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Does International Humanitarian Law Distinguish between Male and Female Combatants in its Provision on Prisoners of War?

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Abstract

Due to increased participation of women in combat, provisions regarding protection of women must be strengthened. According to Article 4 of the Third Geneva Convention, prisoner of war status is granted to persons belonging to certain groups who have fallen into the power of the enemy. The Article itself is very gender neutral. But looking further into the Third Convention it is clear that there is a distinction between men and women. Article 14 is establishing that women shall be treated with regard to their sex while Article 16 states that every prisoner of war must be treated alike. However, every article of the Third Geneva Convention regarding gender agrees upon one thing; that distinction can be made based on gender, and that equal treatment aims to ensure fairness for each individual, rather than treating everyone identically. To reinforce protection, international human rights law can be applied alongside international humanitarian law. Human rights bodies place greater emphasis on women's rights and impose obligations on States to actively combat discrimination, which can help address the gaps in humanitarian law where protections may be limited or underdeveloped. The Geneva Conventions do recognise the difference between male and female prisoners of war, specifically to accommodate the particular needs of women. Provisions on separations during detention, as well as obligations regarding hygiene and medical care, are already in place. However, these protections can be further strengthened through the complementary application of human rights law.

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1. Introduction

1.1 Background

‘Prisoner of war [...] are persons belonging to one of the following categories, who have fallen into the power of the enemy’.¹ The provision is clear: no distinction is made based on sex or gender. As long as the individual falls within one of the categories outlined in the Article, they are entitled to certain privileges due to their particularly vulnerable state.²

Although, at first glance the article seems gender neutral a discussion could be raised on the topic. At the time the Geneva Conventions were adopted in 1949, active female participation in armed conflicts was considered uncommon, though their number were already on the rise, a trend that would continue and challenge traditional gender stereotypes.³

Although the redefinition of gender roles began in the aftermath of the Second World War, it was only in more recent years that scholars and legal practitioners began to seriously advocate for the integration of gender perspectives into international law, especially within international humanitarian law (hereinafter IHL).⁴ The drafters of the Geneva Conventions, predominately males, appeared to operate under the assumption that women were primarily bystanders rather than active participation in the conflict. As a result, the specific ways in which women are affected by war, including sexual violence, were insufficiently addressed.⁵

¹ Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III) Article 4.

² ‘Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.’ <<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020>> (Commentaries GC III) para 1663 accessed 7 April 2025.

³ Kristina Lindvall, ‘Approaching the Geneva Conventions with a gender perspective’ in Cecilia Tengroth and Kristina Lindvall (eds), *IHL and Gender - Swedish Experiences* (Swedish Red Cross 2015) (Tengroth and Lindvall) 15-16.

⁴ Boyd van Dijk, ‘Gendering the Geneva Conventions’ (2022) 44 *Human Rights Quarterly* (van Dijk) 286.

⁵ Kristina Lindvall, ‘Approaching the Geneva Conventions with a gender perspective’ in Tengroth and Lindvall (n3) 16.

One of the clearest examples of this oversight is the historical treatment of rape in armed conflict. Initially, rape was not explicitly recognised as a war crime⁶ nor considered a priority within the law of armed conflict.⁷ However, this perspective has since evolved. Today, sexual violence is widely acknowledged as a systematic weapon of war used to terrorise populations, and the legal framework has been strengthened to recognise rape as a war crime.⁸ This shift reflects a growing understanding that effective protection in armed conflict must extend to women, children and men alike.⁹

The limited inclusion of gender considerations in the 1949 Geneva Conventions reflect both the societal attitudes of the time and the lack of female representation. Although the number of women in combat roles was relatively low when the Conventions were written, it was not insignificant. Therefore, the need for gender-sensitive protection was already present and remain critical today.¹⁰ However, these provisions often focus solely on women's biological roles, such as pregnancy or motherhood.¹¹ They largely overlook other important gender-related factors, including women's social status and their specific needs in economic, cultural, and political contexts. As a result, they fail to ensure adequate protection for women who are not mothers or expecting.¹²

For the most part, there is a general agreement that the world works towards more equality between men and women, this includes every part of society, even within the armed forces. Recently, there

⁶ International Tribunals for Former Yugoslavia and Rwanda both recognised that rape could constitute as crimes against humanity. Today, rape is confirmed as a war crime according to Article 8(2) (b) (xxii) of the International Criminal Court Statute. See also Maite Zamacona Aguirre, 'The Development of a Gender Perspective in Refugee Law' in Tengroth and Lindvall (n3) 24-25.

⁷ *ibid.*

⁸ van Dijk (n4) 286; Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, *War, Conflict and Human Rights: Theory and Practice* (Third edition, Routledge 2018) (Lekha Sriram and others) 51.

⁹ Lekha Sriram and others (n8) 50.

¹⁰ van Dijk (n4) 289.

¹¹ Kristina Lindvall, 'Approaching the Geneva Conventions with a gender perspective' in Tengroth and Lindvall (n3) 16.

¹² *ibid.*

has been a growing push to increase the participation of women in the armed forces worldwide. Norway and Sweden have taken a significant step toward gender equality by implementing mandatory conscription for both men and women.¹³ Also Finland, which traditionally only required men to serve, is now encouraging more women to voluntarily join military training. Although women are required to undergo the same training and receive the same treatment as men, Finland has introduced a special support system to facilitate their integration. This system includes gender-sensitive training and measures to prevent sexual harassment, among other initiatives.¹⁴

An increased participation of women in the armed forces raises concerns regarding equality principles during actual conflicts. This shift introduced new challenges regarding the protection of prisoners of war. Previously, compliance with the regulations governing prisoners of war had not been particularly problematic, largely because the framework assumed a male prisoner population.¹⁵ However, as women increasingly became prisoner of war, it became more difficult to apply existing regulations, which lacked clarity on how to address their specific needs and vulnerability.¹⁶ The treatment of individuals deprived of their liberty, regardless of gender, requires special care, as they are particularly vulnerable to various forms of ill-treatment.¹⁷ Nevertheless, it is widely recognised that

¹³ 'From Finland to Armenia: Diverse Approaches to Increasing Women's Participation in Armed Forces | DCAF – Geneva Centre for Security Sector Governance' <<https://www.dcaf.ch/finland-armenia-diverse-approaches-increasing-womens-participation-armed-forces>> accessed 13 March 2025.

¹⁴ *ibid*; Numbers from armed forces around the world show that more and more women are joining the military, and that trend is likely to keep growing. Currently, Israel has the highest rate of female participation in the military at around 34%, while States like the USA, Australia, France, and Uruguay each report between 15-17%. See Helen Durham and Vanessa Murphy, 'Equal Treatment for Women in State Armed Forces: Three Practical Implications for Medical Care' (*Humanitarian Law & Policy Blog*, 8 March 2019) <<https://blogs.icrc.org/law-and-policy/2019/03/08/equal-treatment-women-state-armed-forces-three-practical-implications-medical-care/>> (Durham and Murphy) accessed 17 March 2025.

¹⁵ van Dijk (n4) 292.

¹⁶ *ibid*.

¹⁷ Cecilia Tengroth and Kristina Lindvall, 'Introducing the Swedish Approach to IHL and Gender' in Tengroth and Lindvall (n3) 9.

women and other gender minorities face heightened risks, especially of gender-based violence¹⁸, in such context.¹⁹ This is a topic that will lead into the discussion whether the current legal framework of IHL, especially the parts about prisoners of war, are enough to provide proper protection toward female prisoners of war.

1.2 Aim and Research Question

The aim and purpose of this research is to critically examine whether international humanitarian law, particularly its provisions concerning the treatment and protection of prisoner of war, reflects and upholds principles of gender equality, or whether it differentiates between male and female combatants that would essentially also affects the protection granted to them. This inquiry would involve examining whether current framework of IHL, with focus on the protection of prisoner of war, are gender-neutral or if there are specific considerations that either promote or hinder gender equality for individuals detained as prisoners of war.

This research is to critically analyse to what extent IHL principles regarding prisoners of war have a gender perspective. Due to the increased participation of women in armed conflict it is important that they receive protection as combatants and not only while they are civilians. Yet, incorporating gender aspects into IHL is not about introducing new legal requirements; rather, it should be seen as a way to ensure that existing provisions are applied properly by acknowledging that men and women are

¹⁸ Gender-based violence are crimes committed against male or females only due to their sex. In the General Recommendation No 19 from the United Nations Committee on the Elimination of Discrimination against Women it was established that crimes committed against women only based on her sex, or crimes that disproportionality affected women is considered as gender-based violence. In Srebrenica, 1995, gender-based violence was committed against men. However, such crimes are more often connect to woman as it affects them more frequently. See Christin Chinkin, 'Gender-based Crimes' (April 2011) in *MPEPIL* (online edn) para 1, 2 accessed 7 May 2025.

¹⁹ Commentaries GC III (n2) para 1663 accessed 7 April 2025.

affected differently by war.²⁰ To not implement a gender perspective during the application of provisions will increase the risk creating discriminatory results.²¹

Based on this, the following questions will be explored in the upcoming analysis.

- Do the provisions regarding the protection of prisoner of war distinguishes between male and female combatants?
- Do IHL provisions, like the one regarding protection of prisoner of war, provide gender equality?
- Does IHL distinguish between male and female prisoners of war in terms of their treatment and protection?
- Could the gender equality in IHL be connected to provisions of IHRL regarding women's rights?
- Are there specific provisions addressing the needs and rights of female prisoners of war, such as those related to hygiene?

1.3 Method and Material

The research is to be conducted by analysing the recognised legal sources of public international law. These sources include international conventions developed and accepted by contracting States; customary international law, which consists of rules that, through general State practice, have been accepted as law; general principles acknowledged by 'civilized nations'; and, finally, subsidiary sources such as publications considered of high quality and created by highly qualified scholars as well as judicial decisions.²²

²⁰ Kristina Lindvall, '*Approaching the Geneva Conventions with a gender perspective*' in Tengroth and Lindvall (n3) 18.
²¹ *ibid.*

²² Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) (ICJ Statute) Article 38.

The method that used to analyse these sources is the international legal positivism. How such method is used may differ depending on ‘who is talking’ but the general idea is that one can only use the recognised legal sources to describe the current law.²³ The recognised legal sources in this case would be the ones from Article 38 of the Statute of the International Court of Justice, ICJ Statute, those mentioned above.

The primary legal framework to be used is International Humanitarian Law, IHL, as the focus is on the protection of prisoners of war. The Articles of the Third Geneva Convention will be interpreted by analysing the Commentaries to the Convention. The Commentaries from 2020 is the latest and only update since 1960.²⁴ However, since women’s rights are a secondary focus, International Human Rights Law, IHRL, also plays a crucial role in the research. The conversation surrounding women’s rights in armed conflict requires an interaction between IHL and IHRL.²⁵

As a final point, the primary perspective of this research is *lex lata*, ‘the law as it exists’, as this approach adheres to the legal positivism, which focuses exclusively on the law currently in force.²⁶ While some may argue that discussing *lex lata* makes *lex ferenda* - ‘what law should be’ or ‘desirable law’²⁷ - irrelevant, a *lex ferenda* perspective is occasionally used to ensure a thorough analysis. This can be necessary since *lex lata* may contain gaps which can be understood and filled by a *lex ferenda*

²³ Annie-Marie Slaughter and Steven R Ratner, ‘The Method is the Message’ (1999) 93(2) American Journal of International Law (Slaughter and Ratner) 410, 411.

²⁴ Elizabeth Rushing, ‘GCIII Commentary: ICRC Unveils First Update in Sixty Years’ (*Humanitarian Law & Policy Blog*, 18 June 2020) <<https://blogs.icrc.org/law-and-policy/2020/06/18/gciii-commentary-update/>> accessed 6 May 2025.

²⁵ Catherine O’Rourke, *Women’s Rights in Armed Conflict under International Law* (Cambridge University Press 2020) (O’Rourke) 4.

²⁶ Slaughter and Ratner (n23) 415; Hugh WA Thirlway, *The Sources of International Law* (Second edition, Oxford University Press 2019) (Thirlway) xi.

²⁷ Thirlway (n26) xi.

approach. Scholars Simma and Paulus described this method as modified legal positivism, which recognised the interaction between *lex lata* and *lex ferenda*.²⁸

1.4 Delimitations

The research focuses on the right of female combatants and how they should be protected and treated when they fall into the hands of the enemy and are entitled prisoner of war status. The analysis will only briefly address the definition of prisoner of war, as it will be assumed that the women discussed have already met the criteria for entitlement of prisoner of war status.

Due to space limitations, the analysis is solely focused on the status of women in the context of prisoner of war protection. This does not imply that other genders do not face challenges or violations as well while they are being detained by enemy power. It is obvious that male prisoner of war also endures extreme violence while being in enemy custody. Additionally, the protection of LGBTQIA+ individuals who becomes prisoner of war deserves its own research, but it will not be discussed in this one. For the purpose of this paper, the focus will remain exclusively on women.

Similarly, the discussion on discrimination will be limited to discrimination against women or based on sex. While the relevant provision also prohibit discrimination on other grounds – such as sexual orientation, religion, nationality, and race – these will not be explored here.

Finally, the paper refers specifically to international armed conflicts, IAC. This is because prisoner of war status is applicable only in IACs due to the specific criteria outlined in the relevant provision.²⁹

²⁸ Slaughter and Ratner (n23) 415.

²⁹ Commentaries GC III (n2) para 1 accessed 1 May 2025.

2. Geneva Convention III – The Treatment of Prisoners of War

2.1 Prisoners of War – Historical Background

Although the term ‘prisoners of war’ dates back to the late 1800s, it did not originally carry the protective status for combatants that it does today.³⁰ Instead, the scholars at that time thought it would be more important to grant protection toward combatants that were sick and wounded and not the ones being captured by the power of the enemy. The first ever, considerably clear definition of prisoners of war was developed by Francis Lieber within the Lieber Code during the American Civil war in 1863.³¹ The definition stated that every member of the armed force, every man that belonged to any sort of rebellion group from the hostile country, and persons that are members of a group that is closely connected to the armed force would be considered a prisoner of war if captured by the enemy.³² If one were to use a literal interpretation of the Lieber Code then only men could be granted protection privileges as a prisoner of war and not women since it specifically uses the word ‘men’. But from a historical point of view, to find women in combat positions during armed conflicts was not very likely. Considering that women were rarely found among prisoners of war at the time, it is understandable that Francis Lieber did not explicitly include references to women in the Lieber Code.

In 1874, slightly around the same time as the adaptation of the Lieber Code in the U.S., the Brussels Declaration was adopted by 15 States, which later would become useful during the adaptation of the 1949 Geneva Conventions especially during the drafting of Article 4A(2) and the part about other militias and voluntary corps.³³ The definition from the Brussels Declaration was unchanged when it was later used during the adaptation of the 1907 Hague Regulations, which then was used during the

³⁰ Jean de Preux and others (eds), *Geneva Convention Relative to the Treatment of Prisoners of War* (2. repr, International Committee of the Red Cross 2006) (de Preux and others) 3.

³¹ Commentaries GC III (n2) para 952 accessed 5 April 2025

³² *ibid.*

³³ *ibid* para 954-955.

development of the 1929 Geneva Convention. The 1929 Geneva Convention eventually became the 1949 Geneva Conventions as we know it today.³⁴ It was not until 1914 that the imprisonment of combatants by the enemy State was recognised as a complex issue, and only then was it fully acknowledged that individuals detained during wartime required specific protections.³⁵

The original protection for prisoners of war was established under the 1929 Geneva Convention, which provided significantly stronger safeguards compared to the protection in place during the First World War.³⁶ Nevertheless, there remained an urgent need to expand the protection of prisoners of war, which ultimately led to the adaptation of the 1949 Geneva Conventions, and specifically the Third Geneva Convention.³⁷ The Third Geneva Convention is applicable from the second a person, that falls under any of the categories of Article 4 of the Convention, is in the hands of an enemy power, and stays applicable until that person has been released.³⁸

2.2 Article 4 Geneva Convention III

In Article 4 of the third Geneva Convention, we find out who is entitled prisoner of war status. The first part of the Article reads as follows; *‘A Prisoner of War, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy’*. It is clear in a sense that prisoners of war status are only granted to certain identified groups and only if persons from these certain groups are under the control of a State that is considered as an enemy.

³⁴ Commentaries GC III (n2) para 956-959.

³⁵ de Preux and others (n20) 3.

³⁶ *ibid* 6.

³⁷ Cecilia Tengroth and Kristina Lindvall, *‘Introducing the Swedish Approach to IHL and Gender’* in Tengroth and Lindvall (n3) 9.

³⁸ Commentaries GC III (n2) para 947.

In Article 4A we get a clear view on who is entitled prisoner of war status and therefore also be ensured protection when being detained by enemy power. Except from the obvious category of prisoner of war, members of armed forces that have been captured by the enemy, other ‘irregular’ members of the forces can be granted such status, as well as *levée en masse*, someone who spontaneously joins the hostilities and is being armed. Except from that, protection can also be granted to those civil individuals who have been authorised by the armed forces to support and, if necessary, join them during an armed conflict and later have been captured by the enemy power. Such persons can be working as constructors, be members of merchant marines and staff members on commercial aircrafts.³⁹

There is nothing in Article 4A that implies that women cannot become prisoners of war. The Article itself is very gender neutral. However, feminist scholars have expressed the importance to know that when the Geneva Conventions were adopted in 1949 combatants was always considered as men, while women only ‘could be’ civilians and victims.⁴⁰ For that reason, it is not completely wrong to imagine that women is unintentionally excluded from the idea of a prisoner of war and that the care of prisoner of war is not adjusted to suit women as adequate as to men.

³⁹ Commentaries GC III (n2) para 947, accessed 13 March 2025.

⁴⁰ Orly Maya Stern, *Gender, Conflict and International Humanitarian Law: A Critique of the ‘Principle of Distinction’* (Routledge, Taylor and Francis Group 2020).

3. Provision regarding Gender in GC III – The Legal Language of IHL Regarding Gender

3.1 Article 14 GC III – Respect for the Persons of Prisoners

Since Article 4 of the Third Geneva Convention does not mention anything regarding gender one must look further in the Convention to ascertain how women shall be treated when falling into the power of the enemy. In Article 14 of the Third Geneva Convention it is stated that ‘prisoners of war are entitled in all circumstances to respect for their persons and their honour’.⁴¹ Article 14 consists of three different paragraphs; the first one stating that prisoners of war are entitled respect for their honour and privacy; the second paragraph is stating that women must be treated with the consideration of their gender; the finale paragraph states that prisoner of war shall retain the full civil capacity which they enjoyed at the time of their capture which the Detaining power may not restrict except if it is necessary for the captivity.

In the original Geneva Conventions from 1929 it was established that there ‘should be a special consideration for women’, however, during the adaptation of the Geneva Conventions in 1949 it was acknowledged that the wording needed to be changed. It was then the second paragraph of Article 14 was adopted which says that women ‘*shall be treated with regard to their sex*’ and that such treatment shall be as favourable as to men’s treatment.⁴² The change was mainly based on the awareness that women did not enjoy same social status and rights across all countries.⁴³ The realisation emerged after the Second World War, as the conflicts had revealed the urgent need to provide women with greater protection when held by powers where, due to national beliefs, religion or cultural norms, their societal status was significantly lower than that of men.⁴⁴ This approach was first formulated by

⁴¹ GC III (n1) Article 14.

⁴² *ibid* Article 14 para 2.

⁴³ Commentaries GC III (n2) para 1655, accessed 3 April 2025.

⁴⁴ *ibid*.

the United Kingdom in the *Finale Record of the Diplomatic Conference of Geneva of 1949*, and in reference to this the United States expressed that prisoner of war should be granted similar rights as the person would in its home country.⁴⁵ While this approach may not be ideal in all circumstance, it could nonetheless provide essential protection for women detained in States where their social status is noticeably lower. Yet, it was also emphasised that any form of discrimination against women held as prisoners of war shall be prohibited, regardless of the legal status of women in the detaining country's laws.⁴⁶

It is well understood that men and women who become prisoners of war must receive the same treatment, especially regarding proper care and humane conditions.⁴⁷ Although, men and women have been treated unequally throughout history, both during peace and war, both groups should be entitled the same standard of humane treatment when becoming prisoners of war.⁴⁸ Article 14, among others, outline the need for humane treatment, including access to medical care, proper food, shelter, and protection from violence, regardless of gender. It reflects a call for consistency and fairness in applying these standards, ensuring that women are not neglected or treated as inferior when it comes to the care they receive as prisoners of war.

3.1.1 Article 14(1) - Respect for moral integrity

Article 14 reflects the underlying principle that prisoners of war must be treated with respect for moral integrity. The moral integrity of a person covers all factors that could make a person unique which results in – each person has different needs and morals that should to be protected.⁴⁹ A prisoner of war shall be protected from humiliating treatment, but such treatment depends on who the individual

⁴⁵ *Finale Record of the Diplomatic Conference of Geneva of 1949* (Vol. II Section A, 1949) p. 249.

⁴⁶ Commentaries GC III (n2) para 1655, accessed 3 April 2025.

⁴⁷ de Preux and others (n30) 146.

⁴⁸ *ibid.*

⁴⁹ GC III (n1) Article 16.

is.⁵⁰ Attributions like religion, cultural, race, social status, sexual orientation and gender must be acknowledged and considered when treating prisoners of war.⁵¹

To ensure that the moral integrity of women who are prisoners of war is respected, it is the responsibility of the Detaining Power to provide appropriate facilities and care.⁵² In the Commentaries to the Third Geneva Convention, it is stated that States must have a gender perspective when planning, building and running facilities made to detain prisoners of war.⁵³ For example, at every detention facility there are ‘searchers’, personnel responsible for physically searching detainees, for example, when they are admitted, moved, or at general security checkpoints. Although, the Third Geneva Convention does not explicitly regulate the manner in which searches are to be conducted or specify who should perform them, the broader obligation to respect moral integrity of prisoners of war nonetheless applies.⁵⁴ In particular, gender considerations play an important role in upholding this standard of treatment. It is widely recognised that, whenever possible, searches should be carried out by personnel of the same gender as the detained in order to minimise the risk of humiliation and gender-based abuse, whether deliberate or unintentional.⁵⁵ This practice reflects the overarching commitment under IHL to preserve the dignity of all prisoners of war, especially in context where invasive procedures may otherwise compromise their sense of personal integrity.⁵⁶

⁵⁰ Commentaries GC III (n2) para 1665, accessed 3 April 2025.

⁵¹ *ibid.*

⁵² *ibid* para 1667.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

3.1.2 Article 14(2) – ‘*The regard due to the sex*’

The first part of the second paragraph of Article 14 is stating that ‘women shall be treated with regard due to their sex’. This part has been adopted as a continuation of the first paragraph of Article 14 to further ensure respect and honour of the person, especially female prisoner of war.⁵⁷

It was acknowledged during the First World War that there was an increased number of women participating in combat.⁵⁸ In Article 3 of the 1929 Geneva Conventions, it was stated that women must be afforded ‘special protection’ during armed conflict when they fall into the hands of a Party to the conflict. This special protection has become increasingly important over time, as the number of women serving in armed forces has increased.⁵⁹ Today, more and more women can be found on the front lines of the battlefield, where the risk of capture and becoming prisoners of war is significantly higher.⁶⁰

Since the adaptation of the 1949 Geneva Conventions there has been a major development within international law on the topic of equality between the sexes.⁶¹ Today’s international society is increasingly aware that men and women, boys and girls, have different needs that must be recognised and addressed.⁶² It is undeniable that women are more likely to face psychological and physical risks specifically related to their gender, experiences that men are unlikely to endure.⁶³

States is responsible to take proactive measures to prevent sexual violence and other gender-based violence to happen while detaining prisoner of war. This obligation arises from Article 14(2) and proactive measure in that manner implies e.g. proper health care towards women, both in general but

⁵⁷ Commentaries GC III (n2) para 1681, accessed 3 April 2025.

⁵⁸ *ibid* para 1676.

⁵⁹ *ibid* 1676.

⁶⁰ Cecilia Tengroth and Kristina Lindvall, ‘*Introducing the Swedish Approach to IHL and Gender*’ in Tengroth and Lindvall (n3) 9; Commentaries GC III (n2) para 1676.

⁶¹ *ibid* para 1682.

⁶² Cecilia Tengroth and Kristina Lindvall, ‘*Introducing the Swedish Approach to IHL and Gender*’ in Tengroth and Lindvall (n3) 7.

⁶³ Commentaries GC III (n2) para 1682.

also after they have become victim to sexual violence. Such health care must be accessed at all the time.⁶⁴

The idea of treatment with regard due to the sex entails that women need protection that men does not need. The Detaining Power must provide women prisoner of war with medical care tailored to the needs of women, but also that such care is performed by experts and easily accessed.⁶⁵ The Detaining Power is also required to provide adequate gynaecological and reproductive health care while detaining female combatants. This is especially important if the woman in question is pregnant or has recently given birth.⁶⁶ Furthermore, basic requirements must be met by the Detaining Power, including the obligation for detention facilities to ensure the separation of men and women.⁶⁷ This separation should extend to all areas of the facility, particularly sanitary installations and sleeping accommodations. In cases where a female detainee is subject to disciplinary measures, she must be held in a separate cell, free from the presence of men, and supervised exclusively by female staff.⁶⁸

Yet, it is important to remember that ‘treatment with regard to the sex’ is not only about health care and protection from violence, but also about clothing and other basic supplies.⁶⁹ What kind of labour are they assigned to do, is there easy and continuous access to toilets and sanitary products, are those areas clean, and do the clothing, shoes and other body protection provided actually fit? Such things must be assessed by the Detaining Power to fully comply with Article 14 of the Third Geneva Convention.⁷⁰ It could be argued, but also not agreed upon, that such basics need may not be as important to men. Males are not as dependent on sanitary products and clean toilets due to their

⁶⁴ Commentaries GC III (n2) para 1684 accessed 3 April 2025.

⁶⁵ *ibid* para 1685.

⁶⁶ *ibid*.

⁶⁷ *ibid* para 1686.

⁶⁸ *ibid*.

⁶⁹ Cecilia Tengroth, ‘*Strengthening the Protections of IDPs*’ in Tengroth and Lindvall (n3) 139; Commentaries GC III (n2) para 1687.

⁷⁰ Commentaries GC III (n2) para 1687.

biological functions, and the clothing may always fit since these places are often male dominated and the equipment is therefore originally designed for the male body.⁷¹

When applying Article 14(2), exception may be permitted if they are intended to provide care that specifically benefits women.⁷² This is justified by the recognition that women have distinct needs that differ from those of men. The exception arises from the specific wording in paragraph 2 of Article 14 where the word ‘regard’ is present. Yet, some have tried to argue that the exceptions are weakening the principle of Article 14 since it removes the idea that the protection of men and women shall be equal, and that the use of the word ‘regard’ suggest that there may be some flexibility or room for interpretation when implementing the principle.⁷³

However, instead of seeing this as weakening the principle of Article 14, it should be considered to make the ‘equal’ part stronger. To not provide equality between the different sexes would be discriminatory, but it is important to know that equality does not always mean the exact same treatment but does also imply giving special treatment for the ‘weaker’ part so that they both end up on ‘the same level’. Equality is all about fairness and the focus should be on receiving equal results and not equal treatment. For example, providing identical uniforms to both male and female prisoners may appear to be equal treatment, but it does not necessarily result in equitable outcomes. While the uniforms may suit the male prisoners, female prisoners are likely to find them ill-fitting, too large and unsuited to the proportions of the female body. This highlights the difference between treating people the same and addressing their specific needs fairly. As mentioned in footnote 68, women serving in

⁷¹ The argument is based on reports from the Swedish armed force where female soldiers were not provided with suitable clothing and other equipment. It can be assumed that other States struggles with the same matter. See Anna-Maria Stawreberg, ‘Fortsatt brist på utrustning till kvinnor’ (*Officerstidningen*, 4 February 2022) <<https://officerstidningen.se/fortsatt-brist-pa-utrustning-till-kvinnor/>> accessed 5 May 2025.

⁷² Commentaries GC III (n2) para 1683.

⁷³ de Preux and others (n30) 146.

the Swedish Armed Forces have reported issues with ill-fitting clothing, underwear, and equipment.⁷⁴ Despite underwear being designed for women, it has caused chafing, discomfort, and even increased the risk of frostbite. A report from the Swedish *Pliktverket* stated that some of the female employees had begun using male underpants; however, this was not considered a solution to the problem of insufficient underwear for women.⁷⁵

3.1.3 Article 14(2) - ‘*Treatment as favourable as that granted to men*’

The second part of the second paragraph of Article 14 states that female prisoners shall be treated as ‘favourable as that granted to men’. After the Second World War it became generally known that women had a lower status than men, especially during armed conflicts.⁷⁶ It became urgent to make sure that women who would fall in the power of the enemy also had a sufficient and favourable protection.⁷⁷

There is a general agreement within international law that discriminatory treatment on the basis of sex shall never be accepted, and the second part of paragraph two is claimed to be establishing such prohibition once again even though it also exists in IHL treaties and customary law.⁷⁸ During the 1949 Diplomatic Conferences, the drafters of the Geneva Conventions clearly recognised the urgent need to strengthen protections for combatants, particularly for those who become prisoner of war.⁷⁹ They also acknowledged that women’s status could vary significantly depending on the cultural norms and legal frameworks of different countries. However, at the Conference it was emphasised

⁷⁴ Anna-Maria Stawreberg, ‘Fortsatt brist på utrustning till kvinnor’ (*Officerstidningen*, 4 February 2022) <<https://officerstidningen.se/fortsatt-brist-pa-utrustning-till-kvinnor/>> accessed 5 May 2025.

⁷⁵ Olof Wärmländer, ‘*Skav, värk och underkläder åt värnpliktiga kvinnor*’ (Pliktrådet, 25 November 2021, Stockholm)

⁷⁶ Commentaries GC III (n2) para 1689 accessed 3 April 2025.

⁷⁷ *ibid.*

⁷⁸ *ibid* para 1688.

⁷⁹ *ibid* para 1690.

that such differences cannot justify any form of discrimination. The principle of non-discrimination is to apply universally, regardless of how women is regraded under national law.⁸⁰

The principle is clear, the protection and treatment of female prisoners shall be mirrored the one given to male prisoners, regardless of the practices of the detaining power. This means that even if the detaining power has different practices or standards for treating its own citizens, it must apply the same or better standards for women in their power.⁸¹

In comparison to the next article to be discussed, Article 14(2) notably acknowledges that women are at higher risk of discrimination based on their sex than men, and that distinction can therefore be made based on gender as long as the treatment is favourable to women.⁸²

3.2 Article 16 – Equality of Treatment of Prisoners and the Meaning of ‘alike’

Article 16 of the Third Geneva Convention is stating that all prisoners of war must be treated equally by the Detaining Power, without discrimination based on race, religion, nationality and other similar factors, while considering differences in rank, sex, health etc.⁸³ The obligations from Article 16 is closely connected to Article 14 and the idea that all prisoners of war must be treated humanely to protect their integrity.⁸⁴

Stated by the Commentaries, Article 16 outlines a duty of equal treatment, which consists of several key elements.⁸⁵ The first and foremost element is that every detainee shall be treated alike. Yet, this

⁸⁰ Commentaries GC III (n2) para 1690.

⁸¹ de Preux and others (n30) 146.

⁸² Commentaries GC III (n2) para 1689.

⁸³ GC III (n1) Article 16.

⁸⁴ Commentaries GC III (n2) para 1734.

⁸⁵ *ibid* para 1735.

part of the Article is not absolute or any ‘one-size-fits-all’ provision. Instead, the Article shall be applied while also considering specific rules of the Third Geneva Convention that may relate to a prisoner’s rank, such as officer vs enlisted, and sex, male vs female. These factors are what makes it possible to justify different treatment, yet, as long as they are based on relevant needs or protection and not made in a discriminatory way.⁸⁶

The core principle of the Article is that every prisoner of war shall be treated ‘alike’ and that it is prohibited to adverse distinction based on nationality, race, religion etc. Yet, distinction may be justified due to sex or rank. The core principle of Article 16 originates from the Lieber Code back in 1863 and its provision stating that the same protection shall be given despite the race, colour or other personal factors.⁸⁷ On the other hand, it was not until the adaptation of the 1929 Geneva Convention that an ‘equal treatment-provision’ was implemented into an international treaty.⁸⁸ In 1929 the provision was worded as follows: ‘Differences of treatment between prisoners are permissible only if such differences are based on military rank [...] or the sex [...] of those who benefit from them’.⁸⁹

The first element of Article 16, which states that all prisoners ‘shall be treated alike,’ can be somewhat complex to interpret. However, it is made clear, by the Commentaries, that this does not mean men and women must receive *identical* treatment.⁹⁰ There is no demand that the Detaining Power shall treat the detainees exactly the same. Instead, the wording ‘alike’ is to be interpreted as concept of ‘equality’ which ties to the ideas of ‘adverse’ and ‘non-adverse’ distinction. In other words, equality

⁸⁶ Commentaries GC III (n2) para 1735.

⁸⁷ *ibid* para 1736.

⁸⁸ *ibid* para 1737.

⁸⁹ *ibid*; GC III (n1) Article 9.

⁹⁰ *ibid* para 1742.

does not mean identical treatment in every case, it means fair treatment that avoids unjust discrimination.⁹¹

Each prisoner of war has unique needs, and these needs must be addressed. Treating a severely ill person the same as someone in perfect health is clearly unfair.⁹² The same applies to women, treating them identically to men would not constitute true equality. When applying Article 16, it is important not to focus solely on the word ‘alike’. Instead, one should recognise that the provision is designed to ensure fairness among prisoners, allowing for different treatment when necessary.⁹³

That said, Article 16 could potentially be misleading. While its primary focus appears to be on the prohibition of discrimination, treating men and women ‘alike’ does not always constitute non-discriminatory treatment. For example, when considering the medical needs of men and women, it becomes clear that women often have different requirements. Therefore, instead of strictly applying the idea of treating everyone ‘alike’, one must focus on what constitutes fair treatment and apply Article 16 with that in mind.⁹⁴ It is only through the Commentaries of GC III that one gets the understanding of what the drafter had in mind when choosing the word ‘alike’, and that it is meant to be interpreted as fair treatment instead of equal treatment. Yet, without the Commentaries, this crucial perspective might be lost during its application, which could have devastating effects on the individuals involved.

Equal does not always mean ‘the same’ which is an important keynote to consider with Article 16. Discrimination can take multiple forms, both direct and indirect. It can be argued that treating individuals identically, despite their different characteristics, may itself be discriminatory. Since men

⁹¹ Commentaries GC III (n2) para 1742.

⁹² *ibid.*

⁹³ *ibid* para 1742, 1743.

⁹⁴ *ibid* para 1749.

and women do not share the same characteristics in all aspects, insisting that they be treated exactly alike may, in some cases, result in discrimination against women.

Even though men and women shall be treated equally, it must also be acknowledged that women face other risks that men do not and that women requires special medical needs that men do not need.⁹⁵ Every Party to a conflict is required to acknowledge and identify such specific needs to comply with the gender provisions of IHL. In Article 12(4) of the First Geneva Convention (hereinafter GCI) it is stated that women shall be treated with ‘all consideration due to their sex’. Although, GCI covers provisions regarding wounded and sick, rather than prisoner of war, commentaries on that Convention, which addresses the special needs of women, can help in understanding the implementation of gender in other IHL provisions. This connection is relevant because women who have prisoner of war status still require the same medical care as those who are wounded or sick. In the Commentary to GC I from 2016 it was stated that the female-specific needs come from the increased risk of physical and psychological harm due to the social structure.⁹⁶ Within Article 12 there exists an agreement that favourable distinction can be made between the different sexes to comply with the obligations of the Article.⁹⁷

As a final point, the Commentaries are also stating that Article 16 should be interpreted alongside Article 14(2). Article 16 is allowing for positive distinction in favour of women and is therefore also complementing the provision set out in Article 14(2).⁹⁸

⁹⁵ Durham and Murphy (n14) accessed 17 March 2025.

⁹⁶ *ibid*; ‘Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.’ <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-12/commentary/2016>> para 1428-29, accessed 18 March 2025.

⁹⁷ ‘Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949.’ <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-12/commentary/2016>> para 1429, accessed 18 March 2025.

⁹⁸ Commentaries GC III (n2) para 1748.

3.3 Other Provisions Regarding Gender in IHL

As previously mentioned, the Commentaries to Article 14(2) establish that, in order to uphold respect for the integrity of women, they must be held separately from male detainees.⁹⁹ This obligation is reinforced in Article 25(4), which states that detention facilities accommodating both men and women must house them in separate ‘*dormitories*’. Like Article 16, Article 25(4) can be understood as an extension of the protections outlined in Article 14(2), aimed at providing additional protection for women who have fallen into the hands of the enemy.¹⁰⁰

However, the requirement for separation applies only to shared sleeping quarters or communal living spaces.¹⁰¹ The Detaining Power is not obligated to provide entirely separate facilities for women. Nonetheless, this does not mean that the Detaining Power is prohibited from establishing dedicated facilities exclusively for female detainees. On the contrary, such arrangements may be considered appropriate, or even necessary, to effectively fulfil the obligations set out in the Third Geneva Convention.¹⁰²

In conjunction with the requirement for separation, the Detaining Power is also obligated to respect the cultural norms and practices of the woman in detention. This includes considering the context of the conflict they come from in order to fully meet their needs.¹⁰³ Cultural consideration may include dress codes, restrictions on food, and social interactions. In situations where only a small number of women are detained, it is recommended that the Detaining Power consult with the women themselves regarding the issue of separations and whether they would like to still be kept separated from men.¹⁰⁴

⁹⁹ See page 16.

¹⁰⁰ Commentaries GC III (n2) para 2099.

¹⁰¹ *ibid* para 2100.

¹⁰² *ibid*.

¹⁰³ *ibid*.

¹⁰⁴ This may appear contradictory, as the Commentaries clarify that even with the consent of the woman, men shall still be prohibited from entering areas exclusive for female detainees. The strict separation is necessary to ensure the protective measures remain effective at all times; See *ibid* para 2099.

If they still prefer to be housed separately from male prisoners, it is essential that they nevertheless granted equal access to social activities and outside time in order to avoid isolation.¹⁰⁵

In connection with Article 25, Article 29 of the Third Geneva Convention addresses hygiene. Article 29(2) specifically requires that women shall be provided with separate toilets and washing facilities, as well as other sanitary installations. These must be clean, accessible at all times, day and night, and maintained in good conditions. Article 29(2) supplements Article 14(2) and 25, reinforcing the need for the Detaining Power to provide exclusive sanitary facilities for women. These facilities must be guarded only by female personnel to ensure privacy and security.¹⁰⁶

Although Article 29(2) does not explicitly mention separate showers or bathing facilities, the Commentaries clarify that these, too, must be exclusively provided for women. Under no circumstance should men have access to these areas. Women must also be given sufficient time to maintain personal hygiene, particularly during menstruation. This may require access to washing facilities on a more regular basis than usual. In line with Article 14(2), the Detaining Power must also provide appropriate sanitary products, clean towels, and suitable means for disposing of used items.¹⁰⁷

¹⁰⁵ Commentaries GC III (n2) para 2100.

¹⁰⁶ *ibid* para 2206.

¹⁰⁷ *ibid* para 2223.

4. International Legal framework and women's rights - Principle of Discrimination in International Law

4.1 Customary Law Rule 88 in IHL

The idea regarding non-discrimination provisions can be easily understood as following; everybody shall be treated without being subject to any form of adverse distinction based on different personal factors or characteristics. Except for Article 14 and 16 of the Third Geneva Convention, the provisions regarding non-discrimination does also exist through IHL customary law Rule 88. The prohibition of adverse distinction has also been incorporated into various military manuals and supported by numerous official statements, but that will not be furthered discussed in this analysis.¹⁰⁸

IHL Customary law Rule 88¹⁰⁹ prohibits adverse distinction based on race, sex, colour, language, religion or belief, political or other opinion, national or social origin, social status (like wealth or birth), and other similar factor.¹¹⁰ The prohibition against adverse distinction toward civilians and person *hors de combat*¹¹¹ also exists in Common Article 3 of the Geneva Conventions and is also as a fundamental guarantee in both Additional Protocol I and II. These provisions are designed to prohibit discrimination and unjustified distinction towards the 'protected persons' of IHL.¹¹²

¹⁰⁸ Rule 88 - Non-Discrimination, ICRC Database, Customary IHL (Volume II, Chapter 32, Section B) (Customary Rule 88) <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule88>> accessed 19 March 2025.

¹⁰⁹ Customary law rules are relevant due to its status in international humanitarian law. Even though IHL is primarily based on the Conventions and Additional Protocols some of the rules is also implemented into customary international law. This relates to the significance of certain rules and the fact that States have the option not to become parties to the Conventions and AP's. In contrast, customary international law imposes obligations that States cannot opt out of, meaning that they are bound to comply regardless of treaty participation. See Malcolm N Shaw, *International Law* (Ninth edition, Cambridge University Press 2021) (Shaw) 1031.

¹¹⁰ Customary Rule 88 (n108) accessed 19 March 2025.

¹¹¹ *Hors de combat* is a combatant who is no longer in the state to take active part in the hostilities and this person shall be treated humanely and cannot be attacked. See 'Hors de Combat | How Does Law Protect in War? - Online Casebook' <https://casebook.icrc.org/a_to_z/glossary/hors-de-combat> accessed 5 May 2025.

¹¹² Protected persons of IHL are wounded and sick, civilian internees, Prisoners of war and hors de combat. See 'Discrimination (or Adverse Distinction) | How Does Law Protect in War? - Online Casebook' <https://casebook.icrc.org/a_to_z/glossary/discrimination-or-adverse-distinction> accessed 19 March 2025.

It is important to recognise that the phrase ‘adverse distinction’ was deliberately chosen, as it also can be explained as unjustified discrimination.¹¹³ While discrimination is generally prohibited, making a distinction may be allowed if it is justified by an urgent need for care. In other words, that would be justified distinction.¹¹⁴ Priority should be made based on need, not personal attributes. A distinction made to address a specific need and considered favourable, should not be viewed as discriminatory. Favourable distinction, also known as positive discrimination, is often applied to women to ensure that they are not disadvantaged due to being perceived as the ‘weaker sex’. This approach is reflected in Article 14(2) through the phrase ‘with regard due to sex’ and Article 16 about treating men and women alike.¹¹⁵

4.2 Discrimination in International Human Rights Law

Alongside the legal framework regarding women within in IHL we also have the rules of international human rights law (hereinafter IHRL). It is well established that IHRL and IHL are two distinct legal frameworks with the traditional view being that that IHRL is applied during peacetime and IHL during armed conflicts.¹¹⁶ However, today, such an argument will be met with resistance, and the prevailing opinion is that IHRL treaty obligations continue to apply simultaneously alongside IHL obligations.¹¹⁷ In 1976, the European Commission on Human Rights established in *Cyprus v Turkey (First and Second Applications)* that during armed conflicts States are bound to comply with international humanitarian law as well as the fundamental human rights obligations.¹¹⁸

¹¹³ Customary Rule 88 (n108).

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ O’Rourke (n25) 71.

¹¹⁷ *ibid.*

¹¹⁸ *Cyprus v Turkey* App Nos. 6780/74 and 6950/75 (Commission Decision, 10 July 1976) para 509, 510.

The relationship between IHRL and IHL has been strengthened and elevated to advance women's rights during armed conflicts. The protection toward women that exists in IHL is dependent on its interaction with IHRL.¹¹⁹ Also, in Rule 88, it is stated that 'adverse distinction' in IHL is closely connected to principle of non-discrimination in IHRL.¹²⁰ Women's rights within IHRL are very important. Even though gender equality is very much established in the Universal Declaration on Human Rights, UDHR, by looking into history it is shown that such questions have not been prioritised and was therefore in need of its own treaty.¹²¹ Also, with a feminist perspective, it was argued that the current legal framework was not sufficient and needed development in order to provide adequate gender equality.¹²² In 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women, also known as CEDAW, since there was a need to strengthen the protection of women's rights.¹²³

The Preamble of CEDAW is establishing that discrimination against women is a violation against the principle of equality and the obligations to ensure human dignity.¹²⁴ The purpose and aim with CEDAW is aligning with the aim and purpose of Article 14 of the Third Geneva Convention. It could therefore be argued that they could be applied simultaneously, with the premise that the States in question have signed and ratified CEDAW.

¹¹⁹ O'Rourke (n25) 107.

¹²⁰ Customary Rule 88 (n108).

¹²¹ Lekha Sriram and others (n8) 49.

¹²² *ibid*

¹²³ *ibid*; Currently, 189 States have signed and ratified CEDAW, and 114 have ratified the Optional Protocol. See 'Committee on the Elimination of Discrimination against Women' (*OHCHR*) <<https://www.ohchr.org/en/treaty-bodies/cedaw>> accessed 8 May 2025.

¹²⁴ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) Preamble.

Further on, in the Preamble it is established that Member States of the Conventions must adopt appropriate measures to ensure the rights of women and ‘eliminate all discrimination’.¹²⁵ This implies that States have positive obligations to comply with. Positive obligations require States to actively adopt policies that prevent discrimination and ensure equal treatment.¹²⁶ This means that States must not only refrain from discriminatory actions but also take proactive steps to prevent discrimination from occurring. For instance, positive obligations may involve providing extra protection to vulnerable groups, in this case women. An example of this could be a company being required to hire a woman over a man, even if the man has more experience, in order to achieve gender balance in the workplace. Protecting individuals from discrimination is just as crucial as ensuring equality. So, due to the positive obligation a connection can be made when talking about prisoners of war is that the Detaining Powers is, through IHRL provisions, obligated to take active measures to protect women from discrimination.

On the other hand, Rule 88 also mentions the possibility of derogation from certain fundamental rights. The International Covenant on Civil and Political Rights, ICCPR, states in Article 3 that men and women shall equally enjoy the civil and political rights of the Covenant.¹²⁷ However, Article 4 of the Covenant states that certain rights may be derogated from during ‘public emergencies’. In the Second paragraph, which lists the rights that cannot be derogated from, Article 3 is not included. This could initially suggest that the principle of equality between men and women under the ICCPR may be subject to derogation. Yet, while Article 4 does allow State to temporarily suspend certain obligations, there are also limits on that power, derogations cannot involve discrimination based on

¹²⁵ CEDAW (n124) Preamble.

¹²⁶ ‘International Human Rights Law’ (*OHCHR*) <<https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>> accessed 7 May 2025.

¹²⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 3.

sex etc. In other words, even in crisis situations, like armed conflicts, discriminatory actions are not permitted.¹²⁸

In the late 1900s and the early 2000s, a transnational movement fighting violence against women began to be generally recognized.¹²⁹ Most of the agreements to end violence against women were made within the legal framework of international human rights. The UN Commission on Human Rights adopted a Special Rapporteur on Violence against Women in 1994, and before that the monitoring Committee for the CEDAW adopted General Recommendations Number 19 claimed that violence against women also is a violation on women's rights. In 1993 at the Vienna World Conference on Human Rights, the key discussion, and concern, was violence against women.¹³⁰

Although, this adaptation may not have included protection towards women in conflict it still became important framework for the recognition of gender-based violence and crimes, which in turn could be said to have increased the recognition of the protection women's rights in armed conflicts.¹³¹

When discussing the principle of non-discrimination, none of the international legal regimes address the issue alone. Instead, they all use each other to interpret the principle as correctly as possible to be able to provide protections of women's rights.¹³² IHRL uses IHL to know how to put obligations on non-state armed groups, and at the same time, IHL uses IHRL to get a progressive interpretation of the protection of women's rights. IHL also uses IHRL to understand the use of remedies, how to monitor the protection and whose violation shall be repaired.

¹²⁸ Human Rights Committee (HRC), 'General Comment No. 18' (10 November 1989) UN Doc CCPR/C/21/Rev.1/Add.1.

¹²⁹ O'Rourke (n25) 7, 8.

¹³⁰ *ibid* 8.

¹³¹ *ibid*.

¹³² *ibid* 106.

IHL and IHRL are complementary legal systems that together provide broader and more inclusive protection during armed conflicts. Although IHL primarily govern wartime conduct and IHRL is traditionally linked to peacetime, human rights bodies have affirmed that IHRL continues to apply during armed conflicts. This overlap is particularly valuable in addressing gaps in IHL, especially concerning gender-based violence and the protection of female prisoners of war, where IHRL principles can strengthen and clarify existing protections.

5. Real-life Experiences

5.1 Why Protect Women

By looking at the real world, and also analysing the Commentaries to the Geneva Conventions, one cannot deny that women are particularly vulnerable and at more risk to become victim of sexual violence. With sexual violence comes both physical and psychological injuries and can in fact amount to torture.¹³³ It is often said that ‘all is fair in love and war’, reflecting the way people may behave during armed conflict as if normal rules no longer apply, this mindset has, tragically, extended to the justification or tolerance of acts such as sexual violence and rape. It is also essential to not only protect women from such horrific crimes, but also to assist them with essential medical care after abuse.¹³⁴ For example, rape can result in unwanted pregnancies, which may lead to further medical complications if not properly addressed. Inadequate treatment of miscarriages or denial of access to safe abortion can endanger the physical health of the victim. Additionally, one must recognise the profound psychological trauma associated with being forced to carry, give birth to, and possibly raise

¹³³ Charlotte Lindsey, ‘Women facing war: ICRC study on the impact of armed conflict on women’ (International Committee of the Red Cross Women and War, ICRC, October 2001) (Lindsey) 51.

¹³⁴ *ibid* 62.

a child conceived through sexual violence. It is also obvious that the risk of becoming victim to sexual violence and rape when they are in force proximity with the enemy.

Like talked about earlier, that women's social status may vary majorly depending on country, it is very important that women have a clear protection covering for them. In 2007, male gynaecologists in Iraq were claimed to violate the privacy of women while simply performing their profession. For that reason, they were attacked, and some were even killed by extremists.¹³⁵ Not only was the attacks devastating for the killing of innocent people, but it also resulted in fewer gynaecologists in Iraq, which lead to it being even more difficult for women to get the health care they needed.¹³⁶

What may seem like a basic necessity, access to a gynaecologist, is in fact essential to women's health and well-being. Ensuring such care is available worldwide is a key component of upholding fundamental human rights. Denying access to this type of medical care not only jeopardises women's health but can also increase their vulnerability to violence. This concern becomes particularly relevant in the context of prisoners of war, where the question arises as to whether detained women under the control of an enemy power are provided with such critical healthcare. As demonstrated by the case in Iraq, it is not unreasonable to assume that other States with similar culture and believes may behave in the same manner.

It is not totally uncommon that the law in theory differs from how it is practised. The requirement that male and female detainees shall be separated is imagined to be quite easy to follow, however, it has been showed that many States have a hard time to comply with it, or does simply ignore it, separated men and women during the first stages of arresting them.¹³⁷ It has been shown that it is not

¹³⁵ Jessica Cadesky, 'Examining Violence against Health Care from a Gender Perspective' in Tengroth and Lindvall (n3) 58.

¹³⁶ *ibid* 58.

¹³⁷ Lindsey (n133) 164.

until after they have been properly arrested and after they have been sent to the detaining facility that men and women are separated. Yet, it is not unusual that they still share common areas such as courtyards.¹³⁸

It has been proven to not be easy to properly separate men and women. Studies have shown that it is common that the different sexes are separated but, like mentioned, that the common areas are just as it sounds, common. To solve the problem regarding men and women's common areas has been to give the different sexes access to the areas during different times of the day.¹³⁹ Women may be locked up while the men have access to the courtyards and vice versa. Some States have also allowed the detained women 24/7 access to the corridors, but that did also result in women being locked up while the men had access to the corridors as well due to them fearing the men.¹⁴⁰

The provision regarding the separation of prisoners of war was adopted with the intention of ensuring that male and female detainees receive equal protection and privileges, while also safeguarding women through separation from men. However, many State lack the appropriate facilities and resources to implement proper segregation, primarily because the number of female detainees is significantly lower than of males.¹⁴¹ As a result, dedicated facilities for women are often not prioritised, leading to adverse effects on female detainees.¹⁴²

Reports has shown that women who are required to share detention spaces with men often confine themselves voluntarily to their room or cells out of fear.¹⁴³ This demonstrates that, beyond the

¹³⁸ Lindsey (n133) 165.

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ *ibid.*

physical absence of separate spaces, the psychological impact of fear further restricts women's freedom of movement during detention.¹⁴⁴ As mentioned in section 3.3, the Detaining Power is obligated to provide proper facilities and make sure that female prisoners of war are not prone to become isolated.

5.2 Experiences of a Prisoner of war - Major Rhonda Cornum

Looking at the current legal framework it is quite clear that a distinction between men and women exists, yet there may exist another reality during the practice of these principles. Reports from multiple armed conflicts has shown that women do faces sexual violence while being detained as prisoners of war even though provisions in both IHL and IHRL prohibits such actions.¹⁴⁵

During the Gulf War in Iraq in the 1990s, it was reported by female combatants from the United States that many of them had endured sexual violence during their time in Iraq.¹⁴⁶ Multiple female members of the U.S. armed forces were captured by Iraqi troops and therefore became prisoners of war. During their detention many of them encountered sexual abuse one of them being Major Rhonda Cornum. When Cornum was originally released, she claimed not to have been sexually abused.¹⁴⁷

However, it was later confirmed by herself that during her time in detention in Iraq, she was sexually abused by a male working in the detention facility.¹⁴⁸ Although it was evident that Cornum was uncomfortable discussing her experiences, she appeared to confirm in an interview that she had been subject to rape during her time as a prisoner of war in Iraq. By the time of the crime, Cornum also

¹⁴⁴ Lindsey (n133) 165.

¹⁴⁵ Commentaries GC III (n2) para 1684.

¹⁴⁶ Cynthia H Enloe, *Morning After: Sexual Politics at the End of the Cold War* (Cynthia H Enloe ed, University of California Press 1996) (Enloe) 188.

¹⁴⁷ *ibid* 188.

¹⁴⁸ *ibid* 189.

suffered from two broken arms, making her health status even worse.¹⁴⁹ If one were to apply Article 14 and 16 of the Third Geneva Convention it would be clear that violations were happening. Not only was she abused due to her sex, but she was also in a health state that made her more vulnerable and in need of special treatment, and the crimes committed were entirely incompatible with the principles of dignity and humane treatment.

It could be questioned why Rhonda Cornum refrained from sharing her experiences at first, but when this happened in the 90s there was a huge discussion in the U.S. concerning how appropriate it was to have females as combatants.¹⁵⁰ Cornum stated that she had deliberately withheld information about her abuse out of concern that it might be exaggerated, and that the media would wrongly interpret the proportion of the crime. At the time there was also this fear that the Congress and the Pentagon would misuse such information and take advantage of it to be able to exclude women from taking on combat within the armed forces of the U.S.¹⁵¹ It was claimed that multiple female combatants were afraid of talking about their experiences while being in combat because there was a widespread belief that the Pentagon in the U.S. would use it to exclude women from getting promotion and rise in ranks in the military, or even just prohibit them from being in combat.¹⁵²

Playing on women's emotions and argue that 'if you are in this game, then you will encounter sexual violence, so it is for the better that you do not get involved and instead stay at home' could not be considered appropriate in a modern society. At the same time, it is important to recognise that both men and women can be victims of sexual violence. So, to argue that women should be prohibited to enter combat due to the risk of being sexually abused such argument could also be applied towards

¹⁴⁹ Enloe (n146) 189.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² *ibid* 191.

men since they may also encounter the same risks, and then no one could ever be a combat. Yet, women are disproportionately affected by sexual violence. This is partly because of the social status of women but also because consequences for women will be more severe, for example, pregnancy resulting from rape may lead to serious medical complications, as well as long-term psychological trauma, particularly when a woman is forced to carry and raise a child conceived through sexual violence.¹⁵³

Also, by critically examining the principles of IHL, it becomes evident that the law of armed conflict was primarily constructed from a male-centric perspective, often envisioning men as the primary agents and heroes of war. Warfare was seen as a task meant solely for men, who were expected to protect and shield women from the horrors and hostilities of conflict. Historically, this mindset contributed to the exclusion of women from the front lines and their marginalization in the development of IHL principles. Men saw themselves as the protectors of women, and in order to fulfil this role, they believed that excluding women from combat was the right course of action and the only way to protect.¹⁵⁴ Nevertheless, such neglect would rather expose women to danger instead of protecting them.

Such mind set only increases the fear of speaking about experiences of abuse and violence, like in Rhonda Corneum's case, and will create a vicious circle where women is not dared to speak in fear of being excluded. Yet, to not speak up about abuse will also decrease the work towards better protection.

Back in the 1940s, during the adaptation of 1949 Geneva Conventions, women were still profoundly affected by war, despite being excluded from direct participation. Simply telling women to stay at

¹⁵³ Commentaries GC III (n2) para 1684.

¹⁵⁴ van Dijk (n4) 291.

home did not shield them from the impact of conflict. Recognizing that women were equally affected by war, and that they did not always have the choice to remain safely at home, raises important questions about why the drafters of IHL disregarded the experiences and perspectives of women.¹⁵⁵ That could be explained by looking at the social status of women in general at the time, about less than half of the original 51 Member States of the United Nations granted women the right to vote.¹⁵⁶ That do tell a lot about the view of women back then. However, today the world has come so far in the development of equality between men and women, so that U.S. still used the same argument for excluding women from combat in 1990 is profoundly wrong.

5.3 Eritrea v. Ethiopia – Abuse against Female Prisoners of War

In 2003 Eritrea claimed that combatants from Ethiopia had raped and even killed Eritrean female prisoners of war. According to Eritrea's claim in the Partial Award the Parties agreed that it was clear that the provision of Article 14 prohibits sexual violence against women being prisoners of war, due to the fact that prisoner of war shall be treated with respect, honour and with regard due to their sex.¹⁵⁷

The evidence supporting the claim came from three Eritrean women who provided statements regarding their experiences during detention.¹⁵⁸ Additionally, testimony was offered by male detainees who had witnessed the treatment of these women while in captivity. Furthermore, the claim was supported by medical documentation related to the alleged abuses, as well as statements from personnel who had debriefed the individuals shortly after their release from detention.¹⁵⁹

¹⁵⁵ van Dijk (n4) 291.

¹⁵⁶ Niamh Reilly, *Women's Human Rights: Seeking Gender Justice in a Globalizing Age* (Reprinted, Polity Press 2010) 52.

¹⁵⁷ Eritrea-Ethiopia Claims Commission, Partial Award: Prisoner of War – Eritrea's Claim 17 (1 July 2003) RIAA XXVI 23 (Partial Award Eritrea v. Ethiopia) para 139.

¹⁵⁸ *ibid* para 140.

¹⁵⁹ *ibid* para 140.

However, there was one problem, the three former prisoners of war were not willing to further discuss their experiences and the Commission along with Eritrea agreed that they should not press the issue further and respect and ensure integrity of the three women. Because of this, the evidence provided was not enough to establish that Ethiopia had breached its obligations.¹⁶⁰ The Commission was clear on the matter that they could not ‘lower the burden of proof’ and that it did not exist any ‘clear and convincing evidence of rape, killing or other assault aimed at female prisoner of war’.¹⁶¹ In the finale statement made by the Commission it was found that none of the Eritrean women had ‘explicitly or implicitly’ confirm that they had been sexually assaulted and it did not exist any other witnesses to the alleged crimes. Rape and killings had only been briefly mentioned in the legal filing, but those claims had not been supported by any submitted evidence.¹⁶² In defence, Ethiopia could however provide evidence that female prisoner of war was kept separately from the male prisoners and that every inspection made in the detention facility was performed by ‘senior officials in pairs’, which suggests that proper procedures were in place to prevent abuse from happening.¹⁶³

Yet, if one were to look at these allegations in comparison with the Major Rhonda Cornum case one could find similarities. In the beginning Cornum also refrained from talking about her experiences and she even denied and lied about ever encountered sexual violence during her time in detention. There is a probability that talking about sexual abuse is taboo and shameful, just like it is during peacetimes as well, which is understandable. There are so many aspects, feelings and factors one must take into consideration when examining cases concerning female prisoners of war, the emotions of the women, what the state of mind the State’s in question is in (like in the U.S. where there was a debate on whether women should even be in combat) etc. But just because the Commission found

¹⁶⁰ Partial Award Eritrea v. Ethiopia (n157) para 140.

¹⁶¹ *ibid* para 141.

¹⁶² *ibid*.

¹⁶³ *ibid*.

that Ethiopia had not violated Article 14 of the Third Geneva Convention or the fact that Rhonda Cornum, even though she also confirmed to be victim of rape, diminished her experiences does not automatically mean that the position of female prisoner of war is not particularly vulnerable. Such a statement was also made by the Commission after they declared that Ethiopia had not breached Article 14. The Commissions official statement was as following: ‘[...] without in any way undermining its recognition of the particular vulnerability of female prisoners of war.’¹⁶⁴

There are relatively few documented cases or legal precedents concerning female combatants who have become prisoners of war and endured gender-based abuse, largely due to the historically low number of women in combat roles. However, the reports that do exist indicate that women are particularly vulnerable when in the hands of the enemy. This vulnerability alone underscores the need to strengthen the existing legal framework to better protect female prisoners of war, especially as the number of women in combat roles continues to rise.

¹⁶⁴ Partial Award Eritrea v. Ethiopia (n157) para 142.

6. Lex ferenda

6.1 Improving, strengthening and recommendations

In a perfect world, the IHL provision is enough as they are right now, but law can always be strengthened. Particularly regarding women and their special need, strengthening such provision would only be good and provide further protection.¹⁶⁵

In 2000 the United Nation Security Council adopted Resolution 1325 on women, peace, and security to remind about the importance of having a gender perspective during the application of IHL.¹⁶⁶ It has been argued that a connection between Res 1325 and IHL would strengthen the gender provisions of IHL by providing a gender perspective consistently during the application of IHL.¹⁶⁷ But to reach the goal set out by the UNSC with Res 1325 the States themselves must act, Resolution 1325 is not itself legally binding to States. The Resolution should instead be viewed as a guide to use when States and other international legal bodies are aiming to implement gender perspectives.¹⁶⁸ The Resolutions urges States to implement gender perspectives in their actions, e.g. Sweden was one of the first States to implement Resolution 1325 into its national action plan.¹⁶⁹ Sweden have the idea to keep implementing Resolution 1325 further both on national, regional, and global level. The goal is to provide sufficient protection regarding the special needs of women and girls.¹⁷⁰

Yet, there is also another perspective to the importance of gender perspective in IHL. The traditional view is that women are victims and must be protected as such. But such gender stereotypes can cause

¹⁶⁵ Cecilia Tengroth, 'Strengthening IHL with a Gender Perspective' in Tengroth and Lindvall (n3) 125.

¹⁶⁶ Cecilia Tengroth, 'The Swedish Armed Forces and Gender in Military Operations' in Tengroth and Lindvall (n3) 73.

¹⁶⁷ Malin Greenhill, Lisa Mossberg & Ingela Winter-Norberg, 'Operationalising a gender perspective in humanitarian assistance – Sida's approach' in Tengroth and Lindvall (n3) 68.

¹⁶⁸ Kristina Lindvall, 'How to Operationalise a Gender Perspective – formulating a Checklist' in Tengroth and Lindvall (n3) 38-39.

¹⁶⁹ Cecilia Tengroth, 'The Swedish Armed Forces and Gender in Military Operations' Tengroth and Lindvall (n3) 73.

¹⁷⁰ *ibid* 73-74.

problems when the woman in fact is a perpetrator.¹⁷¹ When rules are gender neutral, there is an expectation about the behaviour of a man or a woman which will tend to overlook women as perpetrators or combatants. Moreover, such stereotypes also affect men since they are not normally viewed as caretakers, fathers and even victims of abuse such as sexual violence.¹⁷²

Strengthening the gender provisions of IHL is not a one solution fix. The process of providing an adequate gender perspective to the provision would involve thoroughly considerations on societal inequalities and the deeply rooted gender stereotypes.¹⁷³ IHL as we know it today has been shaped by a male perspective, with experiences from men only. Which have resulted in the existing legal framework unintentionally prioritising men's needs. For that reason, it can be claimed that IHL must continue to be questioned and evaluated, both existing law and those provisions that are being developed.¹⁷⁴ Finally, an increased gender perspective is not only beneficial for women, but to everyone protected under IHL, regardless if being man or women, wounded or sick, prisoner of war, civilian, it would strengthen the protection for everyone.¹⁷⁵

Swedish authorities have also suggested that there should be three key aspects to aim for in order to achieve gender equality, representation, resources and rights.¹⁷⁶ The two first aspects are about how women should be more representative within decision making and how resources between men and women should be more evenly distributed.¹⁷⁷ The third aspect is about how human rights should always be fully respected and provided, regardless of traditional norms origination from cultural,

¹⁷¹ Cecilia Tengroth, '*Strengthening IHL with a Gender Perspective*' in Tengroth and Lindvall (n3) 124.

¹⁷² *ibid.*

¹⁷³ *ibid* 126.

¹⁷⁴ *ibid.*

¹⁷⁵ Kristina Lindvall, '*How to Operationalise a Gender Perspective – formulating a Checklist*' in Tengroth and Lindvall (n3) 41.

¹⁷⁶ Gerd Johnsson-Latham & Emil Johansson, '*Combatting sexual and gender-based crimes in connection to armed conflict – perspectives from the Swedish Foreign Service*' in Tengroth and Lindvall (n3) 48.

¹⁷⁷ *ibid.*

religion, political view etc. Sweden has been working specifically with *combatting impunity for sexual and gender-based crimes in connection to armed conflict* and to heightening the status of human rights during armed conflicts.¹⁷⁸

¹⁷⁸ Gerd Johnsson-Latham & Emil Johansson, '*Combatting sexual and gender-based crimes in connection to armed conflict – perspectives from the Swedish Foreign Service*' in Tengroth and Lindvall (n3) 49.

7. Conclusion

With an increasing number of women participating in armed conflicts as combatants also increases the need for gender equality within in international humanitarian law. The current legal framework of IHL is based on the idea of men as heroes, provisions are adopted and developed based on experiences and the perspective of men. So, when females enter the battlefield new challenges will appear. Already after the Second World War, it was raised that women were in urgent need of more profoundly protection, and it was agreed upon by the Drafters of the Geneva Conventions that women were particularly vulnerable during the war.

Article 4, provision regarding who is entitled prisoner of war status, is itself very gender neutral. However, Article 14 establishes that women are entitled treatment with regard due to their sex and it becomes clear that distinction between men and women are allowed. Some have tried to argue that distinction and exception from alike treatment is weakening Article 14. But instead of seeing distinction as weakening it should be recognised that equal treatment does not mean the same treatment. Men and women cannot be treated the same due to their difference, both biological but also due to their social status. Equal treatment should rather be about fairness and integrity instead of alike treatment.

Article 16 of the Third Geneva Convention is also stating that all prisoners of war shall be treated 'alike' but that distinction can be made based on sex or rank. However, the choosing of the word 'alike' could be questioned. It is primarily through the Commentaries that one gains the insight into the drafters' intent behind the use of the term 'alike', which is meant to signify fair treatment rather than identical treatment. Without guidance from the Commentaries, this important interpretation may be overlooked in practice, potentially leading to serious consequence for those affected. As it can be seen in the sections about the articles, every article is interacting with each other. To get the full

picture and truly understand the interpretation of them one should look into them all. But in conclusion, every article regarding gender in Geneva Convention III agrees that men and women are entitled the same standard for humane treatment when they fall into the power of the enemy. However, there is also an agreement that women need different and greater protection than men and it is therefore encouraged by the Commentaries to the Geneva Conventions with justified distinction.

To strengthen the protection of women under IHL it can be argued that international human right law obligations can be useful. Human rights developed specifically for women are much more advanced under IHRL, both through the major IHRL instruments and the Convention on Elimination of All Forms of Discrimination against Women, CEDAW. Traditionally, IHL and IHRL are view as two distinct legal instruments but today such argument is met with resistance since it is now generally acknowledged that IHL and IHRL are applicable alongside each other during armed conflicts. Women's protection can therefore be strengthened by applying human rights even in situations regarding prisoner of war.

Yet even though States are required to protect women and provide them with sufficient care under both IHL and IHRL, real life experiences are proving that it is not always complied with. In Sweden, female employees in the armed forces have reported on the lack of proper clothes, equipment and underwear. Even if such simple things seem unimportant compared to other forms of abuse, it is still not in compliance with the obligations regarding equality and fair treatment. Women should not suffer simply because authorities are too lazy to provide them with proper clothing. Nevertheless, there are also reports of more serious violations of the gender principles of IHL. Major Rhonda Cornum talked about how she had been sexually abused while being a prisoner of war in Iraq in 1990 and female combatants from Eritrea also brought complaints about violence endured during time as prisoners of war in Ethiopia.

International humanitarian law does in fact distinguish between male and female, and in the Third Geneva Convention one can find multiple articles regarding the issue. The articles do, in some way, provide gender equality, however, such is only established by looking into the Commentaries provided for each article. In the Commentaries it is established that men and women need different types of treatment, and that such is needed to reach an adequate level of fairness and equality. To further strengthen the protection of women under IHL, it may be necessary to also apply human rights obligations. IHL and IHRL can complement each other when applied simultaneously, with IHRL helping to fill gaps where IHL is lacking. In conclusion, it can be said that the articles of the Third Geneva Convention work in tandem to address the specific needs of women. These include distinct provisions related to their separation from men, the special need for hygiene products and sanitary facilities, their protection, and their treatment in a manner that is fair and respectful of their sex.

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