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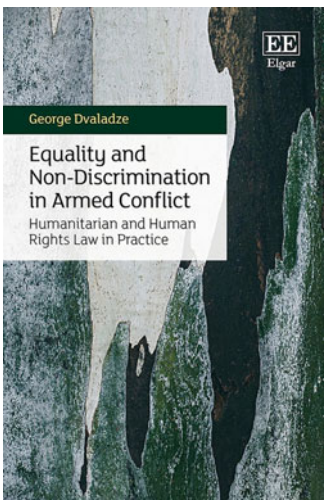
BEYOND THE LITERATURE



Equality and Non-Discrimination in Armed Conflict: Humanitarian and Human Rights Law in Practice

By George Dvaladze*

In "Beyond the Literature", the Editorial Team of the *International Review of the Red Cross* selects a recently published volume in the field of humanitarian law, policy and action and convenes a discussion on the book among experts, in an effort to foster constructive engagement on some of the most promising recent literature in the field.

In this edition of the Review*'s "Beyond the Literature" series, we have invited George Dvaladze to introduce his recent book* Equality and Non-Discrimination in Armed Conflict*, before then posing a series of questions to Nelly Kamunde, Mona Rishmawi, Vanessa Murphy and Alexander Breitegger.*

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Nelly Kamunde is a lawyer in Kenya and has been working as an independent researcher, lecturer, and trainer with various institutions in international humanitarian law (IHL). Mona Rishmawi is the former Chief of the Rule of Law, Equality and Non-Discrimination Branch of the Office of the UN High Commissioner for Human Rights. Vanessa Murphy is the International Committee of the Red Cross (ICRC) Legal Adviser responsible for conflict-related legal issues regarding gender, the protection of children and the protection of the environment. Alexander Breitegger is a Senior Legal Adviser at the ICRC's Thematic Legal Advice Unit; he focuses on IHL and persons with disabilities as part of his thematic files and provides support for the implementation of the ICRC Vision 2030 on Disability.

The Review *team is grateful to all four discussants, and to George, for taking part in this engaging conversation.*

Keywords: adverse distinction, discrimination, equality, international humanitarian law, human rights.

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George, what motivated you to write this book? What message does the book convey?

George Dvaladze: Let me start by thanking the *Review* and its team for providing this platform to discuss the book. I would also like to express my most sincere gratitude to Nelly Kamunde, Mona Rishmawi, Vanessa Murphy and Alexander Breitegger for offering the most illuminating and thought-provoking reflections that truly bring the book to life.

The book is a natural continuation of my work and research on the topic of equality and non-discrimination, which started more than a decade and a half ago. I was involved in the process leading up to the elaboration of the initial draft of Georgia's comprehensive legislation on non-discrimination. Subsequently, I worked with a coalition of civil society organizations on strategic litigation on non-discrimination cases in front of domestic courts and quasi-judicial bodies. My interest in examining the phenomenon of discrimination and its legal regulation in armed conflict came at a later stage and became the subject matter of my doctoral research at the University of Geneva. The motivation to write this book has to do with two main aspects. First is the conviction that non-discrimination represents one of the cornerstones of protection for persons affected by armed conflict, and that better understanding and respect for these rules can bring more humanity to armed conflict. And second is the belief that further clarity (in practice and in legal literature) on the notions of equality and discrimination as understood in armed conflict can be conducive to this endeavour.

The prominence of the humanitarian issue of discrimination in armed conflict is as evident today as it was in 1949 when the Geneva Conventions were being revised in light of the fresh memories of the Second World War, which saw certain segments of the civilian population experience horrors of armed conflict

particularly severely. Today, the International Committee of the Red Cross [ICRC] notes that in contemporary armed conflicts, persons continue to be specifically targeted on grounds such as their real or perceived political opinion, age, gender, ethnicity, religion and disability.[1] As for the legal regulation of the phenomenon, both IHL (treaty and customary) and human rights law (through various instruments, general or specific, universal or regional in scope) expressly outlaw discrimination, with some treaties also containing rules that require equality of treatment of persons. Non-discrimination is also inherently linked to humanitarian principles, in particular that of impartiality.

The aspiration of the drafters of IHL and human rights instruments not to leave gaps and to ensure the most comprehensive protection from discrimination has resulted in an intricate net of dozens of rules with varying personal, temporal, material and other scopes, and various modes of interaction. The absence of a comprehensive definition of the notion of adverse distinction/discrimination in IHL and human rights instruments of general scope – a notion interestingly deemed unnecessary for being at once "self-explanatory" and "overly complex and controversial to be captured by a treaty definition" at the diplomatic conferences leading to the adoption of these instruments – adds a further layer to this complexity. Here we have, in my opinion, a very clear divergence in IHL and human rights law as to how practice and literature have helped to clarify the existing law. While there is an immense load of case law and practice on non-discrimination in human rights law and volumes have been written on the subject matter (albeit focusing on discrimination in peacetime or in ordinary circumstances), the same – understandably – does not hold true for IHL. Of course, in the recent past we have seen important developments in this regard, with, among others, the ICRC's updated Commentaries to the Geneva Conventions, as well as research and publications carried out on selected grounds such as gender and disability in armed conflict, as mentioned by the experts here. In this regard I would also like to commend the work of the *Review* for devoting entire thematic editions to issues closely linked to equality and non-discrimination in armed conflict.

My book seeks to address and attempt to provide answers – and when failing to do so, offer reflections – on various questions that I deem to be critical for understanding equality and non-discrimination in armed conflict: namely, how does IHL protect persons from discrimination? What are the main rules, and how are they built into the complex architecture of the IHL treaty regime? How does IHL reconcile the prohibition of discrimination with the fundamental and underlying principle of distinction between civilians and combatants? How do we draw the line between prohibited discrimination and other differentiations that are allowed or even required by IHL? Does IHL prohibit discrimination only in the treatment of persons in the power of a party, or can one speak of discrimination resulting from the conduct of hostilities? Do human rights law

1 See the ICRC's *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* reports for 2003, p. 7; 2007, p. 4; 2015, p. 5; 2019, pp. 41–43; and 2024, pp. 3, 12–14, 25–29.

safeguards against discrimination apply in armed conflict, and if so, what is their interplay with IHL? And lastly, is there an added value in invoking non-discrimination with respect to practices in armed conflict that target specific segments of the population? In trying to find answers to these questions, and solutions that are realistic and workable in armed conflict, the book looks at various sources. In addition to relevant treaty rules and their preparatory and drafting works, it examines the practice of relevant actors in armed conflict (including States' military doctrines and manuals, as well as deeds of commitment of non-state armed groups), jurisprudence of international courts and tribunals, and legal scholarship.

I suppose the main message of the book is that discrimination – that is, unlawful practice that is inherently arbitrary as it has *no* reasonable and objective justification – is prohibited in all circumstances, and armed conflict is no exception. This means that the state of war does not automatically render any and every differentiation acceptable; while some distinctions, such as those related to the combatant–civilian dichotomy that is inherent to IHL, might be justified or even required by IHL, others will be clearly prohibited. Discrimination as such can never be militarily necessary. And here we are talking of *legal* obligations (and not mere policy considerations) of all the parties in all types of armed conflict – most extensive and comprehensive legal regulation encompassing a great number of treaties enjoying wide and even universal ratification attests to this fact.

Another important message is that discrimination can – and unfortunately does – take many forms and impacts various segments of the population in armed conflict. It can also manifest itself in different settings, be it when persons are in the power of a party to a conflict or are experiencing the effects of hostilities. Dividing lines such as nationality, allegiance, ethnicity or religion in armed conflicts with such backgrounds often impact the fate of persons while in the hands of the enemy, and where requisite elements are met, such instances are capable of amounting to discrimination (in addition to violating substantive rules that prohibit the practices at hand). But in armed conflict, discrimination on other grounds is also prevalent – and often pre-existing inequalities are further exacerbated. IHL and human rights law, with mutually complementing and reinforcing rules, are capable of effectively tackling these heinous practices (including a structural dimension that acknowledges the root cause of the phenomenon), and the legal obligation to do so must be taken seriously by the duty-bearers, including through incorporating non-discrimination not only in domestic legislation, but also in military doctrine, instruction and practice.

Lastly, understanding diversity – in peacetime and in war – is essential for the effective eradication of discrimination in armed conflict. Further research on specific aspects of this cross-cutting and pivotal topic is crucial, and I humbly hope that this book can make a meaningful contribution to this process.

Nelly, Mona, Vanessa and Alexander, in the book, Dvaladze argues that IHL's concept of "adverse distinction" and human rights law's notion of

"discrimination" are synonymous in effect, and that human rights law's understanding of discrimination is realistically capable of fully accommodating the factual and legal exigencies of armed conflict. Do you agree with this assessment?

Mona Rishmawi: Let me at the outset praise Mr Dvaladze for producing a groundbreaking book. Already in 2005, the ICRC Customary Law Study indicated in its Rule 88 that the human rights law equivalent of the prohibition of adverse distinction is the principle of non-discrimination.[2] This is evident when observing that the prohibited grounds for discrimination or distinction are largely the same in the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, on the one hand, and in Article 3 common to the Geneva Conventions and the Additional Protocols, on the other. Only distinction on political or other opinion is missing in the Geneva Conventions and Additional Protocol I, but this was added in Article 2 of Additional Protocol II.

This might be surprising to some, as distinctions are part and parcel of IHL rules: civilians, combatants, persons *hors de combat*, prisoners of war [PoWs], detainees, protected persons, aliens, etc. As Dvaladze points out, what is prohibited is "adverse distinction". To better understand what is meant by "adverse", the book incorporates the prohibition of arbitrary differentiation as a common thread linking adverse distinction, non-discrimination and equality in human rights law and IHL. Here, Dvaladze largely relies on the understanding of the concept of arbitrariness, codified by the UN Human Rights Committee [HRC] in General Comment 35 regarding arbitrary detention[3] and then repeated in General Comment 36 on the prohibition of arbitrary deprivation of life.[4] There, the Human Rights Committee stresses that "[t]he notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality".[5] In other words, an act could appear lawful but could be considered inappropriate, unjust, unreasonable, unnecessary or disproportionate, and hence in fact unlawful.

Furthermore, Dvaladze also explores human rights law to help us understand the notion of discrimination. The most comprehensive expression of this concept can be found in General Comment 20 of the UN Committee on Economic, Social and Cultural Rights [CESCR], entitled "Non-Discrimination in Economic, Social and Cultural Rights".[6] There, the Committee explores the

2 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 88, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule88.
3 HRC, General Comment No. 35, "Article 9 (Liberty and Security of Person)", 2014.
4 HRC, General Comment No. 36, "Article 6: Right to Life", 2018.
5 HRC, above note 3, para. 12.
6 CESCR, General Comment No. 20, "Non-Discrimination in Economic, Social and Cultural Rights", 2009.

formal and substantive types of discrimination in their direct and indirect forms, as well as the various prohibited grounds. This General Comment is cited in Dvaladze's book no less than fourteen times.

Moreover, in Chapter 3 of the book, entitled "Equality, Adverse Distinction and Discrimination under IHL and Human Rights Law", the book provides useful examples from the case law of institutions like the European Court of Human Rights [ECtHR], as well the United Nations [UN] through the views of specialized bodies such as the UN Committee on the Elimination of Racial Discrimination, the UN Committee on the Elimination of Discrimination against Women and the UN Committee on the Rights of Persons with Disabilities.

Alexander Breitegger: First of all, I would like to congratulate Mr Dvaladze for what I consider to be the most comprehensive treatise to date on contextualizing the application of the principles of non-discrimination/non-adverse distinction and equality in armed conflict, and concretely analyzing the interplay between IHL and international human rights law [IHRL] in relation to these principles. For the ICRC, such an inquiry is highly timely and relevant, given the centrality of these principles in key rules of IHL aimed at ensuring humane and equal treatment of persons under the power of an adversary in armed conflict. In particular, the ICRC has been interpreting these principles in its updated Commentaries to the Geneva Conventions as well as in its work on gender and IHL and on IHL and persons with disabilities.[7]

On the specific question posed, I believe that Dvaladze makes a compelling case for the complementarity between IHL and IHRL on the principles of equality and non-discrimination, with the right dose of realism and nuance. Dvaladze's argument is that the open-ended notions which help to analyze whether differentiations are arbitrary under IHRL – i.e., (1) unfavourable treatment (or unfavourable effect of seemingly neutral equal treatment); (2) being in a substantially similar situation as other persons (in relation to whom the comparison in terms of unfavourable different treatment will be made), or where persons are in different situations, the unfavourable effect of the application of the same treatment to their differences; (3) basis/ground of discrimination; and (4) whether there is an objective and reasonable justification for a difference in treatment – must be determined in the light of the legal (IHL) and factual exigencies in armed conflict.

For instance, in analyzing the IHL prohibition against adverse distinction in the context of IHL's rules on the treatment of persons in the power of a party to an armed conflict, Dvaladze convincingly argues that under IHL – beyond fundamental guarantees – what constitutes an arbitrary differentiation regularly

7 See, for example, ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), Art. 3, paras 601–616, and Art. 16, paras 1734–1771; ICRC, *International Humanitarian Law and a Gender Perspective in the Planning and Conduct of Military Operations*, Geneva, 2024; ICRC, *Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law*, Geneva, 2022; ICRC, *IHL and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, pp. 41–43.

depends on the particular status or function/role of the person in an armed conflict. Thus, under IHL, differentiations such as those between PoWs and civilian internees in an international armed conflict are not arbitrary but are required by the different factual exigencies attached to their status. Comparisons for the purposes of analyzing whether persons are in a substantively similar (civilian internee versus other civilian internee) or different situation (PoW versus civilian internee) should thus be made with reference to the protected groups/categories of persons under IHL. Another example which Dvaladze provides of individuals unfavourably treated compared to others but where there are objective and reasonable justifications to do so is that of isolation of persons already subjected to internment because of an outbreak of a communicable disease in a PoW camp, or place of internment in case of civilian internees. Here, one might add, one of the objective and reasonable justifications for the further restriction of liberty of the individual PoW or civilian internee can be directly based on specific IHL rules under Geneva Convention III and Geneva Convention IV [GC IV] which provide for such unfavourable treatment with the legitimate aim of preventing public health risks, given the armed conflict reality of a potentially high number of fellow prisoners/internees and staff affected by this risk. Other IHL rules provide for detailed permissible distinctions, for instance, on the basis of military ranks for PoWs; here Dvaladze also provides evidence from IHRL jurisprudence in resorting to IHL to evaluate what would constitute a permissible versus an arbitrary differentiation.

Dvaladze's approach is therefore in line with how the ICRC generally characterizes the interplay between IHL and IHRL when it comes to shared notions. While discrimination/adverse distinction and equality/equal treatment are shared concepts under IHL and IHRL and thus may be interpreted in a complementary manner with a view to their harmonization, such an approach is indispensable for avoiding a mechanical transplant of IHRL and its interpretations to IHL.[8]

The reverse side of the coin is that IHL rules on equality and adverse distinction – while generally based on the presumption that specific individuals and groups like women, children, persons with disabilities and older persons face specific risks in armed conflict – can be usefully complemented by IHRL. Dvaladze mentions the example of persons with disabilities, where indeed IHRL, and in particular the Convention on the Rights of Persons with Disabilities [CRPD] may inform a more granular understanding of the specific barriers and risks faced by persons with disabilities through the social and human rights model which considers disability as an interaction between a person's impairment – whether physical, psychosocial, intellectual or sensory – and the physical, communication, attitudinal or institutional barriers that they face.[9]

8 ICRC Commentary on GCIII, above note 7, paras 99–105.
9 Alexander Breitegger, "Towards a Disability-Inclusive IHL: ICRC Views and Recommendations", *Humanitarian Law and Policy Blog*, 6 July 2023, available at: https://blogs.icrc.org/law-and-policy/2023/07/06/towards-disability-inclusive-ihl-icrc-views-recommendations/.

Moreover, in situations where a person is in the power of an adversary party to a conflict, I agree with Dvaladze when he points out that the obligations related to accessibility and reasonable accommodation contained in the CRPD may inform what feasible measures may be taken to ensure substantive equality under IHL. Again, what this would concretely entail must be determined within the scope of application of IHL, and, if positive measures are involved, must also take into account what would be feasible in light of the capacities of the parties to the conflict. Finally, the CRPD may be resorted to in order to require participation of persons with disabilities and their representative organizations with a view to seriously considering the specific risks faced by persons with disabilities in armed conflict.[10] Therefore, IHRL may also usefully reinforce the application of IHL rules in this regard.

Nelly Kamunde: Firstly, it is a great honour for me to share my views on this very important text that contributes to understanding the nuances of non-discrimination and adverse distinction. I consider this text to be an academic asset in terms of providing interpretative, analytical and application-based aids on these topics. The author presents a strong case for understanding non-discrimination, and states, among other things, that if the rights and privileges of a group of people are to be limited at all because of the exigencies of the situation, they should not be limited solely because of discrimination against the individual human characteristics of the people concerned.

Human rights law uses the term "discrimination", while IHL uses "adverse distinction". Both terms refer to the fact that all people should receive a certain standard of "treatment". The "human person" and the inherent rights accorded to them are based on the characteristic of being a "human person", which is understood to include "diversity and variations". The idea of discrimination is well explained and documented, as treatment which is adverse and based on what I will call "humanness" (where the characteristics of humanness are inborn, acquired, and to an extent self-chosen).

Turning to the author's assertion that IHL's notion of adverse distinction and IHRL's notion of discrimination are synonymous in effect, and that human rights law's understanding of discrimination is realistically capable of fully accommodating the factual and legal exigencies of armed conflict, I wish to state that I agree that the two terms fall within the realm of appreciating the equal application of rights based on a person's humanness. The terms' synonymity is also evident when it comes to the context of interpretation and application.

Further, this synonymity is visible because the legal development of the term "discrimination" has to do with a background of armed conflict, in that the key instruments of universal codification – the Universal Declaration of Human Rights and the Genocide Convention – and the other key human rights documents that were essentially influenced in terms of the categories of non-discrimination emerged strongly after the Second World War. To this extent, I

10 *Ibid.*

agree with the author that in effect, the terms have at their core the equal treatment of people based on their humanness.

"Adverse distinction", in my opinion, is a term that carries the same message of non-discrimination, but in the context of armed conflict. To this extent, the notion could be transposed into another context and given another term based on that context. The use of a specific term based on context would fit the classical appreciation of legal contexts. Further, on the effect of these terms, I think it also depends on who the users of the terms "adverse distinction" and "non-discrimination" are. If the term is being used by personnel who work in armed conflicts, then telling them to abide by non-discrimination would have the same practical effect as telling them to abide by the rules against adverse distinction. On the other hand, if the terms are employed by those who are drafting a charge sheet in relation to a certain treatment in a situation of armed conflict, then the use of "adverse distinction" as opposed to "non-discrimination" could have a legal effect that would influence the legal classification of an offence, which means that in the second context, the specific terms would have to be used for purposes of legal clarity, which subsequently affects the rights of the accused.

In your view, what relevance, if any, does non-discrimination have in the conduct of hostilities?

Alexander Breitegger: The applicability of the principle of non-discrimination to the general rules on the conduct of hostilities is subject to ongoing examination. Dvaladze's analysis is the most elaborate to date. On the one hand, evaluating a claim that, apart from the general rules on the conduct of hostilities, the prohibition against non-adverse distinction/discrimination has been violated in specific cases may be difficult. This is well illustrated by Dvaladze when he examines the principle of proportionality against the prohibition on adverse distinction/non-discrimination, where he acknowledges that due to the fact that the inquiry will have to compare similar attacks in similar situations, a finding of discrimination will be difficult, if not impossible. Rarely will the necessary detailed information be available, including on the military advantage which must also be factored in that assessment in light of the circumstances at the time of an attack.

On the other hand, it is a reality that the civilian population will be comprised of persons of different ages, gender identities, disabilities and other backgrounds. For instance, it is estimated that any given population would include 16% of persons with disabilities, while that figure is estimated to be between 18% and 30% in armed conflicts. For the purposes of the rules on the conduct of hostilities, this means that the civilian population is not a homogeneous entity but is, rather, a diverse one, with certain groups of civilians, such as civilians with disabilities, facing specific barriers and risks. While the IHL general rules on the conduct of hostilities apply to all civilians, unless and for such time as they directly participate in hostilities, either biased understandings or ignorance of that diversity will result in a higher probability of risk or harm

for civilians with disabilities compared to other civilians. For instance, persons with psychosocial or sensory impairments may be at greater risk of being directly attacked because of erroneous assumptions by belligerents that such persons would be directly participating in hostilities or would be members of a non-State armed group; in reality, however, persons with hearing impairments could simply be unresponsive to oral commands, persons with visual impairments could be unfolding their white canes rather than drawing weapons, and persons with intellectual impairments could be running towards areas of fighting in excitement, rather than these instances being indicative of a military threat that these persons pose. Further, persons with disabilities face a higher risk of being incidentally harmed because of being left behind in an area where hostilities are taking place due to the inaccessibility of advance warnings, of shelters, or of temporary evacuations which may allow other civilians to be protected in due time from the effects of hostilities. Dvaladze illustrates well the issues in rendering advance warnings (where military circumstances permit) effective for persons with disabilities, namely both the variety of accessible formats in which the warning is communicated (mere radio messages will not reach persons with hearing impairments) and the time granted to act upon a warning (especially where persons with disabilities and their families may be in an unfavourable position compared to other civilians without disabilities, where the time period would allow the others to leave in time for protection but not them).

Specific awareness of existing inequalities by parties to armed conflict may contribute to avoiding or minimizing such risks or harm, and to better implementation of IHL rules on the conduct of hostilities overall. This is also the core rationale behind the ICRC's positioning on disability-inclusive and gender-sensitive interpretation and application of IHL,[11] which in turn is consistent with the ICRC's broader recommendations to military commanders in the context of urban warfare.[12] For example, these recommendations aim at reflecting realistic civilian presence (by age, gender, disability, number) and activity, the risks civilians face, and their actions and reactions in training and doctrine so as to familiarize and condition troops before their deployment.

Finally, I would note in complement to Dvaladze's analysis that consideration of specific risks faced by certain groups of civilians, and thus of the diversity of the civilian population, is inherent in particular IHL rules which enshrine specific protections to those groups, including from the effects of hostilities – for instance, those contained in Part II of GC IV related to the creation of protected zones[13] or related to the protection of certain civilians from the particular dangers of being trapped in besieged or encircled areas.[14]

11 See above note 7.
12 ICRC, *Reducing Civilian Harm in Urban Warfare: A Commander's Handbook*, Geneva, 2021.
13 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 14, 15.
14 See e.g. *ibid.*, Art. 17.

Nelly Kamunde: In response to the question of whether there could be discrimination in the conduct of hostilities, I would respond in the affirmative. Parties to the conflict either comply with the rules on the conduct of hostilities or they do not. When they fail to comply with those rules, they are responsible for violations of IHL. In elaborating further, on the interplay with discrimination, I would differentiate between "top-layer" violations and "second-layer" violations. Since breaching the rules on conduct of hostilities is a violation, then violating these rules in a way that discriminates against certain categories of people is a further, second-layer violation. This is the case when, for instance, certain victims of the violation are deliberately left in a worse situation than others.

The assessment of discrimination in the conduct of hostilities is also relevant in legal analysis. For example, the *Boškoski* case before the International Criminal Tribunal for the former Yugoslavia [ICTY][15] is an example where the conduct of hostilities resulted in a specific crime (crime against humanity) based on a discriminatory intent.[16] In this case, while there is no prerequisite for there to be an armed conflict in the sense of IHL for crimes against humanity to be identified, the ICTY considered whether the actions of the accused person had a discriminatory intent in targeting civilians.

Dvaladze has eloquently considered the key themes under which the rules on the conduct of hostilities exist (military necessity, distinction, proportionality, precaution, prohibition of unnecessary suffering), and has analyzed their interplay with discrimination. The application of these rules means that all who ought to benefit from them should do so in a way that does not disadvantage anyone else in terms of the rules' protections, benefits and privileges. Further, the exercise of duty as far as those rules are concerned should not disadvantage any one duty-bearer over the other.

Drawing on Dvaladze's insights, I will add my analysis of adverse distinction and non-discrimination in the conduct of hostilities. I think that there is need to prominently consider the consequential treatment of rights-holders and the experiences of duty-bearers. This will lead to a conclusion of whether there is an advantage by any actor, in a specific context, vis-à-vis another. This connects with Dvaladze's analysis, for example, regarding the principle of precaution. If, for instance, a warning is given for civilians to evacuate due to an impending attack, and some of the civilians are of old age and cannot run, discrimination occurs even though the duty-bearer has issued a similar warning to all rights-holders. To undertake its legal duty, the duty-bearer should ensure that there is equality of consequence of the rights-holders – in this case, that they have the equal opportunity to seek shelter, which means modifying the exercise of the duty to accommodate all. However, a contextual consideration must always be

15 ICTY, *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, 2005–10, available at: www.icty.org/case/boskoski_tarculovski.

16 See, for instance, Article 5(h) of the ICTY Statute, related to "persecution on political, racial, and religious grounds when committed as part of a widespread or systematic attack against any civilian population", as was discussed in ICTY, *Boškoski*, above note 15.

analyzed in that adverse distinction may be unintended because it is outside the means and control of the duty-bearer concerned.

A legal consequence may also be considered as far as discrimination is concerned. Dvaladze gives the example of the 1984 Soviet aerial attacks in Afghanistan[17] in which certain segments of the population, where resistance was high, were punished by bombarding their agricultural fields. This in my opinion may bring a "second layer" of violation where targeting civilian property (agricultural fields) was an IHL violation, and certain segments of the population were further victimized as a result of the violation. Legally this could or ought to give rise to two separate charges, where the first is based on the violation of the rule of IHL (in relation to targeting civilian property) and the second is based on targeting certain civilians more than others.

This situation could compare to the case of Uganda, where weapons were placed in areas where women were going to fetch water. This was problematic from an IHL perspective in terms of duty of care to avoid exposing civilians and civilian infrastructure to danger. In this context, it is the women who were ordinarily going to fetch water and perform related functions, which directly exposed them to harm.[18]

Mona Rishmawi: The book asserts that the prohibition against adverse distinction also applies during hostilities, including in the planning and executing of military operations.[19] It comes down to the choice of the methods of warfare, particularly as IHL requires the parties to respect the principles of distinction, proportionality and precaution. Some policies may fail the test of military necessity if they could lead to prohibited acts, such as genocide, by targeting certain groups on the basis of ethnicity or nationality, or deliberately inflicting on them conditions of life calculated to bring about their physical destruction in whole or in part. There is also the duty of care that is codified in Article 57(1) of Additional Protocol I.

The book explores these issues and more. Two points are worth highlighting: first, the helpful way in which the book deals with the gender dimension of the conduct of hostilities with regard to men and boys.[20] The starting point in the chapter on this topic is the concept contained in the 1907 Hague Regulations regarding military necessity and the 1868 St Petersburg Declaration that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy". The chapter then explains how some parties to the conflict may consider that all men or boys of military age "in the area of suspected activities" are targetable. While this approach could give a military advantage to one side, I agree with the book's conclusion that "[t]argeting decisions based on prejudices rather than on verified and accurate information regarding persons' status, function, or their

17 *Equality and Non-Discrimination in Armed Conflict*, p. 226.
18 Swedish Red Cross, *IHL and Gender: Lessons Learned from a Field Study in Uganda*, 23 December 2015, p. 19.
19 *Equality and Non-Discrimination in Armed Conflict*, p. 223.
20 See *ibid.*, p. 235.

actual conduct at the time of the attack, violates not only the principles of distinction and precautions, but also the prohibition of adverse distinction".[21]

The second point concerns the adverse distinction stemming from the use of certain types of weapons that may result in direct or indirect discrimination. This is particularly important in light of technological advances and the use of artificial intelligence in warfare. We will return to this issue later, but it might be sufficient to stress now, as Dvaladze's book does,[22] that international law prohibits or restricts the use of certain weapons that cause superfluous injury or unnecessary suffering, irrespective of the circumstances.

The author confronts Peter Westen's critique in international law that equality is an "empty idea" and that non-discrimination safeguards add little value. Dvaladze argues instead that establishing and addressing discrimination as a separate humanitarian and legal issue is pivotal. Is his argument a convincing response to the critique of equality and non-discrimination?

Vanessa Murphy: Yes. Dvaladze points out that such a critique ignores the fact that autonomous non-discrimination clauses serve to prohibit differentiations untouched by other substantive IHL rules, and that the autonomous dimension of accessory non-discrimination clauses expands the range of behaviour that is non-compliant. Quite simply, equality and non-discrimination proscribe a wider range of behaviour than the sum total of the substantive rules, and therefore gap-fill.

I agree with this assessment, though my view differs slightly on how important this is: regarding the degree of the behaviour "gap" untouched by specific IHL rules in armed conflict, Dvaladze finds that IHL envisages detailed rules that address most major humanitarian concerns, so recourse to autonomous non-discrimination obligations is not needed very frequently. On gender-related discrimination in armed conflict, however, I think the scope of IHL is more nuanced. Feminist scholars such as Gardam and Jarvis have argued that the scope and content of IHL rules are slanted towards conflict issues most commonly experienced by men – for example, combatant status, detention, protection of property – while being comparatively thin on detail for common issues shaping women's lives during conflict. Relatedly, Lindsey Cameron and I have written on how obligations in the Convention on the Elimination of All Forms of Discrimination against Women [CEDAW] applicable in armed conflict can help gap-fill because in some cases,[23] these obligations apply in the same place and time, but to gender-related issues of different material scope that IHL does not address – examples include civil matters related to property ownership, or disrupted access to family planning and contraception, which arise frequently in wartime. In short, the autonomous IHL and IHRL norms on non-discrimination

21 *Ibid.*, p. 235.
22 See *ibid.*, pp. 253–257.
23 Vanessa Murphy and Lindsey Cameron, "Gender Bias and International Humanitarian Law: Is Human Rights Law the Answer?", *Japanese Yearbook of International Law*, Vol. 66, 2023.

can be very valuable for individuals experiencing different variations of gender-based discrimination in wartime.

Dvaladze also argues that a disinterest in the value of equality and non-discrimination norms overlooks the root causes and collective characteristic of discrimination. I agree: if we are to take prevention and response seriously, we need to understand the discriminatory drivers and impacts of violations, and act on them. We will address root causes in more detail later in this discussion, but it suffices to point out here that IHL and IHRL share a degree of purpose to protect individuals' dignity – discrimination is a particularly common and insidious denial of an individual's dignity, so practitioners of IHL and IHRL shouldn't underestimate its centrality to their work.

Mona Rishmawi: Since Westen wrote his work in the 1980s, much has happened in the world. The quests for racial justice and gender justice are among the defining issues of our time. Neither human rights law nor IHL can ignore the demands for true equality. It is therefore commendable that Dvaladze's book has taken a closer look at the normative contribution of the principles of equality and non-discrimination in rendering justice.

We can understand equality and non-discrimination both as stand-alone autonomous notions and in conjunction with other rules. We can explore them perhaps as the negative and positive expressions of the same principle, which I prefer, or we can attach different constituent elements to each of them through looking at variations such as direct and indirect discrimination, and personal and non-personal characteristics.

There is plenty of international, regional and domestic jurisprudence that can guide us in this regard. From the Advisory Opinion of the International Court of Justice [ICJ] in 1971 that addressed racial discrimination in Namibia,[24] to the ICJ's most recent Advisory Opinion in 2024 regarding the Occupied Palestinian Territory, which discussed the broader concept of discrimination under both human rights law and IHL,[25] to the jurisprudence of the ECtHR, to the Inter-American Court of Human Rights, to the ICTY, to the International Criminal Tribunal for Rwanda, as well as the work of domestic courts, we now have a comprehensive understanding of the normative content of these notions. And this understanding is relevant in armed conflict, invoking State responsibility and individual criminal responsibility.

Nelly Kamunde: To a certain extent, Westen's thesis is relevant because the enactment of rights should not always be pre-qualified with equality and non-discrimination. However, this is because, for instance, with respect to the right to

24 ICJ, *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, 21 June 1971, available at: www.icj-cij.org/sites/default/files/case-related/53/053-19710621-ADV-01-00-EN.pdf.

25 ICJ, *The Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, available at: www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf.

life, the right exists regardless of the qualifier "equal right to life". It is when there is a plurality of rights-holders that the consequence and experience of the right to life needs to be assessed. Westen's thesis is adequate when the rights in question are not challenged by a variation of characteristics of rights-holders which makes some enjoy that right more than others. There are instances when the duty-bearers must adjust so that the consequential rights are enjoyed, and without such adjustments, the right is as good as none.

In this regard, I am convinced by Dvaladze's argument of discrimination being a "separate humanitarian and legal issue". In my opinion, separating discrimination in a humanitarian context provides a context for assessing the experiences and consequences of various rights-holders. In the contexts discussed, non-discrimination is not always a derivative concept, and certain aspects of it are stand-alone consideration that may yield independent legal consequences which may not necessarily be dependent on underlying rights.

The discourse of equality, whether in peacetime or in armed conflict, is at the heart of the guiding principles for social justice, and has pragmatic aspects with regard to how a right is established in law and how it is employed by the relevant institutions.

Dvaladze discusses how discrimination by parties to an armed conflict may relate to the roots of the armed conflict itself. In this context, he discusses suspect classifications – like gender, disability, age, ethnicity and religion – along which discrimination that precedes armed conflict may be exacerbated during war. How can understanding the roots of armed conflict and pre-conflict patterns of discrimination help us better tackle legal and humanitarian concerns relating to that discrimination?

Nelly Kamunde: Conflicts fuelled by ethnic tensions tend to manifest in ill-treatment of those who fall into the hands of a party to the conflict and in the conduct of hostilities. For example, if a party to the conflict has ethnic biases towards a certain group, it can trigger dehumanizing treatment, contrary to IHL. In this context, there are certain offences that may be prevalent in ethnically rooted conflicts in comparison to other situations of armed violence. Understanding the background of these conflicts and the discriminatory contexts that informed them could be useful in legal analysis as far as criminal accountability is concerned. For example, the presence of discriminatory practices along ethnic lines may help to determine which offences qualify for further investigation as being genocidal, and which should be considered under crimes against humanity or other offences.

Understanding the root causes of a conflict could be instrumental in setting up the humanitarian responses to it. For example, in Rwanda, understanding the ethnic tensions that led to the 1994 genocide was useful in setting up the humanitarian responses that were practical for that country. Understanding the cause of the conflict was also important to ensure tailored humanitarian responses that focused on inclusiveness of all ethnic groups. Most importantly,

the institutions that were set up to foster reconciliation, such as the *Gacaca* Courts, had to be appreciative of the ethnic dimensions of the conflict in Rwanda.

The establishment of priorities could also be based on the knowledge of the root causes of armed conflicts. For example, for conflicts that have a root cause of religious differences, humanitarian organization can prioritize the protection of religious minorities and other vulnerable groups. This understanding could also contribute to designing advocacy interventions, reconciliation, and peacebuilding. The knowledge that the root cause of a conflict is based in discrimination against certain groups may also help in designing inclusive humanitarian interventions.

Appreciating the root causes of the conflict, and the discrimination that informs them, could also contribute to monitoring and documenting abuses, which could be useful for accountability. The attitude of the parties to the conflict affects the extent to which humanitarian values that are based on non-discrimination are upheld. For example, if a conflict has a basis of discrimination along religious lines, there could be subsequent discrimination where the party in power declines to recognize the religious freedoms of the other party. Various violations that can be traced to the discriminatory attitudes of the parties could also arise in the conduct of hostilities. For example, a party may specifically attack the religious objects of another party due to the former's discriminatory attitudes based on religion. Understanding the root causes of the conflict may, in this case, help to prioritize humanitarian interventions and institute protective measures around religious objects.

Vanessa Murphy: I find this to be one of the book's most important points. Dvaladze explains that applying the law on equality and non-discrimination can help tackle structural patterns of violations and better prevent them. This call to understand the big picture certainly rings true when it comes to gender-based discrimination in armed conflict.

It is well established in the field of conflict and gender that effective prevention and response to gender-based violence must tackle the root causes – i.e., gender inequality and discrimination. For example, UN Security Council resolutions forming part of the Women, Peace and Security agenda have expressly affirmed the importance of promoting gender equality to prevent conflict-related sexual violence. The ICRC concluded the same in a 2022 study entitled *Male Perceptions of Sexual Violence in South Sudan and the Central African Republic*.[26] This study documents how certain social and gendered norms and stereotypes enable sexual violence in these contexts, and encourages community-based prevention aimed at these norms. More broadly, studies have evidenced that societies with higher levels of gender equality are typically less likely to be engaged in armed conflict – the reasons for this are debated, multi-

26 Emilie Venables, *"My Father and Cows Will Go to Court, not Me": Male Perceptions of Sexual Violence in South Sudan and the Central African Republic*, ICRC, Geneva, 2022, available at: www.icrc.org/en/publication/4589-male-perceptions-sexual-violence-south-sudan-and-central-african-republic.

causal and context-specific, but at minimum a takeaway for policy-makers is that gender equality matters for durable conflict prevention and resolution.

So, addressing inequalities as "root causes" makes for more effective prevention of violations – it also shapes appropriate response. For example, survivors of sexual violence often face societal stigma that prevents them from returning to their communities or finding economic stability. Stigma is largely a result of harmful gender norms – these can include societal perceptions that a woman is less "honourable" or suitable as a mother or partner because she has been raped. Promoting respect for women's innate dignity and equal worth is consequently an integral part of the humanitarian response to that gendered impact.

In connection with this discussion, Dvaladze considers the extent to which IHL – rather than IHRL – deals with structural discrimination, which typically predates conflicts. He concludes that IHL does not seek to make structural changes in society, but when nexus is established between discriminatory practices stemming from such inequality, IHL's prohibition of adverse distinction will accord respective protections to the persons affected. I am not sure that IHL always falls short of the line of enacting structural change on society – compliance with a body of law as extensive as IHL is, in my view, likely to have a constellation of political, social and cultural implications in societies experiencing war. But regardless, I agree with Dvaladze's finding that IHL will only ever go so far (including because its application ends when a conflict concludes), so the guarantees of non-discrimination under human rights law and domestic legislation are essential complements to IHL on this issue. Lindsey Cameron and I recently argued similarly in an article entitled "Gender Bias in IHL: Is Human Rights Law the Answer?"[27] – in short, while IHL can protect people from many forms of discrimination, human rights law is still a unique and precious source of norms for practitioners grappling with the many human impacts of structural inequalities and attendant discrimination in armed conflict.

Mona Rishmawi: Understanding the root causes of a conflict is one of the best ways of promoting prevention and conflict management and resolution. There has been much literature about this topic. Already in the 1980s and 1990s, Professor Edward Azar,[28] who studied protracted conflicts and was the first to refer to this term,[29] found that the trigger for such conflict is often social, reflecting "religious, cultural, or ethnic identity, which in turn is dependent upon the satisfaction of basic needs such as those for security, communal recognition and distributive justice".[30]

Dvaladze's book ends by identifying "avenues for further research",[31] proposing a focus on transitional justice in exploring equality and non-discrimination

27 V. Murphy and L. Cameron, above note 23.
28 Mona Rishmawi, "Protecting the Right to Life in Protracted Conflicts: The Existence and Dignity Dimensions of General Comment 36", *International Review of the Red Cross*, Vol. 101, No. 912, 2019,
29 *Ibid.*
30 Edward E. Azar, *The Management of Protracted Social Conflict: Theory and Cases*, Dartmouth Publishing Company, Dartmouth, 1990, p. 2.
31 *Equality and Non-Discrimination in Armed Conflict*, pp. 271–272.

in armed conflict as one such avenue. I could not agree more. Measures related to the four pillars of transitional justice – accountability, truth, reparations and guarantees of non-repetition – help us to understand the structural dimensions of violence against specific segments of the population and are an area that merits additional attention.

Take, for instance, institutions such as truth and reconciliation commissions. Many of them have been established in countries that emerged out of conflicts or repressive rule. The process of hearing the victims, witnesses and perpetrators telling their stories helps establish a historical narrative that may enhance common understanding of opposing perspectives and could lead to acknowledgment of wrongdoing. Such a commission's final report often identifies systemic problems and makes recommendations for legal system and policy reforms. When implemented, these reforms can provide closure and healing for victims and the society as a whole, and pave the way for true reconciliation.

Which of the book's chapters or arguments did you find most illuminating, and why?

Vanessa Murphy: Chapter 3, section 5 of the book analyses the interplay between IHL and human rights on non-discrimination. The section is particularly illuminating in part because it is fairly novel. This interplay is relatively under-explored: for example, the book notes that international courts and quasi-judicial bodies have not specifically addressed the interplay between the IHL and human rights guarantees of equality and non-discrimination.

The section contains a number of important findings. I found helpful Dvaladze's explanation that the qualified nature of discrimination and adverse distinction (within IHRL and IHL respectively) can function to resolve norm conflict – meaning, both sets of rules rely on notions of "arbitrariness" in the treatment they prohibit, and arbitrariness can be determined by reference to the other body of law (when relevant to the facts at hand). So, there is an in-built regulator to solve norm conflict. Second, Dvaladze explains how both bodies of law can reinforce the guarantees envisaged by the other – for example, IHL prohibits adverse distinction on grounds with a formula of "any other criteria" that can be interpreted by reference to grounds articulated in human rights treaties and the rich jurisprudence connected to them. Third, as mentioned above, the book quite unequivocally clarifies the relationship between adverse distinction (an IHL term) and non-discrimination (more traditionally associated with IHRL): the two terms can be used as synonyms. Dvaladze explains this through a compelling assessment of treaties' drafting history, practice of IHL implementation, jurisprudence and legal literature.

The book also contains other pearls that I think can help practitioners rebut some of the familiar arguments we see leveraged to justify and preserve discrimination. Let me give you two quick examples. First, Dvaladze explains that certain legitimate aims can justify differential treatment such that the treatment does not constitute prohibited discrimination. I enjoyed the overview of aims that are not considered "legitimate", meaning that they do not justify differential

treatment.[32] For example, mere administrative inconvenience, the existence of long-standing tradition, or prevailing views, stereotypes or convictions in a given society – these are familiar fall-back explanations for discriminatory treatment, so it was good to have them expressly ruled out as legitimate aims. Second, there is the "I didn't mean to" justification. To this, Dvaladze clarifies that discriminatory intent is not required; discrimination can be unintentional and still prohibited by both human rights law and IHL.[33] Dvaladze observes that the practice of human rights bodies indicates that a subjective element of intent is not a necessary constitutive element of the violation, though it can certainly be indicative of a violation.

Mona Rishmawi: Overall, the book fills an important gap in legal literature, as the notion of "adverse distinction" under IHL has yet to receive the attention it deserves. The book states[34] that most of the legal writings on the issue, including those dealing with non-discrimination in armed conflict, automatically refer to the human rights law analysis on discrimination. In my opinion, this is an indication of the deep connections between human rights and IHL and evidence of their complementary nature.

It is this substantive engagement with human rights law that I like most about the book. In addition to the extensive reference to the case law of the ECtHR, the work of the UN human rights treaty bodies features significantly, as the bibliography indicates. One can often spot references to UN operational human rights work to prove an IHL point, or at least to demonstrate the nexus. Such references include reports by the Mission Dispatched by the UN Secretary-General for Prisoners of War in Iran and Iraq (1985), the UN Special Representative on the Situation of Human Rights in El Salvador (1985), the UN Special Rapporteur on the Situation of Human Rights in Afghanistan (1985 and 1988), the UN Special Rapporteur on the Situation of Human Rights in Kuwait under Iraqi Occupation (1992), the UN Commission on the Truth for El Salvador (1993), the UN Fact-Finding Mission on the Gaza Conflict (2009), the report of the UN High Commissioner for Human Rights regarding violations by ISIL in Syria and Iraq (2015), the UN Commission on Human Rights in South Sudan (2017 and 2019), the UN Independent Expert on the Situation of Human Rights in the Central African Republic (2017), and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (2017).

Nelly Kamunde: The book contributes to addressing the ever-present problem of discrimination and inequality, whether in armed conflicts or in peacetime. In this way, the text in its entirety offers illuminating insights for the legal academy.

Coming from a continent that offers a rich ground for academic inquiry into the dynamics of ethnic conflicts as they relate to discrimination, I find this

32 *Ibid.*, section 2.1.4.3.
33 *Ibid.*, section 2.1.5.
34 *Ibid.*, p. 151.

text to be highly insightful. Many African conflicts, before and after colonial times, have a background of discrimination in one way or the other. This is seen in the formation and the nature of the parties to the conflict, and the root causes of the conflict. In the theatre of armed conflicts, the application of the rules of non-adverse distinction is greatly influenced by the parties' ethnic identity. This dominance of culture and ethnic identity in some of Africa's longest conflicts is something that benefits from progressive research.

One area that has attracted real attention in the non-discrimination discourse – including in this book – is non-discrimination's relationship to new and emerging technologies, such as artificial intelligence [AI] and machine learning. In the IHL space, these issues are coming up more than ever before in the context of autonomous weapons systems and cyber operations. How are non-discrimination and emerging technologies related? What should future research in this space focus on?

Mona Rishmawi: New technologies, weapons and AI are areas that the book itself recognizes deserve further reflection.[35] Attention to this field of work is growing, particularly in light of the key role that machine intelligence is playing in contemporary warfare and in military decision-making, as has been recently alleged, for instance, in the conflicts currently under way in Ukraine[36] and Gaza.[37]

Two recent reports issued in 2024 deserve particular mention. The first report, *Artificial Intelligence and Related Technologies in Military Decision-Making on the Use of Force in Armed Conflicts*,[38] was produced by the ICRC and the Geneva Academy of International Humanitarian Law and Human Rights. It draws on discussions arising from two expert workshops held in November 2022 on AI decision support systems. The second report, *Decisions, Decisions, Decisions: Computation and Artificial Intelligence in Military Decision-Making*,[39] was authored by Arthur Holland Michel. It draws on interviews and research to provide an in-depth analysis of the trends and implications of AI decision support systems. These two reports attempt to respond to questions regarding the legal implications when AI tools are used on the battlefield. They also discuss the

35 *Ibid.*, p. 271.

36 Vera Bergengruen, "How Tech Giants Turned Ukraine into an AI War Lab", *Time*, 8 February 2024, available at: https://time.com/6691662/ai-ukraine-war-palantir/.

37 Bethan McKernan and Harry Davies, "'The Machine Did It Coldly': Israel Used AI to Identify 37,000 Hamas Targets", *The Guardian*, 3 April 2024, available at: www.theguardian.com/world/2024/apr/03/israel-gaza-ai-database-hamas-airstrikes.

38 ICRC and Geneva Academy, *Artificial Intelligence and Related Technologies in Military Decision-Making on the Use of Force in Armed Conflicts: Current Developments and Potential Implications*, Expert Consultation Report, Geneva, 2024, available at: https://shop.icrc.org/expert-consultation-report-artificial-intelligence-and-related-technologies-in-military-decision-making-on-the-use-of-force-in-armed-conflicts-current-developments-and-potential-implications-pdf-en.html.

39 Arthur Holland Michel, *Decisions, Decisions, Decisions: Computation and Artificial Intelligence in Military Decision-Making*, ICRC, Geneva, 2024, available at: https://shop.icrc.org/decisions-decisions-decisions-computation-and-artificial-intelligence-in-military-decision-making-pdf-en.html.

new risks for civilians and other protected persons, and how such risks could be mitigated.[40]

Human–machine interaction is not new. From time to time, we are reminded of Colossus, the first large-scale electronic computer that aimed at cracking Nazi codes in 1944.[41] With the advancement of AI, there are questions about our ability to deal with algorithmic uncertainties, assumptions and bias. Can a machine differentiate between a toy gun in the hands of a child and a weapon in the hands of a fighter? Can information stored based on facial recognition or names with varying pronunciations lead to mistakes? This is particularly important when data is turned into actionable information, feeding into decisions that could mean life or death.

Irrespective of the response to the above questions, the scepticism they trigger itself reveals a deeper apprehension. There is little doubt that there are legitimate concerns over how AI relates to military command and control structures as we understand them today. Some might find it easier for their conscience to relegate to machines decisions related to life and death. Furthermore, machines are now capable of processing information at an extraordinary velocity, precisely because machines have no need to take time to consider their conscience. But when humans become over-reliant on AI systems, this could cloud accountability for violations. We have recently been warned that "[i]f, tragically, the first AI-powered war does breakout, international law is likely to be pushed to the margins".[42]

Nelly Kamunde: I will respond to this question in two parts: in the first, I will address the connection between non-discrimination and emerging technologies, and in the second, I will consider what future research should focus on.

On the connection between non-discrimination and emerging technologies, technologies such as AI and machine learning can be programmed in such a way that they mitigate human errors that often lead to poor decision-making and biases. Some of the prejudices and biases that are experienced by combatants are based on inevitable human conditions such as fatigue and inability to process large amounts of data quickly in order to make a non-biased decision. Other challenges occur because of advertent biases which form the basis of discrimination. The impersonal nature of machines means that they are not susceptible to experiences, culture and subconscious attitudes that inform discrimination. If well employed, emerging technologies may contribute positively in terms of upholding the rules against adverse distinction and those for non-discrimination. Since AI and machine learning are capable of being audited and transparently analyzed using algorithms, it means there is vast opportunity for upholding the rules of non-discrimination.

40 See also ICRC, "Artificial Intelligence in Military Decision Making: Legal and Humanitarian Implications", 14 May 2024, available at: www.icrc.org/en/event/event-artificial-intelligence-military-decision-making-legal-and-humanitarian-implications.

41 "Colossus", *Britannica*, available at: www.britannica.com/technology/Colossus-computer.

42 "AI Will Transform the Character of Warfare", *The Economist*, 22 June 2024, p. 9.

In the context of legitimate targets, new technologies may be used to inform decision-making in order to ensure that there is no bias when it comes to identifying military and civilian targets. For instance, under the principle of distinction, there are various technologies that can be used to inform a party to the conflict as to whether a building is being used for civilian or military purposes, even from a distance. Relevant forms of technology in this regard include various types of radar that can give details about the inside of a building; thermal imaging, which works like infrared and can be used detect the activities and presence of people inside a building; ultrasonic waves, which can also give useful details about whether or not to target a building and whether that particular building has been used for civilian or military purposes; and hyperspectral imaging that can capture the objects and machines inside a building to tell whether the building is being used for military or civilian purposes. If such resources are available and if they are ethically used, they can not only ensure more responsibility in armed conflicts but can also contribute to effective accountability in cases of IHL violations.

New technologies could also be the source of inbuilt biases and discrimination. For example, when one is using technology to structure a program so that it can have capacity for specific targeting, the exercise will involve fitting data into the program. In the unfortunate circumstance that there are biases during this process of processing data, then it means the decision-making aspect of the program could result in prejudices that are inbuilt. In addition, scarcity of data could lead to incomplete and biased analysis in the functioning of the technology.

In another example, if one is referring to weapons which have the capacity for precision targeting, the targeting is based on the data that is fed into the program. In case of biases during the stages of collecting, analyzing and storing data, the decision-making aspect of the program is going to result in adverse distinction or discrimination. Sometimes, the data which is considered for these purposes may not always be available. Subsequently, there could be various limitations which may cause biases in one way or another. This calls for safeguards in how these new technologies may be employed.

Despite the advantages that new technologies bring, there is a limit on how clear, correct and effective data can be used in these technologies. There are contexts that may not be capable of predetermination, particularly in the exigencies of armed conflict, and this creates room for errors, particularly in attempting to embrace the principles related to non-discrimination and non-adverse distinction. The limitations of data and its access in certain conflicts, because of the protracted nature of the armed violence, could also be a basis of inbuilt biases and prejudices when employing technology.

The capacities of new technologies may inform better experiences in situations of armed conflict, but they must always be employed in ethical and morally acceptable ways. The constant challenge, and even risk, will always be the inevitable power that is resident in the owners of these new technologies, who will always be human beings.

Moving on to the second part of my response, future research could focus on ensuring that new technologies are functional, transparent and accountable.

Research could also focus on standards, policies and rules on how these new technologies would work so that the technologies yield more good than harm. Regarding accountability, there is a need to clarify the legal situation arising from the fact that these technologies, which may be used in the theatre of armed conflicts, are owned by corporations. The rules of IHL need to clarify, in policy, law and interpretation, the role that corporations play in these contexts. The discussion on new technologies considers corporations not as mere suppliers of weapons but as institutions that may even be involved in designing the technology that is instrumental to decisions on targeting. There is also a need for research-based guidance on the legal characterization of the stakeholders of these new technologies, which include corporations, their officials, and the people involved at the operational level of AI and related technologies.

Alexander Breitegger: The relevance of the principle of non-discrimination to emerging technologies, such as autonomous weapon systems [AWS] incorporating machine learning or AI-based decision support systems [AI-DSS], is that it exposes one of the widely recognized limitations of such technologies – namely, that they perpetuate and exacerbate existing biases and structural discrimination based on, *inter alia*, age, gender, ethnicity or disability. This is due to the incomplete and biased datasets on which these systems operate, which has been well documented, for instance, in the context of the use of AI-based facial recognition systems for gender and ethnicity. Where the system fails to account for the specific barriers faced by persons based on these factors, the output will be similarly biased and erroneous, with potential harmful consequences for these persons. These dynamics could increase with the unpredictability and lack of explainability of machine learning; such systems build their own rules based on the data they are exposed to – whether training data or through trial-and-error interaction with their environment – rather than strictly following pre-programmed instructions, thereby making it very difficult for humans to understand how such systems will function in a specific situation and how and why those systems reached a certain output based on a given input.[43]

The deployment of AWS relying on machine learning in an armed conflict (as well as AI-DSS supporting targeting) would obviously pose especially serious concerns, as such systems would self-initiate or trigger a strike in response to information from the environment received through sensors (e.g. measuring heat, light, movement, shape, velocity, weight or acoustic or electromagnetic signals) and on the basis of a generalized "target profile" (e.g. the shape, infrared or radar "signature", or speed and direction of a type of military vehicle), without human intervention, and thus leave life-and-death decisions to sensors, software and machine processes. Concerns have already been expressed especially with regard to targeting of persons by AWS because of the risk of IHL violations, where

43 ICRC, *Artificial Intelligence and Machine Learning in Armed Conflict: A Human-Centred Approach*, Geneva, 2021, available at: https://international-review.icrc.org/sites/default/files/reviews-pdf/2021-03/ai-and-machine-learning-in-armed-conflict-a-human-centred-approach-913.pdf.

generalized target profiles would not lend themselves to making the highly contextual and rapidly changing determinations required for implementing e.g. the principle of distinction, and because of the fundamental ethical challenges of leaving life-and-death decisions to machines; such concerns inform, *inter alia*, calls for new international legally binding rules on prohibitions for unpredictable anti-personnel AWS.[44]

The analysis of the consequences of bias based on, *inter alia*, age, gender,[45] ethnicity or disability in this particular context could still be deepened – for example, disability rights experts have pointed to some potential concerning scenarios in targeting with AWS, including where electrically powered assistive devices emit certain heat signatures which may be wrongly identified as a military objective (e.g. a weapon or military vehicle). Other scenarios which would constitute a replication of incorrect target identification due to ignorance about the diversity of persons with disabilities could be implicated here as well, notably where persons with psychosocial, intellectual or sensory impairments act or react in different ways to other civilians without disabilities (such as lack of response, shouting or unexpected movements), which the system is unable to process and may interpret wrongly as aggressive actions. Similarly, facial or emotional recognition systems used at checkpoints to assist the determination of whether an approaching individual would constitute a lawful target may exacerbate existing bias by not correctly assessing behaviour by persons with disabilities.[46] One of the key recommendations by experts has been to involve persons with disabilities and their representative organizations in the development, procurement and deployment of such technology, and indeed in international processes, including those on AWS.[47] Against the backdrop of these challenges, Dvaladze is absolutely right in suggesting as one of the specific areas deserving further study precisely the relationship between equality and non-discrimination and new and emerging technologies, including AWS, AI and machine learning.

Are there any issues that the book fails to capture, or areas – including additional suspect classifications – that fall beyond its scope? What should future research in this area focus on?

Nelly Kamunde: The ever-changing complexities of society always stand to gain from academic critical thinking and rigour, such as that which is presented in Dvaladze's book. The author presents an opportunity to re-examine non-

44 ICRC, *ICRC Position on Autonomous Weapons Systems*, Geneva, 2021, available at: www.icrc.org/en/document/icrc-position-autonomous-weapon-systems.

45 For an analysis of AI and gender bias, see Farrés Jimenez, "Embedding Gender in International Humanitarian Law: Is Artificial Intelligence Up to the Task?", *Just Security*, 27 August 2021, available at: www.justsecurity.org/77970/embedding-gender-in-international-humanitarian-law-is-artificial-intelligence-up-to-the-task/.

46 See e.g. *Rights of Persons with Disabilities: Report of the UN Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc. A/HRC/49/52, 28 December 2021, para. 54; Mariana Díaz Figueroa, Anderson Henao Orozco, Jes's Martínez and Wanda Muñoz Jaime, "The Risks of Autonomous Weapons: An Analysis Centred on the Rights of Persons with Disabilities", *International Review of the Red Cross*, Vol. 105, No. 922, 2023.

47 *Rights of Persons with Disabilities*, above note 46; M. Díaz Figueroa *et al.*, above note 46.

discrimination and to dissect it, especially in the context of armed conflict. His work contributes to the journey of applying logic to counter underlying biases and perceptions that would limit the effective application of the rules of IHRL and IHL, and to develop inclusive perspectives in peacetime and in armed conflict.

The laws on non-discrimination were set against a backdrop of historical, socially relevant events that influenced the design of the laws and their interpretation. The key contextual issues, particularly after the Second World War and in various periods during colonialism, contributed to the delineation of the socially relevant categories on discrimination of that time (national, racial, religious, ethnic). Because of this, progressive research should always be considered against the social context in which the law is applied. This is in part why I find Dvaladze's exploration of the details of non-discrimination useful. He expounds on the laws to see if there are any gaps that could be filled by legal reform and interpretation.

The author's intentions for this text are made clear from the outset, and they are substantiated fully in the two main parts of the book. What for me is interesting as a topic for future discussion, which arises from the insights that I have gained from this book, is how research is going to develop on the relatively new categories of discrimination (including self-chosen identities) which don't necessarily fall into the traditional categories of discrimination such as those captured by the key instruments of human rights law and IHL. This is in addition to my previous remarks on future research in relation to the role of corporations in emerging technologies.

Mona Rishmawi: In addition to transitional justice and new technologies, other areas identified at the end of the book for further research include specific forms of discrimination such as those related to gender and apartheid, as well as those related to enforcement mechanisms. There are legal developments on these matters that deserve further reflection.

I would like to add the issue of remedy and reparations. The book makes brief references to this concept, particularly in relation to the ICJ's pronouncements in the *Armed Activities* case,[48] and indeed, there is a short section on the remedial role of the State.[49] In my view, this part could be significantly enhanced by covering also other parties to the conflict as well as the role of corporations and third States with influence on the parties. This is an important issue when looting, destruction of property and illicit acquisition of natural resources are prominent features of today's conflicts. I must admit that this is a matter in which I am particularly interested in my capacity as a member of the UN Independent International Fact-Finding Mission for the Sudan. After witnessing the overwhelming and immediate need for assistance to victims and survivors of the conflict in Sudan, our most recent report to the UN Human

48 ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 2005.

49 *Equality and Non-Discrimination in Armed Conflict*, pp. 147–150.

Rights Council in September 2024 recommended the establishment of a victim support and reparations office.[50]

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[51] provide an important entry point for exploring this topic. Measures such as restitution, compensation, rehabilitation and satisfaction need to be explored more deeply. With Mr Dvaladze's academic background and practical experience, I am certain that he can add much-needed scholarship to this topic.

Vanessa Murphy: Dvaladze has managed to pack a great swathe of subject matter into this book; it provides an overview of the international law framework on equality and non-discrimination applicable in armed conflict, and that is no small feat given just how much law there is to cover. The book understandably could not spend significant time delving into the nuances of how discrimination manifests against different groups. It does address some particularities of certain listed grounds of discrimination,[52] but a full analysis of each ground could fill a library.

Dvaladze expressly acknowledges this in the book's conclusion, which encourages future research and focus on "specific forms of discrimination or discrimination based on specific grounds in time of armed conflict, such as racial discrimination, apartheid, discrimination against women, discrimination based on sexual orientation and gender identity, and discrimination based on disability".[53] I agree – each of these grounds merits more tailored attention from IHL practitioners, researchers and scholars.

For example, discrimination based on race, based on gender, based on religion and based on sexual orientation all have distinctive histories, manifest in varied moments, use specialist lexicons, and mobilize unique social movements today. I'm not suggesting that these forms of discrimination are disconnected from one another – their provenance, patterns and practice intersect – but each deserves a dedicated field of study, just as certain grounds are the subject of dedicated human rights treaties. The themed human rights treaties on race, gender equality and disability illustrate the variations (as well as the commonalities) of discrimination experienced by their respective protected groups: the International Convention on the Elimination of All Forms of Racial Discrimination prohibits racial apartheid, the CEDAW addresses women's marriage rights and maternity, and the CRPD addresses reasonable

50 *Report of the Independent International Fact-Finding Mission for the Sudan*, UN Doc. A/HRC/57/23, 5 September 2024, available at: https://tinyurl.com/2xdpy5mc.

51 UNGA Res. 60/147, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", 15 December 2005, available at: www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation.

52 *Equality and Non-Discrimination in Armed Conflict*, sections 1.3, 2.1.3.

53 *Ibid.*, p. 271.

accommodation of the requirements of persons with disabilities. These granular protections, tailored to the relevant ground, are key to eliminating the wily ways in which discrimination shapes societies. This is one of the reasons why at the ICRC Legal Division, we have been working to better understand the implications of different discriminatory grounds for the interpretation of IHL, most prominently the grounds of disability and gender. There is certainly much more work to do, notably with respect to the interplay between IHL and IHRL on racial and religious discrimination.