

CONFLICT RELATED GENDER BASED RIGHTS

- The social construction of gender roles based on sex identity means that armed conflict is heavily gendered because of the different roles women and men play (or are expected to play) in different contexts
- Gender based rights attempt to guarantee equality and non-discrimination in the provision and application of international law so as to address gender specific harms or violations
- Legal and normative frameworks addressing aspects of gender based rights, such as prevention of and response to conflict related sexual violence, have been strengthened in recent times but implementation falls far short
- Political consensus on gender based rights at an international level needs codification into binding law, both domestic and international, and mainstreamed into structures, practices and procedures
- International and domestic accountability mechanisms are critically needed to ensure implementation and enforcement of international law relating to gender if lasting substantive change is to be effected

BACKGROUND

What are gender based rights and how are they relevant to armed conflicts?

1. The concept of 'gender based rights' refers to rights under international law which aim to guarantee equality and non-discrimination where it relates to sex and/or gender.¹ Women, men, girls and boys can all suffer gender based harm or violations related to conflict due solely to their gender or sex.² Gender based rights, however, in-practice, are predominantly concerned with women and girls given: (a) the disproportionate impact armed conflict has on them in terms of specific harm or violations; in incidence as well as effect; and (b) their disproportionately low access to decision making processes concerning peace and security issues.³
2. Armed conflicts can amplify pre-existing gender inequalities in society or give rise to new gender-specific disadvantages thereby escalating rights violations.⁴ Perceptions of the 'role' or behaviour 'expected' of men and women become, sometimes, acutely skewed during conflicts and common stereotypes exaggerated: to men can be ascribed the role of defenders/aggressors and to women the role of secondary victims in their capacity as mothers, wives, or homemakers.⁵ Women are, in fact, usually primary victims but not only victims; like men they experience conflict in myriad ways including as witnesses, combatants, perpetrators and activists.⁶ Conflict can also have positive effects as women can assume agency and decision making which 'normal circumstances' do not allow.
3. Some of the principal gender based rights in armed conflict attempt to address: (a) severe **health threats** to women and girls due to contraction of sexually transmitted diseases, higher maternal mortality, restriction of reproductive rights or reduced access to basic needs/services;⁷ (b) reduction of **socio-economic independence** of women reducing enrolment in education,⁸ access to employment and landownership;⁹ (c) increased risk of conflict related sexual and gender based **violence** (SGBV),¹⁰ forcible recruitment into armed groups or abductions;¹¹ (d) forcible **displacement**;¹² and (e) negligible **representation** of women in public office, institutions engaged in peace building and/or post conflict resolution.¹³

INTERNATIONAL LEGAL INSTRUMENTS

What are the obligations on States or individuals to address gender based rights in armed conflict?

International human rights law

4. International human rights law (IHRL) provides protection from gender based rights violations by imposing obligations on States *vis-a-vis* individuals. Since the UN Charter in 1945, IHRL has recognised the right to equality and non-discrimination which aims to ensure that human rights are upheld on an equal basis particularly between men and women.¹⁴ Numerous UN declarations and CEDAW ask States to eliminate all forms of discrimination against women *without delay* through legislation and other measures.¹⁵
5. **Health threats.** CEDAW requires States to *take measures* allowing for equal access to health care services.¹⁶ ICESCR imposes obligations on States to ensure, without discrimination, access to health facilities, minimum essential food, basic shelter, and reproductive, maternal and child healthcare.¹⁷ CEDAW is the only treaty affirming the reproductive rights of women expressly. This right is non-derogable and, therefore, applicable without limitation.¹⁸

6. **Socio-economic independence.** States are to ensure that all individuals are equally entitled to education and, particularly, free compulsory education.¹⁹ This right is non-derogable and therefore applicable without limitation.²⁰ Whilst covered generally by human right treaties, women's right to own and administer property without discrimination is expressly provided for under CEDAW.²¹
7. **Violence.** CEDAW requires States to suppress all forms of trafficking of women.²² CRC requires States to take measures to prevent the abduction or trafficking of children.²³ States are obligated to criminalise trafficking in persons, provide assistance to victims of trafficking and uphold the rights of trafficking victims as refugees.²⁴
8. **Forcible displacement.** CEDAW provides protection for displaced women by granting them an equal and independent right to a nationality, movement and choice of domicile.²⁵ UNSC Resolutions *call upon* all parties to respect the civilian and humanitarian character of refugee camps and settlements and to *take into account* the particular needs of women and girls and to ensure their protection.²⁶
9. **Representation of women.** CEDAW requires States to *take all appropriate measures* to *eliminate* discrimination against women in political and public life and international decision making bodies.²⁷

International humanitarian and criminal law

10. International humanitarian law (IHL) provides general protection for women on an equal basis with men while also including provisions affording special protection to women.²⁸ Girls also fall under the protection of the provisions in IHL afforded to children.²⁹ IHL regulates the conduct of parties under an 'armed conflict' but does not apply outside the war arena or in intra-group violence.³⁰ International criminal law (ICL), which overlaps with IHL, however, criminalises certain conduct that constitutes war crimes, crimes against humanity, or genocide and binds all parties to an armed conflict individually, including members of State and non-State armed groups. Both IHL and ICL apply regardless of the cause of the conflict or whether the opposing party abides by the rules.
11. **Health threats.** Women's right to health in armed conflict is protected by general health provisions in IHL regarding respect and protection of civilians, prisoners of war, the wounded and sick.³¹ Special consideration is afforded to women due to their 'specific needs' for instance in respect of pregnant women and mothers of young children. (The anachronistic wording is a reflection of the way such issues were seen when the Geneva Conventions were drafted).³² Parties to armed conflict are to also guarantee the health needs of women deprived of their liberty.³³
12. **Violence.** ICL specifically prohibits the use of sexual and gender based violence in armed conflicts and international normative frameworks tackling sexual violence are comprehensive.³⁴ (**Refer to DPI Legal Factsheet on SGBV**). That framework includes the Rome Statute of the International Criminal Court that came into force in 2002, which outlines a comprehensive list of crimes against women building on sophisticated jurisprudence of international tribunals like that relating to Rwanda and Yugoslavia. Special protection is also provided for women held in detention and prisons, which includes obligations to have dormitories and confinement separate from men and to be supervised by women only.³⁵ Post-conflict, UNSC Resolution 1889 *calls upon* States to *take into account* women and girls associated with armed groups and provide them full access to programmes of disarmament and demobilization.³⁶
13. **Forcible displacement.** IHL includes provisions affording protection for displaced people. Unlawful transfers and deportations of women in armed conflicts are considered international crimes.³⁷ IHL stipulates that certain priority must be given to women and children when relief actions in international armed conflict are taken.³⁸ Women are entitled to family rights under IHL obligating parties to the armed conflict to take adequate measures to identify and locate family members, account for people missing, and ensure that family ties are not severed.³⁹
14. **Representation of women.** UNSC Resolutions since 1325 (2000) *urge* States to increase representation of women at all decision making levels and resolution of conflict.⁴⁰ This includes temporary special measures.

International resolutions

15. UNSC Resolution 1325 (2000) and seven others since relating to women, peace and security (**WPS resolutions**) have attempted to increase acceptance and application of IHRL, IHL and ICL relating to gender based rights on the basis of four pillars: prevention, protection, participation, and peacebuilding and recovery.⁴¹ Those resolutions recognised that peace is inextricably linked with gender equality and women's empowerment.

IMPLEMENTATION MECHANISMS

16. IHRL, under binding treaties, imposes obligations on States to uphold and protect gender based rights in armed conflicts.⁴² States assume duties to respect, protect and fulfil human rights and to pass measures and legislation compatible with treaty

obligations.⁴³ There are several UN charter and treaty bodies that are mandated to monitor State compliance with these international law obligations.⁴⁴ Enforcement mechanisms include providing reports to the relevant bodies (such as the CEDAW Committee), followed by a review of the report by interested parties and critique or recommendations by the body to the State (such as the CEDAW recommendation in 2013 on women in conflict prevention, conflict and post-conflict situations).⁴⁵ Some IHRL treaties include mechanisms allowing for individual complaints, for instance, the Optional Protocol to CEDAW which came into effect in 2000.⁴⁶ IHL/ICL binds all parties to an armed conflict including State and non-State armed groups as well as individuals who commit crimes. Individuals responsible for such crimes can be prosecuted either domestically or internationally.

17. “Hard” international law, therefore, comprising binding treaties and UNSC resolutions, does exist to protect gender based rights in armed conflict. The abstract law, however, is selective rather than comprehensive and can be difficult to enforce in practice. At the time of ratification States may lodge reservations against certain gender based rights (in CEDAW in particular) due to political considerations often justified on grounds of culture, social or economic factors. States may also decide in times of “public emergency” to restrict (derogate from) certain rights which hampers implementation. Enforcement of IHL/ICL, where domestic recourse is limited, is constrained by membership of international mechanisms, such as the ICC, or lack of referral of crimes to the relevant tribunal/court by the UNSC or States. There are very few prosecutions either domestic or international for conflict related sexual violence. The difficulty and, often, lack of impetus to document, investigate, and then prosecute sexual violence, which constitutes war crimes or crimes against humanity, has meant that perpetrators are rarely held accountable.
18. In order to mitigate the lack of enforcement of gender based rights numerous “soft” international law instruments exist (UNGA resolutions, guidelines, principles and declarations) to encourage adoption by best practice, but inevitably, they lack the depth or breadth of hard law. WPS resolutions have no monitoring mechanisms. Yet, the UN has sought to implement UNSC resolution 1325 through the development of National Action Plans and other national level policies as well as agreed to appoint a Special Representative on Sexual Violence in Conflict reporting to the UNSC. That process consists of assisting countries in identifying priorities, resources, determining their responsibilities, and committing to action. Women, however, are only marginally involved in formal conflict resolution and are politically and socio-economically disadvantaged during post-conflict reconstruction.
19. The statistics on women, peace and security issues speak for themselves. A study of 31 major peace processes between 1992 and 2011 revealed that only nine per cent of negotiators were women and only three per cent of the military in UN missions are women (largely as support staff).⁴⁷ Only 54 countries have formulated National Action Plans; many are focused on process with neither mechanisms for accountability nor budgets available for real implementation.⁴⁸ Funding for programmes remains abysmally low across all areas of the WPS agenda despite political rhetoric. Bilateral aid has increased to fragile States with regard to gender issues, but forms only still six per cent of the total aid package, and only two per cent of aid earmarked for peace and security.⁴⁹
20. Regional bodies like the Council of Europe via the ECtHR or the EU via the CJEU are relatively better at achieving consensus on gender issues. Stronger legal instruments actionable in courts ensure that States uphold rights without gender biases but, of course, the geographical scope of such bodies is limited to its members as is impact given the relative peace amongst member States.
21. Mainstreaming is perhaps the strongest hope for long term progress on the issue of gender based rights which means developing women-inclusive institutions, structures and processes (national and local) prior to, during and post-conflict. WPS resolutions since 1325 have made gender mainstreaming a key goal of conflict resolution and peace-building the components of which include: (a) adoption of gender sensitive and equality language; (b) policies that include specific gender equality actions, training and empowerment; and (c) gender sensitive monitoring and evaluation.⁵⁰ If the WPS resolutions are to be effective and meaningful UN member States and public or private institutions within those States must pledge to adopt, implement, and enforce policies that action gender-mainstreaming without delay.

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