

Does International Humanitarian Law Adequately Address Gender Issues?

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Abstract

With the increasing complexity of armed conflict situations around the world, how to solve the gender issue in conflict situations has gradually become a topic of concern for the international community. International humanitarian law (IHL), as a legal framework designed to provide humanitarian protection for people in armed conflict, is of great significance in regulating wrongful acts in armed conflict and reducing the adverse effects caused by armed conflict, which of course also includes dealing with gender issues that commonly occur in conflict situations. This essay aims to study the significance and problems of gender provisions in IHL, and how different cultural, legal and political factors affect the implementation of gender provisions in IHL, especially the difficulties in the accountability and punishment of sexual violence, from the perspective of the development of gender regulations under the framework of IHL. This paper mainly adopts a qualitative analysis method and supplemented with appropriate quantitative data. Through case studies of specific conflict countries, comparative analysis and analysis of key legal texts under the framework of IHL, this essay expounds the current achievements and shortcomings of IHL in addressing gender issues in armed conflict. The significance of this study is that it hopes to further understand the IHL framework from a gender perspective and put forward relevant suggestions to promote the appropriateness and effectiveness of IHL as an important humanitarian gender protection legal system.

Keywords: IHL gender provisions, gender issues, humanitarian gender protection

1. The Historical Evolution of Gender Regulation Under the IHL Framework

In armed conflicts, gender often has a differentiated impact on the gender. Among other things, women and girls not only face the challenges of inequality in long-term social, economic and political systems, but also the structural gender differences are more pronounced in conflict situations. In a survey conducted by the United Nations High Commissioner for Refugees (UNHCR) with

Syrian refugee women, most of whom had fled to other countries, they were often forced to live in poor and overcrowded housing without basic necessities, and did not have enough money to support their families.¹ Syrian refugee women who face the loss of adult male company are even more vulnerable. In communities with inadequate infrastructure and overcrowding,

¹ United Nations High Commissioner for Refugees. (2014). *Woman Alone: The Fight for Survival by Syria's Refugee Women*. Report, 15.

women are not only marginalised in the process of obtaining assistance, but are also often subject to abuse.¹ This reflects the many challenges faced by women in conflict situations in terms of access to economic resources and basic services. Women are also underrepresented in decision-making bodies. A report on women's political participation published by UN Women in 2023 shows that the average proportion of women in parliament worldwide is only 26.5% in both the upper and lower houses. At the same time, in terms of holding the highest positions in the country, the proportion of countries with women as head of state and head of government is only 11.3% and 9.8% respectively.² From these aspects, it is not difficult to see that military operations have a more serious impact on women.³

With the changing forms of international armed conflict and people's concerns about gender-based issues in war, IHL has developed some provisions dedicated to addressing gender issues based on the protection of civilians and prisoners of war in general, which is evident in many articles of the Geneva Conventions. The Geneva Conventions clearly stipulate that when members of the armed forces of a belligerent country, other legal combatants, and religious and medical personnel with the status of prisoners of war, etc. are captured, they have a series of rights and certain obligations to the belligerent country that has detained them, and Article 12-16 of the Third Geneva Convention on the general protection of prisoners of war is the core content of the Convention.⁴ Among them, article 16, when discussing the issue of equal treatment of prisoners of war by the detaining State, emphasizes that the detaining State should take into account the provisions of the Geneva Conventions on rank and sex.⁵ This means that the article emphasizes the principle of equality to ensure that prisoners of war will not be unfairly treated because of race, religion,

political beliefs and other factors, adding consideration to the protection of gender issues. At the same time, other provisions of the Third Geneva Convention embody gender-specific protection in detail, taking into account that women prisoners may have special needs and face special risks while in detention, which may be due to the special physical and biological needs of women. It may also be due to concerns about differences in social, economic, cultural, and political structures between countries and regions.⁶ For example, the provisions of article 14, paragraph 2, of the Third Convention take full account of the special needs of women (such as pregnancy and childbirth), prohibit any unequal treatment of women in the status of prisoners of war, and require that women enjoy equal treatment with their sex and equal treatment with men at the preferential level. This has positive implications for the special protection given the increasing number of women in active combat roles in the armed forces of States following the adoption of the Third Convention.⁷ In terms of the provisions on the housing of prisoners of war, in the comprehensive revision of the treatment of prisoners of war in the Third Convention after the Second World War, the current article 25, paragraph 4, was introduced, and the detaining State was responsible for implementing the requirement that male and female quarters must be separated, and male prisoners of war could not enter the female quarters regardless of whether they had obtained the consent of female prisoners of war.⁸ The purpose is to ensure the special needs and safety of female prisoners of war. With regard to health facilities, article 29 of the third Convention, while requiring the detaining State to take the necessary health measures with regard to prisoners of war to prevent diseases in prison camps and to respect the human dignity of prisoners of war,

¹ Ibid 37.

² Inter-Parliamentary Union and UN Women. (2023). *Women in Politics: 2023*. Report, 1.

³ International Committee of the Red Cross, 'Gender and IHL', (Web Page, 2024) <<https://www.icrc.org/zh/law-and-policy/gender-and-ihl>>.

⁴ Robert Kolb and Richard Hyde. (2008). *An Introduction to the International Law of Armed Conflicts*. Bloomsbury Publishing, 209.

⁵ *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 16.

⁶ International Committee of the Red Cross, 'Commentary of 2020: Article 16 - Equality of Treatment of Prisoners', (Web Page, 2020). <<https://ihl-databases.icrc.org/zh/ihl-treaties/gcii-1949/article-16/commentary/2020#12>>.

⁷ International Committee of the Red Cross, 'Commentary of 2020: Article 14 - Respect for the Persons and Honour of Prisoners', (Web Page, 2020). <<https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-14/commentary/2020?activeTab=>>>.

⁸ International Committee of the Red Cross, 'Commentary of 1960: Article 25 - Prisoners of War and Quarters', (Web Page, 1960). <<https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-25/commentary/1960?activeTab=>>>.

specifically provides for the provision of separate facilitation measures for women prisoners of war in prison camps.¹ This not only helps to prevent women prisoners of war from being subjected to gender-based violence, but also enables them to enjoy certain privacy rights and specific protections during detention. With regard to the provisions on the Labour of prisoners of war, article 49 (1) of the Third Convention, when arranging Labour on the basis of individual conditions and determining the suitability of prisoners of war for work, not only takes into account the differences in their age, rank and physical ability to adapt their Labour to their individual circumstances, but also takes into account gender.² Although the article did not explicitly specify the difference between the contents of the work of female prisoners of war, it required that women prisoners of war should be arranged to avoid imposing inappropriate contents of work on them in order to protect their physical and mental health. In the enforcement of penalties, a number of provisions of the Third Convention involve special consideration of gender protection. For example, article 88 (2), of the Third Convention stipulates that the punishment of female prisoners of war shall not exceed the punishment of female members of the armed forces of the detaining State for the same offence, while paragraph 3 of the same article further optimizes the minimum guarantees for female prisoners of war by prohibiting the punishment of female prisoners of war to be more severe than that imposed on male members of the armed forces of the detaining State for similar offences.³ This fully interprets the requirement of Article 14 (2), of the Convention that women shall enjoy the same preferential treatment as men in all circumstances, and expresses the prohibition of discrimination on the basis of sex under IHL. Article 94 (4) requires that women prisoners of war who are subject to disciplinary punishment

must simultaneously meet two strict protection measures, they must be kept in separate places from male prisoners of war and must be directly supervised by female guardians.⁴ This provision is similar to article 108 (2), of the Convention, which applies to the need for separate accommodation and guardianship by specific personnel for women subject to disciplinary action, and obliges the detaining State to comply with obligations stemming from respect for the person and honour of women, with an explicit prohibition of sexual violence on the basis of gender considerations.⁵ To some extent, the special needs of female prisoners of war who were sentenced to imprisonment were met.

In addition to the special protection of women in armed conflict provided for in the Third Geneva Convention, the requirement to respect the special needs of women is also reflected in the Fourth Geneva Convention and Additional Protocol I to the Geneva Conventions, in particular with regard to the special care given to pregnant women and mothers of young children. For example, with regard to the choice of targets for attack by parties to a conflict, article 18 of the fourth Convention stipulates that civilian hospitals organized to care for pregnant women, the wounded and the sick shall under no circumstances be the target of attack and shall continue to be protected and respected by parties to a conflict.⁶ At the same time, article 21 of the Convention, in keeping with the principle of respect for women enshrined in article 18, requires that convoys or hospital trains on land, as well as ships at sea, should not be targeted by parties to a conflict while transporting pregnant women, civilians and the vulnerable.⁷ With regard to the preferential treatment of non-repatriated persons, article 38 of the fourth Convention provides, in particular, criteria for children under 15 years of age, pregnant women and mothers of children under 7 years of age to enjoy the same categories of preferential

¹ International Committee of the Red Cross, 'Commentary of 2020: Article 29 - Hygiene', (Web Page, 2020). <<https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-29/commentary/2020?activeTab=>>>.

² International Committee of the Red Cross, 'Commentary of 2020: Article 49 - General Observations on Labour of Prisoners of War', (Web Page, 2020). <<https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-49/commentary/2020?activeTab=>>>.

³ *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 88.

⁴ Ibid art 97.

⁵ International Committee of the Red Cross, 'Commentary of 2020: Article 108 - Execution of Judicial Penalties: Premises and Essential Safeguards', (Web Page, 2020). <<https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-108/commentary/2020>>>.

⁶ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 18.

⁷ Ibid art 21.

treatment as the local population.¹ This is also a reflection of the special care given to women during wartime. Additional Protocol I to the Geneva Conventions also focus on the relief and protection of women in need of special care. For example, article 70 (1) of the Protocol requires that priority be given to persons entitled to special treatment and protection, such as pregnant women, women who have given birth and nursing mothers, in the distribution of relief supplies.² At the same time, article 76 of the Protocol expressly prohibits all forms of rape, forced prostitution and indecent assault against women, gives special treatment (such as early release) to pregnant women and mothers raising minor babies who are detained during armed conflict, and the parties to the conflict shall use their utmost efforts to avoid the imposition of the death penalty on such women for crimes committed as a result of armed conflict.³ To some extent, this is a development and extension of the relevant provisions of the Fourth Convention, which not only protects women in need of special care in the course of armed conflict, but also takes into account the respect and basic guarantees for women in war in general.

Customary International Humanitarian Law (CIHL) is a collection of legally binding rules that are generally observed by States, even if they are not formally enshrined in international treaties. It is also an important part of IHL because of the high degree of consistency with which it is applied by States in armed conflict. For example, Article 93 of the CIHL on the prohibition of rape and other forms of sexual violence not only summarizes the provisions of the Fourth Geneva Convention and the Additional Protocol I to the Geneva Conventions on the prohibition of sexual violence such as rape and forced prostitution, but also indicates that many military manuals clearly define this act as a war crime. It also provides domestic precedents of corresponding countries to support the prohibition of sexual violence in

armed conflict, such as the “Takashi Sakai case” tried by the War Crimes Military Tribunal of the Ministry of National Defense of China in 1946, which confirmed that the crime of rape was included in war crimes.⁴ At the same time, the Rules refine the definition of rape from the specific cases of the International Criminal Court, not only taking into account the determination of the accurate scope of rape under the framework of international law in the case law of Kunarac case in 2001, but also indicating that the prohibition of sexual violence under IHL is non-discriminatory in practice. That is, both men and women, adults and children are equally protected against sexual violence. For example, except for the act of forced pregnancy, the Statute of the International Criminal Court defines the object of sexual violence as “any person”, that is, not limited to women.⁵ This shows that CIHL not only has great significance in defining the scope of application of gender protection, but also fills the gap on gender provisions in international treaties to a certain extent.

2. The Need for Gender-Specific Protection in the IHL Framework: The Implications of Differentiated Gender Regulation

Up to now, the pattern of international armed conflicts is still not optimistic. In a speech at Columbia Law School in 2023, International Committee of the Red Cross (ICRC) President Mirjana Spoljaric mentioned that the ongoing global armed violence in more than 100 countries, especially the international armed conflict between Russia and Ukraine, has greatly affected the global political landscape. This has resulted in the destruction of national infrastructure and the suffering of the people for a long time, and these conflicts are mainly manifested in the oppression and persecution of race, religion, class and gender, among which, wherever conflicts exist, the equal rights of women and girls will be reduced and destroyed to varying degrees.⁶ A 2021 United Nations report states that in countries experiencing armed conflict, the proportion of households

¹ International Committee of the Red Cross, ‘Commentary of 1958: Article 38 - Non-repatriated persons I. General observations’, (Web Page, 1958). <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-38/commentary/1958>>.

² *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, signed 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 70.

³ Ibid art 76.

⁴ Jean-Marie Henckaerts and Louise Doswald-Beck. (2005). *Customary International Humanitarian Law Volume I: Rules*. Cambridge University Press, 324–25.

⁵ Ibid 325–26.

⁶ Mirjana Spoljaric. (2023, March 3). *Gender Equality and War: “No Humanity, Dignity, Peace Until International Humanitarian Law Is Upheld for All Genders”*. Speech, Columbia University Law School.

headed by women usually reaches 33%, only 44% of women are likely to be engaged in paid work, and the proportion of women in parliament is only 18.9%, especially in countries affected by conflict for a long time, these proportions will be even lower.¹ This means that women face more challenges than men in armed conflict on various levels, limiting their right to fair treatment. Since conflict situations have different manifestations in terms of their impact on gender-related issues, the question of how to coordinate and address gender protection issues within the framework of IHL is an urgent topic.

In situations of armed conflict, resource scarcity often has a severe impact on the civilian population, particularly the relatively vulnerable. In such Settings, women have a greater need for adequate food to safeguard their health and well-being, but they often have a lower status in the social structure as a vulnerable group, which means they are more vulnerable to conflict and have fewer resources.² For example, there are traditional practices in some countries that give preference to men in terms of food distribution, while limiting the amount of food consumed by women.³ In addition, men in armed conflict are often displaced from their families and communities by being mobilized to fight, suffer casualties or are displaced, which prevents them from continuing to do the farming, fishing and paid Labour for which they are responsible to compensate their families.⁴ This means that women in times of armed conflict often assume the role of the head of the household, not only to feed themselves, but also to take care of the household and to buy food, which puts more pressure on already financially difficult families and can create a cycle of poverty. Lack of resources can have other serious consequences in very dangerous conflict countries. For example, in the Democratic Republic of the Congo, where armed conflict intensifies and

resources are scarce, women and girls may be exposed to targeted violence, abuse and exploitation as they seek income opportunities and food resources due to very limited civil protection and security measures.⁵ On the one hand, this indicates that there are potential gender inequality and discriminatory norms in some countries before the adverse situation for women occurs, and on the other hand, it also reflects the insufficient gender protection under the framework of IHL.

In the context of humanitarian assistance to civilians in countries in armed conflict, men have been the primary targets of humanitarian resource planning and delivery. Furthermore, aid agencies do not meet accurate and systematic standards in collecting detailed data on the gender and age characteristics of recipients of assistance from the local civilian population and refugee camps in conflict countries (e.g. households headed by women are prone to omission and neglect). The lack of such data can lead to a lack of comprehensive understanding of the real needs of different gender groups in the planning and specific distribution of humanitarian assistance, which challenges women in an already vulnerable position to obtain adequate and appropriate humanitarian assistance.⁶ The conflict in Syria, for example, has greatly affected women's ability to enjoy their most basic rights. As a result of the massive displacement caused by war and the increase in the number of female heads of household, 74 per cent of the millions of civilians in need of assistance are women and girls, and female-headed households are more likely to be unable to meet basic needs than those with male heads of household, with women who have been displaced for long periods of time being disproportionately affected.⁷

While men are at higher risk of war injury or death due to their higher participation in armed conflict, women are generally more vulnerable

¹ International Committee of the Red Cross. (2022, June). *Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law*. Report, 11.

² *Inter-Agency Workshop on Integration of Gender into Needs Assessment and Planning of Humanitarian Assistance*. (1999, July). Summary Report, 1.

³ Charlotte Lindsey, 'Women Facing War', (Web Document, October 2001), 78 <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc_002_0798_women_facing_war.pdf>.

⁴ Ibid.

⁵ World Food Programme, 'Women, Girls and the Protection Crisis in Eastern DRC', (Web Page, 7 March 2024). <<https://reliefweb.int/report/democratic-republic-congo/women-girls-and-protection-crisis-eastern-drc>>.

⁶ Lindsey (n 25).

⁷ OHCHR, 'Gendered Impact of the Conflict in the Syrian Arab Republic on Women and Girls', (Web Page, 12 June 2023). <<https://www.ohchr.org/en/statements-and-speeches/2023/06/gendered-impact-conflict-syrian-arab-republic-women-and-girls>>.

to illness due to their special reproductive roles in childbirth, pregnancy and delivery, leading to a stronger need for health services.¹ In some countries caught in humanitarian crises, women face more barriers than men in accessing health care during armed conflict, especially in the area of sexual and reproductive health services, due to complex and diverse environments and large gender gaps. For instance, an estimated 140,000 women die in conflict each year, and war impedes access to health services, among which the widespread failure of sexual health services prevents women from accessing safe and effective contraception, abortion and treatment for sexually transmitted diseases.² Therefore, countries where gender discrimination exists in conflict can also limit women's active access to treatment and disease prevention. For example, women may be limited by cultural norms, some women may only travel long distances to seek medical care if accompanied by a male relative, and in some economically constrained communities, the limited resources available to pay for health care often go to the male family members rather than to women and children, especially when armed conflict has a disproportionate impact on people's normal lives.³ These cultural and religious requirements can make it more difficult for women to receive appropriate health care when they need it. Women are also at high risk of contracting sexually transmitted diseases in conflict situations. This is mainly because they may be forced to have sex in the war due to the lack of resources and the increase in sexual violence, so that they can get food and water and other resources to ensure the basic life of themselves and their children. Sexually transmitted infections not only cause a series of serious traumas for women (such as ectopic pregnancy and infertility), but also have a high risk of transmission of sick pregnant women to their newborns.⁴ Thus, causing more serious consequences. Finally, in addition to women's difficulties in accessing specific health services

in situations of armed conflict, women's access to health services in general may face challenges based on religious requirements and gender discrimination, and they may be treated unfairly when requesting medical assistance (e.g. free health services still require payment), and women may be treated unfairly when requesting medical assistance; they may also be subject to abuse (e.g. rough treatment and neglect of treatment needs) by medical personnel who help them.⁵ This is not only detrimental to women's physical health protection, but also may make them suffer psychological trauma and other negative effects.

Women are generally underrepresented in decision-making processes in the humanitarian field.⁶ In 2016, women accounted for 42.8% of all employees in the UN system, with a higher concentration in entry-level positions, and only 9 out of 29 UN humanitarian coordinators were women, which not only means that the gender gap is widespread in the world today, but also has a potential impact on the implementation of gender protection in the humanitarian field.⁷ For example, in armed conflicts, the work of many organizations is to provide targeted support to women and children who are more vulnerable in war through social support and psychological counseling, which can not only be understood as empowering women's rights, but also effectively treat the physical and mental trauma of victims of sexual violence, which has positive significance.⁸ However, if women's participation in decision-making is ignored, it is not only conducive to a comprehensive understanding of the special needs of women receiving support, but also may hinder the direct feedback of women in these areas, resulting in the weakening of service delivery effect and the failure to achieve the expected goal of aid. Gender discrimination is considered a barrier to women's participation in decision-making processes, particularly those related to conflict. For example, in a study of women's participation in decision-making

¹ Juan Carlos Rivillas et al. (2018). How do We Reach the Girls and Women who are the Hardest to Reach? Inequitable Opportunities in Reproductive and Maternal Health Care Services in Armed Conflict and Forced Displacement Settings in Colombia. *PLoS One*, 13(1) e0188654, 1–14, 5.

² Achier D Akol, Silke Caluwaerts and Andrew D Weeks. (2016). Pregnant Women in War Zones. *BMJ*, 353, i2037, 1–2, 1.

³ Lindsey (n 25) 111.

⁴ Ibid 112.

⁵ Lindsey (n 25) 113.

⁶ Spoljaric (n 22).

⁷ Ayla Black, Pip Henty and Kate Sutton. (2017). *Women in Humanitarian Leadership*. Humanitarian Advisory Group, 4.

⁸ Lewis Turner. (2016). Are Syrian Men Vulnerable Too? Gendering The Syria Refugee Response. (Web Page, 29 November 2016) <<https://www.mei.edu/publications/are-syrian-men-vulnerable-too-gendering-syria-refugee-response>>.

processes in Colombia, while women's participation in regional discussion forums increased during the recent peace process, women's underrepresentation in peace negotiations during the ceasefire meant that gender discrimination due to women's marginalization in historical and cultural contexts continued to persist; women are not seen as important transformative forces in conflict.¹ Whether in conflict or post-conflict reconstruction, such stereotypes will not only lead to the continuation of gender inequality, but also fail to effectively obtain the true voice of women in conflict, thus unable to achieve the ultimate goal of gender protection.

In summary, women in armed conflict are significantly underrepresented in terms of access to resources, health-care services and representation in decision-making bodies, which in turn is rooted in the realities of sexual violence and gender discrimination that are prevalent in conflict. Due to the particular vulnerability of women, gender-specific protection planning under the IHL framework is essential not only to ensure comprehensive protection and relief for civilians in conflict, regardless of gender or ethnicity, to curb the negative effects of armed conflict, but also to improve the reconstruction of post-conflict mechanisms and promote the achievement of more far-reaching gender equality goals.

3. Insufficient Gender Protection in IHL Legal Provisions: Ambiguity and Barriers to Implementation

Although some provisions of the IHL have been discussed in the first part of this essay with regard to the regulation of gender-based violence and the protection of women's rights and interests, these provisions are still potentially imperfect and ambiguous, so that they fail to fully reflect the need for gender-specific protection in the context of armed conflict and the continuing gender differences. This is mainly reflected in the targeted criticism of some feminist legal theorists on the gender differences existing under the framework of IHL. The key point is that these scholars believe that IHL essentially advocates the priority of men, and only when

women are victims and bear the responsibility of raising children, they are given a legitimate status by law.² To a certain extent, this indicates that IHL pays more attention to formal equality in gender protection rather than substantive justice when armed conflicts have different impacts on different genders.

Under the framework of the IHL, various conventions, in particular the Geneva Conventions, provide for the protection of civilians in the course of armed conflict, while emphasizing that women civilians are equally protected as men. For example, with regard to the treatment of protected persons, article 27 of the Fourth Geneva Convention provides that women shall be accorded special protection among protected persons against any form of violation of their honour, such as rape or forced prostitution.³ Article 16 of this Convention also makes it clear that pregnant women need special protection and respect in armed conflict, along with the wounded and sick.⁴ In addition, with regard to the distribution and transport of relief supplies, article 23 of this Convention requires that States parties to armed conflict should allow the free passage of essential food, clothing and supplements for children, pregnant women and women giving birth, and that priority should be given to such groups in the distribution of relief supplies.⁵ Unfortunately, the IHL rules that exist to protect the rights of civilians and women sometimes have a limited impact. For example, article 27 of the Fourth Geneva Convention, referred to above, provides for special protection of women's honour from the perspective of women as victims of gender-based violence in war (as opposed to men), often framed in terms of women's need for chastity and modesty rather than directly addressing the real physical and psychological damage to women caused by

¹ Pilar Domingo and Veronica Hinestroza. (2013, September 1). *Evaluation of UN Women's Contribution to Increasing Women's Leadership and Participation in Peace and Security and Humanitarian Response: Headquarter and Global Case Study*. Research Report, 85.

² Helen Durham and Katie O'Byrne. (2010). The Dialogue of Difference: Gender Perspectives on International Humanitarian Law. *International Review of the Red Cross*, 92(877), 31, 34.

³ International Committee of the Red Cross, 'Article 27 - Treatment I. General observations', (Web Page, 1949). <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-27?activeTab=>>>.

⁴ International Committee of the Red Cross, 'Article 16 - Wounded and sick I. General protection', (Web Page, 1949). <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-16?activeTab=>>>.

⁵ International Committee of the Red Cross, 'Article 23 - Consignment of Medical Supplies, Food and Clothing', (Web Page, 1949). <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-23?activeTab=>>>.

sexual violence in conflict.¹ This wording can have a strong negative impact on women by creating a widespread perception that women who have already been sexually assaulted are dishonored. Although the original intention of this provision in the IHL was well-intentioned, it effectively allowed the drafters of the convention to determine the definition of women's honour, which could lead to the further entrenchment of stereotypes and antiquated notions that view women as victims.² Second, IHL's protection of women is not based on them as an independent individual, but is often viewed from the perspective of a woman's relationship with others (such as family or men). This is reflected in the Geneva Conventions and their Additional Protocols of 1977, which contain a total of 42 articles specifically referring to the protection of women, but almost half of the articles are based on the role of women as pregnant women or breastfeeding mothers.³ This shows that even though there are provisions against sexual violence under IHL, women are still viewed as the 'property' of their husbands or families. When they suffer sexual violence and their honour is damaged, the honour of the men they are attached to is also considered to have been violated; the logic behind this idea is that in armed conflict, men wage war against men through the violation of women's bodies.⁴ This highlights the interactive relationship between IHL and the gender norms prevailing in society. The legal provisions under the framework of IHL are both the product of social gender concepts, and in turn reinforce these inherent concepts. The existence of this relationship makes gender bias form a vicious circle in legal norms and general social life, and it is difficult to break it.

In addition to the protection of women in the civilian context, the Geneva Conventions contain several provisions specifically for women combatants, most of which relate to women prisoners of war. For example, it is mentioned in the first part of this essay that articles 25 and 29 of the Third Geneva Convention stipulate that female prisoners of war should have separate

dormitories and health facilities. In addition, Article 12 of the Second Geneva Convention on the care of the wounded in the armed forces requires that women should receive adequate care corresponding to their sex without any discrimination.⁵ These special protections for women combatants lack a degree of consideration, that is, the Convention's restrictive provisions for combatants in armed conflict prevent many women from being formally qualified as combatants, mainly because of their often irregular combat roles and the traditional gender bias that may exist in local armed groups.⁶ For example, Article 1 of the Hague Convention of 1907 clearly states that militia and volunteer regiments have rights and obligations under the laws of war only if they comply with the requirement to carry arms openly, have a special emblem, and have a commander.⁷ Additional Protocol I to the Geneva Conventions also defines the scope of combatants of a party to the conflict, that is, the organized armed forces, groups and units of a party to the conflict, with the exception of medical personnel and chaplains, under the command of the commander of that party.⁸ These restrictions on combatant eligibility exclude some women in support and supporting roles in combat (such as medical support personnel and spies), as well as women in irregular combat who are unable to meet the strict conditions, from a range of protections under the article, which is one reason why the restrictive definition of the IHL law is biased against women.

In the framework of IHL, there exists a potential power hierarchy, that is, combatants take precedence over civilians, public interests take precedence over personal interests, and military interests are superior to other interests. These explicit hierarchies often implicitly express the privileges of men over women.⁹ This means that

¹ Durham and O'Byrne (39) 35.

² Orly Maya Stern. (2018). Gender and International Humanitarian Law' in Orly Maya Stern (ed), *Gender, Conflict and International Humanitarian Law: A Critique of the 'Principle of Distinction'*. Routledge, 103.

³ Durham and O'Byrne (39) 34.

⁴ Stern (n 44) 103.

⁵ International Committee of the Red Cross, 'Article 12 - Protection and care of the Wounded, Sick and Shipwrecked', (Web Page, 1949). <<https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-12?activeTab=>>>.

⁶ Stern (n 44) 101.

⁷ International Committee of the Red Cross, 'Regulations: Art. 1', (Web Page, 1907). <<https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907/regulations-art-1?activeTab=>>>.

⁸ International Committee of the Red Cross, 'Article 43 - Armed Forces', (Web Page, 1977). <<https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-43>>>.

⁹ Stern (n 44) 104.

the IHL is not an important component of the rules relating to women as opposed to advancing the interests of men, especially combatants. For example, rape is not listed as a “serious violation” of the rules of the Geneva Convention against crimes against women, which is intended to protect women rather than specifically; this is a striking indication that gender crimes do not rank highly in the rigid hierarchy of war crimes.¹ In recent years, the entire international community has emphasized that rape is an egregious violation of the personal dignity of women, and many efforts have been made to that end, such as the first conviction of rape as a crime against humanity by the International Criminal Tribunal for Rwanda.² This additional step shows that crimes against women were not taken seriously in the initial armed conflict. Moreover, in 2013, the Declaration on the Prevention of Sexual Violence in Conflict, adopted by the original G8 member states in response to sexual violence in armed conflict, recognized rape and other forms of serious violent crime as war crimes in serious violation of the Geneva Conventions.³ Although this has certain positive significance for the prevention of sexual violence in conflict, a declaration limited to member states may not cover countries around the world where armed conflicts still exist, and the resolution and protection of women's rights and dignity in conflict still face challenges.

4. Inconsistencies and Lack of Uniform Standards in International Implementation

Because of the different contexts and situations of armed conflicts around the world, if the gender protection provisions of IHL are inconsistent in practice or lack of specific standards for implementation, their effect on curbing the occurrence of sexual violence in armed conflicts will be limited. Determining which conflict-related sexual violence violates IHL is therefore a prerequisite for harmonizing standards for the application of IHL treaties to

States in conflict. Gender issues, in particular sexual violence, are diverse and widespread, as they can occur during situations of armed conflict and violence as well as in times of peace, and even sexual violence in armed conflict is not necessarily “conflict-related”. IHL treaties do not actually include the term “conflict-related sexual violence” as an official legal term, and different institutions have different understandings of the definition, such as the United Nations, which describes the definition as being linked to conflicts and political disputes in time and geography, and may be reflected in the motives of the perpetrators, the characteristics of the victims, and the national atmosphere.⁴ This means that IHL applies only to armed conflict or acts sufficiently linked to armed conflict, and not that all conflict-related sexual violence constitutes a violation of IHL and a war crime.⁵ What kind of sexual violence is associated with armed conflict is often not easy to determine. Gloria Gaggioli put forward a case on this issue, that is, in the context of a non-international armed conflict, if a military commander rapes a soldier in an army barracks as a punitive measure, the act is not related to the armed conflict and therefore does not apply to IHL; But if, in the same circumstances, the commander raped a woman detained during an armed conflict, it would be a clear violation of IHL.⁶ Some acts of sexual violence are not fully covered due to this ambiguity in determining the correlation between acts and armed conflicts, which reflects the possible inconsistency in the implementation of IHL in the actual application process. However, it is difficult to judge the precise criteria for the existence of links only through theoretical provisions and provide adequate countermeasures for diverse scenarios, and such judgments need to be continuously improved according to the accumulation of relevant cases.⁷

In addition, although the IHL provides relevant provisions on gender protection, the effectiveness of the specific implementation of the provisions largely depends on the

¹ Durham and O'Byrne (39) 35.

² Richard J Goldstone and Estelle A Dehon. (2003). *Engendering Accountability: Gender Crimes Under International Criminal Law*. *New England Journal of Public Policy*, 19(1), 121.

³ Foreign & Commonwealth Office, 'Declaration on Preventing Sexual Violence in Conflict: Adopted in London on 11 April 2013', (Web Document, 11 April 2013),
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<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/185008/G8_PSVI_Declaration_-_FINAL.pdf>.

⁴ *Conflict-Related Sexual Violence: Report of the Secretary-General*, UN GAOR, 34th sess, Agenda Items 34, UN Doc A/66/657* and S/2012/33* (13 January 2012) 2.

⁵ Gloria Gaggioli. (2014). *Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law*. *International Review of the Red Cross*, 96(894), 503, 514.

⁶ Ibid 515.

⁷ Ibid 517.

implementation and compliance of the parties to the conflict, and the differences in the system, ideology and culture of the armed groups as the subject of the conflict make it difficult to implement the consistency of the IHL provisions. Whether armed groups commit sexual violence against civilians can reflect ideological and institutional differences among different groups to a certain extent. For example, in the civil wars in El Salvador and Peru, various branches of the national army and some anti-government groups differ in the patterns of sexual violence (such as the frequency, scale and groups of victims of sexual violence), this corresponds to its different systems; At the same time, studies have shown that armed groups with mature and sustained political and ideological education mechanisms and rebel groups following a specific ideology (e.g., communism) are less likely to engage in sexual violence during armed conflict.¹ However, the IHL does not fully cover the internal factors of these complex armed groups, which may cause the general rules to be disconnected from the specific situations in the conflict, and thus the IHL lacks adequate coping mechanisms for similar phenomena.

The above phenomenon indicates that, as far as the content of the convention currently included in the IHL is concerned, there is a lack of an effective authority to unify the implementation and standards of the IHL. The Human Rights Council (HRC), established in 2006, is the body of the United Nations system responsible for the promotion and protection of human rights through its special procedural mechanisms and the monitoring and assessment of human rights phenomena around the world.² Therefore, could consideration be given to delegating some of the relevant powers provided for in the Convention to the HRC through specific provisions of the Convention, so as to achieve specific protection for groups suffering from gender issues? This consideration is mainly supported by the following two practical factors. First, the Human Rights Council has a universal periodic review (UPR) mechanism, under which Governments are required to submit reports every four and a half years on their efforts to

protect human rights, which are reviewed and commented on by a working group composed of member States, based on information provided by the States concerned; the aim is to establish an objective and reliable cooperation mechanism based on active dialogue to improve the human rights situation of all countries, to promote the fulfilment of their human rights obligations and commitments and to share their experience in the protection of human rights, taking into account their level of development and specific circumstances.³ Through regular monitoring and reporting mechanisms, not only can gender-based violence and the protection of women's rights in armed conflict be brought to wider attention and countries be encouraged to assess the effectiveness of relevant improvement measures. More flexible and targeted gender protection measures can also be achieved through the sharing of national experiences on how to deal with the issue and by taking into account the geographical and cultural specificities of each country. Second, the HRC established a Special Rapporteur on Violence against Women, its causes and consequences (SRVAW), within its special procedures; its mandate is to investigate gender-based violence against women through cooperation with governments, non-governmental organizations and relevant international organizations and to report thereon to the HRC. For example, gender-based crimes were explicitly included in the Statute of the International Criminal Court (ICC) in 2002, and this historic development is in line with SRVAW's recommendations in its report on violence against women in armed conflict, which also documents that violence against women in armed conflict remains high and persistent; it also points out that there is still a gap between the actual implementation of the relevant legal provisions and the implementation objectives.⁴ This shows that the SRVAW's relevant reporting documents under the Human Rights Council are not only forward-looking in policy, but also can provide targeted assessment and supervision of the response to gender-based violence, thereby improving the transparency and consistency of the implementation of women-specific protection in countries. These existing

¹ Elisabeth Jean Wood. (2014). Conflict-Related Sexual Violence and the Policy Implications of Recent Research. *International Review of the Red Cross*, 96(894), 457, 469.

² Bertrand Ramcharan. (2011). *The UN Human Rights Council*. Routledge, 1.

³ Ibid 50.

⁴ Yakın Ertürk. (2018, December 19). *15 Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences*. Report, 17.

mechanisms can also provide relevant experiences and frameworks for IHL on gender protection issues to some extent.

Although it is theoretically feasible to delegate some of the powers of IHL to the HRC, there may still be challenges in the practical implementation process. For example, the HRC is mainly related to international Human Rights Law (IHRL), which applies not only during armed conflict, but also during peace, while the IHL is a legal framework specifically applicable in times of armed conflict, mainly for the purpose of protecting civilians, prisoners of war, the wounded, etc. Thus, how to involve effective mechanisms, such as special procedures of the HRC, in the monitoring and implementation of gender protection, without violating the existing structure of the IHL, involves coordination among complex legal systems. At the same time, since the members of the HRC are elected by the UN General Assembly and depend to a certain extent on the political will of the international community, the different political positions of different countries may hinder the realization of the mechanism. The realization of this vision will therefore require close evaluation and coordination to achieve the best results for gender protection in conflict, which will be a long-term process.

5. The inadequacy of IHL in the Punishment of Gender Crimes

Although the IHL has put forward many protective provisions in documents such as the Geneva Conventions that address gender issues in all aspects of armed conflict, such as article 27 of the Fourth Geneva Convention and Article 75 of the Protocol I additional to the Geneva Conventions of 1977, which explicitly prohibit sexual violence such as rape in armed conflict. However, under the IHL framework, there is no clear punishment mechanism for violators of relevant provisions. At present, the punishment of gender crimes in armed conflict is mainly based on the case law of the International Court of Justice and the ICC, as well as the adequacy of the domestic judicial system of the country concerned. The establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda has led the international community to recognize that sexual violence constitutes a war crime when it occurs in situations of armed conflict and to

hold perpetrators criminally accountable.¹ For example, the trials of the relevant International Criminal Tribunals in the Kunarac, Akayesu and Čelebići cases found that rape, like other acts, can constitute crimes against humanity, genocide and ill-treatment; Based on these cases, the ICC has also included rape, sexual slavery and other forms of sexual violence as war crimes in international or non-international armed conflicts.² These case laws will not only play a role in clarifying and developing the relevant gender protection laws, but also have a certain deterrent effect on the perpetrators. While these initiatives have some positive implications in promoting gender protection, a significant proportion of the International Criminal Court's pending cases related to sexual violence do not result in a conviction for the crime.³ In some countries in armed conflict, while perpetrators of rape and other forms of sexual violence should be prosecuted and punished through accountability mechanisms and investigations, impunity for sexual violence still exists in many cases. For example, in the case study of sexual violence during conflict in Kenya, Liberia, Sierra Leone and Uganda, victims of sexual violence were reluctant to report their experiences of sexual violence or take other steps to seek protection, mainly due to the widespread perception that the current legal system in the country was inefficient and corrupt; As a result, survivors lack confidence and a sense of security that the legal system can effectively hold them accountable.⁴ In addition, due to the general lack of infrastructure and public services in areas affected by armed conflict, there are significant obstacles to investigating and documenting sexual violence during conflict, which makes it difficult to collect evidence on related issues and promote subsequent prosecutions, thus preventing the legitimate rights and interests of victims of sexual violence from being protected.⁵

¹ Anne Marie De Brouwer et al. (2013). *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia) ch 3, 58.

² Vincent Bernard and Helen Durham. (2014). Sexual Violence in Armed Conflict: From Breaking the Silence to Breaking the Cycle. *International Review of the Red Cross*, 96(894), 427, 431.

³ Ibid 432.

⁴ Kim Thuy Seelinger. (2014). Domestic Accountability for Sexual Violence: The Potential of Specialized Units in Kenya, Liberia, Sierra Leone and Uganda. *International Review of the Red Cross*, 96(894), 539, 548.

⁵ Ibid 550.

In view of the above, how the IHL reaches agreement on cooperation with the ICC and measures to address gender-based violence within countries is key to advancing the punishment of perpetrators of gender-based violence in armed conflict. To achieve this goal, prevention policies should be tailored to the causes of gender problems, and the effective implementation of relevant gender protection laws and regulations should be promoted in stages by analyzing the causes of gender problems, whether the relevant governance framework is real and effective, and the in-depth understanding of different conflict situations and people involved in gender-based violence.¹ Secondly, the effective implementation of the IHL's relevant laws and regulations depends to some extent on the efficiency of the relevant international tribunals and the respect of the armed forces for its establishment rules. Strengthening the trial efficiency of cases of sexual violence in conflict and carrying out training on gender protection in military and armed organizations with a high incidence of gender issues will help further improve the applicable standards of IHL and formulate more effective laws and regulations to regulate gender issues in conflict. Finally, one of the main difficulties is how the IHL's legal framework can be harmonized with national legal systems and how it can work with relevant organizations, such as ICC, to improve accountability mechanisms for perpetrators. It is believed that with the changes in the international situation and the progress of the worldwide human rights movement, IHL will be able to improve relevant laws and regulations in the future, so as to achieve effective protection for groups suffering from gender issues in conflicts.

6. Conclusion

To sum up, this essay mainly illustrates that although the IHL framework provides specific protection for gender issues in armed conflict, there are still ambiguities and deficiencies in terms of the details of the provisions and the response to gender differences in armed conflict. This is mainly reflected in the fact that IHL attaches more importance to formal equality between men and women in terms of gender issues, but does not adequately address the difficulties of women's access to resources and health care under armed conflict, and their low

participation in decision-making bodies. Through the analysis of legal documents under the framework of IHL such as the Geneva Conventions, it can be seen that the provisions of IHL on addressing gender issues will differ in the actual implementation process due to various factors. In addition, the IHL does not have clear provisions for the punishment of gender-based crimes, particularly crimes of sexual violence, which makes accountability for such crimes difficult in situations of armed conflict.

Due to the complexity and diversity of gender issues in different countries and regions in armed conflict, it is difficult for this study to conduct a comprehensive and detailed assessment of the effectiveness of gender protection initiatives under the IHL framework. In addition, this essay focuses mainly on the gender protection of female groups in armed conflict, and does not discuss the sexual violence against men that has occurred in past conflict situations, which is therefore limited. In future studies on whether the IHL adequately addresses gender issues, further discussion could be made on how the IHL framework can improve its implementation mechanisms for gender protection, in particular by considering including organizations such as the HRC in the IHL's accountability mechanisms for gender-based violence. Finally, it is hoped that the IHL will not only provide more effective protection for women in armed conflict, but also contribute to the progress of gender equality in the international law system as a whole, through targeted systematic reforms on the accumulation of experience in addressing gender issues in armed conflict.

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¹ Bernard and Durham (n 64) 433.

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