

THE NEGLECTED ASPECT OF WOMEN AND ARMED CONFLICT-PROGRESSIVE DEVELOPMENT OF THE LAW

by Judith Gardam*

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* Reader Adelaide University School of Law.

1. INTRODUCTION

A decade ago it was controversial to argue that the experience of women of armed conflict was in some ways distinctive and that specific strategies in response were needed. To go further and argue that women had been overlooked by the legal regime that regulates armed conflict was viewed at the very least as misguided if not as outright subversive.

In more recent times efforts have been made to better understand the way in which armed conflict impacts on women. Three detailed studies of women in times of armed conflict have been undertaken at the international level.¹ In 2001 the International Committee of the Red Cross (ICRC) published *Women Facing War* (hereafter ICRC study).² The major objective of the study is to identify the particular needs of women during periods of armed conflict.³ The ICRC is the Swiss based association with a special responsibility for the dissemination and development of International Humanitarian Law (IHL), the area of law of primary significance in protecting those affected by armed conflict. For many years the ICRC was resistant to arguments that it had not done as much as it could to address the situation of women in armed conflict. Despite a slow start, nowadays, the organisation is making concerted efforts to implement strategies that are directly targeted at women's experiences.⁴

The United Nations has also taken an active role in identifying the ways in which armed conflict impacts on the lives of women. Security Council resolution 1325 of 31 October 2000 called on the Secretary-General to 'carry out a study on the impact of armed conflict on women and girls, the role of women in peace-building and the gender dimensions of peace processes and conflict resolution'. Two major UN studies were undertaken in response to the Council's request. The first 'desk' study, presented by the Secretary-General in 2002, was carried out under the supervision of the United Nations Division for

1. See also J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law* (The Hague, Kluwer Law International 2001) ch. 2 and see also the specialist studies of sexual violence against women in times of armed conflict, e.g., Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, UN Doc. E/CN.4/1998/54 (26 January 1998); Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, UN Doc. E/CN.4/2001/73 (January 2001); Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Periods of Armed Conflict, Ms Gay McDougall, UN Doc. E/CN.4/Sub.2/1998/13 (June 1998) and Update to the Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Periods of Armed Conflict, Ms Gay McDougall, UN Doc. E/CN.4/Sub.2/2000/21 (June 2000).

2. C. Lindsey, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women* (Geneva, ICRC 2001).

3. The study also encompasses an evaluation of the relevant international law norms; see further below at n. 41 and accompanying text.

4. For details of these undertakings see women and war section of the ICRC website at <www.icrc.org/web/eng/siteeng0.nsf/iwpList74/8B4D441BF5F484EA41256E4E00490BB8>.

the Advancement of Women and entitled *Women, Peace and Security* (hereafter Secretary-General's study).⁵ A parallel field study was undertaken by the United Nations Development Fund for Women (UNIFEM) who appointed two experts with a mandate to carry out an 'independent assessment on the impact of armed conflict on women and women's role in peacekeeping'.⁶ The results of their investigations, *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building* (hereafter UNIFEM study), was published in 2002.⁷ To an outside observer not familiar with the politics of these undertakings it appears somewhat odd that there was not one co-ordinated overall United Nations study; there also is a considerable degree of overlap between the two studies.

The involvement of the Security Council in the debate is seen as of particular significance. Traditionally the Council is perceived as dealing with the most 'serious' of world events in pursuance of its mandate under the United Nations Charter to maintain and restore international peace and security. For what happens to women to reach this status is unprecedented and great credit belongs to those who managed to achieve this result.

These studies have provided readily accessible, much needed information about women's experience of armed conflict.⁸ Having identified the problem areas for women during these times the next logical step is to consider how these have been addressed to date and what new mechanisms need to be put in place to achieve progress. Consequently the studies contain many carefully thought out recommendations as to how the situation for women in times of armed conflict can be improved. With the exception of the UNIFEM study, development of the law is not amongst them. This is despite the fact that there is a considerable body of existing law that is designed to minimize the impact of armed conflict on civilians and those no longer taking part in hostilities. However, these norms were developed in an era where women's distinctive experience of armed conflict went unrecognised. It appears, therefore, that if a whole range of serious humanitarian related needs have been identified that affect women during times of armed conflict then an investigation is warranted

5. See *Women, Peace and Security, Study Submitted by the Secretary-General Pursuant to Security Council resolution 1325 (2000)* (New York, United Nations 2002).

6. See E. Rehn and E. Johnson Sirleaf, *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building* (New York, UNIFEM 2002) p. vii, available at <www.unifem.org/resources/item_detail.php?ProductID=17>.

7. Ibid.

8. The only one of the studies to include girls is that of the Secretary-General. This coverage matches Security Council resolution 1325 which includes girls within its purview. This present article is restricted to women. Many of the experiences of girls reflect those of women. There are many differences however and the situation of girls during times of armed conflict warrants a separate examination. See ICRC study at pp. 34-35 (explaining the restriction of the study to women).

as to whether the existing legal regime is adequate. If it is deficient it should be considered whether progressive development of the law could make a contribution to addressing the problems identified.

The main argument of this article therefore, is that not enough has been done to investigate the adequacy of the legal regime relevant to women in times of armed conflict and whether there is scope for the development of new norms through a range of law making processes not necessarily of the traditional treaty form. Certainly there has been remarkable progress in the reinterpretation of existing norms so as to encompass the particular experiences of women. This has occurred particularly in the context of crimes of sexual violence.⁹ However, no amount of creative interpretation can make up for an absence of law.

The structure of the discussion is as follows. First, I generally describe the mandate and objectives of the three studies. The overall conclusions and recommendations of the studies (apart from the question of the adequacy of the relevant legal regime, an issue considered later) are then identified. Obviously, to fully appreciate the achievements of these initiatives, readers will need to consult the reports themselves. Secondly, I provide a brief overview of some of the steps that have been taken to date to implement the recommendations of the studies.

The scope of the discussion then narrows. The two UN studies not only address the impact of armed conflict on women but also consider women in peacekeeping and peace building. Moreover, in the case of the Secretary-General's study the influence of gender in peace processes and conflict resolution is a major theme. However, the focus of the remainder of this article is restricted to those sections of the studies that deal with how women are affected by armed conflict. It is in this context that I wish to discuss the question of progressive development of the law.

The existing legal regime, IHL and human rights norms, claims to address the situation of victims of armed conflict and it is this body of law that is being enforced through the rapidly developing international criminal justice system. Therefore, against the background of earlier UN initiatives on women and armed conflict, I critically examine the way in which the ICRC and the UN studies deal with the issue of the legal protections available to women in times of armed conflict. It is apparent from such an investigation that law reform is not seen as having a role to play in ameliorating their situation. My aim overall is to demonstrate that this approach to the law warrants reconsideration and that there is the need for an international initiative that focuses solely on the place of progressive development of the law as an integral component of strategies

9. See Gardam and Jarvis, *op. cit.* n. 1, at ch. 6 and M. Jarvis, 'An Emerging Gender Perspective on International Crimes', in G. Boas and W. Schabas, eds, *International Criminal Law: Developments in the Case Law of the ICTY* (Leiden, Martinus Nijhoff 2003) p. 157. See also V. Oosterveld, 'Sexual Slavery and the International Criminal Court', 25 *Michigan JIL* (2004) p. 605.

to improve the position of women during times of armed conflict. It may be that the international legal regime in relation to women and armed conflict is as satisfactory as its proponents suggest. It may also be the case that the time is not right for reform. Justice, however, demands that the claim as to the state of the law be subjected to rigorous scrutiny.

2. OVERALL OBJECTIVES AND RECOMMENDATIONS OF THE STUDIES

2.1 The ICRC study

The genesis of the ICRC study is the 1999 Pledge Statement, 'To promote the respect of women in armed conflicts', made at the 27th International Conference of the Red Cross and Red Crescent Societies, in which the organisation committed itself 'to put emphasis throughout its activities on the respect which must be accorded to women and girl children. Focus will be placed on actively disseminating the prohibition of all forms of sexual violence to parties to the armed conflict' and 'to ensure that the specific protection, health and assistance needs of women and girl children affected by armed conflicts are appropriately assessed in its operations with the aim to alleviate the plight of the most vulnerable'.¹⁰

The aim of the study is described as follows: 'to understand the ways in which women are affected by armed conflict by drawing on lessons from past and current experience to improve the quality, relevance and impact of ICRC services [footnote omitted]'.¹¹ The study has three principal objectives 'to identify the needs of women engendered by armed conflict, irrespective of whether those needs were the focus of ICRC activities [footnote omitted]; to examine international law, particularly humanitarian law and to a lesser extent human rights law; in order to assess the degree to which they provide protection for women and to draw up an overall picture of the ICRC's operational response to the needs of women affected by armed conflict'.¹² 'The ultimate objective ... is to enhance the assistance and protection offered to women affected by armed conflicts, by making the relevant actors sensitive to the specific needs of women and by improving the quality of activities carried out for/with women.'¹³

The ICRC is in a particularly strong position to undertake a study on what happens to women in armed conflict. It has field delegations in almost all the conflict torn parts of the world that can provide first hand experience of the

10. Pledge Statement of the ICRC at the 27th International Conference of the Red Cross and Red Crescent, available at <www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQ38>.

11. ICRC study at p. 33.

12. *Ibid.*, at p. 212.

13. *Ibid.*, at p. 33.

day-to-day reality of armed conflict for all categories of victims affected.¹⁴ This depth of understanding is evident through out the study and is its great strength.

The coverage of the study is to some extent dictated by the mandate of the ICRC. The activities of the ICRC primarily take place during times of armed conflict and in the territory of states involved in the hostilities.¹⁵ The ICRC's responsibility for the implementation of IHL also determines the scope and structure of the report. Therefore, there is a focus on such matters as internment and detainment in situations of armed conflict and the restoration and maintenance of family links. Nevertheless, the author of the study has taken a very broad view as to what are ICRC concerns. This approach has significantly increased the usefulness of the end result.

The objectives identified above form the framework around which the study is structured. The experience of women in times of armed conflict in relation to a range of issues is described, such as access to food and water, shelter, health-care and maintenance of the family unit. Secondly, any applicable legal provisions are identified. Finally the operational response of the organisation is assessed. At the end of each section there are a number of 'key points' or recommendations. The ICRC study is very specific and directed towards these recommendations. These are designed as practical everyday measures to improve the operational response of the organisation to addressing the needs of women in times of armed conflict. For example, in relation to the distribution of food and water, the study counsels that it be kept in mind that during periods of armed conflict it is frequently women who are the head of the household.¹⁶ The importance of access to female personnel and interpreters for women victims of violence is also highlighted.¹⁷ Overall the study contains a comprehensive, careful analysis of women's experience of armed conflict and its aftermath.

2.2 Secretary-General's study

The Secretary-General's study was prepared under the supervision of the Inter-Agency Task Force on Women, Peace and Security and coordinated by the Special Adviser of the Secretary-General on Gender Issues and The Advancement of Women. The study takes its focus from Security Council resolution 1325 and its emphasis on the integration of gender perspectives into 'all United Nations conflict prevention and resolution, peace-building, peacekeeping, rehabilitation and reconstruction efforts'.¹⁸ Consequently, having consid-

14. For details of the ICRC's activities see 'Overview of Operations 2005', available at <www.icrc.org/web/eng/siteeng0.nsf/iwpList74/FB4EE6333BD39680C1256F5F0051C467>.

15. For the role of the ICRC, see the Statutes of the International Committee of the Red Cross of 24th June 1998, reprinted in 324 *IRRC* (1998) p. 537.

16. See ICRC study at p. 87.

17. *Ibid.*, at p. 64.

18. See Secretary-General's study at p. 1.

ered the impact of armed conflict on women and girls, the main focus of the remainder of the study is the gender dimensions of these activities and analysis of the response of the United Nations, its specialized agencies, funds and programmes to achieving gender equality through the mechanism of gender mainstreaming.¹⁹

In relation to what happens to women in times of armed conflict the study specifically identifies issues relating to violence, health, socio-economic effects, displacement, disappearance and detention and changing roles for women during and after conflict. There is not a great deal new in the description of the impact of armed conflict on women and in comparison with the ICRC study the coverage is somewhat superficial. There are, however, some interesting insights under the heading of socio-economic dimensions such as the complex gendered impact on women and girls as food becomes scarce and so-called 'famine foods' are introduced into the diet.²⁰ The study contains a number of recommendations in relation to the impact of armed conflict on women, primarily relating to violence against women and the health dimensions of conflict.

2.3 UNIFEM study

The independent expert's study in their own words 'complements the study undertaken by the UN Secretary-General as called for in Resolution 1325'²¹ and their mandate was to carry out an 'independent assessment on the impact of armed conflict on women and women's role in peacekeeping' with the aim of providing 'the international community with the information they need to implement Resolution 1325'.²²

The Experts address ten themes in their report, namely, violence against women; displacement; health; HIV/AIDS; organising for peace; peace operations; justice and accountability; media and communications; reconstruction and prevention.²³ The majority of these topics are covered in the Secretary-General's study.²⁴ The methodology of the UNIFEM study, however, is quite distinct. It is imbued with the voices and spirit of the women whose experiences it documents. The women involved tell their own stories in their own words and consequently the result is a powerful document.

One of the major themes of the independent experts' assessment of the reality of armed conflict for women is that the protections for women affected

19. *Ibid.*, at p. 4 (for an explanation of 'gender mainstreaming').

20. *Ibid.*, at p. 25.

21. *Ibid.*, at p. 5.

22. UNIFEM study at pp. 3, 5.

23. *Ibid.*, at pp. 6-7.

24. The UNIFEM study, however, considers in detail the HIV/AIDS consequences of armed conflict for women and also the impact of the media and communications in stereotyping women's experiences of armed conflict.

by armed conflict, as they put it, 'are glaring in their inadequacy'.²⁵ 'Women's specific needs are largely neglected, particularly in relation to physical and psychological care, economic security, HIV/AIDS and displacement. Women continue to have the least access to protection and assistance provided by the state or international organisations.'²⁶ Detailed recommendations are provided in the study as to what should be the response by the relevant agencies and actors to the findings of the Experts.

3. AN OVERVIEW OF PROGRESS

The ICRC has made considerable progress in taking practical steps to implement the findings of its study on women and war. In 2003 the Women and War project team published a special report updating the steps that had been taken subsequent to the study to meet the commitments made by the organisation to respond to the general and special needs of women in times of armed conflict.²⁷ This report was followed in 2004 by a manual entitled 'Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document'.²⁸ The manual is a companion to the ICRC study and designed to provide guidance to delegations in the field as to application of the findings of the study.

The success of this latter initiative is almost wholly dependent on the willingness of the delegations to adopt its recommendations. Although the manual apparently has been well received by other agencies working with women affected by armed conflict, it appears there is resistance within the organisation itself and amongst field delegations to implementing the findings of the study and the provisions of the manual. It is to be hoped that the organisation maintains its commitment to addressing the specific needs of women and does not allow what is a major achievement to fall by the wayside. It is impossible to change an ingrained culture in the space of a few years and although some advances have been made, the Women and War project should be viewed as still in its early days.

There has been a range of follow up activities to resolution 1325 by the United Nations its agencies, NGO's and governments.²⁹ Given the emphasis of the terms of resolution 1325 these have primarily focused on the inclusion

25. UNIFEM study at p. viii.

26. *Ibid.*, at p. 2.

27. 'Women and War', March 2003, available at <www.icrc.org/Web/Eng/siteeng0.nsf/html/women>.

28. Available at <www.icrc.org/Web/eng/siteeng0.nsf/htmlall/p0840>.

29. A comprehensive coverage of the follow up to resolution 1325 is available at <www.peacewomen.org> and see in particular 'Working Towards Implementation of 1325: Who's Who in the United Nations System: A working Document', available at <www.peacewomen.org/un/UN1325/1325whoswho.html>.

of women in peace-building, demobilization, reconstruction of societies after conflict; gender perspectives to peacekeeping and gender based violence in conflict and post conflict situations.³⁰

4. THE PLACE OF LAW IN THE DEBATE OVER WOMEN AND ARMED CONFLICT

4.1 Early UN initiatives

Prior to the recent studies, the issue of women and armed conflict has been investigated by the UN and its agencies on a number of occasions. None of these earlier initiatives have specifically included a consideration of the adequacy of the law in their mandate. The legal regime, however, invariably is the subject of some comment. There is a uniform assumption as to the satisfactory nature of the existing rules of IHL of relevance to women. For example, in March 1994 the Commission on Human Rights appointed a Special Rapporteur on Violence against Women, including its Causes and Consequences.³¹ From the commencement of her work the Special Rapporteur made it clear that ‘all violations of the human rights of women in situations of armed conflict, and in particular, murder, systematic rape, sexual slavery and forced pregnancy ...’ would be covered by her mandate.³² Accordingly, the Special Rapporteur has considered the topic of armed conflict as part of her work on violence against women perpetrated or condoned by the state. In her Preliminary Report, the Special Rapporteur focused, *inter alia*, on the issue of sexual violence during armed conflict, including the treatment of refugee women.³³ In 1998, the Special Rapporteur compiled a more detailed

30. See Statement by Carolyn Hannan, Director, Division on the Advancement of Women, Department of Economic and Social Affairs, ‘Affirmative Action and Security Council resolution 1325 (2000): CEDAW General Recommendation 25 and women’s participation in conflict prevention and conflict resolution’, available at <www.un.org/womenwatch/daw/news/speech2004/CH-SC1325-GenevaApr04.pdf>.

31. Questions of Integrating the Rights of Women into the Human Rights Mechanisms of the United Nations and the Elimination of Violence Against Women, UNESCOR, Commission on Human Rights, 50th Sess., UN Doc. E/CN.4/RES/1994/45 (1994). The mandate of the Special Rapporteur was extended for a further three-year period in 1997. See Commission on Human Rights Res., 1997/44 (1997). See also Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Periods of Armed Conflict, Ms Gay McDougall, UN Doc. E/CN.4/Sub.2/1998/13 (June 1998) and Update to the Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Periods of Armed Conflict, Ms Gay McDougall, UN Doc. E/CN.4/Sub.2/2000/21 (June 2000).

32. Preliminary Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, UN Doc. E/CN.4/1995/42 (November 1994) para. 7.

33. *Ibid.*, at para. 310(c), (d).

report, specifically on violence perpetrated or condoned by the state, and with a significant focus on the issue of sexual violence against women during armed conflict; while in custody; and against refugee and internally displaced women.³⁴

Despite identifying the serious humanitarian problem of what happens to women in armed conflict and proposing strategies to deal with these events, the Special Rapporteur does not suggest that IHL is in any way deficient and confines herself to a recommendation that the four 1949 Geneva Conventions should be 're-examined and re-evaluated so as to incorporate developing norms against women during armed conflict'.³⁵

The 2001 report of the Special Rapporteur considers, in particular, the jurisprudential and structural developments in the system of enforcement of norms prohibiting sexual violence. The report is critical of some aspects of the Statute of the International Criminal Court, such as the definitions of forced pregnancy and gender contained therein. Once again however, the emphasis of the recommendations is on the issue of enforcement of existing norms.³⁶ The Special Rapporteur, in her final 2003 report, re-iterates her concerns about some aspects of the developing criminal law in relation to sexual violence against women, criticising the conflicting definitions of rape that have issued from the trial courts of the *ad hoc* tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).³⁷

Other UN initiatives, including the Beijing Platform for Action, have not questioned the extent to which IHL and the provisions of human rights law provide adequate protection for women, or raised law reform as a serious possibility.³⁸ At the Beijing Conference, women and armed conflict was identified as one of the twelve critical areas of concern to be addressed by member states, the international community and civil society. Paragraph 44 of the Beijing Platform for Action, calls on '[g]overnments, the international community and civil society, including non-governmental organisations and the private sector ... to take strategic action', *inter alia*, in relation to the '[t]he effects of armed or other kinds of conflict on women, including those living under foreign occupation'. Nevertheless, the only reference to law in the Platform is in the context of achieving the reduction of the 'incidence of human rights abuse in conflict situations',³⁹ where the Platform calls for the upholding and reinforcement

34. Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, UN Doc. E/CN.4/1998/54 (26 January 1998) para. 1.

35. *Ibid.*, at para. 22.

36. Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, UN Doc. E/CN.4/2001/73 (January 2001) paras. 18, 19, 66.

37. Integration of the Human Rights of Women and the Gender Perspective, UN Doc. E/CN.4/2003/75 (6 January 2003).

38. Fourth World Conference on Women, Action for Equality Development and Peace, Beijing Declaration and Platform for Action, UN Doc. A/Conf.177/20 (1995) (hereafter Beijing Platform for Action).

39. Beijing Platform for Action, Strategic Objective E 3.

of the norms of IHL and human rights law in relation to these offences against women and the prosecution of all those responsible for breaches thereof.

Silence on the issue of reassessing the adequacy of IHL for women continued at the special session of the UN General Assembly entitled 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century', held in June 2000 to review the progress made towards implementation of the Platform for Action in the five years following the Beijing Conference. The outcome document adopted by the General Assembly identifies developments taking place in the context of the two UN *ad hoc* war crimes tribunals and the Statute of the ICC, as among the examples of achievements in the critical area of women and armed conflict.⁴⁰ There is, however, no recognition of the need to assess whether the existing provisions of IHL and human rights law are adequate to address the needs of women.

Finally the Security Council itself in its 2000 resolution calling for a study of women reiterated the need for all parties to armed conflict to 'respect fully international law applicable to the rights and protection of women and girls, especially as civilians' and emphasized the significance of prosecuting war crimes of sexual violence against women and girls.

4.2 The ICRC and UN studies

4.2.1 *Adequacy of the legal regime*

The only one of the three recent studies on women and armed conflict that specifically encompasses a consideration of the law in its mandate is that of the ICRC. As outlined above this study is intended to assess the organisation's response to this issue in terms of its own mandate to implement IHL.⁴¹ Consequently the focus of the discussion is primarily this body of law although the report does also consider human rights law and refugee law.⁴²

Overall the study is comprehensive in its treatment of the legal regime protecting women in times of armed conflict. However, a similar conclusion to earlier initiatives is reached as to the adequacy of the law. The authors of the study share the oft repeated view of the organisation that the 'tragic plight of women does not primarily result from a lack of humanitarian rules to protect them but rather from a failure to coherently interpret and implement existing rules'.⁴³

40. See Unedited Final Outcome document, 'Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action', 10 June 2000, para. 12.

41. See ICRC study at p. 17.

42. ICRC study at p. 33.

43. See 'Advancement of Women and Implementation of the Outcome of the Fourth World Conference on Women', statement by the ICRC to the UN General Assembly, 53rd Session, Third Committee (15 October 1998), available at <www.icrc.org/Web/Eng/siteeng0.nsf/iwplList74/31432F486A1CE776C1256B66005C2DDA>.

They conclude, ‘on the whole – subject to minor exceptions set out below – the law does adequately cover the needs of women in situations of armed conflict. But this is true only if one considers all the applicable bodies of law simultaneously, in particular international humanitarian law and human rights law’.⁴⁴ Moreover, according to the study the law is adequate in respect to both international and non-international armed conflict. Some gaps are acknowledged: ‘the more substantive of which appear to relate to the issue of return after arbitrary displacement and the question of personal documents’.⁴⁵ The study isolates the challenge for improving the position of women in times of armed conflict as one relating to ‘ensuring respect for and implementation of the existing rules’. This attitude towards the adequacy of the law is repeated forcefully in the follow up report of the Women and War project⁴⁶ and continues to be reflected in the public statements of the organisation.⁴⁷

The ICRC study also illustrates the organisation’s continuing unease with the concept of gender.⁴⁸ Although the organisation is well aware that for some decades the work of the UN and its agencies in relation to women has had as its starting point the achievement of gender equality, it does not see itself as having a role to play in what is essentially a political process. The view of the ICRC is it takes women as it finds them and meets whatever humanitarian needs they present at any given time. This approach is reflected in the *Women Facing War* study that focuses on ‘Women’, not ‘Gender’ and ‘refers to women’s needs rather than to gender-related needs, because the focus is on the assistance and protection given to female victims of war owing to their specific needs’.⁴⁹ An analysis of why these particular needs may arise and how such knowledge could inform the response of the organisation is consequently absent from the study.

Nevertheless the study acknowledges that the specific needs of women are derived from “‘socially defined or constructed sex roles, attitudes and values ... ascribe[d] as appropriate for one sex or the other” already defined as gender [footnote omitted]’.⁵⁰ It is a significant advance for the organisation to recognise the existence of gender as a factor in the way women experience armed conflict.

44. ICRC study at p. 213.

45. *Ibid.*, at p. 214.

46. ‘Women and War’, *supra* n. 27, at p. 16.

47. See e.g., speech of Gabrielle Nanchen, Assembly member of the ICRC, to the 49th Session of the UN Commission on the Status of Women, New York 7 March 2005, available at <www.icrc.org/Web/Eng/siteeng0.nsf/html/6A6FKK>.

48. For a clear statement on gender and how the organisation approaches this issue from the current head of the Women and War project, see ‘Gender in Practice: the Humanitarian Perspective’, EU Conference on Women in Conflict Situations and Peacekeeping, 9-10 December 2004: ‘the ICRC uses a gender analysis (to understand roles of men and women and how they are interrelated for example with regard to access of resources) without adopting a gender policy (which would be to change these roles or to remove the socio-cultural conditions that give rise to gender)’ (copy on file with the author).

49. *Ibid.*, at p. 35.

50. *Idem.*

For many years there was considerable resistance within the ICRC to the idea that the impact of armed conflict on women may be determined to some extent by their socially constructed roles. The study, however, explicitly states that the 'impact of war on women is not only a result of biological differences, but also of the different constraints and opportunities arising from their role in society (gendered roles)'.⁵¹

Despite this welcome advance, running throughout the ICRC study is an assumption that the gendered and biological woman constitute two distinct categories. What is thus envisaged is a biological category of woman (as distinct from a gendered woman) whose needs flow naturally from this condition. The category of biological women is also constructed. There is no such entity as the pre-ordained woman with her special needs. A woman's needs resulting from her biology are just as much determined by how these functions are perceived in the society of which she is a part as by any inherent physical qualities. To illustrate this point – the study refers to the special needs of women being related to their need for privacy.⁵² Is the need for privacy inherent in the very nature of women or is it a requirement imposed on women by the culture they live in? Nevertheless, the reliance on 'privacy' as being the basis for many of the provisions relating to women is certainly a welcome advance on the traditional use of the concept of a woman's honour in such contexts.⁵³ Indeed, the study specifically draws attention to the fact that the conceptualisation of rape as an attack on a woman's honour in Article 27 of the Fourth Geneva Convention is outdated.⁵⁴ However, to ignore the influence of gender in relation to women's biological needs is to run the risk of further entrenching a limited vision of women.

The reluctance to address other than traditional issues in relation to women is evident in the conclusion of the ICRC study. The study reiterates that it focuses on needs not rights but concedes that there are certain rights 'such as the right to nationality or statehood and the right to participate in political groupings, which could be explored further but did not find their place in this study'.⁵⁵ No explanation for this follows.

Overall, it is fair to say that the study shows a degree of confusion in how to address the significance of gender as an element of how women experience armed conflict. This is an understandable but in some ways unfortunate outcome. The ICRC has achieved much over the years through maintaining at all costs its commitment to neutrality. To adopt an approach designed to improve equality for women could be seen as compromising this stance.

51. ICRC study at p. 36.

52. *Ibid.*, at p. 21.

53. See Gardam and Jarvis, *op. cit.* n. 1, at pp. 108-110 (for an analysis of the concept of honour in IHL).

54. ICRC study at p. 57.

55. See ICRC study at p. 212.

However, the work of the organisation is not as neutral as it may appear at first glance if the result is to reinforce detrimental gender stereotypes. It is, in fact, not possible to be a neutral actor when activities are based on a gendered regime that reinforces the position of women in society.

Moreover, this failure to investigate the gendered assumptions that underlie IHL must call into question whether enforcement of a flawed regime is the way forward for women. The organisation nowadays accepts the 'structural disadvantage of women in times of peace' that leads to their particular vulnerability to 'marginalization, poverty and suffering engendered by armed conflict'. Moreover, 'discrimination is both a cause and a consequence of the deprivations they suffer in wartime'.⁵⁶ If this is the case then how can the law serve them well when it was drawn up in an era that neither recognised this discrimination nor took account of it in the legal provisions that were adopted? There is thus an inherent contradiction in the work of the organisation on women and IHL. The situation may indeed improve somewhat for women with better enforcement of the existing provisions of IHL but something far more fundamental is required to achieve real progress. The key to moving ahead is not only the acknowledgment of this factor but ensuring that its impact on the existing legal regime is investigated.

The Secretary-General's study continues the prevailing view that the rules of IHL for women are adequate and that what is needed is better enforcement. In common with other UN initiatives in this area, the legal regime relevant to women and girls in times of armed conflict, however, was not specifically included in the mandate for the Secretary-General's study. Nevertheless, a chapter of the study is devoted to an overview of IHL, human rights law and refugee law as 'complementary strands of international law'.⁵⁷ The treatment of the legal regime in the study is primarily descriptive in nature outlining the relevant provisions of IHL, human rights law and refugee law. It is noted that the provisions of IHL are granted to all without discrimination and that additional protection is provided to pregnant mothers and mothers of young children. Reference is then made to the complementary protections available in human rights instruments and refugee law. In conclusion, the study 'calls upon all parties to adhere at all times to their obligations under principles of international humanitarian law, human rights law and refugee law' and 'to prosecute all perpetrators of crimes of gender-based and sexual violence directed against women and girls and ensure wide knowledge of international humanitarian law and human rights law'.⁵⁸ Nowhere is it suggested that law reform may be called for as a strategy to overcome the situation of women in times of armed conflict.

This silence on the adequacy of the legal regime is puzzling in light of the

56. See speech of Gabrielle Nanchen, Assembly member of the ICRC, to the 49th Session of the UN Commission on the Status of Women, *supra* n. 47.

57. Secretary-General's study at p. 33.

58. *Ibid.*, at p. 49.

detailed findings of the impact of armed conflict on women and girls.⁵⁹ The Secretary-General's study explicitly relies on a 'gender analysis as the basis for understanding what happens to women and girls in armed conflict and to develop effective operational responses'.⁶⁰ This approach has the beneficial result of leading to the recognition of many hitherto unacknowledged ways in which women are affected by armed conflict. The acknowledgment of the relevance of gender to women's experience of armed conflict is particularly marked in the assessment of the socio-economic dimensions of armed conflict.⁶¹

However, despite the fact that gender is the preferred methodology in determining the reality of armed conflict for women, the examination of the law that follows makes no attempt to rely on the insights that a gender approach has provided. There is no indication that the authors of the report have taken the events that they have identified and considered in what way existing international law address these phenomena. In fact the study isolates many distinctive experiences of women during times of armed conflict that are not regulated in any way or quite superficially by the existing legal provisions.⁶² The applicable law is thus accepted uncritically and no suggestion is made that its provisions not only may reflect an outdated and distorted view of women but also ignore the reality of their experience of armed conflict.

The UNIFEM study is the one exception to the general trend to restrict debate about the potential of law to issues of improved dissemination and enforcement of existing norms issues. Although this study does not consider the adequacy of the law in detail, it raises the possibility that existing international law is insufficient to address women's needs. Accordingly, the Independent Experts who prepared the study call upon the Secretary-General to 'appoint a panel of experts to assess the gaps in international and national laws and standards pertaining to the protection of women in conflict and post-conflict situations and women's role in peace-building'.⁶³

Moreover, the Experts echo the view of the Special Rapporteur on Violence in calling for a 'greater specificity in codifying war crimes against women and in recognizing the distinctive harms that result from violations like forced pregnancy'.⁶⁴

59. See ch. II 'Impact of Armed Conflict on Women and Girls', Secretary-General's study at pp. 13-32.

60. Secretary-General's study at p. 14.

61. *Ibid.*, at pp. 22-25.

62. See, e.g., Secretary-General's study at pp. 65-73 (discussing the socio-economic dimensions to armed conflict for women).

63. UNIFEM study at p. ix.

64. UNIFEM study at p. 17.

4.2.2 *The significance of human rights law in the debate over women and armed conflict*

One of the reasons for the conclusion as to the adequacy of the law in relation to women, that is particularly evident in the Secretary-General's study but is also reflected in the ICRC study, is that human rights norms can complement the provisions of IHL in this area.⁶⁵ Since the adoption of the United Nations Charter in 1945, IHL has been undergoing a subtle but pervasive change. The regime of IHL initially primarily utilitarian in nature is now frequently seen as allied to, or even as part of, the developing regime of human rights. The nature of the relationship alleged to exist between the two regimes varies depending on the context, but the trend is well developed to treat IHL and human rights as sharing common values and as directed to the same ends.⁶⁶ In both the *Nicaragua* case and the *Nuclear Weapons* Advisory Opinion, the International Court of Justice recognised this evolving relationship.⁶⁷

The major impetus for the increasing focus on human beings in armed conflicts is that the norms of this system provide a mechanism for confronting the appalling reality of non-international armed conflicts in today's world.⁶⁸ These conflicts have dominated the international scene for many decades. They are almost uniformly conducted without any restraint in relation to the means and methods of combat used by the warring factions and the treatment of the civilian population. Human rights norms are designed to address the mistreatment of individuals by their own state and are consequently more readily adaptable than IHL to situations involving internal armed conflict.⁶⁹

In contrast the rules of IHL developed primarily as a response to international armed conflict and the regime has been slow in adapting itself to the reality of modern conflict. The effectiveness of Common Article 3 to the four 1949 Geneva Conventions, sometimes referred to as the mini-convention on non-international armed conflicts, has been severely limited by the reluctance of states to accept that its threshold of applicability had been reached. Moreover, Protocol II adopted in 1977 has a high threshold before its provisions come into operation.⁷⁰ Apart from these conventional provisions, for many years, IHL had

65. See Secretary-General's study at pp. 36-38 and see also ICRC study at pp. 22-23.

66. See, e.g., T. Meron, 'The Humanization of Humanitarian Law', 94 *AJIL* (2000) p. 238; K. Watkins, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Conflict', 98 *AJIL* (2004) p. 1 and see generally, R. Provost, *International Humanitarian and Human Rights Law* (Cambridge, Cambridge University Press 2003).

67. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, Judgment, *ICJ Rep.* (1986) p. 14, and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Rep.* (1996) p. 26.

68. See T. Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge, Grotius 1987).

69. *Ibid.*, at pp. 2-70.

70. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the

little to offer by way of protections for victims of these savage and intractable conflicts. However, in more recent times the distinction between non-international and international armed conflicts has been eroded, particularly through the jurisprudence and practice of the ICTY.

The importance of human rights in armed conflict is now a very common theme in a variety of venues, including those that deal with the enforcement of international criminal law. However, although there is undoubtedly ongoing erosion of the boundaries between human rights law and IHL, as things stand at present, there are significant limitations on the ability of human rights law to provide protection to individuals in times of armed conflict. One cannot ignore some fundamental normative characteristics of that regime that limit its effectiveness during times of armed conflict.

Traditionally, the two regimes were not intended to be complementary. As Christopher Greenwood explains, '[h]uman rights law is designed to operate primarily in normal peacetime conditions, and within the framework of the legal relationship between a state and its citizens. International humanitarian law, by contrast, is chiefly concerned with the abnormal condition of armed conflict and the relationship between a state and the citizens of its adversary...'.⁷¹ This difference between the regimes is exemplified by the fact that except for a basic core of rights, many human rights norms can be derogated from during states of emergency including armed conflict.⁷² Moreover, even non-derogable rights, such as the right to life, must yield precedence in times of armed conflict to the regime of IHL and take their content from what is permissible in that regime.⁷³ In contrast there is no similar concept of derogability in IHL.

Protection of Victims of non-international Armed Conflicts, adopted in 1977 (Protocol II), 16 *ILM* (1977) p. 1442, applies to armed conflicts 'that take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. The Protocol expressly does not apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts'. Art. 1, Protocol II.

71. See C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press 1995) p. 102. Although there is nowadays evidence of the extra territorial operation of human rights, the point remains that the relationship in that regime is between an individual and a state not one between states, as is the case with IHL.

72. The non-derogable human rights include the right to life; freedom from torture and other inhuman or degrading treatment or punishment; freedom from slavery; and the non-retroactivity of penal laws. See R. Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law', 1 *Yearbook of International Humanitarian Law* (1998) p. 69 at pp. 87-90 (for a discussion of non-derogable human rights). See also General Comment No. 29, 'States of Emergency (Art. 4)', CCPR/C/21/Rev.1/Add.11 (August 2001).

73. See the discussion of this issue in the context of the right to life by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Rep.* (1996) p. 226 (General Assembly Opinion). See, however, the criticism of the Court's treatment

Human rights norms are conferred on individuals and rely for their effectiveness on the ability of the rights holder to access a stable system of supervisory mechanisms, including the courts and political and administrative processes that are severely compromised or non-existent in times of conflict. Human rights consequently are difficult to enforce in times when societal structures have broken down.⁷⁴ IHL, however, is specifically designed for such times and has developed enforcement mechanisms that reflect the reality of armed conflict. For example, IHL relies to a considerable degree for its effectiveness, at least where the protagonists are states, on the notion of reciprocity, such remedies as reprisals and supervision by the ICRC and mechanisms such as fact finding commissions.⁷⁵

Moreover, IHL has had from its inception a distinctive regime of individual criminal responsibility for breaches of its provisions that is not shared by human rights. The norms of the latter system may be the subject of criminal prosecutions if they are independently criminalized, such as through the Statutes of *ad hoc* tribunals. However, individual criminal responsibility is at the heart of IHL.

Another significant difference between the two regimes is in relation to their content. IHL is deliberately designed for situations of armed conflict. Although I argue that to some extent it is deficient in relation to the situations that women find themselves in armed conflict, IHL remains a detailed and powerful regime if individuals can fit themselves into its categories. An example is the Third Geneva Convention relative to the protection of Prisoners of War. Although argued by some to be showing its age due to the rise of irregular combatants, its provisions are carefully fashioned to provide considerable protection to those that fall within its coverage.

The provisions of human rights, however, are not crafted to cover situations of conflict where societal structures have broken down. The issues with which these norms deal take on new forms in the midst of the disruption caused by armed conflict, a factor that is not reflected in their content. Those who argue that human rights norms can compensate for the gaps of IHL often refer to very general norms, such as the right to an adequate standard of living and the right to enjoy 'the highest attainable standard of physical and mental health'.⁷⁶ Even in times of peace these norms are so vague and permissive in content as to provide only the most general level of protection. During the exigencies of

of the relationship between human rights and IHL in V. Gowlland-Debbas, 'The Right to Life and Genocide: The Court and an International Public Policy', in L. Boisson de Chazournes and P. Sands, eds., *International Law and the International Court of Justice and Nuclear Weapons* (Cambridge, Cambridge University Press 1999) p. 315.

74. See Provost, *op. cit.* n. 66, at pp. 16 and 344 ('... a breakdown of order and institutions make it futile to confer rights on individuals upon which they will be unable to act').

75. See the International Fact Finding Commission provided for in Art. 90 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, adopted in 1977 (Protocol I), 16 *ILM* (1977) p. 1391.

76. See, e.g., ICRC study at pp. 106, 109, 116.

conflict, they cannot effectively resolve the rights and entitlements of various categories of war victims to humanitarian assistance. For example, to what extent can it be realistically argued that instruments such as the 1966 International Convention on the Elimination of all Forms of Racial Discrimination and the two 1966 International Covenants on Civil and Political Rights and Social, Economic and Cultural Rights, provide any degree of significant protection for individuals in times of internal armed conflict?

It is, therefore, necessary at all times to distinguish between human rights norms that are also reflected in the provisions of IHL, such as those in Common Article 3 to the four 1949 Geneva Conventions, and those that are not. Those human rights norms that are not also reflected in the provisions of IHL are subject to derogation and are limited in their ability to supplement IHL. It is instructive to consider the norms that are specifically referred to in the Secretary-General's 2002 study as complementing the protections available to women and girls in times of armed conflict, particularly internal armed conflict. Amongst those referred to are the right to life and freedom from torture and other inhuman and degrading treatment.⁷⁷ The conventional and customary norms of IHL however, themselves already proscribe murder, torture and other inhuman and degrading treatment in both international and non-international armed conflict.⁷⁸

In a sense, the very point of IHL is that it sets the limits of derogability in relation to the treatment of human life in times of armed conflict. Moreover, it is the provisions of IHL that are the base of the rapidly developing international criminal law system.

In addition to the limitations as to the content and accessibility to remedies of the human rights regime generally in times of armed conflict (that are experienced to some extent by all rights holders) there is the further question as to whether women can equally access their mechanisms. To suggest as the Secretary-General's study does, that women caught up in armed conflict can realistically avail themselves of the mechanism of the individual complaint procedures of the Optional Protocol to CEDAW, is somewhat disingenuous.⁷⁹ Even if the states concerned are parties to these instruments, and the supervisory mechanisms remain in place, which as things stand presently is unlikely, the vast majority of the female population to whom these rights attach are not in a position to exercise such sophisticated legal remedies.

The Secretary-Generals' study concludes that '[h]uman rights obligations relating to the rights to life, to freedom from torture and other inhuman or degrading treatment, and to freedom from slavery provide legal protection against the majority of the worst abuses suffered by women and girls during

77. Secretary-General's study at p. 36.

78. See, e.g., Common Art. 3 to the Four Geneva Conventions; Art. 12, Second Geneva Convention; Art. 32, Fourth Geneva Convention; Art. 75, Protocol I.

79. See Secretary-General's study at p. 37.

armed conflict'.⁸⁰ This is accurate as far as it goes but these norms add nothing to the protections already available in IHL in almost all situations of internal conflict nowadays. The question remains as to whether these are as comprehensive for women as they are for men or is IHL failing to perform its task as a regime that claims to be based on equality and non-discrimination?

To summarise, some basic non-derogable human rights norms are undeniably of significance in situations where IHL is inapplicable.⁸¹ This is true for all victims of armed conflict. However, IHL remains at present the more effective regime in times of armed conflict (assuming it is applicable) if an individual can fit within one of its categories. As a noted historian has observed '[p]eople become real in it [IHL] only in certain situations or when they are doing certain things; on which occasions they become very real indeed, and can find themselves protected from the blasts of armed conflict better than the less choosy-looking human rights instruments can protect them'.⁸² Therefore, to the extent therefore that women qualify, usually as civilians but also on occasions as combatants and prisoners of war, it is appropriate that the regime should reflect as much as is feasible their particular needs. Therefore, it is of critical importance to have a body of IHL that adequately reflects the distinctive experiences of women facing armed conflict and not to delegate responsibility for addressing the humanitarian problems that women face to the human rights regime.

5. THE WAY FORWARD

There is consensus that this is not the ideal time politically to mount a challenge to IHL. The regime has already come under considerable pressure since the 2001 September 11th terrorist attacks on the United States. There has been a concerted attack on the continuing relevance of IHL in today's world, particularly in relation to the provisions of the Third Geneva Convention in relation to prisoners of war.⁸³ It is argued in some quarters that these are unworkable in the era of the so-called war against terror. The following statement in the 2003 report of the ICRC encapsulates their approach to law reform in the current climate:

80. See Secretary-General's study at p. 36.

81. See, e.g., the discussion of the control of extra judicial killing under the human rights framework in Watkins, loc. cit. n. 66, at pp. 17-22.

82. G. Best, *War and Law Since 1945* (Oxford, Clarendon Press 1994) p. 144.

83. See, e.g., the response to the ICRC Study on Customary International Law released on 15 March 2005 by D. Rivkin Jr & Lee A. Casey, 'A Red Cross Double Cross', *Wall Street Journal*, 12 April 2005, p. 10.

'From an operational point of view it is important to state unambiguously that IHL is very much alive and continues to provide the essential backbone for the tangible work that ICRC staff are carrying out daily in dozens of countries worldwide. Were it not for the provisions contained in IHL and the stubborn determination to see them upheld in the remotest corners of the globe, the situation for many men, women and children would doubtless be far more desperate than it already is. This explains why the ICRC will firmly oppose any attempt of revisiting the Geneva Conventions and their Additional Protocols, in view of the real risk of seeing their provisions weakened.'⁸⁴

This is a position that warrants a great deal of sympathy. Moreover, no concessions should be allowed to states, irrespective of how they perceive their role in the international community, that are tantamount to allowing them to opt in and out of their conventional obligations when it suits their domestic policies. Respect for the rule of law mandates otherwise. However, it is possible to envisage an initiative in the context of women and armed conflict that would not necessarily undermine hard fought gains but would allow improved, carefully targeted protections for them in such times. After all the issues we are dealing in this context are not so controversial and politically explosive as is the treatment of prisoners of war with its security dimensions. The ICRC does somewhat open the door to such an approach recognising the legitimacy of the debate over exploring 'possible areas of its (IHL) development'.⁸⁵

6. WOMEN AND PROGRESSIVE DEVELOPMENT OF IHL

It is not feasible in this article to canvass in any comprehensive way developments in IHL that could be a response to the findings of the UN and ICRC studies.⁸⁶ Moreover, such an undertaking, whatever legal form it may take, clearly requires the input of a range of experts similar to the manner in which previous IHL instruments have been negotiated. It is a long and painstaking process and requires a dedication that at the moment is missing in the international community. However, some examples come readily to hand. Indeed, an excellent starting point in many cases are the so called 'key points' that are identified at the end of each section of the ICRC study. Although evidently intended for the ICRC's own response in the field and not as recommendations for law many of them are perfectly adapted to such a status.

84. See ICRC, 'Overview of Operations 2003', p. 2, available at <[www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5GVEKF/\\$File/OVER2003_bkmk.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5GVEKF/$File/OVER2003_bkmk.pdf)>. See also 'Overview of Operations 2005', *supra* n. 14.

85. See 'Overview of Operations 2003', *ibid*.

86. For a detailed discussion of the various options for law reform and a draft 'soft law' instrument that could serve as a precedent for further developments in this area, see J. Gardam and M. Jarvis, 'The Protection of Women in Armed Conflict the International Response to the Beijing Platform for Action', 31 *Columbia Human Rights Law Review* (2000) p. 1.

One of the most consistent themes of the studies is the discriminatory practices to which women are subjected during armed conflict. They range from unequal access to food, medical supplies and treatment, to discrimination in the supply of documents and denial of culturally and appropriate clothing.⁸⁷ It is true that the Geneva Conventions and Protocols require parties to accord equal treatment and protection to all victims without distinction.⁸⁸ Moreover, there are norms that grant preference to pregnant women and mothers of small children in relation to food, medical assistance etc.⁸⁹ However, the obligations on parties in relation to ensuring that women receive equal treatment need to be spelt out in considerably more detail if they are really to make a difference. Discrimination is so well entrenched and invisible in society generally that it requires much more than a general exhortation for even the best intentioned people to be aware of its impact.

A possible approach would be to adopt specific provisions to the effect that women must be accorded equal access to food, supplies, medical treatment etc. How this is to be achieved should also be detailed, for example, by ensuring that they are included in the decision-making in relation to the allocation of these resources.

This leads on to another consistent theme and indeed one that is at the basis of the Secretary-General's study, namely the need to ensure the participation and involvement of women in all the relevant processes. Law can contribute here. The Geneva Conventions and Protocols already recognise the desirability of women detainees and prisoners of war being under the supervision of other women. This idea could be expanded so that it is mandated that all decision-making that involves women must include the participation of women. Therefore, decision-making bodies as to the allocation of food and other resources, irrespective of how ad hoc they may be, must include women.

Thought also could be given to criminalizing the practice of making the provision of aid (be it foodstuffs, medical supplies or shelter, documentation, etc.) dependent on sexual favours. The issue of consent would have to be addressed by any such laws, as women may appear to be freely offering these inducements.⁹⁰ This proposal is consistent with the observation of the Independent Expert's to the effect that '[g]reater specificity is needed in codifying war crimes against women ...'.⁹¹

87. See ICRC study at pp. 78-79.

88. See *ibid.*, at pp. 81-82 for a description of the obligations imposed by IHL in relation to the provision of humanitarian provisions.

89. See *ibid.*, at pp. 82-83 for a description of the special provisions of IHL in relation to these classes of women.

90. See UNIFEM study at p. 11.

91. *Ibid.*, at p. 17.

7. CONCLUSION

It is of undoubted significance that recent studies of women and armed conflict accept the premise that the major contributing factor determining the impact of these events on women is the endemic discrimination that women experience globally. However, it is to be regretted that these initiatives have failed to apply this insight to their analysis of the law in order to determine whether the legal regime responds to this phenomenon or merely reproduces (and in some respects) exacerbates its effects.

It is fair to ask whether issues of justice and accountability and the sense of progress in terms of the prosecution of crimes of sexual violence against women, have diverted attention from considering whether the law is adequate. Just as women's experience of armed conflict was largely unknown prior to the recent studies (so that strategies to address it were necessarily somewhat haphazard in their impact) so it remains impossible to feel confident that the law is adequate without a thorough investigation. Moreover, it is one thing to say that law reform is politically unattainable without investigating the possibilities.

IHL has undergone a remarkable renaissance in the context of international criminal law, including crimes of sexual violence against women. The two *ad hoc* criminal Tribunals have adopted creative new interpretations of existing legal provisions so as to cover acts of sexual violence against women during times of armed conflict. There is scope for other provisions of IHL of particular relevance to women to be enforced as for example those that criminalize indiscriminate bombardment of the civilian population, of whom women make up a large percentage.⁹² However, for the considerable variety of ways in which women are affected by armed conflict, there are no provisions of IHL to be reinterpreted and enforced. This silence on so many of the wartime experiences of women poses a continuing challenge to IHL to fulfill its humanitarian mandate.

92. See *Prosecutor v. Djukic*, Indictment, Case No. IT-96-20 and *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment (3 March 2000) and see generally, W. Fenrick, 'Attacking the Enemy Civilian as a Punishable Offence', 72 *Duke JCIL* (1997) p. 539.

