

Women, human rights and international humanitarian law

by **Judith Gardam**

The development in the last 50 years of the principles that comprise human rights law has had a major impact on international humanitarian law and indeed on international law generally.¹ In more recent years, the movement for recognition of the equal rights of women has been exerting its own influence on human rights law and to some effect.² In 1979, for example, the international community adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which 155 States are now party. Consideration is currently being given to the adoption of an Optional Protocol that will allow for individual and group complaints to be brought before the CEDAW Committee. Governmental and non-governmental organizations have increasingly focused on women's human rights. As a result, a wide range of studies, reports and recommendations on various aspects of the issue is available. The topic of women is thus firmly established on the international human rights agenda.

So much human suffering in today's world occurs, however, in situations of armed conflict, where to a large extent human rights are in

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¹ See, for example, A. H. Robertson, "Humanitarian law and human rights", in C. Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, p. 793.

² For an overview of the achievements of the last decade, see C. Chinkin, "Feminist interventions in international law: Reflections on the past and strategies for the future", *Adelaide Law Review*, Vol. 19, 1997, pp. 15-18.

abeyance, leaving individuals to rely solely on the protection offered by international humanitarian law.³ And women are major victims in these situations.⁴ There is now evidence, moreover, that women experience conflict in a different way to men,⁵ a phenomenon that is confirmed by those working in the field. This distinctive experience, although its effects differ widely across cultures depending upon the role of women in each society, is related to the particular vulnerability of this group when armed conflict breaks out. War exacerbates the inequalities that exist in different forms and to varying degrees in all societies, and women make up 70 per cent of the world's population living in poverty.⁶ They are, moreover, generally disadvantaged in terms of education and are considerably less mobile because of their traditional role in caring for others.⁷ Perhaps most significantly, women are generally excluded from access to power structures and participation in decision-making with regard to armed conflict. They are therefore unable to draw attention to the particular difficulties they experience in conflict situations and, moreover, are powerless to recommend any preventive action.

Against that background, the present article considers the extent to which the focus on women's human rights and the advances made in the protection of women under human rights law has had an impact on international humanitarian law. As will become apparent, this impact can be seen primarily in developments regarding the criminalization and punishment of sexual violence against women in armed conflicts. Broader consideration has yet to be given to the question of women, armed conflict and humanitarian law.

³ For a discussion of the situation in relation to human rights in times of armed conflict, see Y. Dinstein, "Human rights in armed conflict: International humanitarian law", in T. Meron (ed.), *Human rights in international law: Legal and policy issues*, Clarendon Press, Oxford, p. 345.

⁴ See the statement by Renée Guisan, head of the ICRC delegation to the Fourth World Conference on Women, Beijing, and Article 136 of the Beijing Platform for Action in *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).

⁵ *Ibid.* and see Harvard Study Team, *Health and welfare in Iraq after the Gulf Crisis*, Chapter 9, 1991.

⁶ The feminization of poverty was a key area of concern at the Beijing Conference, see Beijing Platform for Action, paras. 47 and 48, *supra* (note 4).

⁷ See ICRC (ed.), *Women and war*, 1995.

The provisions of the law of armed conflict relating to women at the time of the adoption of the Universal Declaration of Human Rights

There were occasional references to the protection of women in some of the earliest documents of the law of armed conflict. For example, Article XLVII of the Lieber Code punished those responsible for the rape of inhabitants of a hostile country.⁸ Until recently, however, sexual violence against women was never taken seriously. Rape was not listed as a war crime at Nuremberg, despite the high incidence of sexual violence during the Second World War. Indictments before the Tokyo Tribunal did contain charges of rape and some individuals were convicted for their failure to ensure that subordinates complied with the law. Moreover, the occupying powers included rape as a war crime in the charters of their national courts set up to try offences committed in Germany, although no prosecutions were ever undertaken on this basis.⁹ Generally, however, rape and sexual violence against women were regarded as an inevitable aspect of armed conflict and seldom if ever prosecuted.¹⁰

The four 1949 Geneva Conventions,¹¹ which at the time of their adoption were the major instruments protecting the victims of armed conflict (and with their two 1977 Protocols¹² remain so today), contain some 19 provisions that are specifically relevant to women. The scope of

⁸ See, for example, Article XLIV of the Lieber Code: *Instructions for the government of armies of the United States in the field, General Orders No. 100, April 24, 1863*, reprinted in L. Friedman, *The laws of war: A documentary history*, 1972, p. 158.

⁹ See Control Council Law No. 10 of 1945, *Control Council for Germany, Official Gazette*, 31 January 1946, reprinted in Friedman, *ibid.* p. 908.

¹⁰ See generally C. Chinkin, "Rape and sexual abuse of women in international law", *European Journal of International Law*, 1994, p. 326.

¹¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereafter referred to as the Fourth Geneva Convention), of 12 August 1949. For a description of the system of international humanitarian law in relation to women generally, see M. Tabory, "The status of women in humanitarian law", in Yoram Dinstein (ed.), *International law at a time of perplexity*, 1989, p. 941; and F. Krill, "The protection of women in international humanitarian law", *IRRC*, No. 249, November-December 1985, p. 337.

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

these rules is somewhat limited and many of them are in fact designed to protect children.¹³ Overall, the aim of the Conventions is to provide special protection for pregnant women, nursing mothers and mothers in general and to address the vulnerability of women to sexual violence in times of armed conflict.

Significantly, Article 27(2) of the Fourth Geneva Convention contains the first provision specifically dealing with rape and requires that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”. Although this article constitutes a long overdue recognition that rape is unacceptable in times of armed conflict, the extent and gravity of the practice are not acknowledged since the provision falls outside the system of grave breaches of international humanitarian law (under this system States are obliged to seek out and punish persons responsible for failing to observe certain designated provisions of the Conventions). Article 27(2) has also been criticized on the grounds that, like many of the provisions relating to women, it categorizes rape as an attack on the victim’s honour and thus does not reflect the seriousness of the offence of sexual violence.¹⁴ Apart from the protection afforded under such articles, which is clearly valuable as far as it goes, any indication that the difficulties women experience in armed conflicts might be distinctive and encompass wider issues than their roles as mothers and victims of sexual violence is not discernible in the provisions of the Geneva Conventions.

To what extent were the provisions of the 1977 Protocols relating to women influenced by the human rights movement?

The movement to bring about further improvements in international humanitarian law that culminated in the adoption by States of the 1977 Protocols owed a great deal to developments in the area of human rights. Gerald Draper wrote that progress in the law of armed conflict “had come perilously close to stagnation before the impact of the movement for a regime of human rights was brought to bear”.¹⁵ As early as 1956, the ICRC had completed a set of Draft Rules for the limitation of dangers incurred

¹³ See Articles 50 and 132 of the Fourth Geneva Convention.

¹⁴ See J. Gardam, “Women and the law of armed conflict”, *International and Comparative Law Quarterly*, Vol. 46, 1997, p. 74.

¹⁵ G. I. A. D. Draper, “Human rights and the law of war”, *Virginia Journal of International Law*, Vol. 12, 1972, p. 336.

by the civilian population in time of war. No action was taken on these rules. The question of further revision of the law of armed conflict was shelved by the international community until the work on human rights in peacetime undertaken by the United Nations Commission on Human Rights and the UN General Assembly began to expand logically into concern for human rights in armed conflict. The International Conference on Human Rights held in Tehran in 1968 can be seen as a watershed in this relationship.¹⁶ The final outcome of these initiatives was the adoption of the two 1977 Protocols, which have a distinct human rights flavour. The Protocols merge the respective principles of the so-called law of The Hague and law of Geneva and focus on the protection of civilians.¹⁷

What is the approach of the Protocols to women victims of armed conflict? Does the emphasis on protection that underpinned the negotiations leading up to the adoption of these instruments and is reflected in their final text extend to a recognition of the distinctive difficulties women experience in times of armed conflict?

Overall, the approach to women remains unchanged in the provisions of the Protocols. The focus continues to be on protection for pregnant women and mothers. In the context of sexual violence, Article 76 of Protocol I contains the important comprehensive provision specifically protecting women against rape, although this practice is still not designated as a grave breach. There is no recognition, either in the *travaux préparatoires* or in the provisions themselves, of the other distinctive problems women face in armed conflicts.

Women and human rights

It would be misleading to represent the existing body of human rights law as a satisfactory regime from the perspective of women. Commentators have convincingly demonstrated the limitations of this law, which does not adequately take into account the reality of women's experience of the world.¹⁸ However, it is in the context of human rights law rather

¹⁶ See Resolution XXIII, "Human rights in armed conflict", adopted by the International Conference on Human Rights, Tehran, 12 May 1968.

¹⁷ See generally, J. G. Gardam, *Non-combatant immunity as a norm of international humanitarian law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993.

¹⁸ See, for example, C. Bunch, "Women's rights as human rights: Towards a revision of human rights", *Human Rights Quarterly*, Vol. 12, 1990, p. 486; and H. Charlesworth, "What are women's human rights?", in R. Cook (eds), *Human rights of women: National and international perspectives*, 1994, p. 58.

than humanitarian law that more progress has been made in recognizing and attempting to meet the as yet unaddressed needs of women.¹⁹

This attention to women's human rights has had substantial implications for international humanitarian law. Indeed, the fact that violence against women and strategies to contain it have been the focus of much of the work of human rights agencies concerned with this group has led to a consideration of the issue in connection with armed conflicts, where so much of the violence against women occurs. What have been some of the results of this work?

The 1993 Vienna Declaration and Programme of Action, adopted by the United Nations World Conference on Human Rights, confirmed that "violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of human rights and humanitarian law" and that they require a "particularly effective response".²⁰ The Programme of Action also stressed that "the equal status of women and the human rights of women" should be "integrated into the mainstream of United Nations system-wide activity" and "form an integral part of United Nations human rights activities."²¹

This growing movement to address the problem saw the adoption by the General Assembly in December 1993 of the Declaration on the Elimination of Violence Against Women. The Declaration expressly recognizes that women in situations of armed conflict are especially vulnerable to violence.²²

Another important development in the context of women and human rights during armed conflicts has been the appointment of Special Rapporteurs with mandates covering certain aspects of women's experience of armed conflict. In 1994 the United Nations Commission on Human Rights appointed Radhika Coomaraswamy as the Special Rapporteur on

¹⁹ See Chinkin, *supra* (note 2).

²⁰ See Article 38 of the *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/24 (Part 1), 13 October 1993.

²¹ For a description of what amounts to "mainstreaming", see UNHCR, *Policy on refugee women*, and UNHCR, *Guidelines on the protection of refugee women*, 1991, pp. 5-7. For an account of the initiatives taken to achieve this end, see generally A. Gallagher, "Ending the marginalization: Strategies for incorporating women into the United Nations human rights system", *Human Rights Quarterly*, Vol. 19, 1997, p. 283.

²² *Declaration on the Elimination of Violence against Women*, UN GA/Res/48/104, 20 December 1993, preamble, para. 7 and Art. 2.

violence against women, with a mandate covering situations of armed conflict. In January 1998 the Special Rapporteur submitted her report on the subject, in which she recommended, in the context of international wars, that the Geneva Conventions be re-examined and re-evaluated so as to “incorporate developing norms against women during armed conflict”.²³ Additionally, in 1995 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Linda Chavez as Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict.²⁴

The Fourth UN World Conference on Women, held in Beijing in 1995, recognized the seriousness of armed conflict and its impact on the lives of women. The Beijing Declaration referred to the determination of the participating States to “ensure respect for international law, including humanitarian law, in order to protect women and girls in particular”. The Conference’s Platform for Action identified women and armed conflict as one of the twelve critical areas of concern to be addressed by Member States, the international community and civil society. A remedial strategy identified in the Platform was to “increase the participation of women in conflict resolution at decision-making levels and protect women living in situations of armed and other conflicts or under foreign domination”.

The process of identifying women’s particular difficulties and demonstrating the failure of the law to acknowledge them is thus considerably more advanced within human rights bodies than within organizations focusing solely on armed conflict. Of course action plans, recommendations and proposals need to be implemented if they are to be of lasting value. Progress is slow and at times disheartening.²⁵ There are, however, positive signs. Of particular significance in this context is the very effective work at the grass roots level of the UN High Commissioner for Refugees in relation to refugee women.²⁶

²³ See R. Coomaraswamy, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. E/CN.4/1998/54.

²⁴ See *Preliminary Report of the Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict*, UN Doc. E/CN.4/Sub.2/1996/26, 16 July 1996.

²⁵ See Chinkin, *supra* (note 2).

²⁶ See UNHCR, *Policy on refugee women*, *supra* (note 21) and UNHCR, *Sexual violence against refugees: Guidelines on prevention and response*, 1995.

All these efforts, whilst groundbreaking in nature, have focused almost exclusively on sexual violence.²⁷ The broader context of the problem has been largely ignored. However, an exception to this limited view is evident, for example, in the work of the Economic and Social Council, particularly in relation to Palestinian women and children in occupied territories.²⁸

The impact on international humanitarian law of developments in women's human rights

There is no doubt that the work of human rights organizations has had a considerable impact on the approach taken to the protection of women in times of armed conflict. A change of emphasis over recent years can be discerned in the work of the ICRC in this context. The protection of women victims of conflict has always been part of the ICRC's mandate. Traditionally, however, women have been subsumed under the general category of civilians or under the separate category of "women and children". This has occurred despite the fact that the needs of these various categories of victims are not identical.

Over the years, the ICRC has been active in attempts to mitigate the horrors of conflict for women. For example, efforts were made during the Second World War to ensure the lawful treatment of women prisoners of war.²⁹ In the post-war period as well, from time to time the ICRC made efforts to ensure that women were treated humanely in various conflict situations.³⁰ However, in the context of sexual violence — the most obvious way in which women experience conflict — the silence was deafening, despite the appalling reality of this practice in all armed struggles.

²⁷ See, for example, Human Rights Watch (Helsinki Watch), *War crimes in Bosnia-Herzegovina*, 1993, pp. 18, 163-186; *Final report of the Commission of experts established pursuant to Security Council Resolution 780*, UN Doc. S/1994/674 (considering the issue of rape and sexual assault at paras. 58-60 and 232-253); Human Rights Watch, *Global report on women's human rights*, 1995 (at paras. 100-138 in relation to sexual assault of refugees and displaced women); Human Rights Watch, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, 1996.

²⁸ See, for example, E/RES/1991/19 of 30 May 1991; E/RES/1992/16 of 30 July 1992; E/RES/1993/15 of 27 July 1993; and E/RES/1995/30 of 25 July 1995. See also ECOSOC resolutions dealing with women and children in Namibia, and women and children living under apartheid.

²⁹ See Krill, *supra* (note 11), p. 356.

³⁰ *Ibid.*, p. 357.

The invisibility of women and sexual violence rapidly came to an end with the events that took place during the armed conflict in the former Yugoslavia. Although sexual violence against women had been on the agenda of human rights bodies for some years, it was this conflict that galvanized the international community into action and led to the most significant development of humanitarian law attributable to the growing emphasis on women's human rights: the inclusion of rape within the system of grave breaches.

In 1993, as a response to the findings of widespread violations of international humanitarian law in the former Yugoslavia, including rape and many other forms of sexual violence against women, the Security Council set up the International Criminal Tribunal for the former Yugoslavia (ICTY) to prosecute persons responsible for such acts. One of the issues to be resolved was the place of rape within the Statute of the ICTY. In 1992, in the context of what constituted a grave breach of international humanitarian law, the ICRC had declared that the phrase common to the Geneva Conventions and their Protocols, "wilfully causing great suffering or serious injury to body or health", obviously covered not only rape but also any other attack on a woman's dignity.³¹ This added weight to the argument that prevailed with the Commission of Experts set up by the Security Council to consider the question of the establishment of the ICTY, namely that rape and other sexual assaults, although not specifically designated as grave breaches in the Conventions and Protocols, constituted "torture or inhumane treatment" and acts that "wilfully caus[ed] great suffering or serious injury to body or health" and were thus punishable as grave breaches under the Conventions.³²

In the Statute of the ICTY, however, rape is only specifically punishable as a crime against humanity and, to constitute such a crime, it must be directed against the civilian population as a whole: for it to occur on an individual basis is not sufficient. The practice of the Office of the Prosecutor has nevertheless been to charge defendants with sexual violence as a war crime and a grave breach.³³

³¹ ICRC, Update on Aide-Memoire of 3 December 1992. This was a view shared by a number of States, see T. Meron, "Rape as a crime under international humanitarian law", *American Journal of International Law*, Vol. 87, 1993, p. 427.

³² See *Final Report of the Commission of experts established pursuant to Security Council Resolution 780*, *supra*, (note 27).

³³ See R. Coomaraswamy, *supra* (note 23).

Although the precedential value of the ICTY is limited both by its origin as a Security Council measure and by its geographical scope, the normative effect of these initiatives is much more widespread. Consequently, it will now be difficult to maintain that rape and various forms of sexual violence against women committed in international armed conflicts are not grave breaches of treaty rules. This is a major development of humanitarian law and it can be attributed to the growing recognition that women's human rights call for the prosecution of crimes of sexual violence committed in armed conflicts.

Doubts have nevertheless been expressed, in the context of the Rwandan conflict, as to whether the Yugoslav experience indicates a lasting reversal of the long tradition of silence and inaction in relation to sexual violence against women in armed conflicts. The Special Rapporteur on Violence Against Women, after hearing of the levels of sexual violence in the Rwandan conflict was, in her words, "absolutely appalled that the first indictment on the grounds of sexual violence at the International Tribunal for Rwanda (ICTR) was issued only in August 1997, and then only after heavy international pressure from women's groups".³⁴

Despite these reservations, the criminalization of sexual violence against women in internal armed conflicts by the Statute of the ICTR is an important development, and owes much to the work of human rights activists and commentators. International humanitarian law has traditionally distinguished between international and internal armed conflicts, concentrating on the former. However, the redrawing of the boundaries of human rights law has been integral to the implementation of women's human rights and the influence of this approach is now being felt in humanitarian law. Any consideration of violence against women naturally encompasses international and internal armed conflicts without distinction (an increasingly unreal division in any context). The Statute of the ICTR reflects this view by providing both that rape is punishable as a crime against humanity and that the practice falls within the Tribunal's jurisdiction since, in common with enforced prostitution and indecent assault, it is specifically designated as a crime under Article 3 common to the Geneva Conventions. Breaches of Article 3, the so-called "mini code" for internal armed conflicts, have traditionally not been regarded as constituting war crimes.

³⁴ *Ibid.*

Further developments in humanitarian law relating to the enforcement of the provisions protecting women against sexual violence have their genesis in the Yugoslav conflict and the practice of the ICTY. It has long been recognized in the context of women's human rights that, to be effective, any enforcement regime for prohibitions on sexual violence in armed conflicts must incorporate procedural reforms. This view is slowly gaining broader acceptance within the international community and some progress has been made in taking into account the particular concerns of women in the prosecution of sexual offences. Such matters as the anonymity of witnesses and victims in trials for sexual assault and provision for their support and counselling have been addressed by the ICTY.³⁵ However, these changes have not been readily accepted. For example, there is a perceived conflict between the demands of a fair trial and the protection of women as victims and witnesses.³⁶ The two are not necessarily inconsistent: what is required is an appropriate balance between them.³⁷ Recognition has also been given to the importance of equal gender distribution in the composition of enforcement tribunals and their support staff.

The scrutiny by human rights groups of sexual violence against women in armed conflicts has translated into a new perception that such acts must be addressed by mainstream bodies dealing with the enforcement of international humanitarian law. The inclusion, within the definition of war crimes and as serious violations of Article 3 common to the Geneva Conventions, of several forms of sexual violence against women was considered during the negotiations of the Statute for the International Criminal Court. Other issues of concern to women in relation to the enforcement process in general were also discussed in this context, such as the gender balance of the Court, protection for witnesses and victims, and the investigation of crimes of sexual violence. The Commission on the Status of Women, at its March 1988 meeting, called on States to support these initiatives in relation to the future International Criminal Court.

³⁵ See *Prosecutor v. Tadic, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses*, UN Doc. IT-94-1-T (10 August 1995). See also C. Chinkin, "Due process and witness anonymity", *American Journal of International Law*, Vol. 91, 1997, p. 75.

³⁶ See Monroe Leigh, "The Yugoslav Tribunal: Use of unnamed witnesses against accused", *American Journal of International Law*, Vol. 90, 1996, p. 235.

³⁷ Chinkin, *supra* (note 35), pp. 78-79.

The ICRC has given increasing recognition to the fact that the situation of women in armed conflicts poses distinctive challenges for humanitarian law. In 1993 the Final Declaration of the International Conference for the Protection of War Victims expressed alarm at "the marked increase in acts of sexual violence directed notably against women and children" and reiterated that "such acts constitute[d] grave breaches of international humanitarian law".³⁸ In 1995 the 26th International Conference of the Red Cross and Red Crescent adopted by consensus a resolution dealing separately with sexual violence against women,³⁹ which condemned this practice, reaffirmed that rape in the conduct of hostilities was a war crime and highlighted the importance of enforcing the relevant provisions and the need to train those involved in such processes. Moreover, there is growing acknowledgement of the broader nature of the problem, which has not previously been apparent in the work of human rights bodies. For example, recent ICRC publications emphasize that armed conflict exacerbates inequalities which already exist in different forms and to varying degrees in all societies.⁴⁰

Conclusion

After years on the fringe of human rights law, the topic of women and human rights is nowadays gaining increasing respect as a separate area of concern within the mainstream of international law. Moreover, although women's human rights are very much in the developmental stage as regards both framework and substance, each passing year sees the further elaboration of their guiding principles. Yet the new concern being paid to women's human rights and the impact, albeit small, that the issue has so far made on humanitarian law have not led to the general acknowledgement that women's human rights warrant a special place within the field of international humanitarian law. This is, however, only a matter of time. Let us hope that such acknowledgement, when it comes, will be accompanied by a reassessment of humanitarian law that takes into account the actual ways in which women experience armed conflict.

³⁸ Final Declaration of the International Conference for the Protection of War Victims, para. I.3, reprinted in *IRRC*, No. 296, September-October 1993, p. 377.

³⁹ Resolution 2(B), reprinted in *IRRC*, No. 310, January-February 1996, p. 63.

⁴⁰ See ICRC, *Women and war*, 1995.