

## HOW DOES LAW PROTECT IN WAR?

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Home > IHL from a gender perspective: shedding new light on old conventions

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Caption: Kabul. A New Beginning for a war torn metropolis. In many armed conflicts today, gender and IHL issues intersect and play an important role for affected persons.

*Is IHL gendered? Discriminatory? Why is it important for those it aims to protect? The term “gender” refers to the culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas the term “sex” refers to biological and physical characteristics. Gender roles vary widely within*

*and between cultures, and depend on the particular social, economic and political context. Armed conflicts can accentuate or trigger gender-related issues, concerns and violence. This is why it is essential to understand how stereotypes materialize in armed conflict, starting by analysing the wide range of issues: masculinity and war, men or women as victims of sexual violence (by men or women), women as combatants and perpetrators, women and weapons, the treatment of the LGBTQ+ community and how boys and girls are subject to different threats.*

***This highlight follows up on previous highlights: “Sexual Violence in Armed Conflict <sup>[1]</sup>” (updated with new case studies) and “Armed groups and children <sup>[2]</sup>”.***

*VERSION FRANCAISE (PDF) => CLIQUEZ SUR LE LIEN SUIVANT: Coup de projecteur sur le DIH à travers la perspective du genre : apporter un nouvel éclairage aux vieilles conventions <sup>[3]</sup> disponible sur le site du blog Quid Justitiae de la Clinique de droit pénal et humanitaire (traduction de l'Université Laval).*

**IHL and Gender**

The Four Geneva Conventions and Additional Protocols include clauses on non-discrimination (P II, Art. 2(1) <sup>[4]</sup>; GC I-IV, Common Art. 3 <sup>[5]</sup>; GC I, Art. 12 <sup>[6]</sup>; GC II, Art. 12 <sup>[7]</sup>; GC IV, Art. 27 <sup>[8]</sup>; P I, Art. 9(1) <sup>[9]</sup>). This prohibition has even become a rule of customary international law (CIHL Rule 88 <sup>[10]</sup>). Women are mentioned in several articles: “Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men” (GC III, Art. 14 <sup>[11]</sup>, see also GC I, Art. 12 <sup>[6]</sup>, GC II, Art. 12 <sup>[7]</sup>). The phrasing of the prohibition of rape and other forms of sexual violence contemplates women explicitly: “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”(GC IV, Art. 27 <sup>[8]</sup>; see also P I, Art. 76 <sup>[12]</sup>).

Several provisions also contemplate specific measures for female POW and detainees: separate facilities for women and men (GC III, Art. 25 <sup>[13]</sup>, GC IV, Art. 76 <sup>[14]</sup>, P II, Art. 5 <sup>[15]</sup>, see also: GC III, Arts. 29 <sup>[16]</sup>, 108 <sup>[17]</sup>, GC IV, Art. 85 <sup>[18]</sup>) and equal treatment when it comes to punishment (GC III, Arts. 88 <sup>[19]</sup>, 97 <sup>[20]</sup>). Furthermore, pregnant women and mothers of children under 7 years of age are granted preferential treatment (GC IV, Arts. 16 <sup>[21]</sup>, 17 <sup>[22]</sup>, 18 <sup>[23]</sup>, 21 <sup>[24]</sup>, 22 <sup>[25]</sup>, 23 <sup>[26]</sup>, 38 <sup>[27]</sup>, 50 <sup>[28]</sup>, 89 <sup>[29]</sup>, 91 <sup>[30]</sup>, 127 <sup>[31]</sup>, 132 <sup>[32]</sup>; P I, Arts. 70(1) <sup>[33]</sup>, 76(2) <sup>[12]</sup>; P II, Art. 6 <sup>[34]</sup>). The specific protection of women (CIHL Rule 134 <sup>[35]</sup>) and the obligation to separate women deprived of their liberty from men (CIHL Rule 99 <sup>[36]</sup>) are customary international rules.

Interestingly, men are mentioned explicitly in relation to women, for instance: “Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men” (GC III, Art. 14 <sup>[11]</sup>).

### **The critique**

IHL has been strongly criticized from a gender perspective. Feminist legal scholars argue that IHL is inherently discriminatory: for instance, IHL mostly considers women as victims and allegedly men as combatants; on the prohibition of sexual violence, the phrasing refers

to women's "honour" instead of dignity or integrity; women are emphasized in the law mostly because of their reproductive function or as caregivers of young children.[1] Why are IHL provisions related to sexual violence and guardianship of children focused on women, whereas any person can be subject to sexual violence or be the main caregiver of a child? Another important question lies in the silence of the law in relation with the situation of LGBTQI+ persons and their possible specific needs. One could assume from it that IHL rules see women and men as belonging to mutually exclusive binary categories. The gendered approach of IHL is also linked to the overall discussion on cultural relativism [37] as diverse cultures may apply IHL norms differently, reflecting their own system of beliefs, including their particular approach to gender roles.

### **Intersectional Readings**

New light can be shed on old conventions. Innovative and contemporary interpretations of the law can provide a way out of gender stereotyped phrasings. For instance, the 2020 Updated Commentary to GC III [38] explains:

*Since 1949, there have been several social and international legal developments in relation to equality of the sexes, which need to be reflected in the application of Article 14(2) and related provisions. Today, there is a deeper understanding that women, men, girls and boys may have specific needs, capacities and perspectives linked to the different ways armed conflict and detention may affect them. In light of these developments, the specific mention of the protection of women in Article 14(2) is not to be understood as implying that women have less resilience, agency or capacity within the armed forces, but rather as an acknowledgement that women have a distinct set of needs and may face particular physical and psychological risks.*

Recent cases at the ICC (Lubanga [39] and Ntaganda [40]) have also addressed gender issues, notably regarding boys being recruited as child soldiers and girls involved in forced marriages or sexual slavery, both under the protection granted to children and the notion of

active participation in hostilities. Moreover, when it comes to cultural relativism it is worth noting that IHL is based on universal values and deals with such basic human needs and so specific scenarios than it definitely leaves much less space for cultural relativism than human rights law would for instance. More importantly, a proper cultural approach cannot be based on generic assumptions but requires an open-minded case-by-case analysis.

In short, recent practice illustrates that going beyond monolithic categorizations and accounting for the specific needs, risks and capacities of affected people through an intersectional interpretation of IHL can provide an adapted solution to the gender bias both in the practice and in the law.

## **The Law**

More detailed developments and explanations can be found in the “The Law <sup>[41]</sup>”. For the principles of non-discrimination, special protection of women and the feminist criticism of IHL, look at the chapter on “Civilian Population <sup>[42]</sup>”; for cultural relativism go to “Fundamentals <sup>[43]</sup>”.

## **The Practice**

A selection of related case studies from The Practice <sup>[44]</sup> further illustrates:

## **Gender in general**

- Afghanistan, Separate Hospital Treatment for Men and Women <sup>[45]</sup>
- Libya, Report of the Office of the UN High Commissioner for Human Rights (2014/15) <sup>[46]</sup>
- Somalia, Traditional Law and IHL <sup>[47]</sup>
- Geneva Call and the Chin National Front <sup>[48]</sup>
- Myanmar, Forced Population Movements <sup>[49]</sup>

- Central African Republic, No Class: When Armed Groups Use Schools <sup>[50]</sup>
- Central African Republic, Report of the UN Independent Expert, July 2016 <sup>[51]</sup>

## Gender stereotypes and protection

- ICC, The Prosecutor v. Lubanga <sup>[39]</sup>
- ICC, The Prosecutor v. Bosco Ntaganda <sup>[40]</sup>
- ICC, Confirmation of Charges against LRA Leader <sup>[52]</sup>

## A to Z

Adverse Distinction <sup>[53]</sup>, Child soldiers <sup>[54]</sup>, Children <sup>[55]</sup>, Culture (cultural relativism) <sup>[56]</sup>, Discrimination <sup>[57]</sup>, Education <sup>[58]</sup>, Humane treatment <sup>[59]</sup>, Protection of children <sup>[60]</sup>, Protection of women <sup>[61]</sup>, Rape and sexual violence <sup>[62]</sup>, Recruitment <sup>[63]</sup>, Separate quarters <sup>[64]</sup>, Sexual violence <sup>[65]</sup>, Women <sup>[66]</sup>

## To go further

- Humanitarian Law and Policy - Blog Series - Gender and conflict <sup>[67]</sup>
- ICRC - Checklist: Domestic Implementation of International Humanitarian Law Prohibiting Sexual Violence <sup>[68]</sup>
- IRRC - The dialogue of difference: gender perspectives on international humanitarian law <sup>[69]</sup>
- IRRC - “Or any other similar criteria”: Towards advancing the protection of LGBTQI detainees against discrimination and sexual and gender-based violence during non-international armed conflict <sup>[70]</sup>
- IRRC - It’s not about the gender binary, it’s about the gender hierarchy: A reply to “Letting Go of the Gender Binary” <sup>[71]</sup>
- IRRC - Inclusive gender: Why tackling gender hierarchies cannot be at the expense of human rights and the humanitarian imperative <sup>[72]</sup>
- Podcast – Gender and International Humanitarian Law with Dr Helen Durham <sup>[73]</sup>

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[1] See for instance O. M. Stern, *Gender, Conflict and International Humanitarian Law: A Critique of the Principle of Distinction*, Routledge, London and New York, 2019, pp. 103-4.

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[10] [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule88](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88)

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