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

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Integrating a Gender Perspective into IHL

Which definition of gender?

Although in social sciences gender is commonly described as the culturally constructed and prescribed behaviour of men and women, including the roles, attitudes and values ascribed to them on the basis of their sex, the definition of gender in international humanitarian law (IHL) is debated and the concept is still under-theorized. The Rome Statute of the International Criminal Court at art. 7(3) provides that, regarding persecution on gender grounds as a crime of humanity, “the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” Then the Rome Statute refers to gender in some other articles, notably article 21 on applicable law prohibiting any adverse distinction founded on gender. The definition of gender in the Rome Statute has been criticized as too narrow compared with a number of current definitions, including by UN bodies, that acknowledge the influence of culture, political and economic context, class, race, ethnicity, poverty level, age and sexual orientation on the social construction of gender. The two meanings, however, are not totally incompatible as the expression “within the context of society” leaves some room for a more generous interpretation. Be it as it may, when talking about gender it should always be kept in mind that all definitions of the term cover not only the condition of women but also that of men, boys and girls.

Gender and international humanitarian law

Gender is never mentioned in IHL treaties, while the position of women is considered in various provisions according to them special protections. These are inherently discriminatory but they are justified on the basis of the “vulnerability” of women. Thus women must be protected against *attacks on their honour*, “in particular against rape, enforced prostitution, or any form of indecent assault.” (art. 27 GCIV); a woman internee may only be searched by a woman (art. 97). It is clear that those provisions are especially aimed at preserving the social values of honour and modesty that are (or were) traditionally attributed to women, and not at recognizing them full protection under IHL. Significantly GCIII, while also containing several provisions on special treatment of women POWs, fails to ensure equality of opportunities in the election of POW’s representatives.

Other IHL rules highlight the reproductive, maternal and caregiving role of women. For example, art. 76 API provides for the special treatment of *pregnant women and mothers having dependent infants*. Although apparently designed to protect women, these rules really want to safeguard the interests of other persons such as the unborn children and the youngsters within the family.

The view of women as “vulnerable” subjects does not do justice to their ability to react to emergency situations. It is true that civilian women suffer severe deprivation and abuse during armed conflict, but they are also very resilient and ready to assume greater responsibilities; not to mention women serving as active combatants in international or internal conflicts. The special protections accorded to women by IHL, although justified on the basis of their “vulnerability”, are inherently discriminatory. For example, the special treatment of women having dependent infants provided for in article 76 API is not accorded to men taking care of kids, or to women having dependent elderly or disabled persons. While a woman internee may only be searched by a woman, no such privilege exists for the benefit of a male internee. Thus there exists a degree of conflict between the protection of women as “vulnerable” subjects under IHL and the principle of non-discrimination based on sex. In the absence of a specific body in charge of the progressive development of IHL it is up to domestic institutions, and especially the military, to interpret the rules of the Geneva Conventions and Protocols affording special protection to women consistently with contemporary practice and values.

Mainstreaming gender in the conduct of hostilities

After the UN Economic and Social Council defined gender mainstreaming as “the process of assessing the implications for women and men of *any planned action*, including legislation, policies or programmes, *in all areas and at all levels*” ... “a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated”, “gender mainstreaming” has become the *mantra* conveying the UN doctrine of gender equality.

UNSC Res. 1325 of 31 October 2000 focuses on expanding the role and contribution of women in UN field-based operations, involving women in all peacekeeping and peace-building measures and supporting gender-sensitive training efforts. In my view these general goals also apply in the event of an armed conflict. Thus in the conduct of hostilities “gender mainstreaming” should mean to evaluate a military operation as a whole in a gender perspective, that is, always taking into account the roles of men and women in the communities – both military and civilian – involved in, or affected by armed actions and the ensuing consequences on each of them. It is submitted that the obligations to adopt precautions in attacks and against the effects of attacks (articles 57 and 58 API) and especially those of due diligence (“to take constant care”... “to do everything feasible”...)

have the potential to mainstreaming gender in the conduct of hostilities, and that the expertise of legal advisers in the armed forces plays a pivotal role in this context.

Gender and the review of the legality of new weapons

Weaponry is an area where the impact of armed conflict on men and women is considerably different. While men mostly use weapons as means of attack and defence in the conduct of hostilities, women – as well as children – mainly fall victims of those weapons the disruptive effects of which continue for a long time after the conflict. They are highly exposed to the damage caused by explosive remnants of war, anti-personnel mines and cluster munitions while trying to find food or water, working in the fields or grazing cattle.

The Ottawa Treaty and the Convention on Cluster Munitions are not universally accepted. As for the Protocol on explosive remnants of war it merely addresses post-conflict remedial measures. For these reasons, the review of the legality of new weapons required by article 36 API is of the utmost importance in a gender perspective where a state should foresee the different impacts of certain weapons on men, women and children in order to determine whether their use should be prohibited. It is important to bear in mind that the review of the legality of new weapons implies that legal advice is sought not only when a state develops, manufactures, buys or otherwise acquires a new weapon or system, but also when new weapons-related technology is developed, existing technology is adapted to military uses, or an existing weapon or system is upgraded or otherwise changed.

The treatment of persons deprived of their liberty in a gender perspective

Human rights law has developed a number of soft law instruments such as the Standard Minimum Rules for the Treatment of Prisoners (1957); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); the Basic Principles for the Treatment of Prisoners (1990); and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules, 2011). Although in principle applicable in time of peace, they become relevant by analogy for the situation of persons detained for ordinary offences during an armed conflict. The emphasis on institutional training is the common denominator of all these documents. It is therefore the responsibility of states to ensure the implementation of measures provided for in the rules recommended by the UN bodies and to incorporate the gender perspective in the domestic law and practice.

Gender and child soldiers

The gender dimension of children participating in hostilities involves multiple aspects connected with physical and mental integrity, social behaviour and criminal responsibility. There is indisputable evidence that rape and sexual violence are instrumental to enlisting, conscripting and forcing children to participate in hostilities. Although they are widely used as a way to demonstrate control and ownership over child soldiers, they are not gender neutral; on the contrary, they have different features depending on whether they are

directed towards girls or boys. Girls are regularly raped, kept in a status of sexual slavery, sometimes subjected to forced marriage. Besides being forced to kill, boys are also raped, forced to witness rape and taught to commit rape as a tactic of war, or sold for entertainment and sexual activities. Both boys and girls become the object of social stigma when and if they make it back to their communities.

UNSC res. 1882(2009) mentions rape and other sexual violence against children among the violations of IHL triggering inclusion on the list of the Secretary General of parties to armed conflicts committing grave violations against children. Unlike the previous resolutions on gender-based violence, Res.1882 is worded in gender-neutral terms. Nevertheless, the gender dimension of the crime of conscription, enlistment and use of child soldiers in hostilities is about to emerge in the cases before the international criminal tribunals.

To conclude

IHL is firmly rooted in universal principles and rules aimed at protecting all persons involved in, or affected by, an armed conflict. The gender discourse does not intend to challenge the universality of the rights incorporated in the IHL treaties as well as in customary international law. Gender is not an ideology or a system of beliefs. Gender represents, on the one hand, a tool of interpretation of the IHL rules enabling us to better understand some of the reasons for their formulation, and on the other, a “lens” through which to observe the consequences of their application. It is important to bear in mind that this “lens” works both ways, meaning that it puts into perspective the roles of men, women, boys and girls and their needs of protection in situations of armed conflict. In this light, gender awareness is a valuable instrument to guide the responsible behaviour of those who have the power to decide on what military action to take and those who have the task of implementing IHL on the ground.