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

by

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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.

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

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. 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.

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. With regards to the wounded and sick in GCI, for example, steps must be taken to ensure that the wounded and sick in GCI, for example, steps must be taken to ensure that the

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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).


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 Armies 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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{14} the Conventions recognize persons that require additional protection.\textsuperscript{15} Besides special protection being offered based on civilians’ particular functions (e.g. journalists, medical personnel, religious personnel, civil defence personnel),\textsuperscript{16} there are also special protections based on vulnerabilities.\textsuperscript{17}

Multiple provisions specifically protect civilian women.\textsuperscript{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.\textsuperscript{19} Customary IHL acknowledges the specific protection, health, and assistance needs of women in armed conflict.\textsuperscript{20} Article 27 §2 of GCIV, moreover, protects women against attacks on their honour,

\begin{itemize}
\item \textsuperscript{12}Knut Dörmann and others (n 10) 496.
\item \textsuperscript{14}Marco Sassòli, \textit{International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare} (Edward Elgar Publishing 2019) 280.
\item \textsuperscript{15}Jelena Pejic (n 8) 186.
\item \textsuperscript{16}Art 15 §1 and §5, 62, and 79 §1 API.
\item \textsuperscript{17}Yoram Dinstein, \textit{The Conduct of Hostilities under the Law of International Armed Conflict} (Cambridge University Press 2016) 187.
\item \textsuperscript{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.
\item \textsuperscript{19}Marco Sassòli (n 14) 281; Charlotte Lindsey, ‘The Impact of Armed Conflict on Women’ in Helen Durham and Tracey Gurd (eds), \textit{Listening to the Silences: Women and War} (Martinus Nijhoff Publishers 2005) 30.
\end{itemize}
particularly rape, and other forms of indecent assault.\textsuperscript{21} This rule is restated and broadened by art 76\$1 API, applying to all women and not only to protected persons.\textsuperscript{22}

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

Special respect and protection is also granted to the elderly, disabled, and infirm.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{29}

\textbf{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

\textsuperscript{21} Art. 27 \$3 GCIV
\textsuperscript{22} Yoram Dinstein (n 17) 187.
\textsuperscript{23} Fatima Shaheed, \textit{Protecting Children in Armed Conflict} (Hart Publishing 2018) 49.
\textsuperscript{25} Art 17 GCIV.
\textsuperscript{26} Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 489.
\textsuperscript{27} Art 14 \$1 and 17 GCIV.
\textsuperscript{28} Art 8 (a) API.
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.\(^\text{30}\)

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.\(^\text{31}\)

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).\(^\text{32}\) Moreover, religious differences are used to deny other people’s humanity and discrimination based on religion is problematic for the application of IHL.\(^\text{33}\) Armed conflict also exacerbates the vulnerabilities of minorities, deepening the divide along ethnic, religious, and linguistic lines.\(^\text{34}\)

3. Non-discrimination and favourable distinctions in international law

\(^{30}\) Saba Azeem and others (n 2) 247–249 and 290.


\(^{32}\) Saba Azeem and others (n 2) 76.


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

\textbf{3.1 The meaning of non-discrimination and equality}

\subsection{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{37} Gabor Rona and Robert J. McGuire (n 13) 195.
\item \textsuperscript{38} William A. Schabas (n 36) 165.
\item \textsuperscript{39} ibid 163; Dinah Shelton, ‘Prohibited Discrimination in International Human Rights Law’ in Aristotle Constantinides and Nikos Zaiko (eds), \textit{The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa} (Martinus Nijhoff Publishers 2009) 264.; Art 2 UDHR.
\item \textsuperscript{40} William A. Schabas (n 36) 174.
\item \textsuperscript{41} Samantha Besson (n 35) 435.
\item \textsuperscript{42} ibid 437.
\end{itemize}
disproportionately negative effect on certain groups.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{48} Discrimination can therefore take the form of same treatment of persons with different characteristics and needs.\textsuperscript{49} Intent is not required to establish discrimination.\textsuperscript{50}

3.2 Justified distinctions and affirmative action

\textsuperscript{43} Daniel Moeckli (n 36) 55.
\textsuperscript{44} ibid; Samantha Besson (n 35) 438.
\textsuperscript{45} Daniel Moeckli (n 36) 55.
\textsuperscript{47} Daniel Moeckli (n 36) 60–61.
\textsuperscript{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.\textsuperscript{51} Not all distinctions are therefore prohibited discrimination, since they can be justified by objective and reasonable criteria.\textsuperscript{52}

Affirmative action for the benefit of disadvantaged groups is allowed.\textsuperscript{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.\textsuperscript{54} IHRL sometimes even demands to take affirmative action to eliminate or reduce conditions that cause or perpetuate prohibited discrimination.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{58}

\textsuperscript{52} William A. Schabas (n 36) 168; Matthew Craven (n 51) 184.
\textsuperscript{53} Bertrand Ramcharan (n 36) 42.
\textsuperscript{55} ibid 67–68. ; UN Human Rights Committee, ‘CCPR General Comment No. 18: Non-discrimination’ (1989) CCPR/C/21/Rev.1/Add.1, §10.
\textsuperscript{57} ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136., §106.
IHL may be interpreted in light of IHRL, based on the principle of systemic integration.\textsuperscript{59} Shared concepts, such as the prohibition of discrimination, can therefore be interpreted in light of IHRL.\textsuperscript{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.\textsuperscript{61} Therefore, the definition and forms of discrimination in IHRL aid in interpreting the notion of adverse distinction.\textsuperscript{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.\textsuperscript{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.\textsuperscript{64} Moreover, the Convention on the Rights of Persons with Disabilities (CRPD) can provide guidance on what adverse distinction based on disability means.\textsuperscript{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.\textsuperscript{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.\textsuperscript{67} API does not mention the prohibition as one of the rules governing the conduct of hostilities.\textsuperscript{68}

\textsuperscript{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.
\textsuperscript{61} Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) xxxvii.
\textsuperscript{63} George Dvaladze (n 56) 201.
\textsuperscript{64} Marco Sassoli (n 14) 282.
\textsuperscript{65} George Dvaladze (n 56) 201.
\textsuperscript{66} Gloria Gaggioli, ‘The Strength of Evolutionary Interpretation in International Human Rights Law’ in Georges Abi-Saab and others (eds), \textit{Evolutionary Interpretation and International Law} (Hart Publishing 2019) 110.
\textsuperscript{67} Sandra Krähenmann (n 34) 2.
\textsuperscript{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. Additionally, Dvaladze proposes to read the principles on the conduct of hostilities in line with the prohibition on adverse distinction in IHL. 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. 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.

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, (…)’. 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, (…)’. 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’.

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. 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. Some practice supports the prohibition of adverse distinction in the conduct of hostilities.

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69 Sandra Krähenmann (n 34) 2.
70 George Dvaladze (n 62) 428.
71 Marco Sassòli (n 14) 282.
73 George Dvaladze (n 56) 65.
74 Art 49 §4 API.
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.\textsuperscript{78} The United Nations General Assembly (UNGA), moreover, has previously called upon Myanmar to stop military operations that target civilians in ethnic areas.\textsuperscript{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 \textit{hors de combat}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textbf{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.\textsuperscript{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

\textsuperscript{80} For an overview of state practice on this issue see Jean-Marie Henckaerts and Louise Doswald-Beck (n 78) 2024–2060.
\textsuperscript{81} Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 489–490.
\textsuperscript{83} Art 48 API.
areas that were known for terrorist activities.\footnote{George Dvaladze (n 62) 429–430.} General Mladić in Srebrenica, moreover, stated that he had complied with civilian immunity by freeing women, children, and the elderly.\footnote{Orly Maya Stern, \textit{Gender, Conflict and International Humanitarian Law: A Critique of the ‘Principle of Distinction’} (Routledge 2019) 106.}

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.\footnote{Susan F. Hirsch (n 4) 348–349 and 351; Orly Maya Stern (n 85) 106.} 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.\footnote{Susan F. Hirsch (n 4) 167 and 348–349; Vanessa Murphy (n 82) 13; Orly Maya Stern (n 85) 105–106.}

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.\footnote{Ray Acheson, Richard Moyes, and Thomas Nash, ‘Sex and Drone Strikes: Gender and Identity in Targeting and Casuality 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.} \footnote{Vanessa Murphy (n 82) 13; Orly Maya Stern (n 85) 106.} These gendered assumptions lead to sex-selective killing and over-targeting of men.\footnote{Vanessa Murphy (n 82) 13; Orly Maya Stern (n 85) 106.} 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’.\footnote{Alice Priddy (n 3) 59–60; Stuart Casey-Maslen and Tobias Vestner, \textit{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.} These three types of harm are called ‘incidental
harm’. 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.

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. Moreover, research has shown that explosive weapons disproportionately affect women and children. Only 9% of the persons killed by gunfire are women, compared to 34% killed by explosive ordinance. 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. The elderly, on the other hand, are more at risk since they can be unable or unwilling to flee the combat zone.

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.

5.3.2 Subjectivity in assessing expected civilian harm

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92 Alice Priddy (n 3) 60–61.
93 ibid 61.
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.\textsuperscript{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.\textsuperscript{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 IH\textsuperscript{L} for the purpose of lowering the collateral damage.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{104}

\textsuperscript{100} Yoram Dinstein (n 17) 159–160.
\textsuperscript{101} Amichai Cohen and David Zlotogorski (n 99) 41.
\textsuperscript{102} George Dvaladze (n 56) 283.
\textsuperscript{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.


\(^{107}\) 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.\textsuperscript{113} This could then be supplemented by specific research on differentiated mental harm, for example for children in different stages of their development.\textsuperscript{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.\textsuperscript{115} When determining the harm, the attacker may choose to omit certain harm to women and girls.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{120} The rule remains quite abstract and the practical application of this principle is part of the

\begin{footnotes}
\textsuperscript{113} Eirini Giorgou (n 106) 100.
\textsuperscript{115} Vanessa Murphy (n 82) 15.
\textsuperscript{116} ibid; Orly Maya Stern (n 85) 107.
\textsuperscript{117} Vanessa Murphy (n 82) 16.
\textsuperscript{118} ibid; Alice Priddy (n 3) 62.
\textsuperscript{119} Vanessa Murphy (n 82) 16–17.
\textsuperscript{120} Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 51.; Art 57 §1 API.
\end{footnotes}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{127}

\subsection*{5.4.2 Feasible precautions in attack}

\begin{itemize}
\item \textsuperscript{121} Jean-Francois Queguiner, ‘Precautions under the Law Governing the Conduct of Hostilities’ (2006) Vol. 88 International Review of the Red Cross 793, 797.
\item \textsuperscript{122} George Dvaladze (n 62) 430.
\item \textsuperscript{124} Vanessa Murphy (n 82) 19.
\item \textsuperscript{126} Vanessa Murphy (n 82) 17.
\item \textsuperscript{127} George Dvaladze (n 62) 430.
\end{itemize}
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.
the warnings are delivered, such as through their form, language, or substantive, must give everyone a chance as much as possible.  

Assessing the effectiveness of warnings requires an assessment from the perspective of the civilians that could be affected. 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.

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. 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. Reduced literacy and an increasing digital divide is not only an issue from a gender perspective, but also from an age perspective. 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. This was the case in the United Nations Protected Areas in Croatia where women,

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135 George Dvaladze (n 62) 430.
136 Vanessa Murphy (n 82) 18.
138 ibid 63–64.
139 Vanessa Murphy (n 82) 18.
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.\textsuperscript{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.\textsuperscript{143}

The duty is fulfilled when states issue a general warning, for example, through broadcasting and distributing leaflets.\textsuperscript{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.\textsuperscript{145} When it is possible or necessary, the attacker is not exempted from giving more precise warnings.\textsuperscript{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.\textsuperscript{147}

5.4.3 Feasible precautions against the effects of attacks

The defending party must also take precautions against the effects of attacks.\textsuperscript{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.\textsuperscript{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.\textsuperscript{150}

\begin{itemize}
  \item \textsuperscript{142} Charlotte Lindsey, ‘Women and War - An Overview’ [2000] International Review of the Red Cross.
  \item \textsuperscript{143} Vanessa Murphy (n 82) 18.
  \item \textsuperscript{144} Jean-Francois Queguiner (n 121) 808.
  \item \textsuperscript{146} Jean-Francois Queguiner (n 121) 808.
  \item \textsuperscript{147} Alice Priddy (n 3) 64.
  \item \textsuperscript{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.
  \item \textsuperscript{149} Alice Priddy (n 3) 64; Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 70.
  \item \textsuperscript{150} Andrew Navarro (n 148) 1078.
\end{itemize}
presumption is that the defending state must anticipate attacks and therefore prepare the population long before this happens, starting in peacetime with evacuation plans.\textsuperscript{151}

To do this, the defender must assess information from all sources available to them at the time.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{157}

\begin{itemize}
\item 151 ibid 1080.
\item 152 Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 71.
\item 153 Alice Priddy (n 3) 65.
\item 154 ibid 64–65.
\item 156 Orly Maya Stern (n 85) 106.
\item 157 Andrew Navarro (n 148) 1078; Jean-Marie Henckaerts and Louise Doswald-Beck (n 20) 68.
\end{itemize}
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.\footnote{George Dvaladze (n 56) 272.} Since non-discrimination or the prohibition of adverse distinction is generally a subsidiary obligation it requires the breach of another norm,\footnote{Gabor Rona and Robert J. McGuire (n 13) 201.} being the principles of distinction, proportionality, or precaution respectively.

Parties may not intentionally adversely distinguish between civilians in the conduct of hostilities.\footnote{George Dvaladze (n 56) 271.} 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.\footnote{Vanessa Murphy (n 82) 17.} \footnote{George Dvaladze (n 56) 285.} \footnote{Vanessa Murphy (n 82) 17.} Indirect effects can expose a particular category of persons to a disproportionately greater disadvantage,\footnote{George Dvaladze (n 56) 271.} 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.\footnote{Vanessa Murphy (n 82) 17.} Regarding precautions, there will be adverse distinction if a segment of the population, based on a particular characteristic, is excluded from the precautions.
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.\(^\text{164}\) 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.\(^\text{165}\) Moreover, addressing these differences in precautions will allow them to be more effective.\(^\text{166}\) 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.\(^\text{167}\) 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.\(^\text{168}\) 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. 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.

Applying a differentiated approach is also operationally challenging since military and humanitarian actors work under pressure and sometimes with limited resources. 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. 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. Such capacity constraints may particularly be an issue for non-state armed groups.

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

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171 Susan F. Hirsch (n 4) 361.

172 George Dvaladze (n 56) 273.

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

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.
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