

40th Round Table on Current Issues of International Humanitarian Law

“The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives”

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How do the Additional Protocols address the issue of sexual and gender-based violence in armed conflicts?

1. Terminology

Before I begin my remarks, I need to make three preliminary points.

First, ‘gender’ is not the same as ‘women’. Although definitions of gender vary, a useful one can be found in the programme for this roundtable. It reads: ‘Gender is often described as the culturally constructed and prescribed behaviour of men and women, specifically the roles, attitudes and values ascribed to them on the basis of their sex.’¹

Likewise, although there is no universally accepted definition of gender-based violence, that term can be understood as referring to violence that is directed at an individual because of his or her gender or that affects one gender disproportionately.² Thus, gender-based violence is not the same as violence against women and the two phrases should not be used interchangeably.

Second, gender-based violence is not the same as sexual violence. Gender-based violence need not be of a sexual nature. Sometimes, when the phrase ‘sexual and gender-based

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¹ Programme.

See also UN, Office of the Special Adviser on Gender Issues and Advancement of Women, Gender Mainstreaming, Concepts and Definitions, ‘Gender: refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/ time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.’ <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm>

² Adapted from Committee on the Elimination of Discrimination against Women, General Recommendation 19, para. 6, A/47/38 (1993). See also Committee on the Elimination of Discrimination against Women, General Recommendation 35 on gender-based violence against women, updating General Recommendation 19, CEDAW/C/CG/35, 14 July 2017.

violence is used', the two are conflated and the only violence considered is sexual violence. That leads to an incomplete picture.

Third, sexual violence is not limited to rape alone. It includes such things as sexual slavery, enforced prostitution, and enforced sterilization.

It is important to be clear on these issues of language because in numerous reports, the terms are conflated, thus skewing the issue and omitting important parts of the picture. Words matter.

2. Male and female experiences of armed conflict

The socially constructed roles of men and women means that men and women experience armed conflicts in different ways. Men make up most of the armed forces of states as well as most of the military wings of armed groups. In some societies, women are still seen as caregivers and in need of protection – a stereotype – and this is reflected, to an extent, in the language of the Additional Protocols. For example, the notion of the wounded and sick in Additional Protocol I includes 'expectant mothers',³ and that Protocol refers to women as 'the object of special respect'.⁴ The language of Additional Protocol I is a reflection of the period during which it was drafted.

Women and men, girls and boys, all experience gender-based violence in armed conflicts. With the caveat that numbers can be difficult to ascertain and are often not disaggregated by sex, and speaking in broad brush terms – a point I will come back to at the end – in some armed conflicts, males, particularly males of military age, are killed in sex-selective massacres or disappeared. They are often killed or disappeared because they are males of military age and thus to prevent them from taking part in the hostilities. For example, in a number of armed conflicts, males have been separated from females and the males of the group have been summarily executed.

Females are disproportionately subjected to sexual violence, including rape, enforced prostitution, sexual slavery, and other forms of sexual violence.

In a number of conflicts, children have been forcibly recruited into the armed forces or the armed group. Their subsequent experience is also gendered: 'boys may be required to become child soldiers and girls are likely to have to perform domestic tasks and become subject to sexual violence.'⁵

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 (Additional Protocol I), Article 8(a).

⁴ Additional Protocol I, Article 76.

⁵ C Chinkin, 'Gender and Armed Conflict', in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP, 2015) 675, 676.

These are just some examples of the gendered experiences of armed conflict.

3. The role of the Additional Protocols in addressing sexual and gender-based violence

The Additional Protocols address the issue of sexual and gender-based violence in different ways.

3.1 Sex-selective massacres

Massacres - sex-selective or otherwise - and summary executions are prohibited by the law of armed conflict. Both Additional Protocol I and Additional Protocol II explicitly prohibit violence to life, in particular murder.⁶

3.2 Disappearances

By contrast, the Additional Protocols do not explicitly mention the term enforced disappearances. An enforced disappearance is essentially 'the arrest, detention, abduction or any other form of deprivation of liberty by ... [a Party to the conflict] followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.'⁷ However, taken together, a number of provisions implicitly prohibit that practice.

We have already seen that the Additional Protocols prohibit violence to life. They also require humane treatment and prohibit torture and degrading treatment. Importantly for present purposes, Article 33 of Additional Protocol I requires parties to armed conflicts to record certain information about persons who have been detained. Information concerning persons reported missing by a Party is to be transmitted to that Party directly or through the Central Tracing Agency or other listed actor.⁸ Parties are also required to search for persons who have been reported missing by the adverse Party 'as soon as circumstances permit, and at the latest from the end of active hostilities'.⁹ Article 32 of Additional Protocol I provides that these obligations, among others, are 'prompted mainly by the right of families to know the fate of their relatives.' Taken together, these provisions can be said to implicitly prohibit

⁶ Additional Protocol I, Article 75(2)(a); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977 (Additional Protocol II), Article 4(2)(a).

⁷ Adapted from Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. The state actor requirement of the Convention definition has been adapted to refer to the Party to the conflict. On the equivalent issue in the Convention against Torture's definition of torture, see *Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23-T and IT-96-23/1-T, ICTY Trial Judgment, 22 February 2001, para.s 465–497.

⁸ Article 33(3).

⁹ Article 33(1).

enforced disappearances. The Geneva Conventions contain additional reporting obligations.¹⁰

For its part, Additional Protocol II does not contain similar reporting obligations. However, the Protocol does require humane treatment and obliges the Detaining Power, within the limits of its capabilities, to allow detainees to send and receive letters and cards,¹¹ through which the individual has contact with the outside world. And reporting obligations arise through customary international law.¹²

3.3 Recruitment of children

Insofar as recruitment is concerned, both Additional Protocols prohibit the recruitment of children under the age of 15 into the armed forces, and in the case of Additional Protocol II, also into the armed group.¹³ Additional Protocol I also provides that the Parties are to take all feasible measures to prevent children under the age of 15 from taking a direct part in hostilities. Additional Protocol II provides for greater protection for children, providing that children under the age of 15 shall not be allowed to take part in hostilities – the prohibition is not limited to taking a direct part in hostilities.

3.4 Sexual violence

In terms of sexual violence, Article 76(1) of Additional Protocol I provides that ‘Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.’ The Protocol thus makes explicit reference to certain forms of sexual violence and provides that women are to be protected against these acts. Article 75 also prohibits ‘enforced prostitution and any form of indecent assault’, not limiting the prohibition to a particular sex. Article 76 also contains a broader protection for women in that it makes women the object of ‘special respect’.

Additional Protocol I also provides implicit protection against sexual violence. Article 75(1) provides for the general obligation of humane treatment, which therefore includes a prohibition on sexual violence. Article 75(2) prohibits specifically ‘violence to the life, health, or physical or mental well-being of persons’ and in particular torture and mutilation. We know that rape and other forms of sexual violence can constitute torture.¹⁴ Likewise, certain forms of sexual violence can amount to mutilation. Article 75(2) goes on to prohibit

¹⁰ See, for example, Convention (III) relative to the Treatment of Prisoners of War (1949), Article 122; Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), Article 136.

¹¹ Article 5(2)(b).

¹² Customary International Humanitarian Law, Rule 123.

¹³ Additional Protocol I, Article 77(2); Additional Protocol II, Article 4(3)(c).

¹⁴ See *Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23 and IT-96-23/1-A, ICTY Appeal Judgment, 12 June 2002, para. 150.

‘outrages upon personal dignity, in particular humiliating and degrading treatment’ and includes, as mentioned enforced prostitution and indecent assault. Certain forms of sexual violence, such as forced public nudity, have been found by the International Criminal Tribunal for the former Yugoslavia to constitute outrages upon personal dignity.¹⁵

For its part, Article 4 of Additional Protocol II sets out the general standard of humane treatment and prohibits many of the same acts.

Thus, in order to understand the protections against sexual violence, we have to look beyond the explicit references to rape or indecent assault alone.

Indeed, there are other provisions of the Protocols which contribute to the protections against sexual violence. In particular, Article 75(5) of Additional Protocol I provides that ‘women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men’s quarters’ and ‘they shall be under the immediate supervision of women.’ Additional Protocol II is to similar effect.¹⁶ The provisions seek, among other things, to protect women from sexual violence.

4. Conclusions

That brief overview provides a snapshot of how the Additional Protocols address sexual and gender-based violence. A few broader points emerge by way of conclusion:

First, although we are analysing the contribution of the Additional Protocols, they must be read together with the Geneva Conventions which they supplement and customary international law. They should not be read in isolation.

Second, the Additional Protocols provide explicit protections against sexual and gender-based violence. We have seen, for example, mention of indecent assault and rape.

That said, third, many of the protections afforded by the Additional Protocols are framed in gender-neutral terms. Thus, we need to look beyond solely the explicit protections of the Protocols and we must pay particular attention to the neutral, general language. It is not enough simply to search for references to women or to rape. That only provides part of the picture. Broader protection and references, such as to humane treatment, are also important.

Fourth, intersectional gender-based violence often takes place, that is to say, gender often intersects with another characteristic, for example, age, in respect of massacres of military

¹⁵ See, for example, *Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23-T and IT-96-23/1-T, ICTY Trial Judgment, 22 February 2001, para.s 766–774.

¹⁶ Article 5(2)(a).

age men, or ethnicity, in respect of sexual violence against women of a particular ethnicity. And it is intersectional sexual and gender-based violence that we often see in practice.

Fifth and finally, there remain a few blind spots in practice. Because of the broad brush approach that I mentioned earlier, aspects of sexual and gender-based violence tend to be overlooked either in the Additional Protocols or in practice.

Insofar as women and girls are concerned, much of the focus tends to be on sexual violence and there is less focus on other aspects of women's experience in armed conflicts.

I have already noted that men comprise most of the armed forces. What happens when women are part of the armed forces and are captured and detained? Additional Protocol I and the Third Geneva Convention require women to be held in separate quarters from those of men and placed under the immediate supervision of women. However, in Additional Protocol II, that is subject to the capabilities of the Detaining Power.¹⁷ The International Committee of the Red Cross draft of the provision made it an absolute obligation and not capability-dependent but that was altered during the 1974-77 Diplomatic Conference.¹⁸ In practice conditions of detention of female detainees are frequently inadequate. As there tend to be fewer women detainees than male detainees, they tend to be housed in detention facilities that are designed to house men alone, raising issues around safety and privacy.¹⁹ Places of detention of female detainees also tend to be smaller, leading to overcrowding and unhygienic conditions.²⁰ And their medical and health needs are not always met.

Insofar as men and boys are concerned, the reverse is true. They are often not seen as victims of sexual violence. For example, it is notable that Additional Protocol I contains the prohibition on rape in Article 76 with specific reference to the protection of women and not in the Article 75 fundamental guarantees clause. To be clear, as I have already indicated, rape does fall within that provision, with its reference to humane treatment and the prohibition on torture. But it confirms that we have to look beyond the explicit language used and interpret the neutral language of the Additional Protocols in a way that provides protection and meets the needs of all persons concerned.

¹⁷ Article 5(2).

¹⁸ Draft Protocol Additional to Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Article 8(2)(d), in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) Volume I, Part 3, 35.*

¹⁹ *Addressing the Needs of Women Affected by Armed Conflict* (ICRC, March 2004) 119.

²⁰ *Women Facing War* (ICRC, October 2001) 179.