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Women in the Geneva Conventions of 1949**

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## **“All the regard due to their sex”: Women in the Geneva Conventions of 1949**

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### **Abstract**

*This working paper focuses on the gendered concepts of women that emerge from the texts of the Geneva Conventions of 1949, especially the concept of “honor and modesty.” Through analysis of historical materials, the paper describes the background to Article 27 of the Fourth Geneva Convention, which refers to the protection of women from rape and enforced prostitution. In particular, the paper examines the question of why the Conventions’ drafters did not include rape in the list of acts that constitute grave breaches of the Conventions, worthy of special condemnation.*

### **I Introduction**

This paper seeks to cast light on certain aspects of the text of the Geneva Conventions of 1949 – the core of international humanitarian law – as seen through the lens of gender. It draws its title from a passage in the Commentary to Article 14 of the Third Geneva Convention, which deals with the treatment of prisoners of war. The commentaries, published between 1952 and 1960 by the International Committee of the Red Cross (ICRC) under the general editorship of Jean Pictet, remain the most authoritative source for the interpretation of the Conventions.<sup>1</sup> In that passage, the author addresses the meaning of the words “[w]omen

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<sup>1</sup> Jean S. Pictet, (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Volume I, First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva, 1952) [Commentary, Vol. I]; *The Geneva Conventions of 12 August 1949, Commentary, Volume II, Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Geneva, 1960) [Commentary, Vol. II]; *The Geneva Conventions of 12 August 1949, Commentary, Volume III, Third Geneva Convention relative to the Treatment of Prisoners of War* (Geneva, 1960) [Commentary, Vol. III]; *The Geneva Conventions of 12 August 1949, Commentary, Volume IV, Fourth Geneva Convention Relative to the Treatment of Civilian Persons in Time of War* (Geneva, 1958) [Commentary, Vol. IV]. As of November 2016, the ICRC has commissioned a new set of commentaries and the first updated Commentary on the First Convention was published in March 2016. Nonetheless, the ICRC has continued to emphasize the value of the original Commentaries: “The Commentaries are an excellent resource to get a better understanding of each provision of the Geneva Conventions and their Additional Protocols. ... The original Commentaries on the Geneva Conventions and Protocols were based primarily on the negotiating history of these treaties and on prior practice and, in that respect, they remain largely valid. However, the passage of time and the development of practice have made it necessary to update them.” “Interview with Jean-Marie Henckaerts: Bringing the Commentaries on the Geneva Conventions and their Additional Protocols to the 21st Century”, July 12, 2012, available at: <http://www.icrc.org/eng/resources/documents/interview/2012/geneva-conventions-commentaries-interview-2012-07-12.htm>.

shall be treated with all the regard due to their sex”, which appear in the second paragraph of Article 14 (the first paragraph of Article 14 requires that all prisoners of war are treated with “respect for their persons and their honour”).<sup>2</sup> He states:<sup>3</sup>

It is difficult to give any general definition of the ‘regard’ due to women. Certain points should, however, be borne in mind ... These points are the following:

- (a) weakness;
- (b) honour and modesty;
- (c) pregnancy and child-birth.

These three considerations must be taken into account in the application of provisions of the Convention.

This paper examines gender, the social meaning of sex, as manifested in the treatment of women in the text of the Geneva Conventions of 1949 set in its historical context. The three categories outlined in the Commentary to Article 14 – weakness, honor and modesty, pregnancy and child-birth – although directed at the treatment of women prisoners of war, essentially capture the gendered concepts of women that emerge throughout the text of the Conventions; this paper addresses each category, but its focus is on “honour and modesty”, as the category that encompasses provisions addressing sexual violence. The paper draws principally from the travaux préparatoires of the Geneva Conventions,<sup>4</sup> the preparatory materials of the ICRC, and the Commentaries, many of whose authors were present at the 1949 diplomatic conference that adopted the Geneva Conventions.<sup>5</sup> These documents continue to exert an influence on understandings of the Conventions today.<sup>6</sup> Although those who utilize

<sup>2</sup> In full, the second paragraph reads: “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.” See text following note 26.

<sup>3</sup> Commentary, Vol. III, p. 147. The Commentaries have no women authors: Volume I was written mainly by Jean Pictet, with the participation of Frédéric Siordet, Claude Pilloud, Jean-Pierre Schoenholzer, René-Jean Wilhelm and Oscar Uhler; Volume II was written mainly by Jean Pictet, with the participation of Rear-Admiral Martinus Willem Mouton, F. Siordet, C. Pilloud, J.-P. Schoenholzer, R.-J. Wilhelm and O. Uhler; Volume III was written mainly by Jean de Preux, with the participation of F. Siordet, C. Pilloud, R.-J. Wilhelm, O. Uhler, J.-P. Schoenholzer and Henri Coursier; Volume IV was written mainly by Oscar Uhler and Henri Coursier, with the participation of F. Siordet, C. Pilloud, J.-P. Schoenholzer, R.-J. Wilhelm and R. Boppe.

<sup>4</sup> Federal Political Department of Switzerland, *Final Record of the Diplomatic Conference of Geneva of 1949* (Berne): Volumes I-III [Final Record, Vol. I]; [Final Record, Vol. II, Section A]; [Final Record, Vol. II, Section B]; [Final Record, Vol. III].

<sup>5</sup> Four of the ten authors – and the most prominent – Jean Pictet, Frédéric Siordet, Claude Pilloud and René-Jean Wilhelm, attended the 1949 diplomatic conference as representatives of the ICRC, providing expert advice to the delegates. See, Final Record, Vol. II, Section B, p. 516.

<sup>6</sup> For example, Article 32 of the Vienna Convention on the Law of Treaties, which represents customary international law, provides that recourse may be had to the travaux préparatoires to confirm a meaning

them undoubtedly appreciate that they are works of another time, a general appreciation that the attitude displayed toward women may be “old fashioned” or “outdated” is insufficient protection against unconscious endorsement of gendered assumptions that underlie the Conventions’ text. It is important therefore to appreciate how “woman” is constructed in the text of the Geneva Conventions in order to be able to challenge that construction where it appears in modern interpretation of the Conventions’ provisions.

## II Background to the 1949 Diplomatic Conference

Prior to the end of the Second World War the ICRC had begun making arrangements for an international conference of the Red Cross to be held in Stockholm, with the intention that it would consider draft conventions to forward to a diplomatic conference.<sup>7</sup> Based on proposals made by governments, the work of National Red Cross Societies – primarily through a Preliminary Conference that took place in July and August 1946 – and a Conference of Government Experts held in April 1947, the ICRC produced four draft conventions for this conference, the 17<sup>th</sup> International Red Cross Conference, which was eventually held in Stockholm in August 1948. The Stockholm conference considered those drafts and, with amendments, endorsed four draft conventions: these formed the basis of the negotiations at the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, which was convened in April 1949 and adopted the four Geneva Conventions of 1949 some four months later.<sup>8</sup>

The aim of the 1949 diplomatic conference was first, to revise the three existing conventions governing the treatment of prisoners of war and wounded and sick combatants,<sup>9</sup> and second, to establish a new convention concerning “the status and protection of civilians in time of war.”<sup>10</sup> The proposed new convention was the most controversial of the Stockholm

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obtained through the general rules of interpretation, or to determine meaning where a phrase is ambiguous or obscure, or where the general rules would lead to absurdity.

<sup>7</sup> See, ICRC, *Draft revised or new conventions for the protection of war victims prepared for the XVIIth International Red Cross Conference, Stockholm, August 1948* (Geneva, May 1948), p 1 [Draft revised or new conventions]. It is notable that the decade after the end of war marked a period of institutional instability within the ICRC. See, “Endangered in 1945, the ICRC survived thanks to the Cold War and the courage of its delegates: Interview with Catherine Rey-Schyr” *Le Temps* (August 17, 2007). Rey-Schyr notes, “at the start of 1945, the ICRC had over 3000 people on its payroll. In 1948, the number had dwindled to below 400 and by 1955 only 227 remained.” (available at: <http://www.icrc.org/eng/resources/documents/article/other/rey-schyr-press-article-170807.htm>)

<sup>8</sup> In 1948 the Federal Political Department of the Swiss Government wrote to states parties to the Geneva Conventions of 1929 and the Hague Convention of 1907, advising that it proposed to convene the conference that had been planned for 1940 (see below, at note 11). Switzerland was Administrator of the 1929 Geneva Conventions and the Netherlands, the Administrator of the Hague Conventions. Switzerland received the Netherlands assent to convene the conference. Final Record, Vol. I, pp. 147-151.

<sup>9</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva (adopted July 27, 1929); Convention relative to the Treatment of Prisoners of War. Geneva (adopted July 27, 1929); Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague (October 18, 1907).

<sup>10</sup> Final Record, Vol I, p. 147: Letter of May, 11, 1948, from Swiss Federal Political Department to states parties to the Geneva Conventions of 1929 and the Hague Convention of 1907.

drafts as the status and protection of civilians in war had never before been regulated in a multilateral treaty.<sup>11</sup> The other particularly novel aspect of the Conventions was the inclusion of Common Article 3, which subjected the conduct of parties to a non-international armed conflict to international legal regulation for the first time.

Delegations from 63 governments attended the diplomatic conference: 59 had full voting powers and four were observers.<sup>12</sup> Writing in 1985, Jean Pictet, who was a delegate for the ICRC at the diplomatic conference (and director of the ICRC), described the plenipotentiaries as “men and women of good will, not without ideals,” but whose power to implement those ideals was confined by the limitations of the decision-making authority delegated to them.<sup>13</sup> These “men and women of good will” were, as might be expected, almost exclusively men drawn from the upper echelons of government.<sup>14</sup> They met from April to August 1949 in a building previously occupied by the Central Agency for Prisoners of War, which the ICRC had established during the war as a clearing house for information on prisoners of war. The conference was first divided into three committees working simultaneously: Committees I and II considered the revision of the respective existing treaties, while Committee III worked on the new convention for civilians. Provisions common to the four conventions were considered by a joint committee of Committees I, II, and III. “Each Article adopted by Committees I, II and III [was then] examined by the Coordination Committee and afterwards by the Drafting Committee.”<sup>15</sup> The Final Record of the discussions of these committees stretches to more than 1400 pages, reflecting the intensity and duration of the negotiations. Pictet noted that while the ICRC favored the formulation of “general and

<sup>11</sup> Attempts had been made previously: Jean Pictet notes that the ICRC had drew up a draft text regarding civilians for the 1929 diplomatic conference, but that “the Powers, with a flick of the wrist, removed this item from the agenda. It was thought that such a proposal would not make a good impression at the moment when the young League of Nations was working to establish eternal peace—for that dream was still alive.” Jean Pictet “The Formation of International Humanitarian Law” *International Review of the Red Cross*, volume 25, issue 244, February 1985, pp. 3-24, at p. 6. Later, the International Red Cross Conference of 1934 drafted a document, known as the “Tokyo draft”, which also addressed the subject. That text was revised by the International Red Cross Conference of 1938, which proposed that it become an international treaty, but the onset of the Second World War precluded a diplomatic conference planned for 1940 from taking place. That conference would have considered both the 1938 draft and the revision of the Geneva Conventions of 1929 and the Hague Convention of 1907. Pictet notes that it was the French delegation which presented a complete draft of a conventions for civilians at the conference of Government experts (something “the ICRC had not yet dared to do”) and this draft “provided a large part of the framework for the diplomatic instrument which was to emerge...” (at 12).

<sup>12</sup> Raymund T Yingling, and Robert W Ginnane “The Geneva Conventions of 1949” 46 *Am. J. Int'l L.* 393 (1952), 393.

<sup>13</sup> Jean Pictet “The Formation of International Humanitarian Law” *International Review of the Red Cross*, volume 25, issue 244, February 1985, pp. 3-24, p. 11.

<sup>14</sup> One notable exception was Joyce Gutteridge, a member of the British delegation who actively participated in discussions and subsequently authored the entry on the Geneva Conventions in the 1949 *British Yearbook of International Law* (26 *Brit. Y.B. Int'l L.* 294 1949). She was an active participant in the proceedings: the index of speakers lists 61 references to Gutteridge speaking. Gutteridge was also the first woman to appear as an agent for the United Kingdom (and the second woman ever to appear) in the International Court of Justice in the *Aerial Incident of 27 July 1955* case. Other women delegates included: Andrée Jacob, the Head of Department at the French Ministry of Ex-Service Men and War Victims, Ofelia Manloe, the Romanian Deputy Minister of Public Health, and Maria Dmitrievna Kovrignia, Deputy Minister, Ministry of Public Health, USSR.

<sup>15</sup> Final Record, Vol. II, Section B, p. 136.

flexible principles,” “the formalist conception won the day, as the national representatives were chiefly preoccupied with the particular evils suffered by their own countries and which, understandably, they wished to prevent from recurring.”<sup>16</sup> Consequently, the Geneva Conventions of 1949 contain “more than 400 articles, some of them extremely long.”<sup>17</sup>

### III “Weakness”

The Geneva Conventions, in the words, of the author of the Commentary to Article 14, “[make] provision for special treatment for persons of the weaker sex.”<sup>18</sup> The apparent need for such deviations from the general rule illustrates that the Geneva Conventions take men’s lives as the norm: women are portrayed as marginal participants in armed conflict, whose experiences are accorded little significance in a system of rules whose scope, subject matter and content reflect male priorities. As Charlesworth and Chinkin have observed in their seminal work, *The Boundaries of International Law*, “international law is constructed upon particular male assumptions and experiences of life where ‘man’ is taken to represent the ‘human’.”<sup>19</sup> The Geneva Conventions code women as weak and in need of chivalric protection; men, by contrast, are strong and self-reliant. Consequently, “sex” – by which the drafters of the Conventions mean, the weakness and inferiority of women – must be taken into account, for example, when a state detaining prisoners of war determines disciplinary procedures, or when it forces prisoners to work.<sup>20</sup> This normative bias pervades the text of the Conventions and their Commentaries.

### IV “Honour and Modesty”

The Final Record of the Diplomatic Conference of 1949 runs across four volumes, detailing the discussions that took place in the negotiations for the Geneva Conventions. The record is not verbatim, but it is notable that despite mass rape that took place during World War II, the word “rape” appears only in relation to what became paragraph 2 of Article 27 of the Fourth Geneva Convention and even there, it is scarcely discussed.<sup>21</sup> Paragraph 2 of Article 27 provides that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” This paragraph is significant because it is the only reference to rape in the Conventions and it makes overt what is implied in other provisions: that a woman’s “honor” is inextricably tied to her sexuality. This section describes how this explicit reference came to be included in the Conventions. The drafting history of Article 27 reveals that the addition of the reference to “rape, enforced prostitution, or any form of indecent assault” was a late one, and was not accorded any special significance.

<sup>16</sup> Jean Pictet “The Formation of International Humanitarian Law”, at pp. 11-12.

<sup>17</sup> *Ibid.*, p. 12.

<sup>18</sup> Commentary, Vol III, p. 146.

<sup>19</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law*, (Manchester, 2000) at p. 17.

<sup>20</sup> Fourth Geneva Convention, arts 49 and 119.

<sup>21</sup> The one exception to this is in a discussion on an Article concerning the repatriation of sick or wounded prisoners of war who were serving sentences for criminal offences: the delegate from Bulgaria used rape as an example of serious offence: Final Record, Vol. II, Section B, pp. 315-316.

a) The scope of Article 27's application

Article 27 appears in the first section of Part III of the Fourth Geneva Convention. Part III concerns the status and treatment of protected persons and the first section specifies “[p]rovisions common to the territories of the parties to the conflict and to occupied territories.” “Protected persons” are “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>22</sup> Consequently, those who “find themselves ... in the hands of a Party to the conflict” of which they *are* nationals fall outside the scope of Article 27.<sup>23</sup> (By contrast, provisions appearing in Part II of the Fourth Convention apply to “the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion” and “are intended to alleviate the sufferings caused by war.”)<sup>24</sup> Additionally, the Fourth Geneva Convention applies only in international armed conflicts. Article 27’s application in practice is thus very limited. In its entirety, it reads:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

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<sup>22</sup> Fourth Geneva Convention, art. 4.

<sup>23</sup> See, Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law*, (The Hague, 2001) p. 64. Article 76 of Additional Protocol I to the Geneva Conventions (1977) covers women in the territory of any party to the conflict: “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.”

<sup>24</sup> Fourth Geneva Convention, art. 13.

## b) General origins

The Commentary to Article 27 states that the second paragraph is drawn from both a proposal from the International Abolitionist Federation and the International Council of Women submitted to the 1949 diplomatic conference and “a provision introduced into the Prisoners of War Convention in 1929.”<sup>25</sup> The latter was almost certainly Article 3 of the 1929 Convention, which states, “[p]risoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex.”<sup>26</sup> The first two paragraphs of Article 27 mirror Article 14 of the Third Geneva Convention (which effectively replicates Article 3 of the 1929 Convention):

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

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.

The idea that the words “with all the regard due to their sex” in paragraph 2 of Article 14 refer to the same concept as “attack on their honour” in Article 27 is further reinforced by the Commentary to Article 14, which speaks of the three categories (weakness, honor and modesty, pregnancy and child-birth) discussed in this paper. Under the heading “honour and modesty”, the author observes “[t]he main intention is to defend women prisoners against rape, forced prostitution and any form of indecent assault.”<sup>27</sup>

It is also likely that Article 27 was influenced by Article 46 of the Hague Regulations of 1907. The First Hague Peace Conference of 1899 adopted a convention on land warfare with regulations annexed to it.<sup>28</sup> Article 46 of those regulations, which applied in cases of military occupation by foreign forces, stated:<sup>29</sup>

Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected.

Private property cannot be confiscated.

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<sup>25</sup> Commentary, Vol. IV, p. 206.

<sup>26</sup> Convention relative to the Treatment of Prisoners of War. Geneva (adopted July 27, 1929).

<sup>27</sup> Commentary, Vol. III, p. 147.

<sup>28</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague (adopted July 29, 1899).

<sup>29</sup> The language derives from earlier, non-binding, instruments: In 1880 the Institute of International Law produced a declaration on “The Laws of War on Land”, (September 9, 1880) which was subsequently known as the “Oxford Manual” and was very influential in the drafting of the 1899 Hague Conventions. Art. 49 of the Oxford Manual stated: “Family honour and rights, the lives of individuals, as well as their religious convictions and practice, must be respected.” Similarly, art. 38 of the Brussels Declaration of 1874 (Project of an International Declaration concerning the Laws and Customs of War, August 27, 1874) stated “Family honour and rights, and the lives and property of persons, as well as their religious convictions and their practice, must be respected.”

The Second Hague Peace Conference of 1907 adopted nearly identical language<sup>30</sup> and at least by 1945, if not earlier, rape was considered to be contrary to Article 46.<sup>31</sup>

c) The specific wording of Article 27

The wording of paragraph 2 of Article 27 finds its genesis in Article 27 of the Stockholm draft convention “for the protection of civilian persons in time of war.” With the marginal heading “women and children”, the Stockholm draft provided:<sup>32</sup>

Women shall be specially protected against any attacks on their honour or dignity.

Children under fifteen shall in all circumstances enjoy preferential treatment, particularly as regards food, medical care and protection against the effects of war.

Expectant mothers and mothers of children under seven shall also enjoy preferential treatment.

<sup>30</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague (adopted October 18, 1907), art. 46: “Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.” (The 1899 Convention had rendered it “family honours”). The placement of this provision near one prohibiting pillage and the reference to private property within the Article itself reinforces the idea of rape as a property crime committed against the male head of household.

<sup>31</sup> The Trial Chamber of the International Criminal Tribunal for Yugoslavia, in *Prosecutor v. Furundžija*, IT-95-17/1-T (December 10, 1998), for example, considered that a norm of customary international law had developed through the express prohibition of rape in the Lieber code, together with Article 46 read in conjunction with the Martens clause (para. 168). See also, the prosecution of rape by the Tokyo International Military Tribunal: *Tokyo Major War Crimes Trial: The Judgment of the International Military Tribunal for the Far East* (R. John Pritchard ed., 1998) (compiling and annotating the documents from the International Military Tribunal for the Far East) at 49591-97, 49604-12, 49617-20, 49638-40, 49666, 496772, 49783-85, 48789-92m 49814-16; and *X et al v the State* (Tokyo High Court, December 6, 2000): Several Filipino women unsuccessfully attempted to use Article 46(1) as a basis to claim damages for acts including rape perpetrated by the occupying Japanese forces during the Second World War. See also, Radhika Coomaraswamy, *Report of the Special Rapporteur on violence against women, its causes and consequences, Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime*; E/CN.4/1996/53/Add.1 (January 4, 1996), para. 101. Although as Meron notes, “in practice it has seldom been so interpreted: Theodor Meron, “Rape as a Crime Under International Humanitarian Law” *The American Journal of International Law*, Vol. 87, No. 3 (1993), 424, p. 425.

<sup>32</sup> Final Record, Vol. I, p. 118.

This draft Article was influenced by the work of the both the 1946 Preliminary Conference of National Red Cross Societies and the 1947 Conference of Government experts. The Preliminary Conference had recommended that “all means should be employed in order to guarantee adequate protection to children in time of war ... Most of the delegations also expressed the view that the protection afforded by the Conventions should be extended to expectant mothers and to the mothers of infants.”<sup>33</sup> Meanwhile, in a report to the Conference of Government Experts the ICRC had recommended “measures to ensure particular protection of children, expectant mothers and women with young children.”<sup>34</sup> The relevant committee of the Conference of Government Experts considered that the ICRC’s proposed measures were a “minimum which it is desirable to amplify and define” and invited the ICRC to consider the issue of “special treaty stipulations concerning women and children of all nationalities” more broadly, “in conjunction with other organizations whose co-operation may be of assistance.”<sup>35</sup> The text of Article 27 of the Stockholm draft resulted from this recommendation, as well as the recommendations of the Preliminary Conference.<sup>36</sup>

At the Diplomatic Conference of 1949, Committee III was charged with considering the Stockholm “Draft Convention for the Protection of Civilians” in which draft Article 27 appeared. Twenty-four meetings were held at which delegates gave their views on the Stockholm draft and proposed amendments. In the afternoon of May 5, 1949, at its ninth meeting, Committee III considered draft Article 27.<sup>37</sup> Claude Pilloud, an expert from the ICRC,<sup>38</sup> suggested the substitution of paragraph one with language proposed by the International Council for Women and the International Abolitionist Federation. The proposal read “women shall be specially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”<sup>39</sup> This proposal had been

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<sup>33</sup> ICRC, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the study of the Conventions and of various problems relative to the Red Cross, Geneva, July 26 - August 3, 1946* (Geneva, 1947), p. 101.

<sup>34</sup> ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, April 14 - 26, 1947* (Geneva, 1947), p. 301.

<sup>35</sup> Ibid.

<sup>36</sup> In describing the reasons for the Article to delegates to the Stockholm conference, the ICRC noted “The present Article embodies several of the rulings relating to the particular protection due to women and children, as repeatedly foreseen by the Government Experts”: Draft revised or new conventions, p. 165.  
<sup>37</sup> Final Record, Vol. II, Section A, pp. 643-644. The discussion on Article 27 had taken place at the end of the ninth meeting and it continued into the beginning of the tenth meeting the following day.

<sup>38</sup> Mr Pilloud was a barrister and later served as the Director of ICRC. He was also a contributing author to the Commentaries. See, “Death of Mr Claude Pilloud” *International Review of the Red Cross* (1984), 24, pp. 341-342

<sup>39</sup> The proposal was presumably the result of consultation between these organizations as the ICRC, as per the recommendation of the Conference of Government Experts. In September 1947 at its first post war conference, the International Council of Women had passed a resolution urging the United Nations and the International Red Cross “to draft a convention and work for an international agreement expressing the utmost condemnation of [two war crimes especially affecting women]”: “criminal assaults against girls and women (including violation and forcible detention in brothels) and an organized system, unprecedented in history, of using youths and young girls for compulsory breeding of children.”  
International Council of Women, *Report of the First Post War Conference, Philadelphia, September 12-*

previously circulated to delegates by the ICRC, along with a number of other proposals, in a pamphlet entitled “Remarks and Proposals.”<sup>40</sup> At the continuation of the discussion on draft Article 27 the following day, the delegate from India expressed his support for the proposal and the delegate from Italy “suggested that in view of the extreme gravity of offences against the honour and dignity of women, a specific reference should be made to the responsibility of the Commander of the armed forces.”<sup>41</sup> The rest of the discussion on Article 27 focused on its other aspects, with delegates expressing concern that parties to a conflict would be required to afford a higher standard of treatment to alien children and expectant mothers than to children and expectant mothers in their own populations.

Following the initial meetings of Committee III, the drafting committee drew up a new text and after a further twenty five meetings, Committee III adopted a draft based on that text, which included a revised Article 27, renumbered as Article 25. This draft Article 25 included the language suggested by the International Council for Women and the International Abolitionist Federation in between the two paragraphs of Article 25 of the Stockholm draft (whose wording is substantially similar to the first and third paragraphs of the extant Article 27).<sup>42</sup> The text was placed there because, in the view of the committee “it lays down an equally general principle [to the general principle of protection outlined in paragraphs 1 and 3] i.e. respect due to women.”<sup>43</sup> The Committee adopted a US proposal to add a fourth paragraph, as appears in extant Article 27, and the second and third paragraphs of the Stockholm draft of Article 27 were removed, “so as to avoid giving children and mothers of foreign nationality a privileged position in relation to nationals”, with aspects of these paragraphs incorporated into other provisions.<sup>44</sup> The resulting draft Article became Article 27 of the final text of the Fourth Geneva Convention. The only opposition to these changes appears to have come from the International Union of Child Welfare, whose Secretary-General argued in a letter to the Chairman of Committee III in May 1949 that the measures in Stockholm draft Article 27 were “meant for the benefit of all children and women, whatever their nationality, both in the territory under the control of their Government and in occupied territory. This is a fundamental principle which is essential to affirm.”<sup>45</sup>

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*15, 1947*, p. 34 (available in Harvard Law Library); The conference also urged the revision of the Geneva Conventions of 1929 and the Hague Convention of 1907 “so as to include the experiences of total warfare which affects women as much as men, and civilians as much as soldiers.” (p 36)

Contemporaneous records of the International Abolitionist Federation are not accessible, but it would seem likely that in 1949 its efforts were focused on the proposed International Convention for Suppressing Traffic in Persons and Exploitation of the Prostitution of others, which was adopted by the United Nations General Assembly in December 1949.

<sup>40</sup> ICRC, *Remarks and Proposals submitted by the ICRC: Document for the consider of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference at Geneva*, (Geneva, February 1949 [Remarks and Proposals]. The ICRC stated, “The proposed wording has decided advantages and the ICRC fully support it” (p.74).

<sup>41</sup> Final Record, Vol. II, Section A, p. 644.

<sup>42</sup> The words “their family rights, their religious convictions and practices, and their manners and customs” were inserted into paragraph 1 through a proposal from the United Kingdom: Final Record, Vol. II, Section A, p. 712.

<sup>43</sup> Final Record, Vol. II, Section A, p. 821.

<sup>44</sup> Final Record, Vol. II, Section A, p. 714.

<sup>45</sup> Final Record, Vol. III, p. 104.

To modern eyes, it seems notable that the words “or dignity” (after “honour”), which had been included in the Stockholm draft, were not part of the proposal by the International Council of Women and the International Abolitionist Society. The phrase “outrages upon personal dignity”, which appears in Common Article 3 of the Geneva Conventions and has subsequently been included in a number of international instruments, is generally considered to encompass rape.<sup>46</sup> There are no clues in the materials as to why the language of dignity from the Stockholm draft was not incorporated into the proposal. It appears that the United Kingdom submitted a proposal at the diplomatic conference to include “or dignity” in May 1949, but the Final Record does not make clear whether this proposal was ever considered.<sup>47</sup> The most likely reason for the absence of “dignity” from the second paragraph of Article 27 appears to be that the contemporary assumption was that a woman’s honor was synonymous with her dignity. This impression is supported by the Commentary to Article 27 which states, “women ... have an absolute right to respect for their honour and their modesty, in short, for their dignity as women.”<sup>48</sup>

#### d) Grave breaches

Rape is not included in the list of acts that constitute grave breaches of the Geneva Conventions. The explanation for this absence probably lies in general indifference and neglect, rather than deliberate omission: the picture that emerges from the 1949 diplomatic conference and the meetings that preceded it is one in which rape was a marginal issue to the participants. There is no explicit reference to rape in the Stockholm draft, nor in the recommendations of the Preliminary Conference of National Red Cross Societies and the Conference of Government Experts. The history of the concept of “grave breaches” likewise illustrates that it was unlikely that specific and conscious consideration was ever given to whether rape would constitute a grave breach.

Drawing on a recommendation made by the Conference of Government Experts, the Stockholm draft contained general language requiring states parties to apprehend and try those responsible for acts contrary to the Conventions.<sup>49</sup> The Stockholm conference had

<sup>46</sup> See, for example, Statute of the International Criminal Tribunal for Rwanda, art. 4; Statute of the Special Court for Sierra Leone, art. 3; see, also, *Prosecutor v. Furundžija*, IT-95-17/1-T (December 10, 1998), paras 166-168. However, as Askin has noted, “When sexual violence is committed, a charging of, e.g., ‘outrages upon personal dignity’ or ‘humiliating and degrading treatment’ not only mischaracterizes and obscures the nature of the crime, but also perpetuates destructive stereotypes by treating rape as a crime against dignity or honor, instead of a crime of physical, mental and sexual violence.” Kelly Askin, “Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status” *The American Journal of International Law*, Vol. 93, No. 1 (1999) 97, p. 101.

<sup>47</sup> The probable explanation is that the proposal was abandoned.

<sup>48</sup> Commentary, Vol. IV, p. 206.

<sup>49</sup> Final Record, Vol. I, p. 55: Stockholm Draft, Convention I, art. 40:

The Contracting Parties shall be under the obligation to apprehend persons charged with acts contrary to the present Convention, regardless of their nationality. They shall furthermore, in obedience to their national legislation or to the conventions for the repression of acts that may be defined as war crimes, refer

recommended that the ICRC seek the advice of a group of experts on the issue and with the assistance of these experts, the ICRC proposed language that introduced the idea of “grave breaches” for the first time in its pamphlet, “Remarks and Proposals.” In this proposal, the concept of “grave breaches” was defined broadly and said to include “in particular those which cause death, great human suffering or serious injury to body or health, those which constitute a grave denial of personal liberty or a derogation from the dignity due to the person or involve extensive destruction of property, also breaches which by reason of their nature or persistence show a deliberate disregard of this Convention.”<sup>50</sup> This definition would have been common to all four conventions. When Committee III was considering the proposal from the International Council of Women and the International Abolitionist Federation, if delegates reflected on the issue at all, it seems quite possible that – in light of dignity’s synonymy with honor where it appears in connection with women – they would have considered that rape fell within the purview of “grave breaches,” as a “grave... derogation from the dignity due to the person.”

The specific language of Article 147 of the Fourth Geneva Convention, which lists the discrete acts constituting grave breaches, came from a proposal by the Netherlands and other countries in late June that was presented to a different committee.<sup>51</sup> The original proposal from the Netherlands had been to include “the wilful killing, torture or maltreatment” of protected persons as grave breaches.<sup>52</sup> The word “maltreatment” was changed to “inhuman treatment” as a result of concerns raised by the Finnish delegate “in order to distinguish between serious crimes and offences of a milder character. The latter, [he said] under certain penal codes, such as that of Finland, were punishable only by a fine.”<sup>53</sup> The content of the concept of “inhumane treatment” was not discussed by delegates at all, but the Finnish amendment suggests that “maltreatment” that amounts to a crime punishable by imprisonment was intended to fall within its scope.

On the final adoption of the text of Article 147 in August 1949, had delegates turned their minds to the question of rape at all, it may well be that just as giving women “all regard due to their sex” in Article 14 of the Third Convention was known to be code for “having measures thought to prevent women from being raped,” it was equally obvious that in terms of Article 147, rape constituted “inhumane treatment” where it occurred in breach of Article 27. Certainly, in the Commentary to Article 147, which was published in 1958, the author considered “in general, the Convention provides, in Article 27, that protected persons must always be treated with humanity. The sort of treatment covered by this Article [147], therefore, would be one which ceased to be humane.”<sup>54</sup> Gardam has argued however, that “undue reliance ... should not be placed on this explanation,” as “the fact that rape is specifically referred to in Article 27, but not in the articles in the Conventions defining grave breaches, militates against a broad interpretation.”<sup>55</sup>

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such persons for trial by their own courts, or if they so prefer, hand them over for trial to another Contracting Party.

<sup>50</sup> Remarks and Proposals, p. 18.

<sup>51</sup> The Special Committee of the Joint Committee of Committees I, II and III.

<sup>52</sup> Final Record, Vol. III, p. 42 (Amendment 49).

<sup>53</sup> Final Record, Vol. II, Section B, p. 31.

<sup>54</sup> Commentary, Vol. IV, p. 598.

<sup>55</sup> Judith Gardam, “Women and the Law of Armed Conflict: why the silence?” *International and Comparative Law Quarterly* Vol. 46 (1997) 56, p. 75. The phrase “wilfully causing great suffering or

e) The concept of honor

From the preceding discussion, it is evident that there are several overlapping strands that comprise the story of the origin of Article 27. The first is that it derives from a “general” principle that foreign forces must treat all those who have not taken up arms or are hors de combat with honor, as seen in Article 3 of the 1929 Prisoner of War Convention. In the particular circumstances of women, the application of this principle requires that those forces not rape, prostitute or indecently assault them. Another strand suggests it is not the general principle that mandates such a requirement, but an *additional* principle that applies only in relation to women; that is, that the language of “their honour” first used in the Stockholm draft refers to a special type of honor held exclusively by women. The Commentary to Article 27 endorses this latter view, stating, “[a] woman should have an acknowledged right to special protection, the special regard owed to women being, of course, in addition to the safeguards laid down in paragraph 1.”<sup>56</sup> A further strand situates women’s honor in the sphere of the family: one obvious example of this was the initial placement of paragraph 2 within a section concerned with “women and children” which focused on expectant mothers and young children in particular. The notion of “family honour” is particularly influential: the author of the Commentary considered paragraph 2 to be “founded on the principles set forth in paragraph 1 on the notion of ‘respect for the person’, ‘honour’ and ‘family rights’.”<sup>57</sup> This concept of “family rights” or “family honour” is rooted in the idea that when a woman is raped, her husband is dishonored as he holds the exclusive right to her body, as his property.<sup>58</sup>

The word “honor” appears very few times in the Conventions and is virtually absent from the discussions at the 1949 diplomatic conference. Outside Article 27 of the Fourth Geneva Convention and Article 14 of the Third Geneva Convention, it occurs only in relation to honorable burial and in Article 21 of the Third Geneva Convention. Article 21 requires that

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serious injury to body or health” has since been interpreted to encompass rape: see Meron, “Rape as a Crime Under International Humanitarian Law”, above n. 23, pp. 426-427; ICRC, Aide-Memoire (Dec. 3, 1992); Letter from Robert A. Bradtke, Acting Assistant Secretary for Legislative Affairs, to Senator Arlen Specter (Jan. 27, 1993).

<sup>56</sup> Commentary, Vol. IV, p. 205. In a paragraph which presents mass rape as historically exceptional, the author of the Commentary to Article 27 gives his justification for this view (p. 205):

Paragraph 2 denounces certain practices which occurred, for example, during the last World War, when innumerable women of all ages, and even children, were subjected to outrages of the worst kind: rape committed in occupied territories, brutal treatment of every sort, mutilations etc. In areas where troops were stationed, or through which they passed, thousands of women were made to enter brothels against their will or were contaminated with venereal diseases, the incidence of which often increased on an alarming scale. These facts revolt the conscience of all mankind and recall the worst memories of the great barbarian invasions. They underline the necessity of proclaiming that women must be treated with special consideration.

<sup>57</sup> Ibid.

<sup>58</sup> See text accompanying note 77. See also, Hague Regulations of 1907, art. 46. It is worth observing that if a subjective approach is adopted, respect for family honor may mean acquiescing in the murder of a woman by her family because she has been raped. See, e.g. Charlotte Bunch “Women’s Rights as Human Rights: Towards a Re-vision of Human Rights” 12 *Human Rights Quarterly* 486, p. 493.

where prisoners of war are released on promise or parole, they “are bound on their personal honour scrupulously to fulfill ... the engagements of their paroles or promises.” Both Articles 14 and 21 are based on a masculine concept of honor that stems from an ahistorical idea of war as an honorable pursuit carried out by men who adhere to a strict moral code in relation to other combatants.<sup>59</sup> In the Commentary to Article 21 for example, the author notes that the sanction for breach is “first of all a moral sanction by virtue of the consequent dishonour for the person concerned.”<sup>60</sup> That is, the failure of a prisoner to hold true to his word brings dishonor upon him because men of honor keep promises made to equals.

Similarly, in relation to Article 14 the Commentary notes the “sometimes very delicate” problem of clothing prisoners of war as an issue of honor, because “it is understandable that [prisoners] would feel repugnance at having to wear the uniform of the enemy army and they must be asked to do so only in case of absolute necessity.”<sup>61</sup> Further, the Commentary links the requirement to treat prisoners with honor and respect with a number of other provisions in the Convention: for example, that prisoners are able to wear their badges of rank and nationality and that “all labour of the humiliating kind should be avoided.”<sup>62</sup> The “essential thing” about the prohibition on “humiliating work”, the Commentary notes, is “that the prisoner concerned may not be the laughing-stock of those around him.”<sup>63</sup> Gardam and Jarvis observe that “humiliating work” has been interpreted in some circumstances to mean “being made to do work that would normally be done by a woman.”<sup>64</sup> Honor is thus strongly associated with masculine norms of behavior, deviation from which lowers a man’s reputation as a man and a warrior. The same is equally true for civilian men. In the Commentary to Article 27 for example, the author explains the meaning of the words “respect for honour” in paragraph 1 in the following terms:<sup>65</sup>

Honour is a moral and social quality. The right to respect for his honour is a right invested in man because he is endowed with a reason and a conscience. The fact that a protected person is an enemy cannot limit his right to consideration and to protection against slander, calumny, insults or any other action impugning his honour or affecting his reputation; that means that civilians may not be subjected to humiliating punishments or work.

Given the strongly masculine concept of honor that is embodied in these provisions, it is perhaps unsurprising that the idea of women’s “special” honor is more dominant in the story of paragraph 2 of Article 27. This “special” honor is part of a broader narrative where those

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<sup>59</sup> See, Patricia Sellers “The Cultural Value of Sexual Violence” *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 93 (March 24-27, 1999), p. 317.

<sup>60</sup> Commentary, Vol. III, p. 180.

<sup>61</sup> Commentary, Vol. III, p. 145.

<sup>62</sup> Third Geneva Convention, arts. 40 and 52. See also, arts 44 and 120(4).

<sup>63</sup> Commentary, Vol. III, p. 277.

<sup>64</sup> Gardam and Jarvis, above n. 16, p. 99, quoting Leslie Green, *The Contemporary Law of Armed Conflict* (1998), p. 194, note 47.

<sup>65</sup> Commentary, Vol. IV, p. 202.

who are gendered feminine must be protected by those who are gendered masculine. Whereas for men the qualities of honor are “bravery, fortitude, self-reliance”, for women, they are “chastity, modesty, frailty and dependence.”<sup>66</sup> Paragraph 2 “presents women as needing protection. It creates a dichotomy between the warrior as protector and the woman as the protected.”<sup>67</sup> As Gardam and Jarvis note, “Christian and chivalric principles have contributed much to the ‘honour’ of women in IHL... [K]nights were the ‘natural’ protectors of women who, in a portrayal that continues today... were weak, modest, docile, incapable of looking after themselves, and thus condemned to a highly stylised inferior role in society.”<sup>68</sup>

A woman’s honor is strongly tied to her sexuality in the Geneva Conventions. As noted above, in relation to women prisoners of war, the Commentary records that the requirement for women to be treated “with all regard due to their sex” is primarily meant to refer to measures that are thought to protect women prisoners from rape, forced prostitution and indecent assault – namely, separation from male prisoners.<sup>69</sup> Women’s “honour and modesty” are further protected, the Commentary posits,<sup>70</sup> through provisions that require that prisoners of war be provided with adequate clothing<sup>71</sup> and protect them from “insults and public curiosity”<sup>72</sup> and questioning beyond name, rank, date of birth and serial number.<sup>73</sup> A woman who maintains a modest appearance – that is, who covers as much skin as possible – and keeps out of sight of men is thus protected from rape and so preserves her honor. The corresponding assumption is that women are raped because men desire them sexually and consequently a woman who does not display “modesty” and/or maintains the company of men, puts herself at risk of rape. It entirely ignores the power dynamics of rape and its connection with the subordinate position women occupy in society more generally. Women’s honor is thus, in Gardam’s words, “a concept constructed by men for their own purposes [which] has little to do with women’s perception of sexual violence.”<sup>74</sup>

The same linking of women’s honor with rape is evident in Articles 12 of both the First and Second Geneva Conventions respectively. These mandate that members of the armed forces, both at sea and on land, who are sick or wounded be “treated humanely... without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria” and additionally require that “[w]omen shall be treated with all consideration due to their sex.” The latter requirement had not been contained in earlier conventions. Euphemistically referring to “painful experiences during the Second World War,” the author to the Commentary to both Articles explains the reasons for the need for its inclusion in 1949:<sup>75</sup>

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<sup>66</sup> Gardam and Jarvis, above n. 16, p 11.

<sup>67</sup> Charlesworth and Chinkin, above n. 12, p. 314.

<sup>68</sup> Gardam and Jarvis, above n. 16, p. 108.

<sup>69</sup> Third Geneva Convention, arts. 25 (dormitories), 29 (sanitary installations), 97 and 108 (execution of punishment). The same logic applies also in relation to women internees: Fourth Geneva Convention, art. 85 (internment buildings), 97 (searches), 124 (disciplinary punishment).

<sup>70</sup> Commentary, Vol. III, at p. 147.

<sup>71</sup> Third Geneva Convention, art. 27.

<sup>72</sup> Ibid., art. 13(2).

<sup>73</sup> Ibid., art. 17.

<sup>74</sup> Gardam, “Women and the Law of Armed Conflict: why the silence?”, above n. 47, p 57.

<sup>75</sup> Commentary, Vol. I, p. 140 ; Vol. II, p. 92.

It was no doubt felt that this special consideration for wounded or sick women combatants was self-evident and implied. But in view of the continually increasing participation of women in military operations, and in view also of painful experiences during the Second World War, it seemed necessary to include a special injunction on the point.

He makes clear that this “special injunction” is required for the purposes of protecting women’s honor, asking, “What special consideration?” and providing the reply, “No doubt that accorded in every civilized country to beings who are weaker than oneself and whose honour and modesty call for respect.”<sup>76</sup>

The idea of rape as a crime of honor has a long history and it is impossible to do justice to the vast literature that has addressed the subject here.<sup>77</sup> Suffice to say, it is extremely problematic to view rape as a violation of a woman’s honor and, by extension, her family’s honor (that is, the honor held by the male head of household). It connotes adherence to certain gendered social norms: an honorable woman does not have sex before marriage and remains chaste and modest in her appearance. A woman who contravenes these social norms, or is prostituted, is therefore “dishonorable”, the implication being that as she has no honor left to protect, her rape is not worthy of condemnation. Similarly, the rape of an “honorable” woman is deplored *because* her honor is apparently diminished, not because the sexual violation of woman is inherently wrong. Her reputation thus tarnished, she is expected to feel shame at having been raped. Further, her rape is portrayed as a dishonoring of her family, specifically her husband: at the heart of the concept of “family honour” is the idea of a woman as the property of her husband; her rape becomes his shame, because his monopoly over her body has been broken.

## V “Pregnancy and childbirth”

As Charlesworth and Chinkin have observed:<sup>78</sup>

[W]omen’s presence on the international stage is generally focused on their reproductive and mothering roles that are accorded “special” protection. The woman of international law is painted in heterosexual terms within a traditional family structure.

This observation is borne out nowhere more clearly than in the Geneva Conventions. Of the 19 provisions in the four conventions that explicitly refer to women, nine specifically concern

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<sup>76</sup> Ibid.

<sup>77</sup> See, for example, Gardam, “Women and the Law of Armed Conflict: why the silence?”, above n. 47; Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (1997).

<sup>78</sup> Charlesworth and Chinkin, above n. 12, p. 308.

pregnant women or women with small children. Pregnant prisoners of war or “women with infants or small children” should be made eligible to be accommodated in a neutral country;<sup>79</sup> states may establish safe areas “as to protect from the effects of war ... expectant mothers and mothers of children under seven”;<sup>80</sup> “expectant mothers” are to be accorded “particular protection and respect”;<sup>81</sup> states must permit free passage of “essential foodstuffs intended for... expectant mothers and maternity cases”;<sup>82</sup> “[alien] pregnant women and mothers of children under seven years shall benefit by preferential treatment to the same extent as the nationals of the State concerned”;<sup>83</sup> an occupying power may not “hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war ... in favour of ... expectant mothers, and mothers of children under seven years”;<sup>84</sup> “[interned] expectant and nursing mothers... shall be given additional food, in proportion to their physiological needs”;<sup>85</sup> the allowances given to internees “shall be the same for each category of internees (infirm, sick, pregnant women)”;<sup>86</sup> during hostilities, parties should agree on releasing to neutral countries “certain classes of internees, in particular ... pregnant women and mothers with infants and small children.”<sup>87</sup>

Throughout these provisions the gendered role of women as the “natural” caregivers of children is emphasized and women are repeatedly placed in the same category as those who are wounded or sick. The implication is that women with children, or who are shortly expecting to give birth to children, are deserving of higher protection than women without children. The reproductive capacity of women is thus given strong endorsement. However, these provisions are primarily aimed at protecting the welfare of *children* rather than their mothers, whose protection is merely a byproduct of the need to protect their offspring: the focus of the provisions is squarely on women “in terms of their relationship with others... not as individuals in their own right.”<sup>88</sup> Further, the protection accorded to children is built on gendered foundations: the Conventions fail entirely to address, for example, the pervasive issue of sexual violence against girls.<sup>89</sup>

## VI Conclusion

The Geneva Conventions of 1949 are silent on a great many subjects that matter to women because of their gender.<sup>90</sup> They fail to engage with women’s experiences and lives in a meaningful way because they are informed by a vision of international humanitarian law that takes as its core actors male “warriors” competing for domination over land. In this vision,

<sup>79</sup> Third Geneva Convention, Annex I. Model Agreement Concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War (see art. 110.)

<sup>80</sup> Fourth Geneva Convention, art. 14.

<sup>81</sup> *Ibid.*, art. 16.

<sup>82</sup> *Ibid.*, art. 23.

<sup>83</sup> *Ibid.*, art. 38(5).

<sup>84</sup> *Ibid.*, art. 50.

<sup>85</sup> *Ibid.*, art. 89.

<sup>86</sup> *Ibid.*, art. 98.

<sup>87</sup> *Ibid.*, art. 132.

<sup>88</sup> Gardam, “Women and the Law of Armed Conflict: why the silence?”, above n. 47, p. 57.

<sup>89</sup> Charlesworth and Chinkin, above n. 12, p. 315.

<sup>90</sup> An obvious example is the differential treatment of civilians according to whether the conflict they experience is international or non-international.

women are marginal players; weak and helpless in society, they require chivalrous protection in conflict. In the context of a diplomatic conference taking place in 1949 (and whose delegates were almost exclusively male) the explicit inclusion of “rape, enforced prostitution and any other form of indecent assault” as an example of an attack on a woman’s honor was a step forward. However, as this paper has described, the drafters of the Conventions carried into the text a perspective on gender that reinforces, rather than challenges, women’s subordination to men, particularly through its emphasis on women’s “honor.” As much as its words can be reinterpreted, the record of the negotiations and the views of certain members of the ICRC in the 1950s on its meaning continue to shape understandings of the text of the Geneva Conventions of 1949: constant vigilance is required to ensure that gender is incorporated into modern analysis and interpretation of these foundational instruments of international humanitarian law.