FEMINIST DEBATES ON CIVILIAN WOMEN AND INTERNATIONAL HUMANITARIAN LAW

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International humanitarian law [IHL] provisions address the situation of civilian women caught in armed conflict today, but is this law enough? Feminist commentators have considered this question and have come to differing conclusions. This article considers the resulting debate as to whether female-specific IHL provisions are adequate but underenforced, or inadequate, outdated and in need of revision. One school of thought argues that the main impediment to the protection of female civilians during hostilities is lack of observance of existing IHL. A second school of thought believes that something more fundamental is needed to meet the goal of protecting civilian women during war: revision and reconceptualization of IHL to take into account systematic gender inequality. This article considers the status of this debate within three areas of IHL considered by many to be central legal aspects of the experience of female civilians caught in armed conflict: the general non-discrimination provisions, the specific protection for civilian women against sexual violence and the specific protection of pregnant women and mothers. It concludes that, while there has been a vibrant debate within feminist circles on the adequacy of existing IHL provisions, mainstream action has tended to focus on enforcement. This is unfortunate, as it means that certain insights into the impact of deep gender inequalities on conflict have largely been left unexplored.

Les dispositions du droit international humanitaire [DIH] traitent de la situation de femmes civiles prises de nos jours dans un conflit armé, mais ces lois suffisent-elles? Des commentatrices féministes ont songé à cette question et en sont venues à des conclusions différentes. Cet article porte sur le débat qui en résulte à savoir si les dispositions du DIH spécifiques aux femmes sont adéquates mais pas suffisamment mises en vigueur, ou si elles sont inadéquates, surannées et doivent être révisées. Une école de pensée soutient que l'obstacle principal à la protection de femmes civiles au cours d'hostilités est l'inobservation du DIH existant. Une deuxième école de pensée croit qu'il faut quelque chose de plus fondamental pour atteindre le but de protéger les femmes civiles pendant une guerre : la révision et la reconceptualisation du DIH pour tenir compte de l'inégalité systématique entre les

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sexes. Cet article examine l'état de ce débat dans trois domaines du DIH que plusieurs considèrent être des aspects légaux qui se situent au centre de l'expérience de femmes civiles prises dans un conflit armé : les dispositions générales contre la discrimination, la protection spécifique aux femmes civiles contre la violence sexuelle et la protection spécifique de femmes enceintes et de mères. On conclut que quoiqu'un débat animé ait été tenu au sein de cercles féministes en rapport avec la suffisance des dispositions existantes du DIH, l'action principale a eu tendance à être concentrée sur l'application de la loi. C'est malheureux, car cela signifie que certaines intuitions quant à l'impact sur le conflit d'inégalités profondes entre les sexes demeurent en grande partie inexplorées.

I. INTRODUCTION

International humanitarian law [IHL] provisions address the situation of civilian women caught in armed conflict today, but is this law enough? A number of feminist lawyers have considered this question over the past fifteen years and have come to differing, sometimes starkly opposite, conclusions. This article considers the resulting debate as to whether the female-specific IHL provisions are adequate but underenforced, or inadequate, outdated and in need of revision. For example, one school of thought argues that “[i]f women have to bear so many of the tragic effects of armed conflict, it is not primarily because of any shortcomings in the rules protecting them, but because these rules are all too often not observed.”¹ For the advocates of this approach, which this article will refer to as the “enforcement” school, the main impediment to the protection of female civilians during hostilities is lack of observance of IHL. This view is widely reflected in the work of the United Nations on the issue of women and war today.² For example, Security Council resolution 1325 on women, peace and security calls upon all parties to armed conflict to respect fully IHL as it applies to the rights and protection of women and girls, but does not question the suitability of IHL to addressing these needs.³

A second school of thought believes that this lack of questioning of IHL is a mistake. While proponents of this view agree that it would be helpful to civilian women if IHL was more consistently enforced, they also argue that mostly there

1 Charlotte Lindsey, “Women and War – An Overview” (2000) 839 Int’l Rev. Red Cross 561 at 579 [Lindsey, “Overview”]. This is also the view of the International Committee of the Red Cross: “On the whole, public international law (in particular IHL, human rights law and refugee law) adequately addresses the needs of women in all of these situations. The challenge lies in translating the law into practice by ensuring implementation of and respect for the existing rules.” International Committee of the Red Cross, “Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document” (Geneva: ICRC, 2004) at 9.

2 Judith Gardam, “Women and Armed Conflict: The Response of International Humanitarian Law” in Helen Durham and Tracey Gurd, eds., *Listening to the Silences: Women and War* (Netherlands: Martinus Nijhoff Publishers, 2005) at 114-116 [Gardam, “Response”].

3 Women and peace and security, UN SCOR, 4213th Mtg., UN Doc. S/RES/1325 (2000) at para. 9.

are no provisions of IHL that truly address the female experience, so enforcement is not the main issue.⁴ Thus, something more fundamental is needed to meet the goal of more fully protecting civilian women: reconceptualization and revision of IHL.⁵ They see current IHL as a reflection of masculine assumptions that do not take into account global systematic gender inequality.⁶ This will be referred to as the “revision” school of thought. There are, however, points of agreement: both views express frustration at the lack of action in alleviating women’s suffering during armed conflict, and both acknowledge the diverse horrors suffered by women during and after armed conflict.⁷

This article examines the state of the feminist debate since the mid-1990s within three areas of IHL considered by many to be central legal aspects of the experience of female civilians caught in armed conflict: the general non-discrimination provisions within IHL, the specific protections for civilian women against sexual violence and the specific protection of pregnant women and mothers.⁸ It concludes that, while there has been a vibrant debate within feminist international legal circles on the adequacy of existing IHL provisions, mainstream action has tended to focus on enforcement. This seeming marginalization of feminist calls for reconceptualizing and revising IHL is unfortunate, as it means that the “revision” school’s insights into the impact of deep gender inequalities on conflict have largely been left unexplored. This article argues that a combination of continual scrutiny, better enforcement, further (re)interpretation *and* law reform of IHL are all useful strategies for improving the situation of female civilians in armed conflict.

II. GENERAL NON-DISCRIMINATION PROVISIONS WITHIN IHL

A number of provisions within the *Geneva Conventions* and the *Additional Protocols* state that protected persons are to be treated similarly and without any adverse distinction founded on, among other categories, sex.⁹ This principle of

⁴ Gardam, “Response”, *supra* note 2 at 123.

⁵ For example, UNIFEM has called upon the United Nations 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 peacebuilding.” Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War & Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peacebuilding* (New York: UNIFEM, 2002) at 140.

⁶ Judith G. Gardam and Michelle J. Jarvis, *Women, Armed Conflict and International Law* (Boston: Kluwer Law International, 2001) at 93 [Gardam and Jarvis, *Women*].

⁷ Helen Durham, Review of *Women, Armed Conflict and International Law*, by Judith G. Gardam and Michelle J. Jarvis (2002) 847 *Int’l Rev. Red Cross* 655 at 659 [Durham, “Book Review”].

⁸ These categories of IHL provisions are chosen to be illustrative. Other categories also apply to or have a significant impact upon civilian women, such as rules governing women as civilian internees, general rules on the conduct of hostilities and rules on weapons.

⁹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, 75 UNTS (1950) 31 [entered into force 21 October 1950] at art. 12 [*First Geneva Convention*]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, 75 UNTS (1950) 85 [entered into force 21 October 1950] at art. 12 [*Second Geneva Convention*]; *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, 75 UNTS (1950)

“no adverse distinction” is a central principle within IHL. The notion of “adverse distinction” implies that “while discrimination between persons is prohibited, a distinction may be made to give priority to those in most urgent need of care.”¹⁰ According to the International Committee of the Red Cross [ICRC], these provisions have entered customary international law, such that adverse distinction in the application of international humanitarian law based on sex and other similar criteria is prohibited.¹¹ This rule of customary international law applies in both international and non-international armed conflicts.¹² The “no adverse distinction” provisions are IHL’s equivalent of international human rights law’s principle of non-discrimination.¹³

The “enforcement” school of thought argues that the centrality of the “no adverse distinction” rule is an illustration that IHL is based upon equality of protection.¹⁴ Thus, both female and male civilians are clearly entitled to the same protections under IHL.¹⁵ Under this approach, IHL is not seen to contain any specific structural legal bias that disadvantages women. There is acknowledgement that, for many women, war can mean “violence, fear, loss of loved ones, deprivation of livelihood, sexual violence, abandonment, increased responsibility for family members, detention, displacement, physical injury, and sometimes death.”¹⁶ War can also force women into unfamiliar roles and require them to strengthen existing coping skills or develop new such skills.¹⁷ While many women may suffer specific vulnerabilities during armed conflict, the ICRC has indicated that women should not be seen as a homogenous group,

135 [entered into force 21 October 1950] at art. 16 (art. 16 does not mention sex in the no adverse distinction list, but has a basket clause into which “sex” would fall: “or any other distinction founded on similar criteria”) [*Third Geneva Convention*]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, 75 UNTS (1950) 287 [entered into force 21 October 1950] at art. 27 (again, this list does not include sex, but the list is an open one) [*Fourth Geneva Convention*]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 12 December 1977, 1125 UNTS (1979) 3 at arts. 9 and 75 [*Additional Protocol I*]; and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts*, 12 December 1977, 1125 UNTS (1979) 609 at art. 2 [*Additional Protocol II*].

10 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge: Cambridge University Press, 2005) at 309.

11 The other similar criteria include race, colour, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status: *Ibid.* at 308.

12 *Ibid.*

13 *Ibid.* at 309.

14 Helen Durham, “International Humanitarian Law and the Protection of Women” in Helen Durham and Tracey Gurd, eds., *supra* note 2 at 97 [Durham, “Protection”]. See also International Committee of the Red Cross, *Women and War* (Geneva: ICRC, 2008) at 2: “Women benefit from the general protection afforded by IHL. Along with the rest of the protected population, they must be able to live free from intimidation and abuse.” [ICRC, *Women and War*]

15 Durham, *ibid.* at 97; *Women, Peace and Security: Study Submitted by the Secretary-General Pursuant to Security Council Resolution 1325* (2000) (New York: United Nations, 2002) at para. 119.

16 ICRC, *Women and War*, *supra* note 14 at 2.

17 *Ibid.*

as they experience war in a multitude of ways.¹⁸ Women should not be categorized as helpless victims: "On a daily basis in conflicts around the globe, women demonstrate their resilience by caring for family members and by holding communities together."¹⁹ Thus, one should not jump to the conclusion that women are always the most vulnerable in all armed conflicts²⁰ and therefore to a second conclusion that women always require some form of distinction. An analysis of a given armed conflict may indicate that female and male civilians are subject to differing risks: in one situation, men may be at higher risk for killing, detention or disappearance, while women may be targeted for sexual violence.²¹ This may not hold true for another situation. This school of thought does acknowledge, however, that there are circumstances where preferential or beneficial distinction in favour of a group (such as women) is permissible and needed.²²

The "revision" school of thought posits that, while the "no adverse distinction" provisions may apply to all civilians and, in theory, provide equal protections to women and men, this is not the case in reality: "[a]lthough IHL is based on a system of formal equality, the limits of such an approach for achieving substantive equality for women are well documented."²³ The absence of gender bias in the letter of the law cannot guarantee that the application of the discrimination principle protects women's interests *de facto* in the same manner or to the same extent that it protects men's interests: "[a] norm can be formally gender-neutral but gendered in conception and gender-biased in practice."²⁴ Formal equality does not work in this case, according to Judith Gardam and Michelle Jarvis, because the norm on which this equality is based is not neutral – it is masculine and therefore inherently discriminatory.²⁵ This masculine norm operates on a false assumption, "namely, that apart from their role as mothers and in the context of sexual violence, women not only share the same experience of armed conflict as other members of the population but are able to avail themselves equally of the existing provisions offered by IHL."²⁶

Gardam and Jarvis argue that IHL does not recognize that armed conflict has fundamentally different impacts upon civilian men and women and that these differing impacts stem from systematic gender inequality at the heart of virtually all societies.²⁷ Without this recognition, IHL reinforces and exacerbates endemic discrimination against women by failing to address their actual needs.²⁸ "In a world where women are not equals of men ... a general category of rules that

18 *Ibid.*

19 *Ibid.*

20 *Ibid.* at 3: "Women are often portrayed as helpless victims and as a particularly vulnerable group in situations of armed conflict. However, women are not vulnerable as such."

21 *Ibid.*

22 Durham, "Protection", *supra* note 14 at 97-98.

23 Gardam and Jarvis, *supra* note 6 at 93.

24 Aaron Xavier Fellmeth, "Questioning Civilian Immunity" (2008) 43 Tex. Int'l L.J. 453 at 477.

25 Gardam and Jarvis, *supra* note 6 at 93.

26 Gardam, "Response", *supra* note 2 at 120.

27 Gardam and Jarvis, *supra* note 6 at 93 and 97.

28 *Ibid.* at 94.

is not inclusive of the reality for women cannot respond to their situation.”²⁹ Thus, apart from certain special protections - for example, as pregnant women, mothers of young children and women at risk of sexual violence³⁰ - women are largely invisible to IHL.³¹ This group argues that IHL must be reexamined in light of systematic inequality, and that this examination may require that IHL be reinterpreted, expanded or rewritten to better address the needs of female civilians.³²

The “enforcement” school of thought responds to this criticism in two ways. First, it protests that the “revision” school expects too much of IHL. The “enforcement” proponents argue that IHL, as *lex specialis*, is extremely restricted in its aims, focusing on survival for as many people as possible during the most extreme circumstances a society can experience.³³ Within this very limited and pragmatic approach, “international humanitarian law makes no claim to deal with the basis of social structure in general.”³⁴ This narrow mandate “accounts for the successes of international humanitarian law (and there are many) and lies at the heart of this whole legal regime.”³⁵ Thus, there is simply no room in IHL for social analysis of systematic gender inequality: “to do so would draw it into a quagmire of moral and ethical argument which would render its rules useless.”³⁶ However, the “limitations of international humanitarian law and the need for it to avoid inherently questioning a society are complex and require further examination and debate.”³⁷

Second, the “enforcement” school of thought also counters that IHL is not solely focused on formal equality, to the exclusion of substantive equality. According to Françoise Krill, “equality could easily be transformed into injustice if it were to be applied to situations which are inherently unequal and without taking into account circumstances relating to the state of health, the age and the sex of protected persons.”³⁸ A similar observation was made in the ICRC Commentary on the *Fourth Geneva Convention*.³⁹ These proponents point to the recognition of the special needs of pregnant women, mothers of young children and women at risk of sexual violence as clear examples of where IHL has adjusted the law to ensure a practical response to the needs of different individuals.⁴⁰

IHL’s “no adverse distinction” provisions are placed within a much wider context by both schools of thought. The “enforcement” school sees these provisions

29 *Ibid.* at 93.

30 These special protections are explored *infra*.

31 Gardam and Jarvis, *supra* note 6 at 94.

32 *Ibid.* at 254-263.

33 Durham, “Protection”, *supra* note 14 at 97.

34 Durham, “Book Review”, *supra* note 7 at 657.

35 *Ibid.*

36 Durham, “Protection”, *supra* note 14 at 97; Durham, “Book Review”, *supra* note 7 at 658.

37 Durham, “Book Review”, *supra* note 7 at 658.

38 Françoise Krill, “The Protection of Women in International Humanitarian Law” (1985) 249 *Int’l Rev. Red Cross* 337 at 339.

39 Jean S. Pictet, ed., *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Vol. IV* (Geneva: International Committee of the Red Cross, 1958) at 206.

40 Durham, “Protection”, *supra* note 14 at 99.

as of central importance for the protection of female civilians within IHL. The “revision” school questions whether they can be considered central, given that they are based upon the faulty assumption that similarity in treatment results in equality of experience as between men and women. This latter school of thought argues that this assumption does not take into account that women’s experience is largely more oppressed than that of men’s, as a result of pervasive, global gender-based discrimination, and that IHL must and can take this into account. The two schools of thought therefore have radically different starting points.

The approach of each school also raises questions that have not been adequately tackled, in this author’s view. The “enforcement” school’s argument that the narrow mandate of IHL excludes the ability to take into account systematic gender inequality raises two questions: first, would focusing on women as societally unequal within that narrow mandate actually undermine rather than enhance the law’s goal of improving the chances of survival of armed conflict? It appears that the answer is “no,” insofar as the type of analysis the “revision” school of thought seems to be calling for is a wider, deeper and more integrated version the ICRC’s analysis of vulnerabilities. This vulnerabilities analysis has already proven to be useful in identifying the needs of many female civilians in war, and it does not follow that an expanded analysis would do the opposite. Second, the “enforcement” school of thought does not sufficiently explain why the integration of social analysis of endemic discrimination would draw IHL “into a quagmire of moral and ethical argument which would render its rules useless.”⁴¹ The fear appears to be that bringing feminist social analysis into IHL would open IHL rules up to dismissal by those who are expected to apply them because the rules themselves would question underlying beliefs of those carrying out the armed conflict. However, it is not clear how this concern differs from the concern that combatants will not follow IHL rules for other reasons, or why the “quagmire” could not be adequately overcome by an enhanced vulnerabilities analysis.

Similarly, the “revision” school of thought has not drawn out as clearly as it could have the aspects of truth to the “quagmire.” Bringing a feminist analysis of endemic discrimination into IHL will only be able to correct IHL as much as a similar analysis is able to correct international law more generally.⁴² Liesbeth Lijnzaad has elaborated on the dilemma for IHL. She points out that “armed conflict tends to aggravate and magnify pre-existing inequalities in society” and “[c]onsequently, if in society the legal protection of women is gendered and thus insufficient, it is to a certain extent not surprising that the situation of women in armed conflict will be worrying.”⁴³ She concludes that “[i]t would be, after all, unrealistic to expect the protection during armed conflict to be fully taking into account gender issues when this has not been realized in society even during

41 *Ibid.* at 97; Durham, “Book Review”, *supra* note 7 at 658.

42 This analysis is, indeed, needed and Charlesworth and Chinkin have begun it: Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000).

43 Liesbeth Lijnzaad, Book Review of *Women, Armed Conflict and International Law* by Judith G. Gardam and Michelle J. Jarvis (2005) *Nethl. Int’l L. Rev.* 496 at 500.

peace.”⁴⁴ Having said this, Gardam in particular does recognize that the flaws that she identifies within IHL are reflective of, and reflected by, flaws within international law more generally, especially international human rights law.⁴⁵ However, she feels that IHL is even more deficient.⁴⁶

Despite this discussion of dramatically differing feminist responses to the general “no adverse distinction” provisions of IHL, there does appear to be common ground. This common ground is more evident within the “enforcement” and “revision” discussions of how IHL addresses civilian women at risk of sexual violence during conflict and the needs of pregnant women and women with young children. Each of these discussions issues is explored in turn.

III. SPECIFIC PROTECTIONS WITHIN IHL FOR CIVILIAN WOMEN AGAINST SEXUAL VIOLENCE

IHL contains few express references to sexual violence committed during armed conflict. Article 27 of the *Fourth Geneva Convention* states that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁴⁷ Article 75 of *Additional Protocol I* prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.”⁴⁸ Article 76 states that “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”⁴⁹ Similarly, *Additional Protocol II* adopts language prohibiting, with respect to non-international armed conflicts, “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”⁵⁰

The “revision” school of thought has several serious concerns about the way in which IHL addresses sexual violence. The first concern relates to the wording and tenor of certain of the articles covering sexual violence in terms of honour or dignity, rather than in terms of the severe physical and psychological impact sexual violence has on an individual (male or female). This, Gardam and Jarvis argue, is because these articles were constituted “on the basis of certain assumed sexual attributes [of women], the characterizing features of which are chastity and modesty.”⁵¹ In agreement, Bennouna notes that the Commentary to the *Fourth*

44 *Ibid.*

45 Judith Gardam, “Women and the Law of Armed Conflict: Why the Silence?” (1997) 46 I.C.L.Q. 55 [Gardam, “Silence?”].

46 *Ibid.* While one response might be to supplement IHL with international human rights law, Gardam also argues that international human rights law has limited ability to overcome the gaps in IHL: Gardam, “Response”, *supra* note 2 at 122.

47 *Fourth Geneva Convention*, *supra* note 9 at art. 27.

48 *Additional Protocol I*, *supra* note 9 at art. 75. This provision was incorporated into the crimes listed in the *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, UNSCOR 49th sess., 3453rd mtg., UN Doc. S/Res/955 (1994) at art. 4(e).

49 *Ibid.* at art. 76.

50 *Additional Protocol II*, *supra* note 9 at art. 4.

51 Gardam and Jarvis, *supra* note 6 at 97. See also Catherine N. Niarchos, “Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia” (1995) 17 Hum.

Geneva Convention takes a somewhat enlightened approach to honour, defining it as a moral and social quality invested in individuals, but that this approach “did not supersede the discriminatory social norms at the time of drafting” and grounded the rights of women to maintain bodily integrity in now “outdated notions of chastity and virtue.”⁵² Rhonda Copelon argues that the conceptualization of sexual violence as an attack on honour is problematic because it “implies the loss of station or respect” and “reinforces the social view, internalized by women, that the raped woman is dishonorable.”⁵³ She also felt that, “while the concept of dignity potentially embraces more profound concerns, standing alone it obfuscates the fact that rape is fundamentally violence against women – violence against her body, autonomy, integrity, security, and self-esteem as well as her standing in the community.”⁵⁴ The words of IHL do not fully capture the harm done to victims of sexual violence, and they do not indicate that sexual violence “is a crime of the gravest dimension.”⁵⁵ Similarly, Kelly Askin decries the use of the terms “honour” and “dignity” as grossly mischaracterizing the offence, diminishing the harm, perpetrating detrimental stereotypes and concealing the nature of the crime.⁵⁶ Hilary Charlesworth and Christine Chinkin are troubled that, by “designating rape as a crime against ‘honour’ rather than one of violence, the provision [in the *Fourth Geneva Convention*] presents women as male and family property.”⁵⁷

This view is countered by the “enforcement” school, particularly by Charlotte Lindsey and the ICRC. Lindsey states: “In recent years, some writers have voiced concern about the use of the word “honour” in relation to sexual violence, in that it fails to recognize the brutal nature of rape and uses instead a “value” term to define the interest to be protected rather than the woman herself, and for embodying the notion of women as property.”⁵⁸ She continues, the “honour – a term which is also used in other articles of the Geneva Conventions and not only in those pertaining to women – ...[is] a code by which many men and women are raised, define and lead their lives” and therefore “the concept of honour is much more complex than merely a “value” term.”⁵⁹ Therefore, “honour” may, in a given society, indeed mean exactly what the commentators above argue it

Rts. Q. 671; and Judith Gardam, “Women, Human Rights and International Humanitarian Law” (1998) 324 *Int’l Rev. Red Cross* 421.

52 Karima Bennouna, “Do We Need New International Law to Protect Women in Armed Conflict?” (2006-2007) 38 *Case W. Res. J. Int’l L.* 363 at 379. Gardam and Charlesworth recognize this conception of honour in the Fourth Geneva Convention, but argue that it is men’s honour that has the most complex understanding in IHL: Judith Gardam and Hilary Charlesworth, “Protecting Women in Armed Conflict” (2000) 22 *Hum. Rts. Q.* 148 at 159.

53 Rhonda Copelon, “Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law” (1994) 5 *Hastings Women’s L. J.* 243 at 249.

54 *Ibid.*

55 *Ibid.* at 249.

56 Kelly D. Askin, “Women and International Humanitarian Law” in Kelly D. Askin and Doreen Koenig, eds., *Women and International Human Rights Law, Vol. 1* (New York: Transnational Publishers, Inc., 1999) at 55 [Askin, *IHL*].

57 Charlesworth and Chinkin, *supra* note 42 at 314.

58 Lindsey, “Overview”, *supra* note 1 at 576.

59 *Ibid.*

should not: "In many societies the concept of womanhood is embodied by a woman's purity and chastity if she is married or by her monogamous relationship with her husband if she is married."⁶⁰ In these circumstances, the ICRC points out that the "honour" of women may be targeted during armed conflict as a means of attacking the enemy, and thus rape may be considered as dishonouring the victim, her family and community.⁶¹ The ICRC does recognize, however, that it is the perpetrator of sexual violence who is dishonoured, rather than the victim or her family.⁶² Lindsey admits that the concerns expressed by those associated with the "revision" school of thought are valid to a certain extent because of IHL's archaic language, but argues that, even so, honour is part of a binding legal norm protecting civilian women that is still of resonance today.⁶³

The second concern of the "revision" school of thought is also terminological: the provisions relating directly to women focus on their protection, as opposed to explicitly prohibiting listed offences. Charlesworth, Chinkin and Gardam argue that this language creates a protector/protected dichotomy, which reinforces gendered assumptions of men as fighters and women as victims who must be protected by fighters.⁶⁴ This then obscures the issue of whether sexual violence is prohibited. Quéniwet counters with three points. First, she strongly argues that the word "protection" must be interpreted as encompassing within IHL both prohibition and prevention, and that this is consistent with other approaches to the word in international law.⁶⁵ Second, as the aim of the *Geneva Conventions* and *Additional Protocols* is to offer protection to certain categories of persons, then the relevant provisions "must be understood as offering women an unconditional protection from rape, i.e., rape is prohibited via the protection formula."⁶⁶ Third, article 75 of *Additional Protocol I* and article 4 of *Additional Protocol II* explicitly prohibit certain forms of sexual violence and this explicit proscription must be considered when interpreting article 27 of the *Fourth Geneva Convention*.⁶⁷ Durham, Askin and others agree that the protection language translates into a prohibition of sexual violence during international and non-international armed conflict.⁶⁸ Here it seems that both schools of thought are

60 International Committee of the Red Cross, *Women Facing War* (Geneva: ICRC, 2001) at 55.

61 *Ibid.* at 55-56.

62 *Ibid.* at 64.

63 Lindsey, "Overview" *supra* note 1 at 576-577; Charlotte Lindsey, "The Impact of Armed Conflict on Women" in Durham and Gurd, *supra* note 2 at 33 [Lindsey, "Impact"].

64 Charlesworth and Chinkin, *supra* note 42 at 314; Judith Gardam, "Gender and Non-Combatant Immunity" (1993) 3 *Transnat'l L. & Contemp. Probs.* 345 at 358, on the protector/protected relationship [Gardam, "Non-Combatant"]; Gardam, "Silence?", *supra* note 45 at 57; Helen M. Kinsella, "Securing the Civilian: Sex and Gender in the Laws of War" in Michael Barnett and Raymond Duvall, eds., *Power in Global Governance* (Cambridge: Cambridge University Press, 2004) at 255.

65 Noëlle N.R. Quéniwet, *Sexual Offenses in Armed Conflict & International Law* (Ardsey, New York: Transnational Publishers, Inc., 2005) at 87-91.

66 *Ibid.* at 93.

67 *Ibid.* at 94 (presumably this would include art. 76 of *Additional Protocol I*).

68 Durham, "Protection", *supra* note 14 at 98; Askin, *IHL*, *supra* note 55 at 55 (Askin notes that the prohibition is "primitively characterized").

in agreement: despite the use of protection language, IHL does prohibit sexual violence. However, there is a divergence insofar as, to those in the “revision” school, the issue is not whether rape is technically a crime prohibited in war, but whether sexual violence is properly understood as an extremely serious crime.⁶⁹

The third concern of the “revision” school of thought is the lack of breadth of the IHL provisions. Generally, the concern is that women and girls suffer many kinds of sexual violence during armed conflict and the few references within IHL to rape and enforced prostitution do not capture, and therefore name, this diversity of crimes. Initially, this concern was expressed through arguments for rape and other forms of sexual violence to be recognized as grave breaches.⁷⁰ However, this concern has diminished over time as the ICRC recognized that the grave breach of “wilfully causing great suffering or serious injury to body or health” found in article 147 of the *Fourth Geneva Convention* covers rape⁷¹ and the International Criminal Tribunal for the Former Yugoslavia also recognized that sexual violence can amount to a grave breach.⁷² Thus, the concern shifted to a desire for a more fulsome recognition of different kinds of sexual violence. For example, while the *Rome Statute of the International Criminal Court* includes the war crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other comparable forms of sexual violence⁷³ Askin has noted other acts that include an aspect of sexual violence that have yet to be directly identified as war crimes: forced nudity, sexual mutilation, forced marriage and forced abortion.⁷⁴ It is also important to recognize that a fulsome listing of sexual violence war crimes does not necessarily capture non-sexual gender-based war crimes, or war crimes with both sexual and non-sexual aspects.⁷⁵

There is, however, a meeting of minds between the two schools of thought with respect to the expansion of IHL’s understanding of war crimes. Both schools of thought welcome the fact that the limited express references to sexual violence within IHL treaties have been supplemented over the past fifteen years by the Statutes and judgments of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the International

69 Copelon, *supra* note 53 at 248–249.

70 See e.g. *ibid.* at 250 and Gardam and Jarvis, *Women*, *supra* note 6 at 74.

71 ICRC Aide-Mémoire (3 Dec. 1992) cited in Theodor Meron, “Rape as a Crime Under International Humanitarian Law” (1993) 87 A.J.I.L. 424 at n. 20.

72 *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Judgment (10 Dec. 1998) at para. 172 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Furundžija*].

73 *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, 37 ILM 1002 (1998) [entered into force 1 July 2002] at art. 8(2)(b) (xxii) and 8(2)(e) (vi).

74 Kelly D. Askin, “The Jurisprudence of the International War Crimes Tribunals: Securing Gender Justice for Some Survivors” in Durham and Gurd, *supra* note 2 at 147–151 [Askin, “Jurisprudence”].

75 One such example could be the crime of forced marriage, in which individuals are assigned as “spouses” without consent and are expected to undertake sex on demand, household chores and other forced labour. While recognized as a crime against humanity by the Special Court for Sierra Leone in *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-04-15-T, Judgment (2 Mar. 2009) at paras. 1465–1473 (Special Court for Sierra Leone, Trial Chamber) [*Sesay*], forced marriage could conceivably also be identified as a war crime.

al Criminal Court.⁷⁶ Even so, de Londras points out, and the advocates of the “revision” school would likely agree, that these advances are only “a partial and distinctly positivistic success” that have not always translated into investigations, prosecutions or convictions.⁷⁷

IV. SPECIFIC PROTECTION OF PREGNANT WOMEN AND MOTHERS OF YOUNG CHILDREN

Another area where the two schools of thought adopt differing points of view is in respect to IHL’s provisions regarding civilian pregnant women and mothers of young children. Article 38 of the *Fourth Geneva Convention* provides that pregnant women and mothers of children under seven years of age shall be granted preferential treatment to the same extent as the nationals of the State concerned.⁷⁸ Article 50 of the same Convention indicates that the Occupying Power shall not hinder the application of preferential measures adopted prior to the occupation with respect to expectant mothers and mothers of children under seven years.⁷⁹ Parties to the conflict can also create hospital and safety zones to protect, *inter alia*, expectant mothers and mothers of children under seven.⁸⁰ Article 89 requires that interned pregnant and nursing mothers be given additional food “in proportion to their physiological needs.”⁸¹ Under the same Convention, parties to the conflict are to conclude agreements for the release, repatriation, return or accommodation in a neutral country of interned civilians who are pregnant or mothers with infants and young children.⁸² In both the *Fourth Geneva Convention* and *Additional Protocol I*, pregnant women and nursing mothers are given priority in humanitarian relief.⁸³ *Additional Protocol I* includes pregnant women and newborn babies within the protections provided for wounded and sick.⁸⁴ Other relevant provisions include art. 76 of *Additional Protocol I*, under which arrested, detained or interned civilian pregnant women and mothers of dependent infants must have their cases considered with the utmost priority, and the death penalty shall not be executed for these women.⁸⁵

The “enforcement” school of thought believes that these provisions reflect pragmatic protections necessary for pregnant women and women with young

76 Durham, “Protection”, *supra* note 14 at 99; Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR* (Oxford: Intersentia, 2005) at 220-223; Quéniwet, *supra* note 65 at 111.

77 Fiona de Londras, “Prosecuting Sexual Violence in the Ad Hoc International Criminal Tribunals for Rwanda and the Former Yugoslavia”, University College Dublin Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 06/2009 in Martha Fineman, ed., *Transcending the Boundaries of Law* (Routledge, forthcoming 2010) at 5 and 15.

78 *Fourth Geneva Convention*, *supra* note 9 at art. 38.

79 *Ibid.* at art. 50.

80 *Ibid.* at art. 14.

81 *Ibid.* at art. 89.

82 *Ibid.* at art. 132.

83 *Ibid.* at art. 23.

84 *Additional Protocol I*, *supra* note 9 at art. 8.

85 *Ibid.* at art. 76. A similar death penalty provision is found in *Additional Protocol II*, *supra* note 9 at art. 6.

children caught in armed conflict. In this regard, IHL recognizes that, in numerous societies around the world, women are required during armed conflict to protect and care for vulnerable elements of the population, including children, or they may be pregnant themselves.⁸⁶ These caregiving and reproductive roles are made difficult by armed conflict.⁸⁷ Thus, the system of protection of pregnant women and mothers of young children could, if implemented, “undoubtedly contribute toward a decrease in the suffering women endure during conflict.”⁸⁸ The “revision” school of thought does not take issue with the provisions *per se*, but argues that the regime of special protection, of which these provisions play a large part, “reveals a picture of women that is drawn exclusively on the basis of their perceived weakness, both physical and psychological, and their sexual and reproductive functions.”⁸⁹ Gardam and Jarvis note that, of the 42 provisions of the *Geneva Conventions* and *Additional Protocols* that specifically deal with women, 19 concern women as expectant mothers, maternity cases or nursing mothers.⁹⁰ They are concerned that this characterization identifies women only in connection with an ‘other’—an unborn child or young children—rather than providing rights or protections in civilian women’s own right. They further describe how the protection of the unborn child and small children was the rationale for the inclusion of these provisions, which is why women are referred to in their reproductive and mothering roles.⁹¹ Charlesworth and Chinkin argue that this approach “reduces the status of women without children.”⁹² Bennouné indicates that there is concern that the strong focus on pregnant women and mothers with young children within IHL may infantilize women by equating women with children.⁹³ As well, she indicates that the focus on protecting future generations through rules about pregnant women may inadvertently “instrumentalize” women and their bodies.⁹⁴

In addition, the “revision” school of thought is worried that the IHL provisions largely represent a biological (sex-based), rather than sociological (gendered), category of individual who needs certain protections, even when it is more likely that female gender, as a socially-constructed category, leads to vulnerability.⁹⁵ In this respect, Gardam lauds the ICRC for recognizing socially constructed gender as a factor in the way that women experience armed conflict, but expresses the view that the ICRC considers women in two distinct categories: biological

86 Durham, “Protection”, *supra* note 14 at 99.

87 *Ibid.*

88 Bennouné, *supra* note 52 at 377.

89 Gardam and Jarvis, *Women*, *supra* note 6 at 95.

90 *Ibid.* at 96.

91 *Ibid.*

92 Charlesworth and Chinkin, *supra* note 42 at 315.

93 Bennouné, *supra* note 52 at 377.

94 *Ibid.*

95 Otto expresses a similar concern with respect to the manner in which Security Council resolution 1325 on women, peace and security is engaged, for example by “deploying gender as a biological category and reducing its transformative vision to a set of bureaucratic techniques and measurements.” Dianne Otto, “A Sign of ‘Weakness’? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325” (2006-2007) 13 Mich. J. Gender & L. 113 at 173.

women and gendered women.⁹⁶ She argues that the ICRC's category of biological woman is a misnomer because it, too, is actually socially constructed: "[t]here is no such entity as the pre-ordained wom[a]n with her special needs."⁹⁷ While Gardam explores the example of privacy as a socially-constructed rather than biological "need" for women, one can see Gardam's point in another illustration: being biologically female does not necessarily mean a person will be a primary caregiver to children under seven years. Rather, this is likely to be determined by socially constructed gender norms as to who usually cares for young children.

In sum, the IHL provisions providing specific protections for pregnant women and mothers of young children are viewed by the "enforcement" school of thought as necessary expressions of the reproductive and caregiving roles undertaken by some women. The "revision" school of thought does not take issue with the provisions in and of themselves, but is concerned with how these provisions seem to relate to women only in their roles as mothers. In other words, they are concerned that IHL largely does not see, and therefore does not address, civilian women in other roles.

V. COMMON GROUND IN THE APPROACHES OF THE TWO SCHOOLS

This article has largely outlined points of disagreement between the "enforcement" and "revision" schools of thought on female-specific IHL provisions. The first school of thought largely feels that IHL addresses the needs of civilian women caught in war, but that more enforcement of IHL is needed. The second school of thought agrees that greater enforcement of IHL rules is necessary, but feels that there is a deeper problem: the provisions of IHL are inherently discriminatory and no amount of enforcement can overcome this fundamental flaw in the system.⁹⁸ While the two schools do not sit easily together,⁹⁹ there is agreement that the general aim of both sides is the same: to reduce the suffering of women in armed conflict.¹⁰⁰ Both schools also agree that the protection of women under IHL must be accompanied by complementary protection of women under international human rights and refugee law.¹⁰¹

Both schools also stress that civilian women should not be thought of primarily, or only, as victims of armed conflict. Their experiences are much more multifaceted. The ICRC, Lindsey, and Gardam and Jarvis have all made this point in detail.¹⁰² For example, women in war may suffer from being targeted by male combatants or in particular attacks for violence and intimidation, or from lack of access to necessities of life, but they are also resilient and resourceful in

96 Gardam, "Response", *supra* note 2 at 118.

97 *Ibid.*

98 Gardam and Charlesworth, *supra* note 52 at 160.

99 Durham, "Book Review", *supra* note 7 at 655.

100 *Ibid.*

101 See, for example, Askin, *IHL*, *supra* note 56 at 61-62; Gardam and Jarvis, *supra* note 6 at 123 and 254-255; ICRC, *Women Facing War*, *supra* note 60 at 22-23.

102 ICRC, *Women Facing War*, *supra* note 60 at 28-30; Lindsey, "Impact", *supra* note 63 at 22; Gardam and Jarvis, *supra* note 6 at 21-48.

trying to provide for their families and themselves.¹⁰³ In other words, women should not be viewed as passive victims; their situation and coping abilities demand a more complex understanding of their situation. In a similar vein, both approaches understand that one of the ways in which women's experience of war differs from that of men is that they are at greater risk of being subjected to sexual violence, such as rape, sexual slavery and sexual mutilation, and gender-based violence such as forced marriage.¹⁰⁴ As discussed above, both approaches also recognize that international and internationalized criminal tribunals have significantly advanced IHL's understanding of certain war crimes, such as rape.

Both schools agree that there are areas of IHL that need development. Despite their different starting points and conclusions, both schools accept that there are aspects of IHL that can be further added to or revised to better address the situation of civilian women during wartime. Durham points to the regulations placed upon warring parties during non-international armed conflict, an area also identified by Gardam and Jarvis.¹⁰⁵ Durham also points to the need for international criminal tribunals to address in more detail how the conduct of hostilities affects female (and male) civilians, a point Gardam also raises.¹⁰⁶

Finally, both schools of thought have issued calls to action. Durham asks all who strive to give women increased protection during times of armed conflict – theorists and practitioners, academics and operational personnel – to work together to find solutions.¹⁰⁷ Similarly, but more specifically, Gardam, Charlesworth and others have proposed various actions, from the negotiation of a new IHL or international human rights law treaty or protocol, to the adoption of new, overarching “soft law” principles on women in armed conflict, to updating the Commentaries to the *Geneva Conventions* and *Additional Protocols*, to the creation of a Centre of Expertise on Gender Issues and Armed Conflict.¹⁰⁸ Some have reasoned that certain actions become less needed as time goes on. For example, Copelon has argued that “[p]rosecuting rape as a grave breach should effectively expand the meaning of the Conventions and Protocols and obviate the need for formal amendment.”¹⁰⁹ Gardam has put forward the view that the gender-sensitive interpretation of sexual violence crimes by international criminal tribunals actually opens up the possibility of further gender-sensitive interpretations of IHL, for example on indiscriminate bombardment of the civilian population.¹¹⁰

There are also those who argue for action combining the two schools of

103 ICRC, *Women and War*, *supra* note 14 at 2-3.

104 ICRC, *Women Facing War*, *supra* note 60 at 51; Gardam and Jarvis, *supra* note 6 at 25; Askin, “Jurisprudence”, *supra* note 74 at 149-150.

105 Durham, “Protection”, *supra* note 14 at 107; Gardam and Jarvis, *supra* note 6 at 122.

106 Durham, “Protection”, *supra* note 14 at 107; Gardam, “Response”, *supra* note 2 at 123.

107 Durham, Book Review, *supra* note 7 at 659.

108 Gardam and Jarvis, *supra* note 6 at 254-263; Gardam and Charlesworth, *supra* note 52 at 163-166; Bennouna, *supra* note 52 at 387-390 summarizes the various proposed initiatives in detail.

109 Copelon, *supra* note 53 at 254.

110 Judith Gardam, “The Neglected Aspect of Women and Armed Conflict – Progressive Development of the Law” (2005) *Nethl. Int'l. L. Rev.* 197 at 219 [Gardam, “Neglected”].

thought. For example, the Special Rapporteur on Violence Against Women, including its Causes and Consequences, has taken a middle ground by focusing largely on the need for enforcement of existing norms, while also recommending that the 1949 *Geneva Conventions* should be “re-examined and re-evaluated so as to incorporate developing norms against women during armed conflict.”¹¹¹ Bennouna has recommended utilizing the advances in international human rights law with respect to women’s rights to create a better approach, since “creatively patching together interpretations of texts to find space for women’s experiences of war may not ultimately be enough.”¹¹² She also encourages balancing this work with “significant emphasis on full and universal implementation of existing technical rules of IHL.”¹¹³

This author believes that the way forward is to work within the middle ground. The points of agreement identified throughout this article provide the space in which dialogue can take place between proponents of the two schools, and within the wider IHL community. The “enforcement” school of thought has set out the virtues of the existing IHL insofar as it addresses certain needs of civilian women caught in hostilities. The “revision” school has critiqued IHL so as to reveal its many weaknesses. The back-and-forth between the two schools has sharpened the analysis of both sides. These criticisms and virtues, strengths and weaknesses identified by each should not be resisted by the other, nor should this discussion be seen as simply a feminist debate on the margins of “real” IHL analysis. The school of thought inclined toward revision of IHL helps to add a critical edge to the overall understanding of how IHL can and cannot help and empower female civilians. The school of thought focused on enforcement of the existing law helps to ground the discussion in of-the-moment application of IHL.

Having said this, it appears that the “enforcement” side of debate has had somewhat more success in entering mainstream discussions of IHL over the past fifteen years. This is, it seems, because it is conceptually and politically easier for mainstream actors such as states to focus upon existing law, rather than the realization of new law to address deep-rooted inequalities. As Gardam has noted, there “is consensus that this is not the ideal time politically to mount a challenge to IHL.”¹¹⁴ Even so, there are signs that the important issues raised within the “revision” school may yet be considered within the mainstream. For example, international criminal tribunals have adjudicated the war crime of rape in a number of cases and, in so doing, have contributed to the enforcement of this law.¹¹⁵ In addition, in analyzing rape as a violation of IHL, international criminal

111 *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, UN Doc. E/CN.4/1998/54 (1998) at 22. On the need for enforcement of existing norms, see: *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, UN Doc. E/CN.4/2001/73 (2001) at para. 66.

112 Bennouna, *supra* note 52 at 387 and 390.

113 *Ibid.*

114 Gardam, “Neglected”, *supra* note 110 at 216.

115 E.g. *Prosecutor v. Zejnil Delalic et al.*, IT-96-21-T, Judgment (16 Nov. 1998) at 450–451 (counts 18–10, 21–23) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber). This judgment elaborated on rape as a war crime through the rubric of torture and cruel treatment.

tribunals have provided more detail on and enlarged its content,¹¹⁶ viewed as helpful by both schools of thought.¹¹⁷ For example, the Special Court for Sierra Leone recently introduced intersectional analysis of the interlinkages between extreme forms of sexual violence directed against civilian women (and men) and the war crime of committing acts of terrorism.¹¹⁸ However, these advances still leave untouched the non-crime aspects of female-specific IHL.

Similarly, Security Council resolutions on women, peace and security have tended to focus on the need for greater enforcement of IHL.¹¹⁹ However, recently, Security Council resolution 1888 (2009) has provided a potentially exciting venue through which IHL might begin to be reconceptualized to better reflect the entirety of the female experience of conflict. Resolution 1888 authorizes the creation of a new United Nations Special Representative of the Secretary-General on Women, Peace and Security, working with the inter-agency initiative United Nations Action Against Sexual Violence in Conflict.¹²⁰ This partnership could bring new, and focused, attention to the weaknesses of IHL identified by the “revision” school and could influence the development of soft law on the criminalization of IHL violations directed at, or especially affecting, female civilians during war. As Lijnzaad has noted, “[i]t will probably take a broad range of steps, both of a normative character and of a practical nature to deal with gender bias in humanitarian law.”¹²¹ The work of the new Special Representative could be an important step in this process and, despite the consensus against challenging IHL noted by Gardam, it may result in “an initiative in the context of women and armed conflict that would allow improved, carefully targeted protections for them in such times.”¹²²

VI. CONCLUSION

IHL literature reveals a rich discussion over the past fifteen years within femi-

116 E.g., by setting out the elements of crime of rape (applicable both within the context of the violation of IHL, and in the context of the international crimes of genocide and crimes against humanity): *Furundžija*, *supra* note 72 at para. 185; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment (2 Sept. 1998) at para. 598 (International Criminal Tribunal for Rwanda, Trial Chamber); and *Prosecutor v. Dragoljub Kunarac et al.*, IT-96-23-T & 1-T, Judgment (22 Feb. 2001) at para. 460 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber). Note, however, that different judgments have adopted different elements, which has prompted a lively discussion within international criminal law circles of the merits of different definitions. See, e.g., de Brouwer, *supra* note 76 at 120-124; Wolfgang Schomburg and Ines Peterson, “Genuine Consent to Sexual Violence Under International Criminal Law” (2007) 101 A.J.I.L. 121 at 124; Karen Engle, “Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina” (2005) 99 A.J.I.L. 778 at 804.

117 *Supra* note 76.

118 *Sesay*, *supra* note 75 at paras. 1347-1355. The Appeals Chamber concurred with this approach: *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-04-15-A, Judgment (26 Oct. 2009) at para. 990 (Special Court for Sierra Leone, Appeals Chamber).

119 Women and peace and security, *supra* note 3 at para. 9; Women and peace and security, UN SCOR, 6195th Mtg., UN Doc. S/RES/1888 (2009) at preambular para. 6 and para. 7 [Resolution 1888 (2009)].

120 This position is to be created pursuant to Resolution 1888 (2009), *supra* note 119 at para. 4.

121 Lijnzaad, *supra* note 43 at 497.

122 Gardam, “Neglected”, *supra* note 110 at 217.

nist circles on the adequacy, or not, of various provisions addressing civilian women in armed conflict. It is unlikely that there is any one approach that will resolve the tensions between the two schools of thought identified above. Each school has a fundamentally different approach to IHL provisions governing the treatment of civilian women. One school prioritizes better enforcement of existing IHL as crucial to improving the situation of civilian women,¹²³ while the other school of thought believes that IHL itself must be reopened, reinterpreted or revised to eliminate inherent gender bias. The “enforcement” school feels that the “revision” school does not pay enough attention to the successes placed on limiting the means and methods of warfare, while the “revision” school believes that not enough attention is paid within the international community to the question of whether there are better alternatives to existing IHL.¹²⁴ It is understandable that the ICRC (and its proponents) would take the view that enforcement, rather than revision, of IHL is preferred. The ICRC has a job to do - protect people - and its tools are the existing laws. It is also understandable why commentators such as Gardam decry the masculinity of IHL: IHL is law largely written by men largely about male soldiers fighting wars.

However, we must not lose sight of the fact that “IHL remains a touchstone, a source to which governments, national courts, and international courts and mechanisms will always return.”¹²⁵ Therefore, what IHL says about women in war remains and will continue to remain significant.¹²⁶ Both schools of thought raise important issues. If IHL as it exists at the moment was fully enforced, surely the situation of civilian women caught in armed conflicts would improve. However, even in this best case scenario, IHL still would not address the underlying inequality of women that significantly and negatively contributes to the way in which they experience war. Thus, the insights and prescriptions of the “revision” school should not be ignored. Perhaps a deeper, more nuanced version of the vulnerabilities analysis that takes into account systematic gender inequality could be adopted by, for example, the ICRC as an initial step toward the middle ground between the schools. In addition, the new United Nations Special Representative of the Secretary-General on Women, Peace and Security working with the inter-agency initiative United Nations Action Against Sexual Violence in Conflict could work to strengthen - at least - soft law in such a way that it acknowledges the multilayered impact of deep-rooted societal inequality on female civilians in the application of IHL. The debate should continue both within and especially outside of feminist circles in order to advance the insights gained by both schools of thought over the past fifteen years. This should translate into continued scrutiny of IHL, increased focus on enforcement, further (re)interpretation and, eventually, law reform to improve the situation of female civilians in armed conflict.

123 Fellmeth, *supra* note 24 at 485.

124 Gardam, “Response”, *supra* note 2 at 115-116.

125 Bennouna, *supra* note 52 at 386.

126 *Ibid.*