

A FEMINIST ANALYSIS OF CERTAIN ASPECTS OF INTERNATIONAL HUMANITARIAN LAW

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Introduction

The issue of gender in the context of the law of armed conflict¹ is not one that has attracted attention from feminists. It is, however, an area that raises acutely the invisibility and powerlessness of women when faced with the most overtly destructive expression of the power of the state, the use of force. Cynthia Enloe writes of the seeming imperviousness of international politics to the impact of feminism.² Perhaps, she argues, it is because the conduct of international relations is perceived as such an inherently male activity.³ If this is true for international politics how much more so is it true for the rules that govern the end result of the failure of international policy, armed conflict.⁴ Any feminist analysis of these rules must confront the institution of the military and the nature of militarism which determine to a large extent the content and application of the rules. It is not a task for the faint hearted. The military has been described as constituting a "masculinity cult" : a means of reinforcement of gender identification for men.⁵ Michelle Benecke and Kirsten Dodge, in their

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* Jenny Morgan and Robin Morgan made many valuable comments on an earlier draft of this paper.

1 "Armed conflict" is a term which has come to replace such terms as "state of war". The United Nations Charter 1949, in Article 2(4), has outlawed the use of force, except in restricted circumstances, such as self-defence (Article 51). See generally Schindler, "State of War, Belligerency, Armed Conflict" in Cassese A (ed), *The New Humanitarian Law of Armed Conflict* (1979), p3 and Pictet J, *Commentary On The IV Geneva Convention* (1958), pp17-18. See also, "Effects of a Formal Declaration of War: United States Defence Department Statement" (1966) ILM 791-792.

2 Enloe C, *Bananas, Beaches and Bases* (1989), p3.

3 Ibid, p4.

4 Cf von Clausewitz K, *On War* (1968), Vol 1, p101, who wrote last century that "[w]ar is a mere continuation of policy by other means". This view however, is probably not accepted in the era of the United Nations Charter prohibition on the use of force.

5 Tetreault, "Gender Belief Systems and the Integration of Women in the U.S. Military" (1988) *Minerva*, 44, 55-56 cited in Benecke & Dodge, "Military Women in Non-Traditional Job Fields, Casualties of the Armed Forces War on Homosexuals" (1990) 3 *Harv Women's LJ* 215, 234. Ann Scales regards militarism as a prime item on the feminist agenda and in "fundamental symbiosis with gender oppression".

equality analysis of the participation of women in the military, use the incidence of lesbian baiting in the armed forces to demonstrate the high level of hostility to women in the military establishment.⁶ If merely seeking equality of access on men's terms to the military is perceived as such a threat to this institution, how much more so a feminist analysis which reveals the assumptions underlying the rules governing military activities. These rules assume the silence and suffering of women and children and this suffering has been endless. One only needs to consider certain practices of the Second World War and their impact on civilians: the fire bombing of such civilian targets as Dresden and Cologne; the targeting of such objects as dams in the Ruhr Valley; and the nuclear targeting of Hiroshima and Nagasaki.⁷ Robin Morgan refers to the Vietnamese proverb that "mothers, daughters, sisters and wives are `the grass that gets trampled when the elephants fight'".⁸ One looks in vain at the numerous war memorials listing the military dead of these conflicts, for any recognition of the thousands of women and children victims of these battles.

It is not intended in this paper to examine the rules of armed conflict that relate specifically to the protection of women and children.⁹ To do so would be to accept the existing framework and limit the task to attempting to improve these rules.¹⁰ The aim of this paper is to expose some of the underlying assumptions on which the law is based. Feminists have referred to this approach as asking "the woman question". "In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women".¹¹ The following discussion does not purport to be more than a beginning of the task of dismantling the myth of gender neutrality of the law of armed conflict. First, recent developments in the principles of international humanitarian law, flowing from the recognition of the legal right of peoples to self-determination, are used to demonstrate the gendered nature of the rules and, secondly, the role of the military in the development of humanitarian law generally is briefly considered.

"Militarism, Male Dominance and Law : Feminist Jurisprudence as Oxymoron" (1989) 12 Harv Women's LJ 25, 26.

6 Id.

7 Morgan R, *The Demon Lover: On the Sexuality of Terrorism* (1989), p132 writes that part of the rationale for the bombing of Hiroshima was that this action would save soldier's lives that would otherwise be lost in a prolonged war: "[s]oldiers were saved. Women and children were expendable".

8 Ibid 24.

9 For a description of these rules see Tabory, "The Status of Women in Humanitarian Law" in Dinstein Y (ed.), *International Law at a Time of Perplexity* (1989), p941.

10 See Mossman, "Feminism and Legal Method : The Difference it Makes" (1986) 3 AJLS 30 for a discussion of the dilemma posed for feminists lawyers in engaging with legal rules at all.

11 Bartlett, "Feminist Legal Methods" (1990) 103 Harv L Rev 829, 837.

The Humanitarian Law of Armed Conflict – A Gendered Regime?

The law of armed conflict is traditionally regarded as being comprised of two main branches.¹² First, the *ius ad bellum*, which is concerned with the justness of the resort to force, and the *ius in bello*, the rules applicable in armed conflict.¹³ This paper is primarily concerned with the latter. The sources of the law of warfare proper and humanitarian law are both codified and customary.¹⁴ With the movement in the latter part of last century and in this century for the codification of the law of armed conflict, the *ius in bello* has been further divided into the Law of the Hague and the Law of Geneva.¹⁵ The Law of the Hague is the term often used to describe the law of warfare proper, that is the means and methods of warfare. The Law of Geneva refers to humanitarian law whose purpose is to ensure respect for human life in armed conflict as far as is compatible with military necessity and public order. The Law of Geneva imposes no restrictions on the means and methods of warfare but provides for such matters as the treatment of prisoners of war, civilians in occupied territories and persons hors-de-combat.

Irrespective of the divisions and definitions used to describe this set of rules, from a feminist perspective, the label "humanitarian law" is a misnomer. Humanitarian law, in common with all law, is gendered. Its rules purport to be neutral, abstract, objective and value free. But is this the reality? Much of the feminist project in law has been to demonstrate the fallacy of the objectivity of the law, to reveal its underlying assumptions and value judgements as made by,

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- 12 There is no unanimity amongst commentators as to the definitions and divisions in the law of armed conflict, just as there are disagreements as to the relationship between the law of human rights and humanitarian law. For a comprehensive analysis of the scope and content of humanitarian law see Pictet J, *The Principles of International Humanitarian Law* (1966), and *Humanitarian Law and the Protection of War Victims* (1975). For a discussion of the relationship between the principles of human rights and humanitarian law see Rosas A, *The Legal Status of Prisoners of War* (1976), p39 and Meron T, *Human Rights and Humanitarian Norms as Customary Law* (1989).
- 13 Today there is a clear distinction between the *ius in bello* and the *ius ad bellum* and the application of the former is not dependent on the latter. This is, however, a relatively new development.
- 14 Although nearly all civilizations throughout history have placed some restraints on behaviour in war, the attempt to establish a system of binding international law did not begin until the codification of the law of armed conflict in the latter half of the nineteenth century. Up to this stage the laws of war were of a customary nature only. For a comprehensive collection of the conventional rules of the Law of Geneva see, *The International Red Cross Handbook* (1983). See also Schindler D & Toman J, J (eds), *The Laws of Armed Conflict, A Collection of Conventions Resolutions and other Documents* (1972) and Roberts A & Guelff R (eds), *Documents on the Laws of War*, 2nd ed (1989).
- 15 Pictet J, *International Dimensions of Humanitarian Law* (1988) xi-xx, writes that the Law of Geneva or humanitarian law "tends to safeguard military personnel placed hors de combat and persons not taking part in hostilities" and the Law of the Hague, the law of warfare "determines the rights and duties of belligerents in the conduct of operations and limits the choice of warfare methods".

and in the interests of, men. Catharine Mackinnon writes: "[t]he separation of form from substance, process from policy, adjudication from legislation, judicial role from theory and practice, echoes and re-echoes at each level of the [legal] regime its basic norm: objectivity".¹⁶

Recent changes in humanitarian law, impacting adversely on the fundamental distinction between combatants and non-combatants, highlight the gender issues underlying this body of rules. From the perspective of women, the most important general principle of the law of armed conflict is that which requires parties to an armed conflict to distinguish at all times between civilians and combatants and between civilian and military objects and to direct their operations only against the latter.¹⁷ The development and implementation of the distinction has always had to be reconciled with the demands of military necessity. States and the military have traditionally supported initiatives aimed at the protection of combatants but have resisted inroads into freedom of military action designed to protect civilians.¹⁸ Moreover, a review of armed conflict over the years reveals that there is no principle of the law of armed conflict that has been more universally disregarded. Recent developments, however, in the law of armed conflict have exacerbated these problems. What is the background to these developments?

I. *Self-Determination of Peoples*

Currently, the right of self-determination of peoples is one of the most important and influential developments in international law.¹⁹ There is

¹⁶ MacKinnon C, *Towards a Feminist Theory of the State* (1989) p162. See also Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 *Yale LJ* 1373 and Olsen, "Feminism and Critical Legal Theory: An American Perspective" (1990) 18 *Int J Soc L* 199.

¹⁷ It is beyond the scope of this paper to discuss the origin and development of this principle. Its primary purpose however, was not to protect women. See Russell, *History of Medieval Christianity, Prophecy and Order* (1968), p25 and Hartigan, *The Forgotten Civilian* (1982), p65 ff.

¹⁸ Civilians have always suffered in armed conflict but until the advent of aerial bombardment in the First World War they were to a large extent isolated from the battlefield itself. They were most vulnerable after the battle had ceased and during occupation. All this changed with the development of air warfare and other methods of warfare of mass destruction. Despite the appalling loss of civilian lives from indiscriminate aerial bombardment there are still no conventional rules protecting civilians in air warfare and the existence of customary rules is controversial. Moreover, with the exception of some minor provisions in the 1899 Hague Convention II Respecting the Laws and Customs of War on Land; the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12 1949, (which is misleading in its title as its purpose is to protect civilians in occupied territories), until the 1977 Protocols, all the treaty rules were designed to protect combatants. For a full list see Roberts A & Guelff R, note 13 above.

¹⁹ For a discussion of the origins of the principle of self-determination see Brownlie, "An Essay in the History of the Principle of Self-Determination" in Alexandrowicz

significant scholarly and judicial support for the view that this right is a legal right.²⁰ The concept of self-determination of peoples has as its aim the achievement of the Western patriarchal state.²¹ The patriarchal state is regarded by feminists as both creating and perpetuating the oppression of women:

the state is male in the feminist sense. The law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the legal order in the interests of men as a gender, through its legitimizing norms, forms, relation to society, and substantive policies.²²

On this analysis the right of self-determination is just part of the existing power structure and has nothing to offer women.²³ Liberation movements, moreover, are no less patriarchal in their structure and operations than established states.²⁴ But what are the gender implications of the developments in humanitarian law which have flowed from the recognition of the legal right of self-determination?

A (ed), *Grotian Society Papers : Studies in the History of the Law of Nations* (1970) and Wilson H, *International Law and the Use of Force by States* (1988). For a discussion of the right to self-determination and the United Nations Charter see Johnson, *Self-Determination of Nations within the Community of Nations* (1967), pp34 ff. and Crawford J, *The Creation of States in International Law* (1979), pp89 ff. For a discussion of the practice of the United Nations in relation to self-determination up to 1963 see Higgins R, *The Development of International Law through the Political Organs of the United Nations* (1963), pp90-106.

- 20 See for example Crawford J, *ibid* p101; Higgins R, *ibid* p103 and Higgins, "The Attitude of Western States towards Legal Aspects of the Use of Force" in Cassese A (ed), *The Current Legal Regulation of the Use of Force* p499.
- 21 The concept of patriarchy, as Carol Smart writes in *The Ties That Bind* (1984), pp6-23, is a controversial one for feminists. Rifkin in "Towards a Theory of Law and Patriarchy" (1980) 3 *Harv Women's LJ* 83, describes patriarchy as "any kind of group organization in which males hold dominant power and determine which part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded for the practical and political realms, these realms being regarded as separate and mutually exclusive." See also Thornton, "Hegemonic Masculinity and the Academy", (1989) *J. of the Sociology of Law* 115.
- 22 MacKinnon, "Feminism, Marxism, Method, and the State: Towards Feminist Jurisprudence" (1983) 8 *Signs: J of Women in Society* 625, 644. See also MacKinnon, *Towards a Feminist Theory of the State*, note 16 above.
- 23 As MacKinnon argues, "[Feminism] has no theory of the state. It has a theory of power: sexuality is gendered as gender is sexualized":*ibid* 635.
- 24 See Morgan R, note 7 above, pp155 ff and Barr, "Feminism and National Liberation Struggles", paper delivered at the Conference on Human Rights in the 21st Century, Banff, Canada 1990. Rozena Barr argues that when issues of gender oppression are raised by women in national liberation movements they are accused of "bourgeois" tendencies. In her view women's reality has nothing to do with liberation struggles.

II. *The Impact of Protocol I on Civilians*

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977 (hereafter referred to as Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977 are the latest attempt by the international community to codify and develop the humanitarian law of armed conflict.²⁵ It is the provisions of Protocol I which are relevant to the following discussion. To describe the Protocol as a "humanitarian" document is misleading, as its provisions may improve the protection for the predominantly male combatants in these conflicts but in doing so they expose the predominantly female civilian population to totally unacceptable risks of suffering and death.

Article 1(4) Of Protocol I recognizes the international status of certain wars of self-determination. That is, wars fought by peoples against colonial domination, alien occupation and against racist regimes, in the exercise of their right of self-determination, are international conflicts and the international law of armed conflict is applicable in these struggles.²⁶ At first sight this achievement by those states that supported the move seems to be an advance for the victims of such disputes, in particular women and children. Surely international regulation of these conflicts is preferable for those involved than

²⁵ The Swiss Federal Council summoned states to a Diplomatic Conference in 1974 to consider two draft texts submitted by the International Committee of the Red Cross. The Conference met every year, for a period of several months, until 8th June 1977 when the two Protocols were adopted by consensus. As at 30 November 1990, 98 states have ratified or acceded to Protocol I and 88 states have ratified or acceded to Protocol II. For a comprehensive analysis of the proceedings of the Diplomatic Conference and the provisions of Protocols I & II see Bothe M et al, *New Rules for Victims of Armed Conflicts* (1982); Sandoz et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) and Levie H, *Protection of War Victims, Protocol 1 to the 1949 Geneva Conventions* 4 vols. (1979), which contains a compilation of documents in relation to selected Articles of Protocol 1. For a description of the work of the Conference see Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law" (1975) 16 Harv ILJ 1; Forsythe, "The 1974 Diplomatic Conference on Humanitarian Law: Some Observations" (1975) 69 AJIL 77; Cantrell, "Humanitarian Law in Armed Conflict: The Third Diplomatic Conference" (1977) 61 Marquette LR 253 and Green, "The Geneva Humanitarian Law Conference, 1975" (1975) 13 Canadian YbIL 96.

²⁶ Article 1(4) of Protocol I reads: "[t]he situations referred to in the preceding paragraph [international armed conflicts within common Article 2 to the Geneva Conventions of 1949] include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

treating them as purely domestic disputes?²⁷ This first impression is reinforced when one looks further at the detailed provisions of the Protocol in relation to civilian protection. For example, Article 48 codifies the customary norm of non-combatant immunity. Articles 51–54 and 57–58 provide complex practical rules to ensure the achievement of this immunity as far as possible in light of military considerations.²⁸ But is this the reality? In my view the effect of Protocol I is to sacrifice the interests of the helpless victims of these conflicts in order to gain a political advantage for the patriarchal liberation movements involved in these struggles and the states that support them.²⁹ This impact of the Protocol has two aspects.

A. *The Just War Aspect of Protocol I*

One of the arguments supporting the elevation of these conflicts to international status was that these were "just" or legal wars.³⁰ The theory of the just war has brought untold suffering to innocent victims over the centuries, but, from both a humanitarian law and a feminist perspective, its most alarming aspect is in relation to the unequal treatment of victims. Underlying the concept

²⁷ International law has traditionally regarded civil conflicts as beyond its scope and the established state has treated the insurgents under its domestic laws, frequently with great harshness. Castren writes: "customary international law has been unanimously interpreted as not prohibiting, but permitting, civil war". Castren, *Civil War* (1956), p19. Prior to the adoption of Additional Protocol II to the Geneva Conventions, the only conventional regulation of civil disputes was Article 3, common to the four Geneva Conventions of 1949. Article 3 contains minimum standards for victims of civil conflicts. Additional Protocol II expands these protections but only in relation to a more limited category of disputes. Overall, this Protocol is widely regarded as disappointing in its achievements. The issue as to whether there are customary rules in civil conflicts, which could supplement the inadequate treaty rules is an extremely controversial issue. See Kalshoven, "Applicability of Customary International Law in Non-International Armed Conflicts" in Cassese A (ed), *Current Problems in International Law* (1975), pp267, 269.

²⁸ These Articles, *inter alia*, prohibit indiscriminate attacks (for the first time given a concrete definition); codify the rule of proportionality in relation to civilians; specify precautions to be taken in the event of attack and provide protection for civilian objects indispensable to the survival of the civilian population.

²⁹ It is not suggested that the states who opposed the elevation of these conflicts to the status of international were motivated by considerations which necessarily involved an appreciation of the consequences for civilians. The majority of opposition was primarily political, a reflection of the continued opposition by Western states to the legal status of the right to self-determination and fears of interference with territorial sovereignty. There were some states, however, who objected to the expansion of the coverage of the Protocol on the basis that to do so would undermine the protection of civilians in these struggles.

³⁰ For details of state positions on Article 1(4) of the Protocol see the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)* (1978), in Committee I: CDDH/I/SR. 2–5 and in the Plenary of the Conference: CDDH/SR. 56.

of a just war is that the attainment of the just end warrants any means and, moreover, those in opposition to this just cause are not entitled to the application of the law of armed conflict. Thus, on this analysis, the fundamental distinction between combatants and non-combatants which constrains the choice of means and methods of combat can be dispensed with in a just war.³¹

One of the central principles of the modern law of armed conflict is the independence of the *ius in bello* from the *ius ad bellum* and the reciprocal application of the rules of the *ius in bello*. Although just war theory did not entirely dispense with just means,³² the justness of the resort to force, however, determined to a large extent the application of the *ius in bello*.³³ The interdependence of the *ius ad bellum* and the *ius in bello* made it difficult to ensure compliance with the *ius in bello*.³⁴ This interdependence disappeared with the advent of nation states and the emergence of the *ius belli ac pacis*, the right to wage war.³⁵ Although the unequal application of the law of armed conflict is contrary to the current rules of international law, it is impossible to overlook the impact that the elevation of these struggles to the level of international may have in practice. Protocol I, by its recognition of certain categories of non-international armed conflicts as international for the application of the law of armed conflict, lends support to the argument that these are legal or "just" struggles. The preferable approach, which maintains the independence of the *ius ad bellum* from issues as to the "justness" of the war is to do away with the arbitrary distinction between international and non-international armed conflicts.³⁶

31 For example, in the view of the delegate of the Democratic Republic of Vietnam to the Diplomatic Conference, the distinction drawn by Protocol I between the *ius ad bellum* and the *ius in bello* and the equality of both parties in an illegal war was, "condemned not only by modern positive law but also by logic, intelligence and morality". CDDH/III/SR.16, para 21.

32 See Bainton R, *Christian Attitudes Towards War and Peace* (1960), p97 citing Combes, *La Doctrine Politique de Saint Augustine* (1927) and Johnson J, *Ideology, Reason and the Limitation of War* (1975), p100 n 19. The effect of just war theory on the conduct of war is sometimes overstated by commentators. See for example Graham, "The 1974 Diplomatic Conference on the Law of War : A Victory for Political Causes and a Return to the "Just War" Concept of the Eleventh Century" (1975) 32 Wash. & Lee LR 25 and Pictet, "The Need to Restore the Laws and Customs Relating to Armed Conflicts" (1969) Rev ICRC 22, 25.

33 Id.

34 See Draper, "The Development of International Humanitarian Law", in *International Dimensions of Humanitarian Law* (1988), pp65, 67. See also Dinstein Y, *War Aggression and Self-Defence* (1988), p145 n 19 and Draper, "The Christian and War" (1962) Vol II No 6 *International Aff* 13.

35 See Kotsch L, *The Concept of War in Contemporary History and International Law* (1956), p3.

36 This is not a new suggestion. The International Committee of the Red Cross had for some years supported the elimination of the distinction between non-international and international conflict for the purposes of the application of the humanitarian law of armed conflict. The move to apply all these humanitarian rules to civil conflicts,

When it is recalled that the goal of self-determination will impose on women a system that is demonstrably contrary to their interests, the fact that its achievement may involve methods that exacerbate their suffering and death, highlights the illusory advantages of Protocol I other than for the liberation leaders and fighters. Moreover, in providing further protections for the liberation fighters involved in these struggles, the Protocol legitimises the exposure of women and children as targets, rendering deceptive the new provisions in Protocol I for the protection of civilians. How did this occur?

B. The New Definition of Combatant

One of the fundamental rules of the law of armed conflict is that which provides for the acquisition by persons participating in the hostilities of the status of prisoner of war in the event of capture.³⁷ In addition to seeking the acknowledgement by the international community that wars of self-determination were international wars, the liberation organisations wanted their fighters to be afforded the sought-after status of prisoner of war. It was argued that if the scope of the law of armed conflict were expanded to include some categories of wars of self-determination as international in status, then in order to make the rules workable in relation to these conflicts it was necessary to take into account their particular characteristics.³⁸ To expect guerilla forces to meet the same requirements as the organised forces against which they are engaged in conflict was unrealistic. Thus, persons engaged in armed struggles for self-determination should be entitled to the protection of the rules of privileged combatancy without meeting the same standards in distinguishing themselves from the civilian population as regular combatants.

The content of the new rules for the acquisition of this status for guerilla fighters was one of the most controversial issues in the negotiations of Protocol I.³⁹ The issue had implications of great significance for civilians as well as for persons taking an active part in the armed conflict. Any lowering of standards

irrespective of the legal status of the Parties to the conflict, commenced as long ago as 1949 during the negotiation of the Fourth Geneva Convention. See Sandoz *et al* (eds), note 25 above, p1322. This approach is also reflected in the attitude of many of the delegations to the 1974–1977 Diplomatic Conference. See for example the delegates of Finland at CDDH/SR.18 para 15, Sweden at CDDH/SR.14, para 7 and Norway at CDDH/SR.10, para 3.

³⁷ For a comprehensive account of the development of the legal rules relating to prisoners of war see Rosas A, note 12 above, pp43–81.

³⁸ See for example the reported statements of the Socialist Republic of Vietnam in its explanation of the vote at the Committee stage on Article 42–New category of prisoners of war, CCDH/III/SR.56 para 2; the Libyan Arab Jamahiriya *ibid* para 33; Nigeria, *ibid* para 61 and the Peoples Republic of Korea, *ibid*, para 77.

³⁹ See Wilson H, above n 19, p173; Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols" (1979) 165 *Recueil des Cours* 353, 422 and Solf, "A Reply to Douglas J. Feith's Law in the Service of Terror: The Strange Case of the Additional Protocol" (1986) 20 *Akron LR* 261, 277–278.

required a careful balance to be drawn between protecting such irregular combatants and protecting civilians.⁴⁰ Civilians were extremely vulnerable already in such conflicts, and it was highly undesirable that their protection should be sacrificed to the cause of the combatant. The move to change the rules of privileged combatancy appears to have been as much motivated by the political gain to be achieved by a victory over opposing states as from any true desire to protect these fighters.⁴¹ As Robin Morgan writes, death is the ultimate goal of the guerilla fighters.⁴² Whatever the motivation, to accommodate the style of warfare used by these fighters, the standards that combatants must meet in distinguishing themselves from the civilian population are lowered by Protocol I. The armed forces of a party are defined in Article 43 of the Protocol and the changes to the standards designed to accommodate guerilla fighters are contained in Article 44(3) of Protocol I. Articles 43(1) and 44(1) provide that all armed forces, groups and units of a party to the conflict "which are under a command responsible to that Party for the conduct of its subordinates" are combatants for the purposes of the Protocol. In addition, these forces must be subject to an internal disciplinary system and apply the law of armed conflict. Article 44(3) sets out the requirements for combatants in visually distinguishing themselves from the civilian population. Article 44(3) provides that all members of such forces are entitled to be treated as prisoners of war as long as they:

distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly;

- a. during each military engagement, and
- b. during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Article 44 significantly changes the existing rules. Combatants are no longer required to carry arms openly at all times, as was the previous rule under Article 4A(2) of the Third Geneva Convention.⁴³ This takes account of the realities of guerilla warfare. It is the practice for such fighters to resume their everyday life in between engagements with the enemy.⁴⁴

40 See Rosas A, note 12 above, p315.

41 Suter K, *An International Law of Guerilla Warfare* (1984), p165 argues that in fact this status is not particularly important for guerilla fighters. In his view, the threat of loss of prisoner of war status is an empty one.

42 Note 7 above.

43 Geneva Convention Relative to the Treatment of Prisoners of War of August 12 1949.

44 See Aldrich, "Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I" (1986) 26 Va JIL 701, 707.

The most controversial change is set out above in Article 44(3), which provides that where, owing to the nature of the hostilities, armed combatants cannot distinguish themselves from the civilian population, such combatants do not lose their combatant status by failing to do so whilst engaged in a military operation preparatory to an attack, provided that they comply with the lesser requirements set out in Article 44(3)(a)&(b) above. There was almost universal acceptance at the Diplomatic Conference that the circumstances envisaged by this new rule were very limited and could only arise in occupied territories and in conflicts covered by Article 1(4).⁴⁵ There were, however, considerable differences as to the meaning to be applied to the phrase in Article 44(3)(b), "engaged in a military deployment preparatory to an attack". Two possible interpretations were put forward.⁴⁶ One was that the necessity to carry arms only arose at the last moment before attack.⁴⁷ The other interpretation was that the phrase referred to "any movement towards a place from which an attack is to be launched".⁴⁸ The latter interpretation was accepted at the Conference by the majority of Western delegations including the United States.⁴⁹ It appears, however, that the United States has changed its position on this matter in the meantime and now supports the narrow interpretation.⁵⁰ Whatever the

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- ⁴⁵ Ibid 708. See also Mallison and Mallison, "The Juridical Status of Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts" (1978) 42 *Law and Contemporary Problems* 4, 24. But cf. Wilson H, note 19 above, p178.
- ⁴⁶ See the explanations of vote of states on Article 42 in Committee III, CDDH/III/SR.55–56.
- ⁴⁷ See the discussion at CDDH/III/SR.55–56 and Solf, note 39 above, 277.
- ⁴⁸ Id. For an full explanation of the position taken by States on this issue see Bothe M *et al* note 25 above, paras 2.7.2.2.& 2.7.2.3., p254.
- ⁴⁹ See CDDH/SR.40–41. Solf, note 39 above, 277 argues that as the rule is intended to protect the civilian population, the interpretation of the phrase is that which most achieves that aim, namely, that accepted by most Western delegations.
- ⁵⁰ In the explanation of vote in the Plenary Meeting the United States delegate expressed the view: "[t]hat as regards the phrase 'military deployment preceding the launch of an attack,' his delegation understood it to mean any movement towards a place from which an attack was to be launched". (CDDH/SR. 41, para 46.) Since the adoption of Protocol I, the United States military and executive branches have been highly critical of this provision. See for example Matheson and Sofaer, "The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law : A Workshop on Customary International Law and the Protocols Additional to the 1949 Geneva Conventions" (1987) 2 *AUJIL & Pol* 415, 425 and 463 ff. and Hays Parkes, "Air War and the Law of War" (1990) 32 *Air Force LR* 1, 99 ff. See also Gasser, who is critical of the United State's decision not to ratify the Protocol, and argues :"[t]he President's letter of transmittal and the State Department's report give the odd impression that the American Government has relinquished this sensible interpretation of the rule and instead now understands it to mean that a combatant must distinguish himself only in the last moment before the shot is fired". "An Appeal For Ratification By The United States" (1987) 81 *AJIL* 912, 917. See also Solf, *ibid* 262, where the author is highly critical of this tactic of placing the worst possible interpretation on treaty provisions in order to defeat their ratification.

interpretation of this phrase, this move has catastrophic implications for civilians. It legitimizes the use of women and children as shields for the guerilla fighter until the very last moment before an attack is launched. The result is that no commander in the field, when choosing a target, is realistically capable of complying with the other rules of the Protocol that require a distinction to be drawn between civilians and combatants.

The Military and The Doctrine of Military Necessity

The military is a constant barrier to the development of humanitarian law with an emphasis on the protection of the individual.⁵¹ Throughout history, any attempt to ameliorate the rigours of armed conflict has had to operate within the confines of military necessity.⁵² The underlying assumption of this doctrine is that the paramount consideration in armed conflict is military victory by the state. Humanitarian considerations are always subordinated to this aim. As a consequence the emphasis of the law of armed conflict has always been on the protection of combatants; those engaged in the public activity of fighting for the state. Geoffrey Best writes:

"[i]n promoting and applauding developments of that part of the law that protected combatants, the manhood of the 'civilized countries' was in a strikingly real sense attending to its own interests, and womanhood was looking after its menfolk's".⁵³

To see how these considerations operate in practice, one has only to consider the military's approach to the new rules for civilians in Protocol I, illusory as they appear. The suggestion for example, that the provisions of the Protocol may prevent the military from using a burnt earth policy as a tactic in order to ensure the survival of the civilian population has been greeted with great indignation by certain sections of the military.⁵⁴ The idea that combatants may have to face

51 As Cynthia Enloe argues in, *Does Khaki Become You?* (1983), p212, the military need women but they need them to "behave as *gender women*. Military officials and allies in civilian elites have wielded their power to perpetuate these gendered processes that guarantee the military its manpower". In other words, the military has been dependent on patriarchy. Scales, note 5 above, 41, refers to the "symbiotic relationship between militarism and gender oppression". Militarism impacts on women in many ways. For example, it consumes state resources that would otherwise be available to improve the economic position of women and children.

52 Roberts A and Guelff R, note 14 above, p5 define military necessity as permitting the use of "[o]nly that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or total submission of the enemy with a minimum expenditure of time, life and physical resources".

53 Best G, *Humanity in Warfare* (1980), p147.

54 See for example the comments by Brigadier Greville, "Protocols that Spell Disaster" *The Australian* 11 July 1988. See also the detailed military criticism of the provisions of Protocol I, including those relating to the protection of civilians, by Hays Parks, the Head of the International Law Team of the Office of the Judge Advocate-General of the Army in, "Air War and the Law of War" (1990) 32 *Air Force LR* 1.

additional dangers merely to protect the civilian population is regarded as an outrage. Why? Because a judgment is made about the relative value of lives. The judgment is made by men and it favours men, the combatant not the civilian. The former is almost invariably male, the latter female.⁵⁵

The rationale for this judgment appears straightforward. It is in the interests of all that soldiers are protected in order to carry on the fight and protect civilians from the consequences of military defeat. It is argued that it is unreasonable of women to complain when they have to pay a price as well. But this analysis is based on a number of assumptions which as a feminist I would challenge. The question needs to be asked as to whose conflict it really is. It is not those who are told their sacrifice is necessary, without any involvement in the decision that led to the conflict or in the way it is conducted. The assumption is made by men that women's interests mirror their own: "[r]epresentation of the world, like the world itself, is the work of men; they describe it from their own point of view, which they confuse with the absolute truth".⁵⁶ This presumption as to the autonomy or equality of women in society has been demonstrated as a fallacy by succeeding generations of feminists.⁵⁷ Women, as society is presently constructed, exist and function only in the private domain. They are absent and silenced from the realm of men; the public domain.⁵⁸ The relegation of women's voices to the private sphere results in their lack of involvement in the decision making in that most public and powerful function of the state: the making of foreign policy and decisions as to the use of force in international relations.⁵⁹ This "non-personhood" or objectification of women takes on a particular perspective in conjunction with militarism. Ann Scales refers to "militarism as

55 There are increasing numbers of women in the military, but their participation in combat is a highly controversial issue and it is in the combat situation where these choices are predominantly made.

56 de Beauvoir S, *The Second Sex* (1970), p36.

57 Id; MacKinnon, "Feminism, Marxism, Method, and the State : An Agenda for Theory", (1982) 7 *Signs : Journal of Women in Law and Society* 515; MacKinnon, "Feminism, Marxism, Method, and the State : Towards Feminist Jurisprudence", note 22 above and 625, 644; MacKinnon, note 16 above.

58 The public/private dichotomy is central to feminist theory. See Taub & Schneider, "Perspectives on Women's Subordination and the Role of Law" in Kairys D (ed) *The Politics of Law : A Progressive Critique* (1982), p117; O'Donovan K, *Sexual Divisions in Law* (1985); Morgan, "Feminist Theory as Legal Theory", (1988) 16 *Melb ULR* 743 and Charlesworth *et al*, "Feminist Approaches to International Law", paper presented at the International Law Seminar, May 1989 Canberra ANU. See also MacKinnon, "Feminism, Marxism, Method, and the State : An Agenda for Theory" (1982) *ibid*. 536.

59 Every feminist is used to the argument that points to such powerful political leaders as Margaret Thatcher and Indira Gandhi and the fact that they have not hesitated to use armed force to resolve situations. Cynthia Enloe isolates the weakness in this argument: "when a woman is let in by the men who control the political elite it usually is precisely because that woman has learnt the lessons of masculinized political behaviour well enough not to threaten male political privilege". *Bananas Beaches and Bases*, note 2 above, pp6-7.

"objectification perfected".⁶⁰ She argues that "[m]ilitarism requires of the participants an expertise in objectification".⁶¹ The enemy must be regarded as a thing or the "other" in order for soldiers to kill in battle. This objectification is already learned in gender terms; women are the "other" and the lesson is transferred onto the battlefield.⁶²

Thus, once the alleged neutrality of the rationale for the priorities inherent in the law of armed conflict is revealed as fallacious then the full impact of the inequity of the dominant role of the doctrine of military necessity becomes apparent.

Conclusion

If genuine humanitarian considerations are to be the basis of humanitarian law, in other words "human" defined to include the female sex, the obvious solution to the improvement of the situation of civilians in armed conflicts is not to focus on the justness of the dispute. For over half the world's population that approach is meaningless, it overlooks the fact that women play no role in the decision as to what is just or not. Moreover, women played no part in the development of that fundamental concept of existing international law, state sovereignty. This way of viewing the world and its peoples as a number of separate, nonconnected autonomous units prevents the law of armed conflict being applied on the basis of the magnitude of the dispute rather than on whether the conflict is international or deemed to be international. The false barriers of state sovereignty should be lowered to facilitate the development of a genuinely humanitarian system for the regulation of armed conflict.

Moreover, once the fallacy that the goal of armed conflict is universal to men and women is exposed, all the arguments supporting military necessity as the primary consideration in the determination as to the rules governing such conflict lose their force. A recognition of the absence of women's voices in the decision making as to the use of force and at least an acknowledgement of the price they pay in armed conflict would be a starting point towards a more equitable approach: true humanitarian considerations must prevail and the doctrine of military necessity must be revealed for what it is: a further aspect of the male state which oppresses and victimizes women.

⁶⁰ Note 5 above, 40.

⁶¹ *Ibid* 44.

⁶² *Id.*