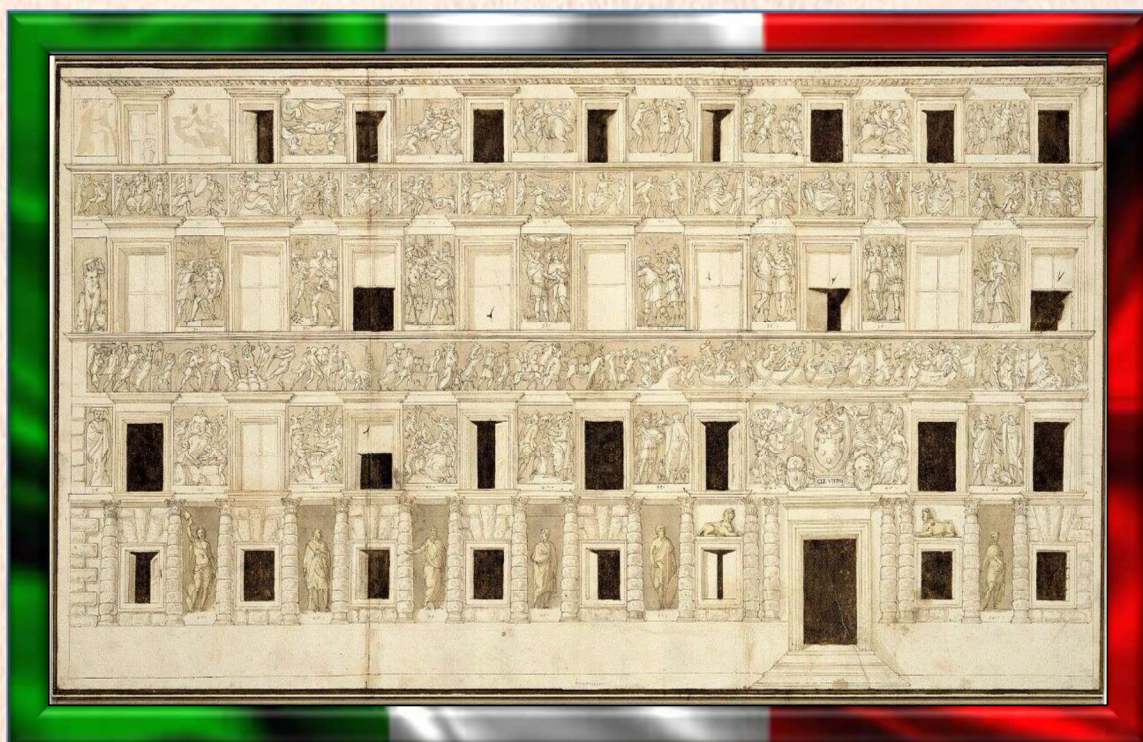


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Reg. Trib. Civile di Roma n. 16019, del 9 agosto 1975

# ***International humanitarian law, gender, and detention in armed conflict\****

Diritto internazionale umanitario, genere, e detenzione nei conflitti armati

*Federica Favuzza*

**Summary: 1. Introduction. – 2. Relevant definitions and scope of the study. – 3. IHL treaty-based rules expressly recognising the specific needs and circumstances of female detainees. – 4. The argument in favour of a gender-sensitive interpretation and application of relevant IHL rules. – 4.1. Taking biological/physiological differences into account. – 4.2. Taking societal expectations of gender roles into account. – 5. Concluding remarks.**

## **1. Introduction**

It is nowadays widely acknowledged that women, men, girls and boys may be affected by armed conflict and conflict-related detention differently, based on their specific needs, capacities and perspectives<sup>1</sup>. This article aims to examine international humanitarian rules relevant to detention in armed conflict with a view to determining whether they take or may be interpreted as taking various gender issues into account<sup>2</sup>.

After defining relevant terms and clarifying the rationale underlying the present investigation (para 2), the article will, first, identify the few IHL treaty-based rules that expressly recognise the specific needs and circumstances of female detainees (para 3) and, second, show how certain international humanitarian law (hereinafter, IHL) obligations may justify or even demand a gender-sensitive interpretation and application of other IHL rules concerning the treatment of detainees (para 4).

## **2. Relevant definitions and scope of the study**

For present purposes, the term “detention” is meant to refer to any deprivation of personal liberty, i.e., ‘the confinement of a person in a restricted space or location’, which ‘begins when a

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\* This article is based on a presentation titled “Gender issues related to detention in armed conflict” and delivered by the author on 12 May 2022 on the occasion of the 22<sup>nd</sup> Congress of the International Society for Military Law and the Law of War on “Exploring Opportunities for Improvement of International Peace and Security”, Florence (Italy). The author would like to thank the Italian section of the ISMLLW, as well as Prof. Gabriella Venturini, the other speakers on the panel and participants in the Congress, for their interesting comments and questions. The usual disclaimer applies.

<sup>1</sup> See, inter alia, H. NIEBERGALL-LACKNER (with contributions by H. Durham), *Article 14: Respect for the persons and honour of prisoners*, in ICRC, *Commentary on the III Geneva Convention*, 2020, para 1682 (available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>); H. Hiemstra and V. Murphy, *GCIII Commentary: I’m a woman and a POW in a pandemic. What does the Third Geneva Convention mean for me?*, in *Humanitarian Law and Policy*, 8 December 2020 (available at: <https://blogs.icrc.org/law-and-policy/2020/12/08/gciii-commentary-woman-pow-third-geneva-convention/>); F. Ní Aoláin, *The gender of occupation*, in 45 *The Yale journal of international law* 2-2020, p. 336 ff.; A. Hoover Green, “Mind the Gap:” *Measuring and Understanding Gendered Conflict Experiences*, in F. Ní Aoláin, N. Cahn, D.F. Haynes and N. Valji (eds), *Oxford Handbook of Gender and Conflict*, Oxford University Press, 2018, p. 316 ff.; F. Ní Aoláin, *Gendering the law of occupation: The case of Cyprus*, in 27 *Minnesota Journal of International Law* 1-2018, p. 107 ff.; K. Lindvall, *Chapter 2. Approaching the Geneva Conventions with a gender perspective*, in C. Tengroth and K. Lindvall (eds), *IHL and gender – Swedish experiences*, Swedish Red Cross and Swedish Ministry for Foreign Affairs, 2015, p. 15 ff. (available at: [www.redcross.se/ihlandgender](http://www.redcross.se/ihlandgender)).

<sup>2</sup> Clearly, the question of whether IHL rules take or should be interpreted as taking gender issues into account is not only relevant in relation to the rules on the treatment of detainees. However, given how these individuals are particularly vulnerable to certain IHL violations (see G. Venturini (Ed.), *Integrating Gender Perspectives into International Operations: A Training Handbook with Commentaries*, International Institute of Humanitarian Law, Sanremo, 2019, p. 92), the scope of this article is intentionally limited to detention.

person is apprehended/taken into detention and ends with their release’.<sup>3</sup> Thus, unless otherwise indicated, the term ‘detainee’ will be used as encompassing all persons deprived of their liberty in connection with an armed conflict. Still, it is worth recalling that several types of conflict-related detention may occur: in the context of an international armed conflict (hereinafter, IAC), individuals may be subjected to (i) internment<sup>4</sup>, (ii) criminal detention<sup>5</sup>, or (iii) retention<sup>6</sup>; in the context of a non-international armed conflict (hereinafter, NIAC), individuals are typically deprived of their liberty either by (i) internment or by (ii) criminal detention<sup>7</sup>. Once conflict-related detention begins, a number of IHL rules apply and regulate the detainee’s treatment<sup>8</sup>. These are the rules that the present research work seeks to examine from a gender perspective.

As for the term “gender”, whilst increasingly used in IHL legal commentary and analyses,<sup>9</sup> it is not included in any IHL treaty-based rule. Clearly, “gender” is no synonym of “sex”: on the one hand, the latter refers to ‘the biological ... and physiological characteristics of a person, such as male or female’; on the other hand, the former is widely defined as ‘the socially constructed roles, behaviours, activities, and attributes that a given society at a given time ascribes as appropriate for men and women’<sup>10</sup>. In other words, whereas ‘sex is biologically determined’, ‘gender is socially constructed’<sup>11</sup>.

In the present writer’s view, the rationale for devoting the present investigation to *gender* issues and detention stems from two main considerations.

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<sup>3</sup> Ibidem, p. 89.

<sup>4</sup> Internment may be defined as a deprivation of personal liberty ordered by administrative authorities without any criminal charge being brought against the individual concerned. IHL regulates the internment of civilians posing a security threat (see Arts 41-42 of the IV Geneva Convention for aliens in the territory of a party to the conflict and Art. 78 of the same Convention for inhabitants of occupied territories) as well as of prisoners of war (hereinafter, POWs) (see esp. the III Geneva Convention).

<sup>5</sup> Criminal detention consists in the deprivation of personal liberty in connection with criminal proceedings. For relevant IHL rules, see esp. Arts 37 and 64 ff. of the IV Geneva Convention and Art. 75 of the I Additional Protocol, as well as several other rules within the III and IV Geneva Conventions related to penal and disciplinary sanctions of POW and civilian internees.

<sup>6</sup> Retention of medical and religious personnel is regulated at Arts 28 of the I Geneva Convention and 37 of the II Geneva Convention.

<sup>7</sup> Whilst IHL treaty rules applicable to NIACs are silent on the grounds and procedures for deprivation of liberty, certain rules do regulate the treatment of persons subjected to internment/detention. See, e.g., Article 3 common to the Geneva Conventions and Art. 5 of the II Additional Protocol.

<sup>8</sup> See esp. Art 12 ff. of the III Geneva Convention; Arts 76 and 79 ff. of the IV Geneva Convention; Art. 3 common to the Geneva Conventions; Arts 75-76 of the I Additional Protocol; Arts 5-6 of the II Additional Protocol. Clearly, different rules may apply depending on the type of conflict-related detention, with the vast majority of treaty rules concerning persons deprived of their liberty in the context of an IAC (in particular POW or civilian internees).

It should also be noted that several international human rights rules apply to the treatment of persons deprived of their liberty. However, the examination of these rules is outside of the scope of the present investigation. For a concise overview, see, inter alia, Venturini, see above at n 2, p. 93 ff.

<sup>9</sup> For recent contributions, see, *ex multis*, ICRC, *Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law*, ICRC, Geneva, June 2022, p. 8; S. Bertotti, G. Heathcote, E. Jones and S. Labenski, *The law of war and peace: A gender analysis. Volume 1*, Zed Books, 2021; Ní Aoláin, *The gender of occupation*, see above at n 1; Venturini, see above at n 2, p. 15; A.-M. De Brouwer and L. Ruiz, *Gender and war: International and transitional justice perspectives*, Intersentia, 2019; G. Venturini, *Women, gender, and international humanitarian law: a complex relationship*, in F. Pocar (Ed.), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, 40<sup>th</sup> Roundtable on Current Issues of International Humanitarian Law, Sanremo, 7-9 September 2017, FrancoAngeli, 2018, p. 215 ff. (available at: <https://iihl.org>).

<sup>10</sup> Venturini, see above at n 2, p. 15.

<sup>11</sup> ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, p. 8. For an extensive analysis of the use of the term “gender” in international law, see I. Rosenthal, V. Oosterveld and S. SáCouto, *What is ‘Gender’ in International Criminal Law*, in Id., *Gender and International Criminal Law*, Oxford University Press, 2022, p. 11 ff., p. 18. For the use of this term specifically in IHL, see, inter alia, Venturini, *Women, gender, and international humanitarian law*, see above at n 9, p. 215 ff.

First, there is an increasing awareness ‘that not only an individual’s biological functions, but [also] the gendered structures in society affect the[ir] status, needs and capacities’<sup>12</sup>. Based on these different needs and capacities, as well as perspectives, individuals may be affected by armed conflict and detention in different ways.<sup>13</sup> This is the main reason why the present investigation will be devoted to *gender* issues and conflict-related detention, rather than merely to *sex differences* and detention.

Second, by referring to *gender* issues and detention, rather than *women* and detention, men’s specific needs, perspectives and experiences may also be taken into account when interpreting and applying relevant international rules. True, there are some IHL rules that specifically apply to *female* detainees and take *women’s* specific needs and circumstances into account. However, it is now widely recognised that ‘[b]oth men and women [may be] subjected to gendered violation of rules and standards established by’ IHL.<sup>14</sup>

In the light of the above, the present investigation will deal not only with IHL rules specifically regulating the treatment of female detainees, but also with other IHL rules generally devoted to the treatment of detainees, with a view to demonstrating how the latter may be interpreted and applied as taking various gender issues into account.<sup>15</sup> In this perspective, the expression “gender issues” is meant to encompass both matters related to biological/physiological differences between the sexes and those linked to societal expectations of gender roles. Thus, the “gender-sensitive” interpretation and application of relevant rules for which this article aims to advocate is intended as broadly as possible to consider both types of matters.

### **3. IHL treaty-based rules expressly recognising the specific needs and circumstances of female detainees**

As is well known, certain IHL treaty-based rules expressly recognise the specific needs and circumstances of female detainees<sup>16</sup>. Clearly, the existence of these provisions is not at odds with the principle of non-discrimination or equal treatment that is also established by several IHL rules applicable both to IACs and NIACs<sup>17</sup>. Indeed, not only do relevant provisions only prohibit ‘adverse’ distinctions<sup>18</sup>, but they also include a clause clarifying that the prohibition of discrimination is

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<sup>12</sup> Lindvall, see above at n 1, p. 16.

<sup>13</sup> See above at n 1. An illustrative case that has recently been examined by the ICRC is that of the rules on targeting, in particular the application of the principle of distinction. Indeed, ‘[t]he identification of who is a combatant and who is a civilian by parties to a conflict can be influenced by gender assumption’, so that, ‘when there is a margin of doubt in targeting decisions, women are more likely to be assessed to be civilians and men are more likely to be assessed to be combatants’. ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, p. 13.

<sup>14</sup> Venturini, see above at n 2, p. 3. A well-known example of a gendered violation of IHL affecting men as well as women is that of sexual violence. Clearly, sexual violence can affect both women and men. What is important to note is that, when it comes to men in armed conflict, it may be a ‘gendered’ violation of IHL rules if it is used as ‘a deliberate strategy’ to ‘humiliate and emasculate’ men, to force them to take the stereotypically submissive/subordinated position of women. H. Durham and O’Byrne, *Gender Perspectives on International Humanitarian Law*, in 92 *International Review of the Red Cross* 2010, p. 31 ff., p. 48.

<sup>15</sup> For a similar approach, see esp. ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, esp. p. 25 ff.; Hiemstra and Murphy, see above at n 1; Durham and O’Byrne, *ibidem*, esp. p. 38 ff.

<sup>16</sup> For a comprehensive examination of IHL rules specifically dealing with women, see, inter alia, N. Quenivet, *Special Rules on Women*, in A. Clapham, P. Gaeta and M. Sassoli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, p. 1271 ff.

<sup>17</sup> See ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, 2022, p. 25; Hiemstra and Murphy, see above at n 1; Venturini, see above at n 2, p. 95; Quenivet, *ibidem*, p. 1273.

<sup>18</sup> See Art. 12 of both the I and II Geneva Convention; Arts 14 para 2 and 16 of the III Geneva Convention; Art. 27 of the IV Geneva Convention; Art. 75 of the I Additional Protocol; Art. 3 common to the Geneva Conventions; Art. 4 of the II Additional Protocol. It should be noted that, although Art. 27 of the IV Geneva Convention does not expressly mention “gender” or “sex” amongst the grounds of prohibited discrimination, it is widely acknowledged that the list of said grounds is non-exhaustive. See, among others, ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, 2022, p. 25.

'[w]ithout prejudice to the provisions relating to [the concerned individual's] state of health, age and sex'<sup>19</sup>. Thus, while providing for an obligation of equal treatment, IHL also admits that certain exceptions be made.

Some of these exceptions are warranted by biological/physiological differences between sexes. Consider, in particular, the case of pregnant or nursing female detainees: Art. 89 para 5 of the IV Geneva Convention expressly requires that 'expectant and nursing [civilian internees] ... be given additional food, in proportion to their physiological needs'; Art. 91 para 2 of the same Convention states that 'maternity cases ... must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population'<sup>20</sup>.

Interestingly, another set of IHL rules also take women's specific needs and circumstances into account. However, they do so not because of some biological/physiological difference, but because of a perceived gender-related vulnerability. This set of rules includes, for instance, those considering the gender-specific risks that female detainees are expected to face in respect of their dignity, privacy, and bodily integrity (e.g., rules requiring separate accommodation in detention camps and supervision by other women)<sup>21</sup>.

Overall, IHL treaty-based rules recognising gender-specific needs and circumstances are sparse. This is probably unsurprising, considering that these treaties are forty-five or more years old. However, as the following paragraphs will show, the present writer agrees with those arguing that a gender-sensitive interpretation and application of relevant IHL rules is not only justified but also, in some cases, required by other IHL rules<sup>22</sup>.

#### **4. The argument in favour of a gender-sensitive interpretation and application of relevant IHL rules**

For present purposes, alongside the abovementioned obligation of non-discrimination or equal treatment<sup>23</sup>, three other IHL obligations may be of particular relevance: first, the obligation of humane treatment, that is established by several treaty provisions<sup>24</sup> and, according to the ICRC Study on customary IHL, also by a customary rule applicable to both IACs and NIACs<sup>25</sup>; second, the obligation to treat women with respect or with all the regard due to their sex, that is also provided

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As for customary international law, see Rule 88 (Non-Discrimination) in J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, 3 Vol., Cambridge University Press, 2005 (hereinafter, ICRC Customary IHL Study).

<sup>19</sup> Emphasis added. It should be noted that Art. 16 of the III Geneva Convention is slightly different from other relevant provisions: 'Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications'.

<sup>20</sup> A couple of other provisions within IHL treaties also refer to pregnant detainees. However, since they are not related to the treatment of detainees, they are outside of the scope of the present investigation. These provisions are: Art. 110 of the III Geneva Convention read in conjunction with Annex I - Model agreement concerning direct repatriation and accommodation in neutral countries of wounded and sick prisoners of war ('All women POW who are pregnant or mothers with infants and small children are eligible for accommodation in a neutral country'); Art. 76 para 2 of the I Additional Protocol ('Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict shall have their cases considered with the utmost priority'); Art. 127 of the IV Geneva Convention ('Sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands').

<sup>21</sup> See Arts 25 para 4, 29 para 2, 97 para 4 and 108 para 2 of the III Geneva Convention; Arts 76 para 4, 82 paras 3-4, 85 para 4 and 124 para 4 of the IV Geneva Convention; Arts 75 para 5 and 77 para 4 of the I Additional Protocol; Art. 5 para 2 lit. a) of the II Additional Protocol; Rules 119 and 120 of the ICRC Customary IHL Study, see above at n 18.

<sup>22</sup> See ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, p. 25; Hiemstra and Murphy, see above at n 1.

<sup>23</sup> See above at Section 3.

<sup>24</sup> See Art. 27 of the IV Geneva Convention; Arts 13-14 of the III Geneva Convention; Art. 75 of the I Additional Protocol.

<sup>25</sup> See Rule 87 of the ICRC Customary IHL Study, see above at n 18.

by some treaty provisions<sup>26</sup> and, according to the ICRC Study, reflected in a customary rule obliging parties to respect the specific protection, health and assistance needs of women affected by armed conflict<sup>27</sup>; third, the obligation to respect one's honour, that is also established by several IHL rules.<sup>28</sup>

In the present writer's view, these obligations may not only justify but also demand a gender-sensitive interpretation and application of IHL rules related to the treatment of detainees. Indeed, the entire text of a treaty is part of the 'context' to be considered when interpreting the terms of one of its provision pursuant to Art. 31 of the Vienna Convention on the Law of Treaties.<sup>29</sup> It may thus be the case that 'other provisions of the same treaty [...] have as a necessary consequence or implication a certain reading of the disputed term'<sup>30</sup>. Following this reasoning, it is contended that, by way of a contextual or systematic interpretation of relevant provisions on the treatment of detainees in the light of the abovementioned IHL obligations of humane treatment, of treating women with respect or with all the regard due to their sex, and of respecting one's honour, detaining authorities have a duty to make certain non-adverse distinctions with a view to taking various gender-issues into account<sup>31</sup>. While some of these issues are linked to biological/physiological differences (para 4.1), others are linked to societal expectations of gender roles (para 4.2).

#### 4.1. Taking biological/physiological differences into account

When it comes to biological/physiological differences between sexes which may justify or even demand a gender-sensitive interpretation and application of IHL rules, the illustrative case of pregnant and nursing detainees comes to mind.

As mentioned above, there are a couple of treaty provisions specifically dealing with the treatment of pregnant/nursing civilian internees. Yet, no similar provision exists in respect of other categories of persons held in conflict-related detention – i.e., POWs, individuals held in criminal detention in the context of an IAC, and those deprived of their liberty for reasons related to a NIAC<sup>32</sup>. There is no specific rule, for instance, on these women's needs in relation to food or medical care. However, as previously mentioned, it may be argued that the gender-sensitive application of existing provisions is required by their contextual or systematic interpretation in the light of two of the abovementioned obligations, i.e., that of humane treatment and that to treat women with respect or with all the regard due to their sex.

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<sup>26</sup> See Art. 12 of the I and II Geneva Conventions; Art. 14 of the III Geneva Convention; Art. 76 of the I Additional Protocol.

<sup>27</sup> See Rule 134 of the ICRC Customary IHL Study, see above at n 18.

<sup>28</sup> See Art. 14 of the III Geneva Convention; Art. 27 of the IV Geneva Convention; Art. 75 para 1 of the I Additional Protocol; Art. 4 para 1 of the II Additional Protocol.

<sup>29</sup> Indeed, under Art. 31 of this Convention, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in light of its object and purpose' (emphasis added). On the notion of "context", see, inter alia, O. Dörr, *Article 31. General rule of interpretation*, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary*, Springer, 2018, p. 559 ff., p. 582; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, 2009, p. 415 ff., p. 427. For a similar reasoning in respect of the principle of non-discrimination under Art. 27 of the IV Geneva Convention and IHL rules on belligerent occupation, see: ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, p. 25-6.

<sup>30</sup> Dörr, *ibidem*, p. 583. The author cites the following judgments of the International Court of Justice: *Dispute Regarding Navigational and Related Rights* (2009) ICJ Report 213, paras 77-79 and 84; *Mutual Assistance in Criminal Matters* (2008) ICJ Report 177, para 123.

<sup>31</sup> The ICRC defines 'non-adverse distinctions' as those 'that are justified by the substantively different situations and needs of protected persons'. ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, p. 25. Indeed, it has been argued that allowing non-adverse distinctions would be in line with a principle of substantive (rather than merely formal) equality between men and women. See *ibidem*; Hiemstra and Murphy, see above at n 1; Quenivet, see above at n 16, p. 1273.

<sup>32</sup> See above at Section 3.



As far as food is concerned, existing provisions do refer to the link between food and health. Art. 26 of the III Geneva Convention states, *inter alia*, that '[t]he basic daily food rations [for POWs] shall be sufficient in quantity, quality and variety to keep [them] in good health and to prevent loss of weight or the development of nutritional deficiencies'. Similarly, Art. 76 of the IV Geneva Convention requires that '[p]rotected persons accused of offences [...] enjoy conditions of food [...] which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country'. As far as NIACs are concerned, Art. 5 para 1 lit. *b*) establishes that 'persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', 'shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene [...]'. Whilst none of these provisions make express reference to pregnant or nursing women and their specific needs, it is contended that the requirement that food rations be sufficient to keep detainees in good health entails an obligation to ensure, among others, that 'pregnant or lactating women [...] [are] provided with rations that [can indeed] keep them in good health'<sup>33</sup>.

As for medical care, relevant treaties are also utterly silent when it comes to the specific needs of pregnant or nursing POWs or civilians held in criminal detention, as they are in respect of pregnant or nursing women who are deprived of their liberty for reasons related to a NIAC. This lack of explicit regulation is all the more striking, considering that reduced access to medical care during pregnancy may be fatal or result in stillbirth<sup>34</sup>.

In this respect too, the present writer agrees with those scholars and experts arguing that an obligation to provide specific medical care stems from the abovementioned general obligations. Indeed, at least as far as POWs are concerned, this is the approach of the updated Commentary on the III Geneva Convention. In discussing the obligation under Art. 14 to treat women POWs with all the regard due to their sex, the authors expressly note how this general obligation 'affects the implementation of th[os]e provisions [...] of the [...] Convention relating to the medical care of POW', by requiring that 'medical services available to female prisoners of war [be] adequately equipped to address [their] gynaecological and *reproductive* health issues'<sup>35</sup>. This interpretation of relevant provisions is reiterated in the Commentary on Art. 30 of the same Convention<sup>36</sup>, based on the provision's wording that '[e]very camp shall have an adequate infirmary where POW may have the attention *they require*'.<sup>37</sup> Interestingly, Peru's 2010 IHL and Human Rights Manual appears to share this view: after reiterating the principle of equal treatment and the obligation to treat women with all the regard due to their sex, the manual stresses that '[t]his means that due attention must be given', among others, 'to [POWs'] special requirements relating to biological factors, such as menstruation and pregnancy'<sup>38</sup>.

It may be argued that similar conclusions should be drawn in respect of other types of detainees. Consider both civilians held in criminal detention in the context of an IAC and persons

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<sup>33</sup> B. Oswald, *Art. 26: Food*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, para 2113. See also Hiemstra and Murphy, see above at n 1.

<sup>34</sup> Hiemstra and Murphy, see above at n 1. On POWs' medical care obligations, see H. Durham and V. Murphy, *Equal treatment for women in State armed forces: Three practical implications for medical care*, in *Humanitarian Law & Policy*, 8 March 2019 (available at: <https://blogs.icrc.org/law-and-policy/2019/03/08/equal-treatment-women-state-armed-forces-three-practical-implications-medical-care/>).

<sup>35</sup> See Niebergall-Lackner, see above at n 1, para 1685 (emphasis added).

<sup>36</sup> See A. Breitegger, *Article 30: Medical attention*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, para 2230.

<sup>37</sup> Emphasis added. A similar wording is used at Rule 118 of the ICRC Customary IHL Study, see above at n 18, which is applicable to both IACs and NIACs and states that '[p]ersons deprived of their liberty must be provided with *adequate* food, water, clothing, shelter and *medical attention*' (emphasis added).

<sup>38</sup> See practice related to Rule 134 (Women) of the ICRC Customary IHL Study, *ibidem*. See also Canada's 2004 Manual on POW Handling and Detainees, which states that 'pregnant female [POW] are ... to be provided with appropriate dietary supplements as directed by the Canadian or coalition Medical officer'. *Ibidem*.

deprived of their liberty for reasons related to a NIAC. As far as the former are concerned, although Art. 76 of the IV Geneva Convention merely states that '[p]rotected persons accused of offences [...] shall receive the medical attention required by their state of health', a contextual or systematic interpretation of this provision in the light of the abovementioned general obligations of humane treatment and of treating women with all the regard due to their sex would entail a duty to consider the specific medical care needs of women, including pregnant and nursing ones. The same reasoning applies to the latter: while Art. 5 para 1 lit. c)-d) of the II Additional Protocol simply provides that 'they shall have the benefit of medical examinations' and that 'their physical or mental health and integrity shall not be endangered by any unjustified act or omission', the obligation to treat them humanely and to treat women with respect would require that female detainees' specific health needs and circumstances be duly cared for.

Alongside food and medical care, hygiene is another illustrative case of how relevant IHL rules may be interpreted and applied as taking biological/physiological differences between sexes into account. The only relevant treaty provisions expressly referring to women are those requiring separate conveniences for female detainees; however, these rules seem to reflect the drafters' concern for women's privacy and (probably) bodily integrity. Not a single provision among those dealing with the hygiene of detainees appears to take the specific biological/physiological needs of women into account: most of them generally demand 'sufficient' conditions of hygiene (including water, soap and time to shower), yet make no express reference to the necessity of any non-adverse distinction between the sexes<sup>39</sup>. Still, in this respect too, it seems reasonable to argue in favour of a gender-sensitive interpretation and application of relevant provisions in the light of the obligations of humane treatment and of treating women with respect or with all the regard due to their sex. In this perspective, detaining authorities wishing to meet IHL requirements in respect of detainees' hygiene would have to provide female detainees with, e.g., sanitary pads/towels, and sufficient water and time to shower (even longer and more frequently than male detainees in case of menstruation)<sup>40</sup>. Interestingly, not only is this the view endorsed by the authors of the updated Commentary on the III Geneva Convention<sup>41</sup>, but it also appears to be shared to a certain extent by the 2008 US Manual on Detainee Operations<sup>42</sup> and by the abovementioned Peru's 2010 IHL and Human Rights Manual<sup>43</sup>.

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<sup>39</sup> As far as POWs' hygiene is concerned, Art. 29 of the III Geneva Convention merely states that '[t]he Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps [...] and that POWs 'shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose'. See, similarly, Art. 85 of the IV Geneva Convention concerning civilian internees. As for civilians accused of offences in the context of an IAC, Art. 76 of the IV Geneva Convention merely requires that they 'enjoy conditions of [...] hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country'. Finally, in the context of a NIAC, the only relevant provision is Art. 5 para 1 lit. b), which states that 'persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', shall 'be afforded safeguards as regards [...] hygiene'.

<sup>40</sup> See Venturini, see above at n 2, p. 97.

<sup>41</sup> A. Breitegger, *Art. 29: Hygiene*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, paras 2223-4.

<sup>42</sup> The manual expressly requires that, '[i]n facilities where women detainees are accommodated, feminine hygiene supplies ... be provided'. See practice related to Rule 118 (Provision of Basic Necessities to Persons Deprived of Their Liberty) of the ICRC Customary IHL Study, see above at n 18.

<sup>43</sup> See above at n 38.

## 4.2. Taking societal expectations of gender roles into account

As mentioned above, it is the present writer's view that a gender-sensitive interpretation and application of IHL rules on the treatment of detainees is justified or even, in some cases, required not only by biological/physiological differences, but also by societal expectations of gender roles<sup>44</sup>.

Consider, for instance, IHL rules related to detainees' clothing. As far as civilian internees are concerned, Art. 90 para 2 of the IV Geneva Convention states that '[t]he clothing supplied by the Detaining Power [...] shall not be ignominious or expose them to ridicule'. Arguably, respect for this rule demands, *inter alia*, a careful consideration of gender roles, i.e., of what is deemed to be the *appropriate* clothing for both female and male detainees at a given time and in a given society. When it comes to other types of detainees in either IACs or NIACs, no similar obligation is expressly established: Art. 27 of the III Geneva Convention merely takes quantity and climate-related needs into account when regulating the detaining power's obligations in relation to POWs' clothing; Art. 5 para 1 lit. b) of the II Additional Protocol does not even expressly mention clothing and simply establishes that 'persons deprived of their liberty for reasons related to the [NIAC], whether they are interned or detained', 'shall be afforded [...] protection against the rigours of the climate'. Still, it is contended that, in the light of the abovementioned obligations of humane treatment and of respect for one's honour, all detainees are entitled to be supplied with clothing that do not expose them to ridicule on the basis of expected gender roles. This appears to be the view of the authors of the updated Commentary on the III Geneva Convention: after recalling that 'Articles 13 and 14(1) require, respectively, that [POWs] be treated humanely and that their persons and their honour be respected', they hold that, '[b]y implication, [...] the clothing must respect the individual's person and honour and be adapted to, for example, their age, *gender* and religious and cultural background'.<sup>45</sup> In the present writer's view, the same reasoning applies to other categories of (female and male) detainees.

Another illustrative case of IHL rules that, while not expressly taking gender issues into account, may be interpreted in a gender-sensitive way is that of searches. Whereas the IV Geneva Convention expressly requires that a female civilian internee be only searched by another woman,<sup>46</sup> no similar obligation is established in respect of other categories of persons held in conflict-related detention. Also, no provision specifically refers to similar requirements for searches on men, although it is reasonable to assume that, in some societies, gender-related expectations on men's roles, behaviours, and attributes would make being searched by a woman particularly humiliating.<sup>47</sup> In the present writer's view, the general IHL obligations mentioned above, especially the one to respect each detainee's honour, would also apply to searches. This would entail the prohibition of any humiliation, including those based on societal convictions of gender roles. As far as POWs are concerned, this view appears to be shared by the authors of the updated Commentary on the III Geneva Convention<sup>48</sup>. It also seems to be endorsed, at least to a certain extent, by the abovementioned 2004 Canada's Manual on POW Handling and Detainees, which requires that POWs be 'searched ... as far as possible by members of the same sex' and, '[w]hen this is not

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<sup>44</sup> See above at Section 4.

<sup>45</sup> See B. Oswald, *Article 27: Clothing*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, para 2151 (emphasis added).

<sup>46</sup> See Art. 97.

<sup>47</sup> Durham and O'Byrne, see above at n 14, p. 40.

<sup>48</sup> They rely on the obligation of humane treatment under Art. 13 to argue that any search must 'be conducted by a person of the same gender, whenever possible, to mitigate the risk of humiliating the POW being searched'. See E. La Haye and H. Niebergall-Lackner (with contributions by A. Leshchinskaya), *Article 13: Humane treatment of prisoners*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, para 1667.

possible', that an officer be present.<sup>49</sup> Arguably, in this respect too, similar conclusions could be drawn in relation to other categories of persons held for reasons related to a conflict.

## 5. Concluding remarks

While it is undeniable that only a relatively small number of treaty provisions expressly consider gender-specific needs and circumstances of detainees (and do so by focussing exclusively on women), the present article has attempted to make a case for a gender-sensitive application of other IHL rules concerning the treatment of detainees. The research has shown that this is not only justified but also, in some cases, required by the contextual or systematic interpretation of relevant provisions in the light of the general obligations of humane treatment, of treating women with respect or with all the regard due to their sex, and of respect for one's honour<sup>50</sup>.

It is certainly worth noting how the relevance of these findings is not limited to the duties of detaining authorities, as they may also significantly affect those of transferring ones<sup>51</sup>. Indeed, under both the III and IV Geneva Conventions, detainees can only be transferred to another State if this State is also a party to the Conventions and provided that it is willing and able to respect them; if this State 'fails to carry out the provisions of the Convention[s] *in any important respect*, the [State] by whom the [detainees] were transferred shall [...] take effective measures to correct the situation or request the return of the detainees'<sup>52</sup>. In the light of the above conclusions on IHL, gender, and detention, the question arises of whether the phrase 'in any important respect' should be intended as encompassing also gender issues arising in relation to the treatment of detainees. Interestingly, the authors of the updated Commentary on Art. 12 of the III Geneva Convention contend that '[o]ne benchmark for determining whether a breach is 'important' is whether it violates the general obligation of humane treatment as articulated in Article 13'; thus, according to them, this phrase would also cover, e.g., 'a failure [of] the receiving Power [...] to provide for the basic needs of the [POWs], specifically as relates to quarters, food, water and medical care in a way that would endanger their health'<sup>53</sup>. In this perspective, at least insofar as IACs are concerned,<sup>54</sup> it may be argued that IHL obligations related to the transfer of detainees would include the duty of any transferring State to ensure that the receiving authorities comply, inter alia, with certain gender-related requirements under IHL.

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<sup>49</sup> See Practice related to Rule 134 (Women) of the ICRC Customary IHL Study, see above at n 18.

<sup>50</sup> This would also be in line with relevant international human rights rules as they have been interpreted by treaty-bodies, as well as soft law instruments on the treatment of detainees. For a concise overview thereof, see Venturini, see above at n 2, p. 93 ff.

<sup>51</sup> A detailed examination of IHL rules regulating the transfer of detainees is outside of the scope of the present article. On recent case law, see, inter alia, T.O. Hansen and F. Nelson, *Liability of an Assisting Army for Detainee Abuse by Local Forces: The Danish High Court Judgment in Green Desert*, in *EJIL:Talk!*, 24 January 2019 (available at: [www.ejiltalk.org/liability-of-an-assisting-army-for-detainee-abuse-by-local-forces-the-danish-high-court-judgment-in-green-desert/](http://www.ejiltalk.org/liability-of-an-assisting-army-for-detainee-abuse-by-local-forces-the-danish-high-court-judgment-in-green-desert/)); T. Rodenhäuser, *Better Safe Than Sorry: Transferring Detainees Safely to Coalition Partners*, in *Lawfare*, 18 January 2019 (available at: <https://www.lawfareblog.com/better-safe-sorry-transferring-detainees-safely-coalition-partners>); *Id.*, *Detainee transfers under IHL of IAC and under IHL of NIAC*, in G. Battisti (Ed.), *Deprivation of Liberty and Armed Conflicts: Exploring Realities and Remedies*, International Institute of Humanitarian Law, 41<sup>st</sup> Round Table on current issues of international humanitarian law, Sanremo, 6-8 September 2018, FrancoAngeli, 2019, p. 180 ff. (available at: <https://iihl.org>).

<sup>52</sup> Arts 12 of the III Geneva Convention and 45 of the IV Geneva Convention (emphasis added).

<sup>53</sup> See E. NOHLE and H. HIEMSTRA, *Article 12: Responsibility for the treatment of prisoners and conditions for their transfer to another Power*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, para 1553.

<sup>54</sup> When it comes to NIACs, considering the lack of any IHL treaty provision specifically regulating the transfer of detainees, the answer to this question is not as straightforward and may heavily depend on applicable international human rights rules. For a detailed examination of the matter, see, inter alia, Rodenhäuser, see above at n 51, p. 183 ff.