HUMANITARIAN LAW & POLICY

Gender (re)balancing: the updated ICRC Commentary on the Fourth Geneva Convention

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International humanitarian law (IHL) has long been critiqued for its gendered fault lines, specifically the marginalization of violence and harm to women and girls during armed conflict, laid bare by the lacunae of protection found in the normative content of the Geneva Conventions. The inadequacy of this normative protection finds a parallel in the Pictet Commentary, whose contours reflect patriarchy, entrenched gender stereotypes, and a lack of awareness of, and disregard for, the vulnerabilities, positionalities and participation of women in war. The limitations of the Fourth Geneva Convention (GC IV), in particular, have been substantively explored by feminist scholars over several decades.

In this post, part of a joint symposium on the updated Commentary on the Fourth Geneva Convention with EJIL:Talk! and Just Security, Fionnuala Ní Aoláin undertakes a close examination of GC IV's Article 27 on the treatment of protected persons, offering an assessment of the extent to which a revised and updated Commentary can overcome the Convention's structural limitations. The answer, she suggests, is mixed. The Commentary is rigorous, expansive and determined, but it remains constrained by the text itself. While progressive interpretative developments help narrow the gap, they cannot fully remedy the gendered DNA of the Conventions as a whole, a challenge that will unfold over decades of sustained work.

An *updated* Commentary on the Fourth Geneva Convention comes at a time when international humanitarian law faces undulating assault. As powerful states discard the rules and loudly proclaim their non-adherence, devalue their necessity, and free themselves from the perceived restraints of compliance, those committed to the rules confront both their abrogation and a long-standing disquiet that many of them are simply not "fit for purpose". The fitness conundrum runs in two directions: as an *argument* protesting undue limitations posed by *jus ad bellum* and *jus in bello* rules to "valid" state objectives in contemporary warfare; and, as its precise opposite, the exposed limitations of those same rules in adequately protecting civilians in the face of new modalities of conflict.

This double-hatted hydra poses two kinds of challenges. The first is simply to hold states to the rules as they have hitherto been understood and accepted, where the *weight* of commitment in military manuals, training, and practice provides a defensive shield against the counterweight of non-compliance. The second is to confront the reality that, at the operational and tactical levels, certain rules are out-of-date and require a "*living instrument*" approach to the Conventions – one that provides a deeper, more nuanced and contextual understanding of the conduct of hostilities to ensure state compliance with IHL.

Gendered gaps in protection

Tensions about the adequacy of the scope of protection have been *keenly felt* in the provisions addressing the protection of women and girls in armed conflict. Despite several articles in the Conventions mentioning women (*GC I, Art. 12*, *GC II, Art. 12* and *GC III, Art. 14*), feminist scholars have long identified *lacunae* in international humanitarian law flowing from the inadequate recognition of the myriad ways in which the female body and person is uniquely vulnerable and harmed in armed conflict.

More explicitly, historical ambiguity regarding both the existence and status of the legal proscription prohibiting rape in war (*GC IV, Art. 27*) – including its exclusion from the list of *grave breaches* of the Conventions – has long plagued debates about protection for women in war. This compounds a limited conception of civilian harm, whereby gender effectively disappears from the regulation of the conduct of hostilities, enlarging rather than limiting the costs of war for women and *girls* (p. 11).

Despite some innovative efforts to close the gap in civilian protection (e.g., *here*, *here* and *here*) mostly through substantive guidance to militaries that focuses on the relevance of gender to military commanders, their reach remains limited. Moreover, even as *lawyers* have come to play a central role in battlefield decision making, there is little evidence that gender analysis plays a comparable role in targeting decisions across multiple countries, particularly within the military structures of permanent members of the UN Security Council.

Perhaps the most *fulsome illustration* of these gender-blind spots is the persistent targeting of men and boys in contested geographies and ungoverned spaces, where the intersection of gender (male), age, and geography effectively denies many men the protection of civilian status. Even as we make some headway on recognizing women as gendered subjects in war, men are rarely seen as vulnerable on the basis of sex, much less denied protection in practice simply because they are male.

Multiple attempts to both "see" the gap and "mind" the gap have emerged. These include the *augmentation* of international criminal law norms and a *deepening* of human rights recognitions for certain forms of violence, enhancing recognition of gendered violations, and extending the scope of prohibitions to include acts and patterns of violence simply not recognized as implicating civilian protection when the Conventions were signed. Parallel developments within the *Women, Peace and Security* agenda at the UN Security Council have, in part, been motivated by efforts to close the gap concerning the *unacceptability of sexual violence* as a method and means of warfare.

From honour to autonomy

Despite these efforts, the structural limitations of the Conventions and their accompanying Commentary have continued to frustrate efforts to place gender at the centre of the application of fundamental IHL principles like distinction, proportionality and precaution on the battlefield. The fossilized entrenchment of *gender orders* is well-illustrated by *GC IV, Article 27*, which sets out the basic principles of equal treatment for men and women while elevating the protection of honour.

Parts of the 1957 Commentary related to Article 27 are worth setting out in full, to illuminate the heart of the challenge:

> *"Respect for honour". Honour is a moral and social quality. The right to respect for* **his honour** *is a right invested in* **man** *because* **he** *is endowed with a reason and a conscience. The fact that a protected person is an enemy cannot limit* **his right to consideration** *and to protection against slander, calumny, insults or any other action impugning* **his honour or affecting his reputation**; *that means that civilians may not be subjected to humiliating punishments or work.*
>
> *It should be noted that respect for a prisoner of war's* **honour**, *as well as respect for* **his person**, *in stipulated in Article 46 of the Hague Regulations, and also in the 1929 Geneva Convention.' (emphasis added)*

Honour, of course, has a *complicated history* in international humanitarian law. It has long been understood as a *code word* for sexed notions of suffering. It is best understood through the patriarchal lens of its entrenchment as a concept protecting female morality and family integrity in war. The "honour" in the text was that of the man to whom a woman was *attached* (namely father, brother, husband or son). Honour for women in humanitarian law was never autonomy-based, but rather the product of attachment, which came at a terrible cost: namely, the affirmation that the harm of sexual violation was harm to family, status, and purity, rather than an autonomous and dignity-based violation for the woman herself.

The new Commentary works hard to rebalance this legacy. Its foundation is "to treat protected persons humanely at all times," leaning into universality, self-worth and mutual recognition, thereby rebounding the cornerstone basis for the protection against sexual violence. The Commentary does not hide honour's tainted legacy; rather, it provides a painful recognition of its history and the consequences of perpetuating "the notion that women are defined by their perceived chastity or sexual value to their families and community". This bluntness is positive.

Shifting norms and emerging nuance

Other essentialisms also persist, as they have with *previous revision*s to the Commentaries on GC I-III, including the affirmation that it is "no longer appropriate" to ground the requirement of "due regard to women" in presumed female weakness and childbirth. Instead, the new Commentary recognizes that it "takes into account the social and international legal developments in relation to equality of the sexes." There is welcome nuance sprinkled in the mix.

For example, in addressing the concept of "respect for the person", the Commentary firmly declares that "respect for their persons requires that Parties to a conflict consider that persons of different genders have different needs and are exposed to different risks". The variable geometry of gendered positionality is now clearly visible. The point is not only theoretical but is also discussed in relation to enforcement. The long discussion of respect in the context of internment underscores this point. The passage on the treatment of persons in places of detention is worth quoting at length here.

> *"For protected persons who are interned, respect for their persons includes the planning and running of places of internment in such a way as to protect them from deliberate or unintentional humiliation on the basis of gender. For example, searches of internees must be conducted by a person of the same gender to mitigate the risk of humiliating them. With regard to highly invasive 'body cavity searches', the participation of doctors raises such complex, compelling and conflicting ethical issues (including patient rights, informed consent, physicians' duty of beneficence, primary loyalty to patients, fiduciary obligations and responsibility to contribute to public health, etc.) that their involvement should only ever be exceptional. The Detaining Power must also supply internees with appropriate clothing (Article 90), including in relation to gender and religious convictions; it may be considered humiliating, for example, if men are forced to wear women's clothing or if women are not provided with adequate undergarments or with hair coverings if that is their wish."*

Reaffirming rape and sexual violence in law

Article 27 of GC IV is, of course, the provision that directly addresses family protection and rape. Rape was previously interpreted through the Pictet Commentary as a sub-clause flowing from the respect to family ("Respect for family life is also covered by the clause prohibiting rape and other attacks on women's honour.") The revised Commentary's approach, influenced by input from established *feminist scholars*, provides a detailed historical grounding for the rape prohibition (a march from *Belli's A Treatise on Military Matters and Warfare* (1563), *Gentili*, *Grotius*, the *Lieber Code*, the history of sex-based violence *during* and *after* World War II and other treads of historical grounding) as a way to widen the historical aperture of state practice on the prohibition.

The Commentary tries to move past the historical baggage of honour, and to firmly place the textual language in a wider historical frame to root an abhorrence for the practice. The groundwork goes some way, but it remains true that, despite these historical antecedents, such examples are exceptions to the *well-documented* historical acceptability of rape in war as a method and means of warfare.

In the absence of a definition of rape in the text of the Convention, the updated Commentary affirms the evolving nature of the definition and recalls the International Criminal Court's *Elements of Crime definition*. A new inclusion is the invocation of forced marriage as a form of inhumane treatment, along with a reminder of the obligations of the occupying power to prevent it. Thereafter, forced prostitution and indecent assault are pulled into the analysis flowing from the articulated prohibition on rape.

The Commentary grapples with the lack of explicit prohibition on sexual violence in Article 27(1). It stakes out a wide berth for the definition of "humane treatment", as well as defining both positive and negative obligations for action. A definition is provided for sexual violence ("used to describe any act of a sexual nature committed against any person under circumstances that are coercive"), and new ground is broken on addressing coercive circumstances (detention, internment, and situations of restricted autonomy). The Commentary holds the "[a]rticle 27(2) provides specific protection for women and girls against sexual violence".

In the revised Commentary, one final procedural but significant change stands out. Namely the decision to use gender neutral language and avoid the male default. As paragraph 47 of the *Introduction* to the revised Commentary notes:

> *Also, in several articles, the Convention uses only masculine pronouns, although the applicability of these provisions is not restricted to men.* (Articles 35, 39, 42, 51, 52, 72, 73, 85, 91, 93, 95, 96, 97, 98, 99, 106, 112, 115, 118, 119, 121, 123, 129, 130, 132, 135, 138 and Annex III details added).

This is a subtle but important nod to the power of language, and its ability to distance women and girls from legal embrace and recognition *ab initio*. Nomenclature changes function as a form of inclusion and validation, even as we see colossal pushbacks by *certain states* on gender inclusive pronouns in state communications, *UN documents*, and communication in multilateral arenas. It also recognizes, honours, and uplifts the struggles that have come before for women and girls and lays a path for transformative paradigmatic shifts.

Progress, limits and the work ahead

These revisions – firmly rooted in the legal rules on treaty interpretation – point to shifting social and legal ground and to the heavy lifting being done to address the limitations of the previous Commentary. Undoing traditional sex and gender norms in law is a progressive task that is fundamental to the broader goal of dismantling normative discrimination and systemic structural bias against women. The reformist moves here are substantial, and reinterpretation of the words contained in the treaty offers a meaningful pathway to implement gender mainstreaming.

The updated Commentaries have *accepted* women as combatants, moved us away from linking women with modesty and weakness, and acknowledged that sexual violence is a sustained reality for women in war. Nonetheless, we are still working with words forged in other eras, and they carry a regrettable gender weight and baggage. Lightening the load will be the progressive work of decades.

Progress on gender equality, and undoing male defaults in law, including in IHL, is neither simple nor linear. We have a long way to go before we upend the gendered status quo in war. To do that, we are in both old and new territory.

Old territory, in the sense that we are still demanding that states provide meaningful, consistent and rule-abiding protection to all civilians – men and women equally – affected by armed conflict. We continue to make the case that this humanization of humanitarian law serves the interests of states, because the protection of their own civilians is a fundamental part of the contract between the citizen and the state.

We are also in new territory, where the nature of contemporary rule rejection and abandonment, combined with the deployment of certain war technologies that appear to operate in a non-compliant-by-design modality, suggests that the arguments made to states must be existential. Protecting all persons in war, including women and girls, is the *sine quo non* of humanity in war. As contemporary war practice risks the singular loss of humanity's protection, the recalling of equality of protection resonates at registers beyond gender, speaking to the strength and necessity of protection itself.

See also

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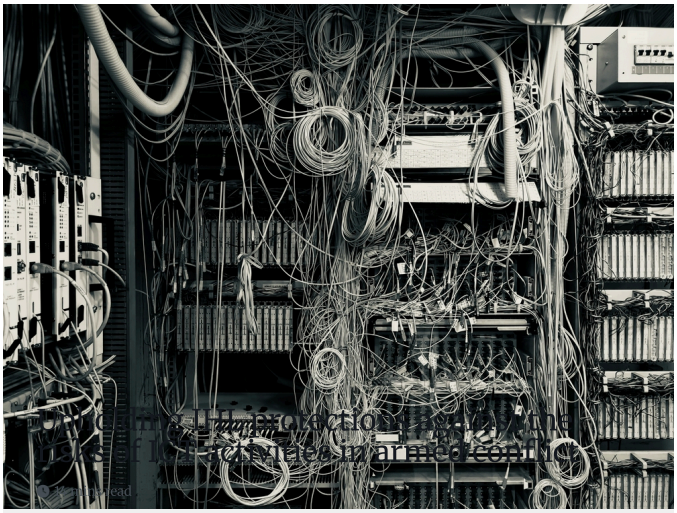

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