

# The dialogue of difference: gender perspectives on international humanitarian law

**Helen Durham and Katie O'Byrne\***

Dr Helen Durham is the Strategic Advisor for International Law and Special Projects at the Australian Red Cross and a Senior Fellow at the Asia Pacific Centre for Military Law, Melbourne Law School. Katie O'Byrne is a solicitor at Freehills in Melbourne and a former assistant legal officer at the International Criminal Tribunal for the Former Yugoslavia (ICTY).

## Abstract

*This article examines the meaning and potential usefulness of a 'gender perspective' on international humanitarian law (IHL). In order to do so, it considers a number of 'gendered' themes found within IHL, including the role of women as combatants, and the gendered use of sexual violence during times of armed conflict. The authors suggest that further development and understanding of a gender perspective will contribute to the resilience and effectiveness of IHL as a system of law, and will strengthen the protection of those who are victimized and disempowered during times of war.*



In 2007, a meeting was held in Stockholm to examine gender perspectives on international humanitarian law. In issuing the invitation, the senior representative from the Swedish Ministry for Foreign Affairs was very clear – 'This is not a meeting about women and war. This is very different: this is about gender and international humanitarian law.'

\* The views expressed in this article are the authors' alone and do not represent any institutional position.

For many of us who have spent considerable time researching and working as practitioners in the area of women and war, the stark reminder that ‘gender is not only about women’ provided a chance for reflection. For professionals engaged in the practical implementation of international law, the provision of humanitarian assistance, and the development of international policy in this area, the term ‘gender’ is often synonymous with the needs of women. However, in the context of the increasingly complex environments in which armed conflict is experienced and the growing challenges many societies are facing in relation to the role of men and women, a more nuanced understanding of the broader application of the concept of gender is necessary to ensure that IHL provides the most resilient protection available. This article examines the meaning and potential usefulness of a ‘gender perspective’ on IHL. To do so it considers a number of ‘gendered’ themes found within IHL, including the role of women as combatants, and the gendered use of sexual violence during times of armed conflict. Treating women and men as if they were fixed and unchangeable categories can exclude the experience of those people who do not fit neatly into the assumption about how ‘men’ and ‘women’ are supposed to behave. This article builds upon the document ‘International Humanitarian Law and Gender: Report Summary of the International Experts’<sup>1</sup> (Expert Report Summary) and aims to further encourage dialogue and reflection on this emerging topic.

## What does a ‘gender perspective’ really mean?

Within scholarly research on international law, there is a range of definitions for the term ‘gender’.<sup>2</sup> The common element in each articulation of the term is the distinction drawn between differences based on sex (biology) and differences based on social assumptions about masculine and feminine behaviours (social constructs). In its Guidance Document entitled ‘Addressing the Needs of Women Affected by Armed Conflict’, the ICRC writes clearly of this differentiation:

‘The term “gender” refers to the culturally expected behaviours of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas “sex” refers to biological and physical characteristics.’<sup>3</sup>

1 *International Humanitarian Law and Gender*, Report Summary, International Expert Meeting: ‘Gender Perspectives on International Humanitarian Law’, 4–5 October 2007, Stockholm, Sweden, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/ihl-women-report-051008/\\$File/ihl%20and%20gender.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/ihl-women-report-051008/$File/ihl%20and%20gender.pdf) (last visited 10 December 2009).

2 See Dianne Otto, ‘Lost in translation: re-scripting the sexed subjects of international human rights law’, in Anne Orford (ed), *International Law and its Others*, Cambridge University Press, Cambridge, 2006, pp. 318–356; Carol Cohn, ‘War, Wimps and Women: Talking Gender and Thinking War’ in Miriam Cooke and Angela Woollacott (eds), *Gendering War Talk*, Princeton University Press, Princeton, NJ, 1993, pp. 227–246; Rosemarie Putnam Tong, ‘Introduction: The Diversity of Feminist Thinking’ in *Feminist Thought*, Westview Press, 1998, pp. 1–9.

3 International Committee of the Red Cross (ICRC), *Addressing the Needs of Women Affected by Armed Conflict*, ICRC, Geneva, 2004, p. 7.

In a similar vein, Hilary Charlesworth has written that:

‘The term “gender ... refers to the social construction of differences between women and men as ideas of “femininity” and “masculinity” – the excess cultural baggage associated with biological sex.’<sup>4</sup>

Patricia Viseur Sellers has critiqued the common perception of ‘gender’ in the context of war crimes prosecutions as exclusively an issue of women and rape. She writes:

‘Gender depends on the meaning given to males and females in the context of a society. So we often speak in “reductionist” terms, reducing gender to women, and when we refer to gender strategy reducing it to sexual violence committed against women and girls. This is unfortunate. There is room for growth.’<sup>5</sup>

Sandra Whitworth expounds on feminist conceptions of gender as follows:

‘When feminists use the term gender, they are usually signalling a rejection of essentialized categories of women and men. Using gender means pointing instead to the ways in which the assumptions that prevail about women and men, and femininity and masculinity, shape (and are in turn shaped by) the real lived conditions of specific people and the institutions they create. Feminists argue that the assumptions that prevail in any given time or place – about what it is to be a man or a woman, or what is considered appropriately feminine or masculine behaviour – has effects on people’s lives. Those assumptions and ideas can be used as rationales for exclusion, or privilege, used to discipline, or used to justify and make appear natural a whole variety of expected behaviours, or policy options.’<sup>6</sup>

Even in recent treaty law there have been some attempts to capture what is meant by the term ‘gender’. The Rome Statute of the International Criminal Court (ICC Statute) contains one of the few legal definitions of ‘gender’ (and in these authors’ view, a very limited one) in article 7(3) as follows:

‘For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.’

However, as noted by the Expert Report Summary, it can be a complex process to operationalize these insights, as gender is a subject that is both highly

4 Hilary Charlesworth, ‘Feminist Methods in International Law’, in *American Journal of International Law*, vol. 93, 1999, p. 379.

5 Patricia Viseur Sellers, ‘Gender strategy is not a luxury for international courts’, in *American University Journal of Gender, Social Policy and the Law*, vol. 17, 2009, p. 301.

6 Sandra Whitworth, ‘Globalizing Gender: Who Gets It? Who Doesn’t?’ in Ryerson Christie and Elizabeth Dauphinee (eds), in *The Ethics of Building Peace in International Relations: Selected Proceedings of the Twelfth Annual Conference of the Centre for International and Security Studies*, York Centre for International and Security Studies, Toronto, 2005, p. 120 (citations omitted).

personal and strongly public. Definitions of masculine and feminine roles within society are often shaped by public institutions and deal with the allocation of power within communities.<sup>7</sup> Despite the range of ways men and women are attributed roles in public and private life, a gender perspective challenges the view that differences between men and women can be accounted for exclusively with biological explanations. Rather, using gender as a category of analysis can open up discussion on the construction of social rules (both formal and informal) that impact upon communities, and how these roles can and do change.

This article begins with a summary of some of the contemporary feminist critiques of IHL, and then moves on to specific subject areas within IHL. Within the themes to be examined in this article, a gender perspective also provides a timely reminder that developing neat categories of 'men' and 'women' (as 'violators' and 'victims') can detract from a deeper examination of needs during times of armed conflict.

## Feminist critics of IHL

Over the last decade, some feminist legal theorists have advanced a range of critiques on the 'gendered' nature of IHL.<sup>8</sup> Concerns generally centre on the challenges that arise where systems of formal equality, such as IHL, are required or expected to deliver substantively equal outcomes, particularly given the fundamentally diverse ways armed conflict impacts upon men and women. In short, these academics have argued that IHL is inherently discriminatory, as it is a legal regime that prioritizes men – specifically male combatants – and often either relegates women to the status of victims, or accords them legitimacy only in their role as child-rearers. Gardam and Jarvis state that of the 42 specific provisions relating to women within the Geneva Conventions<sup>9</sup> and their 1977 Additional Protocols<sup>10</sup>, almost half deal with women in their roles as expectant or nursing mothers.<sup>11</sup> Similarly these authors argue that the other category of protection,

7 Report Summary, International Expert Meeting, above note 1, p. 6.

8 See in particular Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law*, Kluwer Law International, 2001; see also the review of this book in Helen Durham, 'Women, armed conflict and international law', in *International Review of the Red Cross*, vol. 84, no. 847, September 2002, p. 655.

9 International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 (Geneva Convention I); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 (Geneva Convention II); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (Geneva Convention III); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (Geneva Convention IV).

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, (Protocol I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, (Protocol II).

11 J. Gardam and M. Jarvis, above note 8, p. 93.

specifically the crime of sexual violence, is couched in terms of chastity and modesty of women.<sup>12</sup> Evidence of this claim is provided in the wording of Article 27 of Geneva Convention IV which states that ‘women shall be especially protected against any attack on their honour...’. Much has also been written in the past decades about the historical lack of prosecution of rape as a war crime, as well as the fact that it is not listed within the ‘grave breach’ provisions of the Geneva Conventions, which appears to give it a lesser status within the strict hierarchy of war crimes.<sup>13</sup>

On the other hand, some writers have acknowledged the use of outdated language within the body of IHL, but argue that like any text, the Geneva Conventions must be read with a temporal understanding of views in the 1940s and within a range of cultural constructs. As Lindsey notes:

‘... honour is a code by which many men and women are raised, and by which they define and lead their lives. Therefore the concept of honour is more complex than merely a “value” term.’<sup>14</sup>

Furthermore, the language used to articulate crimes involving sexual violence during armed conflict has been updated over time; for example, the wording used in the 1977 Additional Protocols (which does not include the term ‘honour’),<sup>15</sup> and the wider codification of prohibitions on sexual violence under the

12 *Ibid.*, pp. 96–97.

13 Susan Brownmiller, *Against Our Will: Men, Women and Rape*, Simon and Schuster, New York, 1975; Theodor Meron, ‘Rape as a Crime under International Humanitarian Law’, in *American Journal of International Law*, vol. 87, no. 3, 1993, p. 424; Alexandra Stiglmeier (ed.), *Mass Rape: The War Against Women in Bosnia-Herzegovina*, University of Nebraska Press, Lincoln, NE, 1994; Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Kluwer Law International, The Hague, 1997; Patricia Viseur Sellers and Kaoru Okuizumi, ‘Intentional Prosecution of Sexual Assaults’, in *Transnational Law and Contemporary Problems*, vol. 7, 1997, p. 45; Judith Gardam, ‘Women and the Law of Armed Conflict: Why the Silence?’, in *International and Comparative Law Quarterly*, vol. 46, 1997, pp. 55–80; Judith Gardam, ‘Women, Human Rights, and International Humanitarian Law’, in *International Review of the Red Cross*, vol. 324, 1998, p. 421; Christine Chinkin, ‘Women: The Forgotten Victims of Armed Conflict?’ in Helen Durham and Tim McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1999; Anne M. Hoefgen, ‘“There will be no justice unless women are part of that justice”: Rape in Bosnia, the ICTY and “gender sensitive” prosecutions’, in *Wisconsin Women’s Law Journal*, vol. 14, 1999, p. 155; Jennifer Green, Rhonda Copelon and Patrick Cotter, ‘Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique’, in *Hastings Women’s Law Journal*, vol. 5, 1994, p. 171; Nicole Eva Erb, ‘Gender-based crimes under the draft statute for the permanent International Criminal Court’, in *Columbia Human Rights Law Review*, vol. 29, 1998, p. 401; Cate Steains, ‘Gender Issues’, in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 357–390; Judith Gardam, ‘The Neglected Aspect of Women and Armed Conflict: Progressive Development of the Law’, in *Netherlands International Law Review*, 2005, pp. 197–219.

14 Charlotte Lindsey, ‘The Impact of Armed Conflict on Women’, in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War*, Koninklijke Brill, Leiden, 2005, p. 33.

15 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Protocol I, art. 76; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Protocol II, art. 4(2)(e).

ICC Statute, which neither uses such value-laden terms nor focuses exclusively upon women.<sup>16</sup> Significant advances have been made in the last decade in relation to the long overdue clarification of the illegality of all types of sexual violence in armed conflict. Recent jurisprudence from international criminal tribunals, to be discussed later in this article, leaves no doubt that rape can now be charged and successfully prosecuted as a war crime, a crime against humanity and genocide.<sup>17</sup>

In response to some of these critiques, it has been noted that the aim and scope of IHL do not always interact easily with the dynamics of feminist legal theory. Durham has written elsewhere as follows:

‘Feminist legal scholars have expressed frustrations at IHL’s lack of analysis of matters such as systematic gender inequalities. They argue that this contributes to IHL’s inability to move beyond a “male norm” when dealing with the impact of armed conflict upon women. Many of these criticisms highlight the tensions between the pragmatic and limited aims of IHL and the range of expectations placed upon this area of law ... IHL does not attempt to place any regulations upon the basis of social structure before, or after, the conflict ... its limited aim leaves no room ... for deeper social analysis of inherent inequalities required by feminist legal theory.’<sup>18</sup>

While the international community has heard and responded to calls for new legal instruments to realign IHL with contemporary understandings of the way armed conflict specifically impacts upon women, in more recent times the debates appear to have shifted. Concerns about the dangers of developing new and specific treaties and ‘reopening the basic principles of the existing texts’ in IHL have been identified. Bennoune writes:

‘There is the chance that in the contemporary environment it could result in a weakening of protections available, a reality of which feminist scholars are clearly aware.’<sup>19</sup>

Currently, ‘soft law’ options to increase the protection of women during times of armed conflict – including standards, guidelines and resolutions from the United Nations Security Council and the General Assembly – are being

16 UN General Assembly, Rome Statute of the International Criminal Court (ICC Statute) (last amended January 2002), 17 July 1998, A/CONF. 183/9, entry into force 1 July 2002, arts 8(2)(b)(xxii) and 8(2)(e)(vi), which criminalize the commission of rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilization or any other form of sexual violence also constituting a grave breach of the Geneva Conventions’.

17 Carrie McDougall, ‘The Sexual Violence Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda: The Silence Has Been Broken But There’s Still a Lot to Shout About’, in Ustinia Dolgopol and Judith Gardam (eds), *The Challenge of Conflict: International Law Responds*, Martinus Nijhoff, The Hague, 2006, pp. 331–446.

18 Helen Durham, ‘International Humanitarian Law and the Protection of Women’ in Durham and Gurd (eds), above note 14, p. 97.

19 Karima Bennoune, ‘Do We Need New International Law to Protect Women in Armed Conflict?’, in *Case Western Reserve Journal of International Law*, vol. 38, no. 2, 2007, p. 388.

reviewed and considered as a method for supplementing the existing legal norms in this area. Indeed rather than the drafting of more treaties or conventions, many of the responses to calls for increased protection for women (and in a number of cases children) in the last few years have involved developments such as resolutions from a range of bodies of the United Nations. For example, Resolutions 1888, 1889 and 1894 of the Security Council, all passed in late 2009, are the most recent links in a chain of resolutions that aim to bolster the protection of women and children against sexual violations during armed conflict, as well as the role of women in post-conflict peace-building as was expressed in Resolution 1325.<sup>20</sup> Added to this, there have been numerous United Nations administrative issuances, such as the Secretary-General's Bulletin, 'Special Measures for Protection from Sexual Exploitation and Abuse',<sup>21</sup> which build upon obligations and responsibilities expressed in documents such as the Secretary-General's Bulletin on 'Observance by United Nations forces of international humanitarian law'.<sup>22</sup>

The merit of this approach to strengthening protections and accountability is an interesting question deserving of detailed examination in another article dedicated to the specific topic. Rather than suggesting the need for more law, this article aims to provide readers with the capacity for reflection upon the existing IHL norms within a gender perspective. The following sections will move to examine some thematic issues that raise a range of questions relating to gender analysis of IHL.

## Women as combatants

Despite criticism of the Geneva Conventions and their 1977 Additional Protocols for taking an archaic view of the roles and value of women as exclusively 'vulnerable', there are a number of provisions within these treaties dealing with protections afforded to women as combatants. In this sense, the drafters of these treaties in the late 1940s comprehended that women may not always find themselves solely in civilian roles.

In the last decade, the number of women engaged in combat has dramatically increased in both regular and irregular armed groups. While many States, such as Australia, have a policy of excluding women from active participation in combat roles, there are a wide range of activities in which women can be engaged that are often similar or equal to 'war fighting', such as flying with the air force. In the United States, for example, women make up approximately 18% of air force

20 See UN Doc. S/Res/1325 (2000) on *Women and peace and security*, UN Doc. S/Res/1612 (2005) on *Children and armed conflict*, UN Doc. S/Res/1674 (2006) on *Protection of civilians in armed conflict*, UN Doc. S/Res/1820 (2008) on *Women and peace and security*, UN Doc. S/Res/1882 (2009) on *Children and armed conflict*, UN Doc. S/Res/1888 (2009) on *Women and peace and security*, and UN Doc. S/Res/1894 on *Protection of civilians in armed conflict*.

21 ST/SGB/2003/13, 9 October 2003.

22 ST/SGB/1999/13, 6 August 1999.

officers, compared with under 6% of the marine corps.<sup>23</sup> In Canada, the percentage of women in the armed forces has risen steadily to a proportion of approximately 17%, and the absence of restrictions on female participation in combat roles has resulted in women taking up arms as infantry soldiers, fighter pilots, submariners, clearance divers, warship captains and senior commanding officers in recent years.<sup>24</sup> Since 1948, Israel has followed the unique policy of conscripting both male and female citizens to the state defence forces, so that women make up approximately one-third of Israeli soldiers, although their roles and periods of compulsory service are restricted.<sup>25</sup> In the context of a number of civil rebellions, including in Nepal, Sri Lanka, Ethiopia and Eritrea, women have comprised a significant proportion of fighters in the guerrilla forces.<sup>26</sup>

### Protection of women as combatants and prisoners of war

In this sense, the provisions dealing with the protections afforded to women as combatants and prisoners of war are increasingly important. IHL is located within the concept of formal equality, and one sees reiterated throughout the Conventions and their 1977 Additional Protocols the requirement that protections should be provided 'without any adverse distinction founded on sex ...'.<sup>27</sup> In relation to women who find themselves as prisoners of war, article 14 of Geneva Convention III reinforces this concept through the obligation that women should receive treatment 'as favourable as that granted to men'. Article 16 confirms this in the statement: 'Taking into account the provisions of the present Convention relating to rank and sex ... all prisoners of war shall be treated alike by the detaining Power ...'.

Added to these claims of formal equality, IHL provides a range of specific protections to women, in particular for women detained as prisoners of war. For instance, women are required to be provided with separate dormitories and

23 *Statistical Abstract of the United States: 2009*, Table 494: Department of Defence Personnel, available at <http://www.census.gov/compendia/statab/> (last visited 13 November 2009).

24 Canadian Forces National Report to the Committee for Women in NATO Forces, 2006, p. 1, available at [http://www.nato.int/ims/2006/win/pdf/canada\\_national\\_report\\_2006.pdf](http://www.nato.int/ims/2006/win/pdf/canada_national_report_2006.pdf) (last visited 15 November 2009); Canadian Forces Recruiting Timeline, 1885–2007, available at [http://www.forces.ca/html/womeninthecf\\_en.aspx](http://www.forces.ca/html/womeninthecf_en.aspx) (last visited 15 November 2009).

25 Israel Ministry of Foreign Affairs, 'Integration of Women in the IDF', 8 March 2009, available at [http://www.mfa.gov.il/MFA/Israel + beyond + politics/Integration\\_women\\_in\\_IDF-March\\_2009](http://www.mfa.gov.il/MFA/Israel+%20beyond+%20politics/Integration_women_in_IDF-March_2009) (last visited 15 November 2009), quoting statistics published by the then IDF Women's Affairs Advisor, Brigadier General Yehudit Grisaro.

26 See for example Mary Zeiss Stange, 'From Domestic Terrorism to Armed Revolution: Women's Right to Self-Defense as an Essential Human Right,' in *Journal of Law, Economics & Policy*, vol. 2, 2006, p. 385, see in particular Pt IV, in which the author discusses the participation of women in liberation armies in Nepal, Kurdistan, Sri Lanka and Colombia. See also Angela Veale, *From Child Soldier to Ex-Fighter: Female Fighters, Demobilisation and Reintegration in Ethiopia*, Institute for Security Studies, Pretoria, 2003; Elise Fredrikke Barth, *Peace as Disappointment: The Reintegration of Female Soldiers in Post-Conflict Societies: A Comparative Study from Africa*, International Peace Research Institute (PRIO), Oslo, August 2002, available at <http://www.peacewomen.org/resources/DDR/AfricaBarth.html> (last visited 15 November 2009).

27 Geneva Convention I, art. 12; Geneva Convention II, art. 12; Geneva Convention III, art. 16; Geneva Convention IV, art. 27; Additional Protocol I, art. 75; Additional Protocol II, art. 4.



conveniences from men, even when undergoing disciplinary or penal punishment.<sup>28</sup> Furthermore, in the allocation of labouring tasks due consideration must be given to the sex of the prisoner<sup>29</sup> and disciplinary measures and punishments for women are not to be more severe than that accorded to males.<sup>30</sup> It must be noted that unlike female civil internees, female prisoners of war have no specific rights to only be searched by a woman.<sup>31</sup>

## Sexualization of interrogation

A number of authors have expressed concern at what they see as the increasing ‘sexualization’ of interrogation methods during detainment, whereby gender perspectives are thrown into confusion. The widely publicised activities of Private Lynndie England and other (male and female) military personnel in the Abu Ghraib prison in 2003–2004 provide a clear example of this phenomenon.<sup>32</sup> Eisenstein describes the abuse of prisoners at Abu Ghraib as an episode of gender depravity and chaos,<sup>33</sup> while Whitworth perceives it as a case of gender perspective falling into the wrong hands. Whitworth argues that, more than other international actors, many military actors are readily able to understand gender as a constitution of power relations, and, in the case of the Abu Ghraib interrogators, choose to utilize that understanding in order to violate and humiliate those they hold captive. She writes:

‘Those who planned the sexual torture and humiliation techniques used against prisoners understand that assumptions about appropriately masculine behaviour are not fixed across time and place and that we can discover (and in their cases, manipulate) the deeply felt expectations associated with masculinity. The interrogations involved a systematic assault on conceptions of appropriately masculine behaviour: smearing fake menstrual blood on prisoner’s faces, forcing them to masturbate or simulate and/or perform oral and anal sex on one another, to disrobe in one another’s presence, to touch one another, to touch women, and to be photographed in these and other positions. It is a racist and heterosexist understanding of masculinity, to be sure, but it is one that “gets” gender.’<sup>34</sup>

28 Geneva Convention III, arts 25, 29, 97 and 108.

29 *Ibid.*, art. 49.

30 *Ibid.*, art. 88.

31 See Geneva Convention IV, art. 97, which states that a woman internee shall not be searched except by a woman.

32 See generally Major General Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, 2004; Scott Higham and Joe Stephens, ‘New Details of Prison Abuse Emerge: Abu Ghraib Detainees’ Statements Describe Sexual Humiliation and Savage Beatings’, in *The Washington Post*, May 21, 2004; Linda Burnham, ‘Sexual Domination in Uniform: An American Value’, in *War Times*, www.war-times.org, 19 May 2004.

33 Zillah Eisenstein, ‘Sexual Humiliation, Gender Confusion and the Horrors at Abu Ghraib’, in Zillah Eisenstein, *Sexual Deceits: Gender, Race and War in Imperial Democracy*, Zed Books Ltd, New York, 2007, pp. 37, 41.

34 S. Whitworth, above note 6, p. 124 (citations omitted).

With this in mind, a number of the provisions relating to the dignified treatment of female and male prisoners of war could be examined with a gender perspective and in light of the intention of the drafters. The regulation – or lack of regulation – of the searching of detained combatants may be taken as an example. Perhaps the idea of the potential humiliation that could occur to male members of the military (or the civilian population) being searched by female officers was not specifically contemplated in the late 1940s. However, there can be no doubt that the humanitarian principles articulated throughout the legal norms dealing with the treatment of prisoners of war inherently demand respect for their persons and their honour<sup>35</sup> – this would clearly preclude gender humiliation.

### Practical difficulties

Of course, the above must be balanced with the realities of the process of capture and potential practical difficulties in providing military personnel of the appropriate sex (particularly women) to carry out searches.<sup>36</sup> A number of practical problems have also been identified in the implementation of the legal requirements to provide female detainees with adequate quarters separate from those of men, due to the fact that women often make up a minority of the detainee population.<sup>37</sup> Carefully balancing the practical realities of armed conflict and the principle of humanity is a task international humanitarian law constantly struggles to achieve. Yet assessing and reflecting more deeply on the aims of the relevant legal provisions and their relationship with the practical realities on the ground is a useful exercise to undertake. The provisions relating to the treatment of prisoners of war could thus benefit from a gender examination.

### Women perpetrators of crimes

Another area of relevance in a debate about gender and IHL is the development of a more nuanced understanding of social attitudes towards women and girls who break the gender stereotype and engage in crimes during times of armed conflict.

These themes are further examined in Nicole Hogg's article on women's roles in the commission of the Rwandan genocide in 1994.<sup>38</sup> In this piece, the author reflects upon the complex reasons why a range of women (from 'ordinary' women to those in leadership positions) actively participated in the atrocities, and the attitudes and defences that arose when they were prosecuted. She notes that in

35 Geneva Convention III, art. 14.

36 For further discussion see H. Durham, 'International Humanitarian Law and the Protection of Women', in Durham and Gurd (eds), above note 14, p. 101.

37 C. Lindsey, 'The Impact of Armed Conflict on Women,' in Durham and Gurd, *ibid.*, p. 29.

38 Nicole Hogg, 'Women's participation in the Rwandan genocide: mothers or monsters?', in this issue of the Review. For further detailed information on female participation in the genocide, see African Rights, *Not So Innocent: When Women Become Killers*, 1995.

many instances it was deemed impossible for women (good by nature) to commit such acts and thus they were treated ‘not like men, not like women, but something else, like monsters’.<sup>39</sup>

This tendency towards radical type-casting of female perpetrators (and alleged perpetrators) of crimes finds particular traction in the example of Pauline Nyiramasuhuko. The former Rwandan Minister for Family and Women’s Development currently stands accused before the International Criminal Tribunal for Rwanda<sup>40</sup> of criminal responsibility for genocide and rape as a crime against humanity, committed during the Rwandan conflict by Hutu extremists against Tutsis and Hutu moderates.<sup>41</sup> Encircling the persona of Nyiramasuhuko is a tangle of traditionally gendered concepts and contradictions that has confounded many observers. During the conflict, Minister Nyiramasuhuko, dressed in army fatigues, is reported to have suggested ‘Why don’t you rape them before you kill them?’ to armed Hutu Interahamwe as they prepared to massacre groups of Tutsi women.<sup>42</sup> Possibly a Tutsi herself by birth,<sup>43</sup> Nyiramasuhuko has been tried for these acts together with her son, a member of the Hutu Interahamwe who is also accused of genocide and rape.

Sperling observes that during the trial, both the press and Nyiramasuhuko’s supporters became fixated upon her gender, and specifically her womanliness and status as a mother.<sup>44</sup> Miller speculates on the possible implications of this preoccupation for the outcome of the trial:

‘The idea of finding a woman ... guilty of such atrocities performed on her own gender may prove to be too controversial for the Tribunal .... On the other hand, the outrage over discovering that a woman could commit such atrocities may provide Pauline with little defence. She could be found guilty because of her classification as a woman, rather than as a war criminal.’<sup>45</sup>

This statement makes clear that the use of gender stereotypes as a lens through which to view, condemn or justify atrocities is not only an unhelpful means of analysis, but one that ultimately diminishes our humanity. Sperling

39 See N. Hogg, above note 38.

40 International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda between 1 January 1994 and 31 December 1994, created under Chapter VII of the United Nations Charter, UN Doc. S/Res/955 (1994) (ICTR).

41 International Criminal Tribunal for Rwanda (ICTR) *Prosecutor v. Nyiramasuhuko*, Case No. ICTR 97-21-I, Amended Indictment, 3 January 2001, see in particular pt 6. The joint trial of Nyiramasuhuko and five co-accused concluded on 30 April 2009. As at 29 November 2009, judgement has not yet been rendered.

42 Peter Landesman, ‘The Minister for Rape’, in *The Age*, Good Weekend (Magazine), 30 November 2002, p. 28.

43 *Ibid.*, p. 30.

44 Carrie Sperling, ‘Mother of atrocities: Pauline Nyiramasuhuko’s role in the Rwandan genocide’, in *Fordham Urban Law Journal*, vol. 33, no. 1, 2006, p. 637.

45 Alexandra A. Miller, ‘From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape’, in *Pennsylvania State Law Review*, vol. 108, 2003, p. 372.

concludes that social and cultural constructions of women as innately good, innocent and incapable of committing atrocities are in themselves dehumanizing.<sup>46</sup> A gender perspective on IHL enforcement attempts to debunk this kind of mythology by traversing more dynamic understandings of the different experiences of gendered actors in differing contexts. Nyiramasuhuko should be recognized not just as a woman acting within a certain power structure, but as a human being. It is this fact, rather than her femininity or lack thereof, which compounds the monstrosity of her alleged actions.

It is important in this context to acknowledge the clear requirement in IHL that those accused of war crimes be tried with 'safeguards of proper trial and defence'.<sup>47</sup> Similarly, Article 20(1) of the ICTR Statute provides that '[a]ll persons shall be equal before the International Tribunal for Rwanda'. These provisions are aimed at upholding fair and equal standards for all, and ensuring that in such prosecutions, the punishment of a woman is neither more nor less severe than that accorded to a man accused of similar crimes.

## Combat role of women

Even when women are not accused of committing atrocities, and rather are a regular part of the military, controversies flare over issues relating to what role women should or can play during war. In the course 'Women, War and Peacebuilding' at Melbourne Law School, the most heated debates regularly centre on matters relating to women as combatants. One of the readings for the course is a piece by a female legal officer in the Australian Army.<sup>48</sup> She writes about her sadness in leaving her young children back at home during her deployment and then relates a particular experience on patrol in Baghdad when a small child raised and pointed a stick toward her vehicle. She realized that if she had to, she would kill a child. She reflects:

'Was I proud of myself for finding that out? Did I take pleasure in this new-found knowledge? No. But it did give me a sense of confidence in knowing that I would be capable of doing my job if it came to it ...'<sup>49</sup>

This statement is often deemed offensive by some of the students and an important part of the 'equality discourse' by other students. Such uneasy and dispirited views on the role women should be allowed to play during times of armed conflict are often further reflected within the wider community. The Australian

46 C. Sperling, above note 44.

47 Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

48 Penny Cumming, 'Combat Operations in Iraq: An Australian Soldier's Perspective', in Durham and Gurd (eds), above note 14, p. 17.

49 *Ibid.*

Defence Force (ADF) has long expressed its desire to involve more women in its 50,000 strong workforce than the current 13.4%, and is investigating the reasons behind low female participation in the military. Senior Defence Force personnel argue that women's reluctance to join the ADF is not due to exclusion from 'hand-to-hand' combat.<sup>50</sup> Most public commentary on the topic appears to focus upon the lack of capacity of women to fight, as well as the social concerns raised by women being killed or injured in combat.<sup>51</sup> However, commentators such as Peach argue that discussions on the involvement of women in combat are based on deeper ideological principles, such as the 'ethic of care', which are rarely exposed in broader discourse on the topic. She writes:

'The ethic of care is tainted by ideological assumptions that women are different than men, more oriented towards peace and non-violence, and should thus not participate in the immoral activities of a largely sexist and patriarchal institution which functions to destroy rather than preserve life.'<sup>52</sup>

Such statements indicate that societal concerns are not so much about women not being 'good enough' to fight (in a physical/biological sense), but rather that women are 'too good' (morally/ethically) to be exposed to the horrors of war. In other words, the sub-text of the debate is not about the unpalatable notion of women being killed, but instead about the lack of acceptance in many societies of women killing.

### Post-conflict re-integration of women fighters

The social pressures placed on female combatants do not fade away when the fighting stops; in many cases, they intensify. A number of commentators have examined instances of returned female soldiers struggling to re-integrate into their communities due to the rift between their own attitudes as ex-fighter women, and the gendered expectations and perceptions of post-war society. Elise Fredrikke Barth's study of female soldiers in Africa reports that many female ex-fighters find themselves 'socialized out' of their former communities for numerous reasons: because they are reluctant to conform to traditional gender roles, because they broke ties with their families to join the fighting, because their marriages with other ex-fighters failed after the war, because they are childless, or because they have returned from conflict with a disability that makes them less desirable as a wife.<sup>53</sup> Women from rural communities in developing countries in particular have often joined the forces to escape extreme poverty, and frequently refuse to return to their families after the conflict. While this and similar research

50 Brendan Nicholson, 'Women reluctant to join military', in *The Age*, 20 November 2009.

51 Andrew Bolt, 'Up front on women', in *The Herald Sun*, 4 April 2007.

52 Lucinda Peach, 'Women at War: The Ethics of Women in Combat', in *Hamline Journal of Public Law and Policy*, vol. 15, p. 199.

53 E. F. Barth, above note 26.

papers have found that re-integration is often easier for the victors, female ex-fighters have also been 'sidelined' in the political sphere, and denied equal representation in the post-conflict governments they fought to establish.<sup>54</sup> Barth explains:

'Female ex-fighters experience a lot of tension in their lives, finding themselves considered somewhere between, on the one hand, heroines, and on the other, unclean women. They have led lives that do not comply with rules for how respectable women ought to live, and they have to negotiate their identity against this background.'<sup>55</sup>

## Girl soldiers

The above issues relating to female fighters are even more pronounced with regard to girl soldiers. The limited number of studies on this topic indicate that the role of young girl soldiers during and after armed conflict is extremely complex and often overlooked by the international community.<sup>56</sup> Furthermore, concerns have been raised that the type of experiences specific to girl soldiers, such as sexual exploitation in the form of forced marriages, forced child-bearing and domestic slavery, are not expressly covered by API's prohibition on using children under 15 to take 'direct part in hostilities',<sup>57</sup> nor by the Optional Protocol to the Convention on the Rights of the Child.<sup>58</sup> In 2003 the Coalition to Stop the Use of Child Soldiers and UNICEF created a Guide to the Optional Protocol, which argues for a broad interpretation of article 1 to incorporate the range of roles in which girl soldiers are engaged during times of conflict.<sup>59</sup> Consideration needs also to be given to the application of other frameworks, both human rights law and domestic protections afforded to children, which could be used in conjunction with IHL to increase protection for young females caught up in conflict. The current case before the International Criminal Court dealing with the alleged use of child soldiers by

54 *Ibid*; see also A. Veale, above note 26.

55 E. F. Barth, above note 26.

56 Myriam Denov, *Girls in Fighting Forces: Moving Beyond Victimhood*, Child Rights Information Network, 2007; Save the Children, *Forgotten Casualties of War: Girls in Armed Conflict*, 2005, available at [http://www.harare.unesco.org/women/2698\\_GAAF%20report.pdf](http://www.harare.unesco.org/women/2698_GAAF%20report.pdf) (last visited 28 November 2009); Vivi Stavrou, *Breaking the Silence: Girls Forcibly Involved During Armed Conflict in Angola*, Christian Children's Fund and Canadian International Development Agency, Richmond, Virginia and Ottawa: 2005; Susan McKay and Dyan Mazurana, *Where are the girls? Girls in fighting forces in Northern Uganda, Sierra Leone and Mozambique: Their lives during and after war*, Rights and Democracy, Montreal: 2004.

57 Additional Protocol I, art. 77(2).

58 See Optional Protocol I to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, entry into force 12 February 2002, art. 1: 'States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities'.

59 UNICEF and Coalition to Stop the Use of Child Soldiers, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* 2003, available at [http://www.unicef.org/publications/index\\_19025.html](http://www.unicef.org/publications/index_19025.html) (last visited 23 November 2009).

Thomas Lubanga<sup>60</sup> will create precedent in this area, and in particular will provide opportunities for further reflection on the specific experiences of girl soldiers and the legal norms governing such situations.

This section of the article has focused so far upon women as combatants, the applicable legal framework, and social attitudes to women actively engaged in conflict and post-conflict experiences. It has aimed to unmask a number of gender assumptions in relation to the diverse experiences of women, and expose the dangers of assuming that women are a homogenous group who experience war exclusively as victims. In many instances, the topics raised are clearly beyond the scope of what can be directly addressed by IHL. These should rather be recognized in the context of policy development and re-integration programmes. However, the challenges faced by female combatants and ex-fighters prompt us to recall that IHL does not operate in a vacuum when it comes to gender dichotomies. For the women themselves, the contestation of imposed gender roles is inextricably linked with conflict, but is sometimes harder once the war is over.

## Non-discrimination

As a normative legal framework, IHL continually re-iterates the need for protection to be accorded, as noted above, ‘without any adverse distinction founded on sex’.<sup>61</sup> Whether during the detention, processing or questioning of prisoners of war, gender humiliation of either men or women is prohibited by the general and specific wording of the Conventions and their Protocols. Article 14 of Geneva Convention III is very clear in stating that ‘Prisoners of war are entitled in all circumstances to respect for their person and their honour’. In the same vein, the prosecutions of those accused of war crimes, irrespective of their gender and the social attitudes prevailing in relation to their crimes, are required to be undertaken within the safeguards of a proper trial and defence. Guarding against the greater condemnation that may be attributed to women accused of war crimes, owing to ‘gendered’ views of what women’s behaviour should entail, Article 88 of Geneva Convention III states:

‘In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence.’

Thus the basic legal principle of non-discrimination has an important role to play in situations where women ‘disrupt’ assumed gender norms and engage actively in armed conflict.

60 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007.

61 See above note 27.

## A gendered perspective of sexual violence and armed conflict

Sadly, sexual violence has been and continues to be a consistent experience for many women during times of armed conflict throughout the world. After many years of silence on this issue, the last few decades have seen significant amounts of activism, research and writing about horrific and overwhelming examples of rape, sexual slavery, forced prostitution, forced impregnation, forced termination of pregnancy, forced sterilization, sexual mutilation, sexual humiliation and numerous other illegal acts during times of armed conflict.<sup>62</sup> Such attention and focus upon these heinous crimes has resulted in the clear legal recognition of rape and a range of sexual crimes during armed conflict as constituting war crimes, genocide or crimes against humanity.<sup>63</sup>

### Crimes involving sexual violence under IHL

Currently, discussion has shifted beyond the capacity and the need to prosecute crimes involving sexual violence into procedural and technical analysis. Issues include the actual definition of the crime of rape under international law, and the relevance of consent in situations of armed conflict.<sup>64</sup> Debates have ensued in relation to the broad conceptual definition of rape as expressed in the *Akayesu* case of the ICTR, versus the more mechanical definition found in the *Kunarac* judgement of the ICTY.<sup>65</sup> Nevertheless, it remains important to continually

62 See references in footnote 13 and Kelly Dawn Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current status', in *American Journal of International Law*, vol. 93, 1999, p. 97; Karen Engle, 'Feminism and its Discontents: Criminalising Wartime Rape in Bosnia and Herzegovina', in *American Journal of International Law*, vol. 99, 2005, p. 778; Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Intersentia, 2005; Mark Ellis, 'Breaking the Silence: Rape as an International Crime', in *Case Western Reserve Journal of International Law*, vol. 38, no. 2, 2006/2007, p. 255.

63 See *ICTR Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 599; *ICTR Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Judgement, 16 November 1998, paras 478–9; International Criminal Tribunal for the former Yugoslavia (ICTY) *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgement, 10 December 1998, para. 172; *ICTY Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1-T, Trial Judgement, 22 February 2001, para. 460, affirmed in *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1-A, Appeal Judgement, 12 June 2002, paras 127–8; *ICTY Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgement, 2 August 2001, para. 513; *ICTR Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, paras 344–6; *ICTR Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgement, 7 July 2006, paras 153–5.

64 For discussion of the relevance of consent to the crime of rape in situations of armed conflict, see Anne-Marie de Brouwer, above note 62, pp. 103–136; Adrienne Kalosieh, 'Consent to genocide?: The ICTY's improper use of the consent paradigm to prosecute genocidal rape in Foča', *Women's Rights Law Reporter*, vol. 24, 2003, p. 121; Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence Under International Criminal Law', in *American Journal of International Law*, vol. 101, 2007, p. 121.

65 For discussion of the various ways the Tribunals have defined rape, see Kristen Boon, 'Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent', in *Columbia Human Rights Law Review*, vol. 32, 2001, pp. 667–73, 674–5; Anne-Marie de Brouwer, above note 62, pp. 103–136; Catharine A. MacKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*', in Catharine A. MacKinnon, *Are Women Human? And Other International Dialogues*, Harvard University Press,



ensure that victims of sexual violence and rape in armed conflict are able to access justice. Pressure must also still be rigorously applied in order to secure prosecutions.

As noted previously in this article, IHL has also developed in relation to the articulation of sexual crimes. The wording used in Article 27 of Geneva Convention IV of 1949:

‘Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault’

was updated in the 1977 treaties with Additional Protocol II stating that the following acts against persons shall remain prohibited at any time and in any place whatsoever:

‘outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault (Art 4(2)(e)).’<sup>66</sup>

These crimes were further codified in the ICC Statute, which proscribes the following as crimes against humanity and/or war crimes: ‘Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’.<sup>66</sup>

It is vital that the prevention and redress of sexual crimes committed during armed conflict remains a major priority in the development and implementation of IHL norms at both local and global levels. In exploring a gender perspective on IHL, this article acknowledges the great suffering and great courage of female victims of large-scale sexual violence campaigns in many conflict situations, as well as the need to continue to create policies and laws that address this matter. The authors also contend that the international community and those engaged in humanitarian work need to acknowledge that men too have been the victims of sexual violence during wartime, and as such are entitled to equal recognition and protection.

## Sexual violence against men

Just as it took many years to recognize rape as a war crime, a number of authors argue that the issue of sexual violence against men has not yet received the attention it deserves.<sup>67</sup> Sources indicate that men have frequently faced sexual violations

Cambridge, MA, 2006, p. 237; W. Schomburg and I. Peterson, above note 64, see in particular pp. 132–8; Alison Cole, ‘Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape under International Law’, in *International Criminal Law Review*, vol. 8, nos 1–2, 2008, pp. 55–85.

66 ICC Statute, arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

67 Dustin A. Lewis, ‘Unrecognized Victims: Sexual violence against men in conflict settings under international law’, in *Wisconsin International Law Journal*, vol. 27, 2009, p. 1; Lara Stemple, ‘Male Rape And Human Rights’, in *Hastings Law Journal*, vol. 60, 2009, p. 605; Sandesh Sivakumaran, ‘Sexual Violence

in many conflict situations over time in different parts of the world.<sup>68</sup> These have included assaults aimed at causing physical and psychological trauma to the victim and his community, as well as violence intended to inhibit or destroy the victim's reproductive capacity. Like the sexual abuse of inmates at Abu Ghraib mentioned previously in this article, sexual violence is used against men during armed conflict as a deliberate strategy to push the victim to the bottom of a power structure based on gender stereotypes, so as to debase, humiliate and emasculate him. A number of authors perceive that the male victim of sexual assault is 'feminized' by the perpetrator, forced to occupy the position of the stereotypically submissive and subordinated woman.<sup>69</sup>

Reporting of such crimes has been limited, and prosecutions relatively rare. Commentators point to numerous reasons for the silence surrounding sexual assault of men, including lack of detection and misdiagnosis by front-line professionals, lack of vocabulary and understanding combined with shame and fear on the part of victims,<sup>70</sup> and the inadequacy and intolerance of legal and bureaucratic mechanisms.<sup>71</sup> Carpenter further notes that psycho-social services for male survivors of sexual violence are virtually non-existent in almost all parts of the world.<sup>72</sup> Male sexual assault may be hidden by victims or ignored by authorities because of the social stigma associated with sexual crimes in general, and male rape, homosexuality and masculinity in particular. In some cases, it may be that male–male sex is criminalized in the victim's home country, so he is deterred from reporting a violation because he is afraid of prosecution, imprisonment, and in a number of

Against Men in Armed Conflict', in *European Journal of International Law*, vol. 18, 2007, p. 253; Augusta Del Zotto and Adam Jones, 'Male-on-male sexual violence in wartime: human rights' last taboo?', Paper presented to the annual convention of the International Studies Association, New Orleans, 23–27 March 2002.

68 See for example Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Application of the Republic of Bosnia and Herzegovina, paras 44D(c), (h), 62; Oral Proceedings of Bosnia and Herzegovina (CR 2006/06), p. 51, detailing allegations of sexual abuse of Bosnian Muslim men by Yugoslav forces during the Bosnian War; S. Sivakumaran, above note 65, pp. 257–60, where the author sets out a brief history of the commission of sexual violence against men in armed conflicts, spanning from Ancient Persia to today's Democratic Republic of the Congo; Eric Stener Carlson, 'The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals', in *British Journal of Criminology*, vol. 46, 2006, p. 16; Pauline Oosterhoff *et al.*, 'Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret', in *Reproductive Health Matters*, vol. 12, 2004, pp. 68–77; Michael Peel, 'Men as perpetrators and victims', in Michael Peel (ed), *Rape as a Method of Torture*, Medical Foundation for the Care of Victims of Torture, London, 2004; Michael Peel, A. Mahatani, G. Hinshelwood and D. Forrest, 'The sexual abuse of men in detention in Sri Lanka', in *The Lancet*, vol. 355, issue 9220, 2000, p. 2069.

69 See for example S. Sivakumaran, above note 67, p. 260; Z. Eisenstein, above note 33.

70 See 'Congo's male rape victims speak out', in *Agence France-Presse*, 30 April 2009, available at [http://www.clipsyndicate.com/video/play/928991/congo\\_s\\_male\\_rape\\_victims\\_speak\\_out](http://www.clipsyndicate.com/video/play/928991/congo_s_male_rape_victims_speak_out) (last visited 23 November 2009), in which a victim of sexual violence states 'At first I was really ashamed, because I'd never heard of a man being raped'.

71 D. A. Lewis, above note 67, pp. 6–10; S. Sivakumaran, above note 67, pp. 255–257.

72 R. Charli Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations', in *Security Dialogue*, vol. 37, 2006, no. 1, pp. 83–103.

jurisdictions, the death penalty.<sup>73</sup> As a result of these factors, sexual violence against men in wartime has been a largely invisible offence, for which perpetrators go unpunished.

### Absence of a gender-equal approach to sexual violence

The issue is compounded, as some authors point out, by the fact that recent international human rights instruments dealing with sexual violence do not always promote a gender-neutral or gender-equal approach.<sup>74</sup> Some of the Security Council resolutions mentioned earlier in this piece, for example, focus chiefly on the victimization of women and girls, disregarding evidence that men and boys constitute an identifiable proportion of sexual violence victims in wartime.<sup>75</sup> Stemple observes that no international human rights instruments focus exclusively on sexual violence against men and boys.<sup>76</sup> On the one hand, the acknowledgement of women and girls as victims is a victory for feminist advocates and female victims, on the basis that women and girls have overwhelmingly been the targets of wartime sexual violence, and because these occurrences have also been under-recognized. However, a gender perspective on IHL rejects the use of gender as a justification for discriminating between classes of victims.

In fact, a gender perspective encourages us to realize that protection of men and protection of women in armed conflict is not a contest between mutually exclusive concepts. In rejecting stereotypes and recognizing gender nuances, the cause of one can aid the cause of the other. Stemple argues that an interrogation of gender assumptions is the only way to fully address sexual violence against both women and men:

‘Male rape will only be curtailed when the perception of men broadens beyond one that sees men as a monolithic perpetrator class, and instead recognizes that men and boys can and should also be a group entitled to rights claiming. The failure of human rights instruments to address these claims promotes regressive norms about masculinity rather than challenging the harmful status quo. It would be more helpful to understand the ways in which regressive gender norms harm both men and women. It is possible to take sex and gender

73 D. A. Lewis, above note 67, p. 9, citing Daniel Ottosson, International Lesbian and Gay Association, ‘State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity Between Consenting Adults’, 2008, available at [http://www.ilga.org/statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2008.pdf](http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf) (last visited 23 November 2009), p. 4, reporting that seven countries currently impose capital punishment for male–male sex.

74 L. Stemple, above note 67; Pamela Scully, ‘Vulnerable Women: A critical reflection on human rights discourse and sexual violence’, in *Emory International Law Review*, vol. 23, 2009, p. 113.

75 *Ibid.* For examples of human rights instruments that focus on sexual violence against females, see UN Doc. S/Res/1325 (2000) on *Women and peace and security*, UN Doc. S/Res/1820 (2008) on *Women and peace and security*, UN Doc. S/Res/1888 (2009) on *Women and peace and security*, UN Doc. S/Res/1889 (2009) on *Women and peace and security*, and UN Doc. S/Res/1894 (2009) on *Protection of civilians in armed conflict*.

76 L. Stemple, above note 67, p. 618.

into account without setting up false divisions that pit all men against all women, villains against damsels in distress.<sup>77</sup>

Sivakumaran contends that further and better recognition of men as victims may in fact assist in the proper protection of women:

‘Attention to the issue [of sexual violence against men] may lead to a more nuanced consideration of the roles of men and women in armed conflict. It may dispel the idea of women solely as victims and men only as perpetrators, resulting in the negation of the corresponding notion that male victims of sexual violence are emasculated and feminized as a result of the violence. Addressing the issue may prove an invaluable contribution to the fight against sexual violence against women in conflict.’<sup>78</sup>

Accordingly, there is a need for sexual violence against men to be accorded greater recognition, and also to be condemned, reported and prosecuted more effectively. Efforts to achieve this form part of the broader prevention and redress of sexual violence crimes in general.

To this end, the UN Office for the Co-ordination of Humanitarian Affairs (OCHA) in 2008 published a literature review and analysis of research gaps on the topic of sexual violence against men.<sup>79</sup> It is hoped that, by creating an agenda of issues to be addressed, OCHA is stimulating further discussion, debate and study in this area. In addition, some subtle developments are evident in international criminal jurisprudence and charging practices in respect of male sexual assault. Of particular interest is the case of *Prosecutor v. Češić*,<sup>80</sup> decided in 2004, in which Ranko Češić was accused of forcing two brothers to perform fellatio on each other at gunpoint during their detainment at Luka Camp in Bosnia. Češić was charged with rape as a crime against humanity, to which he pleaded guilty and was convicted. While earlier cases of forced fellatio – such as *Prosecutor v. Tadić*<sup>81</sup> and *Prosecutor v. Delalić et al.*<sup>82</sup> – have been charged as inhuman treatment or inhumane acts, the Češić ruling interprets forced fellatio as falling within the Tribunals’ definition of rape,<sup>83</sup> and recognizes the crime as such. This case is some indication of the gradual acceptance and implementation of more expansive, gender-cognisant concepts than those previously applied in international criminal prosecutions, and within IHL more generally. Crucially, and in order to give effect

77 *Ibid.*, p. 634.

78 S. Sivakumaran, above note 67, p. 260.

79 United Nations Office for the Co-ordination of Humanitarian Affairs, Research Meeting, Use of Sexual Violence in Armed Conflict: Identifying Gaps in Research to Inform More Effective Interventions, ‘Discussion Paper 2: The Nature, Scope and Motivation for Sexual Violence Against Men and Boys in Armed Conflict’, 26 June 2008.

80 ICTY Case No. IT-95-10/1, Sentencing Judgement, 11 March 2004, paras 33, 52–53, 103.

81 ICTY Case No. IT-94-1, Amended Indictment, Counts 8–11.

82 ICTY Case No. IT-96-21, Indictment, Counts 44 and 45.

83 See ICTY *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T&IT-96-23/1, Judgement, 22 February 2001, para. 437: ‘the sexual penetration, however slight ... (b) of the mouth of the victim ... by the penis of the perpetrator ... by coercion or force or threat of force against the victim or a third person’.

to these concepts, more robust and gender-sensitive reporting and detection processes, along with support services, are required at the front-line in conflict situations.

The more recent and broader legal articulations of prohibitions of sexual violence, such as those found in article 4(2)(e) Additional Protocol II and the ICC Statute, are useful in that they do not specifically refer to 'women', and deal instead with questions of personal dignity. This is an example of how perceptions of the application of IHL can be challenged, particularly in the development of policies and 'guidelines' rather than new or specific treaty law. Applying a gender perspective to IHL can contribute to all attempts to strengthen the protections afforded to both women and men who find themselves in situations of vulnerability during times of armed conflict.

## Conclusion

There are myriad other issues found within IHL that could benefit from a gender examination. For example, the obligations found in the 1977 Additional Protocols relating to the prohibition of the death penalty for 'mothers having dependent infants'<sup>84</sup> and 'mothers of young children'<sup>85</sup> raises a range of questions in relation to situations when fathers are exclusively raising young children. Whether such rights are located exclusively with the mother's biological capacities (such as breastfeeding) or more broadly related to the well-being of young children is a matter that deserves further consideration. Indeed, the Swedish Expert Meeting examined areas such as methods and means of warfare as well as fact-finding missions and concepts such as 'Responsibility to Protect' within a gendered framework, and concluded that more reflection was required on the principles and specific elements of IHL.<sup>86</sup>

Whilst this article has only focused upon two distinct but related issues (women engaged in fighting and men as victims of sexual violence) it aims to encourage a more comprehensive debate about the relationship between IHL and gendered assumptions. As has been demonstrated, there is much within existing legal norms to review and consider in ensuring that IHL remains a highly relevant and practical protection regime. A gender perspective on IHL insists on emphasizing two principles: first, that where women (and men) participate in war, their experiences should be recognized as valid, rather than being excluded from the discourse or reduced to stereotype; and secondly, that IHL norms apply to all participants in war, in both a protective and a regulatory sense, regardless of gender.

84 Additional Protocol I, art. 76(3).

85 Additional Protocol II, art. 6(4).

86 Report Summary, International Expert Meeting, above note 1, p. 11.

The usefulness of the provision of a gender perspective to matters relating to conflict has been acknowledged by the appointment of ‘gender advisers’ in international criminal tribunals and the International Criminal Court, as well as by the Swedish Armed Forces in creating ‘Genderforce’. A development partnership with six organizations including the Swedish Armed Forces and the Swedish Police, ‘Genderforce’ is a response to Security Council Resolution 1325 and works in the area of international humanitarian relief operations and post-conflict peacekeeping missions. As ‘Genderforce’ states:

‘Ensuring a gender perspective that is well-integrated into day-to-day activities requires knowledge and education for all – men and women. Invisible and structural obstacles, hidden behind old-fashioned views and traditions constitute some of the main problems.’<sup>87</sup>

Increasing the protection of women during times of armed conflict is a pressing need. Furthermore, there is a need to continue to develop jurisprudence and understanding within the law of gendered crimes against any and all people. A gender perspective on IHL provides the capacity to consider different experiences of both women and men in order to break down stereotypes about how men and women ‘should’ operate, and the complex ways in which conflict impacts upon them. This advances the whole cause of gender justice, because it rejects perceptions of women and men that derive from dangerous and sexist assumptions, and are often at the root of discrimination, sexual violence and torture.

87 Genderforce Sweden, ‘From words to action’, p. 4, available at [http://www.genderforce.se/dokument/From\\_words\\_to\\_action.pdf](http://www.genderforce.se/dokument/From_words_to_action.pdf) (last visited 29 November 2009).