Chapter 17. Rape and Other Sexual Violence

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A. Introduction

1 Despite long-standing and clear prohibitions under international humanitarian law (IHL), conflict-related rape and other forms of sexual violence, often committed with unspeakable brutality, persist. Most reports recount sexual attacks against women and girls, but the targeting of men and boys for sexual violence is increasingly gaining visibility. Whether employed as a military tactic to terrorize, humiliate, and dehumanize individuals or communities, as a means to force whole populations to flee, or as a method to punish detainees or to commit genocide, sexual violence violates the fundamental tenet of the Geneva Conventions—humane treatment.

2 The point of departure for the commentary in this chapter is that protection from sexual violence, expressly provided in the Geneva Conventions under Article 27 paragraph 2 Geneva Convention (GC) IV and impliedly elsewhere, for example, Article 14 GC III, and Common Article 3, is inherent to the guarantee of humane treatment without adverse distinction that underpins the Conventions. It is the standard of duty owed to all victims of war at all times. The Preliminary Remarks of the International Committee of the Red Cross (ICRC) to the Geneva Conventions of 1949 confirm this, pointing out that each of the Conventions was 'inspired by the respect for the human personality and dignity'.[1] On GC IV, under which civilians on the territories of a party to the conflict and in occupied territories are explicitly to be protected from rape, enforced prostitution, and indecent assault of any kind in accordance with Article 27, the ICRC notes in its Preliminary Remarks that

> [s]trictly speaking, the (Fourth) Convention introduces nothing new in a field where the doctrine is sufficiently well-established. It adds no specifically new ideas to International Law on the subject, but aims at ensuring that, even in the midst of hostilities, the dignity of the human person, universally acknowledged in principle, shall be respected.[2]

3 Pictet ventured further. He commented that Article 27 'proclaims the principle of respect for the human person and the inviolable character of the basic rights of men and women', and is the 'basis on which the Convention rests, the central point in relation to which all its other provisions must be considered'.[3]

4 The fact that Article 27 paragraph 2 GC IV uses dated, sexist, and legally imprecise language should not inhibit its progressive interpretation (see further Chapter 10 of this volume, MN 25, and MN 52–55). This chapter espouses the view that the Geneva Conventions' shielding of protected persons from rape and other forms of sexual violence in such provisions is not only fundamental to the enforcement of IHL, but also vital to ensure the evolution of the doctrine of humane treatment, the overarching principle of humanitarian law.[4]

[1] ICRC, Preliminary Remarks to 1949 Geneva Conventions in *The Geneva Conventions of August 12, 1949* (Geneva: ICRC, 1994), at 29.

[2] Ibid. [3] Pictet Commentary GC IV, at 200–1.

[4] See Rule 87 ICRC CIHL Study on humane treatment, which affirms that humane treatment is a long-standing core IHL concept owed to all protected persons and persons *hors de combat*. Humane treatment entails provision of a concrete duty to ensure the respect and 'dignity of a person', yet the notion of its execution constantly develops to incorporate the 'influences of changes in society'.

The protection against rape and other forms of sexual violence is also ensured by international human rights instruments and customary international law (CIL).[5] Unbelievably, protection of women and girls from sexual violence is not explicitly provided for in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[6] and this omission highlights some of the limitations international human rights law (IHRL) shares with IHL in addressing women's and girls' particular experiences.[7] However, IHRL prohibits violence, including sexual violence, against any person during armed conflict and in peacetime. It also prohibits violence against women as unlawful sex discrimination,[8] which, like the IHL principle of 'non-adverse treatment', is a customary norm of international law.[9] 5

This chapter examines the historical policy origins and modern scope of the application of the protection from rape and other forms of sexual violence under the Geneva Conventions. Reference is made to the relevant provisions in Additional Protocol (AP) I and AP II, and in 6

[5] Human rights violations have IHL counterparts, including protections against torture and cruel, inhuman, or degrading treatment or punishment, slavery and slavery-like practices such as trafficking, and the right to life. On the relationship between IHL and IHRL see Ch 35 of this volume. On rape as torture, see Ch 16 of this volume. See also, e.g., Special Rapporteur on Torture Report before the Human Rights Council, 15 January 2008, A/HRC/7/3, para 36; also ECtHR, *Aydin v Turkey*, Judgment, 25 September 1997, holding that 'rape was constitutive of torture'. In the context of armed conflict, see also Rule 8 ICRC CIHL Study; ICTR, *The Prosecutor v Jean-Paul Akayesu*, Trial Chamber Judgment, ICTR-96-4-T, 2 September 1998, para 596. In relation to females specifically, see, e.g., UN Declaration on the Elimination of Violence against Women, UNGA Res 48/104, 20 December 1993; CEDAW General Recommendations 19 and 30; Art 11 of the Protocol to the ACHPR on the Rights of Women in Africa; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 2011 (Istanbul Convention) (e.g., Arts 2 and 36).

[6] Note, however, the work of the UN CEDAW Committee. General Recommendation 19 on violence against women provides that violence against women is also sex-based discrimination that violates Art 1 of the Convention and, as such, 'impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions', including 'the *right to equal protection* according to humanitarian norms in times of international or internal armed conflict' (General Recommendation 19, Violence against Women, 1992, CEDAW/C/GC/19, para 7(c) (emphasis added)). The UN CEDAW Committee's General Recommendation 30 on women in conflict prevention, conflict, and post-conflict situations (2013) further clarifies states' human rights obligations towards women and girls in armed conflict, reiterating that 'in situations that meet the threshold definition of non-international or international armed conflict, the [CEDAW] and international humanitarian law apply concurrently and their different protections are complementary, not mutually exclusive'. Note that this General Recommendation, broad in scope, covers 'the application of the Convention to conflict prevention, international and non-international armed conflicts, situations of foreign occupation, as well as other forms of occupation and the post-conflict phase'. It also covers 'other situations of concern' not necessarily classified as armed conflict under international law, 'such as internal disturbances, protracted and low-intensity civil strife, political strife, ethnic and communal violence, states of emergency and suppression of mass uprisings, war against terrorism and organized crime'. The CEDAW Committee acknowledged that, at times, an unclear delineation exists between periods of pre-conflict, conflict and post-conflict (CEDAW/C/GC/30, para 4). For a comprehensive discussion of CEDAW, see M. Freeman, C. Chinkin, and B. Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women, A Commentary* (Oxford: OUP, 2012).

[7] See critical commentaries, C. Bunch, 'Women's Rights as Human Rights: Towards a Re-vision of Human Rights', 12 *HRQ* (1990) 486; H. Charlesworth, 'What Are Women's Human Rights?', in R. Cook (ed), *Human Rights of Women: National and International Perspectives* (Philadelphia, PA: University of Pennsylvania Press, 1994) 58.

[8] See UN CEDAW Committee, General Recommendation 19, above n 6; Istanbul Convention, above n 5, Art 3; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. For prohibition of violence, including sexual violence, elsewhere in IHRL instruments, see CRC (e.g., Arts 34 and 38); CRC-OPAC; and Convention on the Rights of Persons with Disabilities (e.g., Art 11).

[9] The prohibition of discrimination, at a minimum on racial grounds, is also a peremptory norm of international law. See, e.g., the US (Third) Restatement of the Foreign Relations Law. On IHL, see ICRC CIHL Study, Rule 88: Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited.

particular to their fundamental guarantees, as well as to the criminalization of rape and other forms of sexual violence as offences within the jurisdiction of international criminal courts and tribunals. Their jurisprudence has been crucial for the elaboration of definitions of rape and some other forms of sexual violence for the purpose of individual criminal responsibility for war crimes, crimes against humanity, and genocide. In the discussion of this jurisprudence, little or no distinction is made between international armed conflict (IAC) and non-international armed conflict (NIAC), as the conduct defined applies to both.

B. Meaning and Application

I. Article 27 paragraph 2 GC IV

7 Article 27 GC IV safeguards protected civilians who are on the territory of a party to the conflict, as well as enemy inhabitants of occupied territory. Its origin may be traced to a proposal submitted to the ICRC by the International Women's Congress and the International Federation of Abolitionists.[10] Article 27, inter alia, recognizes civilians' express entitlement to respect for their persons, their honour, and family rights. It guarantees humane treatment, which precludes violence, threats, insults, or acts of public curiosity. The provision goes beyond prohibition by affirmatively requiring humane treatment and, in paragraph 2, that women '*shall be* especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.[11] It is the only Article in the Geneva Conventions explicitly to refer to, and require protection from, acts of sexual violence.[12]

8 The drafters of the Geneva Conventions in 1949, with the particular crimes committed against women during the Second World War in mind, and probably lacking awareness of the extent to which males are also targeted for sexual and gender-based violence, limited the explicit prohibitions against sexual assault under Article 27 paragraph 2 to attacks against females. However, the principle of humane treatment without adverse distinction extends Article 27's prohibitions to all protected persons similarly situated, and Article 27 paragraph 1 mandates that male civilians, irrespective of personal circumstance, shall enjoy respect for their 'person and honour'. This necessarily includes protection from sexual violence.[13]

9 The protection of women against rape, forced prostitution, and indecent assault was included in Article 76 AP I, and thus extended to all women in the territory of parties involved in the conflict. As the ICRC Commentary explains, Article 76 AP I 'thus […] applies both to women affected by the armed conflict, and to others, that is women protected by the fourth Convention and those who are not'.[14] In this way, Article 76 'develops the fourth Convention by extending the circle of its beneficiaries'[15] in keeping with the intention of the drafters of that Convention 'to proscribe such acts in general', as a response to the 'abuses perpetrated particularly during the Second World War, when countless women of all ages had been subjected to terrible outrages'.[16] The much-criticized

[10] Pictet Commentary GC IV, at 205, citing the Final Record, vol II-A, at 821.

[11] The special protections to be afforded women under Art 27 para 2 and other provisions extend to girls as well.

[12] See the discussion of the omission of rape as an explicit provision of the grave breaches regime at MN 62–65. On the protection against forms of sexual violence under Art 27 GC IV see *amplius* Ch 61 of this volume.

[13] Cf D.A. Lewis, 'Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law', 27 *Wisconsin International Law Journal* (2009) 1, at 23.

[14] ICRC Commentary APs, para 3151. [15] Ibid, para 3154. [16] Ibid, para 3152.

connection made in Article 27 paragraph 2 GC IV between crimes of sexual violence and women's 'honour' (see MN 16–24) was not repeated in Article 76 AP I, which requires instead that 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'.

The prohibition on enforced prostitution and any form of indecent assault is also contained in Article 75(2)(b) AP I, which expressly provides that these are among the acts that 'are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilians or by military agents'. This provision is applicable to persons of any gender affected by the situations covered by AP I in so far as they are 'in the Power of a Party to the conflict' and 'do not benefit from a more favourable treatment' under the Geneva Conventions and AP I. It thus expands the protection against enforced prostitution and indecent assault already mandated in Article 27 paragraph 2 GC IV. **10**

a. The antecedents of Article 27 GC IV

While GC IV's singular focus on codifying the protection of civilians from the excesses of war was an historical first, earlier instruments also gave protection to civilians trapped by war or under occupation, including from rape and other sexual abuse. **11**

The United States Army General Order No 100 of 1863, commonly known as the Lieber Code,[17] was derived in part from CIL. Article 44 of the Code expressly outlawed, 'all rape', along with killing of persons in the invaded country, designating such conduct as wanton violence. Article 22 provided that 'unarmed citizens were to be spared in person, property and honor', while Article 37, applicable during occupation, required the protection of 'persons of the inhabitants, especially those of women; and the sacredness of domestic relations'. The maximum penalty for violations of Articles 44 and 37 was death.[18] **12**

The Geneva Convention of 1864 quickly followed the promulgation of the Lieber Code. However, Hague Convention IV Respecting the Laws and Customs of War on Land[19] proved more influential on Article 27 GC IV. Drafted in 1899 and revised in 1907, the Regulations in the Annex revisited the protection of persons in occupied territories.[20] It required occupying forces to respect 'family honour and rights',[21] which implicitly includes a prohibition against rape and other forms of sexual violence.[22] The Commission of Government Experts cited Article 46 of the Hague Regulations when urging delegates drafting the 1949 Geneva Conventions to incorporate a provision to respect the decency **13**

[17] Lieber Code (1863), US War Department, *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (Washington, DC: Government Printing Office, 1899), Series III, vol 3, at 148–64.

[18] Ibid, Arts 44 and 47.

[19] Convention Respecting the Laws and Customs of War on Land (Hague Convention IV), The Hague, 18 October 1907.

[20] Art 1 Hague Regulations: 'The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: […] (4) to conduct their operations in accordance with the laws and customs of war.' The authors contend that this prohibited combatants from committing sexual violence, even in circumstances of non-occupation under 'the laws and customs of war'. See P. Sellers, 'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law', in G. McDonald and O. Swak Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (The Hague: Kluwer Law International, 2000) 265, at 274.

[21] Art 46 Hague Regulations.

[22] At the time of the drafting of the GCs, the common meaning of Art 46's protection of 'family honour' prohibited rape, Pictet Commentary GC IV, at 202.

and dignity of women, given the widespread 'rapes, indecent assaults and placement of women in disorderly houses' during the Second World War.[23] Unlike Article 46, Article 27 GC IV protects civilians on the territory of a party to the conflict, irrespective of whether military occupation exists.

14 The extensive rapes and other acts of sexual violence against civilian females in the First World War, particularly in Belgium, were considered by the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties[24] to constitute violations of the laws of war and the 'clear dictates of humanity'. Because of their conspicuous position on the list of war crimes that Central Power defendants could have faced if an international criminal tribunal had been established, prosecution of rape and for the abduction of women and girls for the purposes of prostitution is likely to have figured prominently. The post-war international criminal prosecutions foreseen by Article 227 of the Treaty of Versailles failed to materialize.[25] However, the Report of the Commission recognized that civilians were to be shielded from rape and enforced prostitution during war and periods of military occupation. This view ultimately informed the drafting of Article 27.

15 The third antecedent was the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (1929 GC II), especially Article 3, which gave unprecedented attention to the treatment of female prisoners of war (POWs). It declared that female prisoners shall 'be treated with all consideration due to their sex',[26] providing for a duty to accord humane treatment—plainly intended to protect against sexual violence. Article 27 GC IV reprises this provision and articulates this intention by expressly prohibiting rape, enforced prostitution, and *any* form of indecent assault.

b. Attacks on honour

16 Article 27 paragraph 2 GC IV provides that women are to be especially protected from sexual and gender-based violence as an 'attack on their honour' (see Chapter 61, MN 12–13, of this volume). Protection from all other kinds of attacks against their honour, and all attacks against the honour of all protected persons, is provided in Article 27 paragraph 1.

17 'Honour' is not defined in the Conventions. The ICRC Commentary calls honour 'a moral and social quality', with the right to respect for it 'invested in man' because of inherent human characteristics of 'reason' and 'conscience'. Honour is a quality present in all, and respect for it must be accorded at all times and without discrimination on any ground, as is made clear in Article 27 paragraph 3 GC IV.[27] The content of honour is not fixed. It is

[23] The Commission of Government Experts' Study of Conventions for the Protection of War Victims, Condition and Protection of Civilians in Time of War, Chapter III, at 47 (14–26 April 1947).

[24] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report presented to the preliminary Peace Conference, 29 March 1919, Pamphlet No 32, Division of International Law, Carnegie Endowment for Peace.

[25] See K.D. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague: Martinus Nijhoff, 1997), at 42–4; K.D. Askin, 'Treatment of Sexual Violence in Armed Conflict: A Historical Perspective and the Way Forward', in A-M. de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia, 2013). A descriptive account of the widespread rapes during the First World War is found in S. Brownmiller, *Against Our Will, Men, Women and Rape* (London: Secker & Warburg, 1975), at 43.

[26] Discussion of common Arts 12 GC I and GC II and Art 14 GC III, at MN 43–53.

[27] Pictet Commentary GC IV, at 202. Also, at 206, on the equality/non-discrimination principle in Art 27 para 3, the Pictet Commentary notes that 'any protected person is entitled to all the rights and liberties proclaimed by the Convention under a general principle common to all the Geneva Conventions. It is clear from

dependent on context—at least location, time, and gender—the influence of which is evident in the meanings ascribed to women's honour under Article 27 paragraph 2. Although the relationship between honour in paragraph 1 and paragraph 2 is not addressed in the Conventions, Pictet claims that women have special protection '*in addition* to the safeguards laid down in paragraph 1, which they enjoy equally with men'.[28]

18 This reference to 'honour' has not been replicated elsewhere. For example, the Universal Declaration of Human Rights, which is contemporaneous with the Geneva Conventions, refers to the inherent 'dignity' of every person rather than to their 'honour'.[29] The 1977 Additional Protocols also refer to 'dignity' not honour, prohibiting 'outrages upon personal dignity' and extending the protection against such attacks to men and boys.[30] Accordingly, IHL protects non-combatant females from sexual and gender-based violence as an 'attack on their honour' (Article 27 paragraph 2 GC IV) and all persons from 'outrages upon personal dignity' (Articles 75(2)(b) and 76 AP I) in the context of an IAC. In NIACs sexual violence comprising 'outrages upon personal dignity' is also prohibited (Common Article 3; Article 4(2)(e) AP II), whether committed against males or females. These Additional Protocol provisions also repeat the examples of violations listed in Article 27 paragraph 2 GC IV.[31]

19 Article 27 paragraph 2 is a direct response to the sexual attacks against women and girls committed during the Second World War, which 'revolt the conscience of all mankind' and which 'underline the necessity of proclaiming that women must be treated with special consideration'.[32] Article 27 also ostensibly echoes the concern for the duty owed to female detainees addressed in Article 3 1929 GC II, and carried over subsequently into the protections for women internees under the Geneva Conventions. These detail special measures to protect women detainees from attacks on their honour, including protecting against 'attacks' from the detaining party and from other protected persons,[33] the provision of separate sleeping quarters and sanitary conveniences for women temporarily interned with men who are not family members,[34] and searches of women internees by women only.[35] Other measures address protection of females in recognition of needs arising from their reproductive role, including requiring that 'expectant and nursing mothers […] be given additional food'

the wording of the provision that the list of various criteria on which discrimination might be based—race, religion and political opinion—is only given by way of example. The criteria of sex and gender, language, colour, social position, financial circumstances and birth might be added. In a word, any discriminatory measure whatsoever is banned, unless it results from the application of the Convention. Nationality is not among the various criteria mentioned (it was mentioned in Article 13) and the discussions at the Diplomatic Conference make it clear that it cannot be regarded as implicitly included.'

[28] Pictet Commentary GC IV, at 205. This chapter does not discuss the gendered meaning of honour of males under IHL, although it is a matter warranting further examination. Also, there is some discussion in J.G. Gardam and M.J. Jarvis (eds), *Women, Armed Conflict and International Law* (The Hague: Kluwer Law International, 2001), e.g., at 107–12.

[29] See Art 1 UDHR: 'All human beings are born free and equal in dignity and rights.'

[30] See Art 75(2)(b) AP I and Art 4(2)(e) AP II. See also H. Durham and K. O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law', 92 *IRRC* 877 (2010) 31.

[31] Art 75(2)(b) AP I; Art 4(2)(e) AP II. Under the APs, sexual violence is also implicitly prohibited as, e.g., acts of violence to the life, health, or physical or mental well-being of persons, or torture and mutilation. These acts are prohibited at any time, in any place whatsoever, and against any protected person, regardless of gender (Art 75(2) AP I). However, by contrast to the Conventions, the APs also expressly prohibit sexual and gender-based violence, naming rape, enforced prostitution, and other forms of indecent assault as outrages upon personal dignity against all protected persons, of any gender.

[32] Pictet Commentary GC IV, at 205. See also discussion of Art 14 GC III, at MN 43–53.

[33] E.g., Art 14 GC III. [34] Art 85 GC IV. [35] Art 97 GC IV.

(Article 89), and that 'maternity cases […] can be given and shall receive care not inferior to that provided the general population' (Article 91). Many of these special measures, while perhaps well-meaning, are based on the stereotype of women as inherently weak relative to men[36] and susceptible to sexual violence.

20 Nonetheless, women and girls are disproportionately targeted for sexual attack, but this is attributable to gender inequality throughout the world and not to some inherent characteristic. In the context of war, they are frequently vulnerable to sexual violence as unarmed civilians in a context of generalized violence and disorder. Women also continue to carry out gender-prescribed activities during armed conflict, such as collecting water, which might take them outside safer zones or otherwise expose them to risk. Increasingly, they are also targeted as a deliberate tactic of war, 'a systemic part of the strategy of political control'.[37] The reductionist approach taken in Article 27 of equating female honour with modesty and chastity, is based on a mischaracterization of the harm caused by sexual and gender-based violence, and perpetuates the discriminatory gender stereotypes that make women vulnerable to such attacks.

21 Protecting honour from attack, rather than the person, as in Article 27 paragraph 2, is, therefore, troublesome, and has been the subject of considerable and justifiable feminist criticism. For instance, the linking in Article 27 paragraph 2 of sexual violence to honour may make it seem as if 'the provision is more about the social value traditionally attached to a woman's chastity' than her physical protection.[38] On the other hand, it is undoubtedly the case that in some states, and amongst conservative military officials, the concept of 'honour', as used in Article 27 paragraph 2, resonates strongly. It can therefore be useful in promoting observance of the prohibitions against sexual violence in armed conflict. The authors acknowledge the tension this raises, especially for feminist lawyers, given the imperative of preventing, prohibiting, and punishing sexual violence in armed conflict.

22 Article 27 paragraph 2 has also been criticized for being couched in notions of family honour, rather than physical and psychological safeguards for the protected person.[39] An extreme example of the impact of this is evident where women's honour, understood as inseparable from chastity, is considered the property of the family or community. Here, so-called 'honour crimes', such as killing, or 'chastity' reparations, such as marriage to the offender, are encouraged or forced to avenge perceived transgressions and to prevent any further shaming of the family. This same confusion, a belief in a 'collective honour' residing in the chastity of women, is also behind the deliberate military and political strategy that uses rape as a 'weapon of war'.

23 International humanitarian law, like much of international law in general, is criticized for being a 'thoroughly gendered system' in which the 'characteristics of men and women are assumed and serve as a basis on which to construct the regime'. Here, honour for men means 'bravery, fortitude, self-reliance; for women: chastity, modesty, frailty and dependence'.[40] On this basis, Article 27 paragraph 2 and the other special protections for

[36] This is clear from the special protections for women POWs. E.g., Arts 14, 16, and 49 GC III assume women's relative physical weakness compared to men, which should be taken into account in requiring POWs to work. See Pictet Commentary GC III, at 146–7, which explains the adoption of special measures here on the basis of women as 'the weaker sex'.

[37] C. Chinkin and M. Kaldor, 'Gender and New Wars', 67 *Journal of International Affairs* (2013) 167.

[38] C. Lindsey, 'The Impact of Armed Conflict on Women', in H. Durham and T. Gurd (eds), *Listening to the Silences: Women and War* (Leiden: Martinus Nijhoff, 2005) 21, at 33, referring to the critiques of others and not necessarily her own.

[39] Gardam and Jarvis (eds), above n 28, at 108–10.

[40] Ibid, at 11.

women 'take the male perception of not only what it is to be a woman, but also what it is about a woman that warrants protection. In doing so, a picture of a woman is presented that is distorted and far from the reality of their lives.'[41] The assumptions that follow, evident in Article 27 paragraph 2, include that chastity and modesty are inherent qualities of women's honour, but not necessarily of men's, and that women's dignity equates with their sexual purity. As Pictet comments, 'women […] have an absolute right to respect for their honour and their *modesty*, in short, for their dignity as women'.[42] Under this framework, sexual violence in conflict is erroneously viewed as something that happens only to female 'victims', while males' experience of sexual violence is assumed to be that of a perpetrator.

While there have been convictions for war crimes of rape and other forms of sexual violence before international criminal tribunals, especially by the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the Special Court for Sierra Leone (SCSL), there have been no cases citing 'attacks upon honour' as a basis for gender-based charges. It now seems unlikely that a criminal prosecution would be pursued as an attack against a woman's or a girl's honour. The prohibition has been superseded by the 1977 Additional Protocols and by the adoption of the Statute of the International Criminal Court (ICC), which contains the most comprehensive list of sexual and gender-based crimes under international law but does not include the war crime of attacking a woman's honour.[43] It seems to be largely redundant, even if its underlying assumptions are more enduring. **24**

c. Rape

The International Military Tribunal for the Far East (IMTFE) Judgment[44] condemned rape in several instances as a 'Conventional War Crime', citing in the indictment Article 3 of the 1929 GC II, Article 46 of the Annex to the 1907 Hague Convention, and the laws and customs of war.[45] The Judgment did not, however, define the conduct that amounts to rape. Subsequent Second World War cases in the Pacific theatre, such as the *Yamashita*,[46] *Awochi*,[47] and *Sakai*[48] cases, entered convictions for, but likewise did not define, rape. In the Dutch-led Temporary Court Martial in Batavia, the Judge-Advocate characterized rape as forcibly causing a woman to have 'extra-marital carnal intercourse'.[49] **25**

The Geneva Conventions do not define rape, and neither does Article 76 AP I. By the time the two ad hoc international criminal tribunals for the former Yugoslavia and Rwanda were established in the 1990s, there was still no accepted definition of rape under international law. **26**

[41] Ibid, at 10–11. [42] Pictet Commentary GC IV, at 206 (emphasis added).

[43] Art 8(2)(b)(xxi) and (xxii) ICC Statute.

[44] See IMTFE, *United States et al. v Araki et al.*, Judgment, 4 November 1948, in R.J. Pritchard and S. Saide (eds), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East* (New York: Garland, 1981), vol 22, 31, also available at <http://werle.rewi.hu-berlin.de/tokyo.anklageschrift.pdf>. See also Pritchard and Saide (eds) for transcripts of the proceedings as well as documents.

[45] Indictment, App D, reprinted in *Trial of Japanese War Criminals*, US Dept of State Publication No 2613, at 93–6.

[46] *Trial of General Tomoyuki Yamashita*, United States Military Commission, Manila, 1946, UNWCC Law Reports, vol IV, at 4, 6, 35.

[47] *Trial of Washio Awochi*, Netherlands Temporary Court-Martial, Batavia, 1946, UNWCC Law Reports, vol XIII, at 123, 125.

[48] *Trial of Takashi Sakai*, Chinese War Crimes Military Tribunal, Nanking, 1946, UNWCC Law Reports, vol XIV, at 7.

[49] See *Judge-Advocate v X et al*, Netherlands Temporary Court-Martial in Batavia, 1948, Case No 72/1947 (Verdict 231), available at <http://tinyurl.com/pzsnfwp>, at 2–5.

27 It required several trials at the ICTR and ICTY for a consensus on the legal elements of rape to emerge. The ICTR Trial Chamber first defined rape in the *Akayesu* case,[50] closely followed by definitions in the ICTY in *Delalić*[51] and then in *Furundžija*.[52] Finally, the ICTY Appeals Chamber in *Kunarac* settled on a definition for rape as a war crime[53] and as a crime against humanity in 2002.[54] This decision introduced the requirement for proof of the victim's lack of consent and the perpetrator's knowledge of the lack of consent. Importantly, the Appeals Chamber stated that consent must be given voluntarily and as a result of the person's own free will, and hence is to be 'assessed in the context of the surrounding circumstances'.[55]

28 Although binding only on the ICTY and ICTR, the *Kunarac* definition has been influential. The SCSL applied a slight variation of it in assessing the charge of rape as a crime against humanity in the *Charles Taylor* case,[56] and key elements were incorporated into the Elements of Crimes for the ICC.[57] At the time of writing, the ICC had not rendered a conviction for rape either as a war crime or as a crime against humanity. However, the definition in the Elements of Crimes is highly persuasive and has been copied into the laws establishing the Extraordinary Chambers in the Courts of Cambodia (ECCC)[58] and the Special Panels for Serious Crimes in East Timor, which entered a conviction for rape in the *Cardoso* case.[59] A number of states parties to the ICC Statute have also incorporated these elements for rape into their national laws.[60]

[50] The Trial Chamber acknowledged that it 'must define rape as there is no commonly accepted definition of this term in international law': ICTR, *Akayesu*, above n 5, paras 596 and 597. Note that the definition adopted was in relation to a charge of rape as a crime against humanity. Despite the differences in the contextual elements for rape as a crime against humanity or a war crime, the *actus reus* elements apply equally to both.

[51] ICTY, *The Prosecutor v Zejnil Delalić et al*, Trial Chamber Judgment, IT-96-21-T, 16 November 1998, para 479.

[52] ICTY, *The Prosecutor v Anto Furundžija*, Trial Chamber Judgment, IT-95-17/1-T, 10 December 1998, para 180.

[53] The definition for rape applies to IAC as well as to NIAC.

[54] In the *Kunarac* case (also known as *Foča*), the definition of rape, confirmed on appeal, was the penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, *and* the knowledge that it occurs without the consent of the person. ICTY, *The Prosecutor v Dragoljub Kunarac et al*, Appeals Chamber Judgment, IT-96-23 & IT-96-23/1-A, 12 June 2002, para 128.

[55] Ibid, para 460. An unsuccessful appeal to the ICTR Appeals Chamber was lodged in *Gacumbitsi*, in which the prosecutor argued in favour of retaining the *Akayesu* definition of rape which did not require proof of the victim's lack of consent or the perpetrator's knowledge of the victim's lack of consent. ICTR, *The Prosecutor v Sylvestre Gacumbitsi*, Appeals Chamber Judgment, ICTR-2001-64-A, 7 July 2006, para 153.

[56] SCSL, *The Prosecutor v Charles Taylor*, Trial Chamber Judgment, SCSL-03-01-T, 18 May 2012, para 415.

[57] Rape as a war crime, Art 8(2)(b)(xxii)-1, ICC Elements of Crimes, UN Doc PCNICC/2000/1/Ass 2(2000), Art 8(2)(b)(xxii)-1. Also, e.g., Art 7(1)(g)-1 for identical *actus reus* elements for rape as a crime against humanity and Art 8(2)(e)(vi)-1, rape as a war crime in a NIAC.

[58] In the case against *Kaing Guek Eav* (alias 'Duch'), the Court convicted Duch of the crime against humanity of torture, including an act of rape. It held that, with respect to the *actus reus* of torture, '[c]ertain acts are considered by their nature to constitute severe pain and suffering. These acts include rape […].' See ECCC, Case No 001/18-07-2007-ECCC-TC, Judgment, 26 July 2010, 99, at 85, para 355. This decision has sometimes been misunderstood as a conviction for the crime against humanity of rape. See Trial Chamber discussion, para 366, and the Supreme Court Chamber's discussion on appeal in Case No 001/18-07-2007-ECCC/SC, 3 February 2012, paras 208–13.

[59] *The Prosecutor v Jose Cardoso Fereira*, Case No 04/2001, 5 April 2003.

[60] See, e.g., Coalition for the International Criminal Court, *Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities*, available at <http://www.iccnow.org/documents/Global_Ratificationimplementation_chart_May2012.pdf >.

Unlike Article 27 paragraph 2 GC IV (and Article 76 AP I), the crime is gender neutral under the ICC Statute and in the legal instruments which reformulated the provision contained therein. However, there is no clash with Article 27 paragraph 2 GC IV since the protection against rape expressly mandated in favour of females equally applies to males under the principle of humane treatment and under other specific prohibitions that apply implicitly to rape, such as the prohibition of torture as a grave breach (e.g., Article 146 GC IV).[61] **29**

d. Enforced prostitution

The protection against enforced prostitution was included in Article 27 paragraph 2 GC IV as it was one of the crimes committed against women in the Second World War that the Conference particularly wanted to address (see also Chapter 61, MN 15, of this volume),[62] although the Geneva Conventions fail to define it. Pictet reports that when drafting Article 27, the Conference had in mind the many thousands of women and girls forced into military brothels during that war,[63] and refers to the practice as 'the forcing of a woman into immorality by violence or threats'.[64] A well-known example of enforced prostitution from this time is the Japanese military brothels of the 1930s and 1940s, known as 'comfort stations', in which hundreds of thousands of women and girls across the Asia-Pacific region were held and raped repeatedly for the duration of their detention, or until they were killed.[65] **30**

The Dutch Temporary Court Martial in Batavia (Jakarta) in Indonesia conducted the only prosecutions for enforced prostitution in the context of armed conflict in 1948. They convicted a number of Japanese military of the war crimes of coercion to prostitution, abduction of women and girls for enforced prostitution and rape, and ill-treatment of prisoners in relation to 35 Dutch nationals who had been interned by the Japanese and then forced to become 'comfort' women.[66] One accused was sentenced to death, and the others to terms of imprisonment ranging from two to 20 years. [67] **31**

At the Nuremberg Tribunal, the Russian Prosecutor submitted evidence that in the city of Smolensk, 'the German Command opened a brothel for officers in one of the hotels into which hundreds of women and girls were driven'.[68] At the Tokyo Tribunal, evidence of the Japanese military forces setting up brothels in areas under their occupation, such as Kweilin in China, formed part of the judgment.[69] However, evidence of forced **32**

[61] See S. Sivakumaran, 'Prosecuting Sexual Violence against Men and Boys', in de Brouwer et al (eds), above n 25, 79 at 79–82. Also discussion at MN 7–10 and throughout.

[62] Pictet Commentary GC IV, at 205. [63] Ibid. [64] Ibid, at 206.

[65] There were also German military brothels across Europe during the Second World War, in which tens of thousands of women and girls were forced into prostitution. See, e.g., Askin, *War Crimes against Women*, above n 25, at 79.

[66] The Court Martial applied the definition of 'enforced prostitution' as a war crime from Dutch law, i.e. 'the abduction of girls and women for the purpose of enforced prostitution'.

[67] See Batavia Case No 72/1947 (Verdict 231), above n 49, at 21–2. Also see A.-M. de Brouwer, 'Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR', 20 *School of Human Rights Research Series* (2006), at 103; K.D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', 21 *Berkeley JIL* (2003) 288, at 302.

[68] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945–1 October 1946 (Nuremberg, 1947), vol VII, at 455–6.

[69] IMTFE Judgment, above n 44, vol I, at 1125. Nevertheless, the Tokyo Tribunal did not pursue the enforced prostitution or sexual enslavement of the upwards of 100,000 other women and girls compelled into the 'comfort' system. See P. Sellers, 'Wartime Female Slavery: Enslavement?', 44 *Cornell International Law Journal* (2011) 118, at 117–19.

prostitution that could have been the basis for separate convictions of the war crime of enforced prostitution was instead incorporated into the charges for rape as a violation of the laws and customs of war and into charges of ill-treatment.[70]

33 There had been no prosecutions for enforced prostitution before the more recently established international and internationalized criminal tribunals. The crime is not expressly listed in the ICTY Statute, although it is included in the Statute for the ICTR as an example of an outrage upon personal dignity and a violation of Common Article 3 and of Article 4 AP II.[71] In the Statute of the SCSL, enforced prostitution is expressly included as a crime against humanity against the person (not against a person's 'honour') (Article 2(g)), and as an outrage upon personal dignity as a violation of Common Article 3 (Article 3(e)). The SCSL did not charge enforced prostitution (although sexual slavery as a crime against humanity was charged).[72] The law establishing the ECCC does not expressly include this crime either.[73]

34 Under the ICC regime, enforced prostitution is a war crime and a crime against humanity.[74] It is a crime against the person and not against a person's 'honour'. Like all crimes within the jurisdiction of the ICC, except forced pregnancy, this crime is gender neutral.[75] At the time of writing, the ICC had not issued indictments for enforced prostitution.

35 A number of commentators take the view that the conduct that constitutes enforced prostitution is better characterized and prosecuted as sexual slavery.[76] They consider that, in the context of armed conflict, most, if not all, factual scenarios that could be described as enforced prostitution would also amount to sexual slavery.[77] Furthermore, while the conduct might essentially be the same, characterizing it as sexual slavery rather

[70] IMTFE Judgment, above n 44, vol I, at 1178. General Shunroko Hata, Commander of the Chinese Expeditionary Forces between 1941 and 1944, was convicted upon Count 55 of the indictment that alleged disregard of the legal duty to secure the observance and prevent the breaches of the laws of war that occurred when large numbers of the inhabitants were murdered, tortured, raped, and otherwise ill-treated. Hata's troops invaded and occupied the Kweilin, committing rapes and setting up a brothel.

[71] The ICTY has prosecuted individuals for the crimes against humanity of rape and enslavement for conduct amounting to 'sexual slavery', in *The Prosecutor v Dragoljub Kunarac et al*, Trial Chamber Judgment, ICTY-IT-96-23-T & IT-96-23/1, 22 February 2001.

[72] Indictments for crimes against humanity of sexual slavery—SCSL, *The Prosecutor v Alex Tamba Brima et al*, Trial Chamber Judgment, SCSL-04-16-T, 20 June 2007 ('*AFRC case*'); and convictions for sexual slavery as a crime against humanity—SCSL, *The Prosecutor v Issa Hassan Sesay et al*, Trial Chamber Judgment, SCSL-04-15-T, 2 March 2009 ('*RUF case*'). Also V. Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments', 44 *Cornell International Law Journal* (2011) 49.

[73] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (2004).

[74] Crime against humanity—Art 7(2)(g); serious violations of the laws and customs applicable in IAC—Art 8(2)(b)(xxii)—and NIAC—Art 8(2)(e)(vi). Panels with Jurisdiction over Serious Criminal Offences for East Timor have jurisdiction over the same crimes against humanity and war crimes as the ICC (ss 5 and 6 Regulation No 2000/15, UNTAET/REG/2000/15, 6 June 2000).

[75] The non-contextual elements of the crime, as established in the ICC Elements of Crimes, are: (1) The perpetrator causes a person to engage in sexual acts including by force or threat of force or coercion, by an abuse of power or by taking advantage of a coercive environment in which the person cannot give genuine consent. (2) The perpetrator must also obtain or expect to obtain pecuniary or other advantage in exchange for, or in connection with the sexual acts. E.g., Art 8(2)(b)(xxii)-3, ICC Elements of Crimes.

[76] E.g., Final Report of the UN Special Rapporteur of the Working Group on Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict, 22 June 1998, UN Doc E/CN.4/Sub.2/1998/13 ('McDougall Report'), para 31; K.D. Askin, 'The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Survivors', in Durham and Gurd (eds), above n 38, at 129; see also de Brouwer, above n 67, at 142–3.

[77] McDougall Report, above n 76, para 33.

than enforced prostitution 'responds to the concern expressed by survivors of the "comfort system" that the term "forced prostitution" obscures the terrible gravity of the crime, suggests a level of voluntariness, and stigmatizes its victims as immoral or "used goods" '.[78] Indeed, the legal description of the crimes committed against the 'comfort' women factually are more accurately and appropriately termed sexual slavery.[79]

Nonetheless, the drafters of the ICC Statute decided to retain enforced prostitution as **36** a crime distinct from sexual slavery (see also Chapter 61, MN 15, of this volume), because of its historical significance—its explicit prohibition in the 1919 War Crimes Commission Report, Geneva Conventions, and Additional Protocols. After extensive debate, they included the second *actus reus* element—the perpetrator gets, or expects to get, a pecuniary or other advantage—to distinguish enforced prostitution from sexual slavery, and because it was consistent with a common understanding of the crime.[80] However, on the basis of this element, it is questionable whether the crimes committed against many of the 'comfort' women and girls and others forced into prostitution during the Second World War, which the Conference intended Article 27 paragraph 2 to protect against, would amount to enforced prostitution under the ICC Statute (although they would constitute sexual slavery). Nonetheless, including enforced prostitution in the jurisdiction of the ICC might allow prosecution of conduct that lacks slavery-like conditions,[81] making it another potential 'tool for future prosecutions of sexual violence in armed conflict situations'.[82]

e. Indecent assault

Besides Article 27 paragraph 2 GC IV (see Chapter 61, MN 16, of this volume), the protection **37** against indecent assault is expressly mandated in three provisions of AP I. First, in Article 75(2)(b), which includes 'any form of indecent assault' among the acts that 'are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilians or by military agents'. Secondly, in Article 76(1), which provides that women shall be protected from 'rape, forced prostitution and any other form of indecent assault'. Thirdly, in Article 77(1), which provides that children shall be protected 'against any form of indecent assault' (but without any reference to rape or enforced prostitution). The fundamental guarantees listed in Article 4(e) AP II combine 'any form of indecent assault', with rape, enforced prostitution, and humiliating and degrading treatment, with all types of outrages against personal dignity. Article 4 of the Statute for the ICTR and Article 3 of the Statute of the SCSL incorporate the language 'any form of indecent assault' as an outrage upon personal dignity, following verbatim the language of Article 4 AP II. However, the ICTY Statute does not include 'indecent assault'. Likewise, the ICC Statute does not include indecent assault as an outrage upon personal dignity in either IAC or NIAC.

Article 27 paragraph 2 does not define 'any form of indecent assault'. However, the **38** ICRC Study on Customary International Humanitarian Law (ICRC CIHL Study)

[78] Judgment of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery 2001, para 634, reproduced at <http://www.alpha-canada.org/wp-content/themes/bcalpha-theme/resources/Sexual-Slavery/judgement_e01_optz.pdf>.

[79] Ibid, paras 634–9.

[80] de Brouwer, above n 67, at 142; also K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (Cambridge: ICRC/CUP, 2003), at 329.

[81] B. Bedont and K. Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court', 6 *Brown Journal of World Affairs* (1999) 65, at 73. Also de Brouwer, above n 67, at 143, who posits that 'survival sex', in which women and girls, in the context or aftermath of armed conflict, exchange sex for essential goods and services (e.g., food, medicine, and health care) for themselves or family members, is an example of conduct better prosecuted as enforced prostitution rather than sexual slavery.

[82] McDougall Report, above n 76, para 32.

makes it clear that 'any form of indecent assault' equates to any form of sexual violence.[83] The ICTY Trial Chamber in *Stakić*, for example, took the same view, holding that the offence of sexual assault, other than rape, is punishable and embraces 'all serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim's dignity'.[84] The *Milutinović* Trial Judgment[85] held 'sexual assault' to constitute an act of persecution as a crime against humanity that denied or infringed upon a person's fundamental rights.

39 What conduct, therefore, constitutes indecent acts? To paraphrase Pictet's famous caveat concerning torture, concrete acts depend on the imagination of future perpetrators, therefore rendering any list purporting to be complete restrictive over time. Nonetheless, the present authors' incomplete list,[86] included for illustration, highlights conduct that would amount to indecent assault. Whether the prohibition of 'any form of indecent assault' incorporates rape and enforced prostitution depends on standard treaty interpretation principles, including whether these crimes are specifically prohibited separately. For example, in Article 77(1) AP I, only 'indecent assault' is listed in relation to the protection of children, hence the prohibition must be read to cover rape, enforced prostitution, and all other sexual and gender-based violence.

40 Article 77(1) AP I requires that children 'shall be the object of special respect and shall be protected against any form of indecent assault'. The obligation applies to all parties to a conflict, requiring protection of children from indecent assault by members of their own party or the opposing party. Article 77(3) thus requires an adverse party into whose hands children taking part in the hostilities may fall, to *continue* to afford them this special protection, whether detained as POWs or not.[87]

[83] See ICRC CIHL Study, Rule 93.

[84] ICTY, *The Prosecutor v Milomir Stakić*, Trial Chamber Judgment, IT-97-24, 31 July 2003, para 757.

[85] ICTY, *The Prosecutor v Milan Milutinović et al*, Trial Chamber Judgment, IT-05-87-T, 26 February 2009, para 1767.

[86] Indecent assault conduct would encompass, inter alia: vaginal, labial, penile, testicular, breast, and anal mutilations; insertions of objects and liquids into the genitals and anus; burning of pubic hair; insertion of genitalia into one's own or another person's orifice, or into an animal, plant, tree, or inanimate object; rape (e.g., gang rapes, rape of children, rape of pregnant women, rapes prior to execution); compelled sexual acts between protected persons, especially family members, members of the same sex, internees, the aged, sick, disabled, military comrades or with the deceased; forced nudity, forced public display while nude, forced performance of duties while nude; forced masturbation, forced masturbation of other protected persons or members of Detaining Power; being compelled to watch infliction of sexual violence on others; or sexual insults, threats, intimidation, coercion, punishment, or threats of sexual violence; forced circumcision; forced abortion; forced pregnancy; forced birth; or mutilation of a pregnant womb.

[87] This is a crucial protection for child soldiers, who are not only routinely subjected to sexual and gender-based violence, such as rape, sexual slavery, forced pregnancy and forced abortion, but, especially in the case of girls, who are often 'recruited' specifically for the purpose of sexual slavery and forced (domestic) labour by 'fellow' members of their armed forces. See ICC, *The Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber Judgment pursuant to Article 74 of the Statute, Separate and Dissenting Opinion of Judge Odio-Benito, ICC-01/04-01/06, 14 March 2012. In addition to being subjected to sexual abuse, boys are also often forced to perpetrate sexual abuse against the enemy, or even within their own group, in order, for example, to gain status within the masculine hierarchy of the armed group and thus increase their chance of survival. See also ICC, *The Prosecutor v Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014, at paras 76–80. Ntaganda was a commander of the militia UPC/FPLC in the conflict in the Democratic Republic of Congo and was charged, inter alia, with rape and sexual slavery of members of his own militia, namely child soldiers under the age of 15 years. The Chamber confirmed this charge after finding that, when read in the context of the prohibition against the use of child soldiers under 15 years in hostilities (Art 4(3)(c) AP II as reflected in Art 8(2)(e)(vii) ICC Statute), the child soldiers were not actively or directly taking part in hostilities at

The phrase 'any indecent assault' performs a residual function and covers any form of sexualized conduct that contravenes humane treatment and is not expressly listed. Its inclusion in Article 27 and in the fundamental guarantee provisions of the Additional Protocols, signals that the prohibition is central to assurances of humane treatment for all persons, at all times, irrespective of the circumstances or the characterization of the armed conflict. 41

Note that the equivalent residual clause in the ICC Statute (Article 8(2)(b)(xxii)) criminalizes 'any *other* form of sexual violence *also constituting a grave breach* of the Geneva Conventions'. The ICRC CIHL Study Rule 156 (definition of war crimes of sexual violence) notes that this additional prerequisite in Article 8 was necessary to reassure delegates at the Rome Diplomatic Conference, some of whom were concerned that alternative wording proposed for this residual clause—'any other form of sexual violence'—was too vague.[88] 42

II. Protections for prisoners of war, the wounded, and child detainees

Article 14 GC III provides for the general protection owed to POWs. It complements the general requirement that POWs 'be humanely treated' at all times, and 'be protected, particularly against acts of violence or intimidation and against insults and public curiosity' (Article 13 GC III). Specifically, Article 14 requires that states respect POWs in their 'person and honour', and expressly provides, in paragraph 2, that humane treatment, the *sine qua non* of IHL, be extended to female POWs: '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.' 43

This approach follows Article 3 1929 GC II, which required respect for the 'person and honour' of all prisoners, and that 'women be treated with all consideration due to their sex'. The Rasmussen Commentary to 1929 GC II recalls that the German Delegate, who proposed including 'consideration due their sex', was motivated by the participation of female combatants in the First World War, their growing incorporation into the national defence, and thus the likelihood of female POWs in the future.[89] 44

The provision was invoked during the war crimes trials following the Second World War. At Nuremberg, the Tribunal cited Article 3 1929 GC II in its Judgment, as part of the law relating to war crimes that guided their deliberation.[90] Furthermore, subparagraph 45

the specific time these crimes were committed against them: 'The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time.' (para 79) Accordingly, the Pre-Trial Chamber held that the requirement for humane treatment of persons taking no active part in the hostilities under CA 3 and Art 4(1) and (2) AP II applied, and the 'UPC/FPLC child soldiers under the age of 15 years continue to enjoy protection under IHL from acts of rape and sexual slavery' (para 79).

[88] See, ICRC CIHL Study, Rule 156. The ICRC states that '[i]t was solved by introducing the words "also constituting a grave breach of the Geneva Conventions". Although the intention of some of the groups that pressed for the inclusion of this crime was to stress that *any* form of sexual violence should be considered to be a grave breach, this phrase has been interpreted by states in the Elements of Crimes for the International Criminal Court as requiring that "the conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions".' See also Dörmann, above n 80, at 331–2; O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Oxford: Hart Publishing, 2008), at 451–4.

[89] G. Rasmussen, *Code des prisonniers de guerre: Commentaire de la Convention du 27 juillet 1929 relative au traitment des prisonniers de guerre* (Copenhagen: Levin & Munksgaard, 1931).

[90] *Trial of the Major War Criminals*, above n 68, vol I, at 253.

C of the factual allegation of Count Three, war crimes, included 'ill-treatment of prisoners of war'.[91] At the Tokyo Tribunal, Count 54 (ordering, permitting, or authorizing of war crimes) and Count 55 (alleged disregard of the legal duty to observe and prevent breaches of the laws of war) alleged: 'Inhumane treatment […] [of] prisoners of war'; 'Mistreatment of the sick and wounded, medical personnel and female nurses'; and '(c) *female nurses were raped*, murdered and ill-treated'.[92]

46 The widespread rape of female POWs during the Second World War led the drafters of the 1949 Geneva Conventions to retain verbatim the requirement that women prisoners be accorded 'consideration due to their sex'. However, they also added the requirement that female prisoners 'shall in all cases benefit by treatment as favourable as that granted to men', regardless of any customary practices of the Detaining Power.

47 Pictet advises that these two conjunctive phrases must be read in reverse, with the emphasis placed on the according of equal treatment to all POWs and not on the 'vague idea of regard',[93] since it was the consternation that, in many countries, 'much prejudice still remained which sometimes placed women on an inferior footing' that led members of the Diplomatic Conference to insert this equality provision into Article 14.[94]

48 Pictet comments that the principle of equal treatment of prisoners regardless of gender is weakened to some extent by provision for special measures for female POWs and by unspecified special treatment required to give females 'regard due to their sex'. Special measures for female prisoners under GC III require female guards, separate detention quarters and sanitation facilities, special work assignments, nutritional allocation for pregnant or nursing mothers, repatriation preference, and a penal sanctions regime for pregnant prisoners.[95] However, taken as a whole, these measures should be interpreted as strengthening the principle of equality by recognizing the different needs of prisoners because of their sex, gender, or other status (e.g., pregnancy).

49 Article 14 does not define 'regard due to their sex'. According to Pictet, it refers to the (assumed) feminine attributes of weakness, honour, and modesty, as well as pregnancy and childbirth,[96] that are the basis for the Convention's differential treatment of female POWs. Pictet also comments that the connotation of weakness, and the description 'weaker sex', 'has a bearing on' rules regarding labour by, and food rations for, female prisoners,[97] while attributes such as 'honour' and 'modesty' require protection of women prisoners from 'rape, enforced prostitution and indecent assault'. 'Regard' due to women's honour and modesty therefore unequivocally proscribes any form of sexual violence against women POWs.

50 Geneva Convention III sets out other prohibitions and measures, including against 'insults and public curiosity' directed at POWs (Article 13 GC III), coercion and physical

[91] Nuremberg defendants Rosenberg, the Reich Minister for Occupied Eastern Territories including Russia, and Keitel, Chief of Command of the High Command, were convicted of Counts 3 and 4 based upon the ill-treatment inflicted on persons in occupied territories, substantiated inter alia by evidence of sexual violence; see *Trial of the Major War Criminals*, above n 68, vol I, at 43, 51–2.

[92] Indictment, App D, reprinted in *Trial of the Japanese War Criminals*, US Dept of State Publication No 2613, at 93–6 (1946) (emphasis added); see also IMTFE Judgment, above n 44, at 113.

[93] Pictet Commentary GC III, at 146.

[94] Report on the Work of the Conference of Government Experts, 119, cited in Pictet Commentary GC III, at 146.

[95] See Arts 25, 29, 49, 97, 88, and 108 GC III, respectively. See also Ch 61 of this volume.

[96] Pictet Commentary GC III, at 147.

[97] Ibid.

or mental torture during interrogation of POWs (Article 17 GC III), and the requirement for sex-segregated accommodation (Article 25 paragraph 4 GC III), which Pictet comments was intended to ensure that male POWs could not access female quarters, irrespective of the consent of the female prisoners.[98]

51 The duty to protect women from all forms of sexual violence as part of giving them due 'regard', is also expressly owed to those women who are wounded or sick on land (Article 12 GC I) or shipwrecked (Article 12 GC II). These provisions do not include equal treatment language, but do extend the requirement for humane treatment to all protected persons.[99]

52 Rule 134 of the ICRC CIHL Study (Women) cites these provisions to assert that IHL affords women the same protection as men without discrimination. State practice on protections based upon consideration of 'regard due to their sex', together with the provision of special measures to ensure no adverse discrimination, is discernible in national military manuals.[100] For example, some states have replicated the language of these provisions and specified the intention to prohibit rape, enforced prostitution, and indecent assault.[101] However, to date, no one has been convicted by a modern international criminal tribunal or court for sexual violence as a violation of Article 14.[102]

53 Article 77 AP I echoes Article 14 GC III, providing that 'children shall be the object of special respect and shall be protected against any form of indecent assault'. They are to be provided 'with the care and aid they require, whether because of their age or for any other reason'. Article 77(3) expressly requires a Detaining Power to continue to protect children throughout the period of detention, including children under 15 years of age who have taken direct part in hostilities, even if unlawfully so under international law, and irrespective of their POW status. The special protection must include the same kinds of measures to which adult POWs are entitled, including protection from members of their own party, as well as from members of the Detaining Party. For instance, Article 77(4) AP I, following the approach in Article 25 GC III, requires segregated quarters to protect children from a range of potential abuses, including sexual, by adult members of their own side and of the Detaining Party.

C. Relevance in Non-International Armed Conflicts

54 Common Article 3 to the Geneva Conventions[103] extended fundamental IHL objectives, namely the principle of respect for the human personality and guarantees of humane treatment, to situations of non-international or internal armed conflict.

[98] Pictet Commentary GC III on Art 25 (Quarters), at 195. See also Ch 61 of this volume.

[99] The language of 'regard due to their sex' is not found in the APs. E.g., Art 76(1) AP I states instead that women are the 'object of special respect', an equally vague, and arguably patronizing, term.

[100] ICRC CIHL Study, Rule 134, Section A, III, National Military Manuals.

[101] See ICRC CIHL Study, Rule 134, State Practice.

[102] In *Mrškić*, the ICTY Trial and Appeal Chambers examined the killing and torture of POWs based upon CA 3, as interpreted under Art 3 ICTY Statute. ICTY, *The Prosecutor v Mile Mrškić et al*, Trial Chamber Judgment, IT-95-13/1-T, 27 September 2007, and Appeals Chamber Judgment, IT-95-13/1-A, 5 May 2009.

[103] CA 3 reads in part: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities shall in all circumstances be treated humanely, without any adverse distinction […]'. Various prohibited acts are then listed, including torture and outrages upon personal dignity, discussed below.

Common Article 3 is unconditionally the minimum standard of humane treatment to be given to persons taking no active part in hostilities. No excuse or extenuating circumstances prevent its application. It is operable at any time, in any place whatsoever. The obligation for all parties is absolute.[104] While Common Article 3 does not specify rape or other types of sexual violence, these acts are implicitly covered by the listed prohibitions, in particular under subparagraphs 1(1)(a) ('violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture'), and 1(1)(c) ('outrages upon personal dignity, in particular humiliating and degrading treatment'). Those provisions have proved central to addressing rape and sexual violence in international jurisprudence.[105]

55 Common Article 3 paragraph 1(1)(c) does not define what constitutes 'outrages upon personal dignity'. Clearly, however, the drafters intended the provision to cover, at a minimum, the sexual violence conduct set out in Article 27 GC IV—rape, enforced prostitution, and indecent assault. Pictet reports that Common Article 3 paragraph 1(1)(a) and (1)(c) '[concern] acts which world public opinion finds particularly revolting—acts which were committed frequently during the Second World War'.[106] Furthermore, Pictet opines that the drafters rejected the idea of an exhaustive list of acts, noting that the 'more specific and complete a list tries to be, the more restrictive it becomes'. Hence, Pictet states, '[t]he form of wording adopted is flexible, and at the same time precise'.[107]

56 Sexual violence prohibited under Common Article 3 paragraph 1(1)(a) includes sexual mutilations, reproductive experiments, sexualized killings, and rape. Subparagraph (1)(c), prohibiting outrages upon personal dignity, provides a legal basis for proscriptions of sexual abuse in NIAC. This illustrates a tension in the Geneva Conventions protection regime that links dignity and honour with crimes of sexual violence against females, rather than emphasizing the violent nature of the acts as attacks against a person. Significantly, Common Article 3 provides the basis for sexual violence safeguards in the fundamental guarantees provisions of AP I and AP II. Notably, Article 4 AP II contains the entirety of Common Article 3.[108] Each fundamental guarantee provision proscribes 'outrages upon personal dignity' and lists explicit forms of outrages, such as 'degrading treatment, enforced prostitution and any form of indecent assault' (Article 75(2)(b) AP I; Article 4(2)(e) AP II).

57 The Common Article 3 interdictions have also been incorporated into the Statutes of the ICTR (Article 4) and SCSL (Article 3). Even though the ICTY Statute does not expressly include 'outrages upon personal dignity' per se, the *Tadić* appeals decision held that violations of Common Article 3 were within its subject matter jurisdiction under violations of the laws and customs of war (Article 3 ICTY Statute).[109] The jurisprudence moreover confirmed that Common Article 3 encompasses rape.[110]

[104] E.g., Pictet Commentary GC IV, at 37.
[105] E.g., *Furundžija*, above n 52.
[106] Pictet Commentary GC IV, at 38.
[107] Ibid.
[108] Art 1(1) AP II clarifies that this Protocol 'develops and supplements [Common] Article 3 without modifying its existing conditions of application'.
[109] ICTY, *The Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 91.
[110] ICTY, *The Prosecutor v Anto Furundžija*, Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment, IT-95-17/1-PT, 29 May 1998, at 6(d), stating that the Appeals Chamber in *Tadić* did not preclude charging outrages upon personal dignity, including rape, thereunder.

The ICC Statute incorporates the original wording of Common Article 3, but de-links 'outrages upon personal dignity' from rape, enforced prostitution, and indecent assault (Articles 8(2)(b)(xxi) and 8(2)(c)(ii)), which are covered in separate provisions.[111] 58

The ICRC CIHL Study Rule 90 readily associates outrages upon personal dignity with torture and inhuman treatment. The 'outrages upon personal dignity' umbrella of protections has been a rich source of jurisprudence. For instance, in *Furundžija*, in which Witness A testified that she was raped vaginally and orally, the Trial Chamber found that 59

> [s]exual assaults were committed publicly; Members of the Jokers were watching and milling around the door of the pantry. They laughed at what was going on. The Trial Chamber finds that Witness A suffered severe physical and mental pain, along with public humiliation, at the hand of the accused in what amounted to outrages upon her personal dignity and sexual integrity.[112]

The *Kunarac* ICTY Trial Chamber held that forcible naked dancing on tables constitutes an outrage on personal dignity. The accused, Kovač, knew that 'having to stand naked on a table, while the accused watched them was a painful and humiliating experience for the three women involved, even more so because of their young age'.[113] 60

Common Article 3 paragraph 1(1)(c) has also been relied on to charge 'degrading treatment', especially sexual abuse, including rape, by the ICTR,[114] and acts of sexual slavery before the SCSL.[115] State practice has also relied upon Common Article 3 paragraph 1(1)(c).[116] 61

D. Legal Consequences of a Violation

I. Rape and other forms of sexual violence as war crimes

Despite the inclusion of express protections in Article 27 paragraph 2 GC IV, the omission of rape and other forms of sexual violence from the list of crimes under the Geneva Conventions' grave breaches provisions, especially under Article 147 GC IV, has caused controversy and confusion. The Preliminary Remarks to the Convention have done little to reduce this confusion by commenting that grave breaches would make an 'important contribution toward defining war crimes', arguably implying that only those grave breaches that were listed were war crimes under the Conventions. The omission of rape as an explicit grave breach created a misperception in the minds of some that rape was not a war crime *and* not justiciable under the grave breaches provisions. The omission was compounded by the failure of the drafters of the fundamental guarantees provision in Article 75 AP I to include rape. 62

[111] See Art 8(2)(b)(xxii) ICC Statute. [112] ICTY, *Furundžija*, above n 52, para 272.

[113] ICTY, *Kunarac,* above n 71, paras 772–74.

[114] See ICTR, *The Prosecutor v Augustin Ndindiliyimana*, Trial Chamber Judgment and Sentence, ICTR-00-560T, 17 May 2011; *The Prosecutor v Idelphonse Hategekimana*, Trial Chamber Judgment and Sentence, ICTR-00-55BT, 6 December 2010; *The Prosecutor v Tharcisse Renzaho*, Trial Chamber Judgment, ICTR-97-31-T, 14 July 2009; *The Prosecutor v Théoneste Bagosora*, Trial Chamber Judgment, ICTR-98-41-T, 18 December 2008.

[115] SCSL, *AFRC case*, above n 72, paras 718–19; see also SCSL, *Taylor*, above n 56, para 1196.

[116] See Court of Bosnia and Herzegovina, Section I for War Crimes, *The Prosecutor v Zrinko Pinčić*, Verdict and Sentence, Case No X-KR-08/502, 28 November 2008; *The Prosecutor v Velibor Bogdanović*, Verdict and Sentence, Case No S1 1K003336 10 Krl, 29 August 2011.

63 In the early 1990s, the disclosure of widespread, conflict-related sexual violence in Bosnia and Herzegovina led to persistent demands by the international community, particularly feminist activists, to have rape explicitly 'recognized' as a war crime. Although rape had long been a violation of IHL, as outlined above, it was rarely, if ever, explicitly listed as a war crime in treaties. There was further concern that because rape was not an explicit grave breach of the Geneva Conventions, it was not treated as a war crime. To clarify the status of rape under IHL, the ICRC issued an Aide-Mémoire in 1992, stating that the grave breach regime in Article 147 GC IV 'obviously not only covers rape, but also any other attack on a woman's dignity'.[117] While the Aide-Mémoire did not completely quell concerns, it impelled the ICRC to take greater strides to inform parties to all armed conflicts that rape under Article 27 was indeed a serious violation of IHL and could amount to a grave breach. It also prompted the ICRC to deepen its analysis of the Geneva Conventions and the CIL bases for the prohibition of rape and other forms of sexual violence, as evidenced, inter alia, by the ICRC's CIHL Study Rule 93.[118] In the commentary to Rule 156 of the CIHL Study on the definition of war crimes, the ICRC acknowledges that the listing of rape, sexual slavery, enforced prostitution, and enforced pregnancy as war crimes in the ICC Statute 'reflects changes in society'. It also reiterated that

> [a]lthough rape was prohibited by the Geneva Conventions, it was not explicitly listed as a grave breach either in the Conventions or in Additional Protocol I but would have to be considered a grave breach on the basis that it amounts to inhuman treatment or wilfully causing great suffering or serious injury to body or health.[119]

64 Critically, the convictions for war crimes committed in the former Yugoslavia confirmed that rape and other forms of sexual violence do indeed constitute serious and enforceable violations of IHL that could amount to grave breaches under the charges of torture or inhuman treatment,[120] as well as violations of Common Article 3.

[117] ICRC, Aide-Mémoire, para 2 (3 December 1992). For discussion on feminist activism on this issue, see, e.g., K. Engle, 'Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina', 99 *AJIL* (2005) 778; H. Charlesworth, 'Feminist Methods in International Law', 93 *AJIL* (1999) 379; C. Chinkin, '"Reconceiving Reality": A Ten-Year Perspective', 97 *ASIL PROC* (2003) 55. Note also Y. Kushalani, *Dignity and Honour of Women as Basic Human Rights* (The Hague: Martinus Nijhoff Publishers, 1982), at 148–53, arguing that the dignity and honour of women is a basic human right and a long-standing general principle of international law, including the laws of war.

[118] In the 1990s, the ICRC strengthened its analysis of IHL prohibitions of sexual violence. See ICRC Statement before the Commission for the Rights of Women, European Parliament, 18 February 1993 (Brussels); Resolution 2B, 26th International Red Cross and Red Crescent Conference (Geneva, 1995), wherein the Conference conveyed outrage at sexual violence in armed conflicts, in particular rape used as an instrument of terror, and forced prostitution; ICRC Update on the Aide-Mémoire on rape committed during the armed conflict in ex-Yugoslavia, of 3 December 1992. In 1998, the ICRC conducted a study to better identify the ways in which women are affected by armed conflicts, and to determine how to improve its own response: see Resolution 1: Plan of Action for the years 2000–3, 27th International Red Cross and Red Crescent Conference (Geneva, 1999); in 1999, at the same Conference, the President pledged a four-year commitment to reiterate the ICRC's concern about sexual violence in armed conflict, available at <http://www.icrc/eng/women>. Also in 1999, the ICRC integrated inquiries about rape and sexual violence into a survey marking the 50th Anniversary of the Geneva Conventions: *People on War Report: ICRC Worldwide Consultation on the Rules of War* (Geneva: ICRC, 1999); in 2000, the ICRC's *Project on Women and War* described the ICRC commitment to focus on issues affecting females in armed conflict, C. Lindsey, 'Women and War—An Overview' 89 *International Review of the Red Cross* (30 September 2000), available at <http://www.icrc.org/eng/resources/documents/misc/57jqq3.htm>.

[119] ICRC CIHL Study, Rule 156 Definitions of War Crimes.

[120] See, the ICTY's first case, *The Prosecutor v Duško Tadić*, Trial Chamber Judgment, IT-94-1-T, 7 May 1997, where the Tribunal held that acts of male sexual assault, including mutilation, fellatio, and indecent assault, constituted the war crimes of inhuman and cruel treatment, and the crimes against humanity of other

65 In April 2013, the Foreign Ministers of the Group of Eight (G8) adopted a declaration that included a statement 'recall[ing] that rape and other forms of serious sexual violence in armed conflict are war crimes and also constitute grave breaches of the Geneva Conventions and their first Protocol'.[121] Moreover, confirming the gravity of sexual violence crimes by re-stating their grave breaches status, the G8 reiterated that this status triggers state obligations to prevent, investigate, and prosecute or extradite suspects under for example Article 146 GC IV, and obliges third states to exercise universal jurisdiction over suspects. For a genre of war crimes that has been spectacularly under-investigated and under-prosecuted, such reiteration is significant.[122]

66 To date, no international criminal cases have relied solely on Article 27 paragraph 2 as a legal basis for prosecution of sexual violence. Moreover 'indecent assault' is not listed as a war crime in Article 8 of the ICC Statute, nor in the Statutes of the ICTY, ICTR, SCSL, or the ECCC. Rape and enforced prostitution[123] are expressly listed as war crimes in the ICC Statute (Article 8(2)(b) and (c)).[124]

67 However, Article 27 GC IV has been cited in ICTY decisions. In *Furundžija*, the Trial Chamber held that 'attention must be drawn to the fact that there is a prohibition of rape and any form of indecent assault on women in Article 27 of Geneva Convention IV'.[125] In *Kvočka*, the Trial Chamber recognized that rape was not only prohibited by Common Article 3, but that it was also 'a crime explicitly protected against in Article 27 of the Fourth Geneva Convention'.[126] In *Đorđević*[127] and the

inhuman acts; ICTY, *Furundžija*, above n 52, convicted for forced nudity and humiliation, in addition to acts of rape; see also ICTY, *The Prosecutor v Miroslav Kvočka et al*, Trial Chamber Judgment, IT-98-30/&-T, 2 November 2001, and ICTY, *Delalić*, above n 51. Similarly, the SCSL has held perpetrators of rape guilty of a war crime, see *AFRC* case, above n 72, paras 1068–188. In most situations in which rape and other forms of sexual violence occur in armed conflict, victims will be in the custody or control of the perpetrator, or the perpetrator will be taking advantage of 'a coercive environment' to commit the crime. For this reason, war crimes of rape, etc invariably will be factually and legally contiguous with the grave breach of torture. For analysis, see ICTY, *Kunarac* Appeals Chamber, above n 54; Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court* (IOR 53/001/2011), at 38; REDRESS, *Redress for Rape, Using International Jurisprudence on Rape as a Form of Torture or Other Ill-treatment* (October 2013), available at <http://redress.org/downloads/publications/FINAL%20Rape%20as%20Torture%20%281%29.pdf>.

[121] *Declaration on Preventing Sexual Violence in Conflict*, adopted at the G8 Foreign Ministers Meeting, London, 11 April 2013 ('G8 Declaration'). The statement was based on analysis by the UK, then holding the Presidency of the G8, confirming that although 'sexual violence and rape are not specifically listed as "grave breaches" of the [Geneva Conventions] or [Additional Protocol I] […] as a matter of treaty interpretation, serious sexual violence and rape should be regarded as "grave breaches" on the basis that they will always amount in practice to torture or inhuman treatment, or wilfully causing great suffering, which are so listed. This position can be taken whether or not it is accepted that sexual violence is a grave breach as a matter of customary international law. International practice supports this interpretation.' *Preventing Sexual Violence in Conflict: Sexual Violence as a Grave Breach of the Geneva Conventions*, Paper by the United Kingdom, 3 February 2013, copy on file with the authors. The Declaration was subsequently launched during the 2013 UNGA and, at the time of writing, 140 states had endorsed it.

[122] See also discussion of consequences of violations of Art 27 GC IV in Ch 61 of this volume. See further Ch 31, MN 56–61, of this volume, on the system of universal jurisdiction over grave breaches. Cf, G8 Declaration, above n 121: 'States have an obligation to search for and prosecute (or hand over for trial) any individual alleged to have committed or ordered a grave breach regardless of nationality. Accordingly, those accused of grave breaches should be brought to trial, in a manner consistent with international norms. There should be no safe haven for perpetrators of sexual violence in armed conflict.'

[123] See the discussion of Art 27 GC IV and enforced prostitution at MN 30–36.

[124] See ICRC CIHL Study, Rule 156, discussion of the war crime of committing sexual violence.

[125] ICTY, *Furundžija*, above n 52, para 175.

[126] ICTY, *Kvočka*, above n 120, para 234, fn 409. See also ICTY, *Delalić*, above n 51, para 476.

[127] ICTY, *The Prosecutor v Vlastimir Đorđević*, Trial Chamber Judgment, IT-05-87/1, 23 February 2011, para 1767, fn 6238.

Milutinović case,[128] the Trial Chambers cited Article 27 approvingly as the CIL basis for prohibitions against sexual assault.

68 States' practice has incorporated the Article 27 prohibitions, including rape, enforced prostitution, and indecent assault, into national military manuals, recognizing them as crimes, subject to individual criminal responsibility by members of the armed forces, including commanders.[129]

69 Individual criminal responsibility for direct and indirect perpetrators (including civilian superiors and military commanders) attaches for crimes under international law, including grave breaches of the Geneva Conventions and other serious violations of IHL. As yet, no ICC convictions have been recorded for sexual violence amounting to grave breaches.[130] However, numerous individuals, including combatants, military commanders, and civilians, have been convicted of war crimes of sexual violence before international criminal tribunals, such as the ICTY and ICTR, the SCSL, and the Special Panel for Serious Crimes (East Timor).[131]

II. The role of the Security Council

70 Extensive campaigning by women's rights organizations throughout the 1990s led the Security Council to join other United Nations (UN) organs in condemning sexual violence in armed conflict, particularly against women and children, identifying it as a threat to international peace and security. In 2000, it adopted Resolution 1325,[132] the first in a series of resolutions on the Security Council's Women, Peace and Security agenda, which reaffirmed the *Beijing Declaration's conclusions* and underscored the CEDAW Committee's General Recommendation No 19.[133] Six subsequent resolutions[134] address the continuing prevalence of sexual violence in conflict and highlight the connection between such violence, women's exclusion from peace and transitional processes, and continuing insecurity. They call on UN member states to fulfil their obligations 'to implement fully, international humanitarian and human rights law that protects the rights of

[128] ICTY, *Milutinović*, above n 85, para 196, fn 355.

[129] See ICRC CIHL Study, Rule 93 (Rape and other Forms of Sexual Violence), fn 10.

[130] See, e.g., ICC, *The Prosecutor v Germain Katanga*, Judgment pursuant to Article 74, ICC-01/04-01/07-3436, 7 March 2014, prosecuted for committing through other persons crimes against humanity and war crimes, including rape and sexual slavery—he was found not guilty of rape or sexual slavery charges; ICC, *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 12 July 2010, including charges as an 'indirect co-perpetrator' of the crime against humanity of rape; ICC, *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11, as indirect co-perpetrators of the crime against humanity of rape. Note the charges against Muthuaura were withdrawn on 11 March 2013 and against Kenyatta on 13 March 2015.

[131] These cases are well documented elsewhere in this chapter and on the websites for each tribunal. Also see the ICTY website on its work prosecuting crimes of sexual violence, available at <http://www.icty .org/sid/10312>. Note further the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Basic Standards of Best Practice in the Documentation of Sexual Violence as a Crime under International Law*, 1st edn, June 2014. This initiative of the Government of the UK is intended to assist in better and more investigations and prosecutions of these crimes at national and international levels. Available at <https://www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict>.

[132] UNSC Res 1325 (2000).

[133] Beijing Declaration and Platform for Action, 1995, e.g., para 133. On CEDAW General Recommendation 19, see above n 6.

[134] UNSC Res 1820 (2008), 1888 (2008), 1889 (2009), 1960 (2010), 2106 (2013), and 2122 (2013).

women and girls during and after conflicts',[135] and 'to comply with their obligations for prosecuting persons responsible for such acts',[136] including civilian superiors and military commanders, in accordance with IHL.[137] Further, 'to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice'.[138] They also call on 'all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse'.[139]

71 Security Council Resolution 1960 establishes a mechanism to sanction parties to armed conflict who perpetrate sexual violence against any person in violation of their IHL obligations. Security Council Resolution 1960 asks for the Annual Reports of the UN Secretary-General to detail

> information on parties to armed conflict that are credibly suspected of committing, or being responsible for acts of rape or other forms of sexual violence, and to list […] the parties that are credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda; [and the UN] expresses its intention to use this list as a basis for more focused United Nations engagement with those parties, including, as appropriate, measures in accordance with the procedures of the relevant sanctions committees […][140]

Resolution 1882, mirroring the Women, Peace and Security suite of Security Council Resolutions, also calls on UN Member States to 'take decisive and immediate action against persistent perpetrators of violations and abuses committed against children in situations of armed conflict', including bringing to justice those responsible 'through national justice systems, and where applicable, international justice mechanisms and mixed criminal courts and tribunals, with a view to ending impunity' for such violations.[141]

72 The Security Council Resolutions on Women, Peace and Security, and Children in Armed Conflict are binding on UN member states and reiterate their obligations and duties under international law, including IHL and, in particular, under the Geneva Conventions and their Additional Protocols.

E. Critical Assessment

73 The prohibition of rape and other forms of sexual violence, however described, falls squarely within the duty of a party to an armed conflict to provide humane treatment to protected and other persons, regardless of sex, age, or other distinction. This is an

[135] E.g., UNSC Res 1325 (2000), para 9, which 'Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls as civilians, in particular […] under the Geneva Conventions [1949], Additional Protocols thereto [1977], Refugee Convention [1951] and the Protocol thereto [1967], the Convention on the Elimination of All Forms of Discrimination against Women [1979], Optional Protocol thereto [1999], the United Nations Convention on the Rights of the Child [1989], and the two Optional Protocols thereto [2000], and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court.'

[136] E.g., UNSC Res 1820, para 4.

[137] E.g., UNSC Res 1888, para 7.

[138] E.g., UNSC Res 1820, para 4.

[139] E.g., UNSC Res 1325, para 10.

[140] UNSC Res 1960, para 3.

[141] E.g., UNSC Res 1882, para 16.

obligation that is owed irrespective of the characterization of the armed conflict, and at all times and in all places.

74 Efforts in recent decades to reinterpret the outdated and sexist approach of the Geneva Conventions and Additional Protocols to the protection of women and girls from sexual and gender-based violence, have eliminated any remaining doubt that such acts violate IHL and may amount to grave breaches or crimes under international law (as war crimes, crimes against humanity, or genocide), engendering individual criminal liability as well as state responsibility. No doubt can remain either that the prohibitions against sexual and gender-based violence in armed conflict are *jus cogens* norms,[142] and that states are duty-bound to investigate and prosecute or extradite to a third state those credibly suspected of committing such crimes.[143]

75 Despite these clear obligations, war crimes of rape and other forms of sexual violence continue unabated during armed conflicts of all kinds. Meanwhile, the extensive lack of compliance with the obligations to prevent and diligently investigate and prosecute violations when they occur, and to provide full reparation to victims, creates a cycle of impunity.

76 The factors behind this gross lack of compliance are complex and varied, but significantly include fundamental gender inequalities found in all societies. The failure of the drafters to include express provisions addressing sexual violence in each Convention, including in the grave breaches provisions, is symptomatic of this and has led to the creation of the 'gendered hierarchy that permeates IHL'.[144] In this hierarchy, gender stereotypical ideals of female honour are shrouded in 'chastity and modesty', which impedes women's independent personhood. Masculine privilege and notions of warrior honour and duty obscure, even preclude the possibility of males being subjected to conflict-related sexual and gender-based violence. This is further reflected in the lack of express prohibitions against male sexual violence, rendering the fact of such violations invisible. The failure to confront the innate realities of female and male wartime sexual violence in full[145] results in protections that are ambiguous, incoherent, and insufficient. This is an outmoded and unprincipled approach. A modern, gendered analysis and application of the Geneva Conventions, and a more lucid articulation of how war-related sexual and gender-based violence contravenes the fundamental principle of humane treatment, are overdue.

77 Suggestions have been advanced for a new legal instrument, whether a stand-alone convention or a protocol, that fully integrates a gender perspective.[146] At a minimum, such an instrument should update the Geneva Convention grave breaches regime and the fundamental guarantee articles of the Additional Protocols, to include rape and all forms of sexual violence, including a residual phrase (e.g., 'other forms of sexual violence'). The list of acts in the ICC Statute is the best guide as it is currently the most

[142] See, e.g., P. Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape', 34 *Case Western Reserve JIL* (2002) 287, at 292; D.S. Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine', 15 *Duke Journal of Comparative and International Law* (2005) 219, at 228; Lewis, above n 13, at 11.

[143] Refer, e.g., to para 4 of the G8 Declaration, above n 121.

[144] Gardam and Jarvis, above n 28, at 251.

[145] Ibid, for a comprehensive discussion of the shortcomings of IHL from a gender perspective. See also H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000).

[146] Gardam and Jarvis, above n 28, at 256–7.

comprehensive.[147] Prohibitions against sexual violence must be gender-neutral (with the exception of gender-specific violations such as forced pregnancy) and not replicate problematic language, such as 'regard due to their sex', or concepts, such as treating sexual violence as an attack on female honour.

78 Consistent with the non-adverse distinction principle, any new instrument must expressly include prohibitions of sexual violence against all people regardless of gender, sex, gender identity, sexual orientation, or, indeed, any other status. Consistent with the requirement for states to accord children special respect, it must also fully safeguard them from sexual violence irrespective of their circumstances, and from all parties, including those of their own side. Express protection should include child soldiers[148] and all children born as a result of conflict-related rape.

79 Such an instrument could draw upon IHRL, international criminal law, and IHL[149] to create a protection regime to redress the entirety of sexual and gender-based violence committed during armed conflict, including in 'new wars',[150] wherein sexual violence is commonly used as a deliberate political or military tactic.

80 A new instrument may be an unlikely short-term prospect, and there is a risk that prohibitions, protections, and norms might be weakened or removed rather than strengthened.[151] Nevertheless, a binding instrument that comprehensively addresses protection from sexual and gender-based violence for everyone in every type of armed conflict could outweigh these risks, and merits further consideration.

81 In any event, a strong commitment to the dissemination, implementation, and enforcement of existing protections is vital, as is regular training of armed forces, especially commanders. Political leadership committed to meeting IHL and IHRL obligations in relation to the suppression, investigation, and prosecution of violations involving sexual violence in every case is indispensable and urgently required. Dissemination of and adherence to authoritative guidance from UN human rights treaty bodies on state responsibilities, such as the CEDAW General Recommendation 30, are imperative. Similarly, guidance on the interpretation of Article 38 of the Convention on the Rights of the Child is warranted.[152]

82 Meanwhile, a strenuous execution of regional IHRL instruments that address sexual violence in armed conflict, such as the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa and the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence,[153] is needed to guide states' wartime protection of males and females. Lastly, a more concerted effort by

[147] Art 8(2)(b)(xxii) and (2)(e)(vi) ICC Statute.

[148] Consistent with the decision on the confirmation of charges, ICC, *Ntaganda*, above n 87.

[149] There is precedent for this, e.g., in the ICC Statute.

[150] 'New wars' is a term used 'to distinguish contemporary political violence from the predominant "old war" conception' on which the Geneva Conventions and much of IHL in general are based. See, e.g., Chinkin and Kaldor, above n 37.

[151] There are many examples of efforts to wind back or limit women's rights in the negotiation of international instruments, both 'hard' and 'soft'. Examples include proposals to use 'gender' in the ICC Statute and to include the crime of enforced pregnancy. Both proposals were vigorously opposed by conservative states and civil society organizations, and by the Holy See. On this point, see Bedont and Martinez, above n 81. See also ICRC Commentary on AP II, which has a narrower scope of application than CA 3, which it was originally intended to expand.

[152] On CEDAW General Recommendation 30, above n 6. See the Secretary General's Annual Report to the Security Council on the implementation of UNSC Res 1882 in relation to children in armed conflict.

[153] The Istanbul Convention (Council of Europe) 2011 applies during periods of armed conflict and non-conflict (Art 2(2)), above n 5.

UN member states and UN agency engagement is needed to implement UN Security Council Resolutions on Women, Peace and Security, including prioritizing measures for women's participation on an equal basis with men in peace talks and other transitional processes.

83 When interpreting, implementing, and enforcing the existing protections under the Geneva Conventions, Additional Protocols, and IHL in general, or in the development of new instruments or standards purporting to strengthen such protections, the single guiding question ought to be: what approach best enables IHL to effectively safeguard all persons from sexual and gender-based violence in full accordance with the fundamental principle of humane treatment without adverse distinction?

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