

2022

## Linking Revisions to the AP I Commentary to Gendered Effects of Kinetic Operations

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### Recommended Citation

Jody M. Prescott *Linking Revisions to the AP I Commentary to Gendered Effects of Kinetic Operations*, 19 Loy. U. Chi. Int'l L. Rev. 27 ().

Available at: <https://lawcommons.luc.edu/lucilr/vol19/iss1/3>

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# LINKING REVISIONS TO THE AP I COMMENTARY TO GENDERED EFFECTS OF KINETIC OPERATIONS

Jody M. Prescott\*

## Abstract

In 2000, UNSCR 1325 on Women, Peace, and Security called on the international community to fully implement international humanitarian law (“IHL”) that protects the rights of women and girls during armed conflict. Since then, work in this area has largely avoided the parts of IHL that deal with the application of armed force. The International Committee of the Red Cross (“ICRC”) is now well along in the process of updating its influential commentaries on the 1949 Geneva Conventions and the 1977 Additional Protocols. To fully implement UNSCR 1325 vis-à-vis IHL, the ICRC should use this opportunity to revise the Commentary to Additional Protocol I to include the use of gender considerations in its discussion of the principle of proportionality.

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**I. Introduction**

Promulgated by the UN Security Council in 2000, UNSCR 1325 on Women, Peace, and Security calls on member states “to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts.”<sup>1</sup> Importantly, the Security Council did not limit these efforts to those portions of international humanitarian law (“IHL”) that directly protect victims of armed conflict, such as the 1949 Geneva Conventions (“GCs”).<sup>2</sup> Despite this, international efforts appear to have largely focused on international human rights law and the parts of IHL that intersect with international human rights law, such as prohibitions against sexual violence.<sup>3</sup> The parts of IHL that govern the conduct of armed conflict, which often offer indirect and qualified protection to civilians, such as the principle of proportionality, have in large part not been addressed.<sup>4</sup>

Simply mixing gender considerations into IHL and stirring will not yield the results sought by UNSCR 1325, however. The feminist critique of IHL has identified serious shortcomings in the GCs and Additional Protocol (“AP”) I<sup>5</sup> from a gender perspective in both the texts of the treaties themselves, and the explanations of the meaning of the texts in the influential commentaries published by the International Committee of the Red Cross (“ICRC”).<sup>6</sup> Despite these real problems, there appears to be little appetite among the international community to revisit the language of the treaties at this point.<sup>7</sup> Further, the current polarization between the West and the Russian Federation and the enablers of its war in

<sup>1</sup> S.C. Res. 1325, para. 6 (Oct. 31, 2000).

<sup>2</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

<sup>3</sup> Jody M. Prescott, *The Law of Armed Conflict and the Operational Relevance of Gender: The Australian Defence Force’s Implementation of the Australian National Action Plan*, in IMAGINING LAW: ESSAYS IN CONVERSATION WITH JUDITH GARDAM 195, 215-16 (Dale Stephens & Paul Babie, eds., 2016).

<sup>4</sup> See *id.* at 216 (explaining that IHL concepts such as the principle of proportionality need to be addressed to protect women and girls more fully in armed conflict).

<sup>5</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

<sup>6</sup> Jody M. Prescott, *NATO Gender Mainstreaming and the Feminist Critique of the Law of Armed Conflict*, 14 GEO. J. GENDER & L. 83, 93-101 (2013).

<sup>7</sup> JUDITH G. GARDAM & MICHELLE J. JARVIS, *WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW* 256 (2001).

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Ukraine<sup>8</sup> suggests consensus in any new negotiations on the treaties could be difficult to achieve. Thus, it is unrealistic to expect new treaty language that would address the cogent points raised by the feminist critique of IHL any time soon.

It is a different situation with the commentaries, which do not require consensus among the states party to the GCs and AP I before they can be updated.<sup>9</sup> Although the commentaries are not official ICRC texts,<sup>10</sup> they are regarded as authoritative interpretations of the treaties.<sup>11</sup> Their weight of authority is in large part based on the experiences and work of their primary editor, Jean S. Pictet, who was the ICRC's Director for General Affairs, and the other authors, both during World War II and in the different conferences that resulted in the 1949 GCs.<sup>12</sup> Pictet is also credited with collaborating with the authors of the 1987 Commentary on AP I ("AP I Commentary").<sup>13</sup>

Revisiting the explanations set out in the commentaries, however, has already proven to be both realistic and fruitful. Beginning with its publication of an updated version of the Commentary to GC I in 2016 ("GC I Commentary"),<sup>14</sup> dealing with sick and wounded military personnel, the ICRC has continued to make concrete progress in revising the language of the commentaries to reflect a better understanding of the equality of treatment afforded to women under these treaties. Most recently, in 2020, the ICRC published its updated Commentary on GC III ("GC III Commentary"),<sup>15</sup> dealing with prisoners of war. It has set a path for reviewing the commentary for the last of the four 1949 treaties, GC IV, covering the protection of civilian populations under conditions of occupation and internment, as well as the commentaries for the Additional Protocols in time.<sup>16</sup>

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<sup>8</sup> Rodion Ebbighausen, *Why China Thinks the West Is to blame for Russia's War in Ukraine*, DEUTSCHE WELLE (Mar. 14, 2022), <https://www.dw.com/en/why-china-thinks-the-west-is-to-blame-for-russias-war-in-ukraine/a-61119517>.

<sup>9</sup> Ellen Policinski & Charlotte Mohr, *From the Gilded Age to the Digital Age: The Evolution of ICRC Legal Commentaries*, ICRC CROSS-FILES (June 8, 2022), <https://blogs.icrc.org/cross-files/the-evolution-of-icrc-legal-commentaries/#:~:text=thus%20the%20original%20ICRC%20Commentaries,example%2C%20Human%20Rights%20Council%20reports>.

<sup>10</sup> COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 7 (Jean S. Pictet, ed., 1952) [hereinafter 1952 GC I COMMENTARY].

<sup>11</sup> Policinski & Mohr, *supra* note 9.

<sup>12</sup> *Id.*

<sup>13</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman, eds., 1987) [hereinafter AP I COMMENTARY].

<sup>14</sup> *Updated Commentaries Bring Fresh Insights on Continued Relevance of Geneva Conventions*, INT'L COMM. OF THE RED CROSS (Mar. 7, 2016), <https://www.icrc.org/en/document/updated-commentaries-first-geneva-convention>.

<sup>15</sup> *Updated Commentary Brings Fresh Insights on Continued Relevance of Geneva Conventions for Treatment of Prisoners of War*, INT'L COMM. OF THE RED CROSS (July 10, 2020), <https://www.icrc.org/en/document/updated-commentary-third-geneva-convention>.

<sup>16</sup> Jean-Marie Henckaerts, *Bringing the Commentaries on the Geneva Conventions and Their Additional Protocols into the Twenty-First Century*, 94 INT'L REV. RED CROSS 1551, 1554-55 (2012).

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Although the original timeline for publication of the revised AP I Commentary has slipped somewhat from what was originally planned,<sup>17</sup> at some point in the future it will be completed and published. While this objective is still just over the horizon in important respects, from the perspective of gender considerations in military operations, it is not too early to begin thinking about how the revised AP I Commentary could be properly updated.

The first step in this process should be an assessment of how the revisions to the commentaries respecting gender have already been made. This assessment should also evaluate how these revisions might influence both the understanding and practice of the national military establishments and the approach to working with gender considerations in the revised commentary to AP I. AP I is quite different from the GCs, because it is in many ways an intertwining of the older strand of IHL embodied in documents, such as, the Hague Regulations, which dealt with the conduct of armed conflict with the newer strand of law protecting victims of armed conflict set forth in the 1949 GCs.<sup>18</sup>

As noted *supra*, the feminist critique of AP I has long identified a number of significant issues with the language of the treaty and the ICRC commentary to it.<sup>19</sup> Perhaps the most significant decision point the ICRC will face in drafting the revisions to the AP I Commentary is whether it will forthrightly address the role that gender considerations should play in understanding and applying the law pertinent to the conduct of kinetic operations. In particular, the ICRC must decide whether it will establish a role for gender considerations in the assessment of proportionality in attacks during armed conflict.<sup>20</sup>

This article argues that it should. To explain why these revisions to the commentaries are necessary, this article first briefly reviews the history of the negotiations on the GCs as it relates to gender. Then, it turns to the problematic areas in the language of the GCs and the commentaries to them and show how they established a rationale for the treatment of female victims of armed conflict that is based not on equal rights with men. Instead, it details how the GC protections are based upon women's reproductive status, their relationships with male relatives, and discriminatory stereotyping as to their inherent weakness as compared to men.

Next, this article examines in detail the gender-related revisions of the commentaries to the first three GCs, and as a result it identifies what appears to be an evolution in the ICRC's treatment of gender considerations. Then, it turns to the provisions of AP I that are discriminatory against women from a feminist perspective, and the related explanations in the AP I Commentary to them. This

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<sup>17</sup> Henckaerts, *supra* note 16, at 1555.

<sup>18</sup> Christof Heyns et al., *The Definition of an "Attack" under the Law of Armed Conflict*, LIEBER INSTITUTE W. POINT: ARTICLES OF WAR (Nov. 3, 2020), <https://lieber.westpoint.edu/definition-attack-law-of-armed-conflict-protection/>.

<sup>19</sup> Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, 46 INT'L. & COMP. L. Q. 55, 57, 71, 77 (1997).

<sup>20</sup> See AIR POWER DEV. CTR., AIR FORCE DOCTRINE NOTE 1-18, GENDER IN AIR OPERATIONS 13-14 (2018) (explaining that targeting procedures should include gender considerations) (on file with author) [hereinafter AFDN 1-18].

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section focuses upon the provisions of AP I and its Commentary dealing with proportionality and targeting. This article concludes by examining pioneering work done by the Australian Defence Force (“ADF”) in a doctrinal note on incorporating gender considerations into proportionality analysis and targeting, and the most recent NATO doctrine on targeting to identify the potential benefits and challenges facing the ICRC as it moves to revise the AP I Commentary in the near future.

### II. The GC Negotiations

World War II was marked by widespread abuse of civilians and prisoners of war, and this is reflected in the staggering number who died during the conflict.<sup>21</sup> Afterwards, the international community fully supported a comprehensive overhaul of the existing treaties that dealt with the protection of victims of armed conflict.<sup>22</sup> In 1947, the ICRC convened the Conference of Government Experts to consider revisions to these treaties.<sup>23</sup>

#### A. The Conference of Government Experts

The conference lasted two weeks, and the experts were divided into three different commissions to conduct their work.<sup>24</sup> The proper fashioning of treaty language that would better protect women during armed conflict was a subject of discussion within the commissions. In fairness to the commissions, it must be acknowledged that their work marked a real advance in the equality of treatment for women as men’s fellow victims of armed conflict. At the same time, however, decisions were made regarding the phrasing of the basis for women’s protection – “consideration due their sex,” rather than equality – that would have a continuing influence on the specific scope of the protections afforded.<sup>25</sup>

The First Commission focused its work on updating treaty law that would eventually emerge as GC I and GC II.<sup>26</sup> In doing so, it accepted the formulation favored by the ICRC for describing the basis for women’s protection as being “all consideration due their sex,” and rejected language that would have required

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<sup>21</sup> 2-A INT’L COMM. RED CROSS, FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF 1949, at 9 (1949) [hereinafter FINAL RECORD, VOL. 2]; INT’L COMM. OF THE RED CROSS, *150 Years of Humanitarian Action: The 1949 Geneva Conventions*, YOUTUBE (May 26, 2014), [https://www.youtube.com/watch?v=LbDQ-Rr4BuQ&list=playtsrWbD1\\_2\\_Mo64\\_102wT\\_cyIa4Ncrp&index=5&ab\\_channel=InternationalCommitteeoftheRedCross%28ICRC%29](https://www.youtube.com/watch?v=LbDQ-Rr4BuQ&list=playtsrWbD1_2_Mo64_102wT_cyIa4Ncrp&index=5&ab_channel=InternationalCommitteeoftheRedCross%28ICRC%29).

<sup>22</sup> See Giovanni Mantilla, *Conforming Instrumentalists: Why the USA and the United Kingdom Joined the 1949 Geneva Conventions*, 28 EUR. J. INT’L L. 483, 493 (2017) (explaining the extensive work between the governments, the ICRC, and the National Red Cross and Red Crescent Societies that resulted in the 1949 Geneva Conventions).

<sup>23</sup> Philippe Abplanalp, *The International Conferences of the Red Cross as a Factor for the Development of International Humanitarian Law and the Cohesion of the International Red Cross and Red Crescent Movement*, 308 INT’L. REV. RED CROSS 520, 533 (1995).

<sup>24</sup> INT’L COMM. OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS FOR THE STUDY OF THE CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS I (1947) [hereinafter ICRC, GOVERNMENT EXPERTS’ REPORT].

<sup>25</sup> JODY M. PRESCOTT, ARMED CONFLICT, WOMEN AND CLIMATE CHANGE 178-79 (2019).

<sup>26</sup> ICRC, GOVERNMENT EXPERTS’ REPORT, *supra* note 24, at 7, 75.

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equal treatment of people “without any distinction” of sex.<sup>27</sup> Similarly, the First Commission decided it was unnecessary to expressly mention pregnant women because it “considered that such women were assimilated to the sick in general.”<sup>28</sup> From the outset then, the context within which the subsequent negotiations and drafting work was done on GC I and GC II was not one in which women’s inherent equality with men was recognized.

The Second Commission worked on updating the 1929 Geneva Prisoners of War Convention, and it believed that the language in proposed Common Article 3 (women “shall be treated with all consideration due to their sex”) was not sufficient to protect women.<sup>29</sup> On “the contrary, it considered that as women in many countries were still placed on an inferior footing and received less consideration than men,” and it proposed to add language to Article 3 which would require that the treatment afforded female prisoners of war “shall in no case be inferior to that accorded men.”<sup>30</sup> Had this formulation been taken on board, it would have made progress in having women prisoners of war seen as the legal equals to men while still considering their different medical and security needs and requirements. This formulation was not accepted.<sup>31</sup>

The Third Commission focused on creating what would become GC IV for the protection of civilian victims of armed conflict.<sup>32</sup> Here, the ICRC favored including very specific measures to protect pregnant women and women with young children in this new treaty.<sup>33</sup> The basis for this protection, however, was not equal rights for women in these circumstances. Instead, the Commission in the end only agreed on language that stated women “shall be treated with all consideration due to their sex, and children with all consideration due to their age and helpless condition.”<sup>34</sup>

### B. The Diplomatic Conference

The Government Experts’ work was included in four draft conventions the ICRC forwarded to a drafting conference held in Stockholm in 1948.<sup>35</sup> The conference’s Legal Commission reviewed the drafts and made only a few amendments before approving them.<sup>36</sup> The approved drafts were then submitted to the diplomatic conference in Geneva which began in 1949.<sup>37</sup> The conference delegates worked in committees that were tasked with reviewing particular draft con-

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<sup>27</sup> ICRC, GOVERNMENT EXPERTS’ REPORT, *supra* note 24, at 12.

<sup>28</sup> *Id.* at 69.

<sup>29</sup> *Id.* at 119.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 269.

<sup>33</sup> *Id.* at 301.

<sup>34</sup> *Id.* at 275.

<sup>35</sup> Abplanalp, *supra* note 23, at 533.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

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ventions, similar to the commissions of government experts at the prior conference.<sup>38</sup>

Committee I worked on GC I and GC II.<sup>39</sup> It settled on language that prohibited “any adverse distinction founded on sex, race, nationality, religion, political opinions or any other similar criteria” and required that women “shall be treated with all consideration due to their sex.”<sup>40</sup> Although, in isolation, the prohibition against any adverse distinction based on sex sounds like it is premised on equality, the qualifying “all consideration due to their sex” arguably changes the premise from one of full equality.

Committee II worked on CG III.<sup>41</sup> Regarding gender, the discussion within this Committee focused mostly on ensuring separate dormitories and “separate conveniences” for women.<sup>42</sup> Committee members also discussed medical examinations of prisoners of war, largely in the context of using x-rays to diagnose contagious disease.<sup>43</sup> There is no evidence in the record of any discussion of the different types of medical examinations or treatments that women who were prisoners of war might need to safeguard their health which men would not require.<sup>44</sup>

As to the basis for women’s treatment under the Convention, the Committee II delegates in large part accepted the “all consideration due to their sex” formulation.<sup>45</sup> Here is where a curious gap first appears. Although almost all the delegates were men,<sup>46</sup> the British delegation included women,<sup>47</sup> and it persistently advocated for specific language establishing protections for female prisoners of war who were being punished for penal or disciplinary offenses.<sup>48</sup> It is unclear why the same provision was not made for women’s ordinary camp dormitories in the final version of GC III.

### III. The Gender-Related Provisions of the GCs and Their Commentaries

The diplomatic conference finished its work on August 12, 1949, and all the state parties agreed to four different conventions that had been negotiated as a result.<sup>49</sup> Before turning to the provisions regarding the protection of women in

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<sup>38</sup> PRESCOTT, *ARMED CONFLICT*, *supra* note 25, at 179.

<sup>39</sup> FINAL RECORD, Vol. 2, *supra* note 21, at 43, 45.

<sup>40</sup> *Id.* at 156, 159.

<sup>41</sup> *Id.* at 233, 235.

<sup>42</sup> *Id.* at 256, 259.

<sup>43</sup> *Id.* at 260.

<sup>44</sup> See generally FINAL RECORD, Vol. 2, *supra* note 21, at 259-60, 382, 472, 476, 582 (discussions of Art. 28 did not include the special medical exams women would need).

<sup>45</sup> *Id.* at 489.

<sup>46</sup> I INT’L COMM. OF THE RED CROSS, FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 158-70 (1949) [hereinafter FINAL RECORD, VOL. 1].

<sup>47</sup> *Id.* at 170.

<sup>48</sup> FINAL RECORD, Vol. 2, *supra* note 21, at 489-90, 494, 498, 502.

<sup>49</sup> Abplanalp, *supra* note 23, at 533-34.



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the individual conventions, it is helpful to first examine Common Article 3,<sup>50</sup> which provides important and basic parts of the conventions' coverage beyond the area of international armed conflict to instances of internal armed conflict.

### A. Common Article 3

As a result of the savagery of World War II, there was strong support among the national parties at the 1946 Preliminary Conference of Red Cross Societies for basic IHL protections to cover conflicts that were not international.<sup>51</sup> The 1947 Government Experts' Conference was also in favor of this idea, and recommended to the ICRC that irrespective of the legal status of parties to a conflict, certain principles should apply to all conflicts.<sup>52</sup> By the conclusion of the Diplomatic Conference, the state parties had agreed to a formulation for partial IHL coverage as set out in Common Article 3 to each of the conventions, but only in the case of actual armed conflict.<sup>53</sup>

As expressed in Article 3 of GC I, in all armed conflicts wounded and sick personnel of armed forces will receive humane treatment "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria."<sup>54</sup> In detail, the Article specifically prohibits all acts that do "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,"<sup>55</sup> in addition to acts that constitute "outrages on personal dignity, in particular humiliating and degrading treatment."<sup>56</sup> This formulation by itself clearly provides strong protection for women on a basis of equality with men. As with many things, however, the devil is in the detail, and examination of the other provisions of the conventions through the lens of the commentaries shows that this apparent equality was based instead on prevailing social notions of the time about women's subordinate role in society and their reproductive status and relationships.

### B. GC I and GC II

Interestingly, GC I and GC II each have another common article, Article 12. Article 12 repeats Common Article 3's requirement that humane treatment be afforded to the wounded and sick "without any adverse distinction founded on sex," but then adds that women will "be treated with all consideration due their sex."<sup>57</sup> This qualifier does not appear in Common Article 3.<sup>58</sup>

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<sup>50</sup> GC I, *supra* note 2, Comm. Art. 3; GC II, *supra* note 2, Comm. Art. 3; GC III, *supra* note 2, Comm. Art. 3; GC IV, *supra* note 2, Comm. Art. 3.

<sup>51</sup> David A. Elder, *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*, 11 CASE W. RES. J. INT'L. L. 37, 42-43 (1979).

<sup>52</sup> *Id.* at 43; ICRC, GOVERNMENT EXPERTS' REPORT, *supra* note 24, at 8-9.

<sup>53</sup> Elder, *supra* note 51, at 43-53.

<sup>54</sup> GC I, *supra* note 2, art. 3, § (1).

<sup>55</sup> *Id.* art. 3, § (1)(a).

<sup>56</sup> *Id.* art. 3, § (1)(c).

<sup>57</sup> *Id.* art. 12.

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The 1952 Commentary to GC I (which was later matched by the 1960 GC II Commentary in this regard<sup>59</sup>) explains that the purpose of the article was to not exclude “distinctions made in favour of enemy wounded or sick and in order to take their physical attributes into account.”<sup>60</sup> Accordingly, the consideration due to women was that “which is accorded in every civilized country to beings who are weaker than oneself and whose honour and modesty call for respect.”<sup>61</sup> This is repeated with a slight twist in the discussion of Article 12. Both the 1952 GC I Commentary and the 1960 GC II Commentary discussions on Article 12 state, “[t]he special consideration with which women must be treated is of course in addition to the safeguards embodied in the preceding paragraphs, to the benefits of which women are entitled equally with men. What special consideration? No doubt that accorded in every *civilized* country to beings who are weaker than oneself and whose honour and modesty call for respect.”<sup>62</sup>

This rationale is based on a stereotypical gender role for women that makes them dependent on the good will of men to “honor” social conventions and restrain themselves from committing abuses against women.<sup>63</sup> Further, it is arguably based to a degree on the assessment of a substantive difference between presumably civilized Western nations versus others, while feminist critics at the same time see IHL as designed primarily to address the needs of male Western combatants and ignoring the needs of the most at-risk non-Western female civilians.<sup>64</sup> Thus, at its heart, as explained in the commentaries, the protection afforded to women as women under GC I and GC II is not based on equality but rather the traditional social inferiority of women,<sup>65</sup> particularly as practiced in the West. This problem becomes more pronounced in GC III, the convention protecting prisoners of war.

### C. GC III

GC III contains many important protections for women prisoners of war, and these provisions marked substantive progress in ensuring their better treatment by Detaining Powers when they were captured.<sup>66</sup> However, there are troubling textual gaps in the treaty regarding gender that are not really explained well in the 1960 GC III Commentary. Further, as with the other GC’s, the protections for

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<sup>58</sup> See GC I, *supra* note 2, Comm. Art. 3; GC II, *supra* note 2, Comm. Art. 3.

<sup>59</sup> COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA 84, 91-92 (Jean S. Pictet ed., 1960) [hereinafter Pictet, 1960, GC II].

<sup>60</sup> 1952 GC I COMMENTARY, *supra* note 10, at 137-138.

<sup>61</sup> *Id.* at 140.

<sup>62</sup> INT’L. COMM. OF THE RED CROSS, *Convention (II) of the Amelioration of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea. Geneva, 12 August 1949. Commentary of 1960, Article 12 – Protection and Care* (1960) (emphasis added), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=E22FEB6F44CDD119C12563CD00423430>.

<sup>63</sup> Prescott, *supra* note 6, at 93-94.

<sup>64</sup> GARDAM & JARVIS, *supra* note 7, at 253.

<sup>65</sup> *Id.* at 10-11.

<sup>66</sup> PRESCOTT, ARMED CONFLICT, *supra* note 25, at 183.

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women are not based on equality of treatment with men, but instead upon notions of weakness, honor, modesty, and familial relationships.

### *i. Protections for Women*

GC III contains many important protections for women prisoners of war. Women prisoners of war “shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.”<sup>67</sup> Women prisoners of war will have separate dormitories,<sup>68</sup> separate hygienic facilities,<sup>69</sup> and those convicted of penal offenses or camp disciplinary infractions cannot be punished more severely than female military personnel of their captors for similar offenses.<sup>70</sup> Those convicted are to be “confined in separate living quarters from male prisoners of war and be under the immediate supervision of women.”<sup>71</sup>

### *ii. Problems in Women’s Protection*

Alongside these important protections, there are significant textual gaps, and areas in which it does not appear that the drafters fully thought through from a realistic gender perspective. One important gap appears in GC III, Article 16, which prohibits Detaining Powers from making adverse distinctions among prisoners on the basis of “race, nationality, religious belief or political opinion, or any other distinction founded on similar criteria.”<sup>72</sup> Curiously, this formulation excludes sex, although it is specifically included in Common Article 3.<sup>73</sup> Further, GC III, Article 25, does not provide that women prisoners of war will be under the supervision of women in their dormitories.<sup>74</sup> Although this gap was later closed in AP I, Article 75,<sup>75</sup> it is not clear why this textual omission occurred, given that women prisoners of war serving disciplinary punishments were specifically to be under the supervision of women.<sup>76</sup>

Other significant issues are related to implementation. For example, returning pregnant women prisoners of war to their home countries sounds like a very humane measure, but suppose the pregnancy resulted from rape by Detaining Power personnel. Would the captor country follow this provision and risk providing its enemy with a news item that illustrates its maltreatment of captured fe-

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<sup>67</sup> GC III, *supra* note 2, art. 14.

<sup>68</sup> *Id.* art. 25.

<sup>69</sup> *Id.* art. 29.

<sup>70</sup> GC III, *supra* note 2, art. 88.

<sup>71</sup> *Id.* art. 97.

<sup>72</sup> *Id.* art. 16.

<sup>73</sup> GC I, *supra* note 2, Comm. Art. 3; GC II, *supra* note 2, Comm. Art. 3; GC III, *supra* note 2, Comm. Art. 3; GC IV, *supra* note 2, Comm. Art. 3.

<sup>74</sup> GC III, *supra* note 2, art. 25.

<sup>75</sup> AP I, *supra* note 5, art. 75 § (5) (requiring that “[w]omen whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men’s quarters. They shall be under the immediate supervision of women”).

<sup>76</sup> GC III, *supra* note 2, art. 97.

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male personnel? The politicization that could surround such returns could work to undermine compliance with this provision during wartime.

Further, although GC III provides for separate hygienic facilities, these are defined as “adequate” infirmaries,<sup>77</sup> baths and showers, soap and water, and latrines.<sup>78</sup> Neither contraception services and products nor women’s sanitary supplies are mentioned at all. In addition, because of the textual gap regarding the supervision of women’s dormitories, the risks of pregnancy resulting from sexual intercourse with fellow male prisoners of war is also a possibility.<sup>79</sup>

The 1960 GC III Commentary did little to remedy the concerns raised by the convention’s text. It noted that the “regard” women prisoners of war were to receive was challenging to define, but that it basically rested on three factors: women’s weakness, their “honour and modesty,” and the health challenges pregnancy and childbirth presented in the prison camp environment.<sup>80</sup> Here, “honour and modesty” were basically defined as protection against “rape, forced prostitution and any form of indecent assault.”<sup>81</sup>

The flaws in this approach are obvious. If a woman prisoner of war was deemed dishonorable or immodest by the Detaining Power or its personnel, would she then receive less protection against sexual violence? Further, given the coercive setting of prisoner of war camps, the notion of “voluntary” prostitution in such places seems at best naïve. Finally, the Commentary noted that the protections provided to pregnant women were premised on a failure of “the precautions taken.”<sup>82</sup> The sum of these “precautions” that appears in the treaties seems to consist only of “adequate” infirmaries and spartan hygienic facilities.<sup>83</sup>

The Commentary does set out a draft model agreement that parties to a conflict could use to help negotiate the implementation of Article 110’s provision for prisoners of war with certain medical conditions to either be repatriated to their home countries or be accommodated in neutral countries that includes provisions related to women.<sup>84</sup> Those who are pregnant or suffering from obstetrical problems are to be returned to their home country.<sup>85</sup> On the other hand, women prisoners of war with babies and young children are eligible for accommodation

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<sup>77</sup> GC III, *supra* note 2, art. 30.

<sup>78</sup> *Id.* art. 29.

<sup>79</sup> Prescott, *supra* note 6, at 97.

<sup>80</sup> COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 147 (Jean S. Pictet, ed., 1960).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 148.

<sup>83</sup> PRESCOTT, ARMED CONFLICT, *supra* note 25, at 184-85.

<sup>84</sup> INT’L COMM. OF THE RED CROSS, *Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Commentary of 1960, I. Principles for Direct Repatriation and Accommodation in Neutral Countries*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=9D802598D8253DB4C12563CD00429D17>.

<sup>85</sup> INT’L COMM. OF THE RED CROSS, *Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949., Part I - Principles for Direct Repatriation and Accommodation in Neutral Countries*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/9861b8c2f0e83ed3c1256403003fb8c5/b5d2187010cecc72c12563cd0051b6d6>.

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in neutral countries,<sup>86</sup> but are not required to be returned to their home countries.<sup>87</sup>

In different militaries across the world, gender mainstreaming efforts, either voluntary in terms of national action plans or their equivalents promoting greater career opportunities for women,<sup>88</sup> or involuntary in the sense of massive personnel requirements due to a war providing opportunities for women to serve in different military positions such as in the case of Ukraine,<sup>89</sup> are slowly but surely increasing the number of female military personnel in military formations. Further, they are now more likely to find themselves in combat or combat-related situations where the risk of becoming sick or wounded, or prisoners of war, is greater than in the past.<sup>90</sup> Mindful of this, it is important to see how the ICRC has been updating the GC Commentaries to get a sense of how it might approach the AP I Commentary in the future.

### IV. Gender in The Recent Commentary Revisions

As noted *supra*, the ICRC has completed revisions to the Commentaries on the first three 1949 Conventions already and is working on the GC IV Commentary now.<sup>91</sup> At some point in the near future, it would appear poised to begin working in earnest on the AP I Commentary. One might reasonably assume that those provisions of AP I that deal with the protection of victims of armed conflict, the Geneva strand of the treaty, would have an approach applied to them that was very similar to that used in revisions of the 1949 Conventions, including the revisions related to gender. To understand how it might approach gender considerations into the material parts of AP I that deal with kinetic operations, it is useful first to chart the evolving approach the ICRC has taken in the commentaries it has revised so far.

#### A. GC I and GC II

It is useful for analysis purposes to essentially combine the examination of the revised commentaries for GC I and GC II together. They deal with very similar subject matter, largely the treatment of the sick and wounded, and in the negotiation process that led to their drafting, a single commission or committee consid-

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<sup>86</sup> *Convention (III), Part I, supra* note 85.

<sup>87</sup> *See generally id.* (Annex section A covers those sorts of cases that would receive what is likely the most favorable treatment from a prisoner of war's perspective: being returned to their home country. Section B covers those sorts of cases that would receive what is likely the next most favorable treatment: being accommodated in a neutral country rather than by their enemies).

<sup>88</sup> PRESCOTT, *ARMED CONFLICT, supra* note 25, at 198-226.

<sup>89</sup> Haley Britzky, *Ukrainian Women Are Showing the World What They're Made of in the Fight Against Russia*, TASK & PURPOSE (Mar. 9, 2022, 3:32 PM), <https://taskandpurpose.com/news/ukraine-women-military/>.

<sup>90</sup> Anita Ramasastry, *What Happens When GI Jane Is Captured? Women Prisoners of War and the Geneva Conventions*, FINDLAW (Apr. 2, 2003), <https://supreme.findlaw.com/legal-commentary/what-happens-when-gi-jane-is-captured.html>.

<sup>91</sup> *See supra* notes 15-18 and accompanying text.

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ered them together.<sup>92</sup> Most importantly for this article, as will be explained *infra*, when it comes to considering gender and the protections afforded to women, the revised commentaries are essentially twins.

### *i. Revised GC I Commentary*

The revised GC I Commentary Introduction explains that the ICRC believed it was necessary to update the commentary provisions in general “to reflect the practice that has developed in applying. . . the Conventions and Protocols during the decades since their adoption, while preserving those elements of the original Commentaries that are still relevant.”<sup>93</sup> In describing the specific structure of the revised commentaries on individual GC I articles, the Introduction notes that although the “precise content of the discussion section depends on the article under scrutiny,” the discussions would briefly describe, “where relevant, how the application in practice of a provision may affect women, men, girls and boys differently[.]”<sup>94</sup>

To best appreciate how the ICRC then incorporated gender concerns into the revised GC I Commentary, it is perhaps most useful to focus on the changes to the individual commentaries on Articles 3 and 12, which as noted *supra* are common to both GC I and GC II. In the 1952 GC I Commentary discussion of Common Article 3, there was no mention of women or gender.<sup>95</sup> However, the discussion of GC I, Article 12 emphasized the prohibition against adverse distinctions between the sick and wounded in providing medical treatment on the basis of sex, and it contained many references to the protections afforded women.<sup>96</sup> The content of these references will be examined in detail when comparing the 1952 GC I Commentary provisions with those of the 2016 revision.

Turning first to the comparison of the 1952 GC I Commentary on Common Article 3 with the 2016 revisions, in terms of gender specifically, the revised commentary notes that in assessing the severity of pain or suffering of a sick or wounded individual, factual elements including the person’s gender must be included.<sup>97</sup> It also notes that although GC IV (on the protection of the civilian population and internees) specifically prohibited rape, forced prostitution, and indecent assault upon women, AP I, Article 75 prohibited these acts irrespective of the victim’s sex and that this gender-neutral understanding of the prohibition against sexual violence had been used in decisions by international criminal

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<sup>92</sup> See *supra* notes 27, 39, 40 and accompanying text.

<sup>93</sup> INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITIONS OF THE WOUNDED AND SICK IN THE FIELD 3 (Knut Dörmann et. al. eds., 2016) [hereinafter 2016 GC I COMMENTARY].

<sup>94</sup> *Id.* at 16.

<sup>95</sup> See generally INT’L COMM. OF THE RED CROSS, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva 12 August 1949, Commentary of 1952, Art. 3 – Conflicts Not of an International Character* (1952), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=1919123E0D121FEFC12563CD0041FC08>.

<sup>96</sup> 1952 GC I Commentary, *supra* note 10, at 137-38, 140.

<sup>97</sup> 2016 GC I COMMENTARY, *supra* note 93, at 217.

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courts.<sup>98</sup> It qualifies this recognition by observing that women and girls still constituted the majority of victims of sexual violence during armed conflict.<sup>99</sup>

In terms of the humane treatment guaranteed under Common Article 3, the 2016 GC I Commentary recognized that this was context specific, and that “there is a growing acknowledgement that women, men, girls and boys are affected by armed conflict in different ways.”<sup>100</sup> Thus, an understanding of humane treatment needed to include “[s]ensitivity to the individual’s inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society[.]”<sup>101</sup> This understanding applied as well to determining the standard of medical care that was due to a person.<sup>102</sup>

This language reflects in many respects the practice of “gender mainstreaming,” which has as its purpose gender equality. In 1997, the UN Economic and Social Council defined gender mainstreaming as:

[T]he process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.<sup>103</sup>

While laudable in many respects, it is not obvious that basing appropriate treatment for female personnel who are wounded and sick on a policy concept is necessarily the right approach for explaining the application of legal requirements. This presents a potential weakness in the business case for why the 2016 GC I Commentary’s approach to gender should persuade military organizations to take these revisions on board without reservations or qualifications. Yes, as the internationally recognized arbiter of IHL, the ICRC is well placed to revise the original commentaries,<sup>104</sup> but these revisions should have a more solid legal foundation.

In its favor, however, the 2016 GC I Commentary was very forthright in providing specific examples of how Common Article 3’s standards applied in armed conflict to women, referencing the findings of international tribunals where applicable, and without using dated euphemisms that themselves reflected a discriminatory mindset. For example, it pointed out that female detainees who were

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<sup>98</sup> 2016 GC I COMMENTARY, *supra* note 93, at 238.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 193.

<sup>101</sup> *Id.* at 193, 202.

<sup>102</sup> *Id.* at 261.

<sup>103</sup> *Gender Mainstreaming, Extract from Report of the Economic and Social Council for 1997 (A/52/3 8 September 1997)*, WOMEN 2000, <https://www.un.org/womenwatch/daw/csw/GMS.PDF> (last visited Oct. 13, 2022).

<sup>104</sup> JODY M. PRESCOTT, *EMPIRICAL ASSESSMENT IN IHL EDUCATION AND TRAINING: BETTER PROTECTION FOR CIVILIANS AND DETAINEES IN ARMED CONFLICT* 17 (2021).

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pregnant or nursing might “require tailored nourishment and medical care or adjustments in the organization and equipment of their accommodation.”<sup>105</sup> As another example, in discussing the prohibition against degrading treatment set forth in Common Article 3, it specifically included “sexual slavery, including the abduction of women and girls as ‘bush wives’[.]”<sup>106</sup> Finally, it identified as prohibited cruel treatment “gender-based humiliation such as shackling women detainees during childbirth.”<sup>107</sup>

The revisions related to Article 12, which deals specifically with the protection and care of the wounded and sick, offer a similar mix of positive and negative features that potentially weaken its overall persuasiveness. The discussion of GC I, Article 12 now notes that appropriate humane treatment is based on gender in part,<sup>108</sup> and that accounting for the differences between sexes in providing proper medical care is based on “social and international legal developments in relation to equality of the sexes.”<sup>109</sup> By itself, this sounds favorable.

However, in the footnote to this statement, the 2016 GC I Commentary lists the 1966 adoption of the International Covenant on Civil and Political Rights by the UN General Assembly as the legal development marker for women being recognized as having equal rights with men.<sup>110</sup> Even casual students of international law will be underwhelmed by the strength of this citation in support of this rationale. The UN Charter recognized equal rights for women when it was signed in 1945,<sup>111</sup> although during the negotiations of the conventions in the late 1940s, the ICRC supported formulations of the protections for women that were not based on equality, as noted *supra*.<sup>112</sup> Suggesting that the law first changed in 1966 to recognize legal equality for women with men is at the very least ahistorical.

Similarly, the GC I Commentary notes that the treaty’s requirement for providing women medical treatment different from that given to men is based not on the position that “they have less resilience, agency or capacity within the armed forces or as civilians, but rather acknowledges that women have a distinct set of needs and may face particular physical and psychological risks.”<sup>113</sup> In doing so, it explicitly recognizes that the original language of the 1952 GC I Commentary referred to women’s weakness, honor and modesty as the basis for their humane treatment under the convention. This too sounds favorable.

However, the discussion goes on to simply note that this “was a product of the social and historical context of the time” and “would no longer be considered

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<sup>105</sup> 2016 GC I COMMENTARY, *supra* note 93, at 201-02.

<sup>106</sup> *Id.* at 228-29, 240.

<sup>107</sup> *Id.* at 213-14.

<sup>108</sup> *Id.* at 488.

<sup>109</sup> *Id.* at 506.

<sup>110</sup> *Id.*

<sup>111</sup> U.N. Charter art. 1, ¶ 3.

<sup>112</sup> See *supra* notes 28-49 and accompanying text.

<sup>113</sup> 2016 GC I COMMENTARY, *supra* note 93, at 506.



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appropriate.”<sup>114</sup> While those statements are true, it is not the complete truth. Simply saying that times have changed ignores the reality of the negotiations of the 1949 conventions from a historical and legal perspective. It would have been better if the drafters of the 2016 GC I Commentary had forthrightly come to grips with the ICRC’s role in creating both the texts of the conventions and the gloss placed on them by the original commentaries.

### ii. *GC II Revised Commentary*

For purposes of this article’s analysis, a brief examination of the provisions of the revised 2017 GC II Commentary, concerning the protection of wounded, sick, and shipwrecked military members, will suffice. Many parts are exactly the same as in the revised 2016 GC I Commentary, such as the structure of the discussions of the commentaries on the individual articles,<sup>115</sup> the reliance on gender mainstreaming as a rationale for the revisions,<sup>116</sup> and the examples given of the specific real-world experiences that would violate the convention’s prohibitions against inhumane and degrading treatment.<sup>117</sup>

There is one slight difference worth noting, however. In the discussion of GC II, Article 12, the footnote that deals with the dated and discriminatory approach of basing protection on women’s weakness, honor, and modesty included an additional sentence: “For a more detailed debate and feminist critiques of humanitarian law, see Gardam/Jarvis, Haeri/Puechguirbal, and Durham.”<sup>118</sup> This is more significant than it might seem at first. Prior to this, the ICRC tended to shun the feminist critique of armed conflict and argued instead that the real problem was people not following the existing rules.<sup>119</sup> Though small, it is perhaps a hint of an evolving approach within the ICRC in drafting the commentaries that became more evident just a couple of years later when the ICRC published its revisions to the 1960 GC III Commentary on prisoners of war.

## B. GC III

The Introduction to the revised 2020 GC III Commentary shows both continuity in the ICRC’s handling of gender in the revisions and at least partial recognition that it needed to get out in front of a gap in the GC III text that is troubling from a feminist perspective and the problems posed by the outdated rationale of women’s protection from sexual violence being based on their honor

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<sup>114</sup> 2016 GC I COMMENTARY, *supra* note 93, at 506.

<sup>115</sup> INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE SECOND GENEVA CONVENTION: CONVENTION (II) FOR THE AMELIORATION OF THE CONDITIONS OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 18-19, (Knut Dörmann et al. eds., 2017) [hereinafter 2017 GC II COMMENTARY].

<sup>116</sup> *Id.* at 210, 272, 503.

<sup>117</sup> *Id.* at 222, 237.

<sup>118</sup> *Id.* at 521.

<sup>119</sup> Prescott, *Law of Armed Conflict*, *supra* note 3, at 103.

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and family rights.<sup>120</sup> The continuity is shown by the use of the same methodology of discussing the revisions to the articles as set forth in the revised GC I and GC II Commentaries. This includes the brief but important factor of “where relevant, how the application in practice of a provision may affect women, men, girls and boys differently[.]”<sup>121</sup>

### *i. Textual Gap*

A textual gap is found in GC III, Article 16, which prohibits “adverse distinction based on race, nationality, religious belief, political opinion or any other distinction founded on similar criteria.”<sup>122</sup> As noted *infra*, this provision notably does not include sex explicitly. The ICRC takes an interesting approach to this obvious gap in the revised commentary. Instead of noting that sex might be another distinction based on similar criteria, it lists other grounds that would not be permitted bases for adverse distinction, including disability, education level, and family connections, but not sex. In doing so, it perhaps takes the position that the omission of sex was not a mistake but was in fact purposeful. If this is the case, then the Introduction’s recommendation to use relevant professionals such as gender specialists to help ensure equal treatment of prisoners of war is artful.<sup>123</sup>

### *ii. Problems in Women’s Protection*

The Introduction also sets the context for the rationale that it finds applicable to the protections afforded female prisoners of war under GC III. It states that the rules were “a product of their times,”<sup>124</sup> which is an artful way to dodge attributing responsibility for their drafting. However, it then forthrightly states that those formulations do not meet current standards, such as the notion that sexual violence against women was prohibited because it was deemed an attack on their honor and a violation of their family rights.<sup>125</sup> Instead, that prohibition is based on the “violence to women’s physical and psychological integrity.”<sup>126</sup> Thus, the revised Commentary “analyses the specific needs of women interned as prisoners of war from the perspective of contemporary practice and legal requirements.”<sup>127</sup> This is a much more solid legal rationale than the reliance on gender mainstreaming concepts seen in the revised GC I and GC II Commentaries.

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<sup>120</sup> See INT’L COMM. OF THE RED CROSS, *Convention (III) Relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949, *Commentary of 2020 Introduction*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=1B9A4ABF10E7EAD2C1258585004E7F19> [hereinafter ICRC, *Commentary of 2020 Introduction*].

<sup>121</sup> 1 INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONER OF WAR 36 (Kurt Dörmann et al. eds 2020) [hereinafter 2020 GC III COMMENTARY, VOL. I].

<sup>122</sup> *Id.* at 10.

<sup>123</sup> *Id.* at 11.

<sup>124</sup> *Id.* at 9.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

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This is not to say that gender mainstreaming concepts are absent from the 2020 GC III Commentary. In fact, they are expressed in the revisions to the discussion of Common Article 3, using almost identical language as was used in the Commentaries to GC I and GC II.<sup>128</sup> What the Introduction clarifies though is that their importance is based on the use of these concepts in practice by states, and it is not just a theory of how to look at gender considerations.<sup>129</sup>

### *iii. Other Specific Articles*

Turning now to the discussions of other specific articles of GC III that are illustrative of the ICRC's approach, GC III, Article 13 requires humane treatment of prisoners, and sets out the obligation to protect them at all times, "particularly against acts of violence or intimidation[.]"<sup>130</sup> The 1960 GC III Commentary's discussion of this article did not address sexual violence or its gendered effects. The revised 2020 GC III Commentary notes, however, that although Article 13 does not state that sexual violence is prohibited, "it does so implicitly because it establishes an obligation of humane treatment and requires protection against violence or intimidation."<sup>131</sup>

This discussion is important for two reasons. First, it shows that the drafters of the 2020 GC III Commentary were thinking broadly about the different provisions of GC III that lent themselves to addressing gender concerns, even if they did not explicitly mention "women." Second, it shows reliance on legal interpretation of the actual text without needing to import any policy considerations of gender mainstreaming for justification.

GC III, Article 14 requires respect for the persons and honor of prisoners, and specifically addresses women prisoners of war.<sup>132</sup> The 1960 GC III Commentary addresses the situation of women prisoners of war, but largely in the sense that the main points to consider in determining the regard due to them under Article 14 were women's weakness, their honor and modesty, and pregnancy and childbirth.<sup>133</sup> The revised 2020 GC III Commentary did not refute this analysis directly; it deftly ignored it and interpreted the text of the article itself, stating that it was "not to be understood as implying that women have less resilience, agency or capacity within the armed forces, but rather as an acknowledgment that women have a distinct set of needs and may face particular physical and psychological risks."<sup>134</sup> Again, although the discussion of Article 14 in the revised commentary is not free of gender mainstreaming language, the focus in the revi-

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<sup>128</sup> 2020 GC III COMMENTARY, VOL. I, *supra* note 121, at 209, 219, 280.

<sup>129</sup> ICRC, *Commentary of 2020 Introduction*, *supra* note 120.

<sup>130</sup> GC III, *supra* note 2, art. 13.

<sup>131</sup> 2020 GC III COMMENTARY, VOL. I, *supra* note 121, at 577-78.

<sup>132</sup> GC III, *supra* note 3, art. 14.

<sup>133</sup> INT'L COMM. OF THE RED CROSS, *Convention (III) Relative to the Treatment of Prisoners of War. Geneva. 12 August 1949: Commentary of 1960, Article 14: Respect for the Person of Prisoners*, para. 2.2 (1960), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=64864A7A2AB7E2F6C12563CD00425C7E>.

<sup>134</sup> 2020 GC III COMMENTARY, VOL. I, *supra* note 121, at 616-17.

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sions is on the text of the convention itself, and finding a way to accommodate concerns about the outdated, discriminatory language from the original commentary without doing violence to the words of the article.

The 2020 GC III Commentary is also notable for the way it telegraphs revisions to the discussions of other articles that have been critiqued for their insufficiency by feminist IHL writers. For example, the phrase “with all regard due to their sex” is now explained as not just making sure women prisoners of war have separate dormitories and adequate clothing, it also means that Detaining Powers “are obliged to ensure that the medical services available to female prisoners of war are adequately equipped to address women’s gynecological and reproductive health issues,”<sup>135</sup> and to provide “sufficient and suitable sanitary products, including sanitary towels and the means to dispose of them[.]”<sup>136</sup>

In sum, there appears to be an evolution in the ICRC’s approach to revising the GC commentaries to deal with the issues identified by the feminist critique of IHL. It appears that the ICRC is ever less reliant on notions of gender mainstreaming to justify why gender considerations should be taken on board when interpreting and applying the treaties and is instead taking a more legally defensible approach of showing how these new understandings fit within the existing treaty text. This evolution is not completely even, and there still appear to be some important areas, such as in the case of textual gaps, where the ICRC’s explanations are less than completely convincing. However, overall, the ICRC’s approach shows promise as it works on the revisions of the GC IV Commentary and moves on toward revisiting the 1987 AP I Commentary.

### V. Gender-Related Provisions of AP I and Its Commentary

Before we assess the approach taken in AP I regarding the protection of women, it is useful to first briefly note the international security situation that formed the backdrop to its negotiations. The first diplomatic conference session on the new treaty was held in 1974,<sup>137</sup> and the Additional Protocols to the 1949 Geneva Conventions were finalized in 1977.<sup>138</sup> At this time, after the U.S. retreat and eventual defeat in Vietnam, the Cold War between the U.S. and the Soviet Union and their respective allies had begun warming back up.<sup>139</sup> Most of the colonies of European states had become independent by this time, and non-international armed conflicts had birthed a number of new states.<sup>140</sup> A number of armed conflicts were still ongoing at the time, including insurgencies in Namibia, Rhodesia, and South Africa against apartheid white regimes.<sup>141</sup>

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<sup>135</sup> 2020 GC III COMMENTARY, VOL. I, *supra* note at 618.

<sup>136</sup> *Id.*

<sup>137</sup> Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 32 (1983).

<sup>138</sup> AP I, *supra* note 5.

<sup>139</sup> See GORDON S. BARRASS, *THE GREAT COLD WAR: A JOURNEY THROUGH THE HALL OF MIRRORS* 186-211 (2009).

<sup>140</sup> See RAYMOND F. BETTS, *DECOLONIZATION* 23, 27, 31-32, 40, 60-62, 112-13 (2d ed. 2004).

<sup>141</sup> See JOHN W. TURNER, *CONTINENT ABLAZE: THE INSURGENCY WARS IN AFRICA 1960 TO PRESENT* 16-99 (1998).

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In this context, the negotiations on AP I took a different and perhaps more ambitious approach to IHL than the drafters used for the 1949 Geneva Conventions. AP I effectively merged the Geneva strand of IHL regarding victims of international armed conflict (and Common Article 3's limited coverage for victims of non-international armed conflict) with the Hague strand of IHL concerning the conduct of international armed conflict into one single treaty.<sup>142</sup> In doing so, AP I did more than just combine existing legal requirements. For example, the definition of international armed conflict was expanded to include wars against colonial or racist regimes, and the requirements upon combatants to be afforded prisoner of war status were significantly liberalized. In terms of the protection of women and girls, some of these changes were not favorable, at least for female civilians.

### A. AP I and Its Commentary

Consistent with the provisions of the 1949 Geneva Conventions, AP I provides certain enhanced protections for women, but many of these provisions follow the rationale of the Geneva Conventions positions of women as caregivers and their inherent weakness rather than equality irrespective of sex.<sup>143</sup> There were certain new protections which are indirect in nature, and although they could in certain circumstances mitigate the more severe effects of armed conflict upon women and girls, this was not noted as a basis for the protections. These include provisions found in AP I, Articles 8-20, 35, 39, 41-51, 58, 67, 75, and 79.

In particular, AP I, Article 75, titled "Fundamental Guarantees," prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault."<sup>144</sup> The AP I Commentary notes that the intent of this article was to expand the scope of humane treatment to people who might otherwise have not been fully covered by existing treaties.<sup>145</sup> Regarding the prohibition of enforced prostitution and indecent assault, the AP I Commentary notes that it applied irrespective of sex.<sup>146</sup> It also notes that regarding the respect of people's "honour," this term was used in GC III, Articles 14 and 34,<sup>147</sup> but of course, this usage was described differently for women than it was for men in the 1960 GC III Commentary.

On the other hand, Article 76 of AP I is specifically titled "Protection of women."<sup>148</sup> It states women are to receive "special respect," and to be protected "against rape, forced prostitution and any other form of indecent assault."<sup>149</sup> In the event they are held for "reasons related to the armed conflict," women who

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<sup>142</sup> 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at ix (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2006).

<sup>143</sup> PRESCOTT, ARMED CONFLICT, *supra* note 25, at 187-88.

<sup>144</sup> AP I, *supra* note 5, art. 75.2(b).

<sup>145</sup> AP I COMMENTARY, *supra* note 13, at 865, 867, 868.

<sup>146</sup> *Id.* at 874.

<sup>147</sup> *Id.* at 871.

<sup>148</sup> AP I, *supra* note 5, art. 76.

<sup>149</sup> *Id.* art. 76.1.

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are pregnant or who have dependent infants are to “have their cases considered with the utmost priority.”<sup>150</sup> Further, pregnant women and those with dependent infants who are convicted of offenses “related to the armed conflict” should not receive death sentences, and if they do, they “shall not be executed.”<sup>151</sup>

These are all important improvements in the treatment of women. As the AP I Commentary points out, this greatly expanded the protections for women against sexual assault and enforced prostitution because it was not limited to situations of occupation or internment, and instead, it “covers all women who are in the territory of Parties involved in the conflict.”<sup>152</sup> However, as to the speedy resolution of cases involving pregnant women and those with dependent infants and the rendering and execution of death sentences against them, the intent of these provisions appears to have been the enhancement of the protection of fetuses and born children, rather than women.<sup>153</sup> The Commentary relates the rationale for these provisions back to the “respect for the person and honour” set out in Article 75,<sup>154</sup> which can be traced back to the 1960 GC III Commentary’s use of the dated and discriminatory understanding of this phrase for women.

### B. Challenges and Opportunities in Revising the AP I Commentary

Under Article 44 of AP I, captured irregular combatants are accorded prisoner of war status so long as they carried their weapons in the open before they attacked, and they are no longer required to wear distinctive insignia and uniforms.<sup>155</sup> Under GC III, however, combatants could not receive prisoner of war status unless they had commanders who were responsible for their subordinates’ actions, they wore a fixed and distinctive sign visible at a distance identifying them as combatants, they carried their weapons in the open, and the military operations in which they were engaged were conducted in accordance with IHL.<sup>156</sup> This standard was significantly liberalized in AP I.

The liberalization of this standard has been criticized as working against the protection of women and girls in armed conflict. For example, during the fighting in Afghanistan, there were reported instances of Taliban fighters using civilians as cover and taking civilians hostage as they conducted attacks.<sup>157</sup> Noted international feminist law scholar Judith Gardam has argued that actions such as these have the unintended effect of legitimizing “the use of women and children as shields” just before an attack is launched.<sup>158</sup> This complicates applying the prin-

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<sup>150</sup> AP I, *supra* note 5, art. 76.2.

<sup>151</sup> *Id.* art. 76.3.

<sup>152</sup> AP I COMMENTARY, *supra* note 13, at 892.

<sup>153</sup> *Id.* at 895-96.

<sup>154</sup> *Id.* at at 893.

<sup>155</sup> AP I, *supra* note 5, art. 44.3(b).

<sup>156</sup> GC III, *supra* note 2, art. 4.A(2).

<sup>157</sup> *Afghanistan Taliban “Using Human Shields” – General*, BBC NEWS (Feb. 17, 2010, 4:09 PM), [http://news.bbc.co.uk/2/hi/south\\_asia/8519507.stm](http://news.bbc.co.uk/2/hi/south_asia/8519507.stm).

<sup>158</sup> Judith Gardam, *A Feminist Analysis of Certain Aspects of International Humanitarian Law*, 12 AUSTL. Y.B. INT’L L. 265, 276 (1988–1989).

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ciple of distinction to protect these female civilians when the attacked force responds with armed force itself,<sup>159</sup> often to their complete detriment in many cases. Tragically, in the 20-year conflict that followed the U.S. invasion in 2001, many Afghan civilians found themselves caught in the crossfire between the Taliban and other insurgent forces on one side and Afghan and Western government forces on the other.<sup>160</sup>

Since the time the AP I Commentary was published, there have been important efforts to better refine the understanding of when one becomes a combatant who can be lawfully engaged by an adversary, such as the ICRC's work on explaining the meaning of direct participation in hostilities.<sup>161</sup> Despite such efforts, it would be very challenging to revise the AP I Commentary to redress the impact of the laxer standard for protected combatancy upon civilian women and children, because the text of AP I, Article 44 is very plain, and does not easily lend itself to a gendered interpretation.

The language of the AP I Commentary explaining the article is extensive, and it is obvious from even a cursory reading that it is geared to the protection of guerrilla fighters and not civilians. In this sense, Article 44 is protective of both male and female guerilla fighters, but the reality is that most irregular combatants today are still male. The increased protection of the relatively few guerrilla fighters who are women, therefore, comes at the expense of their relatively more numerous civilian sisters. Thus, modifying the AP I Commentary language related to Article 44 to address this gendered concern and increase protection for civilian women and girls would come at some cost to the protection afforded to irregular fighters.

However, there is one area involving kinetic operations that could be fruitfully addressed to achieve greater protection for females in armed conflict—the principle of proportionality. Under AP I, Article 51, indiscriminate attacks against civilians by military forces are prohibited, and this includes “attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>162</sup> The AP I Commentary on this provision provides no further detail on what sorts of injuries to civilians or damages to their property are covered.

This then provides an opportunity to revise the AP I Commentary language to include the gender-differentiated effects upon civilians into the analysis of an attack without having to modify interpretations that might have been relied upon by armed forces for many decades, but which are now outdated due to their discriminatory basis. In this context, the pioneering work done by the ADF in a doctrinal note on gender in air operations from 2018 provides a potential starting

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<sup>159</sup> Judith Gardam, *supra* note 158.

<sup>160</sup> *Afghanistan: Record Civilian Casualties in 2021*, UN Reports, BBC NEWS (July 26, 2021), <https://www.bbc.com/news/world-asia-57967960>.

<sup>161</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009*, 90 INT'L REV. RED CROSS, 991 (2008).

<sup>162</sup> AP I, *supra* note 5, art. 51.5.b.

point, as does the most recent NATO doctrine on targeting, in assessing the benefits and challenges of taking this approach.

## VI. Targeting Doctrine and Gender

At the moment, there are few military publications that explore or explain the role that gender considerations could play in targeting, and by extension, in applying the principle of proportionality. There are two that are worthwhile to review, however, the ADF's Air Force Doctrine Note 1-18, *GENDER IN AIR OPERATIONS*, and NATO's Allied Joint Publication (AJP)-3.9, *ALLIED JOINT DOCTRINE FOR JOINT TARGETING*.

### A. Air Force Doctrine Note 1-18

In the hierarchy of ADF Air Force doctrinal publications, the doctrinal note is an unusual document. It is intended to address "specific doctrinal matters that need to be formally articulated between major doctrinal reviews" of higher-level, capstone doctrine, and "to inform and promote discussion on a specific doctrine subject and may not necessarily represent an agreed position."<sup>163</sup> Accordingly, doctrine notes "remain current for a limited time and are either then incorporated into approved doctrine or archived."<sup>164</sup>

Air Force Doctrine Note (AFDN) 1-18, *GENDER IN AIR OPERATIONS*, was published in 2018, but it is difficult to assess its current status since most ADF operational doctrine does not appear to be available to the public online. However, it still provides an example of how the inclusion of gender considerations in proportionality analysis and targeting could be practicably explained. Perhaps as importantly, it also provides an example of how important it is to avoid human rights law rationales as a basis for these explanations.

AFDN 1-18 uses the hypothetical example of a bridge to explain the differences between first order and subsequent order effects that should be considered in targeting in terms of gender.<sup>165</sup> If an enemy were using the bridge to transport weapons, then the destruction of the bridge could provide a force with a legitimate military advantage in obstructing the enemy's logistics, which would be a first order effect.<sup>166</sup> But if the local population used the bridge as well to access essential supplies, then its destruction could result in gendered second order effects, such as forcing local women "to travel further [sic] afield, on unfamiliar and less secure, well-known or well-lit routes to gather" these supplies, such firewood or water.<sup>167</sup>

The third order effects that could flow from this could be the increased risk of sexual or gender based violence that the women would face through use of these

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<sup>163</sup> AFDN 1-18, *supra* note 20, at v.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 16.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*



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less-secure alternatives.<sup>168</sup> Because targeting in conformance with IHL requires taking necessary precautions to minimize collateral damage, “[a]pplying a gender perspective in analysing information and assessing intelligence allows greater clarity of the direct and indirect effects of targeting.”<sup>169</sup> Further, from a utilitarian perspective, “collateral damage or unintended civilian death occurring because of [sic] Air Force employing kinetic weapons could prove to be highly counter-productive to the aims and objectives sought by Government in the conflict.”<sup>170</sup>

The doctrinal note, however, also discloses the tension inherent in taking gender in placing it in an operational military context. It notes that the “militarisation and operationalisation of the Women, Peace and Security agenda. . . must not be seen as an operational tool for the exploitation of military advantage.”<sup>171</sup> The doctrine note argues that “[s]uch approaches focus on the operational effectiveness of military or police strategies which seek to forestall an imminent threat, however do so in ways that may threaten women and women’s rights,” degrade their safety, and “side line or marginalise gender equality goals (e.g. Community building and family resilience).”<sup>172</sup> Accordingly, the UNSCR 1325 themes of conflict prevention and protection are to “form the underlying narrative when applying the gender perspective as a means to ensure we ‘do no further harm’ to the population by our military actions and decisions and thereby inhibit or prolong the recovery for the population.”<sup>173</sup>

While laudable from a philosophical perspective, this is not how armed conflict works. Lawful application and implementation of the principle of proportionality by commanders and operators does not require that there be no harm to civilians or their property in the course of an attack.<sup>174</sup> To only use gender-differentiated information and analysis in the course of an attack when it can be guaranteed to not result in additional harm to any particular woman or girl is both impracticable and counterproductive to the goal of making gender considerations an integral part of mission planning. Overall, norming the consideration of gender across a headquarters or a unit should lead to greater protection for women and girls in armed conflict in general, but it will not necessarily result in greater protection for all individual women and girls in the area of operations.

Three years after AFDN 1-18 was published, NATO published its updated targeting doctrine,<sup>175</sup> which meaningfully included gender considerations in the joint targeting process. This doctrine, and perhaps as importantly the U.S. reser-

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<sup>168</sup> AFDN 1-18, *supra* note 20, at 16.

<sup>169</sup> *Id.* at 32.

<sup>170</sup> *Id.* at 20.

<sup>171</sup> *Id.* at 17-18.

<sup>172</sup> *Id.* at 18.

<sup>173</sup> *Id.*

<sup>174</sup> AP I, *supra* note 5, art. 51.5(b).

<sup>175</sup> NATO Standardization Office (NSO), *NATO Standard Allied Joint Publication (AJP) 3.9 Allied Joint Doctrine for Joint Targeting*, NATO (Nov. 2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1033306/AJP-3.9\\_EDB\\_V1\\_E.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033306/AJP-3.9_EDB_V1_E.pdf).

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variations to it, shows the practical challenges in trying to wedge a role for gender advisors (“GENADs”) and gender information in current targeting processes.

### B. AJP-3.9, Allied Joint Doctrine for Joint Targeting

NATO functionally defines “joint targeting” as “taking actions in one or more of the operational domains, using all capabilities available, against a target, in order to create an effect in one or more of the physical, virtual, or cognitive dimensions.”<sup>176</sup> An “effect” can be non-lethal, such as a change in attitude towards a force by the local population because of an information action, or lethal, such as the destruction of an enemy headquarters because of a missile strike. Examples of operational domains include land, air, and cyberspace.<sup>177</sup>

The joint targeting process is cyclical, moving through phases in which targets are developed, missions are planned and executed, effects on targets are assessed, and on the basis of the assessments, commanders issue new targeting guidance, beginning the process anew.<sup>178</sup> In the target development phase, AJP-3.9 has GENADs provide a gender analysis of the target.<sup>179</sup> The assessment phase includes integration of a gender perspective that identifies the different effects on women, men, boys and girls.<sup>180</sup> AJP-3.9 states that the “integration of a Gender perspective contributes to the orchestration of fighting power” and that “close cooperation between GENAD, LEGAD [legal advisors], targeteers, and intelligence is necessary.”<sup>181</sup>

NATO operates by consensus, but not perfect consensus. To move things along, NATO members will agree to certain things but caveat that agreement with reservations. The U.S. reservations regarding the role of the GENAD are worthwhile reading in whole:

Reservation 10. The U.S. does not endorse the requirement for targets to be reviewed by a [GENAD] prior to target validation. The US will follow joint doctrine which requires intelligence (J2 [staff section]), operations (J3 [staff section]), and [LEGAD] review of targets to ensure they meet military objectives and [IHL]. The US has no similar role or function of a GENAD during target development and validation.<sup>182</sup>

The phrasing of this reservation is important. The U.S. has trained GENADs,<sup>183</sup> but their purpose is to execute the Department of Defense imple-

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<sup>176</sup> NATO Standardization Office (NSO), *supra* note 175, at 1-3.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1-14.

<sup>179</sup> *Id.* at 1-15, 1-16.

<sup>180</sup> *Id.* at 1-19.

<sup>181</sup> *Id.* at 1-27.

<sup>182</sup> *Id.* at VII.

<sup>183</sup> Jody M. Prescott, *Moving from Gender Analysis to Risk Analysis of Failing to Consider Gender*, 165 ROYAL UNITED SERV. INST. J. 1, 2 (2020).

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mentation plan<sup>184</sup> for the military portions of the U.S. strategy on women, peace, and security.<sup>185</sup> The U.S. strategy focuses on actions to promote gender equality before a conflict and after a conflict, but studiously avoids carving out a role for gender considerations in the deadly parts of deadly armed conflict.<sup>186</sup> This gap presents practical problems in operationalizing gender considerations in the targeting process if the U.S. is taking the lead in supporting targeting operations.

Even if a nation or group of nations took the lead, and these nations did use their GENADs in the manner set out in AJP-3.9, it is still not clear what value the GENADs would bring to the targeting process. Comparing the GENAD's role in the process with the LEGAD's role highlights this. Military lawyers will likely be present at all staff meetings during all phases of the Joint Targeting Cycle, from assessing nominations of targets to targeting lists to providing real-time legal advice in an operations center as targets are engaged. They will have received substantial education in IHL and undergone training in its application. Importantly, they will have internationally recognized standards that they can apply to issues during the Joint Targeting Cycle.<sup>187</sup>

GENADs, on the other hand, are apparently expected to provide advice only when targets are developed originally, in the form of a gender analysis, and then later when the engagements of the targets are assessed to see whether the desired effects were achieved.<sup>188</sup> They might have an academic degree in some aspect of gender-related studies, but they do not have professional degrees as the military lawyers will. They will hopefully have received training in gender in military operations, but it is unlikely this training lasted more than a couple of weeks.<sup>189</sup> The largest gap between the LEGADs and the GENADs, though, is the standard that GENADs would apply to their analysis. What, for example, would be the standard they would apply to a typical gender analysis that would allow them to credibly say to a commander that an operation should not proceed because it was not sufficiently gender-sensitive?

These are the sorts of practical problems that would need to be solved before any revisions to the AP I Commentary that incorporated gender considerations into the analysis of proportionality could become useful in the field in providing greater protection to women and girls in armed conflict.

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<sup>184</sup> U.S. Dep't of Def., Women, Peace, and Security Strategic Framework and Implementation Plan (June 2020), [https://media.defense.gov/2020/Jun/11/2002314428/-1/-1/1/WOMEN\\_PEACE\\_SECURITY\\_STRATEGIC\\_FRAMEWORK\\_IMPLEMENTATION\\_PLAN.PDF](https://media.defense.gov/2020/Jun/11/2002314428/-1/-1/1/WOMEN_PEACE_SECURITY_STRATEGIC_FRAMEWORK_IMPLEMENTATION_PLAN.PDF).

<sup>185</sup> EXEC. OFF. PRES., UNITED STATES STRATEGY ON WOMEN, PEACE, AND SECURITY (June 2019), [https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/06/WPS\\_Strategy\\_10\\_October2019.pdf](https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/06/WPS_Strategy_10_October2019.pdf).

<sup>186</sup> Jody M. Prescott, *Gender Blindness in US Doctrine*, 50 *PARAMETERS*, 21, 22-23 (2020).

<sup>187</sup> Nathalie Durhin, *The Role of Legal Advisors in Targeting Operations: A NATO Perspective*, 60 *MIL. L. & L. WAR REV.* 47, 50 (2022).

<sup>188</sup> NSO, AJP 3.9, *supra* note 175, at 1-15, 1-16, 1-19.

<sup>189</sup> Prescott, *Gender Analysis to Risk Analysis*, *supra* note 183, at 4.

## VII. Conclusion

To most effectively link the future revisions of the AP I Commentary to the gendered effects of kinetic operations, the discussion of AP I, Article 51 could be revised to clearly explain why the gender-differentiated effects of applying armed force in situations involving civilians and their property should be considered. This explanation would need to provide useful examples of how this could be done, perhaps along the lines set out in the ADF doctrine note. If this happened, it could be a meaningful step forward in realizing the goal of greater protection for women and girls in all areas of international humanitarian law as set out in UNSCR 1325.

There are two caveats that should inform the ICRC's efforts if it were to choose this path. First, for the sake of the credibility of the revisions, it would be important that the ICRC only stake out positions that it can credibly defend against those whom it wishes to convince. Second, since the general statement of the legal principle of proportionality set out in AP I, Article 51, will not change, any change in the discussion in the AP Commentary about it will need to be reflected in doctrine, military educational criteria, training programs, and operational standard operating procedures. As shown by the gender-related provisions in the NATO targeting doctrine and the U.S. reservations thereto, this means that the ICRC must identify convincing real-world examples of how the inclusion of gender considerations in kinetic operations would work in a practicable way.<sup>190</sup>

The ICRC need not complete this task all by itself. Military organizations are the ones best suited to determine how an enhanced understanding of proportionality that includes gender considerations can be accomplished in their activities and operations. Mindful of classification issues, this might require the ICRC to engage with militaries in a different fashion than it does ordinarily, moving discussions with them into the weeds of application where it is no longer the acknowledged expert. Awkward perhaps, but if it could be accomplished, it could lead to militaries investing more in sex and gender-disaggregated data collection and analysis in operations, to form a more actionable picture of gender considerations in mission areas. This would meet the letter of UNSCR 1325 to work with all aspects of IHL to achieve the greater protection of women and girls in situations of armed conflict.

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<sup>190</sup> See Jody M. Prescott, *The Principle of Proportionality and the Operational Relevance of Climate Change— A Gendered Perspective*, 43 NATO LEGAL GAZETTE (forthcoming Dec. 2022) (providing an example of a hypothetical targeting standard operating procedure).

