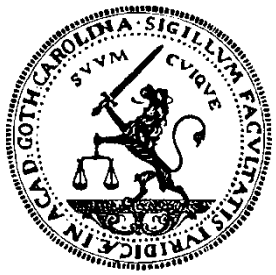

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At war with honour?

Feminist perspectives on female honour and the regulation of wartime rape

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Summary

Wartime rape is old news, and most experts agree that for most of human history, war and rape have gone hand in hand. But although wartime rape is a centuries old phenomenon, it seems to have disinterested the international legal community for most of its existence. The current legislation regulating wartime rape in international humanitarian law (IHL) is decades, not centuries, old. This thesis will present a few of the reasons behind this previous disinterest, as well as some of the consequences.

The focus of this thesis will be on international humanitarian law, including war crimes. The development towards the prevailing regulations began in earnest at the end of the nineteenth century, and was not completed until the late 1970s. In order to understand this development, both the historical and the present-day regulations will be discussed, in combination with a modest introduction to some historical perceptions of women and rape. Furthermore, both the present-day regulations, and the historic development, will be analysed from a series of feminist perspectives, in order to understand whether perceptions of females and their roles in society may have affected legislation concerning wartime rape.

Regulations concerning wartime rape have been relatively slow to develop, and it was only with the Additional Protocols to the Geneva Conventions that the controversial connection to 'family honour and rights' was removed in 1977. With this, focus moved from honour, to the individual victims experiences. The historical focus on honour is problematic, as it delegitimised the experiences of some victims - those not deemed to possess honour.

Sammanfattning

Systematiska våldtäkter av kvinnor i väpnade konflikter är ingen nyhet, utan ett fenomen som drabbat åtskilliga kvinnor, under åtskilliga konflikter, under historiens gång. Men trots att våldtäkter i väpnade konflikter har varit ett utspritt problem, har fenomenet väckt förhållandevis lite intresse inom det internationella samfundet, och regleringar på området har vuxit fram i en långsam takt.

Utvecklingen mot mera omfattande och precisa regleringar har varit långdragen, och trots att den internationella humanitära rätten, samt krigsbrott, idag uttryckligen omfattar våldtäkter i väpnade konflikter, har det inte alltid varit självklart. Det förlopp som lett fram till dagens regleringar började nämligen på allvar först på slutet av artonhundratalet. För att förstå denna utveckling, kommer avhandlingen behandla inte bara de nuvarande regleringarna och den historiska utvecklingen, utan även försöka ge en inblick i den syn på kvinnor och våldtäkt som var utbredd i början på nittonhundratalet och framåt. Slutligen kommer regleringarna utvärderas från ett antal feministiska perspektiv, i ett försök att utröna om kvinnors ställning kan ha påverkat hur regleringarna rörande våldtäkter i väpnade konflikter utformades.

Fram tills 1970-talet fokuserade regleringarna på familjens heder och rättigheter, istället för på de individuella offren. Detta fokus har fått många konsekvenser, bland annat att vissa kvinnors erfarenheter förringats, nämligen de som inte ansetts inneha heder värd att skydda.

Abbreviations

ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICJ Statute	The Statute of the International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
ICTR	International Criminal Tribunal for Rwanda
VCLT	The Vienna Convention on the Law of Treaties

1. Introduction

1.1 Background

Some say that war is a natural part of human existence, and that rape is a natural part of war. Historical records of wartime rape go back to Ancient societies[1], and according to most sources, the prevalence of rape in modern conflicts has continued at the same pace, if not picked up speed. Still, wartime rape has for most recorded history remained hidden, an invisible part of the reality of war.

> "Rape by a conquering soldier destroys all illusions of power and property for men of the defeated side. The body of a raped woman becomes a ceremonial battlefield, a parade ground for the victor's trooping of the colors. The act that is played out upon her is a message passed between men."[2]

The above quote give some insight into the realities of wartime rape, as well as the subject of this thesis. Wartime rape is, naturally, a complicated issue, with many important aspects. However, this thesis will not focus on all of those aspects, but rather focus on one – the individual victims. For often when wartime rape is discussed it is in terms of its appalling impact on communities, regions or even countries, but not as often concerning its effect on its individual victims.

Although the history of international humanitarian law is long winding, the history of regulations explicitly mentioning wartime rape is brief. The reasons behind this veiling, this disinterest from the international community, are fascinating – why do some tragedies receive more attention then others? And, why has this historical tide turned in the case of wartime rape?

[1] Brownmiller (1993) p. 31.
[2] Brownmiller (1997) p. 38.

1.1 Purpose

The purpose of this thesis is to describe the current regulations in international humanitarian law concerning wartime rape and rape as a war crime, and examine these regulations from a series of feminist perspectives. Additionally, to gain a deeper understanding, I intend to give an overview of the historical development leading up to the current regulations. I will attempt to identify a few of the reasons behind why the regulations are constructed the way they are, and why they have not, up until recently, received much attention in the sphere of international law. As a part of this identification, I will focus in particular on the notion of honour.

1.2 Research Questions

In light of the above purpose, the research questions are as follows:

- How are the regulations concerning wartime rape in international humanitarian law, as well as war crimes, constructed?
- How have these regulations evolved throughout the course of recent history?
- What might be some possible reasons behind this evolution?

1.3 Delimitations

This thesis will focus only on rape, and not other gender-based crimes, nor the specific challenges relating to male rape. The focus is on women and their experiences, not as a part of an ethnic, religious or other group, but simply as women. Therefore genocidal rape is more suitable to be discussed in a different context. Likewise, crimes against humanity, defined as a widespread or systematic attack on a civilian population in peace or in war, do not fall within the thesis purpose of focusing on individuals.

Whether international human rights law is applicable during armed conflict is a disputed subject among scholars, and in order to avoid dwelling on this

contention, I have chosen not to include international human rights law in this thesis, though it may (or may not) have some relevance.

Even though wartime rape also takes place during non-international armed conflicts, this thesis will only focus on international armed conflicts, in an attempt to construct a timeline covering the historical development. As non-international armed conflicts and their regulations are a relatively new construction, and surrounded by some uncertainty, I have chosen not to include these.

1.4 Material

This study is principally based on two different types of material. The first, legal documents, is used to describe how regulations concerning wartime rape have been constructed, both past and present. The second part is composed of three methods, whose purposes are to supply feminist perspectives on the above regulations. In order to understand the historical development, I have also chosen to include some information that does not fall into either of the above-mentioned categories, which give limited insight into how rape, and wartime rape in particular, have been perceived.

1.5 Method

The sources of international law, according to article 38 of the Statute of the International Court of Justice[3] (ICJ Statute) are conventions, customary law and general principles.[4] Judgments and literature are used in order to interpret and understand the sources of international law. These means of understanding are relied heavily upon in this study, due to the inherently vague nature of many of the relevant sources. The primary tools for interpretation are established in articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT)[5]. The international legal dogmatic method will be used, in order to distinguish the

[3] San Francisco 26 June 1945.
[4] Article 38 of the ICJ-Statute corresponds to customary law.
[5] Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969.

content of law through its sources. Another important method used in the study is the feminist legal method, which attempts to look at law from a different perspective, and identify missing points of view that have historically been left out of consideration.

1.6 Research status

Wartime rape has been a reality for most of human history, but has interested legal scholars in varying degrees throughout the decades. A controversial subject, many have written about it, with various findings. However, since the 1970s, feminist legal scholars have put great effort into getting wartime rape recognised by the international community as a whole. Many believe that a real breakthrough came in the 1990s, when the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), along with the atrocities that preceded them, which opened the world's eyes to the phenomena. Since, there has been an increasing activity, both in and outside the courts. In recent years, both genocidal rape and rape as a weapon of war have been examined, and discussed, and wartime rape has gone from being considered an individual attack, to a broader problem. Additionally, the focus on female wartime rape, and thereby the omitting of male experiences, has been criticised.

1.7 Structure

The second chapter of this thesis will give a short historical overview of the regulations in international humanitarian law, including war crimes, while the third chapter attempts to give some insight into how sexuality and rape were perceived in the nineteenth century. The fourth chapter details the current regulations, while the fifth presents three feminist methods that will be applied on the current, as well as the historical, regulations. The sixth chapter will provide a conclusion and further analysis.

2. Introduction to wartime rape

War is an age-old practice, perhaps intertwined with civilisation itself. And up until quite recently, rape was seen simply as justifiable spoils of war, or at least an inevitable outcome. According to Brownmiller, rape has accompanied wars of religion, wars of revolution – rape seems to flourish wherever there is war.[6]

However, wartime rape has during recent years started to be viewed as neither justifiable nor an unfortunate consequence, but as a calculated weapon of war[7], a way for men to affront each other through women's bodies. This is a big shift in perception, but it has been a long time coming.

2.1 The development of international humanitarian law and its regulation of wartime rape

Records of wartime rape go back as far as the Ancient Greeks, and continue up until today.[8] Unsurprisingly, with wartime rape common practice throughout the centuries, there have been attempts to regulate and forbid such behavior. King Richard II of England proclaimed in 1385, in one of the earliest surviving examples of such a regulation, that rape was forbidden, and a capital offence.[9] Others have attempted to do the same, more or less successfully.

Most experts consider The Instructions for the Government of Armies of the United States in the Field (the Lieber Code), from 1863, the first modern codification of the law of war.[10] Created during the American Civil War, its aim was to regulate the hostilities, as well as individual soldier's behavior. Among other things, it directed how armed troops should act toward civilians, and rape was a capital offence.[11]

[6] Brownmiller (1993) p. 31 f.
[7] Buss (2009) p. 148.
[8] Brownmiller (1993) p. 33.
[9] Brownmiller (1993) p. 34.
[10] Labuda (2014).
[11] See The Lieber Code, articles 44 and 47.

One might think, as the first modern codification, that the Lieber Code would set the standard for future regulations, but this has not been the case. In 1874, the Russian tsar Alexander II initiated the Brussels Conference, with the hope of creating common regulations on the law of war.[12] The result was the Brussels Declaration[13]. In contrast to the explicit mention of rape in the Lieber Code, the Brussels Declaration barely mentions the subject. Article 38 of the Declaration states that "honour and family rights … of the population must be protected".[14] From the records of the discussion, however, it seems that the delegates never discussed rape or women's rights specifically.[15]

The Hague Convention II[16] of 1899 was modeled on the Lieber Code, and incorporated most of its Articles, excluding those regarding rape.[17] Instead, in line with the Brussels Declaration, the Hague Convention stated in Article 46 "Family honour and rights … must be respected". The article doesn't specifically mention rape, but even if it is interpreted to do so, it creates no formal obligation for states.[18] Another issue regarding the phrasing is its vagueness, which not only makes it troublesome to apply and use, but might also deter from usage, because of its built-in ambiguity.[19] According to Tuba Inal, debates during the conference show that states where aware of this ambiguity, and that they tried to omit measures they knew they could not abide by.[20] In 1907 another Hague Convention followed, with an identical statement regarding family honour.[21]

With the atrocities of World War II still fresh in the world's conscience, the International Committee of the Red Cross (ICRC) initiated a conference to attempt to agree on another convention regulating the conduct of war, this time

[12] Inal. (2013) p. 62.
[13] Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874.
[14] Inal (2013) p. 64.
[15] Inal (2013) p. 63.
[16] 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, 29 July 1899.
[17] Inal (2013) p. 63.
[18] Inal (2013) p. 24
[19] Ibid.
[20] Inal (2013) p. 66.
[21] 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, 18 October 1907, Article 46.

with a special focus on the protection of the civilian victims of war. The result was the Geneva Conventions of 1949[22]. The Conventions constituted an improvement, with the phrase 'rape' explicitly mentioned in Article 27, and deeming it unacceptable.[23] However, there were still shortcomings. Article 27 may have mentioned rape, but it didn't define it, and there were still problems regarding to obligation and delegation.[24] Additionally, it was still the women's honour that was the central element, and rape was never outright prohibited, instead the focus was on protection.

The Geneva Conference represented a new era in other ways as well, with 5.8 percent female delegates[25], in comparison to the Hague Conference in 1899 were there where no female state delegates.[26] It was a successive change, with advocacy by women's organizations as late as 1915 derided as "amiable chatter of a bevy of well-meaning ladies".[27] Inal believes that the absence of women, both as delegates and as part of an active international women's movement, impacted the lawmaking process during the conferences.[28]

In 1977, the Additional Protocols to the Geneva Conventions revisited the matter of rape. Still, rape remained excluded from the list of grave breaches, and thus delegation was not affected. But there were other changes, such as a focus on prohibition instead of protection, along with the connection between female honour and rape being removed.[29]

2.2 The development of war crimes

War crimes as a concept gradually emerged during the latter half of the nineteenth century, and constituted one of the first exceptions to the idea of 'collective responsibility'. Two factors played a crucial role: the codification of

[22] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).
[23] Inal (2013) p. 92.
[24] Inal (2013) p. 93.
[25] Inal (2013) p. 105.
[26] Inal (2013) p. 86.
[27] Inal (2013) p. 88.
[28] Inal (2013) p. 90.
[29] Inal (2013) p. 112.

the customary law of warfare, at both private and at state level, and an increase of judicial procedures on the matter.[30]

Initially, the alleged perpetrator's own national authorities often persecuted war crimes, even though enemy courts also tried some culprits. Thus, the creation of the Nuremberg Tribunal[31] marked a considerable turning point. Before Nuremberg, it was unheard of for senior state officials to be held personally responsible for their offences. Prior to this, only other States could hold States responsible, along with servicemen charged with misconduct.[32]

The Geneva Conventions brought changes also in regards to war crimes, adding additional war crimes dubbed 'grave breaches of the Geneva Conventions', and established the principle of universal jurisdiction. Additionally, the First Additional Protocol of 1977[33] increased the list of grave breaches. [34]

[30] Cassese (2013) p. 63.
[31] Nuremberg International Military Tribunal.
[32] Cassese (2013) p. 64.
[33] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).
[34] Cassese (2013) p. 65.

3. The evolving perception of women and rape

During the 19th century, particularly in Europe, the process of developing a framework concerning wartime rape was started. In order to understand the development of these international regulations, and the reasons behind their particular construction, it is necessary to understand the societal context in which they were created.

3.1 Women and sexuality

Rape was considered a sexual activity, a regrettable loss of self-control[35], rather than a form of violence.[36]An aggressive manifestation of (male) sexuality in combination with what was seen as uncontrollable male lust, rape was perceived as unavoidable.[37] In line with this, much effort was put into controlling female sexuality[38], with sexual acts outside the bonds of marriage treated as criminal acts as well as social suicide. The perception of male indiscretions was quite different, and barely frowned upon.[39]

3.2 Rape as an attack on honour

Rape has long been associated with honour – women's honour. But some experts have come to the conclusion that in reality it is not women's honour, but rather the honour of the man who 'owns' that woman, which is the central aspect. An attack on a woman's honour is an indirect attack on man's honour. As Tuba Inal puts it: "for centuries, then, the physical pain of women has been translated into a social pain through the meanings attached to rape".[40] These perceptions of

[35] Inal (2013) p. 78.
[36] Inal (2013) p. 77.
[37] Inal (2013) p. 60.
[38] Inal (2013) p. 69.
[39] Inal (2013) p. 73.
[40] Inal (2013) p. 60.

rape, honour and shame have remained largely unchanged since medieval times.[41]

However, not all attacks on women's honour have always been perceived as problematic. The key issue was which woman, or 'type' of woman, suffered an attack. The main focus was protection the "family honour and rights" of respectable gentlemen, and thereby protection of property, inheritance and family lineage. The women, whose honour was not interlinked with such values, were of less concern.[42]

[41] Inal (2013) p. 60.
[42] Inal (2013) p. 76.

4. Current regulations

4.1 Definition of rape in international law

For a long time, there was no recognised definition of rape in international law, perhaps due to the lack of criminal prosecution of rape in armed conflict.[43] However, in the *Foca case*[44], the Trial Chamber of the ICTY examined the definition of rape in international law, and concluded that it should be similar to the elemental, common definition in national law; "a serious violation of sexual autonomy".[45] In the *Furundzija case* ICTY stated that rape requires "coercion or force or threat of force against the victim or a third person".[46] A couple of years later, however, in the *Kunarac case* the same court settled that there might be other factors "which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim".[47] Furthermore, in the *Akayesu case,* ICTR defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[48]

4.2 Definition of an international armed conflict

In the *Tadic*[49] case, the Appeals Chamber of the ICTY constructed a test to decide whether or not a situation amounts to an armed conflict:

> "… an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State."[50]

[43] Wachala (2012) p. 541.
[44] ICTY, case IT-96-23T/IT-96 23/1, *Prosecutor v Kunarac, Kovac and Vukovic,* Trial Chamber Judgement of 22 February 2001.
[45] Wachala (2012) p. 541
[46] ICTY, case IT-95-17/1, *Prosecutor v Furundžija*, Judgment of 10 December 1998, para 180.
[47] ICTY, case IT-96-23-T/IT-96-23/1-T, *Prosecutor v Kunarac, Kovac and Vukovic,* Trial Chamber Judgement of 22 February 2001
[48] ICTR, case ICTR-96-4-T, *Prosecutor v Akayesu,* Judgement of 2 September 1998, para 598.
[49] ICTY, Case IT-94-1-AR72, *Prosecutor v Tadic,* Judgement of 7 May 1997.
[50] ICTY, Case IT-94-1-AR72, *Prosecutor v Tadic,* Judgement of 7 May 1997, para 70.

In order to distinguish an armed conflict from other violence that does not reach the above criteria, there are two important factors; the intensity of the conflict and the level of organisation of the fighting parties.[51]

A definition of an international armed conflict is the common Article 2 in the Geneva Conventions of 1949, which reads "all cases of declared war or of any armed conflict that may arise between two or more high contracting parties, even if the state of war is not recognized by one of them".

4.3 Wartime rape in international humanitarian law

International humanitarian law consists of the regulations applicable in armed conflict. Its aim is to lessen the horrors of war for all those affected by it, both combatants and non-combatants, by establishing obligatory guidelines to which all parties must conform. It is also designed to regulate the protection of individuals who have never been, or no longer are, involved in armed conflict.[52]

One form of suffering that has not been getting its fair share of limelight historically, is that of rape during armed conflicts. There are a few applicable articles, such as Article 46 in the IV Hague Convention of 1907[53], which states that 'family honour' must be respected. The Geneva Conventions and the Additional Protocols of 1977 also touch upon the subject, and they do go further than the 'family honour' of the Hague Convention.[54] Article 27 of the Fourth Geneva Convention actually uses the word 'rape', and forbids it, along with other practices, such as 'forced prostitution'. Additionally, Article 76 of Additional Protocol 1 reads that women "… shall be protected in particular against rape".

[51] Cassese (2013) p. 66.
[52] Gardam av Jarvis, supra note 335, p 175 (hennes: 1690)
[53] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land.
[54] Wachala (2012) p. 536.

In order for violations of international humanitarian law to be prosecuted on the basis of universal jurisdiction, it is necessary, according to the UN Security Council, for the particular violation to be deemed a 'grave breach'. If rape in armed conflict is to be tried in this way, it must therefore be a 'specified major violation' in international armed conflict. What exactly constitutes such a major violation is not completely clear, with the Geneva Conventions and the Additional Protocols each providing a different definition, of which none explicitly mention rape or sexual violence.

In the opinion of Rhonda Copelon, "this failure to recognize rape as violence is critical to the traditionally lesser or ambiguous status of rape in humanitarian law".[55] Although rape isn't listed as a grave breach, it has been included through interpretation, as the language of the grave breaches provisions are intentionally broad and are to be interpreted liberally.[56] Even though rape isn't directly defined as a grave breach in the Geneva Conventions or the Additional Protocols, perpetrators of rape have been successfully prosecuted using the grave breach doctrine in the ICTY[57], as the definitions have been interpreted to include acts of rape. However, this was only possible by linking rape to torture.[58] The Statute of the International Criminal Court (ICC-Statute) has simplified the process by stating that rape constitutes a grave breach of the Geneva Conventions in its own right.[59]

4.5 Wartime rape as a war crime

War crimes are serious violations of customary or treaty rules of international humanitarian law, commonly known as the international law of war.[60] In *Tadic* the Appeals Chamber of the ICTY defined war crimes as 'a serious infringement' of an international rule, that "must constitute a breach of a rule

[55] Copelon (1994) p. 249.
[56] Askin (1997) p. 310.
[57] Article 2 of the ICTY Statue grants the court jurisdiction over grave breaches of the Geneva Conventions of 1949.
[58] ICTY, case IT-96-21-A, *Prosecutor v Celebici,* Judgement of 20 February 2001.; *Furundzija* case (IT-95-17/1-PT).
[59] Statute of the International Criminal Court, Article 8 (2) (b) (xxii).
[60] Cassese (2013) p. 65.

protecting important values, and the breach must involve grave consequences for the victim".[61] Additionally, it must be an interstate violation, constituting state responsibility, and the act must be criminalised.[62]

The difference between the concept of grave breaches and that of war crimes is becoming increasingly diffuse in international law. Originally, grave breaches were a limited set of especially serious breaches of the Geneva Conventions of 1949, which created special obligations for the States Parties for the "enactment and enforcement of domestic criminal law".[63] Meanwhile, war crimes constituted certain acts or omissions during armed conflicts that were criminalised in international law.

IHL typically regulates the behaviour of states or other warring parties, and not individuals. Thus, in order for a serious infringement of IHL to be regarded as a war crime when committed by an individual, it must be especially criminalized as such by international law.[64] Today there is consensus that rape entails individual criminal responsibility under international law, based on both doctrine and judgements.[65]

4.5 Wartime rape in customary IHL

Apart from the regulations in international conventions and judicial decisions, as detailed above, guidance can also be found in customary IHL. The existence of a customary IHL rule requires two components; general and consistent state practice in support of the rule and *opinio juris*.[66] However, the requirement of general and consistent state practice is not absolute, and the practices of states specifically affected by the rule are the most crucial.[67] Therefore, customary IHL does not depend on the consent of all states, and a treaty rule can become

[61] Cassese (2013) p. 65.
[62] Cassese (2013) p. 66.
[63] Öberg (2013) p. 163.
[64] Cassese (2013) p. 67.
[65] Solis (2010) p. 311.
[66] Crowe (2013) p. 25.
[67] Crowe (2013) p. 26.

binding for all states, and even armed groups not affiliated with a state[68], if it gains customary status.[69] Furthermore, it is commonly accepted that war crimes constitute a *jus cogens* norm. *Jus cogens* norms are peremptory norms accepted by the international community, which are especially protected, and cannot be modified or derogated. [70]

[68] See, for example, *Nicaragua v United States (Merits),* ICJ Judgement, 27 June 1986 [218]-[219].
[69] Vienna Convention on the Law of Treaties, article 38.
[70] Vienna Convention on the Law of Treaties, article 53.

5. Feminist theories

In order to gain perspective on how wartime rape is regulated in IHL, and how the system of war crimes works, these regulations will be viewed through the lens of several feminist legal methods and perspectives. All methods used point to the status of women as 'outsiders', as something other than the male norm, and consider this to have affected the status of women under international law.

5.1 Asking the woman question

Katharine T. Bartlett's method 'asking the woman question' is constructed to bring light to how the substance of law "may silently and without justification submerge the perspectives of women"[71], even when rules and practices might appear both neutral and objective. In short, the method asks the following questions: Have women been left out of consideration? If so, in what way? Can this exclusion be amended? What difference would such an amendment make?[72]

In the field of law 'asking the woman question' allows examination of how legal systems and rules focus on how the existing system risks disadvantaging women.[73] In doing so, 'asking the woman question' confronts the fundamental premise and assumption of legal neutrality, and understands that some legal rules are not gender neutral, but continue to reflect male experiences.[74] The purpose of 'asking the women question' is to pinpoint and then rectify these weaknesses in legal regulations in terms of equality and neutrality.[75]

'Asking the woman question' has been a well-used tool in the legal field for many years. Early on, the question was not so much if women were left out, but rather if the omission could be justified by the different roles and characteristics assigned to women by the society of the time.[76] Today, 'asking the woman

[71] Bartlett (1990) p. 836.
[72] Bartlett (1990) p. 837.
[73] Bartlett (1990) p. 837.
[74] Bartlett (1990) p. 837.
[75] Bartlett (1990) p. 837.
[76] Bartlett (1990) p. 838.

question' can instead help expose the hidden consequences of laws that do not explicitly discriminate based on sex, and show how social structures embody norms that "implicitly render women different and thereby subordinate".[77]

The focus of 'asking the women question' is exclusion, namely, the exclusion of women, and while it seemingly fulfils this objective, it simultaneously misses a number of other factors. However, as international law claims general, universal application, and makes no conceptual distinction between its human subjects, only looking at the category of 'women' can still be useful in order to highlight the continued marginalisation of all women in the international legal system.[78]

5.2 Public/private dichotomy

Another major feminist critique of international law is that of the 'public/private dichotomy'. This method points to the division and distinction between the public and private spheres in everyday life, and the effects this division has on both international law and the rights of women. According to the supporters of the 'public/private dichotomy' theory, international law privileges the public/male over the private/female.[79] The public/male is associated with public life, while the private/female is associated with private life. By cementing this division, and overlooking the private/female, international law fails to recognize the specificity of the female life in the private sphere. It is also this division that is said to be the source of women's exclusion from international law, especially as this is illustrated in the theory of state responsibility for human rights abuses.[80]

State responsibility for human rights' abuses is an exception to the traditional and historical nature of international law, where the state is the primary subject. Through international human rights law, a system for state responsibility for individual rights was introduced.[81] However, this system's main focus is state action or abuse perpetrated against individuals, instead of 'private' attacks, for

[77] Bartlett (1990) p. 843.
[78] Charlesworth & Chinkin (2000) p. 2.
[79] Naffine (1997) p. 32.
[80] O'Hare (1999) p. 368.
[81] Edwards (2011) p. 65.

example against women in their own homes.[82]

Edwards presents an alternative view, namely that "international law does not really exclude the private, but rather uses the public/private divide as a 'convenient screen' to avoid addressing women's issues".[83] Hilary Charlesworth and Christine Chinkin, in regards to violence against women specifically, say that if such violence is seen as not simply deviant behavior, but as "a part of the structure of universal subordination of women, it cannot be considered a purely 'private' act".[84]

5.3 Absence of female voices

It was true during the Hague Conferences[85], and it is still true today; women are under-represented in international decision-making bodies. The numerical under-representation is not just a problem for the top positions, either, but permeates all levels.[86] And there is good reason to change the status quo, if not for the sake of fairness and equality, then because research points to a direct link between women's involvement in human rights processes and the relevance of such laws to women.[87] However, even if women achieve positions of power, it is not clear-cut that they'll take on a position of advocating for women's rights. On the contrary, there might be a 'numbers threshold' at which women gain the courage to speak up for their sex.[88]

Although it is of course possible for men to adopt the perspectives of women, but as Vanessa Munro notes, "It's just that, for the most part, they have not done so [or been encouraged or socialized to do so]".[89] As Charlesworth, Chinkin and Wright put it: "because men generally are not the victims of … sexual degradation and violence, for example, these matters can be consigned to a

[82] Edwards (2011) p. 65.
[83] Edwards (2011) p. 69.
[84] Charlesworth & Chinkin (2000) p. 235.
[85] Inal (2013) p. 14.
[86] Edwards (2011) p. 44.
[87] Edwards (2011) p. 44.
[88] Edwards (2011) p. 45.
[89] Edwards (2011) p. 47.

separate sphere and tend to be ignored".[90]

[90] Charlesworth, Chinkin & Wright (1991) p. 622.

6. Conclusion

6.1 Historical development of the regulations of wartime rape

The Lieber Code is considered to be the first modern codification of the law of war, and forbade rape as a capital offence. Later, mainly European, codifications have not followed in its footsteps however, with the Brussels Declaration regulating rape in Article 38, which states "honour and family rights … of the population must be protected". This set the standard, with the Hague Conventions from both 1899 and 1907 using similar phrasing. The 1949 Geneva Conventions are seen as a breakthrough, explicitly mentioning 'rape', and forbidding it. However, focus was still on honour and protection rather than prohibition. The Additional Protocols of 1977 changed this, by both removing the connection to honour, and introducing a regime of prohibition, focusing on individual women.

The concept of war crimes developed during the end of the 19th and beginning of the 20th centuries, and the Nuremburg Tribunals were a major turning point. Prior to that, individuals had often been prosecuted by their own state authorities, and high officials were not held personally accountable for their breaches. Both the Geneva Conventions, and later the Additional Protocols, extended the list of war crimes (called grave breaches), and the Geneva Conventions also made war crimes prosecutable with universal jurisdiction.

6.2 Current regulation of wartime rape in international humanitarian law

IHL, commonly known as the law of war, is applicable during armed conflicts. Rape in international law has several definitions. It has been defined both as a

serious violation of sexual anatomy, and as a physical invasion of a sexual nature, committed on a person under coercive circumstances.[91]

Article 27 of the Fourth Geneva Convention was the first international convention to use the phrase 'rape', and subsequently forbid it. Article 76 of Additional Protocol I further states that women should be particularly protected against rape.

Only grave breaches of international humanitarian law can be prosecuted under universal jurisdiction. What exactly constitutes a grave breach is unclear, but it must constitute a major violation. Although rape is not outright included as an example of a grave breach, it has been included through interpretation, and according to the Statue of the ICC, rape constitutes a grave breach in its own right.

Serious violations of IHL are called war crimes. In order for a serious infringement of IHL perpetrated by an individual to be treated as a war crime, it must be especially criminalized as such under international law. There is consensus in the international community that rape entails such individual criminal responsibility under international law. According to customary IHL, a war crime is also to be regarded as a *jus cogens* norm.

6.3 Asking the woman question

The name 'asking the woman question' is perhaps misleading, as it is rather the asking of four questions: Have women been left out of consideration? If so, in what way? Can this exclusion be amended? What difference would such an amendment make?

In the case of wartime rape and its regulation, women have been left out of consideration. Obviously, it is beyond the scope of this study to illustrate all

[91] See section *4.1 Definition of rape in international law*.

aspects of this omission, but nevertheless below is an attempt to mention a few of the more central ones. Women have, historically, been deprived of their voices, as they were not granted access to the rooms of power, where decisions on their rights were taken. Additionally, the decisions emerging from these rooms of power left much to be desired. Wartime rape, although unwelcome, was for a long time never outright forbidden, but instead clad in vagueness, described in terms of honour. It seems that the individual victims of wartime rape were never the ones of the most interest; instead it was the bigger picture, the family unit's honour and rights.

A pivotal change concerning the regulation of wartime rape in IHL was the removing of the association with honour through the Additional Protocols in 1977. With this shift, a circle of sorts had been completed. There were no longer any discriminative regulations, and wartime rape was considered both a grave breach and a war crime in its own right. Furthermore, the elimination of honour from the regulation illustrates a shift of perspective, from that of honour to the individual victim. This change of focus is important – finally women's experiences take center-stage, and male honour is, at least on paper, irrelevant. Consequently, all experiences of wartime rape are legitimate, and not just 'women of honour'.

6.4 Public/private dichotomy

Perceptions of rape have changed over the decades, but are in some ways still eerily similar. In 19th century Europe, rape was unfortunate, but only a crime if it happened to the right woman, under the right circumstances. Only women belonging to a respectable gentleman could be raped, because only then was the honour and interests of a person of consequence threatened.

Rape was something related to the private sphere, and only a problem to ventilate publicly when male honour was at risk. Similarly, today state responsibility for human rights abuses target incidents in the public sphere, such as state action against individuals. Private sphere incidents, such as attacks on

women in their own homes, are a non-issue for the international community. But, as Charlesworth and Chinkin suggest, if violence is part of the structure of universal subordination of women – can it be considered a private act?

Although attitudes towards and perceptions of women have evolved, honour was still a central aspect in regulations concerning wartime rape up until the 1970s. Rape, and wartime rape, is and was not only a physical trauma suffered by women, but also a social trauma suffered by the community. As rape is seen as more than a physical attack, but rather an attack on honour, as the two are intertwined in the minds of many.

6.5 Absence of female voices

Women have not been, and often are still not, equally represented in decision or law making bodies. This most would consider undisputable. A more controversial question, then, is what effect this gender unbalance has had. For while some experts point to a clear correlation between the number of women, and the relevance of the produced material to the lives of women, others point to the numbers threshold. The outcome of the Geneva Conference, with its 5.8 percent female delegates, supports the first hypothesis, but maybe the second is also on to something. Considering historical perspectives on rape, honour and sexuality - who can blame women for not speaking up? When faced with sexist ridicule, and disregarded as ‘well-meaning ladies’, maybe there really is safety in numbers.

Another argument against the absolute importance of female representation is that men have the ability to adopt different perspectives than their own. While this is theoretically true, historical evidence shows that in reality, it simply hasn’t worked that way. With men in charge, the traditional approach of prioritising honour remained cemented, and it was only when the gender-balance started to change, that the approach changed.

6.6 Concluding observations

The importance of the changes in perception, which culminated in the removal of honour from the regulations concerning wartime rape in the Geneva Conventions, cannot be emphasised enough. It marks a monumental development: wartime rape has transformed from a property crime to a crime where the focus is squarely on the individual victim. In fact, it is astonishing that honour remained such an influential component for so long, especially considering the development outside the world of international humanitarian law. The decades leading up to the 1970s were some of the most revolutionary in terms of women's liberation, but somehow, this outside change failed to translate into legislative action.

The legislative focus on honour has been problematic. Not only has it devalued the experiences of those who did not meet the societal criteria for possessing honour (and thus not able to lose it), it has also turned wartime rape into a social trauma. In comparison to other experiences suffered by civilians caught up in armed conflict, wartime rape stands out as one of the only traumas that can result in life-long stigma. Stigma associated with rape is a problematic issue, of course, but one cannot help to think if it would be quite as substantial, if rape and honour were not so deeply interlinked. The obsession with honour has not been purely detrimental, however, as it has at least afforded some victims of wartime rape legal protection, even though it was not originally created for their benefit.

As this thesis has shown, wartime rape is, at least formally, presently regulated in a non-discriminatory manner, both in regards to international humanitarian law and war crimes. As illustrated above, this has not always been the case, with a focus on male honour and entitlement preventing the international legal system from protecting what really matters – not honour, nor property, but the lives and fates of individual victims. Although the above-mentioned progress should not be undervalued, fair legislation is only the first step. The next is the implementation of that legislation, and, eventually, changing perceptions of wartime rape. And that might prove to be an even more challenging endeavour.

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