



INTEGRATING GENDER PERSPECTIVES INTO INTERNATIONAL HUMANITARIAN LAW

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I. Introduction

International humanitarian law (IHL) aims to prevent or mitigate the effects of armed conflict through rules and protections. IHL has grown to include conventions, customary international law and principles, and applies to international and non-international armed conflicts.¹ IHL aims to provide equal protection to those affected by armed conflict, regardless of, for example, sex, gender, age, race or religious belief. However, as this SIPRI Insights Paper demonstrates, although IHL seemingly accords protection to ‘all persons’, it may fail to do so—especially on the basis of gender.² The main risk of failure is twofold.

First, there is inherent gender bias within some of the rules of IHL. Second, certain IHL rules, while intended to be gender-neutral in their text, are vulnerable to bias in their interpretation and application. As a result, inherent gender bias and narrow conceptualizations of gender in these rules can be detrimental to those persons IHL seeks to protect. This collectively

¹ International humanitarian law (IHL) is a legal framework grounded in, among other treaties, the 1949 Geneva Conventions and their 1977 Additional Protocols (I and II). The key rules and norms of IHL are recognized as customary IHL, which means they apply to all states, beyond those party to the Geneva Conventions and Additional Protocols. In 2005 the International Committee of the Red Cross (ICRC) compiled and published these rules in a widely accepted and referenced study on customary IHL: Henckaerts, J. and Doswald-Beck, L., *Customary International Humanitarian Law*, ICRC, vol. 1 (Cambridge University Press: Cambridge, 2005). This study is now available online as the ICRC Customary IHL Database. See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 Aug. 1949, entered into force 21 Oct. 1950; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 Aug. 1949, entered into force 21 Oct. 1950; Geneva Convention (III) Relative to the Treatment of Prisoners of War, opened for signature 12 Aug. 1949, entered into force 21 Oct. 1950; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 Aug. 1949, entered into force 21 Oct. 1950; Protocol I Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 Dec. 1977, entered into force 7 Dec. 1978; and Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 Dec. 1977, entered into force 7 Dec. 1978.

² ‘Gender’ refers to the social organization of people into different categories; the term is distinguished from ‘sex’, which is biologically assigned. Historically and cross-culturally, there are different social systems of organizing people into genders. See Stryker, S., *Transgender History: The Roots of Today’s Revolution* (Seal Press: New York, 2008), pp. 14–16.

SUMMARY

● International humanitarian law (IHL) aims to limit the impacts of armed conflict through rules and protections. However, while IHL seemingly accords protection to ‘all persons’, it may fail to do so, especially on the basis of gender. In turn, failure to include gender perspectives in IHL can result in inaccurate assessments of civilian harm. This paper explores the missing gender perspectives in IHL and proposes that they be integrated with intersectional considerations.

The paper first examines inherent gender bias in the wording of certain IHL rules, highlighting several issues including gender essentialism, limited distinction between sex and gender, and the need to overcome a binary approach to gender to ensure adequate protections for the LGBTQIA+ community. The paper also examines key rules of IHL which are particularly sensitive to bias in interpretation and application, including certain rules on weapons, the rules guiding the conduct of hostilities, and obligations to provide legal advice and legal training to the armed forces. Finally, the paper concludes with action points to more effectively integrate intersectional gender perspectives into IHL.



indicates that interpretation and application of IHL must include gender perspectives to ensure adequate protection for all persons.

Failure to include gender perspectives can also lead to inaccurate assessments of civilian harm, which otherwise form the cornerstone of IHL.³ As noted by the Swedish Red Cross, ‘it is difficult to act in accordance with IHL without having insight into the possible effects of one’s actions’, and such insight is not fully reached without considering the situation of the individuals, including their different status, needs and capacities in a given context.⁴ Fully extending IHL to all persons thus demands an understanding of social power dynamics, especially the identification of marginalized groups in a particular context, as these differences can create varying risks and harm during conflict.

Furthermore, differences in social power and position do not occur on the basis of gender alone, which points to the need for interpretation to acknowledge intersecting social identity factors.⁵ Intersectionality is an analytical approach grounded in feminist studies used to describe the multidimensionality of lived experiences and overlapping discriminations that individuals face, for instance, on the basis of race, nationality, class, caste, religion, disability or sexual orientation.⁶

The importance of adopting an intersectional analysis in the application of IHL is particularly evident in emerging forms of warfare. For example, reports of United States drone strikes that profiled ‘military-age males’ in Afghanistan demonstrate that gender cannot be considered in isolation, as in this case gender and age were both relevant identity markers that resulted in the targeting of individuals.⁷ Another example is artificial intelligence (AI) in the military domain, which, when used to inform and implement targeting decisions, contains a risk of perpetuating—and even amplifying—existing bias, particularly related to race and gender.⁸

Intersectional gender perspectives in IHL therefore provide the means to facilitate more precise assessments of vulnerabilities and the impacts of armed conflict. For example, ethnicity or socio-economic status can intersect with gender, resulting in certain groups experiencing conflict, and its consequences, in a different manner. Yet adopting such an approach

³ ICRC, *Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law* (ICRC: Morges, June 2022), p. 7.

⁴ Lindvall, K., ‘How to operationalise a gender perspective: Formulating a checklist’, eds C. Tengroth and K. Lindvall, *IHL and Gender: Swedish Experiences* (Swedish Red Cross/Swedish Ministry for Foreign Affairs: Stockholm, 2015), p. 39.

⁵ Baldwin, G. and Hynes, T., ‘The securitization of gender: A primer’, IPI Global Observatory, 11 Oct. 2022.

⁶ See Crenshaw, K., ‘Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics’, *University of Chicago Legal Forum*, no. 1 (1989).

⁷ See Shoker, S., *Military-age Males in Counterinsurgency and Drone Warfare* (Palgrave Macmillan: Cham, 2021).

⁸ See e.g. ICRC, ‘Artificial intelligence and machine learning in armed conflict: A human-centred approach’, ICRC Position Paper, *International Review of the Red Cross*, no. 913 (Mar. 2021); Chandler, K., *Does Military AI have Gender? Understanding Bias and Promoting Ethical Approaches in Military Applications of AI*, United Nations Institute for Disarmament Research (UNIDIR: Geneva, 2021); Wilcox, L., ‘Embodying algorithmic war: Gender, race, and the posthuman in drone warfare’, *Security Dialogue*, vol. 48, no. 1 (2017); Sharkey, N., ‘The impact of gender and race bias in AI’, ICRC Humanitarian Law and Policy Blog, 28 Aug. 2018; and Jiménez, A. F., ‘Embedding gender in international humanitarian law: Is artificial intelligence up to the task?’, *JustSecurity*, 27 Aug. 2021.



requires first understanding how gender risks are being addressed in a unidimensional and limited manner under existing rules.

Accordingly, this paper presents an overview of the missing gender perspectives in IHL and provides suggestions for how to integrate them. First, the paper highlights inherent gender bias in the wording of some of the rules of IHL (section II). Second, the paper identifies those IHL rules that are particularly sensitive to gender bias in their interpretation and application (section III). Finally, the paper concludes with actions points to more effectively integrate gender perspectives into the interpretation of certain IHL rules (section IV).

II. Inherent gender bias in IHL

This section provides an overview of the rules of IHL that have inherent gender bias in their wording and adopt narrow conceptualizations of gender. It addresses rules that appear in both IHL treaties and customary law, and which are directly relevant to the protection of civilians. These rules collectively seek to limit the effects of armed conflict by mandating equal treatment and non-discrimination.⁹ However, some rules reflect gendered assumptions and can perpetuate stereotypes based on binary classifications of men and women in specific roles. In addition, such binary interpretations often result in excluding the experiences of lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual and other sexual orientation or gender identity (LGBTQIA+) individuals in armed conflict.

Limited distinction between sex and gender

The difference between the terms ‘sex’ and ‘gender’ is significant. Sex refers to the biological characteristics of individuals assigned at birth and its use is often limited to the distinction between ‘male’ and ‘female’, although experts have observed that the meaning of the term is far more complex.¹⁰ Meanwhile, gender refers to a social construct of characteristics, roles and relations and has been understood to include a wide spectrum of identities, including transgender and non-binary persons.

The wording of IHL rules, however, does not sufficiently distinguish between these two terms, and only the terms ‘sex’ and ‘women’ are used throughout the conventions and protocols.¹¹ Yet this distinction is important, as gender-specific needs are distinct from sex-specific needs. Thus, the lack of distinction in the legal provisions risks failing to recognize (and prevent) the different types of harm experienced in a particular context, and how this

⁹ Geneva Convention I (note 1), Article 12; Geneva Convention II (note 1), Article 12; Geneva Convention III (note 1), Article 16; Geneva Convention IV (note 1), articles 13, 27; Additional Protocol I (note 1), articles 9, 69, 70, 75; Additional Protocol II (note 1), articles 2, 4, 18; and ICRC, Customary IHL Database, ‘Rule 88. Non-discrimination’. IHL adopts the expression ‘without any adverse distinction’ to prohibit discrimination. For a discussion of non-discrimination on the basis of gender see ICRC (note 3), p. 25.

¹⁰ See the analysis of the difference between ‘sex’ and ‘gender’ in Stryker (note 2), pp. 15, 31–33.

¹¹ The ICRC has clarified the interpretation of these two terms, pointing to both sex-specific and gendered harms arising under armed conflict; see ICRC (note 3), p. 11.



may vary across groups.¹² For example, the sex-specific effects of nuclear weapons may include how ionizing radiation impacts women's reproductive health.¹³ The gendered effects of nuclear weapons, on the other hand, may include how radiation-related social stigma intensifies discrimination against women survivors.¹⁴

The lack of distinction between the terms sex and gender is not unique to the wording of IHL rules and is evident in other branches of international law. For example, it is also evident in the Rome Statute of the International Criminal Court.¹⁵ The text of the statute defines gender as 'the two sexes, male and female, within the context of society', thus adopting a binary classification of sex and failing to treat gender as a spectrum of identities.¹⁶

Distinguishing between sex and gender is important to understand, assess and respond to the different needs and vulnerabilities of individuals across sexes, gender identities and overlapping social identity markers during armed conflict. Thus, to ensure equal protection for all persons in armed conflict, deliberate efforts to distinguish between sex-specific and gender-specific impacts are needed.

Gender essentialism

Gender essentialism refers to the assumption that men and women have rigidly defined experiences, based on 'essential' attributes linked to their sex.¹⁷ In IHL, this can have the effect of characterizing individuals based on stereotypical notions linked to their sex, which can be inaccurate. In some rules, the wording exhibits an assumption of 'a certain male experience' as the norm.¹⁸ While this is not expressly stated, the assumption that experiences in conflict are primarily male becomes evident from the carve-out of specific provisions for women.

In this regard, it is highly significant that 42 rules in the 1949 Geneva Conventions and their 1977 Additional Protocols (I and II) have been noted to address women as either expectant or nursing mothers, or victims.¹⁹ These rules are founded on the presumption that, typically, men are combatants and women are victims or caregivers. This gives rise to the frequent categorization 'women and children', which can result in infantilizing

¹² See Dalaqua, R. H. et al., *Missing Links: Understanding Sex and Gender-related Impacts of Chemical and Biological Weapons* (UNIDIR: Geneva, 2019).

¹³ Dalaqua (note 12), p. 19.

¹⁴ Dalaqua (note 12), p. 19.

¹⁵ Rome Statute of the International Criminal Court, opened for signature at Rome 17 July 1998 and at New York 18 Oct. 1998, entered into force 1 July 2002.

¹⁶ Rome Statute of the International Criminal Court (note 15), Article 7.

¹⁷ Harris, A. P., 'Race and essentialism in feminist legal theory', *Stanford Law Review*, vol. 42, no. 3 (1990), p. 585; and Pratt, N., 'Reconceptualizing gender, reinscribing racial-sexual boundaries in international security: The case of UN Security Council Resolution 1325 on "women, peace and security"', *International Studies Quarterly*, vol. 57, no. 4 (2013), p. 776.

¹⁸ Gardam, J., 'The silences in the rules that regulate women during times of armed conflict', eds. F. Ni Aoláin et al., *The Oxford Handbook of Gender and Conflict* (Oxford University Press: Oxford, 2021), p. 40.

¹⁹ Gardam, J. and Jarvis, M., *Women, Armed Conflict and International Law* (Kluwer Law International: The Hague, 2001), p. 96. See also Durham, H. and O'Byrne, K., 'The dialogue of difference: Gender perspectives on international humanitarian law', *International Review of the Red Cross*, vol. 92, no. 877 (2010), p. 34.



women.²⁰ The bias in the wording fails to recognize other roles in armed conflict, such as men who are caregivers.²¹

Experts note that such limited understanding of gender in armed conflict reinforces the gender essentialism described above.²² As a result, gender bias in IHL rules risks erasing experiences that do not fit within a stereotypical categorization.²³ In addition to these types of bias, there is little recognition of the experiences of women who do not have children or of the different roles that women can play during conflict.²⁴ The result of such gender essentialism is that the reality of diverse and complex experiences within and beyond armed conflict is not accurately captured, and dedicated interpretation is required to correct this.

Despite gender essentialism in some rules, there are others where the treatment of women does reach beyond the mother-victim classification, such as those prescribed for the regulation of women prisoners of war. Those rules recognize that women can play additional roles in armed conflict, including as combatants. The rules accordingly prescribe several protections for women, such as separate dormitories, the sex-based allotment of tasks and the prohibition of women prisoners of war being treated ‘more severely or punished more than male (counterparts)’.²⁵ While all these protections are essential, the select and explicit references to women have elicited criticism over the years that the language of other rules ‘speak to men alone’.²⁶

To ensure that IHL rules avoid essentializing the experiences of all genders, interpretation needs to expand beyond a rigid, binary classification of men and women, and also account for the non-stereotypical roles that individuals play during conflict. Furthermore, interpretation must be careful not to incorrectly assume that all bodies experiencing conflict are cisgender (see below on protection of individuals).²⁷ Integrating gender perspectives to correct bias in the interpretation of these rules will help reflect the reality of diverse experiences in conflict. An International Committee of the Red Cross (ICRC) initiative to update the official commentaries of the Geneva Conventions and Additional Protocols with commitments to

²⁰ Kinsella, H. M., ‘Gendering Grotius: Sex and sex difference in the laws of war’, *Political Theory*, vol. 34, no. 2 (2006), p. 166; and Bennoune, K., ‘Do we need new international law to protect women in armed conflict’, *Case Western Reserve Journal of International Law*, vol. 38, no. 2 (2007), pp. 377–78.

²¹ Some experts have identified the impact of these discriminations against women combatants; see Kinsella (note 20), p. 165.

²² Heathcote, G. et al. *The Law of War and Peace—A Gendered Analysis: Volume One* (Bloomsbury Academic: London, 2022), p. 149.

²³ For a critique of the simplistic victim–agency classification of women’s experiences in armed conflict, see Parashar, S., ‘Feminist international relations and women militants: Case studies from Sri Lanka and Kashmir’, *Cambridge Review of International Affairs*, vol. 22, no. 2 (2009).

²⁴ See Parashar (note 23); Oosterveld, V., ‘Feminist debates on civilian women and international humanitarian law’, *Windsor Yearbook of Access to Justice*, vol. 27, no. 2 (2009), pp. 397–98; and ICRC (note 3), p. 14.

²⁵ Geneva Convention III (note 1), articles 25, 49, 88. See also O’Rourke, C., ‘Geneva Convention III Commentary: What significance for women’s rights?’, *Just Security*, 21 Oct. 2020; and Hiemstra, H. and Murphy, V., ‘GCIII Commentary: I’m a woman and a POW in a pandemic. What does the Third Geneva Convention mean for me?’, *ICRC Humanitarian Law and Policy Blog*, 8 Dec. 2020.

²⁶ Ferry, G., ‘Oppression through “protection”: A survey of femininity in foundational humanitarian law texts’, *Minnesota Journal of Law & Inequality*, vol. 35, no. 1 (2017), p. 70.

²⁷ The term ‘cisgender’ refers to individuals who identify with the same gender assigned at birth. It is often used as a counterpart to ‘transgender’, which in contrast refers to individuals whose gender identity differs from the gender assigned at birth. See Stryker (note 2), p. 13.

mainstream gender perspectives is instructive and could form the basis for a more gender-responsive interpretation of IHL.²⁸

Protection of individuals beyond the binary

As illustrated above, the wording of some rules of IHL suggests that there is an inherent binary approach to gender. IHL does not explicitly recognize the need to provide protection to LGBTQIA+ individuals, and thus it can appear to be silent on the needs of individuals who identify beyond the categories of ‘men’ and ‘women’.

Failing to provide specific protection to LGBTQIA+ individuals during an armed conflict is associated with multiple risks. Past cases show that the consequences of armed conflict have particular implications for gender non-conforming individuals.²⁹ In particular, the pre-existing societal inequalities, lack of safety and harm that they may already endure in peacetime, including from community and family members, risk being further exacerbated.³⁰

As noted by the ICRC and Norwegian Red Cross, given that such individuals face discrimination on the basis of their sexual orientation and/or gender identity and expression (SOGIE), it is generally acknowledged that they are at high risk of certain forms of sexual and gender-based violence, including those that may be perpetrated as hate crimes.³¹ For example, as reflected in numerous reports, LGBTQIA+ people face major risks during detention, particularly different types of sexual violence, including but not limited to rape (notably so-called corrective rape), sexual slavery, forced examinations and nudity, harassment and humiliation.³² LGBTQIA+ people may also face higher risks in terms of refoulement, possibly facing more serious criminal sanctions, including longer sentences and the death penalty.³³

However, while a *prima facie* reading of the rules of IHL does not suggest that LGBTQIA+ individuals are offered specific protection, some general

²⁸ See e.g. the official ICRC commentaries updated in 2016, 2017 and 2020 to Geneva Conventions I, II and III; ICRC, ‘Geneva Conventions of 1949, Additional Protocols and their Commentaries’.

²⁹ Examples include cases from Afghanistan, Colombia and Iraq. See Human Rights Watch, ‘Even if you go to the skies, we will find you: LGBT people in Afghanistan after the Taliban takeover’, 26 Jan. 2022; West, S., ‘Colombia’s LGBTQ community: Victims of armed conflict’, NBC News, 7 Sep. 2016; and Human Rights Watch and IraQueer, *Everyone Wants Me Dead: Killings, Abduction, Torture and Sexual Violence Against LGBT People by Armed Groups in Iraq* (Human Rights Watch: Mar. 2022). See also UN Security Council, ‘Report of the Secretary-General on conflict-related sexual violence’, S/2016/361, 20 Apr. 2016.

³⁰ Rossouw, V., ‘“Or any other similar criteria”: Towards advancing the protection of LGBTIQI detainees against discrimination and sexual and gender-based violence during non-international armed conflict’, *International Review of the Red Cross*, no. 914 (Dec. 2021); and Daigle, M. and Myrtilinen, H., ‘Bridging diverse sexual orientation and gender identity (SOGI) into peacebuilding policy and practice’, *Gender and Development*, vol. 26, no. 1 (Jan. 2018), p. 108.

³¹ 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/Norwegian Red Cross: Feb. 2022) p. 21.

³² Margalit, A., ‘Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence’, *International Review of the Red Cross*, no. 907/908/909 (Apr. 2018), pp. 254, 259; and ICRC and Norwegian Red Cross (note 31), pp. 21, 28. See also Rossouw (note 30), p. 781.

³³ Margalit (note 32), pp. 254, 259. See also Rossouw (note 30), p. 781.



and specific protections may be found when reading them in good faith.³⁴ First, IHL offers protection and humane treatment to ‘all persons affected by armed conflict’, which should automatically include persons across the gender spectrum.³⁵ Second, states are obliged not only to respect IHL but also to ‘ensure respect’.³⁶ This arguably means using all feasible measures to prevent violations from occurring, including taking into consideration the special needs of LGBTQIA+ individuals.³⁷ Third, IHL prohibits any ‘adverse distinction’ between protected persons based on race, colour, religion, sex, political or other opinion, birth or other status, or any other similar criteria.³⁸ Although a prohibition against adverse distinction based on sexual orientation and/or gender identity is not explicitly mentioned, the list is non-exhaustive and the specific protection of LGBTQIA+ individuals can be assumed on the basis of either sex or ‘any other similar criteria’.³⁹

Whether IHL is equipped to address the needs and vulnerabilities of LGBTQIA+ individuals therefore depends on a good faith interpretation of the existing rules and specific targeted measures.⁴⁰ However, if left unaddressed through interpretation, certain IHL rules may fail to provide protection to individuals across the gender spectrum during an armed conflict.

Assessment of sexual violence

The Geneva Conventions and Additional Protocols contain a number of rules on sexual violence, many of which are also crystallized in customary IHL.⁴¹ Thus, IHL unequivocally prohibits sexual violence. However, gender perspectives can be more effectively integrated to reinforce these prohibitions and expand understandings of sexual violence.

Common Article 3 of the Geneva Conventions prohibits sexual violence by outlawing ‘violence to life and person, in particular . . . mutilation, cruel treatment and torture’, as well as ‘outrages upon personal dignity, in particular humiliating and degrading treatment’.⁴² This is complemented by the ‘fundamental guarantees’ rule under Additional Protocol II, which, as applicable, prohibits ‘outrages upon personal dignity, in particular,

³⁴ The principle of good faith is a fundamental standard of behaviour in international law that, among others, implies the exercise of honesty, loyalty and reasonableness. See International Law Commission, ‘Draft Articles on the Law of Treaties with commentaries’, *Yearbook of the International Law Commission*, vol. II, 1966, Article 27.

³⁵ Geneva Convention IV (note 1), Article 27; Additional Protocol I (note 1), Article 75; Additional Protocol II (note 1), Article 4; and ICRC, Customary IHL Database, ‘Rule 87. Humane treatment’.

³⁶ Geneva Convention IV (note 1), Article 1.

³⁷ Margalit (note 32), pp. 252.

³⁸ Common Article 3 of the Geneva Conventions; Geneva Convention I (note 1), Article 12; Geneva Convention II (note 1), Article 12; Geneva Convention III (note 1), Article 16; Geneva Convention IV (note 1), articles 13, 27; Additional Protocol I (note 1), articles 9, 69, 70, 75; Additional Protocol II (note 1), articles 2, 4, 18; and ICRC, Customary IHL Database, ‘Rule 87. Humane treatment’.

³⁹ ICRC and Norwegian Red Cross (note 31), p. 16; ICRC, Geneva Convention I, Commentary of 2016, ‘Article 3: Conflicts not of an international character’, para. 569; and Rossouw (note 30), p. 781.

⁴⁰ Margalit (note 32), p. 252; and Rossouw (note 30), p. 785.

⁴¹ Geneva Convention IV (note 1), Article 27; Additional Protocol I (note 1), articles 75, 76; and Additional Protocol II (note 1), Article 4.

⁴² Geneva Conventions I–IV (note 1), Common Article 3.



humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' for civilians and persons hors de combat.⁴³

Moreover, Article 27(2) of Geneva Convention IV specifies that 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.⁴⁴ However, this wording has elicited extensive criticism as it evidences gendered assumptions regarding women's 'honour' being linked with chastity and modesty.⁴⁵ Criticisms include concerns that this wording may result in women being viewed as family property, while others suggest it reinforces the notion that 'the raped woman is dishonorable' and risks reducing women's value to 'pure' sexual beings.⁴⁶ The ICRC, for instance, has noted that an emphasis on honour is both harmful and discriminatory, and that interpretation should be updated accordingly.⁴⁷

Nevertheless, despite these concerns surrounding honour and sexual violence, there have been promising legal developments in terms of including gender perspectives in IHL, such as the clarification that the prohibition against sexual violence applies to all genders, including men and LGBTQIA+ individuals.⁴⁸ These range from judicial decisions in international criminal law and international human rights law to UN Security Council resolutions on women, peace and security, to unequivocally prohibit rape and other forms of sexual violence against all persons.⁴⁹ Such developments demonstrate the capacity for nuanced interpretation and parallel bodies of law to effectively complement and integrate gender perspectives into international law, including IHL.

In line with such developments, gender perspectives can be utilized to expand assessments of sexual violence as per its prohibitions under IHL. For instance, the ICRC and the Norwegian Red Cross note that while the focus of sexual violence on women and girls is essential (being based on overwhelming evidence that they are impacted in large numbers), the diversity of victims and survivors that also include men, boys and LGBTQIA+ persons requires further attention.⁵⁰ This has led to a growing recognition of men as victims and survivors of sexual assault in conflict, which experts note is an area that merits greater study.⁵¹

⁴³ Additional Protocol II (note 1), Article 4(2).

⁴⁴ Geneva Convention IV (note 1), Article 27.

⁴⁵ Gardam (note 18), pp. 40–41.

⁴⁶ Charlesworth, H. and Chinkin, C., *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press: Manchester, 2000), p. 314; and Ferry, G., 'Oppression through "protection": A survey of femininity in foundational humanitarian law texts', *Minnesota Journal of Law & Inequality*, vol. 35, no. 1 (2017), p. 72.

⁴⁷ ICRC (note 3), p. 23.

⁴⁸ See ICRC and Norwegian Red Cross (note 31), p. 16; and Durham, H. and Murphy, V., 'Taking the next steps on sexual and gender-based violence in international humanitarian law: Embracing complementarity and mainstreaming gender', eds R. Kolb et al., *Research Handbook on Human Rights and Humanitarian Law: Further Reflections and Perspectives* (Edward Elgar Publishing, 2022), p. 370.

⁴⁹ ICRC, Customary IHL Database, 'Rule 93. Rape and other forms of sexual violence'.

⁵⁰ ICRC and Norwegian Red Cross (note 31), pp. 12–13.

⁵¹ See Sivakumaran, S., 'Sexual violence against men in armed conflict', *European Journal of International Law*, vol. 18, no. 2 (Apr. 2007); and Sivakumaran, S., 'How do the Additional Protocols address the issue of sexual and gender-based violence in armed conflicts?', ed. F. Pocar, *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives* (International Institute of Humanitarian Law: Sanremo, Sep. 2017). On the exclusion of men and boys from gendered responses



Indeed, men, boys and LGBTQIA+ persons are not homogeneous categories, and their risks or needs may vary based on their position in a given societal context. Moreover, despite the important research on gay cisgender men, the ICRC and Norwegian Red Cross have identified a lesser focus on other individuals that may fall within the LGBTQIA+ community.⁵² As a result, dedicated engagement in assessing the impacts of sexual violence on lesbian, trans, intersex and non-binary individuals is necessary, which will require further data collection and analysis for these specific groups.⁵³

Finally, it is useful to clarify the term ‘sexual violence’ in light of ongoing discussions on gender-based violence. While the term ‘gender-based violence’ does not appear in IHL, it is used in several other international frameworks, including UN Security Council Resolution 1325 on women, peace and security and the Arms Trade Treaty.⁵⁴ The two terms are not synonymous, however, as gender-based violence refers to ‘violations committed in armed conflict against individuals because of their sex and/or socially constructed gender roles’.⁵⁵ Therefore, gender-based violence typically refers to violations that are not necessarily sexual in their expression or manifestation. For example, experts posit that the mass killing of military-age men, killing girls for transgressing value system-specific norms related to typically ‘female’ behaviour, or killing individuals from sexual/gender minorities because they identify as such are serious violations of IHL and constitute gender-based violence.⁵⁶ This points to the need for a clear distinction between the two terms, made in a manner that situates understanding and assessment of sexual violence in the context of parallel ongoing discussions on gender-based violence.⁵⁷ This can then enable more progressive understanding of the types of sexual and gender-based harm experienced in conflict.

A number of efforts have been made to address concerns around the inherent gender bias in certain IHL rules. Overall, two different approaches can be identified. First, some experts argue that by identifying gendered assumptions in the wording of rules, these can and should be subject to revision and reform. Second, other experts acknowledge the bias within IHL, but argue that instead of revising the rules, reinterpretation can and should effectively incorporate gender perspectives into the application of rules.⁵⁸ Notably, proposals for legal reform through amendment are limited, due to concern that discussions around reform may undermine the foundational treaties and supporting protocols, which have largely customary status.⁵⁹ As a result, those who advocate for mainstreaming gender perspectives in IHL tend to shy away from proposing amendments or new instruments

in humanitarian situations, see Slegel, H., Spielberg, W. and Ragonese, C., *Masculinities and Male Trauma: Making the Connections* (Promundo-US: Washington, DC, 2021), p. 52.

⁵² ICRC and Norwegian Red Cross (note 31), p. 28.

⁵³ See Durham and Murphy (note 48), p. 370.

⁵⁴ See Rome Statute of the International Criminal Court (note 15), articles, 42, 54, 68; UN Security Council Resolution 1325, 31 Oct. 2000; UN Security Council Resolution 2467, 23 Apr. 2019; and Arms Trade Treaty, opened for signature at New York 3 June 2013, entered into force 24 Dec. 2014, Article 7(4).

⁵⁵ Durham and Murphy (note 48), p. 366.

⁵⁶ Durham and Murphy (note 48), p. 366.

⁵⁷ Durham and Murphy (note 48), p. 366.

⁵⁸ See ICRC (note 3).

⁵⁹ O’Rourke, C., *Women’s Rights in Armed Conflict under International Law* (Cambridge University Press: Cambridge, 2020) pp. 39–40; and Gardam (note 18), p. 45.

to the current framework and rely instead on advancing more nuanced interpretations to comprehensively assess needs, risks and harm during armed conflict. This second approach highlights the importance of how IHL rules are interpreted and applied to ensure protection of all persons, as addressed in the following section.

III. Gender bias in the interpretation and application of IHL

In addition to issues flowing from inherent bias within some of the rules of IHL, the bias of those interpreting and applying the rules can likewise affect the ability to provide equal protection to all persons. This highlights the importance of who is implementing the law and how their values, bias and gendered assumptions affect the implementation of IHL.⁶⁰ Therefore, the problem is not rooted in the IHL rules themselves but in how they are interpreted and applied. This section identifies and examines some of the key rules of IHL that are particularly sensitive to bias in their implementation. These rules pertain to (a) the fundamental prohibition against deploying any weapons, means or methods of warfare of a nature to cause superfluous injury or unnecessary suffering, (b) the rules guiding the conduct of hostilities, and (c) the obligations related to the provision of legal advice and training to armed forces.

Weapons, means or methods of warfare of a nature to cause superfluous injury or unnecessary suffering

IHL contains both specific and general rules prohibiting or restricting certain weapons, means and methods of warfare. A key rule to consider is the explicit prohibition against any weapon, means or method of warfare that is ‘of a nature to cause superfluous injury or unnecessary suffering’.⁶¹ This rule has, for instance, led to the explicit prohibition of biological weapons, chemical weapons and cluster munitions.⁶² However, the terms ‘superfluous injury’ and ‘unnecessary suffering’ have not been analysed in the context of gender, and as such they are subject to interpretation. Indeed, a failure to include gender perspectives when assessing what constitutes superfluous injury and unnecessary suffering may result in unintended harm to certain individuals more than others. The Swedish Red Cross has observed that this harm may differ based on an individual’s status and function in society, including access to key services, and due to limited study, it is an area requiring further analysis.⁶³

Gender, in combination with other social identity factors, is therefore relevant when making assessments concerning superfluous injury and unnecessary suffering. For example, studies have demonstrated the varied impacts of chemical and biological weapons on the basis of sex and gender, including long-term effects on health (such as sex-specific cancers and

⁶⁰ ICRC (note 3), p. 12.

⁶¹ Additional Protocol I (note 1), Article 35.

⁶² See the 1981 Certain Conventional Weapons Convention, Protocols I–V; 1997 Anti-Personnel Mine Convention; and 2008 Convention on Cluster Munitions.

⁶³ Tengroth. C., ‘Should gender considerations impact the legal review of new weapons?’, eds Tengroth and Lindvall (note 4), p. 119.



pregnancy-related complications) and the social stigmatization of women in certain contexts.⁶⁴

This has led experts to suggest the inclusion of a gender perspective when conducting legal reviews of new weapons, means or methods of warfare.⁶⁵ These legal reviews, which are an obligation under IHL, serve to determine whether a weapon, means or method can be used in compliance with IHL ‘in some, or all circumstances’, including whether the weapon, means or method in question is of a nature to cause superfluous injury or unnecessary suffering.⁶⁶ Currently, there is no (known) streamlined practice for how to include gender perspectives in a legal review and gender is only considered on an ad-hoc basis or using insufficient criteria. In fact, cases of national practice have shown how a sex-based—rather than gender-based—focus has been adopted, highlighting a gap in the current implementation of the rule.⁶⁷

Rules guiding the conduct of hostilities

The rules guiding the conduct of hostilities, also commonly referred to as ‘targeting rules’, are a fundamental part of IHL. Here, the key rules in question are those on distinction, proportionality and precautions in attack. As demonstrated below, compliance with targeting rules is often context-dependent and relies on context-based decisions and value judgements. The subjective nature of these rules makes them particularly sensitive to the risk of bias on multiple social and cultural bases, including on the basis of gender.

The principle of distinction

The principle of distinction requires parties to an armed conflict to distinguish between civilians and combatants, and only direct attacks against combatants.⁶⁸ Targeting decisions that involve distinguishing between civilians and combatants are typically informed and influenced by gendered assumptions embedded in decision making, both on the systemic and the individual level.⁶⁹

On the systemic level, for instance, the impact of gendered assumptions is especially relevant when targeting decisions are based on ‘signature strikes’, meaning strikes that target individuals or groups based on behaviours and characteristics associated with the adversary, but whose identities are not known.⁷⁰ This has resulted in the application of force heavily but not solely

⁶⁴ Dalaqua (note 12).

⁶⁵ See e.g. Tengroth (note 63), p. 113. See also the national practice of New Zealand in Boulanin, V. and Verbruggen, M., ‘SIPRI compendium on Article 36 reviews’, SIPRI Background Paper, Dec. 2017, p. 11; and Jiménez, A. F., ‘Gendering the legal review of new means and methods of warfare’, *Just Security*, 23 Aug. 2022.

⁶⁶ Additional Protocol I (note 1), Article 36.

⁶⁷ Tengroth (note 63), p. 113; and Boulanin and Verbruggen (note 65), p. 11.

⁶⁸ Additional Protocol I (note 1), Article 48; and ICRC, Customary IHL Database, ‘Rule 1. The principle of distinction between civilians and combatants’.

⁶⁹ The reliance of the principle of distinction on visual identity markers, and the subsequent scope for bias has been noted by scholars. See Parsa, A., ‘Knowing and seeing the combatant: War, counterinsurgency and targeting in international law’, Thesis, Lund University, 2017, p. 42.

⁷⁰ See Heller, K. J., ‘“One hell of a killing machine”: Signature strikes and international law’, *Journal of International Criminal Justice*, vol. 11, no. 1 (Feb. 2013).

informed by social indicators such as age and assumed gender.⁷¹ Such assumptions bear multiple risks.

First, men (especially of military age) are at greater risk of being misidentified as combatants. Second, such assumptions may fail to recognize the multiple roles that women and other gender identities can have within the armed forces and during armed conflict.⁷² While this should not be misconstrued as trying to widen the category of who can be lawfully targeted under IHL, it points to the limited recognition of the complex roles played by various genders during conflict.⁷³

In fact, the importance of recognizing the complex roles and identities of individuals and groups during an armed conflict is further emphasized in light of new methods of warfare, notably in the field of military artificial intelligence (AI). Here, concerns have been raised that the use of military AI risks perpetuating—and even amplifying—existing types of bias, particularly those related to race and gender.⁷⁴ Ultimately, such bias could lead to the misidentification of targets and be at odds with IHL, particularly the principle of distinction.

Thus, using assumed gender as an identity signifier contains the risk of misidentifying targets and points to the need for a comprehensive analysis of the variety of roles that individuals play in and outside the context of an armed conflict. Such context-specific analysis in the application and interpretation of the principle of distinction could help ensure that all individuals are offered equal protection under IHL.

The principle of proportionality

The principle of proportionality prohibits launching an attack that may be expected to result in the death or injury of civilians or damage to civilian objects that would be ‘excessive in relation to the concrete and direct military advantage anticipated’.⁷⁵ Compliance with this rule relies on an assessment of the type and scope of civilian harm that the attack may cause and whether it will be ‘excessive’ in relation to the military objective expected. However, the rule does not specify the types of harm that should be taken into account, such as whether to include reverberating effects or psychological harm. This lack of specifics carries a number of risks from a gender perspective.

For example, it is well established that the impacts of explosive weapons (both direct and indirect) are felt differently across a variety of social indicators, including gender identity.⁷⁶ The indirect impacts in such cases can also include reverberating effects, for instance, when women and gender minorities are exposed to gender-based violence in the case of forced migration.

Therefore, consideration of the multi-dimensional gendered impacts of the effects of force is critical when making proportionality assessments.

⁷¹ Heller (note 70); and Acheson, R., Moyes, R. and Nash, T., ‘Sex and drone strikes: Gender and identity in targeting and casualty analysis’, *Reaching Critical Will*, Oct. 2014.

⁷² ICRC (note 3), p. 14.

⁷³ ICRC (note 3), p. 15.

⁷⁴ See e.g. ICRC (note 8); Chandler (note 8); Wilcox (note 8); Sharkey (note 8); and Jiménez (note 8).

⁷⁵ Additional Protocol I (note 1), Article 51(5)(b); and ICRC, Customary IHL Database, ‘Rule 14. Proportionality in attack’.

⁷⁶ UNIDIR, ‘Gendered impacts of explosive weapons in populated areas’, UNIDIR Fact Sheet, 2 Mar. 2021.



A failure to do so risks posing excessive harm to protected persons on the basis of indicators such as gender, age or physical ability. Significantly, recognition of these intersecting factors is growing, as demonstrated in the political declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas (EWIPA), which notes the importance of data collection and encourages data disaggregation by sex and age where feasible.⁷⁷

The principle of precautions

The principle of precautions obliges, among others, the parties to a conflict to take all feasible precautions to protect civilians during an ‘attack’ and, more broadly, to take constant care in ‘military operations’.⁷⁸ Yet it does not specify what ‘feasible precautions’ and ‘constant care’ entail. While such open-ended wording allows for a context-sensitive assessment, it also makes the application of this rule particularly sensitive to bias.

For example, in order to take all feasible precautions in an attack, parties to an armed conflict must possess a sufficient understanding of the likely effects of force so that they can minimize and/or prevent them. However, if those involved in the decision making fail to consider or understand how the effects of force may impact individuals or groups across sex, gender, age, race and so forth, such individuals and groups risk receiving a lower level of protection than otherwise offered by IHL.⁷⁹ This risk is especially high for commanders, whose compliance with IHL is being assessed on the basis of ‘reasonableness’, referring to what the commander should have reasonably known and foreseen from all sources available in the circumstances.⁸⁰ As gendered assumptions and bias can inform this standard of reasonableness, some groups may not be offered equal protection.

Furthermore, the ICRC has cautioned about the consequences of not including a gender analysis in the principle of precautions in terms of issuing warnings during an attack.⁸¹ If warnings are provided through written channels, for instance, the state may be overlooking the accessibility of these warnings among groups with limited literacy (often including women and girls).⁸² This is just one example of how social indicators can impact compliance with the rule.

Therefore, the ICRC has noted existing good practices to integrate gender perspectives at the planning stage of operations, including the appointment of gender advisers in positions of influence and gender coaching for military leaders.⁸³ It finds that posing questions to determine how different individuals use, need or rely on spaces, or understanding how the value of a civilian object may differ for groups on the basis of gender, is critical.⁸⁴ The collection and use of data is another key avenue to integrate gender perspectives into

⁷⁷ Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas, 17 June 2022, para. 1.8.

⁷⁸ Additional Protocol I (note 1), Article 57(1); and ICRC, Customary IHL Database, ‘Rule 15. Principle of precautions in attack’.

⁷⁹ ICRC (note 3), pp. 17–18.

⁸⁰ ICRC (note 3), p. 12.

⁸¹ ICRC (note 3), p. 18.

⁸² ICRC (note 3), p. 18.

⁸³ ICRC (note 3), p. 20.

⁸⁴ ICRC (note 3), p. 21.



the analysis. As a starting point, the ICRC has recommended the monitoring, tracking and reporting of sex-disaggregated civilian casualty data in order to inform future assessments of reasonably foreseeable harm.⁸⁵ Integrating gender perspectives in such ways can thus help ensure compliance with the targeting rules under IHL.

Obligations to provide legal advice and legal training to the armed forces

IHL includes a number of rules of a more ‘procedural’ character as they serve as measures which, when complied with, help ensure respect for the cardinal rules of IHL. Two examples of such rules are the obligation to provide legal advice to the armed forces during military operations and the obligation to ensure that the armed forces receive training in the rules of IHL. While these rules are crucial to ensuring compliance with IHL, they are framed in broad, general terms and risk omission of gender perspectives in their interpretation and application.

First, the obligation to provide legal advice in an armed conflict requires parties to make legal advisers available to military commanders ‘when necessary’ and at the ‘appropriate level’.⁸⁶ Implementation of this rule is likely to include recommendations concerning distinction and proportionality in attack, which are principles that require context-based decisions and value judgements (e.g. the obligation to assess whether a person is taking direct part in hostilities or whether the expected harm will be ‘excessive’ in relation to the military advantage expected). However, the open-ended language of the obligation combined with its inherently subjective nature makes it sensitive to gender bias. For example, a legal adviser’s gendered assumptions (or lack thereof) are likely to be reflected in the advice given on target verification or assessments of indirect harm to the civilian population.

Second, the obligation to disseminate IHL to the wider public includes providing instructions and training to the armed forces in IHL.⁸⁷ Here too, IHL does not specify how this obligation should be performed, including whether or not there is an obligation to incorporate gender perspectives in the instructions and training of armed forces.⁸⁸ Yet, as this paper has illustrated, the consideration of gender perspectives is crucial to ensuring equal protection to all persons during (and after) an armed conflict. Therefore, it should be reflected throughout the implementation of obligations under IHL, as a matter of good practice, not least when providing instructions and training to the armed forces. The Nordic Centre for Gender in Military Operations provides useful examples of training armed forces in

⁸⁵ ICRC (note 3), p. 21.

⁸⁶ Additional Protocol I (note 1), Article 82; and ICRC, Customary IHL Database, ‘Rule 141. Legal advisers for armed forces’.

⁸⁷ Geneva Convention I (note 1), Article 47; Geneva Convention II (note 1), Article 48; Geneva Convention III (note 1), Article 127; Geneva Convention IV (note 1), Article 44; Additional Protocol I (note 1), Article 83; Additional Protocol II (note 1), Article 1; and ICRC, Customary IHL Database, ‘Rule 142. Instruction in international humanitarian law within armed forces’.

⁸⁸ Rossi, A., ‘Training armed forces in IHL: Just a matter of law?’, *Opinio Juris*, 8 Oct. 2020; and Longobardo, M., ‘Training and education of armed forces in the age of high-tech hostilities’, eds E. Carpanelli and N. Lazzarini, *Use and Misuse of New Technologies: Contemporary Challenges in International and European Law* (Springer: Cham, 2019).



gender perspectives and IHL compliance, showing that such courses need to be custom-made for groups and include a combination of both theoretical and practical training.⁸⁹

IV. Conclusions

Gender perspectives need to be integrated into IHL with intersectional considerations because situations of armed conflict vary, and certain individuals or groups may be more vulnerable than others depending on the state, dominant norms and circumstances.

As a starting point, this paper has identified and highlighted the missing gender perspectives in IHL. It has argued that these missing gender perspectives are evident in the wording of IHL rules, which have an inherent gender bias, and that they may stem from a biased interpretation and application of certain rules.

As per these findings, the paper proposes the following action points to enable states and other relevant bodies to (better) integrate gender perspectives into IHL: (a) addressing inherent gender bias in IHL rules through national practice; (b) adopting practical measures to include gender perspectives in the interpretation and application of IHL; and (c) improving data collection on the gendered impacts of armed conflict.

First, some of the rules of IHL exhibit inherent gender bias in their wording by incorrectly assuming that individuals have specific roles and attributes. As a result, they may perpetuate gender essentialism. States should help correct this bias through updated interpretation of the rules in national practice, for example, by updating national military manuals and national rules or legislation relevant to the implementation of IHL. States should further ensure that national practice reflects the gender-responsive interpretations of IHL rules, including those in the updated commentaries of the Geneva Conventions and Additional Protocols published by the ICRC. This includes specific consideration for the protection of LGBTQIA+ individuals.

Second, some of the rules of IHL risk gender bias in their interpretation, such as the rules prohibiting weapons, means or methods of warfare that cause superfluous injury or unnecessary suffering; the rules guiding the conduct of hostilities; and the obligations related to the provision of legal advice and legal training to armed forces. States should adopt practical measures to include gender perspectives when interpreting these rules, for instance, at the planning stage of operations. Such measures could encompass appointing gender advisers, conducting gender training, coaching personnel (particularly commanders), and including questions to determine how individuals may use spaces and value objects differently.

Third, an overarching issue within IHL is the need for further data on sex-specific and gender-specific harm experienced by all persons during armed conflict. In this regard, data should be collected on how LGBTQIA+, especially lesbian and transgender, individuals are impacted by armed conflict and accordingly assess what their specific needs may be.

⁸⁹ Nordic Centre for Gender in Military Operations (NCGM), *Whose Security? Practical Examples of Gender Perspectives in Military Operations, 2015* (NCGM: Stockholm, Feb. 2015), pp. 52, 57.



Together, these action points could form the first steps towards integrating gender perspectives into IHL. Implementing them would enable states to more effectively fulfil their obligation to ensure protection for ‘all persons’ under IHL.

Abbreviations

AI	Artificial intelligence
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
LGBTQIA+	Lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual and other sexual orientation or gender identity
UN	United Nations



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INTEGRATING GENDER PERSPECTIVES INTO INTERNATIONAL HUMANITARIAN LAW

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