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**INTERNATIONAL JUSTICE AND SHIFTING PARADIGMS: ARTICLE: Do We Need New International Law to Protect Women in Armed Conflict?**

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**SUMMARY:**

... Women and Grave Breaches of the Geneva Conventions and Protocol I Violations of Geneva law may be divided into grave breaches, specifically enumerated in the four conventions and Protocol I, and other acts contrary to the provisions of the Conventions and Protocols. ... The forms of gender-based abuse of women and girls in armed conflict that are most frequently documented in literature include: . rape . sexual abuse and assault . deliberate infection with HIV/AIDS . pornography and recording of sexual violence . sexual mutilation . medical experimentation on sexual and reproductive organs . enslavement and sexual slavery . forced marriages or cohabitation . pregnancy complications, birth defects, and sterility following exposure to toxic or prohibited weapons . gender based forms of arbitrary detention and de facto arbitrary detention . forced impregnation . forced pregnancy and abortion; enforced sterilization . strip-searching, forced public nudity, and sexual humiliation . forced veiling or unveiling . trafficking in women and girls . enforced prostitution . failure to grant refugee status for gender-based harms Other types of abuses prevalent during conflict may have a disproportionate or gender-specific impact on women. ... Undoubtedly, recent human rights standards have embraced this holistic view of violence against women, as both a cause and consequence of women's subordination in society and inherently linked to pervasive forms of discrimination against women. ... The goals of these rules, taken together, have been described as "to either reduce the vulnerability of women to sexual violence, to directly prohibit certain types of sexual violence, or to protect them when pregnant or as mothers of young children." ... However, the torture of women and "willfully causing great suffering or serious injury to body or health" to women protected persons are clearly grave breaches of these treaties. ... The ICRC introduction to the Commentary on the Fourth Geneva Convention expresses hope "that the Commentary will be of service to all who, in Governments, armed forces and national Red Cross Societies, are called upon to assume responsibility in applying the Geneva Conventions, and to all, military and civilians, for whose benefit the Conventions were drawn up."

**TEXT:**

[\*363]

## I. Introduction

Expert opinion on the quality of international humanitarian law's provisions for the protection of women diverges. The official position of the International Committee of the Red Cross (ICRC), recognized in the Geneva Conventions as the guardian of international humanitarian law (IHL), [\*364] is that sufficient rules exist in IHL to prevent violence

against women in armed conflict. In the organization's view, the real problem is the failure to implement this law. According to the ICRC, "If women have to bear so many of the tragic effects of conflict, it is not because of any shortcomings in the rules protecting them, but because those rules are not observed." n1 It repeatedly calls on governments to respect and implement the existing rules. For example, as Francoise Krill wrote in the International Review of the Red Cross in 1985:

If women in real life are not always protected as they should be, it is not due to the lack of a legal basis . . . . The international community will not succeed in remedying this situation merely by adopting new rules. Most of all, it must see that the rules already in force are respected. n2

This view would seem to underscore the importance of the role of international criminal law, which is precisely about implementing IHL's prohibitions. It hints that the pressing task is not looking backward to "fix" humanitarian law, but rather looking forward toward its aggressive implementation and development through, inter alia, the practice of international criminal law. This writer has heard the same view expressed by senior staff of some major human rights NGOs.

On the other hand, a number of contemporary feminist critics have suggested that some aspects of the IHL rules regarding women are archaic and reflect the very stereotypical ideas about women that perpetuate discrimination. Given the identification of a crucial link between discrimination and violence against women, including in the conflict context, this assertion is particularly significant. For example, Judith Gardam and Michelle Jarvis concluded in 2000, "it is apparent from a comparison between the reality of armed conflict for women . . . and the existing relevant norms of international law, that the latter are inadequate." n3 This view suggests that implementation of extant IHL through international criminal courts alone, though an important step, may not entirely remedy the problem. Instead, perhaps something must be done to modernize IHL, itself, in light of advances in understanding violence against women in conflict, especially those advances made in international human rights standards. n4 [\*365]

This article will briefly explore these dichotomous views to assess how adequately IHL addresses women's experiences of conflict, and what, if anything, should or could be done to remedy any of the gender-related shortcomings identified in IHL.

## II. Harms to Women in Conflict

### A. Overview

To assess feminist claims regarding the failures of IHL to distill women's experiences of war, n5 this article begins with an overview of findings in the literature regarding those experiences. n6 The international community has formally acknowledged in Security Council Resolution 1325 that "civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements . . . ." n7 Violence against women in war is widespread, often systematic, multi-faceted, and heinous. Reports come from all regions of the world and a variety of sources.

The forms of gender-based abuse n8 of women and girls in armed conflict that are most frequently documented in literature include: n9 [\*366]

- . rape
- . sexual abuse and assault
- . deliberate infection with HIV/AIDS
- . pornography and recording of sexual violence
- . sexual mutilation
- . medical experimentation on sexual and reproductive organs
- . enslavement and sexual slavery
- . forced marriages or cohabitation
- . pregnancy complications, birth defects, and sterility following exposure to toxic or prohibited weapons
- . gender based forms of arbitrary detention and de facto arbitrary detention

- . forced impregnation
- . forced pregnancy and abortion; enforced sterilization
- . strip-searching, forced public nudity, and sexual humiliation
- . forced veiling or unveiling
- . trafficking in women and girls
- . enforced prostitution

. failure to grant refugee status for gender-based harms Other types of abuses prevalent during conflict may have a disproportionate or gender-specific impact on women. These include deliberate or indiscriminate attacks on the civilian population, the detention of women in conditions designed for men or without the presence of female guards, or forced displacement and expulsions. Similarly, the deprivation of economic, social, and cultural rights in conflict situations has a particular impact on women. This includes:

- . house destruction, demolition, and expropriation
- . property destruction and confiscation
- . denial and withholding of humanitarian assistance
- . shortage of food, leading to malnutrition (cultural custom may mandate that women and girls are fed last) [\*367]
- . lack of adequate sanitary conditions and supplies, especially during menstruation and lactation
- . loss of education and employment
- . lack of adequate medical care and rehabilitation, including reproductive and maternal health care

. increased burden of care responsibilities Furthermore, the effects of gender-based abuses suffered during times of conflict are magnified by discrimination against women, and may endure long after armed conflict has ended. Examples include:

- . "unmarriageability" or loss of a spouse after rape or amputation due to landmines or other injury during conflict
- . discrimination against mothers of children produced by conflict-related rapes
- . the derogatory perception of victims as "fallen," "dishonored," or "disgraced"
- . "shame" imposed on the family
- . the practice of honour killings, suicides, and self-inflicted harm following sexual abuse or rumors of such abuse
- . impunity for perpetrators of gender-based harms
- . the perception of women as "secondary" victims of conflict
- . the increase in so-called ordinary violence against women

Does all of this amount to violence against women, or are some of these occurrences and discriminatory impacts merely tragic side effects of conflict? In considering this question, it is interesting to note that the most recent human rights instrument to be adopted to combat violence against women takes a broad approach to defining violence against women that might encompass the wide range of abuses against women listed above. The African Union Protocol on the Rights of Women in Africa, defines "violence against women" to include:

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time or during situations of armed conflict[] or war. n10

Such a comprehensive approach represents the emerging way the human rights regime understands conflict-related violence against women. [\*368]

#### B. Perpetrators

In times of strife, it must not be forgotten that women face harm at the hands of a wide range of public and private actors. Invading soldiers may rape and murder. Armed groups may kidnap women and force them to fight. Even those sent by the international community to help, such as aid workers or peacekeepers, may sexually harass or abuse women. Furthermore, "ordinary" violence against women and girls, such as domestic violence, child abuse, battering, rape, or female genital mutilation, may be exacerbated by the pressures of a conflict situation. Protection or redress for such violence may be even more unavailable than usual due to the breakdown of law enforcement efforts. Agents of a state may be viewed as threatening in the context of a conflict, and women may be unwilling or unable to cooperate with them.

Thus, women and girls face a grim array of violence, harm, and deprivation from a number of quarters during conflict. They may be surrounded on all sides by these potential threats, including what the Former UN Special Rapporteur on violence against women has called threats of "unimaginable brutality," without safe haven.<sup>n11</sup> These abuses are not exclusively comprised of sexual violence, though such violence certainly looms as a constant and horrific possibility. The full picture must be considered to grasp women's experience in conflict and as a standard by which to judge whether international law responds appropriately.

### C. Discrimination and Women in Armed Conflict

The contemporary understanding of the multifaceted phenomenon of conflict-based violence against women grounds this web of harm not simply in the workings of war, but also in ongoing, pervasive discrimination against women and their quotidian subordination.<sup>n12</sup> Discrimination against women may function in any or all of the following ways: (1) as a violation per se, (2) as a cause of violations in conflict, (3) as a factor which compounds violations in conflict, or (4) as an obstacle to adequate remedies for abuses.

In the view of many feminist scholars, wartime violence against women, though an immediate product of the crucible of conflict, is also related to "peacetime" assaults on and attitudes about women.<sup>n13</sup> Thus, [\*369] success for the continuing struggle against sex discrimination is a sine qua non for effectively curtailing or preventing violence against women in conflict. Recent international standards reflect this view. For example, the Beijing Platform for Action points out that "women and girls are particularly affected [by violence in armed conflict] because of their status in society and their sex."<sup>n15</sup> This seems to suggest an even greater urgency for ridding IHL of any lurking discriminatory notions.

The CEDAW Committee, created to monitor implementation of the Convention on the Elimination of All Forms of Discrimination against Women, introduced this connection to the world of international standards when, in 1992, it issued the ground-breaking General Recommendation No. 19.<sup>n16</sup> This recommendation sets out that gender-based violence is a form of discrimination, and one that gravely affects women's enjoyment of their human rights.<sup>n17</sup> With specific reference to armed conflict, the Recommendation makes clear that gender-based violence that impairs or nullifies "the right to equal protection according to humanitarian norms in time of international or internal armed conflict" is covered by the Convention as a form of discrimination.<sup>n18</sup> In 1993, the UN General Assembly Declaration on the Elimination of Violence against Women further proclaimed:

Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial

[\*370]

social mechanisms by which women are forced into a subordinate position compared with men . . . .<sup>n19</sup>

Other related and often overlapping discriminations, such as those based on race, ethnicity, and religion also frequently motivate and perpetuate violence against women in conflict. The Durban Declaration and Programme of Action, which emerged from the 2001 UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, has underscored that "the intersection of discrimination on grounds of race and gender makes women and girls particularly vulnerable to [sexual violence used as a weapon of war], which is often related to racism, racial discrimination, xenophobia and related intolerance."<sup>n20</sup>

Undoubtedly, recent human rights standards have embraced this holistic view of violence against women, as both a cause and consequence of women's subordination in society and inherently linked to pervasive forms of discrimination against women. Conflict creates a free-fire zone, a sort of "free-for-all," in which pre-existing ideas about women as inferior, and other discriminatory and misogynist ideas, may be given free expression by frequently all-male groups of

soldiers or other combatants. It is within this framework that violence against women in armed conflict should be understood; as a (perhaps gross) magnification of "ordinary" violence and attitudes, but not as an aberration. Bearing in mind this sketch of women's lives in conflict and of contemporary human rights understandings of the same, we now proceed to consideration of IHL's response.

### III. International Humanitarian Law

#### A. Introduction

In many ways, IHL represents a tremendous legal achievement as an international consensus on limiting the methods and means of warfare [\*371] designed to minimize the suffering caused. n21 Additionally, in judging IHL, one must be sensitive to temporal considerations. The core of conventional IHL is comprised of the Four Geneva Conventions adopted in 1949 n22 (as explicated by the authoritative Commentaries published by the ICRC between 1952 and 1960) n23 and their two Additional Protocols adopted in 1977. n24 As noted above, it has only been since the early 1990s that international human rights standards have begun to address seriously violence against women.

Each of the treaties noted has a somewhat different focus. Geneva Conventions I and II cover wounded and stranded soldiers on land and sea, respectively, while Geneva III regulates the treatment of prisoners of war, and Geneva IV focuses on the lives of civilians in times of war and occupation. [\*372] Women and girls do sometimes serve as combatants, a growing reality which must not be overlooked. However, they most often fit into the civilian category. Thus, the Fourth Geneva Convention, and the analogous provisions relating to internal armed conflict, are particularly relevant to them. With the exception of Common Article 3 of the Geneva Conventions, the four Conventions relate exclusively to international armed conflict. Less protection is afforded in internal conflict, which is covered only by Common Article 3 and Protocol II, than in international conflict. This distinction has been likened by some feminist scholars to the lower level of protection offered by classical interpretations of human rights law for harms in the "private" sphere. n25

Women are theoretically to benefit, just as men are supposed to, from the general protections offered by IHL, including those shielding the wounded, combatants, and persons detained in connection with an armed conflict. n26 However, in addition to the general provisions of IHL, there are some rules that are gender-specific. According to the ICRC, of the five hundred and sixty articles comprising the law of Geneva, approximately fifty provisions from the Conventions and Protocols deal with non-discrimination or otherwise provide "special protection for women." n27 Much in this regime, which specifically sought to address ways women functioned during and had been affected by World War II, should be lauded. Yet, in light of current understanding of women's human rights, there is a fair amount to criticize, particularly in some of the unfortunate wording to be found in the Commentary on the key texts. n28

#### B. Non-Discrimination

The 1949 Conventions and the 1977 Protocols establish a principle of equality to the effect that "no adverse distinction can be drawn between individuals on the basis of, inter alia, sex." n29 This principle is reflected, for example, in Article 12 of the First and Second Conventions, which require humane treatment of persons in the power of parties to the conflict. They [\*373] prohibit "any adverse distinction founded on sex . . . or any other similar criteria" in such treatment. n30 Article 2(1) of Protocol II repeats this language with respect to the internal armed conflicts it covers. n31

Note that it is only adverse distinctions which are banned, and as Gardam and Jarvis conclude, "differentiation on the basis of sex is thus permissible as long as its impact is favourable." n32 For example, sex may be considered, as well as several other factors, in determining if labor is appropriate for a particular prisoner of war n33 or the quality and quantity of bedding and blankets for internees in occupied territory. n34 The ICRC Commentary on the Fourth Geneva Convention seems to clearly appreciate the need for a careful approach: "Equality might easily become injustice if it was applied to situations which were essentially unequal, without taking into account such circumstances as the . . . sex of the protected persons concerned." n35 This certainly seems to be a positive approach on the part of IHL, overcoming problems asserted by feminist legal scholars with overly formal views of equality.

#### C. "Special Protections" for Women

In addition to non-discrimination, the touchstones of IHL's gender-related provisions are general precepts that, standing alone, do not entail specific obligations, but are important for understanding the philosophical approach of women's IHL. The goals of these rules, taken together, have been described as "to either reduce the vulnerability of women to sexual violence, to directly prohibit certain types of sexual violence, or to protect them when pregnant or as mothers of young children." n36 An example may be found in Article 12 of the First and Second Geneva Conventions,

which states: "Women shall be treated with all consideration due to their sex." n37 The Commentary suggests that this provision is "an example of a favourable distinction made compulsory." n38 This sounds generally like a good idea and could have a range of positive connotations. However, the relevant Commentary, which was published in 1960 by the ICRC, explains it as follows: "What special consideration? No doubt that accorded in every civilized [\*374] country to beings who are weaker than oneself and whose honour and modesty call for respect." n39 Feminist scholars of IHL have justifiably criticized this language and the view of women that seems to underpin it. n40

Another example of a general provision is Article 14 of the Third Geneva Convention, referring to women prisoners of war: "Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men." n41 Turning again to the ICRC Commentary, one finds that the key points to be taken into consideration in deciphering the meaning of this somewhat vague provision are the following: "weakness," "honour and modesty," and "pregnancy and child-birth." n42 "Weakness," a most unfortunate word choice and one that is somewhat absurd given the amount of strength involved in childbearing, seems intended to refer to women's particular physical capacity. On the positive side, such particularity is to be considered when selecting appropriate working conditions and food they must receive. "Honour and modesty" is an old-fashioned way of referencing the intention to protect women from sexual abuse and other "indecent assault." Finally, special treatment is to be afforded to pregnant women whether they are pregnant when taken prisoner, or as the Commentary notes ominously, "become pregnant in captivity despite the precautions taken." n43

Women POWs must be treated as well as men, and in some ways more favourably in a manner specific to their needs. While well-intentioned and perhaps protective of women in conflict situations, the Commentary indicates that this general principle was designed with a paternalistic view of women in mind. It assumes chivalric attitudes, rather than pervasive discrimination, as the ordinary societal stance toward women. This outmoded attitude toward women colors the other gender-specific IHL norms.

#### 1. Protections for Particular Categories of Women

In addition to the general provisions for the protection of all women, certain categories of women are to be afforded particular treatment. These specific rules are designed to meet the goals of the general provisions discussed above. [\*375]

##### a. Women in Detention and Internment

A network of specific and important rules protects detained and interned women impacted by conflict. Separate quarters and conveniences must be provided for women prisoners of war (even during disciplinary punishment), n44 women internees (except when interned along with a family unit), and other women detainees. n45 Female supervision is required for female POWs under disciplinary punishment (under the Third Geneva Convention) and at all times (under Protocol 1); as well as for women internees and detainees, including those in occupied territory, except when held with a family unit. n46 Women internees are to be searched only by women. n47 In interpreting the gender-specific provisions of the Geneva system, the ICRC has written more broadly that this protection should apply to all women detainees. n48

A female POW cannot be sentenced or punished in a more severe way than a female member of the armed forces of the Detaining Power would be. Furthermore, a woman prisoner of war may, in no case, be "awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence." n49 Finally, pregnant women and mothers with dependent infants "who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority." n50 Extra provision of food is to be made, as needed, to such women. n51 It certainly would be of enormous benefit to women detainees in conflict were such specific rules respected. They indeed cover a range of issues of key concern to women in war and offer important safeguards.

Yet, in turning again to the Commentaries, one finds that it is not women's rights to privacy or security of person that require gender [\*376] segregated conveniences but rather, the morally laden notion of "decency." n52 It is to protect women's "honour and modesty," not their basic rights to physical integrity or dignity, that they are afforded separate quarters and female supervision during punishment. n53 Instead of focusing on respect for their persons as grounds for providing separate sleeping quarters for women internees, the relevant Commentary suggests this is a manifestation of "the respect due to women's honour." n54 With regard to the prohibition on punishing a woman more severely than a man, the Commentary simply states that this "affords a safeguard which corresponds to the principles of civilized nations," a rather remarkable assertion in light of the contemporaneous global treatment of women. n55

## b. Mothers and Pregnant Women

Further protection is offered to pregnant women and new mothers, beyond the detention context. As Krill notes, pregnant women and maternity cases are often "assimilated . . . to the sick and wounded . . ." in the Geneva law. n56 They are afforded special protection, usually, but not exclusively, under this rubric. Mothers and pregnant women should receive special treatment in regards to medical care. n57 In addition to "maternity cases," hospitals, their personnel, and land and air vehicles must be protected and respected; they may in "no circumstances be the object of attack." n58 States must allow free passage of foodstuffs and supplies to pregnant women and nursing mothers, n59 and they are to receive priority in the distribution of relief supplies. n60

Beyond the provision of supplies, state parties must consider the possibility of establishing safety zones for pregnant women and mothers with children under the age of seven n61 and endeavor to evacuate "maternity cases" from conflict zones. n62 Attempts should be made at early repatriation, release, or accommodation in a neutral country for pregnant women and [\*377] mothers with infants and young children, among others. n63 Maternity cases among internees in occupied territory must be admitted to medical facilities where they may receive adequate care. n64 However, they should not be transferred if it would be detrimental to their health, unless their immediate safety is at issue. n65

As aliens in occupied territory, pregnant women and mothers of children under the age of seven are to be accorded the same preferential treatment they would receive if they were nationals. n66 Such preferential treatment may include "the granting of supplementary ration cards, facilities for medical and hospital treatment, special welfare treatment, exemption from certain kinds of work, protective measures against the effects of war, evacuation, transfer to a neutral country, admission to hospital and safety zones and localities, etc." n67 Occupying powers cannot alter preferential measures that were in effect prior to the occupation for pregnant women and mothers of children under the age of seven. n68

The death penalty is not to be imposed on pregnant women or women with dependant infants for an offense related to the conflict, "to the maximum extent feasible . . ." n69 Even in internal armed conflict, death sentences are not to be carried out on pregnant women. n70

Again, similar to the provisions regarding detention, the system for protection of pregnant women holds many important rules that, if implemented, could undoubtedly contribute toward a decrease in the suffering women endure during conflict. This code attempts to shield pregnant women and mothers of small children from harm in a number of practical ways. However, the Commentary notes that this is because pregnant women and women with young children are categorized by "weakness making them incapable of contributing to the war potential of their country . . ." n71

An additional question surrounds the commingling of the specific concerns of women, especially pregnant women, with those of children. Though logistically coherent in some ways, this approach has been problematized by women's human rights methodology. The category, "women and children," n72 may infantilize women. n73 Meanwhile, the focus on protect [\*378] ing future generations associated with the rules related to pregnant women may also, inadvertently, "instrumentalize" women and their bodies. n74 This brings us to consideration of IHL's norms designed to protect women from specific types of violence.

## 2. Protections from Particular Categories of Abuse

### a. Rape and Sexual Abuse

A litany of IHL provisions is explicitly designed to protect women from various forms of sexual violence. One of the essential references is found in the Fourth Geneva Convention: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." n75

The Commentary interprets this specific proscription as arising from the general concern for women's honor and "family rights," both somewhat antiquated notions when used in the context of sexual violence. However, to be fair, the Commentary also refers in relevant part to respect for the person and, admittedly, does take a somewhat enlightened approach to honor. It defines the concept in general as "a moral and social quality. The right to respect for his honour is a right invested in man because he is endowed with a reason and a conscience." n76 Furthermore, the Commentary does express outrage at the sexual atrocities against women during World War II, which were inadequately prosecuted afterwards. This leads to a broad condemnation, as follows: [\*379]

These acts [rape, enforced prostitution, and any form of indecent assault] are and remain prohibited in all places and in all circumstances, and women, whatever their nationality, race, religious beliefs, age, marital status or social condition have an absolute right to respect for their honour and their modesty, in short, for their dignity as women. n77

The Commentary's authors seem to have been aware of the problem and attempted to address it, but they did not supersede the discriminatory social norms at the time of drafting. While the rights of individual women to maintain bodily integrity are implicated, they are almost consistently grounded in outdated notions of chastity and virtue. Again and again, the four Conventions and the Commentaries state that rape is "an attack on women's honour" or that women should be protected from being "forced into immorality by violence." n78

To achieve these ends, however phrased, women are entitled to special protections that are much more helpful than the language used in the general rules. For example, the ICRC Commentary to the Third Geneva Convention, Article 14 weaves together a number of specific provisions toward the prevention of sexual assault of women POWs. These include: providing separate housing (Art. 25), sanitary installations (Art. 29), and differential execution of punishment for women prisoners (Art. 108). Additionally, this encompasses rules protecting prisoners in general from insults and public curiosity (Art. 13(2)), limiting the nature of questioning and interrogation (Art. 17) and requiring that adequate clothing be provided (Art. 27). Such practical provisions are vital to preventing sexual assaults.

Furthermore, the drafters of the Protocols in the 1970s introduced language that focuses less on "honor" and more on human dignity: "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault." n79 This provision applies to all women in the territory of parties to the conflict, whether it be an international conflict or one for self-determination in accordance with the Protocol I's scope of application.

In non-international armed conflicts, "the following acts against . . . [persons taking no part in the hostilities] are and shall remain prohibited at any time and in any place whatsoever: . . . outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault . . ." n80 As with all rules in Protocol II, this applies to women in specific types of non-international armed conflict. An analogous rule is found in Protocol I. However, this rule specifically [\*380] prohibits only "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault . . ." without specific mention of rape. n81 But given the language of Protocol II, it impliedly includes rape as a form of outrage on personal dignity. Note further that threats to commit such abuses are also absolutely forbidden. n82

#### b. Implied Prohibitions of Rape and Other Sexual Violence in Conflict

The contemporary understanding of rape, by or with the consent or acquiescence of the state, while in detention, or by organized armed groups in conflict, is that such abuse constitutes a form of torture. n83 Successive UN Special Rapporteurs on torture have affirmed that rape in detention is a form of torture. n84 Rape and sexual abuse of women in such contexts also clearly constitute forms of violence against women. Hence, a number of other provisions of Geneva law may be considered, by implication, to outlaw these practices. Through progressive interpretation these principles can be harnessed to combat such abuse. Unquestionably, explicit inclusion would have been preferable, but at the very least, these extra provisions can be considered in evaluating IHL's contemporary responsiveness to women in conflict.

The additional articles include those which prohibit the torture of wounded and sick combatants on land and sea (including torture by enemy civilians), n85 and those which protect POWs from torture, n86 physical mutilation [\*381] or "acts of violence." n87 Additional relevant prohibitions incorporate those that require respect for the person of protected persons n88 and their being shielded from any physical suffering, mutilation, n89 or torture, "whether applied by civilian or military agents." n90

Importantly, in the case of an internal armed conflict, these principles are echoed by Protocol II and, to some degree, by Common Article 3, which has a wider sphere of application. For example, Protocol II, Art. 4(2)(a) prohibits torture, mutilation, and other forms of violence against those hors de combat, as does Common Article 3. n91 Protocol II, Art. 7 holds that the wounded, the sick, and the shipwrecked shall be respected, protected, and treated humanely. Individual civilians are not to be attacked; nor are acts or threats of violence (including sexual violence) for the purpose of spreading terror among the civilian population to be tolerated. n92 Under the dictates of Common Article 3(c), "outrages upon personal dignity, in particular humiliating and degrading treatment" are utterly impermissible. Protections from violence to health and physical and mental well-being, and prohibitions of torture, cruel treatment, and slavery and the slave trade are all found in Protocol II. n93 Respect, humane treatment, and non-discriminatory treatment of persons not taking part in the hostilities are mandated. n94

#### D. Rules Covering Abuses that Disproportionately Impact Women

The Beijing Platform for Action noted that "civilian victims, mostly women and children, often outnumber casualties among combatants." n95 Gardam and Jarvis have argued that the Geneva law principle that is most important for women during the conduct of hostilities is what they term "non-combatant immunity." n96 As a cornerstone of IHL, also known as the principle of distinction, it requires parties to the conflict to distinguish between civilians and combatants at all times and to refrain from deliberately or indiscriminately attacking the former. [\*382]

Protocol I offers detailed rules for how this principle is to be implemented during conflicts within its scope and so may be seen as particularly important for women. n97 Article 51 of Protocol I prohibits: direct attacks on civilians; acts with the purpose of spreading terror among civilians; reprisals against civilians and using civilians as shields for military operations. n98 Significantly, it also forbids indiscriminate attacks. n99 Indiscriminate attacks are those that do not specifically aim for a particular military target, or employ an inherently indiscriminate method or means, or which treat a group of military targets, even if separated by civilian areas, as one. n100 Article 51(5)(b) of Protocol I also elaborates the crucial principle of proportionality that prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." n101 To the military thinker, this may seem like a tremendous concession of strategic choices for considerations of humanity. To the human rights lawyer, these rules do not approach sufficient protection of any civilian persons, regardless of gender, in time of war and rather reflect IHL's inherent, arguably requisite, concessions to military necessity. n102 Nevertheless, given the large number of women (and girls) who are among the civilian casualties of military attacks versus the overwhelmingly male composition of the militaries making those attacks and political leaderships ordering them, it is indeed possible to link an overarching critique of these aspects of IHL to the gender critique.

Furthermore, in non-international armed conflict, the most common form in our time, the conventional rules governing the means and methods of combat offer even less protection, leaving women particularly vulnerable. Protocol II, Art. 13 provides general norms to protect the civilian population from the effects of conflict. n103 It prohibits the direct targeting of civilians and the use of acts of violence or threats thereof to terrorize the civilian population. n104 However, as Gardam and Jarvis have noted, "Protocol II contains no specific limitations on the means and methods of combat. There is no prohibition against indiscriminate attacks or any requirement as to proportionality, [\*383] no prohibition on the civilian population being used as a shield against military operations, and no prohibition against reprisals." n105

#### E. Women and Grave Breaches of the Geneva Conventions and Protocol I

Violations of Geneva law may be divided into grave breaches, specifically enumerated in the four conventions and Protocol I, and other acts contrary to the provisions of the Conventions and Protocols. With regard to grave breaches, all state parties must enact laws that give rise to individual criminal responsibility, both for those who have ordered and those who have committed such breaches. States are required to actively search for alleged perpetrators (including those who gave the orders) and exercise jurisdiction over any such persons found, or turn them over to another state that will do so.

There is no explicit reference to gender-based harms in the list of grave breaches in the Conventions and Protocol I. This is perhaps the aspect of IHL most criticized by women's human rights experts, as it seems to reflect the insufficient level of gravity with which such harms were regarded at the time the instruments were adopted. However, the torture of women and "willfully causing great suffering or serious injury to body or health" to women protected persons are clearly grave breaches of these treaties. n106 In light of progressive interpretation, these categories undoubtedly include rape and many other forms of sexual abuse, such as sexual mutilation. A number of other provisions of arguable relevance to violence against women in wartime are included, such as those in the Fourth Geneva Convention, art. 147. For example, its extension of grave breach status to unlawful deportation or transfer and unlawful confinement of a protected person may be of particular relevance with regard to gender-based abuses like sexual slavery and trafficking in women. n107

In addition, with regard to the principle of distinction, vital for many women, Protocol I, Art. 85 confers grave breach status on making the civilian population or individual civilians the object of attack; launching an indiscriminate attack knowing this will cause excessive loss to civilians; and [\*384] attacking a person knowing that "he" is hors de combat. n108 Neither Common Article 3 nor Protocol II contains any explicit grave breach provisions. Experts have decried the fairly universal failure to enforce these standards with regard to most allegations of grave breaches, including those committed against women. n109

#### IV. A Summary of the Feminist Critique of IHL

Based on the above summary, the gender-specific problems with humanitarian law identified by critics can largely be summarized as follows. Archaic views about honor and modesty pepper the gender-related Geneva provisions, and especially the relevant Commentaries. The emphasis on honor is especially offensive since it may imply that a woman survivor of wartime rape or other sexual violence is dishonored, a powerful notion fraught with terrible real world consequences for the woman and her family. Stereotyped notions of the relative weakness of women versus the stronger male pervade these provisions and the Commentaries; though well-intentioned, these assumptions may but perpetuate discriminatory thinking about these problems.

Further, the fact that rape and sexual violence are gender crimes is not fully conveyed nor is their obviously violent nature. Rhonda Copelon has problematized the separate categorization of sexual assault from other violent crimes, such as murder and torture which are dealt with in distinct articles. n110 This cloaks the reality which the international community now recognizes through human rights standards, that such abuses represent violence against women and an assault on their very personhood. As Copelon says, "this failure to recognize rape as violence is critical to the traditionally lesser or ambiguous status of rape in humanitarian law." n111

Other failings of IHL, as catalogued by feminist experts, include that less protection is offered in internal armed conflict, the most prevalent type of strife in the contemporary period. The focus of women's IHL is seen to fall narrowly on sexual violence and pregnancy, rather than having a sense of the panoply of violence which befalls women in conflict. Moreover, no explicit connection is made to the impact of underlying discrimination against women on perpetuating and exacerbating such horrors. n112 In [\*385] light of our current understandings of conflict violence against women, this last point is potentially among the most troublesome. Finally, another problem is the lack of adequate standards applicable to the post-conflict situation, a perilous time for women.

Proponents of IHL might respond that some of this criticism is based on unfair expectations and that it overlooks IHL's necessary parameters and mission. Furthermore, the specific, technical rules of IHL governing treatment of women do offer much potential protection. These rules indicate more awareness of the difficulties women face in conflict than some of the problematic general statements in IHL discussed above might suggest. If changes are made to address the gender failings of IHL, we must carefully avoid undermining the good there is in the current system for women.

#### V. Do Gender Insufficiencies in Conventional IHL Matter in the Era of the International Criminal Court?

Before suggesting changes that could be made to correct problems identified above, we must consider the continuing relevance of conventional IHL in the post-Rome Statute era. Some would argue that international criminal law has rendered many of these issues obsolete. Thanks to the vigorous efforts of women's groups and other NGOs, the Rome Statute contains a range of gender-specific provisions. To a lesser degree, the statutes of the ad hoc criminal tribunals for Rwanda and the Former Yugoslavia also contain such provisions. As a result of the progressive jurisprudence of the ad hoc tribunals, rape can now be prosecuted as a crime against humanity, a war crime, and even as a method of genocide in international tribunals. Efforts have been made to ensure prosecutions of perpetrators of gender-based crimes by affording support to victims and witnesses. Even a critic like Copelon concedes that "prosecuting rape as a grave breach should effectively expand the meaning of the Conventions and Protocols and obviate the need for formal amendment." n113 Yet, in the future, failings in IHL may be reflected in international criminal practice, such as the faults identified by Copelon with the early indictments concerning sexual violence that were submitted to the ICTY n114 (though hopefully this danger may be minimized as international criminal jurisprudence and practice develops inexorably). n115 [\*386]

International criminal courts can indeed promote progressive, creative interpretations of IHL's key texts. Theodor Meron, among others, has called for sustained efforts in this direction. n116 Experts and NGOs have also pushed for these developments. The ICRC has made some important contributions as, for example, in its 1992 aide-memoire. This document proclaimed that "the act of rape is an extremely serious violation of international humanitarian law" and indicated that the grave breach of "willfully causing great suffering or serious injury to body or health" found in Article 147 of the Fourth Geneva Convention includes rape and "any other attack on a woman's dignity." n117

However, the nature of conventional IHL remains vitally important, per se, for those women, whose conflict victimization will not be subject to the jurisdiction of any international criminal court (an unfortunately large number). Their only legal recourse, if any, may be ad hoc, perhaps through national courts, most likely based directly on IHL, particularly when involving states that oppose international tribunals. Additionally, some militaries base their training programs directly on IHL, sometimes going so far as to incorporate its provisions directly into instruction manuals. n118

The ICRC introduction to the Commentary on the Fourth Geneva Convention expresses hope "that the Commentary will be of service to all who, in Governments, armed forces and national Red Cross Societies, are called upon to assume responsibility in applying the Geneva Conventions, and to all, military and civilians, for whose benefit the Conventions were drawn up." n119 Thus ideas about women conveyed in such a source may well still have real-world, battlefield relevance.

Moreover, IHL remains a touchstone, a source to which governments, national courts, and international courts and mechanisms will always return. Given the fact that in 2006 the Geneva Conventions became the first treaties "in modern history to achieve universal acceptance" n120 by being ratified by all 194 countries in the world, their symbolic importance cannot be overstated. They have legitimacy even with some governments that remain [\*387] hostile to international criminal law and international criminal courts. Therefore, what IHL says about women in war remains significant. Progressive adjudication should be encouraged and welcomed. Yet, creatively patching together interpretations of texts to find space for women's experiences of war may not ultimately be enough.

## VI. Conclusion

Feminist critics of international humanitarian law suggest several possible strategies to address the gender deficiencies they identify in IHL, including (1) law reform through new treaties or other international standards on women and armed conflict, or (2) written reinterpretation of existing provisions with an updated perspective on gender. This article aims to consider these proposals in light of the theoretical critique outlined above. However, in the current moment such analysis must also be considered in light of imperative political and practical concerns. Thus, the following discussion is informed by Durham's observation that feminist academic and operational perspectives may have divergent perspectives and priorities but are equally focused on "the general aim of reducing suffering . . ." n121

Possibilities for reform in the treaty area which have been discussed, but whose individual merits cannot get full consideration here for lack of space, include drafting a Third Additional Protocol to the Geneva Conventions of 1949 on the protection of women in time of conflict. n122 Another idea that has been suggested is to draft a Convention on Violence Against Women, perhaps based in part on the General Assembly Declaration on the same topic. This could include violence in conflict and would address lacunae in existing treaty law both in the area of human rights and humanitarian law. Alternatively, such an instrument could be appended as a Second Optional Protocol to the Women's Convention. n123 In that case, the CEDAW Committee would monitor its implementation. It could also be subjected to the individual complaints and inquiry procedures available in the current Optional Protocol to the Women's Convention, thus helping to develop jurisprudence in the area. n124

Some important voices have recently -- and unofficially -- suggested exploring the possibility of a specific international standard on rape or on [\*388] sexual violence. n125 Instead of constantly trying to elevate the status of rape by analogy to other atrocities such as torture, rape itself would thereby garner the international stigma that it deserves.

In a perfect world, rectifying the gender problems inherent in IHL might be easier. Humanitarian law could simply be redrafted to reflect the contemporary understandings of why and how violence happens to women in war and how best to prevent and punish it, calling upon recent international human rights standards. However, currently, the basic principles of IHL are under attack from governments, especially those engaged in the "war against terrorism." n126 Moreover, the contemporary political problems are not confined to the world of IHL and terrorism. Some feel that today it would be difficult to achieve a consensus on texts such as the Declaration on Violence against Women or the Beijing Platform for Action, each only a little more than a decade old. Thus, reopening the basic principles of the existing texts in this vital area of law by drafting a new instrument is a high stakes project. n127 There is the chance that in the contemporary environment it could result in a weakening of the protections available, a reality of which feminist scholars are clearly aware. n128 Also, tremendous resources would be needed to make such a document a reality. For now, the possibility of developing or redrafting treaties may only be realistic as a long-term goal. However, in the long run, this writer supports the Gardam idea of drafting an instrument and appending it to the Geneva Conventions themselves, because mainstreaming advances in women's human rights is a necessity. The ICRC should, of course, be thoroughly consulted about any such project.

In the meantime, noting the plethora of "soft law" standards which have been produced in this field in recent years, scholars have suggested the possibility of a comprehensive instrument of this nature. n129 It would draw [\*389] the others together and serve as a kind of focal point. This project could take the form of a General Assembly resolution or Guiding Principles on Women and Armed Conflict, inspired by the analogous standard prepared on internal displacement. n130 Given that 2009 will be the thirty-fifth anniversary of the 1974 General Assembly Declaration on the Protection of Women and Children in Emergency and Armed Conflict, n131 perhaps it would be an ideal moment for such

an effort. This kind of text, representing an important step toward codification of such norms in the long run, can help, in the words of Rhonda Copelon, to " 'surface' gender . . ." in international humanitarian law and thus, in our official conceptions of the rules of conflict. n132 A process recommended recently by UNIFEM's Independent Experts on "Women, War and Peace," whereby the UN Secretary-General would appoint "a panel of experts to assess the gaps in international . . . laws and standards pertaining to the protection of women in conflict and post-conflict situations . . ." [\*390] could help shape such a new instrument. n133 Further, the development of such a soft-law standard could dovetail nicely with another proposal the Independent Experts made that an international Truth and Reconciliation Commission on violence against women in armed conflict be convened. n134

The idea of updating the Commentaries on the Geneva Conventions and Protocols from a gender-sensitive perspective has also garnered widespread support as a way of addressing the problems outlined in this article. n135 The Special Rapporteur on violence against women, among others, has implicitly endorsed this idea. n136 Such a revision of the Commentaries could represent an important way to address feminist concerns. However, any such updating should most likely take the form of a supplement to the existing Commentaries. This would avoid undermining the overall legitimacy of the Commentaries or needlessly calling into question important issues that have been satisfactorily resolved therein.

One may be told that law reform, particularly in the IHL area, should not be a high priority in combating international crimes against women. Serious concerns have been raised about the potential triumph of "form over substance." n137 Yet, in thinking about the role of law in stopping violence against women in armed conflict, it is instructive to note that according to the Beijing Platform for Action, violence against women is exacerbated by: "the lack of laws that effectively prohibit violence against women; and failure to reform existing laws . . ." n138

What the law designed to protect women says about women and the nature of the risks they face will shape the ways in which military forces are trained, the ways in which crimes against women are understood, and whether or not those crimes are prevented and prosecuted. That law should reflect advanced understandings of violence against women. Much progress has been made in human rights standards in reflecting the nature of violence against women, including in conflict. However, many of these advances remain ghettoized. For example, the literature on women in armed conflict [\*391] and humanitarian law is excellent and rich, but almost totally separate from other conflict literature. Thus, the otherwise authoritative, "Handbook of Humanitarian Law in Armed Conflicts," published in 1995 (the year of the UN Fourth World Conference on Women which produced the Beijing Platform for Action), includes no writing by female contributors, and for a book of six hundred pages contains only two specific references to women in its index. n139

Every possible method must be utilized to bring the advances made in the area of women's human rights to bear on the mainstream understanding of IHL. Still, paying heed to the ongoing important work of the ICRC and its views articulated at the start of this article, any such efforts undertaken must be balanced with a significant emphasis on full and universal implementation of existing technical rules of IHL. Despite deficiencies in the overall framework, this would go a long way toward greater protection for women in conflict.

### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Immigration Law Refugees Eligibility International Law Dispute Resolution Laws of War International Law Sovereign States & Individuals Human Rights Hostage Taking & Kidnapping

### **FOOTNOTES:**

n1 Int'l Comm. of the Red Cross, Women and War, at 26, Aug. 1995 [hereinafter Women and War].

n2 Francoise Krill, The Protection of Women in International Humanitarian Law, 249 INT'L REV. RED CROSS 337, 359 (1985).

n3 Judith Gardam & Michelle Jarvis, Women and Armed Conflict: The International Response to the Beijing Platform for Action, 32 COLUM. HUM. RTS. L. REV. 1, 56 (2000).

n4 The relationship between IHL and international human rights law is a complicated one, explicated in a growing body of literature. See, e.g., Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 *INT'L REV. RED CROSS* 94 (1993). These two bodies of law have different goals, different philosophies, and different, though overlapping, spheres of application. While the aim of IHL has been described as to "preserve humanity in the face of the reality of war," human rights law aims higher at effecting systems of repression and denial. UNITED NATIONS CENTRE FOR HUMAN RIGHTS, *FACT SHEET NO. 13: INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS* 17 (1991). Elsewhere this author has critiqued the use of IHL to the exclusion of human rights law in judging the effects of armed conflict. See generally Karima Bennouna, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 *U.C. DAVIS J. INT'L L. & POL'Y* 171 (2004). Still the idea that human rights law can inform the ongoing development of humanitarian law (and has done so) has been increasingly recognized. See, e.g., Theodor Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT'L L.* 239 (2000). For further discussion of human rights law's protections for women in conflict, see generally Amnesty International, *Making Rights a Reality: Violence Against Women in Armed Conflict*, AI Index ACT 77/049/2004, June, 2004.

n5 The preferred term in the legal context is "armed conflict." "War" as a legal term of art has largely been jettisoned from IHL. For stylistic reasons, I use the terms interchangeably, echoing the ICRC, which recently campaigned on "Women and War." See *Women and War*, supra note 1 (emphasis added).

n6 Some forms of abuse to women in conflict may overlap. A detailed list is included for specificity. Unfortunately, even this list is not exhaustive, but rather exemplary.

n7 SC Res. 1325, pmbll., U.N. Doc. S/RES/1325 (Oct. 31, 2000), reprinted in 40 *I.L.M.* 500 (2001).

n8 In the view of the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), "gender-based violence . . . is . . . violence that is directed against a woman because she is a woman or that affects women disproportionately." U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 19, Violence Against Women*, P 6, U.N. Doc. A/47/38 (Jan. 29, 1992), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/300395546e0dec52c12563ee0063dc9d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/300395546e0dec52c12563ee0063dc9d?Opendocument) [hereinafter *General Recommendation 19*].

n9 Sources from which this list has been compiled include, JUDITH G. GARDAM & MICHELLE J. JARVIS, *WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW* (2001); ELISABETH REHN & ELLEN JOHNSON SIRLEAF, *WOMEN, WAR AND PEACE: THE INDEPENDENT EXPERTS' ASSESSMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WOMEN'S ROLE IN PEACE-BUILDING* (2002); and The U.N. Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, delivered to the U.N. Commission on Human Rights, U.N. Doc. E/CN.4/2001/73 (Jan. 23, 2001) [hereinafter *Special Rapporteur's Report*] (prepared by Radhika Coomaraswamy).

n10 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 1(j), adopted July 11, 2003.

n11 *Special Rapporteur's Report*, supra note 9, at 14.

n12 See, e.g., REHN & SIRLEAF, supra note 9 at 13. The Committee on the Rights of the Child has also made reference to the fact that "the traditional inferiority affecting girls' lives is seriously aggravated" during time of armed conflict and emergency. *Convention on the Rights of the Child*, P 296, adopted Nov. 20, 1989, 1577 U.N.T.S. 27531.

n13 Some feminist scholars have questioned the meaning of "peacetime" for women, by noting that it is not necessarily reflective of women's experience of violence. They may commonly experience grave, even lethal, levels of violence during "the time called peace." See, e.g., Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 *HASTINGS WOMEN'S L.J.* 243, 248 (1994). See also Bridget Byrne, *Towards a Gendered Understanding of Conflict*, in *GENDER AND PEACE SUPPORT OPERATIONS* 30 (2002), available at <http://www.genderandpeacekeeping.org/resources/3TowardsaGenderedUnderstandingofConflict.pdf> (last visited March 12, 2007).

n14 The ICRC has recognized this reality, though without using the term, "discrimination." See *Women and War*, supra note 1, at 7. It answered the question, "Why are women more vulnerable than men?," by noting: "Even in peacetime, women are often handicapped in that education, health and nutrition are not readily accessible to them. Moreover, they are often victims of violence within their own families and communities or at the hands of the State." *Id.*

n15 Fourth World Conference on Women, Beijing, P.R.C., Sept. 4-15, 1995, Beijing Declaration and Platform for Action, P 135, U.N. Doc. A/CONF. 177/20 ( Sept. 15, 1995) [hereinafter Beijing Declaration and Platform for Action].

n16 Rather remarkably, as a product of the times in which it was drafted, the Women's Convention, adopted in 1979, does not employ the word "violence" once in its entire text. See *Convention on the Elimination of All Forms of Discrimination Against Women*, adopted Dec. 18, 1979, 1249 U.N.T.S. 13. General Recommendation No. 19 seeks to fill this lacuna. See General Recommendation 19, supra note 8.

n17 General Recommendation 19, supra note 8, P 1.

n18 *Id.* P 7(c).

n19 Declaration on the Elimination of Violence Against Women, G.A. Res. 104, pmbl., U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/104 (Feb. 23, 1994), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.104.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.104.En?Opendocument) [hereinafter Declaration]. All forms of gender-based violence against women in armed conflict are clearly included within the scope of the Declaration which specifies its relevance to "violence occurring in the family . . ." in article 2(a), "violence occurring within the general community . . ." in article 2(b), and "violence perpetrated or condoned by the State, wherever it occurs . . ." in article 2(c). *Id.* art. 2(a)-(c). Furthermore, the preamble specifically registers "concern[] that some groups of women, such as . . . refugee women . . . and women in situations of armed conflict, are especially vulnerable to violence." *Id.* pmbl.

n20 World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Durban, S. Afr., Aug. 31-Sept. 8, 2001, Durban Declaration and Programme of Action, P 54(a), U.N. Doc. A/CONF.189/12 (Jan. 1, 2002).

n21 IHL has been subjected to a driving critique suggesting that it actually thereby legitimizes warfare itself, a topic beyond the scope of this paper. See, e.g., Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 *HARV. INT'L L.J.* 49 (1994).

n22 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 *U.S.T.* 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 *U.S.T.* 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 *U.S.T.* 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention

Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 *U.S.T.* 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]. All four of the Conventions entered into force on 21 October 1950, and all 194 states in the world currently are party to the Conventions. See International Committee of the Red Cross, States Parties to the Following International Humanitarian Law and Other Related Treaties as of 8-Mar-2007, [http://www.icrc.org/IHL.nsf/\(SPF\)/partymaintreaties/\\$ File/IHLandotherrelatedTreaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/partymaintreaties/$ File/IHLandotherrelatedTreaties.pdf). [hereinafter States Parties]. There are also important principles of customary international law in the area. See, e.g., JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005); THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989).

n23 COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed., 1952) [hereinafter Commentary I]; COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA (Jean S. Pictet ed., A.P. de Heney trans. 1960) [hereinafter Commentary II]; COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., A.P. de Henry trans. 1960) [hereinafter Commentary III]; COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean S. Pictet ed., Ronald Griffin et al. trans. 1958) [hereinafter Commentary IV].

n24 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 3. [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 609. [hereinafter Protocol II]. As of March 2007, 167 states are parties to Protocol I, and 163 states are parties to Protocol II. See States Parties, *supra* note 22.

n25 See, e.g., Catherine MacKinnon, Rape, Genocide, and Women's Human Rights, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 183, 193 (Alexandra Stiglmayer ed., Marion Faber trans., 1994).

n26 See Commentary II, *supra* note 23, art. 12, P 4, at 92.

n27 Women and War, *supra* note 1, at 6. Francoise Krill estimates rather that "about 40 provisions are of specific concern to women." Krill, *supra* note 2, at 359.

n28 One must be careful in assigning precise legal status to the Commentary. According to the ICRC itself, "although published by the International Committee, the Commentary is the personal work of its authors." Commentary IV, *supra* note 23, at 1 (referring to the foreword produced by the International Committee of the Red Cross). Still, they are often seen as authoritative.

n29 GARDAM & JARVIS, *supra* note 9, at 61 (emphasis added).

n30 Geneva I, *supra* note 22, art. 12; Geneva II, *supra* note 22, art. 12.

n31 Protocol II, *supra* note 24, at art. 2(1).

n32 GARDAM & JARVIS, *supra* note 9, at 61. This is confirmed in Krill, *supra* note 2, at page 339.

n33 Geneva III, supra note 22, art. 49.

n34 Geneva IV, supra note 22, art. 85.

n35 Commentary IV, supra note 23, art. 27, P 3, at 206.

n36 GARDAM & JARVIS, supra note 9, at 63.

n37 Geneva I, supra note 22, art. 12; Geneva II, supra note 22, art. 12.

n38 Commentary II, supra note 23, art. 12, P 4, at 92.

n39 Id., art 12, P 4, at 92.

n40 See, e.g., GARDAM & JARVIS, supra note 9, at 63.

n41 Geneva III, supra note 22, art. 14.

n42 Commentary III, supra note 23, art. 14, P 2(2), at 147. Weakness refers to "lack of strength, firmness, vigor or the like; feebleness," and also to "an inadequate or defective quality." WEBSTER'S UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 2152 (2001). Honor is defined in relevant part as "chastity or purity in a woman." Id. at 918. Modesty denotes "the quality of being . . . pure, virtuous." Id. at 1236.

n43 Id., art. 14, P 2(2), at 148.

n44 Krill, supra note 2, at 354 (echoing the relevant Commentary, which indicates that Article 14(2) of Geneva III implies that "the separation must be effective, in other words that male prisoners must not have access to the dormitories of women prisoners whether or not the women consent"). Furthermore, it is the responsibility of the Detaining Power to ensure this separation. Id. It should be noted that this provision only explicitly relates to dormitories and conveniences; quarters as a whole do not have to be separated. Id.

n45 Geneva III, supra note 22, art. 25, 29, 97; Geneva IV, supra note 22, art. 85; Protocol II, supra note 24, art. 5(2)(a).

n46 Geneva III, supra note 22, art. 97; Geneva IV, supra note 22, art. 76; Protocol I, supra note 24, art. 75(5); Protocol II, supra note 24, art. 5(2)(a).

n47 Geneva IV, supra note 22, art. 97.

n48 See Women and War, supra note 1, at 11. See also Krill, supra note 2, at 340.

n49 Geneva III, supra note 22, art. 88.

n50 Protocol I, supra note 24, art. 76(2).

n51 Geneva IV, supra note 22, art. 89.

n52 Commentary III, supra note 23, art. 29, P 2, at 207.

n53 Id. art. 97, P 4, at 465.

n54 Commentary IV, supra note 23, art. 85, P 4, at 388.

n55 Commentary III, supra note 23, art. 88, P 3, at 434.

n56 See, e.g., Krill, supra note 2, at 348. In fact, rather alarmingly, the heading of the Commentary on Art. 91, P 2 of Geneva IV is entitled, "Maternity Cases. Serious Diseases." Commentary IV, supra note 23, art. 91, P 2, at 399.

n57 Geneva IV, supra note 22, art. 91.

n58 Id. arts. 18, 20-22.

n59 Id. art 23.

n60 Protocol I, supra note 24, art. 70(1).

n61 Geneva IV, supra note 22, art. 14.

n62 Id. art. 17.

n63 Id. art. 132.

n64 Id. art. 91.

n65 Id. art. 127.

n66 Id. art. 38.

n67 Commentary IV, supra note 23, art. 38, at 248-49.

n68 Geneva IV, supra note 22, art. 50.

n69 Protocol I, supra note 24, art. 76(3).

n70 Protocol II, supra note 24, art. 6(4).

n71 Commentary IV, supra note 23, art. 14, P 1(2), at 126. See also id. art. 38, at 248.

n72 Id. art. 89, P 5, at 395 (listing "Women and children" as the heading of the Commentary's discussion of article 89(5)).

n73 As the UN Special Rapporteur on Violence Against Women has noted, "it is important to maintain conceptual clarity in separating the regimes that operate for women and those that operate for children. Women are adults and should be treated as such in laws, policies and programmes." The U.N. Special Rapporteur on Violence Against Women, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Addendum: Mission to Bangladesh, Nepal and India on the Issue of Trafficking of Women and Girls, P 25, delivered to the U.N. Commission on Human Rights, U.N. Doc. E/CN.4/2001/73/Add.2 (Feb. 6, 2001).

n74 It is interesting to note that some of the provisions regarding pregnant women, in fact, were introduced by the International Union for Child Welfare. See, e.g., Commentary IV, supra note 23, art. 91, P 2, at 400.

n75 Geneva IV, supra note 22, art. 27. This applies to protect women from the agents of states of which they are not nationals during international armed conflict and occupation (though the scope has been extended by international criminal jurisprudence).

n76 Commentary IV, supra note 23, art. 27 (emphasis added). Here the Commentary discusses the general view of "honour," not that specifically related to women and sexual violence. Id. This understanding suggests a greater connection to an alternate dictionary definition of "honour" to the one cited supra in note 42, namely "honesty, fairness, or integrity in one's beliefs and actions." This is certainly a preferable meaning, and yet the meaning seems irrelevant in the context of victims of sexual violence whose behavior is not -- or should not be -- in question.

n77 Id. art 27, P 2, at 207.

n78 See, e.g., id. art 27, P 2, at 206 (emphasis added).

n79 Protocol I, supra note 24, art. 76(1).

n80 Protocol II, supra note 24, art. 4(2)(e).

n81 Protocol I, supra note 24, art. 75(2)(b). Rape is prohibited, but under a different rubric. See id. art. 76(1).

n82 Id. art. 75(2)(e).

n83 Amnesty International has affirmed that:

Under customary international law, many acts of violence against women committed by parties to a conflict (whether international or internal) constitute torture. These include rape and gang rape, abduction and sexual slavery, forced marriage, forced impregnation and forced maternity, sexual mutilation, indecent assault and many other forms of physical violence.

Amnesty Int'l, Broken Bodies, Shattered Minds: Torture and Ill-Treatment of Women, at 54, AI Index ACT 40/001/2001, Mar. 8, 2001.

n84 The first Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Peter Kooijmans, insisted that "since it was clear that rape or other forms of sexual assault against women in de-

tention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture." U.N. Special Rapporteur, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, In Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, P 16, delivered to the U.N. Commission on Human Rights, U.N. Doc. E/CN.4/1995/34 (Jan. 12, 1995). The next Special Rapporteur on torture, Nigel Rodley, cited this approvingly. *Id.*

n85 Geneva I, *supra* note 22, arts. 12, 18; Geneva II, *supra* note 22, art. 12.

n86 Geneva III, *supra* note 22, art. 17.

n87 *Id.* art. 13.

n88 Geneva IV, *supra* note 22, art. 27.

n89 Protocol I, *supra* note 24, art. 75(2)(a)(iv).

n90 Geneva IV, *supra* note 22, art. 32. See also Protocol I, *supra* note 24, art. 75(2)(a)(ii).

n91 Geneva I, *supra* note 22, art. 3(1)(a); Geneva II, *supra* note 22, art. 3(1)(a); Geneva III, *supra* note 22, art. 3(1)(a); Geneva IV, *supra* note 22, art. 3(1)(a).

n92 Protocol II, *supra* note 24, art. 13.

n93 Protocol II, *supra* note 24, art. 4(2)(a) & (f).

n94 *Id.* art. 4(1).

n95 Beijing Declaration and Platform for Action, *supra* note 15, P 133.

n96 GARDAM & JARVIS, *supra* note 9, at 68.

n97 Protocol I, *supra* note 24, arts. 48-58.

n98 *Id.* arts. 51(2), (6) & (7).

n99 *Id.* art. 51(4).

n100 *Id.*

n101 *Id.* art. 51(5)(b).

n102 See e.g., Bennoune, *supra* note 4, at 187-90.

n103 See Protocol II, *supra* note 24, art. 13.

n104 Id.

n105 GARDAM & JARVIS, *supra* note 9, at 71. Conventional norms regulating the conduct of internal armed conflict should be understood in the context of developing customary rules in the area. The Rome Statute of the International Criminal Court has made a significant contribution in this regard. See generally Rome Statute of the International Criminal Court, opened for signature July 17, 1998, 2187 U.N.T.S. 3; see also Protocol II, *supra* note 24, *prmb.* (reiterating the Martens clause, which may help further fill in this gap).

n106 Geneva I, *supra* note 22, art. 50; Geneva II, *supra* note 22, art. 51, Geneva III, *supra* note 22, art. 130. See also YOUNGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 71-72 (1982).

n107 See Geneva IV, *supra* note 22, art. 147.

n108 Protocol I, *supra* note 24, arts. 85(3)(a), (b) & (e).

n109 See, e.g., FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 68 (1987). The record has improved only somewhat since that volume, published by the ICRC, appeared.

n110 See Copelon, *supra* note 13, at 249.

n111 Id.

n112 For a response to this criticism, suggesting that IHL can not and should not address "the basis of social structure in general," see Helen Durham, Women, Armed Conflict and International Law, 84 INT'L REV. OF THE RED CROSS 655, 657 (2002) (reviewing GARDAM & JARVIS, *supra* note 9).

n113 Copelon, *supra* note 13, at 254.

n114 See *id.* at 253-56 (criticizing, in one instance, the failure to charge sexual violence against women as torture, when sexual mutilation of men was so charged).

n115 See generally KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS (1997).

n116 See Theodor Meron, Rape as a Crime Under International Humanitarian Law, 87 AM. J. INT'L L. 424, 426-28 (1993).

n117 INTERNATIONAL COMMITTEE OF THE RED CROSS, Aide-Memoire, para. 2 (Dec. 3, 1992) (on file with the author).

n118 See generally THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 317 (3d. ed., West Group 2002) (1988) (discussing this practice and providing citations to relevant materials).

n119 Commentary IV, *supra* note 23, at 2 (referring to the foreword produced by the International Committee of the Red Cross).

n120 See Jean-Philippe Lavoyer, A milestone for international humanitarian law, ICRC, Sept. 22, 2006, <http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-220906?opendocument>.

n121 Durham, *supra* note 112, at 655.

n122 See, e.g., Judith Gardam, Women and the Law of Armed Conflict: Why the Silence?, *46 INT'L & COMP. L.Q.* 55, 77 (1997).

n123 See GARDAM & JARVIS, *supra* note 9, at 256 (discussing the option of appending a Second Optional Protocol to the Women's Convention).

n124 See Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, art. 8, adopted Oct. 6, 1999 (appended to General Assembly Resolution 54/4 of Oct. 15, 1999).

n125 This was most recently suggested in the presence of the author by a prominent figure in international criminal practice at an off-the-record NGO consultation during summer 2003.

n126 See, e.g., Gabor Rona, Interesting Times For International Humanitarian Law: Challenges from the "War on Terror," *27 FLETCHER F. OF WORLD AFF. (ISSUE 2)* 55 (2003).

n127 A further counterpoint is to be found in the question posed by former Payam Akhavan, Legal Advisor to the Office of the Prosecutor for the ad hoc tribunals. Akhavan asks: "By expanding the ambit of humanitarian protection, do we risk creating a law that is more in the tendency of a utopia in the sense that it does not remotely reflect what states are actually willing to concede?" Payam Akhavan, *The Dilemmas of Jurisprudence*, *13 AM. U. INT'L. L. REV.* 1518, 1520 (1997-1998).

n128 GARDAM & JARVIS, *supra* note 9, at 256.

n129 See, e.g., GARDAM & JARVIS, *supra* note 9, at 257. Soft law sources which could feed into this new standard include some cited above. See, e.g., Declaration, *supra* note 19; the Beijing Declaration and Platform for Action, *supra* note 15; General Recommendation No. 19, *supra* note 16; Security Council Resolution 1325, *supra* note 7. Other soft law sources which could also feed into this new standard include recommendations made in numerous reports by UN human rights treaty bodies, CEDAW in particular, by the Special Rapporteur on violence against women and those from the Independent Experts. See, e.g., Special Rapporteur's Report, *supra* note 9, at 140-48. For additional standards, see also, International Conference on Population and Development, Sept. 5-13, 1994, Cairo Declaration and Programme of Action, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994) and the United Nations Transitional Assistance Group UNTAG, Windhoek Declaration on "Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations," (May 31, 2000), available at <http://www.peacewoman.org/un/pkwatch/WindhoekDeclaration.html>. Standards related to refugee and displaced women can also make great contributions. See U.N. High Commissioner for Refugees (UNCHR), Guidelines on the Protection of Refugee Women, (July 1991), available at [http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5DVBN/\\$ FILE/unhcr-guidewomenref-jul91.pdf](http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5DVBN/$ FILE/unhcr-guidewomenref-jul91.pdf); UNHCR, Sexual and Gender-Based Violence against Refugees, Returnees, and Internally Displaced Persons: Guidelines on Prevention and Responses (May 2003 ed.) (1995), available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3f696bcc4>.

n130 See generally The Representative of the Secretary-General, Report of the Representative of the Secretary-General on the Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission, Addendum: Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/add.2 (Feb. 11, 1998). Gardam and Jarvis offer a draft which could potentially serve as an initial basis for work in this area. GARDAM & JARVIS, *supra* note 9, at 58-64. In their book, they also endorse the Deng principles as a useful model. *Id.* at 257.

n131 Born out of the work of the UN Commission on the Status of Women on the subject at sessions in 1972 and 1974, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict was adopted by the UN General Assembly in December 1974. G.A. Res. 3318 (XXIX), U.N. GAOR, 29th Sess., Supp. 31, U.N. Doc. A/9631 (Dec. 14, 1974), available at <http://www.unhcr.ch/html/menu3/b/24.htm>. The aim of the declaration is to "provide special protection of women and children belonging to the civilian population." *Id.* pmbl. Though it does not make specific reference to rape, sexual assault or other gender-based violence, it is significant because it represents the first real recognition within the UN system of the need to address the specific threats to women in armed conflict. Innovatively, for its time, the declaration deems "criminal" repression, cruel and inhuman treatment, imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings, and forcible eviction of women and children. *Id.* P 5.

n132 Copelon, *supra* note 13, at 247.

n133 REHN & SIRLEAF, *supra* note 9, at 140.

n134 *Id.*

n135 See GARDAM & JARVIS, *supra* note 9, at 258 (discussing revisions to the Commentaries of the four Geneva Conventions and Protocols).

n136 "Existing humanitarian legal standards should be evaluated and practices revised to incorporate developing norms on violence against women during armed conflict." The U.N. Special Rapporteur on Violence Against Women, Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, P 95, U.N. Doc. E/CN.4/1998/54 (Jan. 26, 1998)

n137 See Christine Chinkin, *Feminist Interventions into International Law*, 19 *ADEL. L. REV.* 13, 18 (1997).

n138 Beijing Declaration and Platform for Action, *supra* note 15, P 118.

n139 See *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (Dieter Fleck ed., 1995).

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