

CHAPTER 61
SPECIAL RULES ON WOMEN

Noëlle Quénivet*

Contents

A. Contextual Introduction

B. Meaning and Application

I. Protection of women

II. Protection of specific categories of women

a. Grounds for preferential treatment

b. Personal safety

c. Health, food, and household items

III. Protection of women detainees

a. Quarters

b. Sanitation

c. Health and medical care

d. Food and work

e. Execution of penalties

f. Release

C. Relevance in Non-International Armed Conflicts

D. Legal Consequences of Violations of the Norms

I. State responsibility

II. Criminal responsibility

III. The Security Council

E. Critical Assessment

I. Women and vulnerability

* I would like to thank Richard A. Edwards for proof-reading this chapter.

II. Women and children

III. Gender

A. Contextual Introduction

1. International humanitarian law (IHL) does not distinguish between individuals on the basis of sex. Women are afforded the same protection as is given to men and may not be discriminated against.¹ Consequently, women benefit from the general protections offered by the Geneva Conventions (GCs), including those relating to combatants (Articles 14 and 16 GC III), the wounded, sick, and shipwrecked (Articles 12 GC I and GC II), and civilians and persons detained in connection with an armed conflict (Articles 13 and 27(3) GC IV). Whilst the inclusion of the principle of non-adverse distinction was an achievement at the time of the writing of the Conventions, it is now considered an essential norm in treaty² IHL, and is accepted, though under the principle of non-discrimination (Chapter 10), in customary IHL³ and international human rights law (IHRL).⁴ In relation to women more specifically, this principle is enshrined in Article 2 of the Convention on the Elimination of Discrimination Against Women (1979) (CEDAW).
2. Yet whilst the Geneva Conventions stress that no adverse distinction based on sex should be made, women also benefit from specific protection enshrined in these Conventions.⁵ Differentiation on the basis of sex is allowed, is even compulsory, provided its impact is favourable.⁶ Formal equality, if applied in situations where individuals are essentially unequal, does not automatically lead to real equality. Given women's lack of full participation in many societies, as well as their gender and

¹ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee, General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc CEDAW/C/GC/30 of 2013, para 20.

² Arts 9 (wounded, sick, shipwrecked persons) and 75 (general application) AP I.

³ See ICRC CIHL Study, Rule 88 on Non-Discrimination.

⁴ See, e.g., Art 2 paras 2 and 3 International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966); Art 2 para 1 ICCPR; Art 1 para 3 UN Charter (1945).

⁵ CEDAW Committee, General Recommendation No 30, supra n 1, para 20.

⁶ See, e.g., Arts 12 para 4 GC I and GC II.

biological roles, armed conflicts reinforce inequalities in society and increase women's vulnerability.⁷ Therefore IHL provides for special rules on women,⁸ an approach adopted by IHRL which encourages positive measures to fill in the discrimination gap.⁹

3. The majority of these provisions relate to women's status as civilians, as traditionally women rarely fall within the category of combatants. The United Nations (UN) Security Council aptly summarizes the situation: '[I]nternational humanitarian law affords general protection to women [...] as part of the civilian population during armed conflicts and special protection due to the fact that they can be placed particularly at risk.'¹⁰ States involved in armed conflicts are urged to make all efforts 'to spare women [...] from the ravages of war'.¹¹
4. The common meaning of those provisions of the Geneva Conventions that mention women, is that women are viewed as being at greater risk of suffering from the conflict. In IHL, women are protected due to their vulnerability in relation to sexual assault, or in their roles as mothers or expectant mothers. Moreover, falling into one of certain specified categories (pregnant women, maternity cases, and mothers of children under seven years of age) means heightened protection. In contrast, IHRL, which views women as a vulnerable group in times of armed conflict, does not distinguish between these categories of women.¹² Whilst an in-depth discussion of why women civilians are particularly affected by violence in armed conflict is beyond the remit of this Commentary, we might recall, in the words of the Beijing Platform

⁷ See UN, *Women, Peace and Security* (United Nations, 2002), at 14–15; CEDAW Committee, General Recommendation No 30, *supra* n 1, para 34.

⁸ Pictet Commentary GC IV, at 205.

⁹ See, e.g., CEDAW.

¹⁰ UNSC Res 1960 (2010) of 16 December 2010, Preamble; UNSC Res 1888 (2009) of 30 September 2009; UNSC Res 1894 (2009) of 11 November 2009, para 21; 27th International Conference of the Red Cross and Red Crescent, Plan of Action for the Years 2000–2003 (1999).

¹¹ UNGA Res 3318 (XXI) of 14 December 1974, Declaration on the Protection of Women and Children in Emergency and Armed Conflict, para 4.

¹² See, e.g., UNGA Res 48/104: Declaration on the Elimination of Violence Against Women of 20 December 1993, Preamble; HRCouncil, Follow-up to Resolution 4/8 of 30 March 2007 Adopted by the Human Rights Council at its Fourth Session Entitled 'Follow-up to Decision S-4/101 of 13 December 2006, adopted by the Council at its Fourth Special Session Entitled "Situation of Human Rights in Darfur"' of 20 June 2007; HRCouncil Group of Experts on the Situation of Human Rights in Darfur, Res 6/35 of 14 December 2007.

for Action, that this is tied to ‘their status in society and their sex’,¹³ and that women are viewed as inferior.¹⁴ This link between peacetime discrimination against women and abuse of women in armed conflict has been stressed by the Special Rapporteur on Violence against Women.¹⁵

5. The protection offered to women in armed conflict may be divided into two main categories, that is, their protection as ‘free individuals’ and their protection as detainees, the former category being further divided into the protection offered to all women and the protection offered to women who fulfil certain requirements. As ‘civilians, particularly women [...], account for the vast majority of those adversely affected by armed conflict [...], and increasingly are targeted by combatants and armed elements’,¹⁶ ensuring their personal safety is fundamental (section B.I.). Additional protection from the consequences of war is offered to mothers, whether expectant, having given birth, or of a child under seven years of age (section B.II.). Last but not least, the Geneva Conventions offer protection to women who are detained either as civilians or as prisoners of war (POWs) (section B.III.).

B. Meaning and Application

I. Protection of women

6. Articles 12 GC I/GC II offer ‘respect, protection, humane treatment and care’¹⁷ to the wounded, sick, and shipwrecked. Likewise, Article 14 GC III is central to its Convention, since it calls for respect for POWs, which involves respect for the

¹³ Beijing Declaration and Platform for Action, Fourth World Conference on Women, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) of 15 September 1995, para 135.

¹⁴ See also Declaration on the Elimination of Violence against Women, *supra* n 12, Preamble.

¹⁵ UN Doc A/66/215 of 1 August 2011, para 40; UN Doc A/HRC/4/34 of 17 January 2007, para 63; UN Doc A/HRC/11/6/Add.5 of 27 May 2009, para 44; UN Doc A/HRC/7/6/Add.4 of 28 February 2008, para 101.

¹⁶ UNSC Res 1325 (2000) of 31 October 2000, Preamble. See also CEDAW Committee, General Recommendation No 30, *supra* n 1, para 35.

¹⁷ Pictet Commentary GC I, at 135.

physical and moral person of the POW, as well as respect for the POW's honour.¹⁸ All three Articles refer to women,¹⁹ requiring women to be treated with all consideration/regard due to their sex. As central as Articles 12 GC I/GC II and Article 14 GC III are to their respective Conventions, Article 27 GC IV,²⁰ which refers to the protection of women, is the cornerstone of GC IV.²¹ It must be reiterated that the protection offered to women is additional to the safeguards enshrined in other parts of the Conventions.

7. Articles 12 paragraph 4 GC I/GC II stipulate that 'women shall be treated with all consideration due to their sex'. The original commentary explained the expression 'consideration due to their sex' by referring to women as 'beings who are weaker than oneself and whose honour and modesty call for respect'. Remarkably, though without implications,²² Article 14 GC III uses 'regard due to their sex' rather than 'consideration due to their sex'. The original commentary explains that the three factors that must be taken into account are: (i) weakness; (ii) honour and modesty, which covers rape, forced prostitution, and any form of indecent assault,²³ as well as humiliating treatment; and (iii) pregnancy and child-birth.²⁴ These three elements have been used in the International Committee of the Red Cross (ICRC) *Model Manual on the Law of Armed Conflict for Armed Forces*, which states that 'due regard must be paid to [women's] physical strength, the need to protect their honour and modesty and to the special demands of biological factors such as menstruation, pregnancy and childbirth'.²⁵
8. These protective measures base the status of women on biological factors, a literal interpretation of 'sex' referring to the biological difference between men and women. However, today, the difference between men and women is often construed in terms of

¹⁸ Ibid, at 143–46.

¹⁹ For Arts 12 para 4 GC I/GC II and Art 14 GC III to apply, the woman must fall within one of the categories enumerated in Arts 13 GC I/GC II and Art 4 GC III respectively.

²⁰ It must be noted that Art 27 GC IV does not protect women from the activities of the state of which they are a national.

²¹ Pictet Commentary GC IV, at 199–200.

²² See Commentary on Rule 134 ICRC CIHL Study.

²³ See section B.I., MN 12–13.

²⁴ Pictet Commentary GC III, at 147.

²⁵ ICRC, *Model Manual on the Law of Armed Conflict for Armed Forces* (Geneva: ICRC, 1999), para 1405.6.

gender, whereby social, economic, and cultural factors are taken into consideration. In this new light, ‘consideration/regard due to their sex’ now refers to biological (e.g. menstrual cycle and reproductive function, menopause), socio-economic (e.g. power relationships between women and men, cultural and traditional practices), and psychosocial factors (depression, eating disorders, etc) that may affect and determine women’s status.²⁶ Furthermore, a contextual reading (the other paragraphs in Articles 12 GC I/GC II and Article 14 GC III relate to humane treatment) of the expression ‘consideration due to their sex’ links to the overarching concept of human dignity that is central to understanding which measures need to be adopted to offer appropriate respect, protection, treatment, and care to women.

9. Article 27 GC IV proclaims the basic principle of protection for human beings and the right to humane treatment, thereby stating the core principles upon which the entire law of the Geneva Conventions is founded. The state is obliged not only to respect civilians, but also to protect them, i.e. to take all the precautions and measures in its power to prevent the proscribed acts and help victims. Of particular importance is that these standards must be observed in ‘all circumstances’ and at ‘all times’. Article 27 paragraph 2 is devoted to the protection of women.
10. Unlike Articles 12 GC I/GC II and Article 14 GC III, Article 27 GC IV does not use the expression ‘consideration due to their sex’ to refer to the protection of women. Instead, it clarifies that women need to be especially protected from attacks on their honour, and contains a list of three acts from which women must be protected in particular—rape, enforced prostitution, and any form of indecent assault—which are recurrent crimes against women in armed conflict.²⁷
11. The second paragraph of Article 27 is the subject of two different, albeit complementary, interpretations. First, it offers additional protection, for the word ‘especially’ is used. This means that women benefit from the general protections and respect stated in paragraph 1 *and* those listed in paragraph 2. Secondly, the provision lists acts that *particularly* affect women, and thus it may be seen only as an illustration of the types of violations of the principles spelled out in paragraph 1.

²⁶ These three factors are particularly important in relation to women’s health. See, e.g., CEDAW Committee, General Recommendation No 24 on Article 12: Women and Health, 1999, para 12(a), (b), and (c).

²⁷ See, e.g., UN Doc E/CN.4/RES/2003/45 of 23 April 2003; UN Doc E/CN.4/RES/2004/46 of 20 April 2004; UN Doc E/CN.4/RES/2005/41 of 19 April 2005.

12. The concept of honour is key to understanding Article 27 paragraph 2 GC IV. Honour is understood as a moral and social quality given to human beings because they are endowed with reason and a conscience.²⁸ Literally, honour relates to reputation and, to some extent, to humility and modesty. The word might be better understood with reference to Article 14 GC III, although it concerns POWs, which refers to the ‘honour’ of predominantly male POWs. Moreover, as ‘honour’ is also used in Article 27 paragraph 1, which covers *all* protected persons (men included), literally, it should not be interpreted in any different manner. Nonetheless, the application of the concept of honour in relation to POWs is associated with preserving their moral integrity and avoiding shame and humiliation, rather than physical harm. Applied to women in relation to acts such as rape, enforced prostitution, and any form of indecent assault, this understanding of the concept of honour, which is socially constructed and often sustained by male ideas about women’s chastity, modesty, and associated frailty and dependence, appears inappropriate.²⁹ Moreover, as women ‘are often portrayed as symbolic bearers of their cultural and ethnic identity, and as producers of future generations’,³⁰ the word ‘honour’ resonates as referring to the honour of the community rather than that of the women themselves.
13. Influenced by IHRL, a more contemporary reading of the notion of ‘honour’ integrates the key concept of human dignity.³¹ International criminal tribunals³² and human rights bodies³³ construe rape, enforced prostitution, and indecent assault as physical, rather than reputational, attacks upon a woman. Further, inasmuch as Additional Protocol (AP) I supplements the Geneva Conventions,³⁴ it is important to note that Article 75 paragraph 2(b) AP I understands these acts as comprising outrages upon personal dignity, while Article 76 AP I fails to mention ‘honour’ and lists the

²⁸ Pictet Commentary GC IV, at 202.

²⁹ UN Doc E/CN.4/1998/54 of 26 January 1998, para 11.

³⁰ ICRC, *Addressing the Needs of Women Affected by Armed Conflict*, March 2004, at 10.

³¹ ICTY, *The Prosecutor v Furundžija*, Trial Chamber Judgment, IT-95-17/1-T, 10 December 1998, para 183.

³² ICTR, *The Prosecutor v Akayesu*, Trial Chamber, Judgment, ICTR-96-4, 2 September 1998; *Furundžija*, *supra* n 31, para 183; ICTY, *The Prosecutor v Delalic et al*, IT-96-21-A, Trial Chamber, Judgment, 16 November 1998, para 475.

³³ See ECtHR, *Aydin v Turkey*, App Nos 28293/95, 29494/95, and 30219/96, Judgment, 25 September 1997; IACommHR, *Raquel Martín de Mejía*, 10.970 (Peru), Judgment, 1 March 1996.

³⁴ See Art 1 para 3 AP I.

prohibited acts only after declaring that women ‘shall be the object of special respect’. Likewise Section 7 paragraph 3 of the 1999 UN Secretary-General’s Bulletin removes the reference to honour and provides that ‘[w]omen shall be especially protected against any attack’.³⁵ International humanitarian law has thus distanced itself from a concept of honour that used to be defined not by the nature of the act but rather by the wider community, and now tends to view these acts as violent attacks upon women’s physical integrity. That being said, not all such acts have a physical element; Article 27 paragraph 2 GC IV covers a wide spectrum of acts affecting a woman’s physical and mental integrity.³⁶ In this light the word ‘honour’ may have to be re-evaluated when interpreting Article 27 paragraph 2 GC IV.

14. The three attacks from which women shall be protected ‘in particular’ in accordance with Article 27 paragraph 2 GC IV are rape, enforced prostitution, and any form of indecent assault.³⁷ None of these acts was defined in the Conventions (maybe because the Geneva Conventions were not meant to constitute a criminal code) or in the original commentary (perhaps because of the rather Victorian attitude displayed towards women and an unwillingness to explain such concepts in mechanical terms). Drawing upon the definitions of rape found in states’ domestic laws, the International Criminal Tribunal for the former Yugoslavia (ICTY) provided a definition of ‘rape’ in the *Furundžija* case,³⁸ which was based on the *Akayesu* judgment³⁹ and subsequently developed in the *Kunarac* case before the ICTY.⁴⁰ This definition of ‘rape’ now forms the core of the definitions used by other international criminal tribunals.⁴¹ It covers more than just penetration, thus moving away from ‘the historic focus on the act of penetration [which] largely derives from a male preoccupation with assuring women’s

³⁵ UN Doc ST/SGB/1999/13 of 6 August 1999 (Bulletin).

³⁶ See *Akayesu*, supra n 32, para 688.

³⁷ An in-depth discussion on these terms is provided in Ch 17, B.I.

³⁸ *Furundžija*, supra n 31, para 185.

³⁹ *Akayesu*, supra n 32, paras 597–98.

⁴⁰ ICTY, *The Prosecutor v Kunarac, Kovač and Vuković*, Appeals Chamber, Judgment, IT-96-23& IT-96-23/1-A, 12 June 2002, para 127.

⁴¹ See, e.g., the crime of rape as defined in the Elements of Crime of the ICC Statute (Art 7(1)(g)(1) and Art 8(2)(b)(xxii)(1), with regard to rape as a crime against humanity and rape as a war crime respectively): ‘The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.’

chastity and ascertaining paternity of children'.⁴² Rape and other acts of a sexual nature are thus uncoupled from the idea of a woman's reputation and honour.⁴³

15. The second category of violation is 'enforced prostitution', which is used interchangeably with 'forced prostitution' in Article 76 paragraph 1 AP I.⁴⁴ The second category appeared in the GC IV in order to reflect specifically the abuse suffered by women who were forced to provide sexual services in brothels during the Second World War.⁴⁵ The Special Rapporteur on Systematic Rape, Sexual Slavery, and Slavery-like Practices during Armed Conflict has defined 'forced prostitution' as 'conditions of control over a person who is coerced by another to engage in sexual activity',⁴⁶ clearly refuting the idea that such an act should be understood as violating a woman's honour. Although sexual slavery and forced prostitution may overlap,⁴⁷ they are distinct crimes to be prosecuted separately. Whilst sexual slavery refers to the condition whereby a person exercises ownership-like rights over a person, enforced prostitution denotes the situation whereby an individual forces a person to engage in an act of sexual nature, expecting to obtain some pecuniary advantage.⁴⁸
16. Thirdly, 'any form of indecent assault', understood as an assault of a sexual nature short of rape,⁴⁹ such as groping or fondling a woman's breast, is prohibited. This specific terminology does not appear in any other international *corpus juris*. In IHRL and international criminal law (ICL) reference is made to sexual violence, which covers rape and acts of similar gravity.⁵⁰ Whilst these acts are 'intended to inflict

⁴² UN Doc E/CN.4/Sub.2/1998/13 of 22 June 1998, para 24.

⁴³ UN Doc E/CN.4/2001/73 of 23 January 2001, para 38.

⁴⁴ See, e.g., UN Doc E/CN.4/Sub.2/1998/13, supra n 42, para 31.

⁴⁵ Pictet Commentary GC IV, at 205. 'Enforced prostitution' was prohibited prior to the Second World War under the laws prohibiting the mistreatment of women (see UN Doc E/CN.4/Sub.2/1998/13, supra n 42, para 17).

⁴⁶ UN Doc E/CN.4/Sub.2/1998/13, supra n 42, para 42.

⁴⁷ Ibid, para 33.

⁴⁸ This reflects the definitions of 'sexual slavery' and 'enforced prostitution' in the ICC Elements of Crime. With regard to sexual slavery, see Article 7 para 1(g)-2 (crime against humanity) and Article 8 para 2(b)(xxii)(2) (war crime) and with regard to enforced prostitution, see Article 7 para 1(g)-3 (crime against humanity) and Article 8 para 2(b)(xxii)(3) (war crime).

⁴⁹ In *Furundžija* the ICTY stated that rape was the most serious manifestation of sexual assault; *Furundžija*, supra n 31, para 175.

⁵⁰ UN Doc A/66/657-S/2012/33 of 13 January 2012, para 3. Sexual violence is defined in the ICC Elements of Crime in Art 7(1)(g)-6 (crime against humanity) and in Art 8(2)(b)(xxii)(6) and Art 8(2)(e)(vi)(6) (war crime).

severe humiliation on the victims',⁵¹ they are also violent acts and thus fall within the prohibition of cruel, inhuman, or degrading treatment or punishment, as the International Criminal Tribunal of Rwanda (ICTR) observed in the *Akayesu* case.⁵² Yet indecent assault in the sense used by the Geneva Conventions does not necessarily meet these thresholds; rather, indecent assault extends to a wider range of acts of a sexual nature.

II. Protection of Specific Categories of Women

17. The Geneva Conventions proceed from the premise that whilst the men are fighting, women are in charge of the children and the household.⁵³ Therefore, an array of provisions intended to alleviate the sufferings caused by war directly refer to women. Yet, according to the Geneva Conventions, not all women are to be afforded particular treatment in terms of personal safety, shelter, health, food, water, etc. This stands in contrast to Rule 134 in the ICRC CIHL Study, which offers such protection to all women. Despite the general applicability spelled out in Rule 134, and in Resolution 2 of the 26th International Conference of the Red Cross and Red Crescent,⁵⁴ it is not feasible to expand the application of the rules spelled out below to all women, as Rule 134 specifically refers to specific categories of women in a separate section in the explanation of the rule.

a. Grounds for preferential treatment

18. The categories of women who are marked for preferential treatment are pregnant women, maternity cases, and mothers of children under seven years of age. Whilst in the Geneva Conventions expectant mothers and maternity cases often feature

⁵¹ UN Doc E/CN.4/Sub.2/1998/13, *supra* n 42, at para 22.

⁵² *Akayesu*, *supra* n 32, para 688.

⁵³ UNGA, 66th Session, Third Committee, Items 28 of the Agenda, Statement by the International Committee of the Red Cross (ICRC), New York, 13 October 2011 (ICRC Statement 2011).

⁵⁴ 26th Conference of the Red Cross and Red Crescent of 7 December 1995, Resolution 2.

alongside the wounded and sick, and are thus assimilated to these groups,⁵⁵ these categories of women are expressly covered under ‘wounded’ and ‘sick’ in AP I.⁵⁶

19. Although it is acknowledged that there is some arbitrariness in choosing the age of the children in the third category (seven years old) and in selecting the other categories (pregnant/expectant mothers and maternity cases), these parameters were deemed by the drafters as appropriate, reasonable, and generally in accord with the requirements of the physical and mental development of children.⁵⁷ Whilst pregnant or expectant women refers to women’s condition prior to childbirth, the concept of ‘maternity cases’ covers labour and a short period after childbirth,⁵⁸ and implies that such women are in need of medical assistance. Indeed, Article 8 AP I refers to maternity cases as women ‘who may be in need of immediate medical assistance and care’. In contradistinction, ‘nursing mothers’, in Article 70 AP I, refers to mothers of babies, the stress being on the protection and care of the child.⁵⁹ That it was deemed necessary to add ‘nursing mothers’ shows that the concept of ‘maternity cases’ relates to birthing. Moreover, the term ‘nursing mothers’, rather than ‘maternity cases’, appears only once in the Geneva Conventions (Article 89 GC IV), alongside references to pregnant women and children under 15 years of age.

b. Personal safety and shelter

20. In view of the vulnerability of some categories of women, ensuring their personal safety is fundamental.⁶⁰ Article 14 GC IV provides for the creation of hospital and safety zones and localities so as to protect certain categories of civilians from the effects of war. The common denominator between all those listed in Article 14 GC IV

⁵⁵ F. Krill, ‘The Protection of Women in International Humanitarian Law’, 249 *IRRC* (1985) 337, 348. Generally, women are associated with the wounded and sick, see Arts 12 GC I/GC II.

⁵⁶ Art 8 AP I.

⁵⁷ Pictet Commentary GC IV, at 126.

⁵⁸ The expression ‘*femmes en couche*’ in the French version of the GCs confirms this interpretation.

⁵⁹ ICRC Commentary APs, Art 70 AP I.

⁶⁰ ‘Personal safety’ is defined as ‘safety from dangers, acts of violence or threats thereof against members of the civilian population not or no longer taking a direct part in hostilities’. ICRC, *Addressing the Needs of Women*, supra n 30, at 17.

is that such individuals are deemed to not take part in the hostilities, and to suffer a weakness that makes them incapable of contributing to the conflict. Expectant mothers and mothers of children under seven years of age are seen as one such group of individuals who can seek refuge in these hospital and safety zones and localities. Article 14 GC IV may be considered as customary.⁶¹ It is noteworthy that Rule 35 in the ICRC CIHL Study⁶² does not specifically refer to these categories but applies to ‘civilians’, which means that any woman is to be protected in these locations. Yet Article 14 GC IV goes a step further than Rule 35, inasmuch as it offers protection from both the indirect and direct effects of war.⁶³ Direct effects include bombardment, aerial attacks, etc, whilst indirect effects cover issues that are of particular relevance to these two categories of women: health, sanitation, housing, shelter, heating, etc. This means that these women’s personal safety is assured, whilst they are also able to find shelter in a broader sense.

21. The personal safety of specific groups of women is also found in Articles 16 paragraph 1 and 17 GC IV. Article 16 GC IV provides that expectant mothers, along with the wounded, sick, and infirm who are deemed not to take part in hostilities and to be in a state of weakness, shall be the object of particular protection and respect. This means that such women are not only to be spared and not attacked, but should also be assisted and supported,⁶⁴ obligations that are moreover applicable to female detainees.⁶⁵ This dual obligation is absolute, no derogations being permitted: the safety of expectant mothers is to be assured.

c. Health, food, and household items

22. Besides ensuring that the physical integrity of certain categories of women is protected, the Geneva Conventions offer women a range of benefits regarding health, food, and household items. Although health might be considered as part of personal

⁶¹ See examples provided in the practice relating to Rule 35 ICRC CIHL Study.

⁶² Rule 35 ICRC CIHL Study.

⁶³ Pictet Commentary GC IV, at 127.

⁶⁴ Ibid; Art 16 para 1 GC IV.

⁶⁵ Ibid; Art 76 para 2 GC IV.

safety (and thus to some extent subsumed under the category ‘Personal safety and shelter’ examined in section B.II.b. above), the special protection relating to food and household items is warranted because of women’s reproductive and caretaking functions. These special protections are additional to the protection granted to the general civilian population.

23. Two provisions mentioned earlier, Articles 14 and 16 paragraph 1 GC IV (MN 20–21), offer general protection to certain categories of women. Article 14 GC IV protects expectant mothers and mothers of children aged under seven from the effects of war, by allowing their admission to hospital and safety zones and localities, which must, however, first be established by agreement between the parties to the conflict. It implies shielding women from the negative impact of the war on health, sanitation, housing, etc, and providing women with life-saving services such as maternal programmes.⁶⁶ In relation to expectant mothers, Article 16 paragraph 1 GC IV demands particular protection and respect, by including them in the category of the wounded and sick, which undoubtedly allows them to benefit from medical assistance, and arguably food and other essentials.

24. Moreover, Article 23 GC IV, a provision designed to save the most vulnerable and most worthy of protection and assistance from the impact of war,⁶⁷ specifically requires all belligerents to allow the free and unlimited passage of medical supplies, food, and clothing intended for expectant mothers and maternity cases, whether these women are nationals of an enemy, allied, associated, or neutral state.⁶⁸ Article 23 GC IV is, however, subject to the proviso that there be no military advantage gained from the provision of such materials. Yet it is highly unlikely that consignments for these women, which are often barely sufficient to meet their basic needs,⁶⁹ will increase the military and economic capacity of a belligerent.⁷⁰ The provision was intended to refer

⁶⁶ ICRC Statement 2011, supra n 53.

⁶⁷ Pictet Commentary GC IV, at 179.

⁶⁸ Ibid., Art 23 GC IV.

⁶⁹ See, e.g., ICRC Annual Report 2011, *ICRC’s Operational Approach to Women and Girls*, Annex 2, at 31, for the kind of items given to women.

⁷⁰ Pictet Commentary GC IV, at 182.

to situations of blockade, and has subsequently been interpreted in this sense.⁷¹ Article 23 GC IV was later complemented by Article 70 AP I, extending the circle of beneficiaries to nursing mothers and affirming that in the distribution of these consignments, priority should be given to these categories of women.

25. In occupation, Article 50 paragraph 5 GC IV requires the Occupying Power not to impede the application of preferential measures that were in effect prior to the occupation in regard to food, medical care, and protection against the effects of war in relation to expectant mothers and mothers of children under seven years of age. Article 38 GC IV, which refers to specific categories of women who are aliens in the territory of a party to the conflict, stipulates that all such protected persons must be regulated by peacetime provisions. Reference is made to a series of provisions to protect individuals who are deemed weak and thus warrant special care.⁷² Pregnant women and mothers of children under seven years shall benefit from this preferential treatment, similar to that provided to nationals in a similar situation.

26. Although ‘war may compromise women’s access to healthcare’,⁷³ the Geneva Conventions deem only specific categories of women to warrant protection. In contrast, General Recommendation No 24 of CEDAW, which expands on Article 12 on women and health, asserts that states ‘should ensure that adequate protection and health services [...] are provided for women in especially difficult circumstances, such as those trapped in situations of armed conflict’,⁷⁴ thereby offering protection to all women.⁷⁵ Similarly, Resolution 2 of the 26th Conference of the Red Cross and Red Crescent calls for measures ‘to ensure that women victims of conflict receive medical, psychological and social assistance’, dropping the reference to specific categories of women.⁷⁶

⁷¹ See, e.g., Israeli Ministry of Foreign Affairs, *The Operation in Gaza, Factual and Legal Aspects*, July 2009, para 1300; Israeli Supreme Court, *Jaber Al-Bassiouni Ahmed and others v Prime Minister and Minister of Defence*, 30 January 2008, para 13.

⁷² E.g., see Pictet Commentary GC IV, at 290.

⁷³ UNGA, 64th session, Third Committee, items 28 of the agenda, statement by the ICRC, New York, 14 October 2010.

⁷⁴ CEDAW Committee, General Recommendation No 24, supra n 26, para 16.

⁷⁵ See also CEDAW Committee, General Recommendation No 19 on Violence against Women, UN Doc A/47/38 of 1992, para 19.

⁷⁶ 26th Conference of the Red Cross and Red Crescent, supra n 54, Res 2.

27. The Geneva Conventions specifically provide for the medical protection of maternity cases, for these women are considered to be in a vulnerable position owing to childbirth and to the fact that their health and life, as well as those of the child, might be at risk. This fits with Rule 134 in the ICRC CIHL Study, which, like Article 8 AP I, views these women as being entitled to the same rights as those who are sick and wounded; and it fits with Article 10 paragraph 2 ICESCR, which states that ‘special protection should be accorded to mothers during a reasonable period before and after childbirth’.⁷⁷ For these women, medical care is essential,⁷⁸ and they are to be provided with ante-natal, obstetric, and postnatal care, or be brought to a place where such care is available.
28. Maternity cases are protected in a number of provisions in GC IV. Article 18 GC IV stresses that civilian hospitals, which gain their protected status because they treat, inter alia, maternity cases, must be protected and respected. Further, the Geneva Conventions explicitly safeguard the free movement of women who are about to give birth. This is of vital importance, as checkpoints, closures, and curfews often imperil the lives of pregnant women who are unable to reach a hospital in time for a safe delivery.⁷⁹ The United Nations Commission on Human Rights has further linked the personal safety and health of maternity cases to human dignity, in a resolution condemning the denial of access to hospitals to pregnant women who are ‘force[d] [...] to give birth at checkpoints under hostile, inhumane and humiliating conditions’.⁸⁰ In this vein, Article 17 GC IV offers protection to maternity cases in relation to evacuation from besieged or encircled areas. Although evacuation is not compulsory, since the words ‘shall endeavour’ are used, it is strongly recommended to proceed to an evacuation after local agreements have been made.⁸¹ Article 21 GC IV stipulates that maternity cases may be brought to safety by land and sea transport, provided these comprise convoys, i.e. groups of vehicles. The convoy is allowed to use the emblem. Such a convoy must be respected and protected, thus not only it is prohibited to attack or harm a convoy, but the state must also ensure that the convoy

⁷⁷ ICESCR, supra n 4, Art 10 para 2.

⁷⁸ See UN Doc A/68/297 of 9 August 2013, para 43.

⁷⁹ ICRC, *Addressing the Needs of Women*, supra n 30, at 44.

⁸⁰ HRCComm, Res 2005/7 of 14 April 2005.

⁸¹ Pictet Commentary GC IV, at 139.

and those who are operating it are indeed respected and protected.⁸² Article 22 GC IV further protects medical aircraft (both in convoys and flying singly) carrying, inter alia, maternity cases. In this instance marking is not compulsory. The conditions of the flight need to be agreed upon by the belligerents.⁸³

III. Protection of women detainees

29. Although there are fewer women than men detained as either civilians or POWs,⁸⁴ the Geneva Conventions contain a corpus of rules concerning women in detention, most of which are derived from the provisions and principles discussed in sections B.I. and B.II. These provisions seek to protect women's physical (especially sexual) integrity and to ensure that due consideration is paid to maternity cases. Concurrently, the Geneva Conventions reiterate states' obligations not to discriminate against women belonging to the enemy party.

a. Quarters

30. Specific accommodation arrangements must be made for women. To avoid women being subjected to indecent assault, and to ensure that they are treated with all the regard due to their sex, the Geneva Conventions oblige states where possible to separate men and women when deprived of liberty.⁸⁵ This preventive stance is adopted in Articles 25, 29, and 97 GC III, and in Articles 76 paragraph 4, 85, and 124 GC IV, which must be interpreted in the light of Article 14 paragraph 2 GC III and Article 27 GC IV respectively. Rule 119 in the ICRC CIHL Study, which deals with accommodation for women deprived of their liberty, also links this physical separation

⁸² Ibid, at 171.

⁸³ Ibid, at 174.

⁸⁴ ICRC, *Women and War*, February 2008, at 22.

⁸⁵ The *Kunarac* case, supra n 40, para 132, shows that the lack of separation of quarters lead to sexual attacks.

of men and women to the requirement to take into account women's needs and to prevent women from becoming victims of sexual violence.⁸⁶

31. Yet GC IV does not specify that women must be separated from men in all circumstances; Article 82 GC IV encourages the Detaining Power to lodge members of the same family together. In contrast, Article 124 paragraph 3 GC IV, relating to the premises for disciplinary punishments of female civilian internees held for imperative security reasons, requires the Detaining Power to arrange for women internees to undergo their punishment in separate quarters, and under the immediate supervision of women. Also, Article 76 paragraph 4 GC IV stipulates that women in pre-trial detention or serving a sentence should be kept in separate quarters and under the direct supervision of women. Read in conjunction with Article 27 paragraph 2, this allows for women to be free from the threat of assault from strangers. As a further safeguard against potential violations of women's dignity, Article 97 paragraph 4 GC IV requires that female internees be searched only by women.
32. In contrast, the protection offered to female POWs is less extensive. Article 25 GC III only requires men and women to have separate dormitories and not separate quarters. Supervision by female staff is not obligatory, and the rule that searches be carried out only by female staff does not feature in GC III. This might be explained by the fact that POWs are predominantly male, and it might have been difficult for a Detaining Power to find female guards to supervise and search women. That being said, it is possible to interpret this provision in such a way that female POWs have separate quarters, are supervised by women, and are searched only by women. Indeed, in the case of disciplinary punishment by confinement, or punishment following a judicial sentence, the Detaining Power is in, accordance with Article 97 paragraph 4 GC III and Article 108 GC III respectively, required to provide separate quarters (i.e. sleeping quarters and conveniences), as well as to ensure that female POWs are under the supervision of female staff. Moreover subsequent rules, such as Article 75 paragraph 5 AP I and Rule 119 in the ICRC CIHL Study,⁸⁷ spell out a general obligation to provide such a treatment to all women deprived of their liberty for reasons related to the armed conflict. The Standard Minimum Rules for the Treatment of Prisoners also

⁸⁶ Rule 119 of the ICRC CIHL Study refers to Rule 134 (specific needs of women) and to Rule 93 (victims of sexual violence).

⁸⁷ Rule 119 ICRC CIHL Study.

confirm that women should be kept in separate quarters⁸⁸ and be under the immediate supervision of women.⁸⁹ Therefore the relevant provisions of GC III may be interpreted so as to include separate quarters, rather than only dormitories and conveniences, and to oblige the Detaining Power to ensure that women detainees are under the authority of a woman. As for body searches of female POWs, they must be conducted in a manner consistent with human dignity,⁹⁰ which means that ‘persons subjected to body searches should be examined only by persons of the same sex’.⁹¹

b. Sanitation

33. The Geneva Conventions enjoin states to provide prisoners with adequate sanitation facilities. From a human rights perspective, the right to adequate sanitation, which is based on Articles 11 and 12 ICESCR, is considered fundamental to human dignity⁹² and privacy,⁹³ and is considered ‘a human right that is essential for the full enjoyment of life and all human rights’.⁹⁴

34. Article 29 paragraph 2 GC III requires states to ensure that sanitary measures are taken to keep the camps in a clean and healthy state. Prisoners of war are to be provided with water and soap for their personal hygiene, with facilities and installations for that purpose (e.g. baths and showers), and with enough time to wash (Article 29 paragraph 3 GC III). Moreover, conveniences are to comply with the rules of hygiene and to be kept clean. In situations where POWs are undergoing punishment, Article 97 paragraph 2 calls upon the Detaining Power to ensure that the same standards of sanitation are maintained. Whilst Article 29 paragraph 1 and 3 and Article 97 paragraph 2 do not specifically refer to women, it is nonetheless possible to interpret

⁸⁸ Economic and Social Council (ECOSOC), Standard Minimum Rules for the Treatment of Prisoners, Res 663 C (XXIV) and 2076 (LXII) of 31 July 1957 and 13 May 1977 respectively, Rule 8.

⁸⁹ *Ibid*, Rule 53.

⁹⁰ See, e.g., ECtHR, *Valasinas v Lithuania*, Application 44558/98, 27 July 2001, para 117.

⁹¹ ICRC, *Addressing the Needs of Women*, supra n 30, at 128.

⁹² UN Doc A/HRC/RES/15/9 of 6 October 2010, para 3.

⁹³ CESCR, General Comment 15 on the Right to Water (Articles 11 and 12 ICESCR) (2002), UN Doc E/C.12/2002/11, 20 January 2003, para 29.

⁹⁴ UNGA Res 64/292 of 3 August 2010, para 1.

them so as to require the Detaining Power to attend to women's special health and sanitary needs (e.g., relating to menstruation). Read in light of Article 14 paragraph 2 GC III ('with all the regard due to their sex'), facilities need to be set up so as to cater for women's privacy, safety, and needs, and arranged so as to grant them appropriate time to wash and clean, especially during menstruation.⁹⁵

35. Concerning civilian internees, Article 85 paragraph 1 GC IV obliges the Detaining Power to provide accommodation that fulfils certain minimum standards with regard to hygiene and health, standards which are also applicable to premises for disciplinary punishments (Article 124 paragraph 2 GC IV). According to Article 85 paragraph 3 GC IV, sanitary conveniences are to be maintained in a clean state, and baths and showers are to be available for the internees. The internees must be provided with sufficient water and soap for their daily personal hygiene, and be given enough time for washing and cleaning. According to the original Commentary, these sanitary facilities 'must be so constructed as to preserve decency and cleanliness'.⁹⁶ As most articles relating to civilian detainees are based on those enshrined in GC III, which deals with POWs, an analogy may be drawn with regard to the state's duties to pay particular attention to women's sanitary and health needs.

36. Article 29 paragraph 2 GC III and Article 85 paragraph 4 GC IV oblige the Detaining Power to provide women with sanitary conveniences separate from those of men. The original Commentary explained that this separation was necessitated by 'the most elementary rules of decency'.⁹⁷ However, this is not provided for women who, either as civilians or as POWs, are undergoing disciplinary punishment. Article 124 paragraph 3 GC IV does not specifically refer to sanitary conveniences, though the term 'quarters', in contradistinction to 'sleeping quarters' mentioned in Article 85 paragraph 4 GC IV, could also cover sanitary conveniences. Article 97 paragraph 4 GC III, which covers the premises for female POWs undergoing punishment, does not specify that sanitary conveniences must be separate. Moreover, the term 'quarters' can be widely interpreted to include such facilities. This interpretation is supported by Rule 8 of the Standard Minimum Rules for the Treatment of Prisoners, which

⁹⁵ ICRC, *Addressing the Needs of Women*, supra n 30, at 135–56.

⁹⁶ Pictet Commentary GC IV, at 387 and 494.

⁹⁷ Pictet Commentary GC III, at 207.

stipulates that ‘the whole of the premises allocated to women shall be entirely separate’.⁹⁸

c. Health and medical care

37. The Detaining Power is under the obligation to provide free medical care and medicines to all detainees. As women’s health issues are different from those of men, the Detaining Power needs to provide specific services that include screening for cervical and breast cancer,⁹⁹ medical check-ups assessing the risk of anaemia and mineral deficiencies,¹⁰⁰ and so on.

38. According to Article 91 GC IV, maternity cases among civilian internees must be transferred to institutions where adequate medical assistance can be provided. This is a rule that is also enshrined, for both POWs and all civilians deprived of their liberty, in the Standard Minimum Rules for the Treatment of Prisoners.¹⁰¹ Moreover, the standard of care these cases receive should not be less than that applied to the general population. The inclusion of maternity cases in Article 91 GC IV reflects the desire to ensure that women are given proper medical attention when giving birth and shortly thereafter, as internment camps are unsuitable places for giving birth. After all, internment is not a punishment, and thus when women give birth they are entitled to receive the care they need. Also to this effect, Article 127 GC IV stipulates that these women should not be transferred if the journey would be detrimental to them, unless their safety imperatively so demands. The women’s state of health and physical fitness must be determined individually if they are to be transferred.

d. Food and work

⁹⁸ ECOSOC, ‘Standard Minimum Rules for the Treatment of Prisoners’, supra n 88, Rule 8.

⁹⁹ ICRC, *Addressing the Needs of Women*, supra n 30, at 115 and 132.

¹⁰⁰ *Ibid*, at 131.

¹⁰¹ ECOSOC ‘Standard Minimum Rules for the Treatment of Prisoners’, supra n 88, Rule 23(1).

39. The quality, quantity, and variety of the daily food ration distributed in civilian internment, as well as in POW camps, depend on the particular characteristics of the individuals and the context (e.g. climate, amount of work).¹⁰² Nevertheless, Article 89 paragraph 1 GC IV and Article 26 paragraph 1 GC III, which use similar language, oblige the Detaining Power to ensure that internees are in a good state of health to prevent the development of nutritional deficiencies. This certainly calls for an individual appraisal, where the sex of the person is likely to be taken into account.
40. Moreover, according to Article 89 paragraph 5 GC IV, expectant and nursing mothers are to be given supplementary provisions of food (e.g. specific vitamin and mineral supplements, as well as a diet containing sufficient calories and protein)¹⁰³ to cater for their physiological needs. This Article sits alongside the principle that certain categories of women are to be given preferential treatment.
41. The Detaining Power has the right to compel POWs to work. Yet, as Article 49 GC III explains, the type and amount of work to be carried out by POWs depends on a variety of factors, including sex. Interpreted in the light of Article 16 GC III, this means that women's physical strength and specificities must be taken into account when assigning work to them. Given a broad interpretation, it would also mean that pregnant women, maternity cases, and women with young children should be exempted from mandatory work.¹⁰⁴

e. Execution of penalties

42. Article 88 GC III reiterates in strong language the principle of non-adverse discrimination in relation to penal and disciplinary sanctions, i.e. in relation to the rules on sentencing and the treatment of women whilst undergoing punishment. The comparators are women (Article 88 paragraph 2 GC III) and men (Article 88 paragraph 3 GC III) in the armed forces of the Detaining Power. Such an Article might now be seen as redundant in the light of the principle of non-discrimination enshrined in IHRL.

¹⁰² Pictet Commentary GC IV, at 393; Pictet Commentary GC III, at 197.

¹⁰³ ICRC, *Addressing the Needs of Women*, supra n 30, at 121.

¹⁰⁴ *Ibid*, at 148.

f. Release

43. Article 132 GC IV encourages states to conclude agreements with neutral parties in regard to releasing, repatriating, and returning certain categories of individuals to these states. Among the categories listed are pregnant women, and mothers with infants and young children. No equivalent provision exists in GC III. However, it might be possible to interpret Article 14 GC III, which contains the ‘regard due to their sex’ clause, as encouraging the Detaining Power to grant early repatriation of female POWs who are pregnant and those who are mothers of young children. Such a reading is confirmed by Annex I, which reproduces the Model Agreement Concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War that relates to Article 110 GC III, and lists ‘women prisoners of war who are pregnant or mothers with infants and small children’ among the individuals to be given priority in the repatriation. These women benefit from special protection, along with the sick and wounded and children, as they are deemed to be at higher risk in internment and POW camps.

C. Relevance in Non-International Armed Conflicts

44. Undoubtedly the gist of the main provisions concerning women applies in non-international armed conflict (NIAC). The principle of non-adverse discrimination spelled out in Articles 12 GC I/GC II and Article 27 paragraph 3 GC IV applies in NIAC. Common Article 3 of the Geneva Conventions and Article 2 paragraphs 1 and 4 AP II reiterate the principle. Further, Rule 88 (on Non-Discrimination) in the ICRC CIHL Study stipulates that this norm applies in NIAC too. In addition, the principle of non-discrimination, which is enshrined in a variety of IHRL instruments, applies at all times, as derogations from the principle of non-discrimination based on sex are not permitted.¹⁰⁵ Women should not be discriminated against in NIAC.

¹⁰⁵ See, e.g., Art 4 para 1 ICCPR, which specifies that derogations may not involve ‘discrimination solely on the basis of [...] sex’.

45. Article 12 paragraph 4 GC I/GC II obligates states to treat wounded, sick, and shipwrecked women with the regard due to their sex. There is no corresponding provision in IHL instruments regulating NIAC. The legal support for asserting that this rule also applies in NIAC is mainly found in a range of UN resolutions that do not characterize the nature of the armed conflict when exhorting parties to the conflict to respect and protect women.¹⁰⁶ Likewise, Resolution 2 of the 26th Conference of the Red Cross and Red Crescent does not differentiate between the types of conflict when it encourages states to set up programmes, ‘to ensure that women victims of conflict receive medical, psychological and social assistance’.¹⁰⁷
46. Article 27 paragraph 2 GC IV, which protects women from attacks on their honour, features in IHL instruments relating to NIAC in a modified form. Reference to the concept of ‘honour’ is dropped and replaced by ‘outrages upon personal dignity’ in Common Article 3 paragraph 1(c), and in Article 4 paragraph 2(e) AP II. Article 4 paragraph 2(e) AP II almost mirrors Article 27 paragraph 2 GC IV, with the addition of ‘humiliating and degrading treatment’ to the list of acts that fall within the definition of ‘outrages upon personal dignity’. In contrast, Common Article 3 does not expressly refer to rape and sexual violence (short of rape), which may nevertheless be subsumed under ‘cruel treatment and torture’ (Common Article 3 paragraph 1(a)) and ‘humiliating and degrading treatment’ (Common Article 3 paragraph 1(c)) respectively. Indeed, in *Furundžija* the ICTY explained that rape was implicitly prohibited under Common Article 3.¹⁰⁸ The protection offered to women in NIAC with respect to freedom from sexual violence is phrased in terms of physical harm and harm to human dignity rather than to honour.¹⁰⁹ Moreover, a range of instruments that condemn sexual violence do not make a distinction on the basis of the nature of the armed conflict, e.g. Section 7.3 of the 1999 UN Secretary-General’s Bulletin,¹¹⁰ reports by the Secretary-General,¹¹¹ CEDAW General Recommendation No 19 on

¹⁰⁶ UNSC Res 1325, supra n 16; UNSC Res 1820 (2008) of 19 June 2009; UNSC Res 1889 (2009) of 5 October 2009; UNSC Res 1960, supra n 10.

¹⁰⁷ 26th Conference of the Red Cross and Red Crescent, supra n 54, Res 2.

¹⁰⁸ *Furundžija*, supra n 31, paras 166–68. See also UN Doc E/CN.4/Sub.2/1998/13, supra n 42, para 69.

¹⁰⁹ See ICTR, *The Prosecutor v Nyiramasuhuko*, ICTR-98-42-T, Judgment and Sentence, 24 June 2011, paras 6178–79.

¹¹⁰ Bulletin, supra n 35.

¹¹¹ See, e.g., UN Doc A/66/657-S/2012/33, supra n 50, para 3.

Violence against Women,¹¹² etc. The International Criminal Court (ICC) Statute also confirms that rape (Article 8 paragraph 2(e)(vi)(1)) and other forms of sexual violence, such as sexual slavery (Article 8 paragraph 2(e)(vi)(2)), enforced prostitution (Article 8(2)(e)(vi)(3)), and sexual violence (Article 8 paragraph 2(e)(vi)(6)), are prohibited in NIAC.¹¹³ No doubt, women must be protected from sexual violence in NIAC.

47. Whilst the Geneva Conventions protect specific categories of women—pregnant women, maternity cases, and mothers with children under the age of seven—neither AP II nor Common Article 3 refers to these categories. Likewise, the section on the protection offered to women in NIAC in Rule 134 in the ICRC CIHL Study does not explicitly mention these categories, although the general rule demanding respect for the ‘specific protection, health and assistance needs of women affected by armed conflict’ is stated to apply in NIAC.¹¹⁴ Maternity cases are often subsumed under the ‘sick, wounded and shipwrecked’ category in IAC, and one might contend that NIAC provisions relating to the ‘sick, wounded and shipwrecked’ also apply to maternity cases. In NIAC the wounded and sick must be protected and respected: Common Article 3 paragraph 2, and Article 7 AP II and Rule 110 in the ICRC CIHL Study (treatment and care of the wounded, sick, and shipwrecked) apply irrespective of the nature of the conflict.

48. In NIAC, detained women are to be humanely treated, for the general principle of humane treatment is applicable irrespective of the nature of the conflict. Moreover, detained women also enjoy the benefit of quarters separate from those of men and are to be kept under the immediate supervision of women. Article 5 paragraph 2(a) AP II thus reflects many aspects of the key provisions found in GC III and GC IV, though one should recall that the concept of POWs does not exist in NIAC. Rule 119 in the ICRC CIHL Study and Section 8(e) of the Secretary-General’s Bulletin¹¹⁵ confirm the application of this norm in NIAC. Whilst no reference is made to maternity cases in detention centres, the rules relating to the sick and wounded, as discussed above, are to apply to these women too.

¹¹² CEDAW Committee, General Recommendation No 19, *supra* n 75.

¹¹³ Statute of the International Criminal Court (1988).

¹¹⁴ ICRC CIHL Study. See summary by J.M. Henckaerts in 87 *IRRC* (2005) 175, at 210.

¹¹⁵ Bulletin, *supra* n 35.

D. Legal Consequences of Violations of the Norms

49. Violations of the special rules concerning women in the Geneva Conventions may be divided into grave breaches, specifically enumerated in Article 50 GC I, Article 51 GC II, Article 130 GC III, and Article 147 GC IV, and other acts contrary to the provisions of the Conventions. Whilst the violations of all rules contained in the Geneva Conventions entail state responsibility, only violations of those rules that are considered as grave breaches entail criminal responsibility. Furthermore, different international criminal tribunals, as well as the Statute of the ICC, provide for the criminalisation of certain acts prohibited in the Geneva Conventions.

I. State responsibility

50. If the armed forces of a state violate any of the provisions discussed in section B. above, the state incurs responsibility for their acts.¹¹⁶ United Nations bodies have in past decades taken a lead role in reminding states of their obligations towards women in armed conflict,¹¹⁷ and in condemning, violence, especially sexual violence against women.¹¹⁸ The first legal consequence of the violation of international legal treaty obligations is the duty to cease the act, and to offer appropriate assurances and guarantees of non-repetition. In relation to gender-based violence in armed conflict, the Security Council has '*demand[ed]* that all parties put an end to such practices'.¹¹⁹

51. The second legal consequence is to offer reparation for violations of IHL.¹²⁰ However, under the classic law of state responsibility, compensation is not offered to individuals but to the state. A rare example of compensation being directly awarded to

¹¹⁶ Art 4 ILC Articles on State Responsibility.

¹¹⁷ UN Doc A/RES/59/141 of 25 February 2005; UN Doc A/RES/59/171 of 24 February 2005; UN Doc A/RES/62/94 of 25 January 2008.

¹¹⁸ UNSC Res 1674 (2006) of 28 April 2006, para 5; UNSC Res 1325, supra n 16; UNSC Res 1820, supra n 106; Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (part 1) of 13 October 1993, Art 28; Beijing Declaration and Platform for Action, supra n 13, para 33.

¹¹⁹ UNSC Res 1674, supra n 118, para 5.

¹²⁰ See, e.g., UNSC Res 1894, supra n 10.

women having suffered sexual assault is the awards made by the United Nations Compensation Commission, established by the Security Council to deal with claims arising from the Gulf conflict of 1990–91.¹²¹ The 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 explain that states are to adopt a range of reparation measures,¹²² and that a victim’s right to a remedy cannot be discriminatory towards women.¹²³ The Declaration on the Elimination of Violence against Women,¹²⁴ the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,¹²⁵ the Protocol of the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,¹²⁶ and the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence,¹²⁷ all expressly grant women access to reparations. The Special Rapporteur on Violence against Women has noted that ‘[t]here are signs that the traditional neglect of women in the reparations domain [...] is ending’.¹²⁸

52. The Geneva Conventions are peculiar inasmuch as they compel states to penalize a number of violations of the treaties.¹²⁹ The Security Council has reiterated states’ obligations to prosecute those responsible for war crimes perpetrated against civilians, and more particularly perpetrators of sexual violence.¹³⁰ Moreover, states are obliged,

¹²¹ S/AC.26/1992/8 of 27 January 1992, at Category C.

¹²² UNGA Res 60/147 of 21 March 2006, para 7.

¹²³ Ibid, paras 11–12. In relation to compensation to women victims of violence, see UN Doc A/HRC/7/6/Add.4, supra n 15, para 86.

¹²⁴ Art 4(d) Declaration on the Elimination of Violence against Women, supra n 12.

¹²⁵ Art 7(f) and (g) Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994).

¹²⁶ Arts 4 and 10 Protocol of the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003).

¹²⁷ Arts 5(2) and 30.

¹²⁸ UN Doc A/HRC/14/22 of 23 April 2010, para 25. See, e.g., ECtHR, *Cyprus v Turkey*, App Nos 6780/74 and 6950/75, 10 July 1976.

¹²⁹ Art 49 GC I; Art 50 GC II; Art 129 GC III; Art 146 GC IV.

¹³⁰ See, e.g., UNSC Res 1325, supra n 16, para 11; UNSC Res 1888, supra n 10, Preamble and para 7. See also G8, Declaration on Preventing Sexual Violence in Conflict, 11 April 2013.

if requested by another state or an international criminal tribunal, to surrender alleged war criminals.

53. Further, under the principle of due diligence, states are obliged to train troops to abide by the Geneva Conventions, put domestic measures into place to investigate alleged violations of the Conventions, and provide redress for individuals. These obligations to prevent, investigate, protect, prosecute, redress, adequately punish, and compensate for wrongs committed by the state and its agents through the principle of due diligence, are of particular relevance to women¹³¹ as they obligate the state ‘not merely to protect against violence, but rather to eliminate its “causes”—that is, gender discrimination at structural, ideological and operational levels’.¹³² However, such a wide interpretation cannot be given to the provisions of the Geneva Conventions themselves, as they aim at protecting women from the effects of armed conflict and not at eliminating discrimination.
54. Human rights instruments, which offer complaint mechanisms that are more accessible to individuals alleging violation of a human right, have been used to deal with violations of the aforementioned rules. Most claims made to these bodies tend to focus on sexual violence.¹³³ Rape and sexual violence violate the prohibition on torture and cruel, inhuman, or degrading treatment,¹³⁴ and also impair other human rights, including the right to the highest attainable standard of physical and mental health under the ICESCR.

II. Criminal responsibility

55. Although there is no explicit reference to acts against women in the list of grave breaches in the Geneva Conventions, some of the acts enumerated in the relevant Articles may be interpreted so as to cover violence against women. This is particularly important inasmuch as acts that fall within the definition of a grave breach must be

¹³¹ UN Doc A/HRC/11/6/Add.5, supra n 15, para 64; UN Doc A/HRC/7/6/Add.4, supra n 15, para 65.

¹³² UN Doc A/HRC/11/6/Add.5, supra n 15, para 87.

¹³³ The author of this commentary is unaware of cases that examine violations of women’s rights in armed conflict other than relating to sexual offences.

¹³⁴ See, e.g., *Aydin*, supra n 33, paras 83–84; and *Mejía*, supra n 33, paras 182–88.

criminalized in national law, and alleged culprits must be brought to justice in accordance with the grave breaches system of repression. Only acts of sexual violence, including rape and enforced prostitution, are indirectly covered by the grave breaches provisions¹³⁵ and are now widely viewed as war crimes under customary international law (see Chapter 17, D.I.).

56. Other violations of the protection to which women are entitled in armed conflict are not explicitly referred to by the Geneva Conventions as offences to be criminalized under national law, and do not fall into any of the categories mentioned in the grave breaches provisions. However some acts, such as outrages upon personal dignity (not all rising to the level of inhuman treatment), are now seen as constituting serious violations of IHL and are thus defined as war crimes (under, for example, Article 8(2)(b)(xxi) ICC Statute). That being said, a range of other violations of the Geneva Conventions (e.g., denying free passage to maternity cases, or failing to provide sanitary conveniences separate from those provided to men) fail to meet the *Tadić* requirements,¹³⁶ and cannot thus be considered as war crimes under customary international law. Still, states are allowed, should they so wish, to criminalize under national law violations of IHL that are not listed in the grave breaches provisions of the Geneva Conventions or as war crimes in the ICC Statute.¹³⁷
57. Sexual violence is also a serious violation of IHL in NIAC, as the crime can be subsumed under Article 8(2)(c)(i) and (ii) ICC Statute. Further, rape and acts of a similar nature are specifically referred to in Article 8(2)(vi) ICC Statute, and are listed as serious violations of IHL in Rule 156 in the ICRC CIHL Study.

III. The Security Council

58. The Security Council has also acted to facilitate respect for and enforcement of the IHL rules relating to women in a number of ways. First, the Security Council has condemned sexual violence when used as a tactic of war to target civilians deliberately, or as part of a widespread or systematic attack against civilian

¹³⁵ See discussion in Rule 156 ICRC CIHL Study.

¹³⁶ ICTY, *The Prosecutor v Tadić*, IT-94-1, Interlocutory Appeal Decision, 2 October 1995, para 94.

¹³⁷ See discussion in Rule 156 ICRC CIHL Study.

populations.¹³⁸ Secondly, pursuant to Article 13(b) of the ICC Statute, the Security Council is able to refer situations to the ICC. It has ‘recall[ed] the inclusion of a range of sexual violence offences in the Rome Statute of the International Criminal Court and the statutes of the ad hoc international criminal tribunals’,¹³⁹ and situations referred to the ICC by the Security Council have led to arrest warrants including sexual violence as a war crime.¹⁴⁰ Thirdly, the Security Council has established a range of mechanisms, the purpose of which is to monitor, analyse, and report on conflict-related sexual violence so as to provide the Security Council with timely, accurate, and reliable information in order to take action to prevent and respond to conflict-related sexual violence.¹⁴¹ Three UN posts have been created—the Special Rapporteur on Violence against Women (1994), the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery, and Slavery-Like Practices (1995), and the Special Representative on Sexual Violence in Conflict—to monitor violations perpetrated against women, notably in armed conflict. The Secretary-General also reports on the subject.¹⁴² Fourthly, the Security Council has enjoined the Secretary-General of the UN to mainstream sexual violence in armed conflict in all UN reports to the Security Council,¹⁴³ and has requested the Secretary-General to monitor the implementation of pledges on the prevention, prohibition, and investigation of sexual violence made by parties to armed conflict on the Security Council’s agenda.¹⁴⁴ This policy of ‘naming and shaming’ has now been broadened to encompass ‘parties suspected of committing or being responsible for patterns of rape and other forms of sexual violence’.¹⁴⁵ Yet again, the focus is on sexual violence rather than on the protection of women more generally.

¹³⁸ See, e.g., UNSC Res 1888, supra n 10, para 1; UNSC Res 2106 (2013) of 24 June 2013, para 2.

¹³⁹ See, e.g., UNSC Res 1888, supra n 10, Preamble.

¹⁴⁰ See, e.g., ICC, *The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, Pre-Trial Chamber I, ICC-02/05-01/07, 27 April 2007, at Counts 14 and 43.

¹⁴¹ UN Doc A/66/657-S/2012/33, supra n 50, para 7.

¹⁴² UNSC Res 1820, supra n 106, para 15.

¹⁴³ See, e.g., UNSC Res 1888, supra n 10, para 24.

¹⁴⁴ UNSC Res 1960, supra n 10, para 6; UNSC Res 2106, supra n 138, paras 5–8.

¹⁴⁵ See, e.g., Annex of UN Doc A/66/657-S/2012/33, supra n 50. However, it should be noted that most parties listed are non-state actors.

E. Critical Assessment

59. Overall the Geneva Conventions provide special protection for pregnant women, maternity cases, and mothers of children aged under seven, and address the vulnerability of women to sexual violence in armed conflict. These provisions have been criticized for perpetuating stereotypical ideas of women as weak individuals whose ‘honour’ is defined by reference to male views on women, associating women with children, and failing to consider gender rather than sex as the distinguishing factor.
60. It is claimed that IHL rules are archaic and reflect the very stereotypical ideas about women (honour is likened to virtue)¹⁴⁶ that perpetuate discrimination and violence against women, and lead to the stigmatization and rejection of victims of sexual violence.¹⁴⁷ That being said, a modern interpretation of IHL confirms the view that sexual violence is a violation of a woman’s physical and mental integrity. Although violence against women in armed conflict is the manifestation of unequal power relations between men and women, it is not the aim of the Geneva Conventions to tackle the roots of discrimination based on sex and address social, economic, and structural inequalities.¹⁴⁸ Nonetheless the Geneva Conventions can be used to debunk the idea that women are property, spoils of war. Likewise, in some cultures the rape of women is viewed as a violation of the honour of the community, rather than of the individual herself.¹⁴⁹ Yet again, IHL is not meant to alter cultural traditions and perceptions, but to ensure that certain standards of treatment towards women are being respected. Feminists also argue that IHL is old-fashioned, in that it considers women as civilian victims (of sexual violence) and men as combatants.¹⁵⁰ Whilst this might

¹⁴⁶ The notion of attack upon a woman’s honour ‘reinforces the notion of rape as a social stigma rather than an attack against a woman’s personal and psychological well-being’: J. Gardam and M. Jarvis, ‘Women and Armed Conflict: The International Response to the Beijing Platform for Action’, 32 *Columbia Human Rights Law Review* (2000) 1, at 56.

¹⁴⁷ UN Doc E/CN.4/Sub.2/1998/13, supra n 42, para 16.

¹⁴⁸ ICRC Annual Report 2011, Annex 2, supra n 69, at 30, ‘[T]he ICRC does not claim to reform gender relations.’

¹⁴⁹ A. Barrow, ‘UN Security Council Resolutions 1325 and 1820: Constructing Gender in Armed Conflict and International Humanitarian Law’, 92 *IRRC* (2010) 221, at 224.

¹⁵⁰ See discussion in UN Doc A/HRC/11/6/Add.5, supra n 15, para 43.

have been the case when the Geneva Conventions were drafted, the fact that many women are now in the armed forces or armed opposition group challenges this view.¹⁵¹ It is thus not possible to apply a historical interpretation anymore. The ICRC has recognized that ‘the relevant question is not who is more vulnerable but rather who is vulnerable to what particular risks’, and ‘it is an oversimplification to see one gender as active (male combatants) and the other as passive (female victims)’.¹⁵² The absence of rape in the list of grave breaches also suggested that states were not under the duty to criminalize and prosecute rape (and sexual violence more generally). Nevertheless, in the 1990s, when feminists claimed that ‘rape ought to be a war crime’, rape was already a war crime under customary law, albeit rarely prosecuted,¹⁵³ and this was confirmed by the subsequent progressive case law and statutes of the international criminal tribunals (see Chapter 17, D.I.).

61. Another criticism levelled at the Geneva Conventions is that the rationale for protecting women is their nurturing and caring roles as regards children: the majority of provisions protecting women view them in this capacity. The comingling of the specific concerns of women with those of children tends to prove that women are viewed only in their reproductive roles. The original Commentary to Article 132 GC III explains that pregnant women and mothers of infants and young children were included in the provision ‘because of what children represent for the future of humanity’.¹⁵⁴ Additional Protocol I does little to dispel this, as the expression ‘nursing mothers’ was introduced to protect future generations. This association with children serves to highlight the reproductive functions of women to the exclusion of their other, non-reproductive related needs. Whilst it is logistically coherent to regroup women and children, it instrumentalizes women’s bodies and minds as vehicles to care for children. This exposes a feminine model of a woman whose aim is to give birth to and care for children. Yet it is not only in their role as carers of the disabled, children, or the elderly, that women ought to be protected: women perform a variety of roles, often acting as the backbone of society. Today, women’s participation is visible in a number of fields previously thought to be the exclusive preserve of men.

¹⁵¹ *Women and War*, supra n 84, at 18.

¹⁵² ICRC Annual Report 2011, Annex 2, supra n 69, at 30.

¹⁵³ UN Doc E/CN.4/Sub.2/1998/13, supra n 42, para 69.

¹⁵⁴ Pictet Commentary GC IV, at 513.

62. A further criticism is that the association with children gives the impression that women, like children, are powerless and in need, thereby infantilizing women.¹⁵⁵ Lumped together with children in the same category of vulnerability, women's needs, experiences, and roles in armed conflict are often overlooked. The protection rather than prohibition language found in the Geneva Conventions buttresses this viewpoint, for it addresses women's needs within a welfare paradigm. What is more, this normative recognition aligns women with victimhood, denying them any individual and/or collective agency as active participants in armed conflict. Having said that, the focus may slowly be shifting from a victimization-oriented approach to one of empowerment. The resilience shown by women is a testimony to their real power in armed conflict, a fact acknowledged by Security Council Resolution 1325, which views women not simply as vulnerable individuals, or as victims, but rather as a driving force for change and peace.¹⁵⁶

63. Since the drafting of the Geneva Conventions, the concept of 'gender' has emerged in a number of legal instruments¹⁵⁷ and through the cases.¹⁵⁸ Whilst 'sex' refers to the biological features of a person, 'gender' 'denotes the culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex'.¹⁵⁹ Whilst the concept of 'gender' could be used to apply to both men and women, gender is often understood as relating to women only.¹⁶⁰ Indeed sexual violence against men is framed in terms of violation of personal integrity. This is, however, changing. Recently a proper application of the concept of gender in IHL has reinforced that sexual violence, whether perpetrated against a man or a woman, is an act against a person's physical integrity.¹⁶¹ Further, the application of the concept of

¹⁵⁵ UN Doc E/CN.4/2001/73/Add.2 of 6 February 2001, para 25.

¹⁵⁶ See also CEDAW Committee, General Recommendation No 30, supra n 1, para 6.

¹⁵⁷ See, e.g., Art 7(1)(h) ICC Statute.

¹⁵⁸ *Delalić et al*, supra n 32, para 493.

¹⁵⁹ ICRC, *Addressing the Needs of Women*, supra n 30, at 7.

¹⁶⁰ See, e.g., CEDAW Committee, General Recommendation No 19 of CEDAW, supra n 75; UNSC Res 1674, supra n 118; UNGA Res 60/1 of 24 October 2005, para 116.

¹⁶¹ See, e.g., the commentary on Rule 134 ICRC CIHL Study that specifies that 'the prohibition of sexual violence applies equally to men and women', and so does Rule 93 on rape and other forms of sexual violence of the ICRC CIHL Study; UNSC Res 1960, supra n 10. See also the gender-neutral definition of 'rape' in UN Doc E/CN.4/Sub.2/1998/13, supra n 42, para 24, and ICC Statute, fn 15 (relating to Art 7 para 1(g)(1)) and fn 50 (relating to Art 8(2)(b)(xxii)(1)).

‘gender’ rather than ‘sex’ could shift the focus away from sexual violence to other human activities prohibited by the Geneva Conventions. It would help in understanding male and female roles in armed conflict, and thus offer better-tailored protection to such individuals. After all, the ICRC admits that ‘[g]ender analysis is [...] used to better appreciate the respective sociocultural roles attributed to men and women when it comes to the division of labour, productive and reproductive activities, and access to and control over resources and benefits’.¹⁶² Better protection for women can be achieved by espousing a holistic approach to women’s and men’s roles, responsibilities, and experiences.

Bibliography

- A. Barrow, ‘UN Security Council Resolutions 1325 and 1820: Constructing Gender in Armed Conflict and International Humanitarian Law’, 92 *IRRC* (2010) 221.
- J. Gardam, ‘The Neglected Aspect of Women and Armed Conflict: Progressive Development of the Law’, 52 *NILR* (2005) 197.
- J. Gardam and M. Jarvis, ‘Women and Armed Conflict: The International Response to the Beijing Platform for Action’, 32 *Columbia Human Rights Law Review* (2000) 1.
- J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law* (The Hague: Kluwer, 2001).
- J. Gardam, ‘Women, Human Rights and International Humanitarian Law’, 324 *IRRC* (1998) 421.
- F. Krill, ‘The Protection of Women in International Humanitarian Law’, 249 *IRRC* (1985) 337.
- C. Lindsey, ‘Women and War—An Overview’, 839 *IRRC* (2000) 561.

¹⁶² *Women and War*, supra n 84, at 3.