

**ADDRESSING THE NON-HOMOGENOUS NATURE
OF THE CIVILIAN POPULATION IN THE CONDUCT
OF HOSTILITIES: ENHANCED PROTECTION
THROUGH DIFFERENTIATION**

by

Sophie Timmermans

Under the supervision of

Prof. Dr. Gloria Gaggioli

*Submitted in partial fulfilment of the requirements of the LLM in International Humanitarian
Law and Human Rights*

Academic year 2021–2022

21 August 2022

Word Count: 9.994

TABLE OF CONTENTS

1.	INTRODUCTION	3
2.	ADVERSE DISTINCTION AND DIFFERENTIATION IN IHL	4
	2.1 <i>The prohibition of adverse distinction and permitted favourable distinctions</i>	4
	2.2 <i>Vulnerabilities of civilians in armed conflict</i>	5
	2.2.1 Vulnerabilities explicitly recognized in IHL	5
	2.2.2 Other relevant vulnerabilities.....	6
3.	NON-DISCRIMINATION AND FAVOURABLE DISTINCTIONS IN INTERNATIONAL LAW	7
	3.1 <i>The meaning of non-discrimination and equality</i>	8
	3.1.1 Positive and negative concepts	8
	3.1.2 Direct and indirect discrimination.....	9
	3.2 <i>Justified distinctions and affirmative action</i>	9
4.	THE INFLUENCE OF NON-DISCRIMINATION IN IHRL ON THE PROHIBITION OF ADVERSE DISTINCTION IN IHL.....	10
5.	ENHANCED CIVILIAN PROTECTION THROUGH A DIFFERENTIATED APPROACH IN THE CONDUCT OF HOSTILITIES.....	11
	5.1 <i>The prohibition of adverse distinction in the conduct of hostilities</i>	11
	5.2 <i>Distinction: Biases and subnorms in civilian status</i>	13
	5.3 <i>Proportionality</i>	14
	5.3.1 Increased harm of certain groups	15
	5.3.2 Subjectivity in assessing expected civilian harm.....	15
	5.3.3 Differentiated indirect effects	16
	5.4 <i>Precautions</i>	18
	5.4.1 Constant care without adverse distinction	18
	5.4.2 Feasible precautions in attack	19
	5.4.3 Feasible precautions against the effects of attacks.....	22
	5.5 <i>An option or duty to differentiate?</i>	24
6.	CHALLENGES	25
7.	CONCLUSION	26
8.	BIBLIOGRAPHY	28

1. Introduction

Civilians in armed conflict are affected in a number of ways, ranging from injury and death to food insecurity, insufficient shelter, and water contamination.¹ The harm and suffering caused is not identical and must be assessed from the perspective of the vulnerabilities of the person or community affected.² The principles on the conduct of hostilities in international humanitarian law (IHL), however, focus their protection on ‘civilians’ and the ‘civilian population’ as a whole, leading to a generalization of their experiences and harm.³

While the universalist approach in IHL does not recognize the differences within the civilian population,⁴ pre-existing vulnerabilities of civilians and certain groups lead to a varying impact of violence in practice.⁵ The provided protection must therefore reflect the specific needs of the individuals involved. This requires consideration of the elements that create vulnerabilities, such as gender, age, ethnicity, disability, race, religion, ...⁶

When alluding to differentiations, the question of non-discrimination emerges. This paper will start by explaining the prohibition of adverse distinction and permissible distinctions in IHL as well as some different vulnerabilities that civilians in conflict face. Then, it will elaborate on discrimination and equality in international law, specifically in international human rights law (IHRL). Following this, the paper explains how IHRL can influence IHL on this topic. Finally, this paper will address three issues. First, the possibility of applying the prohibition of adverse distinction in the conduct of hostilities. Second, the direct and indirect discrimination that can be inherent when applying the principles on the conduct of hostilities. Third, it will address where additional differentiations in the application of the principles are possible, whether it is required, and what the challenges are.

¹ Cordula Droege and Helen Durham, ‘Civilian Protection in Armed Conflict’ in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (Oxford University Press 2021) 362.

² Saba Azeem and others, *On Civilian Harm: Examining the Complex Negative Effects of Violent Conflict on the Lives of Civilians* (Erin Bijl, Welmoet Wels, and Wilbert van der Zeijden eds, PAX, Protection of Civilians team 2021) 246.

³ Alice Priddy, ‘Disability and Armed Conflict’ [2019] *Academy Briefing* n° 14 1, 61; Saba Azeem and others (n 2) 246.

⁴ Susan F. Hirsch, ‘Civilians under the Law: Inequality, Universalisms, and Intersectionality as Intervention’ in Daniel Rothbart, Karina V. Korostelina, and Mohammed D. Cherkaoui (eds), *Civilians and Modern War: Armed conflict and the ideology of violence* (Routledge 2012) 346–347.

⁵ Saba Azeem and others (n 2) 237.

⁶ Cordula Droege and Helen Durham (n 1) 378.

2. Adverse distinction and differentiation in IHL

2.1 *The prohibition of adverse distinction and permitted favourable distinctions*

Non-discrimination has a long history in IHL and has been included ever since 1864.⁷ Over time, it has turned into a fundamental principle and has been explicitly included in the Geneva Conventions of 1949 (GC) and the Additional Protocols of 1977 (AP).⁸

The protections of IHL therefore apply to civilians and persons *hors de combat* without any adverse distinction based on race, colour, religion or faith, sex, birth, wealth, or any other similar criteria.⁹ Because of ‘or any other similar criteria’, this list is not exhaustive. API has introduced a more elaborate list: race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria.¹⁰

There is only a prohibition on ‘adverse’ distinction, signifying that differential treatment for the benefit of certain categories of persons may sometimes be permitted or even required.¹¹ With regards to the wounded and sick in GCI, for example, steps must be taken to ensure that the

⁷ Art 6 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865); Art 1 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 6 July 1906, entered into force 9 August 1907) ; Art 1 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 27 July 1929, has not entered into force); Art 4 Convention for the Treatment of Prisoners of War (adopted 27 July 1929, has not entered into force).

⁸ Jelena Pejic, ‘Non-Discrimination and Armed Conflict’ (2001) 83 *International Review of the Red Cross* 183, 186. ; Art 12 and 3 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI); Art. 12 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GCII); Art 16 Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII); Art 13 and 27 Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV); Preamble and Art 9, 10, 70 and 75 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API); Art 2, 4 and 7 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII).

⁹ Alice Priddy (n 3) 55. ; Jelena Pejic (n 8) 186; ICRC, ‘Discrimination (or Adverse Distinction)’ <<https://casebook.icrc.org/glossary/discrimination-or-adverse-distinction#:~:text=In%20IHL%2C%20the%20principle%20of,nationality%2C%20religion%20or%20political%20affiliation>> accessed 28 May 2022.

¹⁰ Knut Dörmann and others, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) 495. ; Art 9 API.

¹¹ Alice Priddy (n 3) 55. ; Jelena Pejic (n 8) 186; ICRC (n 9).

wounded and sick can seek and access equal care when their particular situation or status prevents them from doing so.¹²

The Conventions acknowledge that various groups need to be treated differently in the provision of humanitarian care. IHL is based on distinctions between categories of persons or ‘protected persons’ in the Conventions. These distinctions are not prohibited and parties are obliged to treat civilians differently from prisoners of war, for example. What is not allowed is different treatment of similarly situated groups or similarly situated individuals in a group. For example, wounded combatants cannot be treated better or worse on the basis of their religion.¹³

2.2 Vulnerabilities of civilians in armed conflict

2.2.1 Vulnerabilities explicitly recognized in IHL

In addition to the general protection granted to all civilians,¹⁴ the Conventions recognize persons that require additional protection.¹⁵ Besides special protection being offered based on civilians’ particular functions (e.g. journalists, medical personnel, religious personnel, civil defence personnel),¹⁶ there are also special protections based on vulnerabilities.¹⁷

Multiple provisions specifically protect civilian women.¹⁸ While discrimination is prohibited, there is also recognition of the specific protection needs of women because of their perceived vulnerabilities, based on physiological needs or social stereotypes.¹⁹ Customary IHL acknowledges the specific protection, health, and assistance needs of women in armed conflict.²⁰ Article 27 §2 of GCIV, moreover, protects women against attacks on their honour,

¹² Knut Dörmann and others (n 10) 496.

¹³ Gabor Rona and Robert J. McGuire, ‘The Principle of Non-Discrimination’ in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 195.

¹⁴ Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 280.

¹⁵ Jelena Pejic (n 8) 186.

¹⁶ Art 15 §1 and §5, 62, and 79 §1 API.

¹⁷ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2016) 187.

¹⁸ Arts 14, 16, 21–23, 76, 85, 89, 119, 124 and 132 GCIV ; Art 8(a) and 76(2)–(3) API ; Art 6(4) APII.

¹⁹ Marco Sassòli (n 14) 281; Charlotte Lindsey, ‘The Impact of Armed Conflict on Women’ in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff Publishers 2005) 30.

²⁰ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I (4th edn, Cambridge University Press 2009) 475.

particularly rape, and other forms of indecent assault.²¹ This rule is restated and broadened by art 76§1 API, applying to all women and not only to protected persons.²²

Children, moreover, are the beneficiaries of special protection.²³ This special protection is laid down in customary IHL, article 77 of API, and article 4§3 of APII.²⁴ In relation to removal from besieged or encircled areas, children benefit from special regard in GCIV.²⁵

Special respect and protection is also granted to the elderly, disabled, and infirm.²⁶ Wounded and sick civilians are protected by art 10§1 of API, whereas GCIV offers protection for civilian wounded and sick, infirm, maternity cases, and the elderly.²⁷ The scope of article 8(a) API is broad and includes those who need medical assistance or care because of trauma, disease, physical or mental disorder, or disability. This includes new-born babies, maternity cases, and others in need of medical assistance or care, for example the infirm and expectant mothers. These persons must refrain from acts of hostilities.²⁸ The plight of persons with disabilities in conflict can be noted in Ukraine in 2022, where the attacks are putting 2.7 million persons with disabilities at risk. The UN Committee on the Rights of Persons with Disabilities has noted that few people with disabilities are internally displaced, indicating the inability to flee.²⁹

2.2.2 Other relevant vulnerabilities

The special protections do not cover all categories of persons that may be more vulnerable in armed conflict. Socio-economic status and livelihood generation cause persons to be more vulnerable to certain attacks and their effects. In general, those depending on agriculture for

²¹ Art. 27 §3 GCIV

²² Yoram Dinstein (n 17) 187.

²³ Fatima Shaheed, *Protecting Children in Armed Conflict* (Hart Publishing 2018) 49.

²⁴ Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 479; ICRC, 'Legal Protection of Children in Armed Conflict' (ICRC 2003) 1 <<https://www.icrc.org/en/document/legal-protection-children-armed-conflict-factsheet>> accessed 20 August 2022. ; Art 77 API ; Art 4 §3 APII.

²⁵ Art 17 GCIV.

²⁶ Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 489.

²⁷ Art 14 §1 and 17 GCIV.

²⁸ Art 8 (a) API.

²⁹ UN Committee on the Rights of Persons with Disabilities, 'Ukraine: 2.7 Million People with Disabilities at Risk, UN Committee Warns' (14 April 2022) <[https://www.ohchr.org/en/statements/2022/04/ukraine-27-million-people-disabilities-risk-un-committee-warns#:~:text=Ukraine%3A%202.7%20million%20people%20with%20disabilities%20at%20risk%2C%20UN%20committee%20warns,-Back&text=GENEVA%20\(14%20April%202022\)%20%E2%80%93,people%20with%20disabilities%20at%20risk](https://www.ohchr.org/en/statements/2022/04/ukraine-27-million-people-disabilities-risk-un-committee-warns#:~:text=Ukraine%3A%202.7%20million%20people%20with%20disabilities%20at%20risk%2C%20UN%20committee%20warns,-Back&text=GENEVA%20(14%20April%202022)%20%E2%80%93,people%20with%20disabilities%20at%20risk)> accessed 24 July 2022.

their livelihoods will suffer more harm when the environment is damaged than those persons with another source of income. When oil refineries were set on fire in Iraq in 2016, this disproportionately affected two groups. The resulting damage to lands and death of livestock caused farmers and persons keeping livestock to lose their livelihoods. Additionally, children with a weak socio-economic background were forced to work in artisanal refineries to make a living, exposing them to health risks caused by a dangerous and toxic working environment. This vulnerability can also be seen in the effects of explosive remnants of war on rural residents in Cambodia, who are affected more than those living in urban areas.³⁰

Certain types of damage can exacerbate the vulnerabilities of civilians in poverty. The effects of damage to water infrastructure still affects the residents of Gaza. In 2010, a survey showed that approximately 83% of Gazan households had to rely on private vendors for water. This costs 15 to 20 times more than water from the network, therefore particularly affecting those already vulnerable or in poverty.³¹

Ethnicity can also be a factor of vulnerability. In the South Sudanese conflict, the Nuer community, especially women and girls, had become particularly vulnerable as they were perceived as supporters of the Sudan People's Liberation Movement/Army in Opposition (SPLM/A-IO).³² Moreover, religious differences are used to deny other people's humanity and discrimination based on religion is problematic for the application of IHL.³³ Armed conflict also exacerbates the vulnerabilities of minorities, deepening the divide along ethnic, religious, and linguistic lines.³⁴

3. Non-discrimination and favourable distinctions in international law

³⁰ Saba Azeem and others (n 2) 247–249 and 290.

³¹ *ibid* 88; United Nations Country Team in the Occupied Palestinian Territory, 'Gaza Ten Years Later' (July 2017) 20 <<https://www.un.org/unispal/document/gaza-ten-years-later-un-country-team-in-the-occupied-palestinian-territory-report/>> accessed 18 August 2022.

³² Saba Azeem and others (n 2) 76.

³³ Carolyn Evans, 'The Double-Edged Sword: Religious Influences on International Humanitarian Law' (2005) 6 *Melbourne Journal of International Law* 1, 9.

³⁴ Sandra Krähenmann, 'IHL and the Protection of Minorities' (Geneva, 24 November 2016) 1 <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/MinorityIssues/Session9/StatementS/SandraKrahenmann_IHLandtheProtection_minorities.pdf> accessed 26 July 2022.

Non-discrimination can be found everywhere in international law, and especially in IHRL.³⁵ The principles on equality and non-discrimination are customary international law,³⁶ and some argue that it is *jus cogens*.³⁷ The list of discrimination grounds in article 2 of the Universal Declaration of Human Rights (UDHR) enjoys consensus by states.³⁸ These are ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.³⁹ Other grounds may be included as it is non-exhaustive.⁴⁰

3.1 The meaning of non-discrimination and equality

3.1.1 Positive and negative concepts

Non-discrimination and equality are often used as interchangeable terms. Equality demands equal treatment for equal situations, where the prohibition of discrimination prohibits differentiation on unreasonable grounds.⁴¹ Two duties are therefore included: a negative duty to abstain from discrimination and a positive duty to ensure equality by preventing discrimination and taking positive measures.⁴²

Formal equality is achieved when persons in a similar situation are treated equally. Treating persons in a consistent manner regardless of their background can nonetheless have a

³⁵ Gabor Rona and Robert J. McGuire (n 13) 194; E.W. Vierdag, *The Concept of Discrimination in International Law, with Special Reference to Human Rights* (Nijhoff 1973) 1; Samantha Besson, ‘The Principle of Non-Discrimination in the Convention on the Rights of the Child’ (2005) Vol. 13 *The International Journal of Children’s Rights* 433, 440. ; Art 1 §3 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. ; Art 2 and 7 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR). ; Art 2 §2 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR). ; Art 2 §1 and 26 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). ; Art 14 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR).

³⁶ Bertrand Ramcharan, ‘Equality and Nondiscrimination’ in Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law*, vol II (Routledge 2016) 32; Samantha Besson (n 35) 440; Daniel Moeckli, ‘Equality and Non-Discrimination’ in Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law*, vol II (Routledge 2016) 57; William A. Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021) 165. ; ICJ, *South West Africa (Liberia v. South Africa)* (Dissenting Opinion of Judge Tanaka) [1966] ICJ Rep 6, 293.

³⁷ Gabor Rona and Robert J. McGuire (n 13) 195.

³⁸ William A. Schabas (n 36) 165.

³⁹ *ibid* 163; Dinah Shelton, ‘Prohibited Discrimination in International Human Rights Law’ in Aristotle Constantinides and Nikos Zaiko (eds), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa* (Martinus Nijhoff Publishers 2009) 264. ; Art 2 UDHR.

⁴⁰ William A. Schabas (n 36) 174.

⁴¹ Samantha Besson (n 35) 435.

⁴² *ibid* 437.

disproportionately negative effect on certain groups.⁴³ To avoid this perpetuation of existing inequality a substantive concept of equality is proposed. This has two variants: equality of opportunity and equality of results.⁴⁴ Equality of opportunity presupposes the removal of barriers for certain groups and addressing existing discrimination. Equality of outcome goes further and aims for an equal distribution of social goods. It stresses that the mere removal of barriers does not allow all disadvantaged groups to take advantage of opportunities.⁴⁵

3.1.2 Direct and indirect discrimination

Direct discrimination exists when a person is treated in a less favourable manner than someone in a similar situation, on account of one or more of the prohibited grounds.⁴⁶ To prove this, the person must show that another has been treated more favourably because they do not share the same characteristic, and that they are in a relevantly similar situation. The classic example of this is the denial of access to persons of an ethnic group.⁴⁷

A discriminatory outcome is also prohibited. This indirect discrimination exists when a seemingly neutral rule or practice has disproportionate effects on a particular group that is defined on the basis of one of the prohibited grounds for discrimination. The Human Rights Committee has explicitly acknowledged indirect discrimination, stating that it exists when the detrimental effects of a rule or decision disproportionality or exclusively affect persons with a certain characteristic.⁴⁸ Discrimination can therefore take the form of same treatment of persons with different characteristics and needs.⁴⁹ Intent is not required to establish discrimination.⁵⁰

3.2 Justified distinctions and affirmative action

⁴³ Daniel Moeckli (n 36) 55.

⁴⁴ *ibid*; Samantha Besson (n 35) 438.

⁴⁵ Daniel Moeckli (n 36) 55.

⁴⁶ UN CESCR, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009) E/C.12/GC/20, §10.

⁴⁷ Daniel Moeckli (n 36) 60–61.

⁴⁸ *ibid.*; UN Human Rights Committee, 'Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights: Seventy-eighth session concerning Communication No. 998/2001' (2003) CCPR/C/78/D/998/2001, §10.2.

⁴⁹ Anne F. Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law' (1990) Vol. 11 Human Rights Law Journal 1, 10.

⁵⁰ Daniel Moeckli (n 36) 62; Samantha Besson (n 35) 436; Anne F. Bayefsky (n 49) 8.

Persons are not identical in all ways and they possess certain qualities, innate or imputed, which can be considered. Just as equal persons should be treated equally, so should different persons be treated differently.⁵¹ Not all distinctions are therefore prohibited discrimination, since they can be justified by objective and reasonable criteria.⁵²

Affirmative action for the benefit of disadvantaged groups is allowed.⁵³ In international law, special measures of protection are an important part of affirmative action. These measures focus on correcting the position of members of a certain group in a certain area to achieve effective equality.⁵⁴ IHRL sometimes even demands to take affirmative action to eliminate or reduce conditions that cause or perpetuate prohibited discrimination.⁵⁵

4. The influence of non-discrimination in IHRL on the prohibition of adverse distinction in IHL

Since human rights law continues to apply in armed conflict, the prohibition of discrimination in IHRL applies jointly with the prohibition of adverse distinction in IHL.⁵⁶

There are three possible situations that emerge according to the International Court of Justice (ICJ): rights that are exclusively matters of IHL, those that are exclusively matters of IHRL, and those that are matters of both.⁵⁷ The rules on non-discrimination are a matter of both IHL and IHRL and both bodies of law are complementary and mutually reinforcing on the subject.⁵⁸

⁵¹ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights A Perspective on Its Development* (Clarendon Press 1998) 154.

⁵² William A. Schabas (n 36) 168; Matthew Craven (n 51) 184.

⁵³ Bertrand Ramcharan (n 36) 42.

⁵⁴ Daniel Moeckli (n 36) 67. ; UN Commission on Human Rights, 'The concept and practice of affirmative action : final report submitted by Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5' (2001) E/CN.4/Sub.2/2001/15, §7.

⁵⁵ *ibid* 67–68. ; UN Human Rights Committee, 'CCPR General Comment No. 18: Non-discrimination' (1989) CCPR/C/21/Rev.1/Add.1, §10.

⁵⁶ George Dvaladze, 'Equality and Non-Discrimination in Armed Conflict' (PhD Thesis, University of Geneva 2021) 192. ; ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, §25. ; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, §105–106. ; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 168, §216.

⁵⁷ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136., §106.

⁵⁸ Cordula Droegge, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 20 *Israel Law Review* 310, 340.

IHL may be interpreted in light of IHRL, based on the principle of systemic integration.⁵⁹ Shared concepts, such as the prohibition of discrimination, can therefore be interpreted in light of IHRL.⁶⁰ This is also supported by the International Committee of the Red Cross (ICRC), who stated that human rights law can support, inform, and clarify analogous rules of IHL.⁶¹ Therefore, the definition and forms of discrimination in IHRL aid in interpreting the notion of adverse distinction.⁶² IHRL can complement IHL, either through authoritative interpretations of human rights bodies or through new human rights instruments. IHRL can aid in assessing what is adverse distinction in IHL, based on the definitions of specific discrimination in human rights law and their evolutions.⁶³ Sassòli, for example, has stated that the prohibition of adverse distinction against women under IHL is to be interpreted in light of IHRL, covering both direct and indirect discrimination.⁶⁴ Moreover, the Convention on the Rights of Persons with Disabilities (CRPD) can provide guidance on what adverse distinction based on disability means.⁶⁵ Using such an evolutionary interpretation is relevant, since interpreting the Conventions and Protocols in the same way as in 1949 and 1977 would make very little sense.⁶⁶

5. Enhanced civilian protection through a differentiated approach in the conduct of hostilities

5.1 The prohibition of adverse distinction in the conduct of hostilities

While the prohibition on adverse distinction is a guiding principle in IHL, it is often stated that it only applies to the treatment of persons that are in the hands of a party to the conflict.⁶⁷ API does not mention the prohibition as one of the rules governing the conduct of hostilities.⁶⁸

⁵⁹ Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford University Press 2014) 165. ; Article 31(3)(c) Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

⁶⁰ Raphaël van Steenberghe, 'The Impacts of Human Rights Law on the Regulation of Armed Conflict: A Coherency-Based Approach to Dealing with Both the "Interpretation" and "Application" Processes' [2022] *International Review of the Red Cross* 1345, 1356.

⁶¹ Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) xxxvii.

⁶² George Dvaladze, 'Non-Discrimination under International Humanitarian and Human Rights Law' in Robert Kolb, Gloria Gaggioli, and Pavle Kilibarda (eds), *Research handbook on human rights and humanitarian law: further reflections and perspectives* (Edward Elgar Publishing 2022) 434.

⁶³ George Dvaladze (n 56) 201.

⁶⁴ Marco Sassòli (n 14) 282.

⁶⁵ George Dvaladze (n 56) 201.

⁶⁶ Gloria Gaggioli, 'The Strength of Evolutionary Interpretation in International Human Rights Law' in Georges Abi-Saab and others (eds), *Evolutionary Interpretation and International Law* (Hart Publishing 2019) 110.

⁶⁷ Sandra Krähenmann (n 34) 2.

⁶⁸ George Dvaladze (n 56) 72.

Scholars have argued that the prohibition could apply to the conduct of hostilities. According to Krähenmann, the prohibition could have a broader ‘umbrella’ function and apply to the conduct of hostilities.⁶⁹ Additionally, Dvaladze proposes to read the principles on the conduct of hostilities in line with the prohibition on adverse distinction in IHL.⁷⁰ Regarding adverse distinction against women, Sassòli states that women of the civilian population protected against attacks and the effects of hostilities must be protected in the same manner as men based on their status.⁷¹ Regarding persons with disabilities, Priddy argues that the rules governing hostilities must apply in accordance with the prohibition of adverse distinction and the prohibition of discrimination based on impairment.⁷²

These proposals are supported by the preamble of API, which explicitly states ‘(...) that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, (...)’.⁷³ Also crucial is article 49§4 API, which states that ‘the provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, (...)’.⁷⁴ Part II deals with the protection of civilians against the consequences of war and includes article 13 on the prohibition of adverse distinction. According to Jean Pictet the objective of Part II ‘is to bind belligerents to observe certain restrictions in their conduct of hostilities’.⁷⁵

The prohibition of adverse distinction is also a rule of customary IHL. According to the ICRC, there is no indication that adverse distinction would be lawful for some rules, and states do not make such claims either.⁷⁶ Nevertheless, this rule is mentioned under the part on the treatment of civilians and persons *hors de combat*, which is a part of the chapter that only applies to civilians in the power of a party who do not directly participate in hostilities and persons *hors de combat*.⁷⁷ Some practice supports the prohibition of adverse distinction in the conduct of

⁶⁹ Sandra Krähenmann (n 34) 2.

⁷⁰ George Dvaladze (n 62) 428.

⁷¹ Marco Sassòli (n 14) 282.

⁷² Alice Priddy (n 3) 58. ; Art 5 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

⁷³ George Dvaladze (n 56) 65.

⁷⁴ Art 49 §4 API.

⁷⁵ Jean Pictet (ed), *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War: Commentary* (ICRC 1958) 118; George Dvaladze (n 62) 429.

⁷⁶ Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 309.

⁷⁷ *ibid* 299.

hostilities. The military manual of Canada, for example, considers non-discrimination an operational principle and states that the Law of Armed Conflict must be applied without adverse distinction.⁷⁸ The United Nations General Assembly (UNGA), moreover, has previously called upon Myanmar to stop military operations that target civilians in ethnic areas.⁷⁹ These examples are rather rare, as states generally refer to the prohibition in the context of civilians in the power of a party to the conflict and persons *hors de combat*.⁸⁰

The ICRC has nonetheless recognized the need to consider the specific vulnerabilities of certain civilians in the conduct of hostilities. Its Plan of Action for 2000-2003 states that the civilian population must be protected and respected in the conduct of hostilities and that protective measures should be taken for groups with specific vulnerabilities, such as persons with disabilities and the elderly.⁸¹

While there are good arguments to include the prohibition of adverse distinction in the conduct of hostilities, the debate is unsettled as the scope of the prohibition remains under examination.⁸² Therefore, the following analysis will indicate where there can be adverse distinction in the application of these principles, even if the debate is unresolved.

5.2 Distinction: Biases and subnorms in civilian status

Parties to the conflict are obliged to distinguish between the civilian population and combatants and between civilian objects and military objectives.⁸³ Breaches of this principle could result in adverse distinction. For example, the signature strikes by the United States against terrorists did not respect the principle of distinction and they were discriminatory on the grounds of age, gender, and place of residence. Targets were all military aged men within the ‘strike zone’ or

⁷⁸ George Dvaladze (n 56) 72; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol II: Practice (Cambridge University Press 2005) 2029.

⁷⁹ UNGA Res 61/232 (22 December 2006) A/RES/61/232, §3 (b) ; UNGA Res 62/222 (22 December 2007) A/RES/62/222, §4 (h).

⁸⁰ For an overview of state practice on this issue see Jean-Marie Henckaerts and Louise Doswald-Beck (n 78) 2024–2060.

⁸¹ Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 489–490.

⁸² Vanessa Murphy, ‘Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law’ (ICRC 2022) 17 <<https://shop.icrc.org/download/ebook?sku=4634/002-ebook>>.

⁸³ Art 48 API.

areas that were known for terrorist activities.⁸⁴ General Mladić in Srebrenica, moreover, stated that he had complied with civilian immunity by freeing women, children, and the elderly.⁸⁵

This indicates a fundamental issue in the application of the principle of distinction in practice. Norms may be distorted or contradicted by an implicit moral frame. The frame for the principle of distinction is innocence and vulnerability, which has traditionally been connected to women and children as the primary examples of civilians. While the norm is neutral, there is significant bias in its application.⁸⁶ The term is influenced by a gender ideology that includes women more into this category, to the detriment of civilian men. Considering the norm as neutral leads to the invisibility of the adult civilian man in IHL.⁸⁷

Designating targetable persons based on maleness deprives men of the protection of the law on discriminatory grounds, amounting to direct discrimination, and violates article 50 AP I on the presumption of civilian status in case of doubt.⁸⁸ These gendered assumptions lead to sex-selective killing and over-targeting of men.⁸⁹ Gender is not the only factor influencing the moral frame, as an elderly man will not be considered a target in the same way as a military-aged man. This indicates the possible existence of difficult intersections between gender, age, ethnicity, race, and other factors.

5.3 Proportionality

Attacks must also respect the principle of proportionality, which prohibits an attack if it ‘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’.⁹⁰ These three types of harm are called ‘incidental

⁸⁴ George Dvaladze (n 62) 429–430.

⁸⁵ Orly Maya Stern, *Gender, Conflict and International Humanitarian Law: A Critique of the ‘Principle of Distinction’* (Routledge 2019) 106.

⁸⁶ Susan F. Hirsch (n 4) 348–349 and 351; Orly Maya Stern (n 85) 106.

⁸⁷ Susan F. Hirsch (n 4) 167 and 348–349; Vanessa Murphy (n 82) 13; Orly Maya Stern (n 85) 105–106.

⁸⁸ Ray Acheson, Richard Moyes, and Thomas Nash, ‘Sex and Drone Strikes: Gender and Identity in Targeting and Casualty Analysis’ (Article 36 and Reaching Critical Will 2014) 9 <<https://www.article36.org/wp-content/uploads/2014/10/sex-and-drone-strikes.pdf>> accessed 25 July 2022. ; Art 50 API.

⁸⁹ Vanessa Murphy (n 82) 13; Orly Maya Stern (n 85) 106.

⁹⁰ Alice Priddy (n 3) 59–60; Stuart Casey-Maslen and Tobias Vestner, *International Law and Policy on the Protection of Civilians* (Cambridge University Press 2022) 39; Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 46. ; Art 51(5)(b), 57(2)(a)(iii) and 57(2)(b), API.

harm'.⁹¹ The assessment is not an exact science and is context-specific. This is exactly where the specific characteristics play a crucial role: in determining the expected harm.⁹²

5.3.1 Increased harm of certain groups

Certain civilians with a particular characteristic can be subject to more incidental harm. For example, a visually impaired person could be subject to more physical and mental harm because they cannot protect themselves by fleeing the attack.⁹³ Moreover, research has shown that explosive weapons disproportionately affect women and children.⁹⁴ Only 9% of the persons killed by gunfire are women, compared to 34% killed by explosive ordinance.⁹⁵ Children are also more likely to die from explosive weapons because of their smaller physiological makeup. Children are also particularly at risk for the long-term negative effects on mental health.⁹⁶ The elderly, on the other hand, are more at risk since they can be unable or unwilling to flee the combat zone.⁹⁷

In these situations, applying the principle of proportionality without regard for different experiences can lead to these categories of persons being disproportionately harmed. Therefore, it is crucial for commanders to have access to information indicating how the civilian population, and its different groups with certain characteristics, can be harmed in the attack. This will allow for a much more accurate assessment of the expected incidental harm.⁹⁸

5.3.2 Subjectivity in assessing expected civilian harm

⁹¹ Laurent Gisel, 'The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law' (2016) International Expert Meeting 32 <<https://www.icrc.org/en/document/international-expert-meeting-report-principle-proportionality#:~:text=The%20principle%20of%20proportionality%20prohibits,and%20direct%20military%20advantage%20anticipated.>> accessed 25 July 2022.

⁹² Alice Priddy (n 3) 60–61.

⁹³ *ibid* 61.

⁹⁴ ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions' (ICRC 2019) 20 <<https://shop.icrc.org/international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts-recommitting-to-protection-in-armed-conflict-on-the-70th-anniversary-of-the-geneva-conventions-pdf-en.html>> accessed 25 July 2022.

⁹⁵ Gabriella Irsten, 'Women and Explosive Weapons' (WILPF 2014) 13.

⁹⁶ Humanity & Inclusion, 'Death Sentence to Civilians: The Long-Term Impact of Explosive Weapons in Populated Areas in Yemen' (Humanity & Inclusion (Handicap International) 2020) 20 <https://www.hi-us.org/news_new_report_yemen_and_explosive_weapons_a_death_sentence_for_civilians> accessed 13 August 2022.

⁹⁷ Stuart Casey-Maslen and Tobias Vestner (n 90) 141.

⁹⁸ Alice Priddy (n 3) 62.

Another question is whether all civilians are weighed equally in the calculation of proportionality.⁹⁹ Dinstein, for example, argues that not all civilians are equal in all respects and that there must be some discretion to differentiate between categories of civilians. He argues that intuitively adult men are not weighed in a similar way as women, children, and the elderly because the latter are more vulnerable. Accordingly, when an attack on a military objective results in the incidental death of adult men in a bar, this will not be equated with the death of children present in a kindergarten.¹⁰⁰

The application of the rule is influenced by moral considerations, and different value is attributed to the lives of certain civilians. For example, child casualties are seen as more grave. These extra-legal considerations can mean that belligerents pose stricter obligations on themselves than required by IHL for the purpose of lowering the collateral damage.¹⁰¹ This may not lead to a categorical exclusion of certain civilians or groups of civilians based on a characteristic since this would be adverse distinction in the application of the proportionality principle.¹⁰²

5.3.3 Differentiated indirect effects

Civilians may also be harmed through effects that are not directly or immediately caused by the attack but that are the result thereof.¹⁰³ These effects range from unemployment caused by the destruction of ammunition factories or industrial factories, to displacement caused by the destruction of houses, disruption to medical services, diseases caused by the loss of water, sewage systems, and medical facilities, harm to civilians because they could not flee because of damage to roads or because of a diminished supply of humanitarian aid. The casualties caused by reverberating effects are significant. For example, the attacks on the power system of Iraq in 1991 caused the deaths of 40.000 to 110.000 civilians due to a lack of water.¹⁰⁴

⁹⁹ Amichai Cohen and David Zlotogorski, *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures* (Oxford University Press 2021) 41.

¹⁰⁰ Yoram Dinstein (n 17) 159–160.

¹⁰¹ Amichai Cohen and David Zlotogorski (n 99) 41.

¹⁰² George Dvaladze (n 56) 283.

¹⁰³ Isabel Robinson and Ellen Nohle, 'Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas' [2016] *International Review of the Red Cross* 107, 108.

¹⁰⁴ Amichai Cohen and David Zlotogorski (n 99) 84–85.

It is currently unsettled whether mental harm, illness, displacement, and economic loss are relevant effects for the proportionality analysis.¹⁰⁵ While displacement caused by a destroyed home may not be incidental harm in itself, it has been argued that this should increase the weight given to this destruction and to the incidental damage of an object.¹⁰⁶ The destruction of a home should therefore be given greater weight than a business premise, for example.¹⁰⁷

Moreover, poverty, economic hardship, and unemployment are not as such considered as incidental harm.¹⁰⁸ General and drawn-out consequences are too remote to be ‘foreseeable’ but economic losses tied to a particular attack are relevant. The attacker must consider whether the attack on an object incidentally damages a civilians’ livelihood generation. For example, an attack on a market shop will not be counted in the same way as an attack on an abandoned garage.¹⁰⁹ Moreover, certain attacks causing environmental pollution also impact agriculture, which in turn heavily impacts food security and livelihoods.¹¹⁰ Greater weight must therefore be assigned to damage to or destruction of civilian objects that have more severe effects on the civilian population.¹¹¹ Once again, for a truly accurate assessment it will be crucial to differentiate beyond ‘civilian’. When a segment of the population is already food insecure they will be affected more severely when prices skyrocket due to attacks on agriculture, for example. Moreover, those dependent on agriculture or other ways of livelihood generation will be affected more severely by the effects of attacks thereon.

It is also challenging to assess mental harm since reactions are unpredictable and differ in individuals, based on their vulnerabilities and resilience. Moreover, mental harm could be caused by the general exposure to hostilities and not necessarily one particular attack. There are nonetheless situations in which mental harm can be connected to a specific attack. For example, an attack on a military objective next to a kindergarten could traumatize children for many years, or even their whole lives.¹¹² Psychological harm is currently more difficult to understand

¹⁰⁵ Stuart Casey-Maslen and Tobias Vestner (n 90) 40; Laurent Gisel (n 91) 41.

¹⁰⁶ Emanuela-Chiara Gillard, ‘Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment’ (Chatham House 2018) Research Paper 20; Eirini Giorgou, ‘Explosive Weapons With Wide Area Effects: A Deadly Choice in Populated Areas’ (ICRC 2022) 100 <https://www.icrc.org/en/download/file/229018/ewipa_explosive_weapons_with_wide_area_effect_final.pdf> accessed 13 August 2022.

¹⁰⁷ Emanuela-Chiara Gillard (n 106) 20.

¹⁰⁸ Eirini Giorgou (n 106) 100.

¹⁰⁹ Laurent Gisel (n 91) 42.

¹¹⁰ Eirini Giorgou (n 106) 60.

¹¹¹ Emanuela-Chiara Gillard (n 106) 20.

¹¹² Laurent Gisel (n 91) 36.

and anticipate, but in the future belligerents may be influenced by an enhanced understanding of these consequences.¹¹³ This could then be supplemented by specific research on differentiated mental harm, for example for children in different stages of their development.¹¹⁴

A particular issue is therefore the invisibility or exclusion of harm of certain civilians. For example, gendered value judgements can reduce the protection granted to women and girls.¹¹⁵ When determining the harm, the attacker may choose to omit certain harm to women and girls.¹¹⁶ While it is generally foreseeable that gender inequality exists in conflict and in hostilities, there is a gender data gap leading to invisibility. Improving this can aid in making such harm foreseeable for the attacker.¹¹⁷ While the focus in scholarship is often on the gender dimension, the same invisibility barrier can exist for other segments of the civilian population.

Foreseeability of incidental harm is directly influenced by past practices and is informed through the analysis of past attacks and their effects, studies on the effects of conflicts, modelling of weapon's effects, an understanding of infrastructure and the interdependence of services, etc. The use of disaggregated data can aid in the evolution of foreseeability.¹¹⁸ More research on these differentiated impacts of attacks, especially the effects of systemic inequality on harm suffered, can aid in addressing the foreseeability. General evidence should be paired with context-specific analyses as a part of military planning.¹¹⁹

5.4 Precautions

5.4.1 Constant care without adverse distinction

Constant care must be taken to spare the civilian population, civilians, and civilian objects.¹²⁰ The rule remains quite abstract and the practical application of this principle is part of the

¹¹³ Eirini Giorgou (n 106) 100.

¹¹⁴ Certain research already endeavours to map the consequences of armed conflict on the mental health of children, see Paramjit T. Joshi and Deborah A. O'Donnell, 'Consequences of Child Exposure to War and Terrorism' (2003) 6 *Clinical Child and Family Psychology Review* 275 and David Bürgin and others, 'Impact of War and Forced Displacement on Children's Mental Health—Multilevel, Needs-oriented, and Trauma-informed Approaches' [2022] *European Child & Adolescent Psychiatry* 845.

¹¹⁵ Vanessa Murphy (n 82) 15.

¹¹⁶ *ibid*; Orly Maya Stern (n 85) 107.

¹¹⁷ Vanessa Murphy (n 82) 16.

¹¹⁸ *ibid*; Alice Priddy (n 3) 62.

¹¹⁹ Vanessa Murphy (n 82) 16–17.

¹²⁰ Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 51. ; Art 57 §1 API.

following paragraphs. It is, however, not purely aspirational. Because ‘military operations’ is broader than ‘attack’ in the following paragraphs, it can give rise to independent legal obligations.¹²¹

The prohibition of adverse distinction could be read in line with the duty to take constant care to spare the civilian population, civilians, and civilian objects. Therefore, in precautions, the rule will be violated if the precautions neglect certain categories of persons.¹²²

This duty implies an obligation to collect, evaluate, and disseminate information to be able to make appropriate decisions in the planning or execution of the military operations. The best possible intelligence must be gathered from all reasonably available sources.¹²³ This information can aid in addressing the invisibility of certain categories of persons in precautions. A gender lens, for example, can highlight whether women are less likely to flee because of a lack of access to vehicles, less likely to benefit from warnings because of lower literacy rates and the digital divide, etc.¹²⁴ Enhanced attention for persons with disabilities might show that warnings are sometimes not accessible to persons with disabilities (e.g. auditory warnings for the hearing impaired and leaflets for persons with visual impairments), that specific consideration must be given to accessible transport for evacuations, etc.¹²⁵ Assessing the pattern of life, for example, can aid in assessing the civilian presence. Such patterns are dependent upon many variables such as age, gender, and culture. Understanding how different people use a space, and subsequently how an attack has differentiated effects upon them, allows the attacker to take more adequate precautions in reducing this harm.¹²⁶

Generally, the notion of ‘feasibility’ cannot be used to exclude certain categories of persons from precautionary measures by default through an excessively narrow reading.¹²⁷

5.4.2 Feasible precautions in attack

¹²¹ Jean-Francois Queguiner, ‘Precautions under the Law Governing the Conduct of Hostilities’ (2006) Vol. 88 *International Review of the Red Cross* 793, 797.

¹²² George Dvaladze (n 62) 430.

¹²³ Jeroen C. van den Boogaard and Arjen Vermeer, ‘Precautions in Attack and Urban and Siege Warfare’ in Terry D. Gill and others (eds), *Yearbook of International Humanitarian Law*, vol 20 (Springer 2017) 176.

¹²⁴ Vanessa Murphy (n 82) 19.

¹²⁵ Helen Durham and Gerard Quinn, ‘Lifting the Cloak of Invisibility: Civilians with Disabilities in Armed Conflict’ (*Humanitarian Law & Policy blog*, 21 April 2022) <<https://blogs.icrc.org/law-and-policy/2022/04/21/civilians-disabilities-armed-conflict/>> accessed 27 May 2022.

¹²⁶ Vanessa Murphy (n 82) 17.

¹²⁷ George Dvaladze (n 62) 430.

The attacking side must take a range of precautions pursuant to article 57 API. This includes verifying the military nature of the objective and assessing the collateral damage, choosing means and methods that avoid or limit loss or damage to the civilian population and objects, cancelling or suspending an attack when it becomes apparent that it would violate proportionality, distinction or that the objective has special protection, choosing military objectives with least danger to civilian lives and objects, and issuing advance warnings.¹²⁸

Many of these elements are related to the principles of distinction and proportionality and have been clarified earlier.¹²⁹ For example, the duty to verify the military nature of the objective is inherently intertwined with the principle of distinction. Attacking based on a mere suspicion, based on age, gender, ethnicity or a combination thereof, is in itself a violation of the principle of distinction and precautions.¹³⁰ Overcoming this issue requires correcting these biases through comprehensive training for those involved in targeting, dynamic and pre-planned, to ensure that the targeting complies with this principle. Training of target verification or selection training could include awareness-raising on racial and gender biases, allowing the attacker to correctly assess whether they are attacking a lawful military target.¹³¹

Another crucial element to consider with regards to the differentiated needs of civilians is the obligation to give effective advance warnings of attacks that may affect the civilian population, unless circumstances do not permit.¹³² While precautions may be not be intentionally discriminatory, as was the case in Belgrade during the NATO bombing where only foreign journalists were informed and advised to leave the radio-television station,¹³³ they can also have unintended discriminatory effects. For example, the Israeli practice of advance warnings did not allow children, the elderly and those with disabilities to evacuate in time.¹³⁴ They should have been given the time to flee from the area as much as possible. Moreover, the way in which

¹²⁸ Art 57 API.

¹²⁹ George Dvaladze (n 56) 287.

¹³⁰ Jean-Francois Queguiner (n 121) 797–798.

¹³¹ Vanessa Murphy (n 82) 14.

¹³² Art 57(2) (c) API.

¹³³ George Dvaladze (n 62) 430.

¹³⁴ See for example the short time-lapse between the “roof-knock” and the actual attack in UN Human Rights Council, ‘Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1’ (2015) A/HRC/29/CRP.4, §237

the warnings are delivered, such as through their form, language, or substantive, must give everyone a chance as much as possible.¹³⁵

Assessing the effectiveness of warnings requires an assessment from the perspective of the civilians that could be affected.¹³⁶ It must be delivered to those most likely affected by the attack and must be comprehensible to them. It must be delivered in a language they understand and grant them enough time to evacuate. The Goldstone report on the 2008-2009 conflict in Gaza stated that an effective warning has to reach those likely to be in danger, give them adequate time, and an explanation on how to avoid harm. The warning must be clear and credible, meaning civilians should be in no doubt that it is addressed to them and intended to be acted upon.¹³⁷

While this is necessary, parties to the conflict currently do not consider whether their warnings are accessible to different categories of persons, such as persons with disabilities. More accessible warnings for persons with disabilities could include leaflets in braille, large print, alerts through apps or assistive devices, or warnings through television or radio if possible. Moreover, sufficient time should be provided for persons with disability to act appropriately, either by evacuating or seeking shelter.¹³⁸ A related issue can be noted with regards to women and girls, based on the gendered digital divide and lower literacy rates of women in certain contexts. If warnings are only distributed through digital means and written information, the warnings will be less effective for them.¹³⁹ Reduced literacy and an increasing digital divide is not only an issue from a gender perspective, but also from an age perspective.¹⁴⁰ When precautions are issued through digital means, this can neglect the elderly based on this same digital divide and digital exclusion based on age. More accessible warnings in these cases could include a combination of measures, such as radio messages and leaflets with images instead of written text. Another issue is that certain categories of persons spend more time within their home, such as women and girls because of societal expectations and persons with reduced mobility.¹⁴¹ This was the case in the United Nations Protected Areas in Croatia where women,

¹³⁵ George Dvaladze (n 62) 430.

¹³⁶ Vanessa Murphy (n 82) 18.

¹³⁷ Alice Priddy (n 3) 63. ; UN Human Rights Council, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (2009) A/HRC/12/48, §530.

¹³⁸ *ibid* 63–64.

¹³⁹ Vanessa Murphy (n 82) 18.

¹⁴⁰ For more information on age and the digital divide see Carol C McDonough, 'The Effect of Ageism on the Digital Divide Among Older Adults' [2016] *Journal of Gerontology & Geriatric Medicine*.

¹⁴¹ Vanessa Murphy (n 82) 18.

especially older women, were left behind by fleeing family members to protect property or since they were unable or unwilling to leave their homes.¹⁴² Warnings in these cases will only be effective if they reach persons within their homes, such as through media broadcasts and phone calls for example.¹⁴³

The duty is fulfilled when states issue a general warning, for example, through broadcasting and distributing leaflets.¹⁴⁴ The Commission of Inquiry on Lebanon, however, has stated that if a military is serious about warnings, it has to take into account how the instructions will be carried out and not solely drop papers from the air.¹⁴⁵ When it is possible or necessary, the attacker is not exempted from giving more precise warnings.¹⁴⁶ If it was feasible and the attacking party did not provide an accessible warning, then it could be argued that this amounts to discrimination. Differential treatment in this case is required to adequately respond to specific needs of a certain individual or group.¹⁴⁷

5.4.3 Feasible precautions against the effects of attacks

The defending party must also take precautions against the effects of attacks.¹⁴⁸ These precautionary measures can include a removal of civilians from the vicinity of military objectives, providing shelter, humanitarian supplies, the distribution of warnings and emergency information, digging of trenches, constructing shelters, withdrawing civilians to safe places, directing traffic, guarding civilian property, and mobilizing civil defence organisations.¹⁴⁹

It has been argued that there is limited foresight for the defender and therefore less preparation required prior to the attacks, since the defender may obviously not receive warning of the attack. More may be required when the attacker is beginning its preparations to attack.¹⁵⁰ The

¹⁴² Charlotte Lindsey, 'Women and War - An Overview' [2000] International Review of the Red Cross.

¹⁴³ Vanessa Murphy (n 82) 18.

¹⁴⁴ Jean-Francois Queguiner (n 121) 808.

¹⁴⁵ UN Human Rights Council, 'Report of the Commission of Inquiry on Lebanon established pursuant to Human Rights Council Resolution S-2/1' (2006) A/HRC/3/2, §156.

¹⁴⁶ Jean-Francois Queguiner (n 121) 808.

¹⁴⁷ Alice Priddy (n 3) 64.

¹⁴⁸ Andrew Navarro, 'Balancing Precautions in Attacks Versus Precautions Against the Effects of Attacks in Urban Armed Conflict' (2022) 47 Brigham Young University Law Review 1075; Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 68. ; Art 58 API.

¹⁴⁹ Alice Priddy (n 3) 64; Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 70.

¹⁵⁰ Andrew Navarro (n 148) 1078.

presumption is that the defending state must anticipate attacks and therefore prepare the population long before this happens, starting in peacetime with evacuation plans.¹⁵¹

To do this, the defender must assess information from all sources available to them at the time.¹⁵² These negative effects on certain parts of the population can be mitigated through the availability of disaggregated data that is inclusive of the grounds of discrimination such as gender, disability, age, etc., as well as trained commanders that understand diversity. Enhanced attention will ensure that the precautions are actually accessible, effective, and not discriminatory.¹⁵³

In practice, considerations about persons with disabilities and older persons, for example, are usually not included in the nature and delivery of precautions. Evacuation measures, such as transports, are often not accessible to those with assistive devices. This leaves them at a risk of being left behind.¹⁵⁴ Recently in Ukraine, the vulnerabilities of certain persons are clear. Persons with disabilities had no access to bomb shelters and evacuation trains. These persons need assistance and persons with reduced mobility had to wait because they were unable to board the trains. Generally, older persons stayed behind because they were unable or unwilling to leave their homes. Moreover, they also had less access to bomb shelters and no adequate assistance in evacuations.¹⁵⁵

Additionally, evacuations of only women and children can perpetuate the gendered notion of civilian immunity which is detrimental to civilian men. Moreover, it legitimizes the killing of men that remain behind as they are deemed worthy of targeting.¹⁵⁶

The precautions are nonetheless limited by the notion ‘to the extent feasible’, meaning they must be practicable or practically possible considering all circumstances at the time.¹⁵⁷ In

¹⁵¹ *ibid* 1080.

¹⁵² Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 71.

¹⁵³ Alice Priddy (n 3) 65.

¹⁵⁴ *ibid* 64–65.

¹⁵⁵ UN Human Rights Office of the High Commissioner, ‘Situation of Human Rights In Ukraine in the Context of the Armed Attack by the Russian Federation: 24 February – 15 May 2022’ (OHCHR 2022) 18 <<https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf>> accessed 16 August 2022.

¹⁵⁶ Orly Maya Stern (n 85) 106.

¹⁵⁷ Andrew Navarro (n 148) 1078; Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 68.

certain circumstances, it will therefore not be possible to include an enhanced differentiation in the precautions based on the existing circumstances, such as limited time or available means.

5.5 An option or duty to differentiate?

While it has been shown that additional differentiations can be beneficial for the accuracy of the application of the principles, it must be ascertained whether it is a duty of merely an option for the parties to the conflict.

If it were decided that the prohibition of adverse distinction is applicable then there will be an obligation not to discriminate in the application of the rules on the conduct of hostilities. Adverse distinction is only prohibited in case the practice is unfavourable to those protected by IHL.¹⁵⁸ Since non-discrimination or the prohibition of adverse distinction is generally a subsidiary obligation it requires the breach of another norm,¹⁵⁹ being the principles of distinction, proportionality, or precaution respectively.

Parties may not intentionally adversely distinguish between civilians in the conduct of hostilities.¹⁶⁰ When decisions are based on criteria other than the targetability in IHL, such as on gender and age, the rule on distinction will be violated and this will amount to direct discrimination. Assessing the indirect effects has proven to be much more challenging. With regards to proportionality, there is ambiguity on the legal consequences of incidental harm disproportionality targeting civilians with a certain characteristic.¹⁶¹ Indirect effects can expose a particular category of persons to a disproportionately greater disadvantage,¹⁶² but the common view is that effects disproportionately affecting a certain part of the civilian population do not amount to an unlawfully disproportionate effect on civilians overall.¹⁶³ Regarding precautions, there will be adverse distinction if a segment of the population, based on a particular characteristic, is excluded from the precautions.

¹⁵⁸ George Dvaladze (n 56) 272.

¹⁵⁹ Gabor Rona and Robert J. McGuire (n 13) 201.

¹⁶⁰ George Dvaladze (n 56) 271.

¹⁶¹ Vanessa Murphy (n 82) 17.

¹⁶² George Dvaladze (n 56) 285.

¹⁶³ Vanessa Murphy (n 82) 17.

If the prohibition on adverse distinction does not apply in the conduct of hostilities, the IHL principles themselves offer relief. If targeting is based on a characteristic, such as maleness, and not on the basis of whether the person is a legitimate military objective then this will be a breach of the principle of distinction and precaution regardless of whether it also amounts to adverse distinction. In proportionality, considering the specific characteristics of civilians allows the attacker to more accurately assess the expected harm. For this, belligerents are expected to gather information to the extent feasible so they can update the basis for the proportionality assessment to take into account these elements.¹⁶⁴ As a minimum standard, they must use information at their disposal or reasonably available information. If additional information on the civilian population, their characteristics, and how this influences the expected harm is available, then the belligerent is obliged to use it.¹⁶⁵ Moreover, addressing these differences in precautions will allow them to be more effective.¹⁶⁶ The gathering of reasonably available data helps in overcoming the invisibility of certain groups. Differentiations into precautions can then be included to the extent feasible. When the information is available and the differentiation in precautions is feasible, it is an obligation to take this into account and adapt based on these needs.

6. Challenges

While formally equal laws ignore persons' particular vulnerabilities, focusing on specificities may essentialize them, over-emphasize differences, and perpetuate stereotypes. Both neutrality and specificity can therefore cause problems, indicating the need for a careful balance.¹⁶⁷ Another challenge in this regard is the compartmentalization of the individual based on a singular characteristic. Characteristics and their social divisions interact and lead to differentiated experiences.¹⁶⁸ For example, disabled elderly woman might not face the same vulnerabilities as a disabled elderly man, or a younger disabled woman.

Therefore, adequate information on the civilian population is crucial for any meaningful differentiation. The gathering and use of disaggregated data is crucial for non-discrimination since it can be used to support tailored and evidence-based policies. It is nonetheless quite

¹⁶⁴ Emanuela-Chiara Gillard (n 106) 20.

¹⁶⁵ *ibid* 26.

¹⁶⁶ Alice Priddy (n 3) 62.

¹⁶⁷ Orly Maya Stern (n 85) 102.

¹⁶⁸ Spike Peterson, 'Thinking Through Intersectionality and War' (2007) 14 *Race, Gender & Class* 10, 10.

challenging to disaggregate data based on all relevant characteristics because of technical, political, and capacity constraints.¹⁶⁹ Even for the party under whose control the civilians find themselves, it will be challenging to gather and disaggregate this data since it is costly and can have significant political and logistical challenges.¹⁷⁰

Applying a differentiated approach is also operationally challenging since military and humanitarian actors work under pressure and sometimes with limited resources.¹⁷¹ For example, states may not have access to their full selection of weapons and other resources in enemy territory, especially in remote areas or at the initial stages of the fighting.¹⁷² Considering the characteristics of the civilian population is particularly challenging in attacks with little planning on ‘emerging targets’, which do not allow very complicated procedures. This does not mean that precautionary measures must be discarded at once but it does indicate the operational difficulties in identifying targets and estimating collateral damage which require a large range of information and skills.¹⁷³ Such capacity constraints may particularly be an issue for non-state armed groups.¹⁷⁴

7. Conclusion

While the principles on the conduct of hostilities in IHL seek to protect all civilians and the civilian population as a whole, such a universal approach is not always the best way to reach an adequate level of protection for everyone because of underlying vulnerabilities and characteristics. This is recognized by certain IHL rules on the treatment of persons in the power of a party, which specifically address the vulnerability of women, children, the elderly, persons with disabilities, and the wounded and sick besides the general prohibition of adverse distinction. The corresponding human rights obligations, non-discrimination and equality, are better elaborated upon than their IHL counterparts. Because of the complementary nature of

¹⁶⁹ UN Human Rights Office of the High Commissioner, ‘SDGs Indicator Framework: A Human Rights Approach to Data Disaggregation to Leave No One Behind’ (UN OHCHR 2015) Draft Background Note 1–2 <<https://www.ohchr.org/sites/default/files/Documents/Issues/HRIndicators/DataDisaggregation.pdf>> accessed 15 August 2022.

¹⁷⁰ Inga T. Winkler and Margaret L. Satterthwaite, ‘Leaving No One behind? Persistent Inequalities in the SDGs’ (2017) 21 *The International Journal of Human Rights*, 1073, 1079.

¹⁷¹ Susan F. Hirsch (n 4) 361.

¹⁷² George Dvaladze (n 56) 273.

¹⁷³ Jean-Francois Queguiner (n 121) 798–799.

¹⁷⁴ Amrei Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health-Related Issues in Non-International Armed Conflicts* (Martinus Nijhoff Publishers 2013) 60–61.

both bodies of law on this subject, IHRL can be used to interpret adverse distinction. Especially the different notions of equality, direct and indirect discrimination, and evolutions in IHRL can aid in clarifying the meaning of adverse distinction. The application of the prohibition of adverse distinction in the conduct of hostilities nevertheless remains unsettled.

There are, however, many instances where the characteristics of civilians can play a role in interpreting and applying the principles on the conduct of hostilities. First, moral considerations underpin civilian immunity and incidental harm. Because of the ideologies underpinning civilian status, categories of persons, particularly military-aged men, are often excluded. This is a violation of the principle of distinction, precautions, and could be adverse distinction. This same ideology attaches greater weight to female and child casualties in proportionality. If civilian men are excluded from the assessment as such, this would amount to direct discrimination. Second, considering the different characteristics of the civilian population can lead to a more accurate assessment of the expected direct and indirect incidental harm and avoid disproportionately harming certain groups. Paying attention to differences also ensures more accurate and effective precautions.

Such an approach requires reliable information on these characteristics and their effects to avoid stereotyping. This indicates the need for disaggregated data. Moreover, context-specific information for military operations is crucial. Implementing such differentiations is nonetheless challenging, since information may be unavailable or it may not be feasible to undertake these additional measures because of the operational context or capacity constraints.

In conclusion, addressing the different characteristics of civilians allows to pinpoint the overinfluence of ideologies and moral assumptions as well as identifying those categories of civilians that do face more harm, and those whose harm or risk is sometimes invisible. Parties' increased understanding of these differences, the ways to accommodate them, and their capacity to do so will improve the protection of the civilian population and its different segments.

8. Bibliography

Treaties

1. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI
2. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 6 July 1906, entered into force 9 August 1907)
3. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 27 July 1929, has not entered into force)
4. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865)
5. Convention for the Treatment of Prisoners of War (adopted 27 July 1929, has not entered into force)
6. Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3
7. European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5
8. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31
9. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85
10. Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
11. Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135
12. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
13. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3
14. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3

15. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609
16. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III))
17. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Case law

1. ICJ, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), [2005] ICJ Rep 168
2. ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136
3. ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226
4. ICJ, South West Africa (Liberia v. South Africa) (Dissenting Opinion of Judge Tanaka) [1966] ICJ Rep 6

United Nations Documents

1. UN CESCR, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009) E/C.12/GC/20
2. UN Commission on Human Rights, 'The concept and practice of affirmative action : final report submitted by Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5' (2001) E/CN.4/Sub.2/2001/15
3. UN Human Rights Committee, 'CCPR General Comment No. 18: Non-discrimination' (1989) CCPR/C/21/Rev.1/Add.1
4. UN Human Rights Committee, 'Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights: Seventy-eighth session concerning Communication No. 998/2001' (2003) CCPR/C/78/D/998/2001
5. UN Human Rights Council, 'Report of the Commission of Inquiry on Lebanon established pursuant to Human Rights Council Resolution S-2/1' (2006) A/HRC/3/2

6. UN Human Rights Council, 'Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1' (2015) A/HRC/29/CRP.4
7. UN Human Rights Council, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (2009) A/HRC/12/48
8. UN Human Rights Council, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (2009) A/HRC/12/48
9. UNGA Res 61/232 (22 December 2006) A/RES/61/232
10. UNGA Res 62/222 (22 December 2007) A/RES/62/222

Books

1. Amichai Cohen and David Zlotogorski, *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures* (Oxford University Press 2021)
2. Amrei Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health-Related Issues in Non-International Armed Conflicts* (Martinus Nijhoff Publishers 2013)
3. E.W. Vierdag, *The Concept of Discrimination in International Law, with Special Reference to Human Rights* (Nijhoff 1973)
4. Fatima Shaheed, *Protecting Children in Armed Conflict* (Hart Publishing 2018)
5. Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford University Press 2014)
6. Jean Pictet (ed), *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War: Commentary* (ICRC 1958)
7. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol II: Practice (Cambridge University Press 2005)
8. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I (4th edn, Cambridge University Press 2009)
9. Knut Dörmann and others, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016)
10. Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019)
11. Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights A Perspective on Its Development* (Clarendon Press 1998)

12. Orly Maya Stern, *Gender, Conflict and International Humanitarian Law: A Critique of the 'Principle of Distinction'* (Routledge 2019)
13. Saba Azeem and others, *On Civilian Harm: Examining the Complex Negative Effects of Violent Conflict on the Lives of Civilians* (Erin Bijl, Welmoet Wels, and Wilbert van der Zeijden eds, PAX, Protection of Civilians team 2021)
14. Stuart Casey-Maslen and Tobias Vestner, *International Law and Policy on the Protection of Civilians* (Cambridge University Press 2022)
15. William A. Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021)
16. Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2016)

Chapters in edited books

1. Bertrand Ramcharan, 'Equality and Nondiscrimination' in Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law*, vol II (Routledge 2016)
2. Charlotte Lindsey, 'The Impact of Armed Conflict on Women' in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff Publishers 2005)
3. Cordula Droege and Helen Durham, 'Civilian Protection in Armed Conflict' in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (Oxford University Press 2021)
4. Daniel Moeckli, 'Equality and Non-Discrimination' in Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law*, vol II (Routledge 2016)
5. Dinah Shelton, 'Prohibited Discrimination in International Human Rights Law' in Aristotle Constantinides and Nikos Zaiko (eds), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa* (Martinus Nijhoff Publishers 2009)
6. Gabor Rona and Robert J. McGuire, 'The Principle of Non-Discrimination' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015)
7. George Dvaladze, 'Non-Discrimination under International Humanitarian and Human Rights Law' in Robert Kolb, Gloria Gaggioli, and Pavle Kilibarda (eds), *Research handbook on human rights and humanitarian law: further reflections and perspectives* (Edward Elgar Publishing 2022)
8. Gloria Gaggioli, 'The Strength of Evolutionary Interpretation in International Human

Rights Law’ in Georges Abi-Saab and others (eds), *Evolutionary Interpretation and International Law* (Hart Publishing 2019)

9. Jeroen C. van den Boogaard and Arjen Vermeer, ‘Precautions in Attack and Urban and Siege Warfare’ in Terry D. Gill and others (eds), *Yearbook of International Humanitarian Law*, vol 20 (Springer 2017)
10. Susan F. Hirsch, ‘Civilians under the Law: Inequality, Universalisms, and Intersectionality as Intervention’ in Daniel Rothbart, Karina V. Korostelina, and Mohammed D. Cherkaoui (eds), *Civilians and Modern War: Armed conflict and the ideology of violence* (Routledge 2012)

Journal articles

1. Andrew Navarro, ‘Balancing Precautions in Attacks Versus Precautions Against the Effects of Attacks in Urban Armed Conflict’ (2022) 47 Brigham Young University Law Review
2. Anne F. Bayefsky, ‘The Principle of Equality or Non-Discrimination in International Law’ (1990) Vol. 11 Human Rights Law Journal 1
3. Carol C McDonough, ‘The Effect of Ageism on the Digital Divide Among Older Adults’ [2016] Journal of Gerontology & Geriatric Medicine
4. Carolyn Evans, ‘The Double-Edged Sword: Religious Influences on International Humanitarian Law’ (2005) 6 Melbourne Journal of International Law 1
5. Charlotte Lindsey, ‘Women and War - An Overview’ [2000] International Review of the Red Cross
6. Cordula Droege, ‘The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 20 Israel Law Review 310
7. David Bürgin and others, ‘Impact of War and Forced Displacement on Children’s Mental Health—Multilevel, Needs-oriented, and Trauma-informed Approaches’ [2022] European Child & Adolescent Psychiatry 845
8. Inga T. Winkler and Margaret L. Satterthwaite, ‘Leaving No One behind? Persistent Inequalities in the SDGs’ (2017) 21 The International Journal of Human Rights, 1073
9. Isabel Robinson and Ellen Nohle, ‘Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas’ [2016] International Review of the Red Cross 107
10. Jean-Francois Queguiner, ‘Precautions under the Law Governing the Conduct of

- Hostilities' (2006) Vol. 88 International Review of the Red Cross 793
11. Jelena Pejic, 'Non-Discrimination and Armed Conflict' (2001) 83 International Review of the Red Cross 183
 12. Paramjit T. Joshi and Deborah A. O'Donnell, 'Consequences of Child Exposure to War and Terrorism' (2003) 6 Clinical Child and Family Psychology Review 275
 13. Raphaël van Steenberghe, 'The Impacts of Human Rights Law on the Regulation of Armed Conflict: A Coherency-Based Approach to Dealing with Both the "Interpretation" and "Application" Processes' [2022] International Review of the Red Cross 1345
 14. Samantha Besson, 'The Principle of Non-Discrimination in the Convention on the Rights of the Child' (2005) Vol. 13 The International Journal of Children's Rights 433
 15. Spike Peterson, 'Thinking Through Intersectionality and War' (2007) 14 Race, Gender & Class 10

Other sources

1. Alice Priddy, 'Disability and Armed Conflict' [2019] Academy Briefing n° 14 1
2. Eirini Giorgou, 'Explosive Weapons With Wide Area Effects: A Deadly Choice in Populated Areas' (ICRC 2022) <https://www.icrc.org/en/download/file/229018/ewipa_explosive_weapons_with_wide_area_effect_final.pdf> accessed 13 August 2022
3. Emanuela-Chiara Gillard, 'Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment' (Chatham House 2018) Research Paper
4. Gabriella Irsten, 'Women and Explosive Weapons' (WILPF 2014)
5. George Dvaladze, 'Equality and Non-Discrimination in Armed Conflict' (PhD Thesis, University of Geneva 2021)
6. Helen Durham and Gerard Quinn, 'Lifting the Cloak of Invisibility: Civilians with Disabilities in Armed Conflict' (*Humanitarian Law & Policy blog*, 21 April 2022) <<https://blogs.icrc.org/law-and-policy/2022/04/21/civilians-disabilities-armed-conflict/>> accessed 27 May 2022
7. Humanity & Inclusion, 'Death Sentence to Civilians: The Long-Term Impact of Explosive Weapons in Populated Areas in Yemen' (Humanity & Inclusion (Handicap International) 2020) <https://www.hi-us.org/news_new_report_yemen_and_explosive_weapons_a_death_sentence_for_civilians> accessed 13 August 2022

8. ICRC, 'Legal Protection of Children in Armed Conflict' (ICRC 2003) <<https://www.icrc.org/en/document/legal-protection-children-armed-conflict-factsheet>> accessed 20 August 2022
9. ICRC, 'Discrimination (or Adverse Distinction)' <<https://casebook.icrc.org/glossary/discrimination-or-adverse-distinction#:~:text=In%20IHL%2C%20the%20principle%20of,nationality%2C%20religion%20or%20political%20affiliation>> accessed 28 May 2022
10. ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions' (ICRC 2019) <<https://shop.icrc.org/international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts-recommitting-to-protection-in-armed-conflict-on-the-70th-anniversary-of-the-geneva-conventions-pdf-en.html>> accessed 25 July 2022
11. Laurent Gisel, 'The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law' (2016) International Expert Meeting <<https://www.icrc.org/en/document/international-expert-meeting-report-principle-proportionality#:~:text=The%20principle%20of%20proportionality%20prohibits,and%20direct%20military%20advantage%20anticipated.>> accessed 25 July 2022
12. Ray Acheson, Richard Moyes, and Thomas Nash, 'Sex and Drone Strikes: Gender and Identity in Targeting and Casualty Analysis' (Article 36 and Reaching Critical Will 2014) <<https://www.article36.org/wp-content/uploads/2014/10/sex-and-drone-strikes.pdf>> accessed 25 July 2022
13. Sandra Krähenmann, 'IHL and the Protection of Minorities' (Geneva, 24 November 2016) <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/MinorityIssues/Session9/Statements/SandraKrahenmann_IHLandtheProtection_minorities.pdf> accessed 26 July 2022
14. UN Committee on the Rights of Persons with Disabilities, 'Ukraine: 2.7 Million People with Disabilities at Risk, UN Committee Warns' (14 April 2022) <[https://www.ohchr.org/en/statements/2022/04/ukraine-27-million-people-disabilities-risk-un-committee-warns#:~:text=Ukraine%3A%202.7%20million%20people%20with%20disabilities%20at%20risk%2C%20UN%20committee%20warns,-Back&text=GENEVA%20\(14%20April%202022\)%20%E2%80%93,people%20with](https://www.ohchr.org/en/statements/2022/04/ukraine-27-million-people-disabilities-risk-un-committee-warns#:~:text=Ukraine%3A%202.7%20million%20people%20with%20disabilities%20at%20risk%2C%20UN%20committee%20warns,-Back&text=GENEVA%20(14%20April%202022)%20%E2%80%93,people%20with)>

%20disabilities%20at%20risk> accessed 24 July 2022

15. UN Human Rights Office of the High Commissioner, ‘SDGs Indicator Framework: A Human Rights Approach to Data Disaggregation to Leave No One Behind’ (UN OHCHR 2015) Draft Background Note <<https://www.ohchr.org/sites/default/files/Documents/Issues/HRIndicators/DataDisaggregation.pdf>> accessed 15 August 2022
16. UN Human Rights Office of the High Commissioner, ‘Situation of Human Rights In Ukraine in the Context of the Armed Attack by the Russian Federation: 24 February – 15 May 2022’ (OHCHR 2022) <<https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf>> accessed 16 August 2022
17. United Nations Country Team in the Occupied Palestinian Territory, ‘Gaza Ten Years Later’ (July 2017) <<https://www.un.org/unispal/document/gaza-ten-years-later-un-country-team-in-the-occupied-palestinian-territory-report/>> accessed 18 August 2022
18. Vanessa Murphy, ‘Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law’ (ICRC 2022) <<https://shop.icrc.org/download/ebook?sku=4634/002-ebook>>