affected” countries, compared to 66 per cent of men in the same countries, with this dropping from 44 to below 20 per cent in countries affected by protracted conflict.¹⁷

Such inequalities are likely to exacerbate the direct and indirect civilian harm caused by hostilities: women are likely to have fewer financial resources to cope with injury and property damage, are more likely to be discriminated against because of injury or disability, may face additional barriers to accessing health care when injured¹⁸ and are likely to be less represented in decision-making roles regarding humanitarian aid delivery.

Thus, generally speaking, systemic inequality involves exposure to specific risks, influences access to resources and shapes coping strategies in armed conflict. A more granular understanding of how such systemic inequality influences the harm hostilities cause to women and girls would help to increase the likelihood that parties to armed conflict will act to mitigate this harm as they apply relevant IHL.

¹⁵ Reaching Critical Will, *Women and Explosive Weapons*, WILPF, 2014, pp. 13–16. See also: Action on Armed Violence (AOAV), “Examining the gendered impacts of explosive weapons: an overview of existing datasets”, 5 September 2019: <https://aoav.org.uk/2019/gendered-impacts-overview-of-existing-datasets>.

¹⁶ See: WEF, 2021, p. 9.

¹⁷ UN Security Council, 2021, paras 5, 43 and 63.

¹⁸ For example, when they can only be examined by female health-care workers or need male guardianship to travel to health-care services.

Recognizing gendered impacts on all persons. Though the inequality impacting the experience of women and girls merits dedicated analysis, gendered assumptions and expectations shape the experience of all persons, including men and boys in the conduct of hostilities. In certain situations, the civilian status of men and boys may be improperly revoked because they are presumed to be combatants or to pose security risks by simple virtue of their gender. This can lead to problematic results, such as gender and age-based targeting of men and their exclusion from incidental harm estimates. Such examples underline the fact that gender affects the conflict-related experiences of women, men, boys and girls differently, but that it certainly affects all.¹⁹

Gendered data gaps and the resultant “invisibility barrier”. Data gaps on gendered impacts of the conduct of hostilities mean that, in practice, parties to armed conflict often do not have the evidence base to adapt military operations to mitigate gendered harm. The historical “invisibility” of women to data capture is becoming more deeply understood: data collection methods that do not account for stereotypes, social norms and other factors may introduce bias that compromise data quality, with knock-on blind spots in decision-making.²⁰

A context-specific understanding of civilian patterns of life that reflects gender-based differences would help. However, there is debate about the advisability of encouraging parties to armed conflict to collect more gendered information on civilians, including on women and girls. Parties to armed conflict may not always use such data for protection purposes; gender-directed strategies, tactics and methods of war that violate IHL are major risks. The ICRC therefore emphasizes that the context-specific information gathering on the civilian population referred to here is understood to be for the purpose of compliance with IHL obligations regarding the protection of civilians. In addition, a lack of specific data on civilians in the theatre of operations does not preclude generalized guidance from commanders based on evidence-based trends and patterns regarding the inequalities and risks facing women and girls in conflict-affected contexts. Key trends of gender inequality are well-documented and corrective measures based on general trends should be further explored. One such measure that could help parties to better understand the impact of attacks is the monitoring, tracking and reporting of sex- and age-disaggregated civilian casualty data, and the use of these findings to inform future assessments of reasonably foreseeable harm.

The significance of who is applying the law. Who is applying IHL is likely to affect whether and how gendered impacts are taken into account. Compliance with IHL during the conduct of hostilities depends on what the commander knew or should have known at the time of an attack, based on information reasonably available from all sources in the circumstances. The related notion of the “reasonable military commander”²¹ can be vulnerable to gender biases; the standard of “reasonableness” can contain latent gendered assumptions and, in practice, can vary depending on the identity of the military commander and their value judgments.²² For example, based on gendered assumptions, a military commander might ascribe different value to different types of civilian harm. They might also be more likely, or less likely, to consider certain types of harm as “reasonably foreseeable”.

19 See: S. Shoker, *Military-Age Males in Counterinsurgency and Drone Warfare*, Palgrave Macmillan, Cham, 2021; R. Acheson et al., *Sex and Drone Strikes: Gender and identity in targeting and casualty analysis*, Article 36 and Reaching Critical Will, London and New York, 2014.

20 For a mapping of gender data gaps related to conflict, see: Data2x, *Mapping Gender Data Gaps in Human Security*, 2020: https://data2x.org/wp-content/uploads/2020/03/MappingGenderDataGaps_Security.pdf. The UN Secretary-General has called for priority to be given to closing gendered data gaps; see: UN Security Council, 2021, para. 112.

21 Further discussion of this legal notion can be found in: ICRC, *International expert meeting report: The principle of proportionality in the rules governing the conduct of hostilities under international humanitarian law*, ICRC, Geneva, 2018, pp. 57–62.

22 For example, the diverse views of expert witnesses during the Gotovina trial at the International Criminal Tribunal for the former Yugoslavia (ICTY) illustrate the differing assessments that military commanders might have. For a summary and analysis of the experts’ testimony covering the principles governing the conduct of hostilities, see: M. Brehm, *Unacceptable Risk: Use of explosive weapons in populated areas through the lens of three cases before the ICTY*, PAX, 2014, p. 60.

In some cases, this may be influenced by a decision-maker's own gender, and it is relevant in this respect that militaries comprise a majority of men. For example, women make up 19.7 per cent of the Australian Defence Force, 5.5 per cent of the Republic of Korea Armed Forces, 18 per cent of the Armed Forces of Uruguay and 17.2 per cent of the United States Armed Forces.²³ Research in other fields has demonstrated that the inclusion of women tends to broaden the scope of information brought to the table. For example, the inclusion of women in peace negotiations has been documented to lead to wider accord content: agreements without female signatories include more provisions with regard to military reform and withdrawal of troops, while agreements with female signatories include more provisions with regard to political, social and economic reform.²⁴

Elaborating on the topic of who is applying the law, an important consideration to take into account is that, in practice, military personnel often apply the rules on the conduct of hostilities in situations of high intensity and stress. This environment might enhance gender biases, as decisions during hostilities are made quickly and heuristically about who is a combatant, what incidental harm is foreseeable and the value ascribed to it, and what precautions are feasible. It is therefore critical that discussions on gendered impacts are distilled into something practicable and tailored to these high-pressure decision-making environments.

The ICRC therefore submits that a context-specific gender analysis should take place in advance of fighting to the extent feasible, so that there are fewer unknown variables leaving room for gendered assumptions. This analysis could be mainstreamed into existing practices such as assessments of patterns of civilian life and other measures of operational planning.²⁵ It should also be reassessed at appropriate intervals in light of the reality that gender roles and related patterns of life can shift owing to conflict dynamics, and be age-sensitive in that it takes account of differences between women, girls, men and boys.

B. THE PRINCIPLE OF DISTINCTION

The IHL principle of distinction requires that the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants and, correspondingly, attacks must not be directed against civilians.²⁶ The identification of who is a combatant and who is a civilian by parties to a conflict can be influenced by gendered assumptions. Put most simply, when there is a margin of doubt in targeting decisions, women are more likely to be assessed to be civilians and men are more likely to be assessed to be combatants.

This gender bias raises two issues. First, men of presumed "fighting age" may be mistakenly targeted as combatants. In other words, men may be over-targeted. Correspondingly, assumptions about the combatant status of "fighting-age" males require careful attention to correct for gender bias. Generally speaking, all those involved in targeting procedures (both pre-planned and dynamic) should receive comprehensive training and take part in related exercises, which include a range of different aspects that help ensure targeting is lawful.²⁷ Part of such training should include target selection and verification training, which can be defined as the establishment, with reasonable certainty, that an object of attack (defined in function and position) is a

23 Australian Government Department of Defence, *Annual Report 2020–21*, p. 105: <https://www.defence.gov.au/about/information-disclosures/annual-reports>. See also: Australian Government Department of Defence, *Women in the ADF Report 2020–21* (supplement to the *Annual Report 2020–21*), p. iv; Republic of Korea, Ministry of National Defense, "Ministry of National Defense Working to Increase the Percentage of Female Officers in the Military", 17 September 2018: https://www.mnd.go.kr/user/boardList.action?command=view&page=1&boardId=O_47261&boardSeq=O_197103&titleId=&siteId=mndEN&id=mndEN_020100000000; Ministerio de Defensa Nacional, *Mujeres en Defensa y Fuerzas Armadas*, 30 March 2022: <https://www.gub.uy/ministerio-defensa-nacional/politicas-y-gestion/mujeres-defensa-fuerzas-armadas>; U.S. Department of Defense, *2020 Demographics Report: Profile of the Military Community*, 2020, p. 16: <https://download.militaryonesource.mil/12038/MOS/Reports/2020-demographics-report.pdf>.

24 J. Krause, W. Krause and P. Bränfors, "Women's Participation in Peace Negotiations and the Durability of Peace," *International Interactions*, Vol. 44, No. 6, 2018, p. 17.

25 For different factors that should be evaluated during military operation planning, see: ICRC, *Reducing Civilian Harm in Urban Warfare: A Commander's Handbook*, ICRC, Geneva, 2021, pp. 38–49.

26 Art. 48 of AP I, Rule 1 of the ICRC Customary IHL Study.

27 For further guidance on targeting training, see: ICRC, 2021, p. 27–28; also see p. 20 on positive identification.

lawful military target in accordance with the law of armed conflict and applicable rules of engagement. This target selection and verification aspect of training could feature awareness-raising on gender and racial bias, to alert targeting decision-makers to potential bias regarding men of certain age and race, depending on the context, in the process of establishing with reasonable certainty that a person identified for attack is a lawful military target.

Second, historically, women have been problematically caricatured as “innocent civilians” in wartime, implying passivity and feminine weakness.²⁸ In reality, and in a multitude of ways across contexts and cultures, civilian women fulfil a spectrum of roles that are far from this reductive characterization. They contribute labour (in and outside of the home), skills and leadership on which parties to armed conflict and wartime economies depend. As members of armed forces, women are more present than ever before.²⁹ As members of armed groups, they also fulfil a spectrum of roles.³⁰

Outside of the scope of women combatants, there is a range of views as to how the IHL principle of distinction relates to the discriminatory gendered notion of “innocent”³¹ civilian women. One category of views holds that because the principle of distinction understands “direct participation in hostilities” – the criterion based on which civilians lose their protection against direct attack – as restricted to a certain type of activity more commonly fulfilled by men,³² it reinforces or even produces the discriminatory stereotype of women as inherently more passive, i.e. the law “produces the subjects it ostensibly protects”.³³ These views consider that IHL’s categorization of many women’s roles as non-targetable is problematic in that it devalues women’s work, contributes to the maintenance of their invisibility in some contexts and perpetuates discriminatory presumptions about the role of women in society.

This issue of how gender is embedded in IHL’s conception of a civilian, discriminatory assumptions about the secondary importance of women therein, and how best to overcome gender discrimination in armed conflict, are interlinked issues with many different solutions, all of which have a role to play in advancing gender equality. The starting point is to acknowledge that gendered views regarding the role of women and men in armed conflict, and related views on gender and sexuality, informed the drafting history of the Geneva Conventions.³⁴ Then, when identifying solutions to gendered assumptions and discrimination against women

28 For a history and analysis of how sex and sex difference were constructed and, in turn, informed the distinctions between combatant and civilian in the Geneva Conventions of 1949 and their Additional Protocols of 1977, see: H. Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian*, Cornell University Press, Ithaca, 2011, pp. 6–16, and Chapters 5 and 6.

29 See footnote 23 above for statistics on the presence of women in armed forces. Articles 14(2) and 16 of GC III require that women members of armed forces receive equal treatment. For an overview of how the ICRC Commentary on the Third Geneva Convention addresses equal treatment for women in the armed forces, see: H. Hiemstra and V. Murphy, “GCIII Commentary: I’m a woman and a POW in a pandemic. What does the Third Geneva Convention mean for me?”, ICRC Humanitarian Law & Policy Blog, 8 December 2020: <https://blogs.icrc.org/law-and-policy/2020/12/08/gciii-commentary-woman-pow-third-geneva-convention/>.

30 For analysis of the variety and complexity of roles women hold in the context of armed groups, see, for example: Geneva Call, *Women in Armed Opposition Groups Speak on War, Protection and Obligations under International Humanitarian and Human Rights Law*, Geneva Call, Geneva, 2008, and in particular pp. 7–8 regarding roles; M. Felices-Luna, “The involvement of women in anti-establishment armed groups: deviance in the service of a citizenship enterprise”, *Champ Pénal/Penal Field*, Vol. IV, 2007; S. Parashar, “Feminist international relations and women militants: case studies from Sri Lanka and Kashmir,” *Cambridge Review of International Affairs*, Vol. 22, 2009, pp. 235–256.

31 To be clear, “innocence” is not used here as a legal requirement for the definition of civilian.

32 In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: (1) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm), (2) there must be a direct causal link between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (direct causation), and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). See: ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, p. 46.

33 This is addressed in, among others: H. Kinsella, 2011, p. 6, pp. 125–126, quote from p. 190; O. Stern, *Gender, Conflict and International Humanitarian Law: A critique of the ‘principle of distinction’*, Routledge, London, 2019, pp. 164–177.

34 For a recent analysis of the role that gender and sexuality played in the making of the Geneva Conventions of 1949, see B. van Dijk, “Gendering the Geneva Conventions”, *Human Rights Quarterly*, Vol. 44, No. 2, May 2022, pp. 286–312. See also H. Kinsella, 2011, Chapters 5 and 6.

playing a variety of roles in contemporary armed conflicts, it is important to parse apart the different forums in which this issue manifests and to tailor solutions accordingly. Recognition of the diverse and historically under-valued contribution of women in armed conflicts should take place in numerous forums, including peacebuilding negotiations, multilateral exchanges and academic research. For example, it could be discriminatory if access to disarmament, demobilization and reintegration (DDR) programmes, or involvement in peace negotiations, were denied to women associated with an armed group without a continuous combat function but nevertheless fulfilling important roles, while access was given to the primarily male members because they held a continuous combat function.³⁵ This example illustrates that the criteria of “direct participation in hostilities” should not be used automatically as a metric to determine state actions outside of targeting if it has discriminatory outcomes, including for women.

At the same time, it does not necessarily follow that advocating for the widening of the legal criteria for lawful targeting in IHL, i.e. direct participation in hostilities, is an effective and ethical way to serve the purpose of furthering gender equality. There are potentially fatal consequences for the women implicated. Thus, in the ICRC’s view, it is possible to acknowledge that gendered assumptions about the secondary importance of women’s roles in society informed the drafting of the Geneva Conventions without concluding that it is in women’s interest today to widen the category of who can be lawfully killed in war. In addition, outside of the present gender lens, the principle of distinction is subject to certain interpretations that do seek to widen the category of people or objects subject to lawful targeting. The ICRC’s legal positions on these issues have been clarified elsewhere³⁶ and generally express the view that direct participation in hostilities is a legal concept of “limited elasticity”.³⁷ In the view of the ICRC, in case of doubt as to whether a specific type of civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that such conduct does not amount to direct participation in hostilities.

C. THE PRINCIPLE OF PROPORTIONALITY

IHL prohibits attacks that may be expected to cause incidental civilian harm that would be excessive in relation to the concrete and direct military advantage anticipated.³⁸ While the existence of the principle of proportionality is uncontested and is applied daily by military commanders, the ICRC has observed in other reports that the key concepts on which this principle relies (“incidental civilian harm”, “military advantage” and “excessiveness”) would benefit from further clarification.³⁹

Further clarification of these concepts would benefit from a gender perspective, particularly because their application involves value judgements.⁴⁰ Value judgements can be gendered, and this may reduce the protection that the proportionality principle affords women and girls. More specifically, gendered considerations may determine what civilian harm is foreseeable to a given decision maker or system of decision makers,

³⁵ This is one of the negative consequences of the principle of distinction for women associated with armed groups identified in O. Stern, 2019, pp. 201–203. Regarding the potential exclusion of women from DDR programmes because of different roles they have occupied in armed groups, see also: M. Samuel, *Female Boko Haram members need tailor-made rehabilitation*, 27 January 2020: <https://issafrica.org/iss-today/female-boko-haram-members-need-tailor-made-rehabilitation>; Save the Children, *Forgotten Casualties of War: Girls in armed conflict*, Save the Children, London, 2005, pp. 19–21: <https://resourcecentre.savethechildren.net/pdf/2717.pdf/>.

³⁶ ICRC, 2009, pp. 41–64. On addressing risks of widening the categories of objects (rather than persons) that can be lawfully targeted, see also: L. Gisel, “The relevance of revenue-generating objects in relation to the notion of military objective”, in ICRC/College of Europe, *The Additional Protocols at 40: Achievements and Challenges, Proceedings of the 18th Bruges Colloquium, 19–20 October 2017*, Collegium, No. 48, Autumn 2018, pp. 139–150.

³⁷ *Idem*, p. 42.

³⁸ Art. 51(5)(b) of AP I, Rule 14 of the ICRC Customary IHL Study.

³⁹ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC, Geneva, 2019, p. 16; see notably: ICRC, *International expert meeting report: The principle of proportionality in the rules governing the conduct of hostilities under international humanitarian law*, 2018. The ICRC has also taken part in processes involving experts and organized by other institutions, including the International Law Association Study Group and Chatham House.

⁴⁰ For a more detailed discussion regarding the role of value judgements in proportionality assessments, see: ICRC, *International expert meeting report: The principle of proportionality in the rules governing the conduct of hostilities under international humanitarian law*, 2018, p. 52.

and what is assessed to be excessive.⁴¹ This section therefore applies a gender perspective to the concept of reasonably foreseeable harm and the concept of excessiveness.

Reasonably foreseeable harm. In the ICRC's view, proportionality assessments must consider incidental civilian harm that is foreseeable – for example, the spread of disease due to incidental damage to municipal sewage systems in an attack. Due to the “invisibility barrier” referred to earlier, in addition to other factors, the harm to women and girls that results from an attack may often be obscured; thus though it is foreseeable in general that gender inequality exists in the contexts in which hostilities take place, a more specific gender data gap exists on the impacts of attacks in armed conflict on women and girls.⁴² There is therefore room to improve the foreseeability of such harm for military decision-makers.

What is reasonably foreseeable varies depending on the circumstances of the attack and the target, but patterns of incidental civilian harm can be foreseen based on past experience.⁴³ What is foreseeable will be informed and evolve in particular through: analysis of the effects of past attacks, including for example through the collection of sex- and age-disaggregated civilian casualty data; studies on the effects of conflicts; better modelling of weapons' effects; better understanding of the infrastructural set-up and interdependency between services; and new technologies to better assess the condition or status of infrastructure and service delivery during the conflict. In this vein, “foreseeability” could evolve through more research and publications on gendered impacts of attacks, including regarding how systemic inequality influences the harm hostilities cause to women and girls.

However, the general knowledge that attacks are likely to exacerbate existing gender inequalities is not the same as having granular, operationally specific information that parties to conflict can process in real time.⁴⁴ Improving the general evidence base to discern patterns on gendered impacts of attacks should therefore go hand in hand with context-specific gender analysis conducted as part of military planning prior to attacks. The example of a path used daily by women to collect food and water has been used to illustrate this point: a context-specific gender analysis could reveal that the loss of access to the path if it is destroyed by military operations could lead to collection routes through different or longer terrain and corresponding rises in violence against women.⁴⁵ The incidences of sexual and gender-based violence (SGBV) against women and longer or more exposed water, firewood or other collection routes is a pattern that is documented in different contexts.⁴⁶ This indirect civilian harm could then be factored into the proportionality assessment.

⁴¹ Though it was not raised in the expert discussions, Gardam among others has critiqued the principle of military necessity from a gender perspective; see: J. Gardam, “A Feminist Analysis of Certain Aspects of International Humanitarian Law”, *Australian Year Book of International Law*, Vol. 12, 1992, pp. 266–278, at pp. 276–278.

⁴² For more on the gender data gaps related to conflict, see: Data2x, 2020.

⁴³ This and other related ICRC views in the context of urban warfare are set out in: ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2019, p. 18.

⁴⁴ Military manuals often underline that most applications of the principle of proportionality are not so simple and while it is easy to formulate the principle in general terms it is far more difficult to apply to a particular set of circumstances; see: ICRC, *International expert meeting report: The principle of proportionality in the rules governing the conduct of hostilities under international humanitarian law*, 2018, p. 54.

⁴⁵ This example is from the Royal Australian Air Force doctrine note on gender in air operations, which also suggests an analysis of “sex-disaggregated data to identify the second and third-order impacts on communities that result from targeting”; see: J.M. Prescott, “Moving from Gender Analysis to Risk Analysis of Failing to Consider Gender”, *The RUSI Journal*, Vol. 165, No. 5, November 2020. This example is repeated here, with the acknowledgement that there are a number of variables involved in this outcome of increased violence against women. Acknowledging that the context-specific evidence base for the likely risk of increased violence against women is unlikely to be of the quality desired when targeting decisions are made, this example nevertheless illustrates the kind of pattern of gendered harm that may guide and inform the military operational planning and targeting processes.

⁴⁶ M. Sommer et al., “Violence, gender and WASH: spurring action on a complex, under-documented and sensitive topic”, *Environment and Urbanization*, Vol. 27, No. 1, 2015, pp. 105–116. The ICRC has also observed the incidence of SGBV around firewood collection or farming routes in certain contexts; see: ICRC, *Male Perceptions of Sexual Violence in South Sudan and the Central African Republic*, ICRC, Geneva, 2022, p. 22.

In other words, a gendered effect on women and girls arising from an attack on a piece of infrastructure important to their physical and food security could be captured by a context-specific gender analysis, in order to ultimately influence the personnel making specific targeting decisions in pre-planned attacks. For other attacks (such as attacks that are dynamic, or part of close air support or fire support), some form of gender analysis could be incorporated into pre-mission briefs for forward observers or air controllers, for example in briefs received prior to deployment to an area of operations or prior to specific mission sets.

Excessiveness. The concept of excessiveness could be influenced by the application of a gender perspective, or lack thereof, in three ways. First, the decision maker may omit certain civilian harm from the harm that is reasonably “foreseeable”, such that the incidental civilian harm against which military advantage is weighed is diminished. Second, even if certain civilian harm is foreseeable to a given decision maker, gendered bias might mean they assign different value to it. For example, a particular hospital might be the only hospital with gynaecology and obstetrics services (in addition to other health-care services), such that damage to it would spike mortality particularly among women and girls. If the gynaecology and obstetrics services are known but not considered valuable by the decision maker, this could lead to a determination that an attack that damages the hospital is not excessive.

Third, a question can be posed as to the legal consequence of incidental civilian harm disproportionately affecting women and girls. If the foreseeable civilian harm affects women and girls more than men and boys, does that tilt the calculation towards an attack being disproportionate overall, on the basis that it is discriminatory and could potentially exacerbate existing inequality? On this issue, one view has been put forward as a matter of *de lege ferenda* that if the effects of an attack harm women and girls more than men and boys, this is a form of indirect discrimination, which could render the attack unlawful if the proportionality requirement is assessed together with IHL’s non-discrimination requirements. The more common view is that women and girls being harmed more than men and boys does not lead to an unlawfully disproportionate effect on civilians overall. The scope of IHL’s non-discrimination obligations is subject to ongoing examination in scholarship.⁴⁷

D. THE PRINCIPLE OF PRECAUTIONS

Precautions in attack. IHL requires parties to conflict to take a range of precautions in attack and against the effects of attack to protect civilians and civilian objects. With regard to precautions in attack, all feasible precautions must be taken to avoid or at least minimize incidental civilian harm.⁴⁸ Feasible precautions are those that are possible in practice, taking into account all of the circumstances ruling at the time, including humanitarian and military considerations.

The ability to take precautions to minimize injury to civilians relies on the military practitioner’s understanding of the kind of harm that might result from an attack. It is accordingly crucial that information collected when planning an operation includes assessment of the incidental civilian harm, including the indirect or “reverberating” effects, that may be expected. Practices such as assessing patterns of civilian life – which vary across age, gender and culture – among other practices may help to accurately assess civilian presence. In this regard, gender analysis can be a useful concrete technique or procedure to improve the precautionary measures taken to minimize civilian harm among women and girls. If commanders understand how different groups – including women and girls – use the space and therefore will be differentially affected by an attack, precautions to reduce this harm will be more possible in practice.

⁴⁷ See, for example: G. Dvaladze, *Equality and non-discrimination in armed conflict*, thesis, University of Geneva, 2021, Part I, Section 2.3.1.2, pp. 64–75; Part II, Section 2, pp. 265–308: <https://archive-ouverte.unige.ch/unige:158584>. See also a consideration of non-discrimination in the application of the principle of distinction in: A.F. Jiménez, “Embedding Gender in International Humanitarian Law: Is Artificial Intelligence Up to the Task?”, Just Security, 27 August 2021: www.justsecurity.org/77970/embedding-gender-in-international-humanitarian-law-is-artificial-intelligence-up-to-the-task/.

⁴⁸ Art. 57(2) of AP I, Rule 15 of the ICRC Customary IHL Study.

Such a gender analysis may have implications for warnings in attack. IHL requires that, unless circumstances do not permit, effective advance warning must be given of attacks that may affect the civilian population.⁴⁹ The effectiveness of a warning should be assessed from the perspective of the civilian population that may be affected, including women and girls. It should reach and be understood by as many civilians as possible among those who may be affected by the attack, and it should give them time to leave, find shelter or take other measures to protect themselves. In this respect, the issue of the gendered digital divide⁵⁰ and lower literacy rates among women and girls underscores that, in certain contexts, women and girls may be disadvantaged if warnings are issued only through digital means and/or written information.⁵¹ In such contexts, this kind of warning is likely to be less effective for many women and girls. Implementing effective warnings might therefore require the presentation of accessible information in a variety of formats that would, taken together, help overcome the limited access women and girls have to digital communication and comparatively lower literacy rates: for example, through the use of a combination of radio messages and leaflets with image-based (instead of solely written text) warnings. Another issue may be that, in a given context, women and girls spend considerably less time than men and boys outside the home. In such a context, effective warnings that reach persons at home could include media broadcasts and phone calls.

Constant care. The obligation of constant care is particularly germane to the discussion on mitigating gendered civilian harm. This general obligation supplements the basic rule of distinction and requires that, in the conduct of military operations, constant care shall be taken to spare the civilian population, individual civilians and civilian objects.⁵² It applies to the entire range of military operations and not only to attacks within the meaning of IHL. The term “military operations” encompasses “any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat” or “related to hostilities”.⁵³ It includes, for example, troop movements, the establishment of military bases, defensive operations or search operations.

The obligation of constant care is an obligation of conduct, to mitigate risk and prevent harm. It applies constantly in the planning or execution of any military operation.⁵⁴ As a general rule, the higher the risk for the civilian population in any given military operation, the more will be required in terms of care.⁵⁵ The requirement to take constant care extends to every aspect of military operational training, planning and mission

⁴⁹ Art. 57(2)(c) of AP I, Rule 20 of the ICRC Customary IHL Study.

⁵⁰ The Overseas Development Institute (ODI) reports that a digital divide is present along gender lines in many humanitarian contexts, with differing rates of access to and use of various technologies; see: B. Willitts-King, J. Bryant and K. Holloway, *The humanitarian ‘digital divide’*, ODI, London, 2019, p. 20.

⁵¹ For example, Plan International reported in 2019 that in every crisis-affected country with available household survey data on youth literacy rates, boys had higher youth literacy rates than girls. The inequality was reportedly starkest in Afghanistan, where the female youth literacy rate was 29 per cent, compared to the male youth literacy rate of 80 per cent; see: Plan International UK, *Left Out, Left Behind: Adolescent girls’ secondary education in crises*, Plan International UK, London, 2019, p. 35: <https://plan-uk.org/file/plan-uk-left-out-left-behind-reportpdf/download?token=kSIq8iq1>.

⁵² Art. 57(1) of AP I, Rule 15 of the ICRC Customary IHL Study.

⁵³ Y. Sandoz, Ch. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, p. 680, para. 2191; United Kingdom Ministry of Defence (MOD), *The Joint Service Manual of the Law of Armed Conflict*, Joint Doctrine and Concepts Centre, London, 2004, para. 5.32, fn. 187; M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, Boston/The Hague, 1982, pp. 325–326, para. 2.2.3, and p. 408, para. 2.8.2; International Law Association (ILA) Study Group on the Conduct of Hostilities in the 21st Century, “The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare”, *International Law Studies*, Vol. 93, No. 322, 2017, p. 380.

⁵⁴ M.N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., prepared by the International Group of Experts at the invitation of the NATO Cooperative Cyber Defence Centre of Excellence, Cambridge University Press, Cambridge, 2017, p. 477, para. 5.

⁵⁵ ILA Study Group on the Conduct of Hostilities in the 21st Century, 2017, p. 381.

execution, and is interpreted by some as demanding that soldiers be trained and directed to instinctively endeavour to mitigate civilian risk in all situations.⁵⁶

Take, for example, armed forces seeking to establish physical presence as a deterrent to enemy advances. To do this, troops might move into narrow village roads or paths leading to a marketplace or water collection points. In a given context, this might lead women to avoid roads where troops are present, therefore exposing them to risks arising from weapon contamination such as mines, or sexual violence, on less frequented routes. If it is reasonably foreseeable that women in the community will experience an increase in injury (in this example, from weapon contamination or sexual violence) as a result of this troop activity, steps must be taken to mitigate this risk and prevent harm as much as possible.

In sum, the application of a gender lens to the collection of information during such operational planning could include: whether troop location, including at checkpoints and through patrols, exposes women to new risks including but not limited to sexual exploitation, abuse and violence,⁵⁷ whether certain medical services are more accessible or important to women than others (e.g. some may not have women staff, availability of gynaecology and obstetrics services),⁵⁸ whether patterns of life around markets/shopping hubs, water collection points, schools and other civilian objects vary by gender,⁵⁹ whether women have less access to vehicles in situations where civilians are expected to flee (for example, if many women in a context cannot drive), whether women and girls have lower literacy rates or access to digital technology, or are typically less present outside the home in contexts where advanced warnings will be issued, and whether implications arise from the fact that women and girls are likely to have more care responsibilities for children, the sick or older persons in situations where civilians are expected to flee.

To have impact, the process of integrating these kind of gender perspectives into the planning of an operation needs to have two basic steps: the gender analysis of the civilian environment, followed by integration of the assessment into planning and training in a way that makes resultant precautions actionable in high-pressure combat environments.

⁵⁶ ICRC, *Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas*, ICRC, Geneva, 2022, p. 102. This is supported by: ILA Study Group on the Conduct of Hostilities in the 21st Century, 2017, p. 381; Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, Cambridge, 2013, p. 142, para. 2; G. Corn and J.A. Schoettler Jr, “Targeting and civilian risk mitigation: The essential role of precautionary measures”, *Military Law Review*, Vol. 223, No. 4, 2015, pp. 794 and 800.

⁵⁷ For a related example of how a gender analysis in Kosovo identified that roadblocks were affecting men, women, boys and girls differently, see: Nordic Centre for Gender in Military Operations (NCGM), *Whose Security? Practical Examples of Gender Perspectives in Military Operations*, NCGM, Stockholm, 2015, pp. 16–17: <https://www.forsvarsmakten.se/siteassets/english/swedint/engelska/swedint/nordic-centre-for-gender-in-military-operations/whose-security-2015-low-resolution.pdf>.

⁵⁸ In this respect, the United Kingdom MOD states in its operational policy on human security that access to health care must take into account gender-specific services; see: United Kingdom MOD, *Joint Service Publication 985: Human Security in Defence*, MOD, London, December 2021, p. 5: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040257/20211209_JSP_985_Vol_1.pdf. See also the practice of the International Security Assistance Force (ISAF) in: NCGM, 2015, pp. 18–19.

⁵⁹ For instance, applying a gender lens to operational planning in Afghanistan showed that a certain bazaar was women-only, which led to a change in troop movements; see: NCGM, 2015, p. 15; pp. 32–33.

E. EXISTING GOOD PRACTICE AND ORIENTATIONS FOR FUTURE WORK

While gender remains a fringe and fraught issue for many militaries, progress is being made and there are pockets of good practice on the integration of gender perspectives into military operations. Examples include the incorporation of gender advisers in positions of influence,⁶⁰ gender coaching for military leaders⁶¹ and structural approaches aimed at holistic, gender-responsive organizational change that go beyond increasing the number of women in the ranks. Guidance for militaries, such as from Geneva Centre for Security Sector and Governance (DCAF) and the Nordic Centre for Gender in Military Operations (NCGM), provides instructive resources.⁶²

More generally, if IHL obligations governing the protection of civilians in the conduct of hostilities are to be translated into practice in a manner that takes account of gendered inequalities, then knowledge, skills and tools are required to integrate gender analysis into military operations. There is considerable room for development at the level of both theory and practice.

Theory. At the level of theory, three topics are prime for further research and guidance from a gender perspective. First, empirical research on whether and how the reasonableness standard attached to the legal concept of the “reasonable military commander” in the interpretation of IHL obligations of precautions and proportionality introduces gendered assumptions when applied in practice would be fruitful, with possible implications for militaries, fact-finding inquiries and courts. Second, further research and guidance regarding how gender analysis could be used as a tool to ensure respect for the principle of precautions, including in the application of the constant care obligation, would be particularly useful in order to more compellingly make the case for changes in armed force practice.

Third, and beyond the legal perspective, militaries typically do not have an overarching theory of the operational relevance of gender. It has been argued that the case has yet to be convincingly made that failing to consider the gendered impact of a military operation can be a risk to mission success.⁶³ A gender analysis is more likely to take place if it is framed as critical to mission success. Thus, either in complement to, or separate from, integrating gender analysis in civilian harm assessments, approaching the issue through the prism of risk to the operation may be a way to “make the case” more convincingly for militaries. Proponents of this view consider that this framing would improve the likelihood of impacting the decision-making of commanders.

Practice. At the level of practice, gender analysis should be understood as a tool to assess context-specific gendered impacts in the planning of military operations. Pragmatism is key, as progress is contingent on grappling with the high-stress situations in which decisions regarding the conduct of hostilities are made. At times, commanders and personnel are acting in situations of high stress and limited time. In other cases, pre-planned attacks are executed at a slower tempo and there is more time for greater deliberation. What is practically possible for pre-planned attacks might not be possible for dynamic attacks, close air support or fire support, and it is impractical to suggest that a gender analysis can take place in these moments. Instead, the integration of a gender analysis into military planning in advance will increase the likelihood that

60 Experts referred to the inclusion of gender advisers in United Nations peacekeeping operations, North Atlantic Treaty Organization (NATO) operations, African Union military operations and the national armed forces of certain states.

61 See, e.g.: A. Björsson and L. Olsson, *Gender Training for Leaders: The Swedish Gender Coach Program*, Georgetown Institute for Women, Peace and Security, Washington, DC, 2017: <https://giwps.georgetown.edu/wp-content/uploads/2017/10/The-Swedish-Gender-Coach-Program.pdf>.

62 See notably: M. Bastick, *Integrating a Gender Perspective into Internal Oversight within Armed Forces*, DCAF, Organization for Security and Co-operation in Europe (OSCE), OSCE/Office for Democratic Institutions and Human Rights (ODIHR), Geneva, 2014: www.dcaf.ch/integrating-gender-perspective-internal-oversight-within-armed-forces; NCGM, *Gender Perspectives in Military Operations: Soldier Cards*, NCGM, Stockholm, 2016: www.forsvarsmakten.se/siteassets/english/swedint/engelska/swedint/nordic-centre-for-gender-in-military-operations/soldiers-card-2016-10-01.pdf; NCGM, 2015.

63 J.M. Prescott, 2020.

personnel will actually make decisions that take account of context-specific risks to different women, men, girls and boys foreseeably arising from an attack. This could inform pre-planned attacks, as well as potential dynamic targeting situations if some elements of a gender analysis are integrated into pre-mission briefs. In sum, when considering gender analysis as a tool relevant for the application of obligations related to the conduct of hostilities, the focus should be on improving upstream planning.

The form of potential practical guidance on gender analysis thus needs to be fit for parties to armed conflict to realistically use in practice. The target audience for such tools includes parties to armed conflict of varied capacities, conceivably including resource-poor non-state armed groups (NSAGs), who often lack the technical capacity and/or interest to integrate a formal gender analysis into the planning of attacks.

Accordingly, a good starting point towards incremental progress could be a simple, practical tool such as a checklist that sets out the kinds of questions that personnel should ask when assessing civilian harm. Including questions such as “How do women, men, girls and boys of different ages and abilities use this space differently?” – or, for forces with developed data collection capabilities, “What are the sex-, age- and disability-disaggregated data of the civilian use of a given objective” – in existing guidance for parties to armed conflict could help mainstream gender perspectives into analyses and decision-making. In addition, the monitoring, tracking and reporting of civilian casualties, including through the collection of disaggregated civilian casualty data, is an important measure through which parties to conflict can better understand patterns of harm, learn how to minimize gendered civilian harm in future operations and adapt future behaviour accordingly.

KEY TAKEAWAYS

- Gender inequalities in contexts where the conduct of hostilities takes place are a factor that influences civilian harm. Further research on this influence would help increase the likelihood that parties to armed conflict will act to mitigate such harm as they apply relevant IHL. The ICRC would thus welcome further research to discern patterns of gendered harm that occur as a result of hostilities in different contexts.
- Gender biases can affect how the principles of distinction, proportionality and precautions are applied. Training for armed force personnel with decision-making responsibilities should consider whether this is an issue and how it would best be addressed.
- Parties to armed conflict should integrate a gender analysis, as a practitioner’s tool, into the planning of military operations when feasible, including for the purpose of reducing unseen civilian harm.
- Knowledge, skills and practical tools are required to integrate gender analysis into the planning of military operations. Good practices in this respect include:
 - the appointment of gender advisers in positions of influence in military operations
 - the integration of questions into assessments of civilian harm during the planning of military operations, such as “How do women, men, girls and boys of different ages and abilities use, need or rely on this place or space differently?” and “How does the value of the civilian object differ for women, men, boys and girls?”
 - the monitoring, tracking and reporting of age- and sex-disaggregated civilian casualty data, and the use of these data to inform future assessments of reasonably foreseeable harm.

North Kivu, Goma. Women parade through the town for the International Women's Day.



2. GENDERED IMPACTS OF ARMED CONFLICT: EXPLORING IMPLICATIONS FOR IHL GOVERNING SITUATIONS OF OCCUPATION

This chapter examines potential implications of gendered impacts of situations of occupation for the application of certain IHL provisions. It highlights cross-cutting issues before setting out gender perspectives on rules on family rights and non-discrimination in the Fourth Geneva Convention. It then addresses the issue of how an occupying power's authority can or must be lawfully used to address gendered harm that women and girls experience in occupation while respecting the limits on transformative occupation.

A. CROSS-CUTTING ISSUES

Three cross-cutting issues inform this examination of the implications of gendered impacts of situations of occupation for applicable IHL provisions.

Interpretations of IHL governing situations of occupation have at times inadequately addressed gendered harm, but can be updated to do so. Certain provisions of IHL governing situations of occupation are articulated in terms that do not meet today's standards on gender-based discrimination. For example, the prohibition of sexual violence in Article 27(2) of the Fourth Geneva Convention is construed as an attack on a woman's honour, instead of as violence against women's physical and psychological integrity. Aspects of the ICRC's original 1960s commentaries to the Geneva Conventions contain discriminatory interpretations in the same vein.⁶⁴ But more holistically, scholarship on IHL governing occupation has tended either to be silent on women and girls' experiences, or to address gender issues in a brief, piecemeal manner. The gendered impact of the totality of the system of legal governance in occupation is seldom considered, including the impact of what is arguably omitted from IHL's scope.⁶⁵

Thus, interpretations of IHL governing situations of occupation have hitherto inadequately addressed gendered harm and require updating. Beyond this, there is debate around the extent of IHL's silence on gendered harms in occupation and the degree to which updated interpretations could take account of women's rights and needs in occupation. In other words, there are a range of views as to whether and how provisions of IHL can be interpreted to be "fit for purpose" for women and girls living in situations of occupation.

Among other issues, the centrality of property to IHL governing occupation has been highlighted as a telling example of how women's experience of occupation in IHL is eclipsed.⁶⁶ IHL rules governing occupation expressly affirm and defend private property, notably Articles 46, 53 and 55 of the Hague Regulations of 1907 (THR). Property and land are historically owned by men.⁶⁷ The specificity of IHL rules regarding public and private public property stand in juxtaposition to the comparative silence on women's and girls' rights in

64 For example, the statement in the 1960 Commentary that the "regard" that was due to women in Article 14(2) of GC III must take into account three considerations: their "weakness", "honour and modesty", and "pregnancy and childbirth". It also referred to women as "the weaker sex"; see: J. Pictet, *Commentary on the Third Geneva Convention*, ICRC, Geneva, 1960, pp. 146–147.

65 With exceptions, including: F. Ní Aoláin, 2020, pp. 335–376; F. Ní Aoláin, "Gendering the Law of Occupation: The Case of Cyprus", *Minnesota Journal of International Law*, Vol. 27, 2018, p. 107–141; S.A. Longworth, "The Law of Occupation and Gender", in C. Tengroth and K. Lindvall, *IHL and Gender: Swedish Experiences*, Swedish Red Cross and Swedish Ministry for Foreign Affairs, Stockholm, 2015.

66 F. Ní Aoláin, 2020, p. 344.

67 UN Human Rights Office of the High Commissioner (UN OHCHR) and UN Women report that less than 13 per cent of agricultural landholders are women worldwide, and women and men have equal rights to own, use and control land in law and practice in only 29 per cent of 164 countries studied; see: UN OHCHR and UN Women, *Realizing Women's Rights to Land and Other Productive Resources*, 2nd ed., UN OHCHR and UN Women, New York and Geneva, 2020, p. 11: <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Realizing-womens-rights-to-land-and-other-productive-resources-2nd-edition-en.pdf>.

occupied territory, and it has correspondingly been observed that this is an indicative example of “patriarchal standard-bearing” characterizing what IHL considers worthy of protection.

Prolonged occupations pose specific risks to women’s rights. The norms of occupation law, in particular Article 43 of THR and Article 64 of the Fourth Geneva Convention, were originally designed to regulate short-term occupations.⁶⁸ Prolonged occupations thus place IHL under strain insofar as they call into question some of the underlying principles of occupation law, in particular the provisional character of occupation and the necessity of preserving the status quo ante. Indeed, many challenging gendered issues arise specifically from prolonged occupations. When the *status quo ante* is discriminatory towards women, occupation might add an additional layer of legal authority that hinders advancement of women’s rights, upholding a “freeze” on progress for the duration of occupation. Occupations can therefore inflict compounded harm on women, who experience both violations of occupation law and a deceleration of progress on women’s rights. The new legal limits on reform decelerate progress through both the introduction of new substantive legal hurdles⁶⁹ and new fodder for any factions opposing progress on women’s rights.

Gendered assumptions shaping notions of the “military commander”, the “public” and the “population” should be surfaced and challenged. Rules of IHL governing situations of occupation set out permissible measures that the military commander of the occupying power interprets to decide lawful actions. For example, Article 27(4) of the Fourth Geneva Convention refers to permissible “measures of control and security”, Article 64(2) permits certain security provisions and Article 43 of THR requires respect for laws of the occupied territory “unless absolutely prevented”. The exercise of the commander’s prerogatives under these rules, and assessments of the lawfulness or unlawfulness of this decision-making, would benefit from a gender lens. Typically, commanders in contemporary militaries are men, and – among other factors such as training and the formal and informal normative framework – this may influence the likelihood of whether they will integrate, or will be expected to integrate, impacts on women and girls into their decision-making.⁷⁰

Similarly, it is worth underscoring that women and girls represent half of the “public” referred to in Article 43 of THR, and of the “population” whose welfare an occupying power should be guided by in the administration of the territory.⁷¹ The significance of using a gender perspective to assess what measures can legally be undertaken for the welfare of the population is therefore far from a “nice to have”. Rather, it is necessary to take account of half of the population. Unlike other language in the Geneva Conventions, these formulations are not per se problematic, but attention is needed to ensure they are not interpreted in a biased manner that diminishes the welfare of women and girls.

68 This is not to say that they cannot be interpreted to take account of the needs of the civilian population, including women and girls, in longer occupations. This is addressed in Section C below.

69 Legal reforms introduced by the occupying power must comply with IHL, and most notably with Article 43 of THR and Article 64 of GC IV.

70 See footnote 23 and footnote 24 above regarding the representation of women in militaries and the impact of women on decision-making, respectively.

71 Regarding the welfare of the local population as the main principle guiding the measures and policies undertaken by the occupying power in the administration of the occupied territory, see ICRC, *Expert Meeting: Occupation and other forms of administration of foreign territory*, ICRC, Geneva, 2012, p. 72.

B. FAMILY RIGHTS AND NON-DISCRIMINATION IN ARTICLE 27 OF THE FOURTH GENEVA CONVENTION

Article 27 of the Fourth Convention is a key provision regulating the protection of civilians in conflict, including in situations of occupation. Cognizant that the wording of Article 27(2) regarding violence against women has been well-critiqued elsewhere,⁷² and notwithstanding that other elements of Article 27 are ripe for gender analysis, this section focuses on gendered implications of the obligation under Article 27 to respect “family rights” and its prohibition of discrimination.

Family rights. Article 27(1) provides that protected persons are in all circumstances entitled “to respect for their person, their honour, their family rights, their religious convictions and practices, and their manners and customs”. Article 46 of THR similarly provides that “family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected”. There is a risk that the notion of “family honour” in the latter could be elided with family members’ compliance with societal gender norms, especially those concerning reproduction and women’s sexuality. Legal interpretations of Article 46 of THR should avoid perpetuating such discriminatory interpretations. Family life is also a traditional site of gendered divisions of labour and power; the preamble of the Convention on the Elimination of Discrimination against Women (CEDAW) specifically states that “a change in the traditional role of men as well as the role of women ... in the family is needed to achieve full equality of men and women”. As such, a consideration to take into account when interpreting the obligation to respect “family rights” is to avoid calcifying discriminatory practices and to take account of women as family members with equal rights. Implications may include, for example, the complementary application of Article 16 of CEDAW, which requires states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. This may raise issues related to transformative occupation, as addressed further below.

Non-discrimination. Article 27(3) sets out the prohibition of discrimination under the Fourth Geneva Convention.⁷³ Even though Article 27(3) does not expressly mention “sex” or “gender” among the prohibited grounds for discrimination, the phrase “in particular” confirms that the list is not exhaustive, and the ensuing development of customary law makes it clear that adverse distinction in the application of IHL based on sex or gender is now prohibited too.⁷⁴ This article is one of several places in which the Geneva Conventions and their Additional Protocols address equal treatment and non-discrimination, by attaching the prohibition of adverse distinction to specific humanitarian obligations relating to the treatment of persons protected under these provisions. It entails that, to achieve equal treatment of protected persons in occupied territory, non-adverse distinctions – i.e. distinctions that are justified by the substantively different situations and needs of protected persons – are allowed and may even be required under humanitarian law in certain circumstances. In the context of international human rights law (IHRL), this is commonly referred to as substantive rather than formal equality. There are a range of views as to the extent to which this provision can be implemented to take account of the gendered harm women and girls experience as a result of occupation both with respect to this IHL provision as such, and with respect to its interplay with applicable non-discrimination obligations under IHRL.

Regarding the IHL provision as such, the prohibition of discrimination in Article 27, in addition to being applicable in situations of occupation in its own right, forms part of the context to inform the interpretation of

⁷² Article 27(2) states that “[w]omen shall be especially protected against any attack on their honour”. For critique, see notably: J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law*, Kluwer Law International, The Hague, 2001, p. 97; K. Bennoune, “Do We Need New International Law to Protect Women in Armed Conflict?”, *Case Western Reserve Journal of International Law*, Vol. 38, No. 363, 2007, pp. 378–379; V. Oosterveld, “Feminist Debates on Civilian Women and International Humanitarian Law”, *Windsor Yearbook of Access to Justice*, Vol. 27, No. 2, 2009, pp. 392–393; H. Kinsella, “Gender and International Humanitarian Law”, in J. Steans and D. Tepe-Belfrage (eds), *Handbook on Gender in World Politics*, Edward Elgar Publishing, Oxford, 2016, pp. 171–177; C. O’Rourke, *Women’s Rights in Armed Conflict under International Law*, Cambridge University Press, Cambridge, 2020, p. 60; F. Ní Aoláin, 2020, pp. 345–347.

⁷³ Article 27(3) provides that “without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion”.

⁷⁴ See: K. Mačák, “The Role of International Human Rights Law in the Interpretation of the Fourth Geneva Convention,” *Israel Yearbook on Human Rights*, Vol. 52, 2022 (forthcoming); see also: Rule 88 of the ICRC Customary IHL Study.

the other rules on occupation under the Fourth Geneva Convention.⁷⁵ This supports the interpretation that the measures taken by an occupying power under Articles 27(4) and 64(2) must not be discriminatory. It clarifies that the welfare of the local population – as the main principle guiding the measures and policies undertaken by the occupying power in the administration of the occupied territory – includes respect for non-discrimination.

Regarding the interplay between the prohibition of discrimination in Article 27(3) and applicable IHRL, it is widely recognized that human rights law provisions applicable in armed conflict complement the protection afforded by IHL. When both IHL and human rights law regulate a particular issue, a comparison between their provisions may reveal certain differences. In such cases, it is necessary to determine whether the difference amounts to an actual conflict between the norms in question. If there is no conflict, the ICRC seeks to interpret the different norms with a view to harmonization.⁷⁶ Accordingly, the non-discrimination obligations contained notably in CEDAW – but also importantly in the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of Persons with Disabilities, and other instruments – apply to their states parties in occupied territory in complement to the prohibition of discrimination in Article 27(3).⁷⁷ Generally, the ICRC seeks to interpret the obligations of substantive equality within IHL and IHRL with a view to harmonization, absent a norm conflict.⁷⁸ On this point, a potential norm conflict arises between IHL's limitation of transformative occupation and the occupying power's obligation to respect protected persons' manners and customs in Article 27(1) of the Fourth Geneva Convention on the one hand, and the non-discrimination obligations on the other.

C. NAVIGATING TENSIONS BETWEEN GENDERED HARM AND THE LIMITS ON TRANSFORMATIVE OCCUPATION

Occupation law authorizes the occupying power to repeal, suspend or enact laws under the existing domestic legal system according to certain criteria. However, the relevant rules and principles of the law of occupation place limits on the permissible transformations of the occupied territory. The ICRC understands transformative occupation to be an operation the main objective of which is to overhaul the institutional and political structures of the occupied territory, often to make them accord with the occupying power's own preferences, entailing an important purposive component.⁷⁹ There is no legal basis and no justification under IHL for transformative occupation as just defined.

The key provisions of occupation law that govern the occupying power's authority to repeal, suspend or enact laws are Article 43 of THR⁸⁰ and Article 64 of the Fourth Geneva Convention.⁸¹ The question this section

⁷⁵ Pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties, in order to determine the ordinary meaning to be given to the terms of a treaty, those terms have to be placed “in their context”, which includes the text of the treaty.

⁷⁶ ICRC, *Commentary on the Third Geneva Convention*, ICRC, Geneva, 2020, para. 103.

⁷⁷ Regarding the IHRL treaties to which the occupying power is a party, the views of a few important dissenters notwithstanding, it is widely accepted that human rights law applies extraterritorially based, *inter alia*, on decisions by regional and international courts. The precise extent of such application is yet to be determined. Human rights bodies generally admit the extraterritorial application of human rights law when a state exercises control over a territory (e.g. occupation) or a person (e.g. detention). An analysis of the effect of any IHRL treaty obligations of the state whose territory is occupied on the duties or discretion of the occupying power, and resultant complexities if the two states do not have identical IHRL obligations, would also be merited. Regarding the different sources of the human rights obligations of the occupying power, see: N. Lubell, “Human rights obligations in military occupation”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012, pp. 334–337; ICRC, 2012, p. 62.

⁷⁸ See, for example, the interpretation of IHL and interplay with the Convention on the Rights of Persons with Disabilities in: ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2019, pp. 41–43.

⁷⁹ For further discussion of the notion of transformative occupation, see: ICRC, 2012, pp. 67–71.

⁸⁰ Article 43 of THR provides that “the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”.

⁸¹ Article 64(2) of GC IV provides that the occupying power may “subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them”. See also Article 64(1).

examines is as follows: how can – and how must – this authority be lawfully used to address gendered harm that women and girls experience in occupation while respecting the limits on transformative occupation? Examples of such harm linked to the *status quo* ante include the continuation of female genital mutilation (FGM) practices or the continuation of discriminatory laws regulating civil family matters such as marriage and divorce. Examples of such harm arising specifically due to the occupation include new economic and social drivers facilitating increases in sex trafficking, and a freeze on the progress of women’s rights, facilitating a continuation of discriminatory practices. For ease of reference, the term “gendered harm” is used in this section to refer to these different forms of gender-based discrimination and violence.

Before proceeding, this question should be put in perspective with the caveat that it rests on the assumption that an occupying power supports women’s rights. In reality, occupying powers may, on the contrary, seek to repress women’s rights in the occupied territory, potentially alongside other human rights such as those of persons of diverse sexual orientation and gender identity. Or when occupations are undesired by the local population, an expectation of the occupying power to promote women’s rights might be perceived as an instrumentalization of those norms to justify the occupation itself. An occupied population could reasonably view such measures as colonial or neo-colonial, or more generally may consider it undesirable that standards are introduced by an authority perceived primarily as a source of military violence.⁸²

With this caution in mind, the subsequent section analyses the question of when and how an occupying power may or must use its authority under Article 43 of THR and Article 64 of the Fourth Geneva Convention to address gendered harm that women and girls experience in occupation.

i. Article 43 of the Hague Regulations of 1907 and Article 64(2) of the Fourth Geneva Convention as key provisions for assessing the scope of an occupying power’s rights and duties

Article 43 of THR and Article 64 of the Fourth Geneva Convention are key provisions delimiting the rights and duties of an occupying power.⁸³ Article 43 of THR sets out the occupying power’s positive obligation to restore and maintain public order and safety in the occupied territory as far as possible, while respecting, unless absolutely prevented, the laws in force in the country. This obligation relates to a public roughly half of whom are women and girls, whose personal welfare and safety are accordingly an important component of “public order and safety.” In addition, Article 64 of the Fourth Geneva Convention provides the occupying power with the right to subject the population of the occupied territory to provisions which are essential, among other purposes, to enable it to fulfil its obligations under the Convention. This includes the obligation of non-discrimination in Article 27(3). There is therefore the possibility of introducing measures to address gendered harm on the basis of “public order and safety”, or to fulfil the obligation of non-discrimination contained in the Fourth Geneva Convention, or to give effect to IHRL in occupied territory, on the understanding that such measures would have to comply with the terms of Article 43 THR and Article 64 of the Fourth Geneva Convention respectively.

The extent to which these would permit or require the occupying power to take measures addressing gendered harm can be assessed against four criteria: whether the occupation is prolonged, the implications of inaction, the role of human rights law and the participation of the local population in decision-making.

⁸² This discussion is continued in the context of the importance of participation in the decision-making process of relevant authorities; see Section 2.C.v below.

⁸³ For a more detailed discussion on the powers ascribed to the occupant under these provisions, see: ICRC, 2012, pp. 56–59.

ii. Prolonged occupation

The duration of the occupation is a factor that can lead to transformations and changes in the occupied territory that would not normally be necessary during short-term occupation.⁸⁴ Some changes are needed in prolonged occupations simply because public policies have to be adjusted in order to keep up with the passage of time. In such situations of prolonged occupation, the welfare of the local population is the well-established main principle guiding the measures and policies undertaken by the occupying power in the administration of the occupied territory. Administration “for the benefit of the local population” means the entire local population, including women as an equal constituency. Basic acknowledgement that non-discrimination, and thus gender equality, plays a role in the welfare of the population should be accepted as uncontroversial; what remains controversial is the meaning ascribed to these terms and resultant policy implications.

Accordingly, in a prolonged occupation, the occupying power may be required to introduce measures to address the passage of time including the advancement of gender equality for the welfare of the local population. However, this is not a *carte blanche*, and requires careful consideration against the implications of inaction, applicable human rights law obligations and the involvement of the local population in decision-making.

iii. The implications of inaction

The complexity of this legal, policy and humanitarian issue is worth acknowledging; there is no single “easy answer” to the question of when an occupying power has a legal duty, or at least a legal right, to introduce measures to address different forms of gendered harm, whether under Article 43 of THR, Articles 27 and 64 of the Fourth Geneva Convention, and/or the occupying power’s applicable IHRL obligations.

Importantly, however, this acknowledgement should be paired with a reminder that complexity could be mistaken for – or instrumentalized as – justification for inaction. This is precisely the gender-blind compounding of harm against women and girls for which IHL is critiqued. Inaction is not “neutral” in terms of impact on the occupied population because, as a result, women and girls continue to experience gender-based discrimination.

To grapple with the issue of inaction, clarity is needed regarding when such measures are obligations of the occupying power (a duty) and when such measures are at the occupying power’s discretion (a right). This is particularly important to clarify because of the reality of what one scholar has characterized as “complementary patriarchies”,⁸⁵ referring to the authorities of both the occupying power and the occupied territory, both of which are more likely than not to be male-dominated. A common situation in occupation is therefore for decision-making power to lie with belligerents comprised of majority male personnel such that the likelihood of gaining traction for measures to address gender-based discrimination is diminished. Faced with these stacked odds, the question of when measures “must” be taken, rather than left to the discretion of these complementary patriarchies, takes on new salience.

In response to this question of when an occupying power has a legal duty to introduce measures to address gendered harm in occupation, the wording of Article 43 of THR and Article 64(2) of the Fourth Geneva Convention is instructive. Article 43 of THR establishes a legal duty on the occupying power based on its wording that the occupying power “shall take all the measures in its power” to ensure public order and safety. Where gendered harm rises to the level of an issue of public order and safety, it is consequently an obligation

⁸⁴ This does not preclude the possibility that changes may be necessary to protect the rights of women and girls in short-term occupations, but the need for such changes becomes more likely in prolonged occupation. The notion and implications of prolonged occupation are discussed in further detail in: ICRC, 2012, pp. 72–78.

⁸⁵ This notion is taken from the discussion of “the squeeze between multiple oppressions” exacerbating women’s experience of harms in: F. Ní Aoláin, 2020, pp. 349–350.

on the occupying power to take corresponding gender-sensitive measures. This is also because this obligation should be interpreted in the context of the occupying power's non-discrimination obligations,⁸⁶ and the understanding of a public half of whom are women and girls.⁸⁷

Examples of gendered harm constituting clear issues of public order or safety on which the occupying power would be expected to legislate if there were gaps in the local legislation include SGBV or human trafficking. Forms of SGBV such as rape, sex trafficking and FGM are violations of IHRL and disrupt public order and the safety of women if they are inadequately proscribed in legislation in the occupied territory. In a prolonged occupation, the introduction of legislation on such issues is part of the duty of the occupying power to maintain public order and safety.

The text of Article 64(2) of the Fourth Geneva Convention is different, providing that the occupying power "may" introduce relevant provisions. This is a right at their discretion, though it does not exclude that the occupying power may have a duty to introduce measures under Article 64(2) in order to comply with other applicable obligations under the Fourth Geneva Convention or IHRL. The same is true of Article 64(1) regarding the suspension and repeal of existing laws. One consideration in this respect is that such measures might not be entirely divorced from public order issues, as root issues of gender discrimination have been linked to the exacerbation of security issues: for example when the marginalization of certain girls can encourage their recruitment by armed groups.

iv. Human rights law

An occupying power's IHRL obligations apply in complement to its IHL obligations in the occupied territory.⁸⁸ Where IHRL obligations require the occupying power to take measures to address gendered harm in the occupied territory, norm conflicts may arise with IHL, where human rights-based gender-sensitive measures conflict with the limits on transformative occupation and the IHL obligation to respect manners and customs in Article 27(1) of the Fourth Geneva Convention. With the guiding principle of the welfare of the population including women and girls in mind, there is a spectrum of views as to the extent to which an occupying power can legislate to implement IHRL.

One view cautions that while an occupying power could be given a certain amount of flexibility to implement human rights law in the occupied territory, that should not be interpreted as a *carte blanche* to change legislation and institutions in the name of human rights to make them accord with its own legal and institutional ideas: this would be at odds with the limits on transformative occupation. A contrary view questions whether IHL is fit for purpose to meaningfully address gendered harm in occupation at all, positing that the IHRL obligations of the occupying power are more relevant and need not be viewed through the prism of IHL.⁸⁹ A related view suggests that, on issues of gender-based discrimination in a prolonged occupation, CEDAW rather than the Fourth Geneva Convention could be argued to constitute the *lex specialis*. Beyond the matter of law, there is also the more practical dimension of enforcement. For example, for the CEDAW Committee, the application of CEDAW obligations to occupied territories is uncontroversial; in concluding observations to states, the Committee has addressed the application of CEDAW in occupied territory.

Debate around whether IHL or IHRL is most relevant to determine the measures taken by an occupying power to address gendered harm in occupation should be resolved through recourse to the notion of complementarity, which clarifies that this is not an "either/or" question, but rather a case-by-case analysis of the applicable IHRL obligations and their interplay with IHL. The crux of the legal issue is therefore the identified norm conflict between an occupying power's IHL obligations and IHRL regarding women's rights in occupied territory.

⁸⁶ Whether pursuant to Article 27 of GC IV, applicable IHRL, or both: see the related discussion on non-discrimination in Section 2.B above.

⁸⁷ See the cross-cutting issue regarding the surfacing of gendered assumptions on the notion of the "public" in Section 2.A above.

⁸⁸ Regarding the sources of the occupying power's human rights obligations, see fn. 77 above. The role of IHRL in situations of occupation is discussed in further detail in: ICRC, 2012, pp. 61–67.

⁸⁹ Other views on the complexity of the application of IHRL are expressed in: ICRC, 2012, pp. 63–64.

More specifically, on the one hand IHL sets limits on transformative occupation and Article 27(1) of the Fourth Geneva Convention provides that protected persons are in all circumstances entitled “to respect for [...] their manners and customs”. Yet worldwide, local manners, customs and traditions often feature aspects that perpetuate gender-based discrimination. For this reason, Article 2(f) of CEDAW specifically required states parties “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”, and Article 5 requires states parties to take all appropriate measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. Where applicable, an occupying power is therefore faced with these conflicting normative obligations.

To resolve this conflict, a number of context-specific factors should be considered to determine what the occupying power’s rights and duties are. If IHL is to be understood as flexible enough to address the protection of a population comprised of women and girls in occupied territory, this theoretical Gordian knot requires practical and operational solutions to guide the behaviour of authorities, because the alternative and reality is the inaction that was critiqued earlier.

v. Cutting the Gordian knot? Participation and process in decision-making

How an occupying power can lawfully take measures to address types of gendered harm that implicate the norm conflict identified above is a thorny issue, but one of the most significant determinatives of lawfulness is the participation and process in the occupying power’s decision-making.

The present discussion on participation and process is conditional on the context of prolonged occupation and the understanding that the measures would *prima facie* need to comply with Article 43 of THR, Article 64(3) of the Fourth Geneva Convention and IHRL as applicable. Other legal mechanisms whereby such measures could be introduced may also be worth exploring, such as the possibility of special agreements between the occupying power and occupied states pursuant to Article 7 of the Fourth Geneva Convention, or the possibility of the local administration of the occupied territory unilaterally reforming its law.

More specifically, the participation of women and women’s organizations in the process of decision-making, including decisions not to take action, is key to diffusing the identified norm conflict. This would help diffuse the legal tension because the occupying power would not be failing to respect protected persons’ manners and customs, and would not be transforming the territory for a purpose driven by its own preferences, if its actions reflected the views of local women as to their manners and customs. Legislative reform carried out by or with the occupying power – such as the repeal of discriminatory civil laws – would therefore need to be participative and process-oriented in order to be lawful. The occupying power could lawfully introduce gender-sensitive measures if this was the will of the local population, specifically including women and/or women’s organizations of the occupied territory, as determined via their inclusion in the decision-making process.⁹⁰

Participation and process of affected people is not absent from IHL. For example, the Fourth Geneva Convention foresees, in the context of internment camps, the setting up of internees’ committees empowered to represent internees before the detaining authority.⁹¹ Thus, *mutatis mutandis*, consultation on a proposed measure to address gendered harm in occupation – for example, on the introduction of new law or the repeal of discriminatory law – might be imagined for a situation of occupation.

⁹⁰ The involvement of the local population in the occupying power’s decision-making process was also discussed in: ICRC, 2012, pp. 75–76. Another factor to consider could be whether these measures had been introduced in non-occupied parts of the occupied state’s territory; similarly, and depending on the context, this could indicate that the relevant measures do not contravene local manners and customs.

⁹¹ This observation was made in: ICRC, 2012, p. 76. A similar observation has been made regarding the participation of women in the context of GC III; see: C. O’Rourke, “Geneva Convention III Commentary: What Significance for Women’s Rights?”, Just Security, 21 October 2020: www.justsecurity.org/72958/geneva-convention-iii-commentary-what-significance-for-womens-rights/.

A participation- and process-oriented assessment of lawfulness would help address a number of complex issues. These include the issues of inaction, of gendered assumptions regarding what constitutes local culture, and of potential colonial or neo-colonial ambitions of the occupying power. Regarding inaction, a focus on process and participation could help avoid the problem wherein authorities have some ability to address gendered harm but no perceived urgent responsibility – empowering local women in the decision-making process could increase the likelihood of lawful improvement of their rights. Regarding gendered assumptions of manners and customs, deference to local culture and tradition should not be over-simplified and flattened in a way that re-privileges conservative interpretations of local cultures and re-empowers cultural arbiters, who are mostly men. The involvement of women in shaping the narrative of what constitutes definitive “respect for manners and customs” could help unroot such assumptions.

Finally, caution is needed regarding a hypothetical self-styled “enlightened” occupier; there can be colonial ambitions or neo-colonial undertones in the advancement of women’s rights that will not be lost on an occupied population. Similarly, measures seemingly taken for the advancement of women’s rights might in fact intentionally or unintentionally have the contrary effect. It is not inconceivable that gender-sensitive measures introduced by the occupying power during the occupation could become associated with the

occupying power in a way that disempowers or spurs backlash on local women’s rights advocates who align with the occupier on these issues. The meaningful involvement of local women and women’s organizations in decision-making will allow them to make their own context-specific assessments about such risks.

It is not inconceivable that situations may arise where the occupying power has undertaken such consultations regarding potential measures to address types of gendered harm that implicate the norm conflict described above, and the outcome of the consultation does not resolve the norm conflict – for example, if the occupying power understands its IHRL obligations to require certain changes to local legislation but consultation with local women and women’s organizations reveals general opposition to these changes. In such cases, recourse to established legal interpretive methods apply, requiring a case-by-case analysis of the specific rules in question.⁹²

KEY TAKEAWAYS

- Interpretations of IHL governing situations of occupation have at times inadequately addressed the variety and scope of gendered harm arising in occupation, but IHL can be interpreted in a manner to better take these into account.
- Prolonged occupations pose specific risks to the rights of women and girls, who can experience both violations of occupation law, and a stagnation or deceleration of progress on women’s rights as a result of the occupation.
- Gendered assumptions shaping the understanding of legal concepts of the “military commander”, the “public” and the “population” should be surfaced and challenged.
- Family life is a traditional site of gendered divisions of labour and power. The obligations to respect “family rights” under Article 27(1) of the Fourth Geneva Convention and Article 46 of THR should not be interpreted to calcify discriminatory practices.
- In a prolonged occupation, the occupying power may be required to introduce measures to keep abreast of the passage of time (including the advancement of gender equality for the welfare of the local population) or to address gendered harm arising from occupation. Such measures must be in compliance with Article 43 of THR, Article 64(3) of the Fourth Geneva Convention and IHRL as applicable. This is not a *carte blanche*, and requires careful consideration against the implications of inaction, the applicable human rights law obligations, and identification and resolution of any norm conflict, including through the participation of the local population in the decision-making process.

⁹² See K. Mačák, 2022 (forthcoming).

Nagorno- Karabakh conflict. Stepanakert/
Khankendi. Three hundred participants
attend a session on International
Humanitarian Law conducted by the ICRC.



M. Kojic/ICRC

3. GENDER AND IHL: LIMITATIONS AND OPPORTUNITIES

Moving on from the discussion of specific IHL rules, this final chapter critically reflects on the more general theme of gender and IHL from an institutional viewpoint, with the IHL-based mandate and humanitarian purpose of the ICRC in mind.

This chapter accordingly places the topic in historical context, addresses the opportunities and complexities raised by the circumscribed scope of IHL and of humanitarian action, and proposes both practical and multilateral ways that IHL norms could be further leveraged to reduce gendered harm in conflict.

A. HISTORICAL CONTEXT

Part of any critical reflection on gender and IHL should include acknowledgement of the ICRC's past failures on the topic.⁹³ The ICRC has been critiqued, with reason, for legal interpretations that characterize women as peripheral, passive victims of armed conflict, and for failing to engage with feminist legal critiques of IHL.⁹⁴

Since the Geneva Conventions were adopted in 1949, the international legal and policy governance landscape relevant to women and girls in armed conflict has seen significant and hard-won progress. International criminal tribunals have clarified war crimes of sexual violence, and gendered experiences of war are better documented. The UN Security Council's women, peace and security (WPS) agenda has mobilized states and civil society, and human rights treaty bodies have worked to articulate rights violations in armed conflict in broader contexts of structural discrimination.⁹⁵ These legal and policy frameworks have been the tools of choice for lawyers and policymakers working to address the complexity of gendered harm in conflict.

IHL too is not devoid of progress. Though the text of IHL treaties is difficult to amend, IHL is nevertheless a living body of law. Its interpretation by states and others who apply it is far from static. This is evident in the practice of states and parties to armed conflict, and in international as well as domestic case law. In addition, political declarations and commitments on IHL-governed topics have been developed to further reduce harm, including gendered harm, caused by armed conflict.⁹⁶ For its part, the ICRC has undertaken work to update discriminatory interpretations of IHL relevant to women and girls in armed conflict, notably through the project to update the commentaries to the Geneva Conventions and their Additional Protocols.⁹⁷

⁹³ For a related exploration of the ICRC's failure to act on sexual violence in conflict in the 20th Century, see: D. Palmieri, "Sexual violence in armed conflict: the historical limits of humanitarian action and the ICRC in the 20th century", ICRC Humanitarian Law & Policy Blog, 2 December 2021: <https://blogs.icrc.org/law-and-policy/2021/12/02/sexual-violence-icrc-20th-century/>.

⁹⁴ See, for example: C. O'Rourke, *Women's Rights in Armed Conflict under International Law*, 2020, pp. 41–42; K. Bennoune, 2007, pp. 364 and 384.

⁹⁵ Notably: CEDAW Committee, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 1 November 2013; CEDAW Committee, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/CG/35, 26 July 2017. UN Security Council Resolution 2467 (2019) preambular paragraph 13 also recognizes "that sexual violence in conflict occurs on a continuum of interrelated and recurring forms of violence against women and girls" and that "conflict also exacerbates the frequency and brutality of other forms of gender-based violence".

⁹⁶ For example, the Safe Schools Declaration seeks to reduce the impact of armed conflict on education, and observes that "[a]ttacks on schools and universities have been used to promote intolerance and exclusion – to further gender discrimination, for example by preventing the education of girls". The Paris Commitments and related Principles on children associated with armed forces or armed groups contain a number of principles addressing the specific situation of girls.

⁹⁷ ICRC, 2020, para. 24.

B. THE ROLE OF IHL: LEVERAGING COMPLEMENTARITY AND IDENTIFYING ADDED VALUE

IHL has an important role to play in the prevention of, and the response to, gendered harm in armed conflict, and can be a vehicle for the incorporation of gender perspectives into the actions of the authorities it binds. However, IHL practitioners such as armed forces or humanitarian actors – those who have traditionally seen it as “their body of law” – can also recognize the relevance and role of other applicable normative frameworks in alleviating the suffering of women and girls in armed conflict. Each body of law and standards offers added value.

More specifically for the ICRC, IHL constitutes the primary substance of its legal exchanges with states. This follows from the ICRC’s mandate: as the guardian of IHL, the ICRC is at the origin of the Geneva Conventions and their Additional Protocols, and IHL treaties confer specific mandates on the ICRC. The Statutes of the International Red Cross and Red Crescent Movement stipulate that the ICRC will “work for the faithful application of international humanitarian law applicable in armed conflicts” and “work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof”.⁹⁸ With this mandate in mind, there are a number of ways that the use of IHL norms could be advanced to better respond to gendered harm in armed conflict.

Leveraging complementarity to enhance influence. While recognizing the place of IHL, applicable IHRL and the WPS agenda have an important complementary role to play in the international framework designed to improve the situation of women and girls in armed conflict. IHL is deliberately limited in scope. It requires a nexus to conflict, such that it does not regulate all acts that occur during the temporal scope of a conflict, but rather only those that fulfil the legal criteria of nexus to the conflict. For example, IHL does not prohibit acts such as common theft or intimate partner violence, though these can be exacerbated by the conflict environment. On gender-based violence and discrimination falling outside IHL’s scope but nevertheless occurring during conflict, applicable IHRL and the WPS agenda thus play a crucial role as complementary sources of protection. The CEDAW Committee has a corresponding role to play, as a legal authority whose concluding observations and General Recommendations addressing armed conflict contexts have been sites of dialogue with states.

In the ICRC’s view, alongside the contribution of IHL, the faithful application of other international law and policy would significantly strengthen the protective normative environment addressing gendered harm experienced by all persons during and post-conflict. Taken together, existing IHL, IHRL and the WPS framework are a comprehensive and strong framework that would immeasurably improve the reality of women around the world if they were realized on the ground. Ensuring these international legal and policy frameworks are implemented into national-level law and policy remains an area where much progress, political will and resources are needed.

Complementarity also requires a well-informed and strategic approach to the mesh of systems and actors implementing these legal and policy frameworks. The ICRC occupies roles on gender and IHL issues in several different spaces of influence, each of which is also populated by other actors. At least three such spaces can be identified: humanitarian diplomacy in multilateral spheres, bilateral exchanges with states and parties to conflict including NSAGs and the space of civil society. The perception of the ICRC and its ability to influence behaviour vary across those spaces: a position on gender and IHL that may seem “progressive” in dialogue with a given state or NSAG may hinder advancements by states and civil society in the WPS space or detract focus from civil society asks. To maximize influence, actors need to be conscious of which space they are operating in, understand the positions of others in the space and adapt messaging accordingly. While different actors play different roles and contend with different types of constraints,

⁹⁸ These were adopted by states party to the Geneva Conventions and by the International Red Cross and Red Crescent Movement and, among other things, set out the role of the ICRC; see: Article 5(2)(c) and (g). They are available at: <https://www.icrc.org/en/doc/resources/documents/misc/statutes-movement-220506.htm>.

all actors should recognize the sum total of the bodies of international law that protect people in armed conflict, and each other's roles, seeking to never weaken those bodies of law or other actors' roles.

Exploring IHL's added value. The issue of sexual violence in armed conflict has occupied much of the advocacy space on gender and IHL, and advancement is needed on gender perspectives in other areas of IHL that could add important value to the broader international legal and policy framework on women and girls in armed conflict. Three areas are particularly prime for further examination. First, the conduct of hostilities – for example, how a gender perspective can be accurately and pragmatically incorporated into precautions and proportionality assessments under IHL – is an area of IHL relatively untouched by feminist engagement.⁹⁹ Second, IHL binds NSAGs as parties to armed conflict and so is an important vehicle for influencing their behaviour on gender issues.

Third, there is an under-estimation of the inclusivity of IHL's protections with regard to persons of diverse sexual orientation and gender identities. IHL protects groups such as the wounded and sick, prisoners of war, protected persons and others – if an individual is a part of such a group, they are entitled to that protection regardless of their sexual orientation or gender identity. Sexual orientation and gender identity are not grounds for exclusion from IHL's category-based protections. At times, this protection has been overlooked or misinterpreted – it is an example where the ICRC's silence has been perceived by some as the view that IHL excludes these individuals from protection, and this merits proactive clarification that all persons are protected under the relevant group categories. In other words, gender-neutral protections should be actively clarified to be gender-inclusive so as to deepen the application of existing protections.¹⁰⁰

C. NEUTRALITY AND IMPARTIALITY

The Fundamental Principles of the International Red Cross and Red Crescent Movement are at the core of the ICRC's humanitarian work.¹⁰¹ Questions regarding how the Fundamental Principles of neutrality and impartiality should guide humanitarian action on issues of gender encompass broad multidisciplinary issues spanning humanitarian action, political science and anthropology, and have also surfaced in legal discourse on gender equality and IHL. A nuanced and context-specific approach is needed to navigate tensions between these principles, while remaining faithful to the understanding that the principles of humanity and impartiality are the guiding objectives of humanitarian action.¹⁰²

Neutrality. The fundamental principle of neutrality provides that “[i]n order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.”¹⁰³ As observed by Jean Pictet, neutrality is not an objective in and of itself, but rather a means that contributes to the application of the “substantive” Fundamental Principles of humanity and impartiality.¹⁰⁴ Neutrality is thus a tool “to gain access to victims in need of help, and these victims are in the power of the States. It is therefore necessary to obtain the required authorization from States and to maintain the relations of confidence essential for continuing co-operation.”¹⁰⁵

⁹⁹ This observation has also been made in scholarship; see, for example: J. Gardam, 2018, p. 41.

¹⁰⁰ For a relevant ICRC report, see: ICRC and Norwegian Red Cross, “*That Never Happens Here*”: *Sexual and Gender-Based Violence against Men, Boys and/including LGBTIQ+ Persons in Humanitarian Settings*, ICRC, Geneva, 2022.

¹⁰¹ For a commentary on these principles, see: J. Pictet, *The Fundamental Principles of the Red Cross: Commentary by Jean Pictet*, IFRC, 1979, pp. 9–10: <https://volunteeringredcross.org/wp-content/uploads/2019/02/The-Fundamental-Principles-Pictet-Commentary.pdf>.

¹⁰² The Fundamental Principles have a hierarchical order, in that the principles of humanity and impartiality are substantive principles while the principle of neutrality is designed to put the substantive principles into action, in the “domain of means and not of ends”; see: J. Pictet, 1979, pp. 9–10.

¹⁰³ ICRC, *The Fundamental Principles of the International Red Cross and Red Crescent Movement*, ICRC, Geneva, 2015, p. 4: www.icrc.org/sites/default/files/topic/file_plus_list/4046-the_fundamental_principles_of_the_international_red_cross_and_red_crescent_movement.pdf.

¹⁰⁴ J. Pictet, 1979, pp. 34–35.

¹⁰⁵ Idem, pp. 38–39.

In assessing the implications of this principle for its approach to gender inequality, the ICRC's 2004 publication *Addressing the Needs of Women in Armed Conflict: An ICRC Guidance Document* ("the 2004 position") stated that it is not the ICRC's role to engage in the debate around gendered power relations because "highlighting social inequalities in terms of rights and resources and pushing to establish a balance in power relations is a political act incompatible with the neutrality principle".¹⁰⁶

This blanket statement has been critiqued as overly simplistic.¹⁰⁷ Certainly, gender-related issues are at times the subject of ideological disagreement between states in multilateral forums, as well as between political and social groups at the national level in some contexts. Contemporary multilateral and national politics have revealed what the UN Secretary-General has called a rising pushback on women's rights.¹⁰⁸ However, cordoning off any engagement with gender inequality whatsoever, as the 2004 position appeared to do, is inconsistent with the reality of the ICRC's work as an actor engaged in the interpretation of international law. Casting gender equality only as a matter of ideological or political controversy fails to recognize the guarantee of equal rights between men and women, and prohibitions of discrimination, in international law. It is also inconsistent with the ICRC's role as an actor distributing resources, visiting detainees and influencing behaviour in humanitarian settings and, most critically, with the principles of humanity and impartiality.¹⁰⁹

Impartiality. The fundamental principle of impartiality requires that the ICRC and other components of the International Red Cross and Red Crescent Movement make "no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress."¹¹⁰ The resultant approach entails that the ICRC seeks to intervene for the relief and protection of those most in need. In practice – owing to structural inequalities and resultant risks – this is often women and girls. The ICRC is committed to inclusive programming, derived from the principles of humanity and impartiality, and the principle of non-discrimination inherent to these. Several ICRC doctrines highlight context analysis as a starting point for good programming and stress that a protection mandate necessarily includes an understanding of, and response to, community and individual risks, vulnerabilities and capabilities, all of this being central to inclusive programming.¹¹¹

To act in accordance with the principle of impartiality in humanitarian work, a tension may arise with the principle of neutrality in specific contexts: specifically, relieving the suffering of and giving priority to those most in need may raise questions by some parties of a lack of neutrality, depending on the conflict's dynamics. Faced with any tension, one of the factors to guide the course of action is reference to the hierarchy of the Fundamental Principles, whereby humanity and impartiality are the main objectives of humanitarian action.¹¹²

¹⁰⁶ ICRC, *Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document*, ICRC, Geneva, 2004.

¹⁰⁷ See, among others, C. O'Rourke, *Women's Rights in Armed Conflict under International Law*, 2020, pp. 42–43, 305–307, see also p. 353.

¹⁰⁸ UN Secretary-General, "Secretary-General's remarks at the opening of the 63rd Session of the Commission on the Status of Women", 11 March 2019: www.un.org/sg/en/content/sg/statement/2019-03-11/secretary-general's-remarks-the-opening-of-the-63rd-session-of-the-commission-the-status-of-women-delivered.

¹⁰⁹ Relevant with respect to the relationship between the Fundamental Principles and gender equality in the approach of other components of the International Red Cross and Red Crescent Movement, the Gender and Diversity Policy (February 2020) of the IFRC, which applies to all National Societies and the IFRC, states as follows: "The National Societies and the IFRC commit to actively embrace different identities and individuals, to guard against all discrimination in all our actions, and to promote the value of a diverse society with gender equality. We recognize that there are often different views within communities about gender and diversity. We will be respectful of these differences, but we will not be deterred from our commitments as they are based on the Fundamental Principles. Gender and diversity inclusion is an essential part of ensuring people are safe from harm and in any action that aims at ensuring the protection of people; gender and diversity must be at the core and must guide the work of National Societies and the IFRC." See: IFRC, *Gender and Diversity Policy*, IFRC, Geneva, 2020: <https://www.ifrc.org/sites/default/files/GD-Policy-v4.pdf>.

¹¹⁰ ICRC, 2015, p. 4.

¹¹¹ These include: Doctrine 1: The ICRC: Its Mission and Work (2004); Doctrine 7: External Communication (2015); Doctrine 49: ICRC Assistance Policy (2004); Doctrine 65: The ICRC's Protection Policy (2008).

¹¹² See fn. 102 above.

Towards a more nuanced approach. The 2004 position no longer reflects the nuance and contextualization of the ICRC's approach to the issue of gender inequality. Understanding gender dynamics is a necessary element of impartial humanitarian response, because such an analysis enables humanitarian actors to understand where the most urgent needs are and to prevent unintended exclusion from the response. In this respect, and alongside its work to incorporate a gender perspective into its law and policy work, the ICRC's approach to inclusive programming and accountability to affected persons is an important advancement since the 2004 position.

In 2019, the ICRC established its *Accountability to Affected People Institutional Framework*.¹¹³ This framework and its nine guiding principles make explicit the ICRC's commitment to take into account diversity factors such as gender, age and disability in understanding the specific needs and capabilities of affected people. This is further detailed under the principle of "Inclusive and Accessible Programmes," which requires operations to (1) understand the role diversity factors including gender play in community structures and power dynamics, (2) identify whether social power dynamics, including gender roles or other diversity factors, are excluding individuals and groups from accessing aid, and (3) disaggregate data by sex, age and disability to identify gaps, reveal diversity-based perspectives and inform inclusive programming. The operationalization of these efforts is currently being supported through the development of an inclusive programming policy and the piloting of inclusive programming approaches, including capacity-building efforts and the application of a "Social Power Analysis" methodology.

Through this framework, the ICRC strives to apply a gender and diversity lens to all its operations, and to consider changing gender dynamics to create and support a protective, participatory and enabling environment. In this way, the ICRC strives to provide equitable access to resources, services, programme activities and feedback mechanisms to diverse women, girls, men and boys, contributing to greater equality and empowerment. Applying this diversity lens also enables a greater understanding of who the worst affected and most in need individuals and groups are, allowing for the operationalization of the Fundamental Principle of impartiality.

D. RAISING AWARENESS AND INFLUENCING BEHAVIOUR THROUGH RESEARCH, GUIDANCE AND PRACTICAL TOOLS

IHL is a living body of law, applied by practitioners in conflicts daily across the globe. Research, guidance and practical tools influence how it is interpreted – and can signify who are its most powerful interpreters – and so the integration of a gender perspective in these is important. Gender remains far from a prominent area of IHL and is often only superficially understood by practitioners; it is indicative that plenty of publications on this body of law do not pass the simple litmus test of featuring the word "gender".

In this vein, the mainstreaming of gender perspectives in research, guidance and practical tools of implementation is needed to gradually render the scale of harm suffered by women and girls more visible to military planning and operations with obligations to reduce that harm. Regarding the role of research, more empirical studies on the topic of gendered impacts of armed conflict would help narrow the gender data gap and distil actionable information on gendered patterns of harm for military decision-makers. Beyond research, practical legal guidance for parties to armed conflict is perhaps the most important added value and role for humanitarian actors who use IHL, such as the ICRC. Mainstreaming a gender perspective in law and policy documents has the potential to influence the behaviour of parties to armed conflict, particularly in spaces where humanitarian actors such as the ICRC have access to interlocutors and institutions that would otherwise be unwilling or unable to engage on gender.

¹¹³ ICRC, *Accountability to Affected People Institutional Framework*, 2019.

Finally, the fundamental need to turn the theoretical into the practical is the leitmotif of progress among IHL practitioners. Implementation into standard operating procedures, military manuals and training exercises is where the rubber hits the road: if research and guidance do not influence these, they fail to impact the experience of individuals affected by armed conflict. In this respect, training is fundamentally important – and multidisciplinary teams who design training that takes into account the relevance of gender in both formal and informal norms, in a manner tailored to the nature of the armed force or armed group, are an asset in this regard.¹¹⁴ To complement training, a range of supporting approaches is needed to promote the socialization of a shared acceptance of the added value of a gender perspective in the conduct of military operations.¹¹⁵

E. OPPORTUNITIES IN THE WOMEN, PEACE AND SECURITY AGENDA

The WPS agenda of the UN Security Council is a particularly impactful site of progress in international policymaking regarding women and girls in armed conflict, driven by states and civil society. In the year 2000, the first and founding WPS resolution, UN Security Council Resolution 1325, established four pillars of the WPS agenda: increased participation of women in decision-making in the prevention, management and resolution of conflicts; the protection of women and girls from violence in situations of armed conflict; ensuring the important role of women in conflict prevention; and the advancement of relief and recovery measures. In sum: participation, protection, prevention, and relief and recovery.¹¹⁶ This section seeks to clarify some features of the relationship between IHL and the WPS agenda, and puts forward how this relationship could be further leveraged to enhance the fulfilment of the rights and protections of women and girls in armed conflict.

Three features of IHL's relationship with the WPS framework are important to bear in mind. First, IHL is one of the bodies of law on which the WPS framework is based.¹¹⁷ The considerable degree of state and civil society engagement on WPS objectives is therefore an opportunity to amplify and build coalitions around IHL elements therein, and so improve compliance with IHL and its critical protections for diverse women, men, boys and girls in armed conflict. Second, at the same time, an understanding of IHL as being one part of, rather than the only, normative framework of importance in this agenda is an essential component of engagement with WPS humanitarian diplomacy and civil society activity. IHL thus has a contribution to make to the WPS agenda, but its contribution should not work at counter-purposes with others actors by perpetuating binaries or throwing into question the centrality of issues that are well-established in the WPS space, such as gender equality and the importance of women's participation. Third, civil society has played an influential role and has a significant track record in both the development and implementation of the WPS agenda.¹¹⁸ While feminist civil society organizations exist to progress issues in the international criminal law, IHRL and WPS space, by contrast, IHL has hitherto proved somewhat exclusionary for feminist civil society, a reality of which WPS actors are well aware. There are therefore potential opportunities for WPS-linked civil society members to make IHL more localized, concrete and accessible.

¹¹⁴ Regarding the importance of both formal and informal norms in influencing behaviour, see ICRC, *The Roots of Restraint in War*, ICRC, Geneva, 2018.

¹¹⁵ Regarding the variety of approaches that play a role in influencing behaviour in armed forces and armed groups, see *idem*, pp. 68 – 71.

¹¹⁶ The WPS agenda and the scope of these pillars have seen important developments since 2000; for the most recent overview, see: UN Security Council, 2021.

¹¹⁷ See, among others, preambular paragraph 6 and operative paragraphs 9–11 of UN Security Council Resolution 1325. For a summary of references to IHL in UN Security Council resolutions on women, peace and security, see: J. Klugman *et al.*, *Can the Women, Peace and Security Agenda and International Humanitarian Law Join Forces? Emerging Findings and Promising Directions*, Policy Brief, Georgetown Institute for Women, Peace and Security, 2020, p. 7: <https://giwps.georgetown.edu/wp-content/uploads/2020/12/WPSAgendaAndInternationalLaw.pdf>.

¹¹⁸ For an overview of the range of work being led by civil society to advance the women, peace and security agenda, see, for example: S. Sonneveld, *Through the Lens of Civil Society: Summary Report of the Public Submissions to the Global Study on Women, Peace and Security*, PeaceWomen/WILPF, New York, 2015: <https://wilpf.org/wp-content/uploads/2015/08/May-29-Copy-Through-the-Lens-of-Civil-Society-Executive-Summary-For-Summary-Report.pdf>.

With these features of the relationship in mind, the ICRC considers that there is space for progress to enhance the fulfilment of the rights and protections of women and girls in armed conflict using the synergies of IHL and the WPS agenda. As part of its “protection” pillar, WPS-related Security Council resolutions call on states to apply obligations of IHL to protect women and girls in armed conflict. The ICRC submits that this pillar of protection would be enhanced if states incorporated a gender perspective in the application of IHL obligations. For example, WPS National Action Plans could commit to striving to apply and interpret IHL from a gender perspective, with the aim of ensuring that the protection of women and girls in armed conflict is maximized and inequalities are taken into account.¹¹⁹

KEY TAKEAWAYS

- Interpretations of IHL must not discriminate against women and girls. Where interpretations of IHL are discriminatory, they should be – and are being – updated.
- Alongside IHL, the application and implementation of other international law and policy – notably IHRL and the WPS agenda – would significantly strengthen the protective normative environment addressing gendered harm experienced by all persons during and post-conflict. A robust understanding of complementarity is key to leverage the protective potential of different frameworks.
- The ICRC must be aware of the impact of gender inequalities where it operates. It must ensure its humanitarian action is impartial in nature and does not exacerbate or perpetuate gender-based discrimination. This is not generally in tension with the principle of neutrality; where context-specific tensions arise, the ICRC will act in accordance with the understanding that the principles of humanity and impartiality are the guiding objectives of humanitarian action.
- Further research, guidance and practical tools would help to render patterns of gendered harm suffered by women and girls more visible to military planning and operations, in light of IHL obligations of parties to armed conflict to reduce civilian harm.
- Efforts to promote awareness and implementation of IHL could add value to the UN Security Council’s WPS agenda, and vice versa. To this end, the ICRC recommends that, as part of the implementation of their IHL obligations and the WPS agenda, states could commit to interpreting IHL with a gender perspective, for example in the framework of WPS National Action Plans or other relevant policies.

¹¹⁹ The Swedish National Action Plan makes this commitment; see: Government Offices of Sweden, *Women, Peace & Security: Sweden’s National Action Plan for the implementation of the UN Security Council’s Resolution on Women, Peace and Security 2016–2020*, Government Offices of Sweden, Stockholm, p. 13: <https://www.government.se/contentassets/8ae23198463f49269e25a14d4d14b9bc/women-peace-and-security-eng.pdf>.

Gnjilane/Gjilan, Sojeva, primary school. Children of school receiving mine awareness training from ICRC officers.



G. Diffident/ICRC

ANNEX 1: LIST OF PARTICIPANTS

The following experts took part in one or more sessions of the expert scoping workshop on 24–25 June 2021.

EXPERTS

Dr Louise Arimatsu, Distinguished Policy Fellow at the Centre for Women, Peace and Security, London School of Economics, United Kingdom

Dr Radhika Coomaraswamy, Under-Secretary-General and Special Representative on Children and Armed Conflict (2006–2012), Special Rapporteur on Violence Against Women (1994–2003), Sri Lanka

Dr Boyd Van Dijk, McKenzie Postdoctoral Fellow, University of Melbourne, Australia

Dr Judith Gardam, Emeritus Professor of Law, University of Adelaide Law School, Australia*

Ms Nelly Kamunde, Lecturer, Kenyatta University School of Law, Kenya

Dr Amrita Kapur, Project Coordinator, Gender and Security Division, DCAF, Switzerland

Dr Helen Kinsella, Associate Professor, University of Minnesota, Twin Cities, United States of America

Dr Sandra Krahenmann, Senior Policy and Legal Adviser, Geneva Call, Switzerland

Dr Fionnuala Ní Aoláin, UN Special Rapporteur on Human Rights and Counter-Terrorism; concurrently Regents Professor and Robina Professor of Law, Public Policy and Society at the University of Minnesota Law School and Professor of Law at Queen's University Belfast, United Kingdom

Dr Valerie Oosterveld, Professor, Western University Faculty of Law, Canada

Dr Catherine O'Rourke, Professor, Ulster University, United Kingdom

Col. (Ret.) Jody M. Prescott, Lecturer, University of Vermont, United States of America

Dr Patricia Viseurs Sellers, Special Adviser for Gender for the Office of the Prosecutor of the International Criminal Court, the Netherlands

Dr Orly Stern, Visiting Fellow of Practice, Blavatnik School of Government, University of Oxford, United Kingdom

NATIONAL RED CROSS AND RED CRESCENT SOCIETIES

Mr Randall Bagwell, Senior Director of International Services, American Red Cross

Ms Linda Borgheden, Legal Adviser, Swedish Red Cross

Ms Catherine Gribbin, Senior Legal Adviser, Canadian Red Cross

Dr Noel Trew, International Law Adviser, British Red Cross

Ms Yvette Zegenhagen, Head of International Humanitarian Law, Australian Red Cross

* Dr Gardam was not able to participate in the expert meeting but provided valuable written feedback on the draft of this outcome report.

INTERNATIONAL COMMITTEE OF THE RED CROSS

Dr Lindsey Cameron, Head of the Unit of Thematic Legal Advisers, Legal Division

Ms Valentina Camponovo, Adviser on Diversity and Inclusion in Operations

Ms Irina Cristescu, Legal Adviser, ICRC Delegation for the US and Canada

Ms Ann Deer, Strategic Adviser, ICRC Delegation to the United Nations

Dr Cordula Droege, Chief Legal Officer and Head of the Legal Division

Dr Helen Durham, Director of Law and Policy

Dr Tristan Ferraro, Senior Legal Adviser, Unit of Thematic Legal Advisers, Legal Division

Dr Eirini Giorgou, Legal Adviser, Arms and Conduct of Hostilities Unit, Legal Division

Ms Heleen Hiemstra, Legal Adviser, Commentaries Update Unit, Legal Division

Ms Alexandra Jackson, Global Adviser on Child Protection, Protection of Civilian Populations Unit

Ms May Maloney, Deputy Head of Addressing Sexual Violence Unit

Ms Vanessa Murphy, Legal Adviser, Unit of Thematic Legal Advisers, Legal Division

Mr Mikhail Orkin, Legal Adviser, Commentaries Update Unit, Legal Division

Dr Matt Pollard, Legal Adviser, Commentaries Update Unit, Legal Division

Ms Pilar Gimeno Sarciada, Head of Protection of Civilian Populations Unit

Ms Meghan Simon, Humanitarian Affairs Adviser, ICRC Delegation to the United Nations




Ms Sophie Sutrich, Head of Addressing Sexual Violence Unit

Ms Kelisiana Thynne, Legal Adviser, Advisory Service on IHL, Legal Division

Ms Abby Zeith, Legal Adviser, Arms and Conduct of Hostilities Unit, Legal Division

MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

 facebook.com/icrc
 twitter.com/icrc
 instagram.com/icrc



ICRC

International Committee of the Red Cross
19, avenue de la Paix
1202 Geneva, Switzerland
T +41 22 734 60 01
shop.icrc.org
© ICRC, June 2022