DEVELOPMENT OF GLOBAL PROHIBITION

REGIMES: PILLAGE AND RAPE IN WAR

A DISSERTATION
SUBMITTED TO THE FACULTY OF THE GRADUATE SCHOOL
OF THE UNIVERSITY OF MINNESOTA
BY

TUBA INAL

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

ADVISER: KATHRYN SIKKINK

JULY 2008
Acknowledgements

I would like to take this opportunity to thank the most important people in my life; without their support, encouragement and guidance, this dissertation would not have been possible.

I am extremely lucky to have Professor Kathryn Sikkink as my adviser not only because her knowledge and vision shed light on my research or because she spent so much of her time to read and comment on my drafts but also because she personally supported me through the hardest struggles of my life. For that I am grateful.

I would also like to thank Professor Mary Dietz for her invaluable mentorship. Every time my brain got numb in the dullness of the dissertation writing process, she lighted up light bulbs in my mind.

I am thankful to Professor Sally Kenney for believing in me through the ups and downs of the last eleven years. Without her encouragement and guidance I would not go into graduate school, I would not be interested in women’s movements and I would not know how to write about them hence this dissertation would not be written.

I would like to thank Professor Colin Kahl for his valuable comments and fruitful discussions.

Many thanks to Professor Fionnuala Ní Aoláin for her invaluable comments on the legal aspects of my work.

I also would like to thank the members of the dissertation writing group at the University of Minnesota who read and commented on every chapter of this dissertation.

So much has happened during the four years that I spent writing this dissertation and many thanks to my husband, Hakan Inal for bearing with me through them. I also thank my baby, Alim Ediz Inal for being the joy of my life.

I dedicate this dissertation to my parents, Sule and Latif Cilingiroglu and my sister Rana Oral who have always had my back.

The writing of this dissertation was supported by a Peace Scholar award from the United States Institute of Peace. The views expressed in this dissertation are those of the author and do not necessarily reflect the views of the United States Institute of Peace.

The fieldwork in Geneva and Bern for this dissertation was supported by a Doctoral Research Fellowship from MacArthur Interdisciplinary Program on Global Change, Sustainability and Justice.
To my family.
Abstract

Although rape and pillage in war had been so closely related and so similarly justified, there is a 100-year gap between the prohibition of pillage (with The Hague Conventions of 1899, 1907) and the prohibition of rape (with the Rome Statute of 1998) by modern international law. The question is given that women had historically been considered the property of men, why did the prohibition regime that regulated pillage of property not include “pillage” of women? By addressing this chronological discrepancy in the development of these two prohibition regimes, this project seeks to explain two related theoretical questions: The first one is how does change happen in international relations; in particular why do states make laws binding themselves to change the ways war is conducted? The second question is what is the role of “gender” as a category in this process of change? I argue that three conditions are necessary for the emergence of a global prohibition regime: states must believe that they can comply with the prohibition because non-compliance is costly. Secondly, a normative context conducive to the idea that the particular practice is abnormal/undesirable as well as a normative shock to show this undesirability hence give the final push for the normative change are necessary. Thirdly, state and/or non-state actors actively propagating these ideas to promote the creation of a particular regime should exist. The temporal difference between the emergence of the regimes against pillage and rape reveals the role of gender in this process. By looking at the writing of The Hague Conventions (1899, 1907), the Geneva Conventions (1949), the Additional Protocols (1977) and the Rome Statute (1998), I illustrate that until the 1990s, states did not believe that they could prevent rape in war as opposed to pillage because of the gender ideology that framed rape as an inevitable byproduct of male sexuality. Plus, the exclusion of women from politics like the international law-making process meant that actors to promote change could not be effective. Hence, a normative context and a normative shock to make the prohibition of rape in war possible could not develop.
# Table of Contents

Chapter 1: Introduction 1

Chapter 2: The Prohibition of Pillage in War 37

Chapter 3: The (Non-) Prohibition of Rape in War: The Hague Conventions (1899, 1907) 74

Chapter 4: The Prohibition of Rape in War: First Steps- The Geneva Conventions (1949) and the Additional Protocols (1977) 113


Chapter 6: Conclusions 204

Appendices 224

Bibliography 242
List of Tables

Table 1. Emergence of Prohibition Regimes for Pillage and Rape in War 8
Table 2. The Participation of Women in the Diplomatic Conferences 19
List of Figures

Figure 1. Civilians Convention, Text Adopted by the Working Party-Corrigendum, 8 July 1949. 125
Chapter I

Introduction

One of the important questions in international relations theory is “why and how change happens (if it happens at all)?” Especially the central form of international relations, the core of security realm, i.e. the conduct of war is critical in this respect. According to the mainstream theories of international relations, particularly realism, in an anarchical world where the main actors in international relations, states, are primarily concerned about survival, war, as the ultimate untouchable resort of states, is one area where we should be deeply pessimistic about change. Then why do states make laws binding themselves to change the ways war is conducted? How is it that a practice, a weapon considered perfectly normal in war comes to be perceived abnormal and becomes the subject of a prohibition regime?

In order to answer this question I explore when and why states prohibited two closely associated practices in war, namely pillage and rape. The question about these two prohibitions is, given that women had historically been considered the property of men, ¹ why did the prohibition regime that regulated pillage of property not include “pillage” of women, i.e. why did the prohibition regime against rape develop almost a hundred years later than pillage? Although rape and loot continued to go hand in hand as bonuses for the soldiers for centuries, ² why were both eventually prohibited and why was one prohibited before the other?

Feminist international relations scholars have long argued that gender ideologies and the marginalization of women within political institutions are at the root of the perpetuation of certain structures in international relations whether it is the lack of change or the direction of change. The historical discrepancy between the regime changes on rape and pillage, therefore, brings out a second question: How can this historical

---

discrepancy help us understand the impact of gender on “change” in international relations?

By explaining the specific questions about the development of the prohibition regimes against pillage and rape in war, I will address these two related theoretical questions: how does change happen in international relations and what is the role of “gender” as a category in this process of change?

I argue that for a prohibition regime to emerge there has to be certain material factors, ideational factors and agents at work. While the material factors alone cannot explain the regime changes, they need to be taken into consideration since states do make calculations (over the cost-benefit structure) when they create and sign on to international laws. In this respect the costs and benefits of continuing or discontinuing certain practices in war should be examined to get a better picture. I look at two types of ideational factors. The first is the ideas about the practice (including the normative context with core norms and the normative shocks) and the second is the belief, on the part of states, in the preventability of that particular practice. The agents (the norm entrepreneurs both within and outside the state apparatus) who were active in the promotion and creation of these prohibition regimes constitute the third focal point. I will suggest gender, both as a socially constructed ideology and as a barrier to exclude women from institutions like international law-making process as the key to solve the puzzle of why the prohibition regime against rape emerged almost 100 years later than the regime against pillage.

This chapter lays out the research question and design in three sections. The first section is about theoretical foundations of the research questions and the key concepts that I use to ask and answer them. The second section is a chapter overview in which I look at the two cases, pillage and rape in war, briefly from a historical as well as a theoretical perspective exploring the changes in the practice and later prohibition of pillage and rape. Thirdly, I explain the methods I use for the research.

I. Regimes and Prohibition Regimes

There are two major conceptual and theoretical questions that I need to address: Firstly, what is a regime, what is a prohibition regime and for purposes of research how
do we know whether a regime and a prohibition regime exist or not? Secondly, why and how do regimes in general, and prohibition regimes in particular emerge and develop?

a) What is a Regime and a Prohibition Regime?

The definition of a regime is “sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.” The major theoretical concern of this research project is how a certain principle or behavior comes to become the norm and rule, i.e. how actors’ expectations about following certain principles and behaving in certain ways come to converge at a certain point in time. To address this general question, I focus on a particular kind of regime: a prohibition regime.

Global prohibition regimes are made up of a certain kind of norms, which prohibit, both in international law and in the domestic criminal laws of states, the involvement of state and non-state actors in particular activities.... These norms strictly circumscribe the conditions under which states can participate in and authorize these activities and proscribe all involvement by non-state actors. Those who refuse or fail to conform are labeled deviants and condemned not just by states but by most communities and individuals as well.

States and people come to consider these particular activities “deviant” as the regime emerges and seek to suppress them. Therefore, prohibition regimes exist where “the substance of these [prohibitory] norms and processes by which they are enforced are institutionalized.” They are like “municipal criminal laws” banning rather than regulating and they have the objectives of protecting state as well as individual interests within the state by providing order, security and justice. By deterring and punishing the “deviant” activities through force (criminal justice or military measures), they also “give force and symbolic representation to the moral values, beliefs and prejudices of those who make the laws.”

The cases that I look at fit into these definitions of global prohibition regimes. Pillage in war is the first case. Looting, plunder, sacking and “appropriation of property”

---

4 Nadelmann (1990), p.479.
5 Ibid., p.479.
6 Ibid., pp. 480-481, 525.
are other words for pillage, and I will use them interchangeably. It means the forceful acquisition, seizure or destruction of property of the inhabitants of a town or place by the soldiers of an invading army without proper compensation, and it is an activity that had been a normal part of war for centuries. Visigoths pillaged Rome in 409 and Vandals in 455, the Crusaders pillaged Belgrade, lots of villages and towns in the Asia Minor in 1096, Jerusalem in 1099 and Constantinople and the Greek islands in 1204, and the Napoleonic Armies looted Italian towns in 1805-1806 and in return the Russian Army looted the French countryside just to name a few examples. These lootings included destruction and plunder of food, gold, silver, art treasures, holy relics (like in the case of Constantinople), literary classics, and all kinds of transport like horses. A local historian describes the pillage of the French countryside:

They wanted the ruin, the devastation, the desolation and the destruction to complete their demented task of pillage. They shattered doors and windows, panes of glass, hacked down paneling... ripped up tiles, burnt barns and haystacks, destroyed shrines, vineyards, broke up implements and tools, and threw into the gutter the phials and glass jars of the pharmacists.7

Eventually, pillage had become undesirable and deviant at a certain point in history and the norm against the practice of this activity prohibited the involvement of states and their armies in it, which aimed at granting more order and security to people involved in a military invasion.8 Also, the prohibition clearly reflected the moral values and beliefs of the time, like the liberal values of progress, civilized behavior and the sanctity of private property.

Various legal bodies and texts defined rape in various ways. For the purposes of this research, I borrow the definition adopted by the International Criminal Tribunal for Rwanda (ICTR): “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”9 Throughout history, it is almost impossible to find a war where rape did not happen. To give just a few examples from history, Crusaders raped women as they marched to Constantinople in 1096 and 1204, German troops raped Belgian women in World War I, Russian troops raped German women, Japanese troops

---

8 See Appendix A.
9 Judgment of ICTR-96-4-T, The Prosecutor versus Akayesu.
raped Chinese women in World War II, Pakistani soldiers raped Bangladeshi women in 1971 and American soldiers raped Vietnamese women during the Vietnam War. However, rape too, previously considered to be a normal and acceptable activity in war, came to be regarded as deviant and undesirable and eventually was prohibited. It is clear that the regime that ultimately banned rape in war should be considered a prohibition regime because it banned rather than regulating the activity.

*How Do We Know a Prohibition Regime When We See One?*

Although we define regimes as “sets of implicit or explicit principles, norms, rules and decision-making procedures,” it is hard to detect the existence of implicit regimes especially in the security realm where military necessity or “security interests” may render them invisible. Therefore, I am interested in explicit regimes and in particular legalized regimes. Here, legalization or becoming the subject of, as Abbott and Snidal call it, *hard law* means “legally binding obligations that are precise and that delegate authority for interpreting and implementing the law.” In order to see whether a clause of an international legal document can be considered a prohibition against an activity or not, I subject it to “the legalization test for international regimes” put forward by Abbott et al.

However, before getting into the legalization framework, I also need to consider some of the criticisms directed towards this kind of formal understanding of law in order to make sense of the reason that I am assuming a formal approach in determining the emergence of prohibition regimes. Martha Finnemore and Stephen J. Toots, for instance, criticize formal approaches to legalization by saying that they ignore customary international law as well as interstitial law. I agree that some of their criticisms should be taken very seriously and the main focus of my study will be an attempt to answer

---

12 Abbott et al. (2000).
13 For a detailed explanation of formal versus behavioral and cognitive approaches see Hasenclever, Mayer and Rittberger (1997).
14 Finnemore and Toots (2001), 743. Customary international law results when states follow certain practices generally and consistently out of a sense of obligation that comes out of the norms, which developed over time through customary exchanges among states.
some of the very important questions they raise against this framework (like “Is legalization a dependent variable or an independent one?,” “If legalization is a phenomenon to be explained, what other factors might explain it and how important are they?”)¹⁵ However, a less formal approach will not explain some very important issues, which are raised by their framework, and my research question resides at the heart of these issues: Why are some parts of the customary and interstitial laws legalized and some left out? Why are states willing to formally codify some parts of customary laws and not others? To repeat my initial question in this context, given that women had historically been considered the property of their husbands (or fathers) and given that both pillage and rape had long been prohibited by customary law,¹⁶ why did states chose to codify pillage as a violation of international law and to leave out rape for almost a century? Therefore, I approach the subject of regime change from a legalistic point of view associating normative changes with positive legal changes that followed them. Accordingly, I use the definition of legalization put forward by Abbott, Keohane, Moravcsik, Slaughter and Snidal in a special issue of the journal *International Organization* on “Legalization and World Politics.” I also use their distinction between “hard legalization versus soft legalization” and measure the existence of the prohibition regime by the “hardness” of its legalization.

Abbott et al. define legalization in terms of the characteristics of rules and procedures of institutional forms and laws. In order to determine the level of legalization, they look at its three components: obligation, precision and delegation. Obligation means whether or not states are “bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well.” It can range from an expressly nonlegal norm on the lower end to a binding rule (jus cogens) on the higher end.¹⁷

Precision is the degree to which the rules unambiguously define the conduct they require, authorize or prescribe (or prohibit.) Therefore, the rules of a regime may be a

---

¹⁵ Ibid., p.745.
¹⁶ Askin traces some rare prohibitory measures on rape in war as far back as the ancient times but the most comprehensive customary law regarding this matter comes along with Grotious’ *The Law of War and Peace* (1646) and his laws’ implication by various nations. Askin (1997), pp.22-30.
vague principle or a highly elaborated, precise rule. Delegation is when the regime grants third parties authority to implement, interpret and apply the rules. A high form of delegation is when there is an international court, organization or a mechanism for domestic application as opposed to leaving it to diplomacy.  

The authors use a scale where each of the components of legalization may rank high, moderate or low. There are also certain indicators that are being used in order to place certain regimes on these scales. I use these indicators (indicators of obligation, precision and delegation) to help determine where the prohibition regimes against pillage and rape should reside.

Deriving from this theoretical framework, I define a prohibition regime as a particular category of norms prohibiting a particular activity by state and non-state actors through an international legal document that is legally binding, precise and possibly delegates authority for interpretation and implementation. Therefore, in order to determine when a prohibition regime is created, it is necessary to look for a high degree of obligation and precision combined with at least a low degree of delegation.

The Cases:

In order to establish the fact that there is indeed a gap between the prohibitions of these two practices in war, I used the approach of Abbott et al. to detect the codification of the prohibitions through tests of obligation, precision and delegation. I looked at four documents of international law in order to trace the codifications: The Hague Conventions of 1899 an 1907 as the first pieces of codified laws of land warfare; the Geneva Conventions of 1949, which were written after WWII in order to ensure better protection to civilians in war; the Additional Protocols to the Geneva Conventions (1949) accepted in 1977 to adapt the laws of war to the new military technologies and types of war; and the Rome Statute of 1998 establishing the International Criminal Court in order to judge the most serious international crimes.

18 Ibid., p. 401, 404.
19 Ibid., p.406. See Table 1, “Forms of Legalization,” where regimes may range from hard law to anarchy according to the degrees of obligation, precision and delegation.
20 See Appendix B.
Examining these documents and considering high degrees of obligation and precision along with some degree of delegation as the criteria for a prohibition regime establishes almost a 100-year gap between the prohibitions of pillage and rape. (See Table 1.)

Table 1. Emergence of Prohibition Regimes for Pillage and Rape in War

<table>
<thead>
<tr>
<th>PILLAGE</th>
<th>OBLIGATION</th>
<th>PRECISION</th>
<th>DELEGATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Hague (1907)</td>
<td>High</td>
<td>High</td>
<td>Moderate-Low</td>
</tr>
<tr>
<td>Geneva (1949)</td>
<td>High</td>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td>RAPE</td>
<td>The Hague (1907)</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Geneva (1949)</td>
<td>Low</td>
<td>Moderate-Low</td>
<td>Low</td>
</tr>
<tr>
<td>Geneva (1977)</td>
<td>Moderate</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td>Rome Statute (1998)</td>
<td>High</td>
<td>High</td>
<td>High</td>
</tr>
</tbody>
</table>

b) Why and How Does a Regime Develop?

“How and when international political orders are created, maintained, changed and abandoned”\(^{21}\) is one of the important questions of international relations theory and international regimes, as parts of these international orders ask for an explanation as to their creation, change and death. When we look at the literature dealing with international regimes, we see three groups of approaches: Power-based approaches like realism, interest-based approaches like neoliberal institutionalism and knowledge-based approaches like constructivism.\(^{22}\) Since conventional structural theories like realism consider regimes as the products of the distribution of power in the international system or the tools of the powerful states, thus with little causal significance, they are unable to explain why they emerge without any powerful state interests (in realist sense) involved or change and die without corresponding changes in the distribution of power.\(^ {23}\) Therefore, I will briefly explore whether powerful state interests or changes in the distribution of power were behind the creation of these prohibition regimes. In my

---


\(^{23}\) Finnemore (1996).
attempt to explore the development of the regimes against pillage and rape in war, however I will concentrate on the other two groups of approaches.

Interest-based approaches look at regimes in terms of “logic of consequences.”24 In other words, they see regimes emerging as a result of the recognition of mutual interests by the states. According to this approach, states are self-interested, goal-seeking actors with rationally ordered preferences ensuring maximum utility, which are stable over time. When there is a collective action problem preventing states from achieving their objectives in the most efficient way, regimes are formed to facilitate coordination and cooperation under interdependence. Therefore, regimes are consequentially formed for achieving common interests and change happens when interests change. As Goldstein et al. put it on the issue of the creation of international law, “Law [is] deeply embedded in politics: affected by political interests, power, and institutions.”25 Therefore, what leads to regime development and legalization are not the norms underlying it but interests and strategic choices of actors. Although some of the theorists of these approaches acknowledge the importance of ideas in triggering the formation of regimes,26 they have only looked at the effects of ideas when they cannot explain the emergence of a regime by material interests instead of explaining “why some ideas and not others find their way into policy.”27

Knowledge-based approaches, on the other hand, look at regimes in terms of “logic of appropriateness.”28 State interests are not exogenous but are derived from ideas and constructed through social interaction.29 The sources of regimes, therefore, are the intersubjective relationships between the states and the international system constituting state identities, which instruct appropriate behavior in a given situation. The answer they give to the question “where do these ideas that instruct and form regimes come from?” varies but it is usually states, non-state actors (both non-governmental organizations and intergovernmental organizations)30 or historical contingencies31 that trigger change.

26 For example, Keohane and Goldstein (1993).
27 Jervis (1994).
29 For example, Finnemore (1996).
So, how exactly does a prohibition regime emerge? According to Nadelmann, although international regimes usually reflect the interest structures of their members, moral and emotional factors play a role in their creation as well. This is especially true in the case of prohibition regimes, which, Nadelmann contends, “like criminal laws, tend to involve moral and emotional considerations more so than most other laws and regimes.”32 He emphasizes the role of “moral proselytism” and how the desire to reconstruct the world in one’s own image on the part of both states and non-state actors plays an important role in international politics.33 Is that the case? How do state interests versus ideas and emotions play into the creation of a prohibition regime?

In order to answer these questions and to explain prohibition regimes in particular and change in general, I use both interest-based and knowledge-based approaches. There have been attempts to reconcile interest-based and knowledge-based approaches34 and they were criticized by scholars who said that the sharp differences in the ontological assumptions of these two approaches make them incompatible.35 According to knowledge-based approaches since state behavior (including regime formation) is a product of social structures constructing rules, norms and social identities, interest-based ontology with its assumptions of a presupposed rationality and state interests pursued by this rationality cannot be reconciled with their sociological ontology. These scholars argue that the divide between the knowledge-based ideas of “states as role-players acting on the basis of the logic of appropriateness” versus interest-based ideas of “states as utility-maximizers acting on the basis of the logic of consequentiality” does not allow a synthesis.

While I do agree that it is not possible to make a “synthesis” out of these two approaches, I will contend that it is possible to use both of them to explain different facets of a phenomenon in international relations. It is analytically useful to assume that states are rational actors and they try to maximize their utility presupposing that what

---

33 Ibid., pp. 481-482.
their utility or interest is defined by the norms, rules, ideas and their identities and utility-maximization is a role that they are assigned to play by their identity of being a nation-state at a certain point in history. The process (or social construction) through which these identities hence interests are defined bring about state behavior and historical outcomes/change.

This project seeks to explain the process of social construction that led to the creation of certain norms and laws and prevented the creation of others. Understanding the source of change, whether it be “humanitarian sentiments, ideas of chivalry and honor [or] points of agreement as to military convenience,” requires an understanding of what I call “the core norms” or principles defining “the normative context” of a particular historical period and “normative shocks,” which develop contingently. However, I also underline the role of the non-state actors or norm entrepreneurs both in the transformation of the normative context and the transformation of potential events into normative shocks. Lastly, I argue that it is necessary to analyze the cost-benefit structures of the state actors that are not independent of the normative context.

For the purposes of this research, I define “core norms” as “beliefs and visions about one’s (person, social group or state) self and the characteristics that define that self, which become sources of behavioral norms about the appropriate behavior for that self given these characteristics.” They are constitutive, creating the actors with a particular identity and set of interests, hence becoming foundations for regulative norms like prohibition regimes. Accordingly, normative context becomes the environment in which these core norms exist as a web of intersubjective meanings shared by groups of people or states. In order to help me in explaining regime change, I use the concept of normative shocks, which I derive from the shock hypothesis of Kowert and Legro. In the context of prohibition regimes, a normative shock will be calamitous circumstances or events that shock the public conscience into focusing on particular activities or

36 Von Glahn (1957), p.3.
38 See Finnemore and Sikkink (1998) for constitutive and regulative norms.
institutions and change the core norms taking people out of the existing normative context into another one.⁴⁰

Although the concept of shock I am using comes from the knowledge-based approaches with their emphasis on these shocking events or crises changing the way international actors see the world hence their identities and the norms about appropriate behavior for these new identities, it is possible to find the idea of shock in interest-based approaches to international relations, too. For example, Oran Young, in his institutional bargaining model, underlines the importance of exogenous shocks in helping the regime formation when actors obstruct the process while maneuvering for positional advantages and lose track of the common interests. He argues that, exogenous shocks such as the Chernobyl accident (1986) or the discovery of ozone hole over Antarctica (1985) give the necessary boost to solve these collective action problems and lead to the creation of the regimes by capturing and galvanizing attention.⁴¹ Another example can be given from the economic realm: an economic catastrophe that led to the great departure from orthodoxy all around the world, i.e. the emergence of Keynesian paradigm after the Great Depression (1929).⁴²

However, the concept of normative shock that I am using is somewhat different from the shock in these approaches in two related respects. First of all, normative shocks are not solely related to material state interests hence they are not directly felt by the states. It is easier for states to create norms and laws related to their material interests as long as they agree among themselves, i.e. solve the collective action problem. Young emphasizes that external shocking events are only necessary in these cases in order to put the issue on the agenda and help the states reach compromises among themselves. What happens when the issue is not hurting any material state interests or the creation of an international regime does not have an immediate impact on them? It appears that for norms and laws related to human security the processes as well as the actors playing any

---

⁴⁰ Meron uses a similar understanding of shock to explain the emergence of new international laws. See Meron (1998), p.204.  
⁴² McNamara (1998), p.84. For the impact of the devastating experience of policy failure in the interwar period on this dramatic policy shift she cites Gourevitch (1986). Also see Ikenberry (1993) for the impact of the normative context or a “new thinking” as he calls it on the emergence of Keynesianism as the alternative policy.
role in these processes are different. You need actors and events that will create (non-material) state interests and sometimes even create those despite competing material interests (like in the case of land mines or some of the environmental norms).

Hence we come to the second difference of the normative shocks: they are not exogenous. Most of the time events that have a potential to become normative shocks happen without anybody recognizing them. Mass rapes in Former Yugoslavia are not like Chernobyl in terms of being a slap in the face of states. Mass rapes have happened in Belgium in World War I, in Nan King and Germany during World War II, and in Bangladesh during its independence war (1971) to give just a few examples of many other instances in history. None of these had any effect on state behavior in the direction of creating a norm and law against rape. Only after women’s movements developed a normative context in which violence against women is considered a human rights problem that occurrences of mass rape could become shocking for the world.

There are other cases in history where norm evolution processes needed a shock for taking people out of the existing normative framework into another one. World War II is a good example in terms of being a huge shock for the world in many respects creating shocks. These shocks had impact on both international and domestic political systems which “prove[d] that politics [and war] must be conducted differently or thought about differently.” The exogenous shocks that WWII generated can be seen, for instance, in its impact on domestic systems such as the examples of Germany and Japan: As we see in Berger’s analysis, highly militaristic political-military cultures of these two states, thus their foreign policies were radically reshaped as a result of the material and spiritual lethal blow of their defeat in the war. Obviously, the impact of the war was not something that could be missed for these states and the exogenous shock directly led to change.

In the international arena, the impact of the shock of World War II reveals itself in the emergence (and universalization) of strong human rights norms along with institutions to protect them along with strengthening of international law on these issues. One important development was the recognition of the flaws in The Hague Regulations

---

regarding deportations from occupied territories. Theodor Meron says that because deportation of civilians was thought not to be practiced on a large scale any longer at the beginning of the Twentieth Century, The Hague Regulations failed to mention it explicitly. However, the shock of “Nazi Germany's resort to the large scale deportation of civilians for slave labor and extermination during the Second World War led the drafters to restate in Article 49 of the Fourth Geneva Convention an absolute prohibition.”

The question is why did the deportations that happened in 19th century Europe go unrecognized and fail to trigger the norm and law change that revealed itself in The Hague Conventions? The answer to this question deserves another research project but the very fact that we can ask such a question shows the invisibility of human rights shocks in the absence of proper normative context created through the agitation of some actors and the intricate connection between the normative context and normative shocks.

As a result, the answer to the question of Kowert and Legro, “what counts as a shock, how shocking must shocks be and what will we say about the shocks that reinforce rather than change existing collective beliefs” can be answered by distinguishing between types of regimes. Also in the case of normative shocks we need to recognize the importance of norm entrepreneurs (and experts or epistemic communities in some issue-areas) as well. In the cases of prohibition regimes that I am looking at, the shockingness of the shock and (more frequently) the direction of the development of new norms and policies as a result of the shock are determined by these entrepreneurs and experts to a large extent.

The changes in the norm creation process, thus the emergence/creation or detection of a shock is part of this study. The key point here is that once the shock

---

46 For example the deportation of one million Russians to Siberia in the 19th century, Jews from Moscow and Rostov-on-Don (1891-1892) or the entire Muslim population in the Black Sea region of Russia and the Caucasus (starting early 19th century). See Polian (2004).
48 We see a discussion of the relationship between exogenous shocks or crises and epistemic communities in Haas (1992), p.14.
49 I am not trying to suggest that in the case of exogenous shocks there is only one direction that the norm can take and that norm entrepreneurs and experts have no effect on it. For example, after the shock of the Great Depression, the direction of economic policy change was affected by what was available as an alternative. Keynesian model was there as an alternative and it was taken seriously only after dramatic failures of the Depression. See Odell (1982), pp.371-372.
happens norm entrepreneurs and experts provide the alternative policy prescriptions which are deriving from or building on their previous work and whose emergence on the political agenda is made possible by the shock. The role of these people is necessary to create the image of the shock in the human rights area since human rights issues are more prone to be made invisible and disregarded as opposed to, for instance, economic shocks, which are more ‘objective’ and directly felt. Therefore, whereas preparing the basis for the demand for policy change and the alternative (the mechanism or law/legal prescription in the case of prohibition regimes) and using these for the desired end once the shock occurs is common to all issue-areas, I suggest that in issues where obvious state interests are not involved, such as human rights issues, there is much more work to be done by the activists in making the shock a shock. In contrast, exogenous shocks are more shocking by themselves, making themselves felt with less need for external promotion. This means a normative shock will not be a shock without the part played by the norm entrepreneurs but at the same time the norm entrepreneurs cannot influence the norm evolution process successfully without an event that has the potential to become a shock.

On this issue about norm “prominence,” Ann Florini also argues that contingency (that is something like a shock to be worked on) plays a major role. Crises are sources of political change but in the end they are “a matter of interpretation.” Ideas and interpretations transform disastrous events into crises or shocks but the interpreters lack the material in the absence of these disastrous events. But it is also important to understand why certain interpretations and ideas triumph over others which brings us back to the normative context and the core norms.

50 The invisibility of women’s human rights’ abuses up until today is one example to the possibility of selectivity about what counts as a shock on part of the policy makers. Mass rape in war, for example, is not a new phenomenon but it has never been able to provide the necessary shock until 1990s. A similar pattern may be found in the environmental issues as well: though there can be more obvious shocks, in many cases epistemic communities contribute to the creation of the shock with scientific advances or reports capturing public attention. (Haas (1992), p.14.) In the security area most of the time shocks are obvious, like Second World War’s devastating effects on Germany and Japan, but the direction of the norm change (or sustenance) is more indeterminate.

In the process of campaigning for a new norm and creating a normative shock, the norm entrepreneurs use different tactics depending on the problem they are dealing with. As I have argued before, in human rights issues, whose shocks are often not that obvious until some people make them so, one tactic is working on the existing norms and associating the new issue to these existing norms. “No norm exists in a vacuum,” i.e. the new norm that will be proposed by the proponents of the norm has to fit coherently with other prevailing norms.53 I argue that especially in the human rights area, these prevailing norms that need to support the new norm should be the core norms for a successful campaign since they are more immune to political contention. The successful campaign against the Atlantic slave trade for instance could not sustain itself on the basis of the prevailing norm of economic efficiency but could gain impetus only when it was grounded on the core norms of the 19th century, i.e. the Enlightenment’s promise of natural rights of man.54

Also crucial is that the fit between the new norm and the core norms has to be emphasized strongly in order to make the case: when the existing norm that will be referred is already in international law, the norm entrepreneurs must convince the audience that the emerging norm is the logical extension of that law or necessary change to it if the existing law will fulfill its function at all.55 This combination of an already existing framework on which the new norm can be built and the efforts of the norm entrepreneurs to use it appropriately is referred as “grafting” by Price, which means “the mix of genealogical heritage and conscious manipulation involved in such normative rooting and branching.”56

When it comes to my original question about the prohibition of pillage and rape, we can analyze the three cases, creation of the prohibition regime against pillage, non-creation of the prohibition regime against rape and the creation of the prohibition regime

53 Florini (1996), p.376. This is what Florini calls “coherence.”
54 Nadelmann (1990), p.493.
against rape under these four levels of normative context with core norms, normative shocks, norm entrepreneurs and the cost-benefit structure.\textsuperscript{57}

The normative context that led to the creation of the prohibition of pillage in the 19th century consisted of three core norms related to the self-image of Europeans. They were the ideas of progress, civilization and sanctity of private property. These ideas were introduced and propagated by political theorists starting in the 18th century. However, the major actors who took these ideas and used them to propagate a change in the way war is conducted were the jurists or publicists of 19th century.\textsuperscript{58} When it comes to pillage, the normative shock came with the Revolutionary and Napoleonic Wars of the late 18th - early 19th centuries. Since these wars brought large-scale pillage back to the European wars after a century of relative reduction of the practice, they provided the basis for its prohibition later in the 19th century.

Looking at the normative context of the 19th century with respect to women’s status and the understanding of rape, one can expect that rape would not be prohibited as a violent outrage upon women. Women were considered the sexual property of men and rape was unacceptable to the extent that it violated the property rights of some gentlemen who “owned” the rape victims. Therefore, class was an important factor making the wives and daughters of the propertied class off-limits while relegating the rape of lower class women to a non-issue. Also noteworthy was the paradoxical implications of the word “rape” for the 19th century European women seeking legal redress for being raped. As we will see in the England case, if rape victims said they were raped and described the ordeal they would be considered not respectable. Since only respectable women were rapeable it became virtually impossible to prosecute and convict rapists.\textsuperscript{59}

The absence of women from the law-making process at The Hague Conferences is significant, too. Although 19th century feminists were very much aware of the oppression of women by the rape laws in their countries as well as rape itself and its societal

\textsuperscript{57} The reason that I distinguish the cost-benefit structure as a separate level is purely analytical since I argue that the cost-benefit considerations of states are not independent of the normative context they are situated in, which includes their identities. See for example, Katzenstein (1996), Finnemore (1996), Wendt (1999).

\textsuperscript{58} In the 19th century, the word publicist meant “those learned men, philosophers with a practical bent, who specialized in what we now call public international law and international relations.” See Nabulsi (1999), p.158.

\textsuperscript{59} Clark (1987).
consequences for the victims, their ideas and work did not take the form of transnational advocacy and did not reach The Hague. It is also safe to think that the fact that there were no women delegates at the Conference contributed to the issue’s dereliction as well. Feminists have long argued that state and especially military are gendered institutions and the absence of women in these institutions leads to the marginalization of women’s issues in them.60 According to feminist international relations scholars, one of the important facets of the marginalization of women in international relations is the use of myths which help to perpetuate war and exclude women from citizenship due to their exclusion from “armed civic virtue.” Men as the proprietors of this armed civic virtue are valued and recognized as “the agents” due to their “contribution” to the defense of sovereignty and security. They are the sovereign and warrior citizens, the defenders of the sovereign and the victimized, dependent and weak women. Women, on the other hand, are associated with peace, which ends up marginalizing their voices since they are regarded as not contributing to the protection of the sovereign state as warriors. As a result women have traditionally become invisible and unable to affect international relations since they were excluded from positions of power and particularly from war departments and foreign ministries as well as the international negotiations.61

Given that the number of women within a particular state institution directly correlates with the appearance and promotion of women’s problems and perspectives on that institution’s agenda,62 it is not surprising to see the exclusion of rape from the international legal documents which were written by conferences dominated by male delegates. Access to institutions is a key component of influencing policy63 and not having any access to the process of international law-making through state or non-state channels blocked women’s agenda significantly.

---

61 See Elshtain (1987), Tickner (1992). It is possible to see the exclusion of women particularly from international politics even in the United Nations Women’s Conferences. As late as 1980, during the Second World Conference on Women in Copenhagen, women delegates were pushed aside by their male counterparts whenever the introductory and international sections of the documents were being discussed. Fraser (1987), p.48.
63 Joachim (2007).
Accordingly, we will see with the Conferences where rape slowly entered into international law, the presence of women’s issues in the final texts is directly linked to women’s physical presence at the Conferences as active participants. (See Table 2. below)

<table>
<thead>
<tr>
<th>Table 2. The Participation of Women in the Diplomatic Conferences</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total number of delegates</strong></td>
</tr>
<tr>
<td>-------------------------------</td>
</tr>
<tr>
<td><strong>The Hague Peace Conferences 1899, 1907(</strong>)**</td>
</tr>
<tr>
<td><strong>Geneva Diplomatic Conference 1949</strong></td>
</tr>
<tr>
<td><strong>Rome Conference 1998</strong></td>
</tr>
</tbody>
</table>

*Excludes administrative secretaries/administrative staff but includes advisers.
**Total number of delegates in both Conferences.
***The Additional Protocols to the Geneva Conventions of 1949 were prepared by these four Conferences and the number of delegates is the total number of all four Conferences.
****The International Council of Women was not among the official participants of the 1907 Conference but participated through its lobbying efforts for peace by submitting a petition.
*****The International Alliance of Women and the World’s Young Women’s Christian Association were not among the official participants of the Conference though they communicated their demands to the ICRC beforehand.

As a result of the normative context, which was not women-friendly and the absence of actors to push for changes in that normative context at the international arena, a normative shock could not happen. In terms of its preeminence in European wars, rape was not different from pillage. For instance, in 1898, a British author wrote about the Napoleonic Wars as bringing disasters with far-reaching and horrible consequences the
world had not been able to yet recuperate among which he counts “slaughter, plunder, pestilence, agony, rape and ruin.” However, out of these disastrous events only rape could not be shocking enough for the Europeans to do something about it. The question still remains why rape did not even enter into the law at least as a property crime. The normative context was conducive for such a framing in the law so why were women not property enough?

In order to answer this question, I will turn to the second part of the ideational factors, i.e. the ideas about the preventability of a practice. However, in order to understand why this idea is important we need to first look at the cost-benefit calculations that states make when they are making international commitments.

International relations scholars have approached the question of why states make international laws and why they make them the way they are from different perspectives. As I discussed with the regime theories, i.e. the power-based, the interest-based and the knowledge-based theories, scholars may argue that international laws do not mean anything to states other than a potential tool to use against weaker states as it becomes convenient. This realist perspective argues that in the anarchic world order with no government above the states to enforce rules, states make these laws so that they can use them to further their national interests in the never-ending global struggle for power. The question is since states know that they can ignore and violate these laws when they contradict their interests, why do they negotiate these treaties so meticulously? Are they being extremely careful about every wording in every article of a treaty in order to make sure that international law reflects their interests as much as possible ensuring relative gains against their enemies?

Still, if states have no intention of complying with the laws, knowing that in the end all comes down to who has more material power, why lose time, energy and resources on something politically trivial? In fact, when we look at the negotiations of these international treaties a very different picture than the one drawn by realists appears. For example, the powerful states who, according to realists, determine the rules of the

---

64 Mallock (1901), p.84. He describes Herbert Spencer’s depiction of the Napoleonic Wars but the list of the disasters is his. Also for rape and pillage during some of the battles in the Napoleonic Wars see Fletcher (1998); Fremont-Barnes (2002).
game seem to struggle the most in order to protect their power positions and especially with humanitarian law they do not always get their way. Rather the evidence supports the traditional legal views of international law where weaker states demand more legalization to protect themselves against the powerful.66

I do not argue that the power of the powerful does not mean anything or that ideas like the 19th century liberal euphoria in the case of The Hague Conference swept all states away into humanitarianism. For instance, in The Hague, in 1899, the meticulous negotiations that lasted six weeks demonstrate that some states, especially Britain tried to impair the project of codification. Britain’s role is especially noteworthy given that it had utmost power to draw on and to violate rules so why did it bother to try and prevent the codification of them? General Ardagh, the British delegate, proposed that the Conference accept the Brussels Declaration as a general basis for instruction on the laws and customs of war to be given to troops, without any pledge to accept all the articles as voted by the majority. He said for Britain having “full liberty to accept or modify the articles is of supreme importance.”67 Despite this intense opposition, the rules were codified and Britain ultimately signed and ratified the Convention.

Ultimately, realism cannot explain why in the case at hand the states purposefully excluded rape from The Hague Conventions and for the most part from the Geneva Conventions at the same time as they included other similar practices.

Neoliberals (or interest-based approaches) argue that since international law helps make cooperation under anarchy possible by furthering common interests and reducing uncertainty, states negotiate to make sure that international law will indeed serve these interests. In this respect, clear legal obligations on state parties and mechanisms for enforcement through reciprocity and management through institutions are key factors that get the attention of states in international law-making.68

Constructivists (or knowledge-based theories) emphasize the centrality of norms and shared understandings of appropriate behavior inducing law-making and compliance which means states do not want to make commitments that they believe they cannot

---

67 Scott (1920), p.517.
comply with.\textsuperscript{69} Non-compliance has costs which states do not want to bear unnecessarily. Having a reputation as a legitimate member of the international society behaving appropriately is important for states and they do not want this reputation to be hurt by becoming “the spoilsport” or “the outlaw,” who disrespects the most fundamental rules of international society.\textsuperscript{70} One of the most important of these rules is “Pacta Sunt Servanda,” “Pacts must be obeyed” whose existence leads to “distaste for breaking the law” on the part of all states.\textsuperscript{71} It is possible to see the signs of this thinking in various documents of international law. In the words of the president of the Brussels Conference (1874), Russian delegate Baron Jomini, “It would be a wrong to the contracting parties to imagine that they could have the intention of not abiding by their agreement.” Along the same lines, General den Beer Poortugael, the Dutch delegate at The Hague Peace Conference (1899) declared that “there is no better watchman than the nation’s honor.” He said since “Honor is like an isle with a steep and landless shore; When once it has been lost, it cannot be regained anymore,” forfeiting an oath or an accepted agreement is unthinkable for nations as with individuals unless they are willing to sacrifice their honor.\textsuperscript{72}

The debates over the prohibition of pillage and many other topics in all the international conferences I look at partly support the neoliberal argument. States usually strive to clarify the obligations and the enforcement mechanisms because “clear legal standards reinforce reciprocal enforcement by clarifying what acts constitute violations and which do not.”\textsuperscript{73} For example, during the first Hague Conference in 1899,

\textsuperscript{69} The argument here is about states’ ability to abide by a treaty rather than their intention to do so which is what Downs, Rocke and Barsoom argue. See Downs, Rocke and Barsoom (1996).
\textsuperscript{70} The arguments about the reputation effects of regime violations are considered by both interest-based and knowledge-based approaches though in different terms. See Keohane (1984), Axelrod and Keohane (1986), Stein (1990), Simmons (2000); Bull (1977), Franck (1990), Hurrell (1993). While interest-based approaches see reputation concerns as rational investments for possible future cooperation and gains, knowledge-based approaches emphasize the normative aspects. I do not think the two are separable. In other words, a state not wanting to commit to a treaty that it is bound to violate because it does not want to be known as a violator may not only feel repulsed with the idea of law-breaking because it is not an “appropriate” behavior but also it may count the costs of this behavior on the regime and its future relations with others into its calculations being aware of the “consequences.” See Kelley (2007) for the integration of both factors.
\textsuperscript{71} Abbott and Snidal (2000), p.428.
\textsuperscript{72} Scott (1920), p.351.
recognizing the fact that some states wanted to make some of the laws vague to be able to escape the violator status at times, neutral states demanded more clarification.\(^{74}\) Complaining about the lack of precise articles on the rights and obligations of the neutral states, Mr. Eyschen, the delegate from Luxemburg, summarized the situation:

\[
\text{[E]ven if success in formulating precise rules were not always attained, it would be useful at all events to have it stated by the Conference that there is a controversy on certain points. In these cases pretensions would be less and conduct more restrained.}^{75}
\]

However, hard bargaining and desire for clarification in law-making does not happen over every topic and it does not happen only for the purpose of preventing defection by other parties. Instead, I argue that states want clarification also for knowing/making it known exactly what they themselves are committing to and the desire to clarify the laws changes according to the degree of the difficulty of compliance on their part because they do not want to be accused of violation easily. When they believe that it is impossible to comply, they do not commit and they do not want clarification stipulating any precise obligation. When they believe that it is possible to comply, they strive to make the law very clear with lots of details. As Abbott and Snidal’s analysis demonstrates when the “preferences and capacities” of states are divergent, soft laws with less precision and limited delegation become more attractive to them.\(^{76}\)

When we look at the long and hard process of the writing of these international laws, we see the meticulous bargaining and outlining of the laws because states want them to work and we see careful negotiations over some murky exceptions and constraints like “military necessity” inserted into the laws of war because they want valid justifications when rules are violated.\(^{77}\) Therefore, we should expect them to avoid

\(^{74}\) Scott (1920), p.506.
\(^{75}\) Ibid., p.496.
\(^{77}\) We need to realize that the use of “military necessity” as an excuse to violate laws of war is related to states’ national interests and the desire to leave an open door in the laws of war so that one can ignore them when “necessary.” But in spite of the use of this obscure concept in many treaties, the bare need of any excuse or justification for violation indicates the normative force as a source for the “distaste” among the members of the international society. See Kratochwil and Ruggie (1986), Kratochwil (1989), Reus-Smit (2004).

23
making commitments on subjects that they believe are out of their hands, especially the ones that cannot be justified by “military necessity.”

In the case of the non-prohibition of rape in The Hague Regulations, for instance, the states left the issue vague on purpose. Similarly, they decisively excluded rape from the grave breaches in the Geneva Conventions (1949). As we will see in Chapters 2 and 4, the debates both in The Hague and in Geneva substantiate my expectations that states want to commit to a treaty on the table because it serves (or do not conflict with) their perceived material interests and/or because they think it is the appropriate thing to do given their identities as members of the international society. However, they make these commitments only if they also believe that they can fulfill their obligations (to a reasonable degree) and they want more details and clarity over what constitutes obedience and violation for these commitments.

Pillage, like other practices that were prohibited, fits this profile. The changes in the structure of armies and wars since the 18th century had already made pillage costly and undesirable for states. It was breaking the discipline of the army and aggravating the relations between the army and the civilian population both in one’s own countryside and in the occupied territories. Also, it lost its function of financing the wars since the modern state had already found taxation as the new source for them. Therefore, prohibiting pillage would serve their interests although a multilateral treaty to do it was not necessary because rival armies’ pillage practices did not have much to do with the reasons that a state would want to prevent pillage. However, prohibition through a multilateral treaty would not hurt any state either.

Pillage was also becoming more and more abhorrent in the eyes of the European public because of the growing ideas since the 18th century about the sanctity of private property, being civilized and progressing towards higher forms of civilization. Especially the Napoleonic Wars reminded the European states how their identity is defined within these terms by showing what kind of state behavior they do not want in Europe any more.

Last but not least, states believed that they could prevent pillage. Conscripted armies of the 19th century were not like the mercenaries of the previous centuries who join the army just for booty. Instead they were fighting for the “nation.” Hence, as long as
they are fed and clothed properly and kept under strict discipline in military camps, it was possible to prevent pillage.

In contrast to pillage, rape did not fit this profile very well. Surely it was as costly as pillage in terms of hurting the army discipline and breeding hostility among the civilian population. That is why army codes going back to the 14th century prohibited it just like they prohibited pillage.\textsuperscript{78} It was also a repulsive act for the “civilized” Europeans. Even in the 17th century Grotius wrote it was not an acceptable practice for “civilized” nations. In addition to this, the domestic rape cases show that people did not even want to talk about rape in the context of the “new prudery” of the late 18th and 19th centuries. Towards the end of the 19th century, with the influence of the evolutionary theory, people also began to think of rapists as primitive organisms ranking lower on the evolutionary scale. Therefore, it was not something they wanted to see in Europe either. That is why aggressor states usually do not admit to rape and the victimized states use rapes as propaganda tools to show the savageness of the enemy.\textsuperscript{79}

However, when it came to the beliefs about its prevention rape was drastically different from pillage. Historically, rape was considered a crime of passion that got out of control.\textsuperscript{80} This was also the prevailing sentiment in the 19th century (as well as most of the 20th century). Rape was seen solely as a sexual act, rather than an aggressive and violent manifestation of sexuality.\textsuperscript{81}

\textsuperscript{78} The earliest known example of such a prohibition is the English king Richard II’s proclamation in 1385. Brownmiller also mentions a possible example from 546 A.D., a prohibition by the Ostrogoths that captured Rome but the sources are insufficient to give the exact details. See Brownmiller (1975), p.34.

\textsuperscript{79} Brownmiller (1975), pp.37-38.

\textsuperscript{80} For instance, in the 11th century, William the Conqueror, the King of England, reduced the sentence for rape from death to castration and loss of eyes because the rapist’s eyes which “gave him the sight of the virgin’s beauty for which he coveted her” and his testicles which “excited his hot lust” had to be taken away as punishment. This shows how people understood rape as originates from passion for the beautiful woman rather than desire to dominate violently. Burgess-Jackson (1999), p.17.

\textsuperscript{81} This does not mean that this understanding of rape as a sexual act disappeared after the 19th century. In the 20th century, especially with the influence of Darwinism, the male-centric idea of “rape as an instinctual sexual act” gained a new perspective. In academia (and probably in the general public too) there are still people who advocate that rape is a sexual act with roots in the evolution of human species. For example see Thornhill and Palmer (2000). In their attempt to make a case for the evolutionary basis of rape, they also argue that rape in war is sexually motivated and the vulnerability of women during wartime due to the absence of the male protectors explains its prevalence. p.134. Also see Ellis (1989) for different theories of rape; Burgess-Jackson (1999) for different perspectives on rape laws; Burgess-Jackson (1996) for the philosophical debate over whether rape is an act of violence or sex.
At the beginning of the 20th century, with the influence of psychoanalysis, theories considering rape as a mental problem started to develop. Rapists were thought to have “character disorders” making it impossible for them to control their impulses. The “drive reduction” or “instinct” model using psychoanalysis explained male behavior of rape as an effect of inherent urges beyond immediate control. Accordingly, it argued that since male sexuality innately contains aggression due to the “primitive necessity of pursuit and penetration, whilst the female recognizes this and submits” rape happens when a mentally challenged man happens to be unable to control these urges. “Sexual offenders were often good citizens in all but this one respect” or “one of the best combat soldiers I have known” were the ways rapists were described, which excused the ill-(mis)-behavior of the perpetrator.

The attitude towards rape in war is particularly revealing in term of demonstrating the idea of inevitability. What some scholars called a “sexual deprivation theory” of military rape seems to be pervasive in the minds of the military and the statesmen as well as the general public throughout much of history. According to this theory, because military personnel do not have many sexual opportunities, they satisfy their sexual impulses through rape. Hence soldiers who are “revved up by war” and “needy” may get “briefly out of control” and, according to this mentality, it is “normal” to see rape as an unpleasant yet inevitable by-product of war. The fact that rape in war has been ubiquitous further allowed the military and the statesmen to render it inevitable.

One thing that this gendered ideology of rape being inevitable especially in war had historically produced is the use of brothels by militaries to “curb” the need for sex, hence rape. Since rape is a discipline spoiler just like pillage, states want to prevent it but a sexual outlet is necessary for doing so. Besides the desire to prevent the spread of venereal diseases, this “institutionalized rape” serves the purpose of preventing

86 Brownmiller (1975), p.103. The statement was made at a court-martial by the superior officer of a sergeant who led his squad to gang-rape and murder a Vietnamese girl in 1966.
89 Barkan (2002).
something unpleasant (or the “indistinguishable part of a poisonous wartime stew called ‘lootpillage and rape’”) by providing something routine.\(^{90}\)

However, providing the soldiers with prostitutes is not always possible either due to the logistics of war or the domestic constituency’s attitude towards prostitution as we will see in the case of WWII and the US Army. Plus, prostitution usually has not been able to prevent rape in war as we will see in the case of “comfort women” of the Japanese Army in WWII. Therefore, given the widespread beliefs about its inevitability, it is not surprising to find states avoiding legal commitments to prevent rape in war.

II. Chapter Overview

a) Pillage:

In chapter 2, I look at the prohibition regime against pillage, which is established by The Hague Conventions of 1899 and 1907 (in particular 1907 because of the additional measures it adds in terms of delegation). Considering the Regulations in terms of the degree of obligation they bring for the state parties on the issue of pillage, we should place them at the high end of the obligation spectrum. Indeed, the whole Section III of the “Convention with Respect to the Laws and Customs of War on Land” (Hague II) is about the prohibitions and regulations regarding property.\(^{91}\) Three different articles formally prohibit pillage. Feilchenfeld interprets the existence of the word “formally” in Article 47 as an indicator of the “absolute character of the rule.” He also says that the obligation for the occupants created by the same article is to “both prevent and to punish pillaging” as well as “to restore pillaged property and to indemnify the owner.”\(^{92}\) Also, it is made very clear that the state parties are obligated to observe these prohibitions by issuing instructions to their armed forces in conformity with The Hague Regulations.\(^{93}\) Louis Renault, who was a prominent international law professor, one of the dominant figures at The Hague Conference of 1907 as well as one of the winners of the Nobel Peace Prize in 1907, emphasized this point further in his Nobel lecture in 1908. He said that the inclusion of a new article in The Hague Convention of 1907 (Article 3), upon the

---

\(^{91}\) See Appendix A.
\(^{93}\) See Appendix A.
suggestion of the German delegation, making a violator state party subject to penalties and responsible for all acts committed by the members of its armed forces, gave rise to international liability and removed all doubts about the compulsory character of the Statute. Therefore, applying the indicators of obligation framed by Abbott et al., The Hague Conventions have “unconditional obligation-language and other indicia of intent to be legally bound,” which indicate to the highest degrees of obligation.

As with obligation, the precision of the Regulations with regard to pillage is very high. Besides saying “Pillage is prohibited” openly twice, Section III of the Convention defines in detail what kinds of properties can and cannot be confiscated and how other matters of property should be managed on an occupied territory (like taxes, dues, tolls, cash, funds, destruction by bombardment, requisitions, contributions, public property, forests, agricultural works, railways, land telegrams, telephones, steamers, ships, arms, real property, property of communes, religious and charitable institutions, arts and science, historical monuments.) Moreover, the belligerent state’s “responsibility for acts committed by the members of its armed forces is clearly defined,” which brings additional precision in terms of accountability. These provisions qualify as “determinate rules: only narrow issues of interpretation” on the indicators of precision table of Abbott et al., which put them at the highest end of the precision scale.

The Hague Conventions do not provide a clear mechanism of delegation for the violation of the Regulations and any disputes related to them although there are some important provisions that can be interpreted as an obligation on states to prosecute violators: both the 1899 and 1907 regulations require the violation of those prohibitions to “be made the subject of proceedings.” Also 1907 regulations have an additional article saying, “A belligerent party which violates the provisions of the said Regulations

94 Scott (1920b), Volume III, p.13, 140-143.
95 Renault (1908), p.152.
96 See Appendix B.
97 Renault (1908), p.152.
98 See Appendix B.
99 The Hague Conventions establish a mechanism of international arbitration for the settlement of disputes between states (through Convention For the Pacific Settlement of International Disputes (Hague I)) but it is established for the purpose of settling disputes before war happens rather than prosecuting the violations of Laws and Customs of War on Land (Hague II).
100 See Appendix A.
shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”101 Graber interprets this change from the 1899 document as the recognition of the fact that violation of these rules gives rise to international liability.102 Therefore, looking at the indicators of delegation put forward by Abbott et al.,103 the structure of the regulation of pillage and private property in The Hague Conventions can be called moderate/low on the delegation scale: They require “conciliation and mediation” at the least and “nonbinding arbitration” at most in terms of dispute resolution and “coordination standards” in terms of rule making and implementation.

When we look at the Geneva Conventions’ (1949) handling of pillage, we see that while obligation and precision continue to be high, the moderate delegation of The Hague is strengthened: The Geneva Conventions continue to bring a high degree of obligation on the state parties to observe the prohibition against pillage by both repeating the fact that it is prohibited and by including “appropriation of property” in grave breaches along with other war crimes such as “willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial, taking of hostages.”104 Precision is also high when it comes to pillage since Article 33 openly says, “Pillage is prohibited.”105

The Geneva Conventions provide a system of delegation by requiring domestic legislation and prosecution for violations in the case of grave breaches. Therefore, pillage, which is included in the grave breaches as “appropriation of property” is subject to delegation since “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave

---

101 See Appendix A.
103 See Appendix B.
104 See Appendix A.
105 As for a detailed description of what counts pillage, the Geneva Conventions do not go into much detail but since those had been put into international law previously by The Hague Conventions, there is no need to look for a repetition there.
breaches, and shall bring such persons, regardless of their nationality, before its own
courts. It may also, if it prefers, and in accordance with the provisions of its own
legislation, hand such persons over for trial to another High Contracting Party concerned,
provided such High Contracting Party has made out a prima facie case.” 106 Applying the
indicators of delegation to determine the level of delegation, it is safe to conclude that
this provision brings about “binding internal policies-legitimation of decentralized
enforcement” at the very least and even “binding regulations with consent or opt-out” 107,
which lead to the conclusion that delegation becomes high in this case.

As a result, the lower criterion that I use for analyzing the development of a
prohibition regime, i.e. one regarding high obligation and precision along with some
degree of delegation sufficient, will put The Hague Conventions (1899-1907) as the point
of creation for the prohibition regime against pillage. A higher criterion requiring a
higher degree of delegation would pick out the Geneva Conventions (1949).

In order to understand how this prohibition regime against pillage was created, I
begin by looking at the sources of The Hague Conventions, which starts with the Lieber
Code (1863). Then I turn to the Brussels Declaration (1874) and finally to The Hague
Conventions. After looking at how these documents were written and how states
incorporated a prohibition against pillage into them, I focus on the normative context in
which the materialization of the law through these 19th century documents became
possible. I start with a brief history of how pillage in war had been seen as normal until
the 18th and 19th centuries. Then I trace back the norm that deemed it unacceptable
through the emergence of the core norms of the sanctity of private property, necessity to
be civilized (as opposed to barbarous) and progress towards higher forms of civilization.
A normative shock happened in the middle of these normative changes, i.e. the
Napoleonic Wars that brought pillage back to then “civilized” Europe after taking a break
that lasted about a century. I look at the impact of this normative shock and its interaction
with the normative context on the creation of the prohibition against pillage in detail.

b) Rape:

106 See Appendix A.
107 See Appendix B.
Searching for the exact moment where the prohibition regime against rape is created is a harder task (than pillage) because of the resistance of lawmakers to recognize it as a wrongdoing in itself. The first task is to establish the exact timeline through which the regimes develop. For this purpose, I will look at four basic documents of the international law of war: The Hague Conventions (1899 and 1907), the Geneva Conventions (1949), the Additional Protocols to the Geneva Conventions of 1949 (1977) and the Rome Statute (1998). While establishing the timeline, I will also discuss the historical normative contexts in which these legal documents emerged in order to see the interaction between normative context and regime development.

In chapter 3, I discuss the case of the non-prohibition of rape in war. There is no effort to create a prohibition against rape in The Hague Conventions as there is against pillage. Since The Hague Regulations do not mention rape it is not possible to derive any formal obligation, let alone a binding one, for states to prevent rape in war. Even if we consider “family honors and rights” mentioned in Article 46 as indirectly referring to rape\textsuperscript{108}, the article does not demand a commitment for prevention nor does it provide a rule as a basis for scrutiny since it uses a language of “respect” rather than prohibition unlike the other practices outlawed in the Regulations including pillage.\textsuperscript{109} The provision could be regarded as a “recommendation” at best requiring very low obligation even if we presume that it indirectly referred to rape.

The most important problem with The Hague Regulations with respect to rape is a lack of precision. What does “family honors and rights” mean? What do they include? How will they be respected? Doing what will violate them? “Respect for family honors and rights” could be considered as a “standard only meaningful with reference to specific situations” if we assumed that it implicitly includes rape. However, given the failure of the provision to even mention rape makes it “impossible to determine whether conduct applies” and puts it at the lowest end of the precision degrees.\textsuperscript{110} These are extremely

\textsuperscript{108} Some scholars argue that this clause can be regarded as a prohibition on rape because by the time of The Hague Conventions rape was already considered a violation of customary international law and if the will to punish rape had been there, states could have brought rape charges at Nuremberg and Tokyo using this provision. See Askin (1997), p.40. However, this is precisely the problem with imprecision, it leaves too much to the will of the states which makes creating international laws pointless.

\textsuperscript{109} See Appendix A.

\textsuperscript{110} See Appendix B.
vague concepts that permit states to ignore their violations easily. As we will see, the vagueness of the concept may have contributed to such disregard at Nuremberg and to a large extent at the Tokyo Trials.

Since it is questionable if rape is prohibited by The Hague Regulations, we should conclude that delegation does not exist in this case. Therefore, we can exclude The Hague Conventions (1899-1907) from the legal timeline prohibiting rape in war.

Since the basic puzzle of why the prohibitions against pillage and rape did not happen at the same time comes out of The Hague Conventions where one was prohibited and the other was not, chapter 3 concentrates on how and why The Hague Conventions excluded rape and in what kind of normative context this could happen. I will also look at the situation of the women’s movement in the 19th century and their attitude towards rape as well as their lack of effect on the international law creation process. An overview of the 19th century Europe’s property, marriage and rape laws with special attention to France, a case of civil law and Britain, a case of common law traditions are especially helpful in our understanding of the normative context where women were treated as property by the laws but at the same time not property enough to be granted the protections that it received. Then I will look at the reflections of the idea of “inevitability of rape” in the 19th century European society.

Chapter 4 is an overview of the continued non-prohibition of rape by the Geneva Conventions (1949) and the Additional Protocols to the Geneva Conventions (1977). While the first international legal document to mention rape as an unacceptable practice in war was the Geneva Conventions (1949), there are still some problems about the degree of obligation the Geneva Conventions impose on states to prevent rape in war. First of all, Article 27 says, “Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.” Therefore, it is possible to conclude that the provisions are protective not prohibitive111 as opposed to other practices, like pillage, for which they state an open prohibition.112 This discrimination against rape in the text gives the sense that rape is not necessarily something the state parties to the treaty are barred from as part of their legal

112 See Appendix A.
obligation, but rather a distasteful practice that everybody must try to avoid, i.e. a recommendation and guideline.\textsuperscript{113} Therefore, when it comes to rape, the Geneva Conventions are at the lower end of the obligation scale.

In terms of precision, Article 27 of the Geneva Conventions IV (1949) can be an example for a rule with a degree of precision that has “broad areas of discretion”\textsuperscript{114} leading to a moderate/low precision although they constitute a step forward, since for the first time in history an international legal document mentioned the word “rape” as a subject of international humanitarian law.\textsuperscript{115} Despite the fact that the practice that needs to be avoided through the protection in the Article is stated, what Article 27 means by “protection” is unclear, and it does not explain what constitutes rape or any kind of sexual assault.

The Geneva Conventions is a case of hard legalization (in terms of delegation) with regard to its provisions on the enforcement of the committers of grave breaches since it brings obligation on the states to either bring them before domestic courts or hand over them for trial by other parties.\textsuperscript{116} Hence, there is “binding third party (court)” or “domestic court jurisdiction” requirement leading to a high degree of delegation.\textsuperscript{117} However, when it comes to rape this is not valid because rape is not included among the grave breaches. Article 147 lists grave breaches “willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”\textsuperscript{118} Rape is not on the list hence the delegation measures of the Convention do not apply. As a result, the Geneva Conventions (1949) cannot be regarded as the point at

\textsuperscript{113} See Appendix B.
\textsuperscript{114} See Appendix B.
\textsuperscript{115} There are many domestic legal documents prohibiting rape that came before 1949 but not any international one.
\textsuperscript{116} See Appendix A.
\textsuperscript{117} See Appendix B.
\textsuperscript{118} See Appendix A.
which the prohibition regime against rape is created since it does not fulfill obligation and
delegation while we have to admit the fact that it is a step forward in the creation of the
prohibition regime because it finally mentions the word rape.

The two Additional Protocols (1977) to the Geneva Conventions changed the
status of rape slightly in terms of obligation and precision though there is no change in
delegation because the list of grave breaches continues to exclude rape. The Second
Protocol on the Protection of Victims of Non-International Armed Conflicts adopted a
language of prohibition instead of protection, which is different both from the original
Geneva Conventions (1949) and the First Protocol on the Protection of Victims of
International Armed Conflicts.\textsuperscript{119} This increased the degree of obligation, at least in the
law for non-international armed conflicts. Besides, the original article in the Geneva
Conventions (1949) defining rape as an attack on women’s honor changed, which signals
a change in the way women are viewed, i.e. from being less than property towards human
beings who deserve protection from violence. Despite these developments, because of the
continuing problems of obligation and delegation, it is not possible to derive a prohibition
regime against rape from the Additional Protocols.

The way the new changes regarding rape entered into the Geneva Conventions
and the Additional Protocols and the way these new changes fell short of creating a
prohibition are the focal points of chapter 4. I follow these processes particularly by
looking at the proceedings of the Conferences and the Draft Conventions as they evolved
at various stages and the discourse surrounding some of the conflicts, including WWII,
that witnessed widespread rapes. I also focus on the feminist movement and the emerging
anti-rape movement in the Western world to see their impact on these processes.

In chapter 5, I turn to one of the “hardest” laws in force today that is the Rome
war crimes explicitly mentions rape, sexual slavery, enforced prostitution, forced
pregnancy, enforced sterilization, or any other form of sexual violence as grave breaches
of the Geneva Conventions.\textsuperscript{120} Also the Rome Statute is different from the Geneva
Conventions in that State Parties are not only responsible for the investigation and

\textsuperscript{119} See Appendix A.
\textsuperscript{120} See Appendix A.
prosecution of the grave breaches but of all crimes under the jurisdiction of the International Criminal Court (ICC). Article 86 says: “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” States are obligated to prevent the crimes mentioned in the Statute, prosecute the violators or hand them in for prosecution to the ICC and rape is clearly part of these crimes within the jurisdiction of the Court. It is an “unconditional obligation [with] language and other indicia of intent to be legally bound.”

As we see in both Article 7 concerning Crimes Against Humanity and Article 8 on War Crimes, the Rome Statute includes not only rape but also other forms of sexual violence: “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence” are declared to constitute grave breaches of the Geneva Conventions. Therefore, precision is on the highest end as the articles fit into “determinate rules-only narrow issues of interpretation” in the indicators of precision.121

Since the ICC, as a court with “binding third party decisions,” has jurisdiction over all of the crimes mentioned in the Rome Statute, delegation is at the highest point, too.122 Therefore, with high degrees of obligation, precision and delegation the Rome Statute (1998) created a strong prohibition regime against rape in war.

Chapter 5 concentrates on how this change in law happened both materially, i.e. through the drafting changes and normatively through the work of women’s organizations. I also analyze the role of the conflicts in former Yugoslavia and Rwanda in this process in detail.

III. Methods

Although there are two practices that I look at, there are in fact three cases: The emergence of a prohibition regime against pillage, the non-emergence of a prohibition regime against rape in war and finally the emergence of a prohibition regime against rape

---

121 From Abbott et al. (2000) See Appendix B.
122 See Appendix A.
in war. Therefore, I use comparative case method to explore why each of these three dependent cases developed the way and at the time they developed. The comparative method I adopt is one of John Stuart Mill’s basic research designs: method of difference. This method is used to contrast cases, which are as similar as possible in many respects but the phenomenon to be explained and the hypothesized causes are present in one case and absent in the other. 123 In this project the cases, pillage and rape in war are very similar in terms of being practiced side by side for centuries against what are considered to be the same things, namely property and women both belonging to men. Both property and women, who had been considered to be part of that property, were plundered as the booties of war. However, the phenomenon I explain, i.e. the emergence of a prohibition regime against a practice in war, is temporally different in each of the cases. I hypothesize that the causes that give rise to the prohibition regimes, that is the interests and ideas are temporally different too.

Each case requires different methods due to the time-line of their developments, though they are all qualitative. For pillage, I primarily did archival research since the law emerged more than a hundred years ago. For the non-emergence of a prohibition against rape, I mostly looked at the same archives and resources as for the emergence of a prohibition against pillage. For the emergence of a prohibition against rape, on the other hand, in addition to the archival work I did into the international criminal tribunals (ICTR and ICTY), the Geneva Conventions and the Rome Statute, I conducted interviews with participants in the process of law creation.

Chapter II

The Prohibition of Pillage in War

The practice of pillage was essential in medieval feuding, became a weapon of European warfare by 1500 and continued to be a normal part of any war during 16th, 17th and early 18th centuries.\(^1\) It had had two legitimate functions: hurting the enemy and maintaining one’s own army in charge of the countryside.\(^2\) It was taken for granted as an inevitable part of war during the medieval times and as late as early 18th century.\(^3\) Even Grotius, who is considered the father of the laws of war with his important work, *The Rights of War and Peace* (1625), considered the destruction and plunder of enemy’s property normal.\(^4\) He wrote:

Cicero, in the third of his Offices, declares, It is not against the Law of Nature to spoil or plunder him whom it is lawful to kill. No wonder then if the Law of Nations allows to spoil and waste an Enemy’s Lands and Goods, since it permits him to be killed. Polybius tells us in the fifth of his History, by the Right of War it is lawful to take away, or destroy, the Forts, Havens, Cities, Men, Ships, Fruits of the Earth, and such like Things of an Enemy. And we read in Livy, There are certain Rights of War, which, as we may do, so we may suffer, as the burning of Corn, the pulling down of Houses, the taking away of Men and Cattle. We may find in History, almost in every Page, the dismal Calamities of War, whole Cities destroyed, or their Walls thrown down to the Ground, Lands ravaged, and every Thing set on fire. And we may observe, these Things are lawful to be done, even to those that surrender themselves.\(^5\)

One thing that is interesting is that the idea that rape in war is unacceptable started to emerge well before the idea that pillage is unacceptable. In the 17th century, for instance, although there was a close connection between women and booty in the minds of the soldiers (hence since booty was permissible so too was rape), attempts to forbid rape for one’s own soldiers had already begun in the writings of jurists.\(^6\) Grotius said:

The Ravishing of Women is sometimes permitted in War, and sometimes not. They that permit it, respect only the Injury done to the Body of an Enemy, which

---

\(^1\) Redlich (1956), pp.19-20.
\(^3\) Redlich (1956), p.3, 5. Redlich talks about texts written as late as 1737 that deemed taking enemy’s property lawful.
\(^4\) Grotius (1625), Book III, Chapter 5.
\(^5\) Ibid., pp.1303-1304.
by the Law of Arms they think should be subject to all Acts of Hostility. But others, with more Reason, look not to that Injury alone, but also to the Act of Brutality, which being neither necessary for the Security of those who commit it, nor proper for the Punishment of those against whom it is committed, should be as much punished in War as in Peace; and this last is the Law of Nations, if not all, yet of the most civilized.\(^7\)

Ultimately, pillage appeared in The Hague Conventions as a practice that was banned and in the post-World War II period, it was reprohibited by various international legal documents like the Geneva Conventions (1949), the Additional Protocols to the Geneva Conventions (1977) and the Rome Statute for the International Criminal Court (1998) as well as in the Charter of the Military Tribunal at Nuremberg (1945), the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) and the Statute of the International Criminal Tribunal for Rwanda (1994) under war crimes.\(^8\)

In this chapter, I will address the questions of when and how international law first prohibited pillage. Applying the definitions and standards of legalization\(^9\) used in this volume, we can trace back the prohibition to The Hague Conventions (1899-1907), the first international legal documents that codified the laws of land warfare and obligations of an occupying power on occupied territories. After looking at the immediate history behind the creation of the law against pillage and the resulting law, I will turn to the normative context surrounding the development of this prohibition regime in order to understand how this normative and eventually legal change came about. In the end, I will also take a glance at the Geneva Conventions of 1949 where the prohibition against pillage was reaffirmed.

I. Historical Background

The Lieber Code (1863) was the foundation of the laws of land warfare that were first codified in The Hague Conventions. It was the first attempt to gather the new or modern ideas about the acceptable and unacceptable practices in war into a code. It was written by Francis Lieber, a German-American jurist, and issued to the Union troops

\(^7\) Grotius (1625), p.1300.
\(^8\) See Appendix A.
\(^9\) *International Organization* 54(3).
during the American Civil War. Lieber was both personally and professionally involved in the Civil War. Personally, he not only knew the horrors of war as a veteran of the Napoleonic Wars but also as a father whose three sons were soldiers in the Civil War fighting on both sides. Professionally, in 1861 he left South Carolina College, where he had lived as a muted minority in terms of his strong anti-slavery opinions and enthusiastically joined the North where he wanted to be not just a professor but a publicist influencing government policy.\(^{10}\)

First he solved the government’s problem of exchanging prisoners of war without recognizing the Confederacy. After the death of one of his sons during the Civil War in 1862, he had become determined to push his interpretation of the laws of war on the Union army. He was the one who proposed the establishment of a committee to draw up the code on the conduct of war for the Union armies, he was the one who pressed for it against resistance from the government and his persistence paid off when he was asked to do it.\(^{11}\) In 1862, as a result of his connection with General Halleck, the General-in-Chief of the Union armies (1862-1864) and an expert on the “science of war” and international law, and at the request of US Secretary of War Edwin Stanton, he was appointed as the only civilian member to a board “to propose amendments or changes in the Rules and Articles of War and a code of regulations for the government of Armies in the field as authorized by the laws and usages of War.”\(^{12}\)

Though Lieber wrote the Code to be used in a civil war, it was later used by the American troops during the Spanish-American War (1898) and then republished in 1914 by the United States War Department for international wars. Also a German version of the Lieber Code was used by the German troops during the war of 1870.\(^{13}\) The fact that Lieber fought in the Prussian Army against Napoleon where he was heavily wounded and was very much influenced by what went on during these wars is particularly interesting in this respect.\(^{14}\) Indeed both his published and unpublished materials show his deep interests into the horrors of war. For example, he collected newspaper clippings and notes

\(^{10}\) Hogue (2005), p.52.
\(^{11}\) Freidel (1947), p.326-332.
\(^{13}\) Graber (1949), p.19.
on matters such as Confederate attempts for starting an epidemic, using exploding rifle balls or booby-trapping surrendered positions.\textsuperscript{15} According to Freidel, he was an emotional scholar, easily wrapped up in his enthusiasm for his strongly-held beliefs but most of the time he was also calm enough to integrate himself into the delicate political processes as a respected and authoritative professor.\textsuperscript{16}

Lieber was a firm believer in private property and the Lieber Code clearly reflected his “stanch defense of property rights” (which did not include slavery).\textsuperscript{17} The most significant articles in terms of the protection of property and the prohibition of pillage are Articles, 22, 37, 38, 44, 47 and 72:

\textbf{Article 22:}

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

\textbf{Article 37:}

The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women: and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and churches, for temporary and military uses.

\textbf{Article 38:}

Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

\textbf{Article 44:}

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all

\textsuperscript{15} Johnson (2005), p.65.
\textsuperscript{16} Freidel (1947), pp.318-319.
\textsuperscript{17} Freidel (1947), pp.335-337; Hogue (2005), p.55.
pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.
A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

Article 47:
Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred.

Article 72:
Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American Army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.
Nevertheless, if 'large' sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they have been placed in the private luggage of the prisoners.

It is important to note that the Lieber Code prohibits both rape and pillage explicitly in Article 44 and 47. Since it is not international law but an army code written for the purposes of managing US Army’s conduct in the American Civil War, it is not on my chronology of law development, however, it is interesting to see that Lieber did not fail to include rape in his Code in contrast to his colleagues in Europe. I will address some possible explanations for this variation in Chapter 4 during the discussion of Additional Protocol II (1977), which was also written for civil wars.

Going back the Lieber Code, it is usually considered to have launched the “golden decade of restraints on warfare.”\(^{18}\) It inspired the first attempt to codify international law of war, the Brussels Declaration (1874). Russian delegate M. le Baron Jomini, presiding at the Brussels Conference, said that the Declaration was written with the regulations of

---

\(^{18}\)Raymond (2005), p.72.
President Lincoln for making the sufferings of war milder, i.e. the Lieber Code, in mind.\textsuperscript{19} The draft convention was prepared with the backing of D.A. Miliutin, the Russian Defense Minister who was close to Tsar Alexandre II, and by Friedrich Martens (F.F. Martens), who called the Brussels Conference “a natural development of the Lieber Code.”\textsuperscript{20} It was intended to establish universal rules of warfare including regulations for the treatment of the prisoners of war as well as non-combatants.

The author of the draft code, Martens was a Russian scholar of international law and a diplomat. He was one of the most prominent professors from the Russian academia, which had very active international law programs. He was also part of the Russian delegations to all the international conferences including all Red Cross conferences, Brussels Conference and The Hague Conferences between 1868-1909 during which time he served at the Russian Ministry of Foreign Affairs. He was a firm believer in individual rights and he situated the individual at the center of international law. He “considered protection of the rights, interests and property of a human being to be the substance of the entire system of international relations and regarded respect for human rights as a yardstick of the degree of civilization of states and international relations.”\textsuperscript{21} In terms of understanding the centrality of private property in the draft convention he prepared, it is also important to note that Martens’ dissertation topic was the law of private ownership during war (“On the Law of Private Property in Time of War” which was published as a book in 1869) and it was translated and made him well-known in Europe at the time.\textsuperscript{22} Martens also believed that the true international legal consciousness resulted from the changes in the development of the individual. According to him, more developed or “civilized” international laws are for more civilized states while natural law norms are for states with lower level of civilization. In his inaugural lecture (1871) he says:

International law will only stand on a firm foundation, when the natural and historical laws of the development of peoples have been elucidated… International treaties which conform to the conditions of the cultural development

\textsuperscript{19} Actes De La Conférence De Bruxelles 1874 (1899), p.26. It is also known that some of the leading people who were involved in the Brussels Conference were friends of Lieber. See Glazier (2005), p.160.
\textsuperscript{20} Graber (1949), p.20; Pustogarov (1996).
The German delegate’s impression at The Hague in 1899 was that Martens’ vision of the laws of war derived comprehensively from Lieber’s Code. See Nabulsi (1999), p.161.
\textsuperscript{21} Pustogarov (1996).
\textsuperscript{22} Grabar, p.382; Pustogarov (1996).
of peoples do not contain the embryo of their inevitable violation and elimination.\textsuperscript{23}

Looking at these ideas, it is easy to understand why he might have written the protection of private property again and again into the draft and left out Lieber’s prohibition of rape, which was not “conforming the conditions of the cultural development of the people” in Europe at the time. He was one of the publicists who used Grotius’ method of introducing “specific customs which [are] imbued with… conservative political ideologies” into the language of the laws of war.\textsuperscript{24} Hence it is not surprising that the language of the drafts he prepared did not contain progressive elements for his time.

While Martens was a firm believer in the power of international law, he was not part of the anti-war movement that was growing rapidly in the late 19\textsuperscript{th} century. He found the goals of the peace associations (125 of them in 1895 all over Europe except Russia) of the abolition of war utopian and considered the establishment of clearly defined and accepted laws of war the only solution for the horrors of war.\textsuperscript{25}

In 1874, at the initiative of Russia, Martens draft was submitted to the Brussels Conference. Most European countries did not welcome the idea.\textsuperscript{26} England, in particular, resisted the idea of putting down the laws of war in the form of a convention. Ultimately, England accepted to participate only with the condition that “there would be no discussion of the relations between belligerents in general, no attempt to state new principles, and the conference would limit discussion strictly to the Russian code and would refrain from considering points of maritime law.”\textsuperscript{27} The text itself was not objectionable to most state parties, especially the powerful ones, but the idea of restricting war by international law faced opposition from them. This opposition existed despite the fact that the laws were rearticulating the already existing principles of international law and keeping with “the legal awareness and humanism” that were on the rise among the European public.\textsuperscript{28}

\textsuperscript{23} Grabar (1990), p.386.
\textsuperscript{24} Nabulsi (1999), p.168. She puts Lieber on the list of these publicists, too.
\textsuperscript{25} Pustogarov (1996). For more on the peace movement in 19\textsuperscript{th} century Europe see Cooper (1991).
\textsuperscript{26} For a detailed account of each Power’s position see Nabulsi (1999), pp.5-8.
\textsuperscript{27} Graber (1949), p.21.
\textsuperscript{28} Pustogarov (1996).
In terms of its dealings with pillage, the Brussels Code was very strong. Article 39 said: “Pillage is formally forbidden.” Article 18 also stated “A town taken by assault should not be given over to pillage by the victorious troops.” Besides the other articles dealing with the protection of private property (Article 6, Article 38, Article 40), this double-prohibition of pillage is interesting given that one of the delegates proposed to delete one of them but it was rejected without debating over it or giving reasons.29

One thing that is noteworthy about the handling of pillage by the Brussels Conference is that the original draft prepared by Russia mentioned pillage only in Section I (The Rights of the Belligerent Parties With Regard to Each Other) and Chapter IV (Sieges and Bombardments)30 but not in Section II (The Rights of the Belligerent Parties With Regard to Private Persons) although this section did contain articles stipulating the protection of private property. Article 51 of the original draft (Article 39 in the final text) said: “The troops must respect private property in the occupied country and not destroy it without urgent need.”31 This article was modified into “Booty must be formally prohibited”32 by the commission upon the new draft prepared by Baron de Jomini, the Russian delegate. The Swiss delegate Mr. Hammer proposed substituting the word “booty” with “pillage” and “must be” with “is.”33 Baron Baude, the French delegate wanted to add “fire and pillage” into the article, which was opposed by the German delegate who said that fire comes back to the idea of destruction so its place is elsewhere.34 Ultimately, the commission gave article 51 (article 39 in the final text) its final form: “Pillage is formally prohibited.”

The issue was revisited later in the Conference, since the Italian delegate regretted the change of wording. Others responded by saying that there are spoils allowed on the battle field: for example, that which have as an aim the horses, ammunition, guns, etc…; that it is the spoils which would be exerted at the expense of the private property that the

30 Article 17 of the draft code: “A city taken by assault should not be given over for pillage by the victorious troops.” Actes De La Conférence De Bruxelles 1874 (1899), p.15.
31 Actes De La Conférence De Bruxelles 1874 (1899), p.20. (my translation)
32 Ibid., p.353. (my translation)
33 Ibid., p.207. (my translation) The French words in the original document are “butin” versus “pillage” and “doit être” versus “est.”
34 Ibid., pp.207-208.
commission intends to prohibit. General Leer, the Russian delegate, added that it is precisely the forbidden booty which is called pillage. Mr. Lanza demanded that these explanations are inserted into the Protocol.\(^{35}\) This debate reveals the attempts to clarify the fact that property can be justifiably confiscated by the occupying powers as long as it is for meeting “military necessity” and not for looting private property randomly at the discretion of the soldiers. The state parties wanted to make it very clear that while pillage of private property would be absolutely prohibited, the necessities for the occupying army like horses, guns and ammunitions could be taken away.

We can find similar efforts to clarify the prohibition of pillage during the discussion of the other Article on the subject. When Article 17 of the draft code (Article 18 in the final document) “A city taken by assault should not be given over for pillage by the victorious troops” was being considered, the Swiss delegate said that it is heard that the expression “city” must be interpreted in the sense of the previous paragraphs here where it is a matter of “cities, villages or agglomerations of houses.” The president of the Conference Baron de Jomini (Russia) responded that this interpretation is not suspicious and the Swiss delegate should reproduce his observation during the general reading.\(^{36}\) During one of the later meetings, Mr. Lambermont (Belgium) demanded a change of wording in the Article: Instead of “should not be given” he proposed to use “cannot be given.”\(^{37}\) Baron de Jomini responded that the word “should (doit)” is more peremptory implying a formal obligation so it was to be used in the Article.

In the end the Conference failed to produce a final document that was acceptable to all the state parties. One remarkable point about this failure was that although initially jurists feared that the dominance of military men on the commissions would make their job harder due to their resistance to their military powers’ reduction, it was the diplomats who blocked the success of the Conference.\(^{38}\) The draft was ultimately adopted as a declaration instead of becoming a law. States found the idea of restricting war with international law unacceptable even though the end document itself was not objectionable

\(^{35}\) Ibid., p.274. (my translation)
\(^{36}\) Ibid., p.58.
\(^{37}\) The original draft said “ne doit pas.” He proposed “ne peut pas.” Ibid., p.249.
Besides Britain (as the only great power lacking a large standing army) leading the opposition to making it into a law, small states also resisted the idea. They thought codification of the law of war would make them easy prey because established laws of war would make people too comfortable and stifle the need for resistance against occupying powers. Later during The Hague Conference, the Belgian delegate Auguste Beernaert would explain their opposition to the Brussels draft by saying that:

[B]y undertaking to restrict war to States only, the citizens remaining to a certain extent only mere spectators, would not the risk be run of reducing the factors of resistance by weakening the powerful mainspring of patriotism?...[T]elling the citizens not to mingle in the struggles in which the fate of their country is at stake [will be] encouraging that baneful indifference... Small countries especially need to fill out their factors of defense by availing themselves of all their resources...

With the backing of France and Britain, small states also found the text of the Code too favorable for occupying forces (they called it the “Code of Conquest”), which gave advantage to large aggressor states by granting legal combatant status only to professional soldiers and not to civilians who take up arms to fight against occupying powers.

In the end, the Brussels Declaration never became law, but “it is alleged that the moral force of the project was so great that belligerents after 1874 observed its rules although it was criticized for its vagueness. The Institute of International Law,…reached the conclusion that the code contained the essential rules of the laws of war which were recognized by all civilized states.” Interestingly enough, it was also considered “more humane” and better respecting the rights of the non-combatants than the Lieber Code. Martens was not disheartened by the failure of the Brussels Conference. He continued to defend his views in the press, publish popular books on laws of war, advised governments about international disputes and continued to act as a member of many

---

40 Graber (1949), pp.24-25.
41 Scott (1920), p.504.
43 Graber (1949), p.27.
45 For example, in 1893 he advised on a dispute between Greece and Romania about the succession of immovable property in Romania. See Grabar (1990), p.384.
law societies and institutions in Europe including the Institute of International Law. His work would ultimately bear its fruit in The Hague.

*The Hague Peace Conferences (1899, 1907)*

In 1899, the Russian Czar Nicolas II called an international peace conference in The Hague. It was not difficult to convene the Conference because the Czar and other European statesmen were nervous about the over-militarization in Europe. New weapons were being invented every year and the European powers were competing to acquire those new technologies before their rivals. This arms race was becoming too heavy to bear for everyone. Russia was particularly concerned because its industry was incapable of meeting the demands of this arms race.\(^{46}\) In order to draw the attention of the Conference to their concerns, Russians even presented a letter to the Conference proposing to fix the amount of effective military and naval forces and budgets among other things.\(^{47}\)

Although the focus of the Conference was peace, i.e. the Peaceful Settlement of International Disputes, a section on the Laws and Customs of War on Land (The Hague Regulations) was added to the Convention. Hence the Brussels Declaration was turned into a legal convention with some modifications. But this would not be a smooth process. In fact, even before the Conference began the states, including Russia, started to feel uneasy about disarmament which made the officials in the Russian Ministry of Foreign Affairs consider withdrawing the invitation for the Conference. Friedrich Martens had other plans. He had already prepared the program of the Conference and he turned the Conference into a peace conference an important part of which would be a convention on the laws and customs of war.\(^{48}\) Delegates from 27 states including 21 European countries (Germany, Austria-Hungary, Belgium, China, Denmark, Spain, the United States of America, the United States of Mexico, France, Great Britain and Ireland, Greece, Italy, Belgium, China, Denmark, Spain, the United States of America, the United States of Mexico, France, Great Britain and Ireland, Greece, Italy, China, Denmark, Spain, the United States of America, the United States of Mexico, France, Great Britain and Ireland, Greece, Italy,

\(^{48}\) Pustogarov (1996). Also see Nabulsi (1999), p.7, 11 for an alternative view on the motivations of Martens for his contribution to the Brussels Code and The Hague Regulations, i.e. serving the needs of the Russian army. However, it is not well-supported.
Japan, Luxemburg, Montenegro, Netherlands, Persia, Portugal, Romania, Russia, Serbia, Siam, Sweden and Norway, Switzerland, Turkey, Bulgaria) gathered at The Hague.

Similar to the drawbacks of the Brussels Conference, the process of turning the laws and customs of war would not be an easy task this time either. At the very beginning of the debates on the laws of war on land, the British delegate read a statement saying:

> Without seeking to know the motives to which may be attributed the non-adoption of the Brussels Declaration, it is permissible to suppose that the same difficulties may arise at the conclusion of our labors at The Hague. In order to brush them aside and to escape the unfruitful results of the Brussels Conference…we would better accept the Declaration only as a general basis for instructions to our troops on the laws and customs of war, without any pledge to accept all the articles as voted by the majority…. [Governments will thus retain] full liberty to accept or modify the articles.⁴⁹

Martens expectedly took on the question:

> The object of the Imperial Government has steadily been the same, namely, to see that the Declaration of Brussels, revised in so far as this Conference may deem it necessary, shall stand as a solid basis for the instructions in case of war which the Governments shall issue to their armies on land. Without doubt, to the end that this basis may be firmly established, it is necessary to have a treaty engagement similar to that of the Declaration of St. Petersburg in 1868. It would be necessary that the signatory and acceding Powers should declare in a solemn article that they have reached an understanding as to uniform rules, to be carried over into such instructions. This is the only way of obtaining an obligation binding on the signatory Powers. It is well understood that the Declaration of Brussels will have no binding force except for the contracting or acceding States…[This document will be a] mutual insurance association against the abuse of force in time of war.⁵⁰

With the help of his efforts as the chairman of the subcommission that prepared the section on the laws and customs of war the states could reach a unanimous agreement on a text.⁵¹

Ultimately, all powers that participated in The Hague Conference in 1899 signed and ratified the Convention (except China and Switzerland which waited until 1907), however only France, England and Russia put it into their military manuals.⁵² Therefore,
the 1907 modifications to the Convention required the State Parties to issue instructions
to their armies according to the Convention.

II. The Main Actors

In the 19th century, the main actors in international politics were states, the great
powers in particular. However, publicist or jurists were not only effective in terms of
initiating and preparing draft codes for international consideration (as we see in the cases
of Lieber and Martens) but also in terms of pushing their governments for participation in
the efforts to establish them through international conferences. They used their positions
as respectable legal authorities “to advance their own formulations on the legal agenda of
war.” On the subject of the Brussels Conference (1874), for instance, the French
minister Baron Baude complained:

> It appeared obvious to me that we could not decline the invitation to participate in
the project’s deliberations, especially on a subject which current publicists have
kept, without cease, in the public eye.

After the failure of the Brussels Conference, these jurists continued their work
under the umbrella of the Institute of International Law and under the wing of another
important publicist, one of the leading figures in the Institute of International Law,
Johann Caspar Bluntschli, produced drafts of a potential code such as the Oxford Manual
(1880). However, state opposition to the codification of the laws of war continued as
well. In fact, Bluntschli, the chief promoter of the Oxford Manual, was publicly
humiliated by his own government. The Prussian Ministry of War replied to the proposal
stated that “the expression ‘civilized warfare’ used by Bluntschli, seems hardly
intelligible; for war destroys this very equilibrium…Absolute military action in time of
war is an indispensible condition of military success.”

By the late 19th century, the internationalization (at least in the Western world) of
ideas and organizations as well as a consciousness of “one-ness” began to develop.
Peace societies were flourishing all over Europe including women’s peace organizations

---

54 Ibid., p.8.
55 Ibid., p.9.
and professionals, international lawyers in particular, were organizing across borders. The press was booming making it possible to raise public awareness about international events.\footnote{Ibid., pp.620-621.} Although the non-governmental participation in The Hague Conference was nowhere near the participation of the non-governmental organizations (NGOs) in the contemporary international conferences (both in terms of scale and influence), these organizations alongside a very interested media were present at The Hague in 1899. Besides the Institute of International Law, there were peace groups, peace institutes such as Nobel’s and pro-free trade organizations.\footnote{Nabulsi (1999), p.10.} Most government delegations were not prepared to receive the lobbying efforts of these organizations and the public was excluded from the Conference but that did not stop these actors’ efforts.\footnote{In 1907, the public would be allowed to participate in the Conference but it was still limited.} For instance, one of the prominent women within the peace movement, the recipient of the Nobel Peace Prize in 1905, a noblewoman and a writer from Austria, Bertha von Suttner opened a salon at The Hague during the Conference where diplomats and peace activists could meet.\footnote{Best (1999), pp.623-625.} Also there were international law experts within the government delegations, including Martens (Russian delegate), Asser (Dutch delegate, 1911 Nobel Peace Prize winner), Renault (French delegate, 1907 Nobel Peace Prize winner), Veljkovitch (Serbian delegate), Descamps (Belgian delegate), Ariga (Japanese delegate), Lammasch (Austria-Hungary’s delegate) and Zorn (German delegate) and they turned out to be very influential actors. For example, when the work of the Conference over the Convention on the Laws and Customs of War on Land faced the possibility of collapsing because of two opposing views over the meaning of combatants and non-combatants, it was Martens’ proposal, which came to be known as the \textit{Martens’ Clause} that solved the deadlock.\footnote{Best (1999), p.624, 627. Nabulsi argues that Martens plagiarized the Martens’ Clause from Baron Lambermont. See Nabulsi (1999), p.161. This puts Martens’ ethics into question though it does not change the fact that the law was saved by the efforts of a publicist.}

In the end, the fact that the Conference failed to produce disarmament but instead revised and codified the laws of war was disappointing to most of the peace activists. The growing women’s movement would also take on the issue that the Conference ignored
women but the breakout of WWI would curtail the efforts of these non-governmental organizations silencing the issues temporarily.

III. The Law

The Hague Conventions of 1899 and 1907 (in particular 1907 because of the additional measures it includes in terms of delegation) are the legal documents that created the prohibition regime against pillage. In Section III of The Hague Regulations there are three articles prohibiting pillage over and over again. In terms of the obligation the regime imposes on the state parties, there are three aspects that need consideration: Firstly, Article 47, which is the second article that prohibits pillage adopts a language of absolute prohibition by saying “Pillage is \textit{formally} prohibited.” This absolute prohibition requires states to prevent and punish the violators and compensate the victims.\footnote{Feilchenfeld (1942), p.30.} Secondly, the state parties are obligated to issue instructions to their armed forces in conformity with The Hague Regulations in order to ensure compliance.\footnote{See Appendix A.} Thirdly, under Article 3 of the 1907 text, international liability for violator states is established. These Articles make The Hague Conventions’ degree of obligation high with respect to its regime regulating pillage.

The articles of The Hague Conventions related to the prohibition of pillage, being very determinate rules both in terms of defining the act that is prohibited and in terms of the accountability this brings, are also at the highest end of the precision scale. What exactly is prohibited and the responsibilities of states with respect to these prohibited acts are defined in exact terms in the pillage regime.

The Hague Conventions have two articles that can be interpreted as requiring “conciliation and mediation” at the least and “nonbinding arbitration” at most in terms of dispute resolution and “coordination standards” in terms of rule making and implementation, which put them at the moderate/low end of the delegation spectrum. Firstly, Article 56 of both the 1899 and 1907 regulations call for the violation of the prohibitions to “be made the subject of proceedings.” Secondly, Article 3 of the 1907
Regulations brings responsibility on each state party for the violations committed by its armed forces in the form of liability to pay compensation.\textsuperscript{64}

IV. The Normative Context and the Normative Shock

While jurists were writing about the necessity to prohibit rape and while most armies’ codes in Europe prohibited rape by the 17\textsuperscript{th} century,\textsuperscript{65} they both allowed (though with restrictions that will help keep the military discipline) pillage. What happened in the 18\textsuperscript{th} and 19\textsuperscript{th} centuries that reversed this trend giving us the first international law regulating the conduct of war with a clear prohibition of pillage and a clear non-prohibition of rape? Did pillage lose its functions while rape did not or did something else happen? I will address these questions in three steps: The first step is looking at the early-mid 18\textsuperscript{th} century, when the structure of war along with the costs and benefits had changed. At the same time the ideological basis of the norm change was prepared through the creation of the normative context with the core norms of the sanctity of private property, necessity to be civilized and progress towards higher forms of civilization. The second step is the late 18\textsuperscript{th}- early 19\textsuperscript{th} century when a normative shock happened in Europe and made the states think of a need to prohibit pillage. The third step came in the late 19\textsuperscript{th} century when pillage was prohibited.

a) 18\textsuperscript{th} Century- The Decline of Pillage:

Until the 18\textsuperscript{th} century, pillage was a weapon and its result, booty, had two purposes: compensation for the wrong that had caused the war (which was basically a feud between princes extending to their subjects and their properties) and attraction for helpers, i.e. mercenaries.\textsuperscript{66} In 18\textsuperscript{th} century three developments changed the cost-benefit balance in terms of pillage, the evolution of the modern state eliminated the private interest in taking booty, the establishment of standing professional armies with strict discipline, and the development of large-scale business made it possible for the state to

\textsuperscript{64} See Appendix A.
\textsuperscript{65} Redlich (1956), p.37.
\textsuperscript{66} Ibid., pp.2-3.
fund wars through taxation instead of pillage.\textsuperscript{67} Besides, undisciplined armies pillaging and deserting were hurting the ambitions of the modern states and their absolutist monarchs. These developments meant pillage became costly in terms of upsetting the discipline of the professional armies while its benefits to the state became insignificant.\textsuperscript{68}

However, this alone cannot explain the emergence of a global prohibition regime since the change in the cost-benefit structure was related more to the behavior of one’s own army than the behavior of the rival armies, which are usually a big part of the reason behind the endeavors to develop prohibition regimes. Moreover, the resistance of almost all the governments to regulate their conduct through international rules particularly in the security realm, even if it may have great benefits, is apparent in many cases. In fact, we find states regulating their own armies’ plundering for the sake of discipline as early as 1393. The Swiss Confederates forbade looting by their own soldiers before complete victory, i.e. until the commanding officer gave permission.\textsuperscript{69} The same principle was applied over and over again by various armies in order to keep the discipline.\textsuperscript{70} During the 16\textsuperscript{th} and 17\textsuperscript{th} centuries, many military laws also prohibited fights among the soldiers for booty in order to ensure discipline and efficiency.\textsuperscript{71} After these regulations, which deemed unrestricted looting normal, but attempted to control its harmful effects on the military objectives, another type of regulation started to surface in Europe: curbing pillage to improve the relations between the soldiers and the civilian population.\textsuperscript{72} This kind of regulation originated with the purpose of protecting the warlords’ own subjects since the mercenary soldiers were treating the subjects of their own lord’s land the same as the subjects of the enemy hence looting everyone as they passed along on the way to the war. Then, mostly in the 17\textsuperscript{th} century, came the rules forbidding the looting of the enemy population for the purpose of saving the booty from the soldiers in order to benefit

\textsuperscript{67} Ibid., pp.58-59.
\textsuperscript{68} Woloch (1982), p.51; Redlich (1956), pp.59-62.
\textsuperscript{69} Redlich (1956), pp.6-7.
\textsuperscript{70} Some examples are the armies of the Holy Roman Empire and Spain in the 16\textsuperscript{th} century as well as the Polish army, English army and Swedish army in the 17\textsuperscript{th} century. See Redlich (1956), pp.9-10.
\textsuperscript{72} Ibid., p.14.
the army in general by collecting it for the state in the form of contributions (or requisitions).\textsuperscript{73}

By the early 18\textsuperscript{th} century, pillage was becoming more and more a burden on the armies. The modern state with its professional standing army, strong controlling bureaucracy and taxing power did not need out-of-control soldiers running around for booty instead of making sure a battle was completely won or alternatively deserting (which became a big problem in the 18\textsuperscript{th} century)\textsuperscript{74} after looting for fear of punishment. Looting caused not only the loss of discipline but also led civilians to become bitter towards the invading armies, which did not help with the war efforts. For example, Redlich points out that because of looting “the French Revolutionary and Napoleonic armies… lost all sympathy of the non-French bourgeoisie, which in many places had originally welcomed the invading troops as emancipators.”\textsuperscript{75}

Hence, it is apparent that the changes in the cost-benefit structure influenced how pillage was regarded and regulated but only to the extent of one’s own army rather than attempts to condemn and prohibit the practice on a larger scale like through mutual treaties or even through the writings of jurists. There was only a debate about whether the “justness” of the war affects the pillage practice where some jurists claimed pillage is only permissible if the war is “just” (like Belli), while others said they are unrelated things (like Grotius).\textsuperscript{76} As a result, we do not see any attempts to eliminate it except to the extent that it upset military discipline.

\textit{What is special about the 18\textsuperscript{th} century?}

The European wars that happened during the early-mid 18\textsuperscript{th} century were limited in terms of both purpose and scope as opposed to the devastating systemic wars involving most European powers during the 17\textsuperscript{th} century like the Thirty Years’ War (1618-1648) and the late 18\textsuperscript{th}-early 19\textsuperscript{th} century like the French Revolutionary Wars (1792-1802).\textsuperscript{77}

\footnotesize
\textsuperscript{73} Contributions are in money; requisitions are in goods and services. See Graber (1949), p.217.
\textsuperscript{74} Redlich (1956), p.60.
\textsuperscript{75} Ibid., p.61.
\textsuperscript{76} There was only a debate about whether the “justness” of the war affects the pillage practice where some jurists claimed pillage is only permissible if the war is “just” (like Belli), while others said they are unrelated things (like Grotius). See Redlich (1956), p.20.
Since the Peace of Westphalia (1648) “removed moral content from war” by giving sovereignty to each state, thus the right to make war (*competence de guerre*), the focus of the states shifted from the problem of starting the war (*jus ad bellum*) to the problem of determining and following “the laws and usages of war” (*jus in bello*).\(^{78}\) Therefore, during the 18\(^{th}\) century the King of Prussia, Frederick the Great and the Empress of Holy Roman Empire Maria Theresa established a clear set of rules for the art of war based upon the existing rules in Europe.\(^{79}\) Some important features of this art was sound money and regular taxes which gave way to only exceptional use of levies or pillage, magazines of food, clothing and munitions, regular pay and long training for the soldiers, a “by the book” approach and avoidance of recklessness.\(^{80}\) The fact that military academies and military journals grew and soldiers were properly trained helped the 18\(^{th}\) century armies with its prescribed codes prepared by the central bureaucracy in the process of stabilization and control of the forces.\(^{81}\)

The 18\(^{th}\) century also witnessed major ideological changes\(^{82}\) and in this section I will address these changes under two headings: The first is the growing influence of liberal ideas, which include the emergence of the idea of the sanctity of private property\(^{83}\) and a new self-definition on the part of Europe as a group of “civilized” nations with a certain definition of civilization “progressing” towards higher forms of civilization making pillage perceived increasingly as an unpleasant practice.\(^{84}\) The second is the reconceptualization of war as a contest between states not individuals.\(^{85}\) In other words, in the context of these core norms or principles (like the sanctity of property and being civilized and liberal, as well as the idea of wars being fought between states hence the necessity of protecting the individuals from its harms defining a certain normative

\(^{78}\) Johnson (2005), p.62.


\(^{80}\) Griffith (1998), p.58. Also see Duffy (1988), pp.10-13 for the physical, political and ethical constraints imposed on 18\(^{th}\) century warfare. “Style and restraint” were at the foundation of the 18\(^{th}\) century’s characteristics and they found their way into the conduct of war as well. Duffy (1988), pp.3-4, 304-305.


\(^{83}\) Feilchenfeld (1942), pp.10-13. Although the ideas legitimizing private property started to emerge in the 16\(^{th}\)-17\(^{th}\) centuries, the process gained momentum in the 18\(^{th}\) century.

\(^{84}\) See Higgins (1912).

context) another norm, namely a norm against pillage in war, began to emerge. Therefore, pillage began to be seen as an exception, an infamous institution, by the early 19th century.86

1. Liberalism, private property, “progress” and “civilization”:

Economic Liberalism / Private property

The 18th century, or as it is commonly referred “the Age of Enlightenment” marked the development of some very powerful new ideas (though not unchallenged) in Europe, which would affect the social, political and economic reorganization of the world. Liberalism is the general framework that gave birth to most of these ideas. Thus, in order to understand the significance of “private property,” “progress” and “civilization” in the context of the 18th century, it is necessary to understand liberalism. Starting in the 16th century new lands had been colonized along with their riches creating new wealth and then on this foundation the eventual rise of industrial capitalism led to the emergence of new wealthy classes. These developments were followed by the popularization of revolutionary ideas about human possibility (belief in reason, progress and perfectibility promulgated by philosophers like Descartes, Bayle, Spinoza, Bacon and Locke in the 17th century and, Montesquieu, Turgot, Condorcet, Voltaire, Hume, Smith, Bentham, Mendelssohn and Kant in the 18th century). As a result of these economic, political and intellectual developments, the old institutions in Europe, i.e. the absolutist monarchies, the landed aristocracy and the mercantilist economies started to break down.

The new classes, with the influence of the new ideas about the necessity of the lack of political, economic and social restraints on human reason for the sake of progress, wanted their share of political and economic power. Liberalism, founded on the principle of individual liberty both in the political and economic sense, was born out of these conditions. While the growing idea of personal liberty led to the rise of popular participation and government in the political sense, it also meant the rise of laissez-faire capitalism with its most important components free trade and private property in the economic sense. The new powerful classes, i.e. the middle classes, wanted minimum

86 Redlich (1956), pp.72-76.
government, which would not interfere with their free enterprises and trade but would ensure the enforcement of business contracts as well as the protection of their private property. According to 18th century thinkers, the economic progress brought about political progress: the progress of government towards “more comprehensive and civilized systems of policy” where “government and property… arrived at that stability and perfection.”

In the 18th century, Adam Smith’s theories prepared the basis of the comprehensive form of this new perspective on economics. With his book *An Inquiry into the Nature and Causes of the Wealth of Nations*, published in 1776, he made the case for laissez-faire economics, arguing that if people are left to themselves without interference by the government, the best economic outcomes for everyone will result thanks to the market forces (or “the invisible hand” as he calls it), where every person’s self-interest automatically serves every other’s. For example, when people are allowed to accumulate as much property as they can, this ability will encourage them to work more and save more which, in turn, will contribute to progress and well-being of everyone by adding to the overall production. Progress was a side effect of the rise of property and this progress or civilization benefited even the poor by contributing to humankind’s “liberation from the limitations of our primitive nature.” Though Smith did not spend much time on justifying private property (this process had already been going on for over a century though on the basis of a different philosophical claim, i.e. private property as a natural right rather than as a contributor to progress), he certainly talked about “the sacred and inviolable rights of private property” within the context of 18th century capitalism as an integral part of his theory. This not only reflects the status of private property gained by that time but also strengthens the case for private property

---

89 Smith (1776), pp.456-457. Smith discusses the behavior of slaves versus metayers here in order to show how being able to gain your own property as a result of your labor makes a difference in terms of increasing the overall production. This kind of reasoning will find its place as a dominant way of thinking in the 19th century as well, i.e. utilitarianism. Utilitarianism also justifies private property on the basis of its contribution to economic efficiency, hence general happiness of the society. See Ryan (1987), p.103.
90 Ryan (1987), p.95, 98.
91 See Smith (1776), p.158, 196.
for the following generations who saw it as the source of economic efficiency hence development.\(^{92}\)

Even the works that were criticizing private property show the status it gained by 18\(^{\text{th}}\) century as well as the understanding about its contribution to the “progress” of Europe. For instance, Rousseau, one of the most influential theorists of the 18\(^{\text{th}}\) century, harshly criticizes the idea of private property by saying that modern civilization’s progress owns its existence partly to private property, though it brought about misery and slavery.\(^{93}\) Then, it is no wonder that the 18\(^{\text{th}}\) century Europe with its euphoria over the progress of its civilization would consider private property as one of the main building blocks of its existence and treat it as such.

Progress and Civilization:

What did the 18\(^{\text{th}}\) and 19\(^{\text{th}}\) century Europeans mean by “progress”? Rather than a general understanding of “forward movement or advances in technology,”\(^{94}\) they thought of it as “the course of things since the beginning- in spite of possible minor deviations and the occasional occurrence of backwaters in the stream of history- [that] has been characterized by a gradual progressive increase, or a wider diffusion, of goodness, or happiness, or enlightenment, or of all of these;”\(^{95}\) the idea that “civilization has moved, is moving, and will move in a desirable direction”\(^{96}\) along with a “belief in the essential goodness and self-sufficiency of man and faith in the power of science to banish suffering and bring about the ‘evanescence of evil.’”\(^{97}\)

Although “a doctrine of progress” was already beginning to emerge in the 17\(^{\text{th}}\) century, it was in the 18\(^{\text{th}}\) century that Western Europe started to believe that perfection or human perfectibility (on earth), thanks to the human reason and will, can be attained.\(^{98}\) It was during the 18\(^{\text{th}}\) century that progress “became synonymous with the perfection or betterment or improvement of mankind.”\(^{99}\) The French philosophers like Concordet, for

---

\(^{93}\) Rousseau (1754), Part II.  
instance, believed that France was approaching to an “idyllic felicity” with the perfect constitution, and once other nations adopt the same principles of government the millennium would arrive.\textsuperscript{100} In England, although the idea of progress was not as popular as it was in France, it found its place in the writings of many theorists like Adam Smith. In \textit{An Inquiry into the Nature and Causes of the Wealth of Nations}, he tells how human society progressed in the economic sense historically and expects “an indefinite augmentation of wealth and well-being.”\textsuperscript{101}

The idea of the “blessed law of progress” would be further reinforced by the Industrial Revolution: “a nation which travels sixty miles an hour must be five times as civilized as one which travels only twelve…”\textsuperscript{102} According to 19\textsuperscript{th} century scholars, progress had been going on since the beginning of history but we became aware of it only in the 17\textsuperscript{th} and 18\textsuperscript{th} centuries, particularly with Enlightenment\textsuperscript{103} after which point it became “the most characteristic and pervasive theme in modern Western thought.”\textsuperscript{104}

2. Reconceptualization of war:

Starting in the 17\textsuperscript{th} century and gaining momentum in the 18\textsuperscript{th} century a reconceptualization of war happened. Whereas war was considered a feud between kings or princes before, a new idea that it was a military action between states was developing as the state was taking on an identity of its own.\textsuperscript{105} Though the seeds of the idea started with Grotius, who said, “plundering doth not so much hurt \textbf{the State}, or the King”\textsuperscript{106} (rather than just saying that it does not hurt the king as Redlich points out\textsuperscript{107}), it was particularly developed by the 18\textsuperscript{th} century writers on international law. The idea developed that war occurs between states, and not individual kings and their subjects, and the citizens of the enemy states along with their private property should remain subject to law.\textsuperscript{108} Abandoning the medieval idea that everything that will hurt the enemy is permissible in war, they started to emphasize the illegitimacy of the use of unnecessary

\textsuperscript{100} Bury (1982), p.206.
\textsuperscript{101} Ibid., p.220.
\textsuperscript{102} Inge (1927), p.162.
\textsuperscript{103} Wagar (1967), p.56-57.
\textsuperscript{104} Spadafora (1990), p.2.
\textsuperscript{105} Woloch (1982), p.8; Redlich (1956), pp.63-64.
\textsuperscript{106} Grotius (1625), pp.1531.
\textsuperscript{107} Redlich (1956), p.63.
\textsuperscript{108} See for example Rousseau (1762), Book I, Chapter 4.
force that injures the enemy and that does not ensure victory to end the war. The new idea that booty belonged to the sovereign and not the soldiers developed, which caused the abandonment of looting in favor of contributions (or requisitions), i.e. “collections of money and other fungible things for supporting an army, exacted from the subjects of the enemy” and foraging by and for whole armies, i.e. “forcefully collecting provisions and fodder for troops,” since looting was done by individual soldiers while contributions and foraging were collected by the state. As a result, pillage became an infamous institution; when it happened, such as in East Prussia in 1757 or in Poland in 1760, it was looked upon with horror. Eighteenth century armies widely enforced the old principle “no booty without permission” and looting was punished severely rather than only paying lip service to it as the earlier generations had done: “As late as 1806, on the eve of the Battle of Jena, Prussian troops, still animated by eighteenth century military tradition, froze and went hungry rather than loot the nearby villages.”

b) Early 19th Century- Revival of Pillage:

The early 19th century, with Revolutionary and Napoleonic Wars, (starting in the late 18th century and continuing in the early 19th century) witnessed the revival of pillage, which came as a normative shock for the “civilized” Europe.

[T]he light-fingered General Bonaparte, his delinquent young subordinate generals, and his insatiable soldiers together established an unshakable reputation as in every way the most rapacious pillagers in that league of high-grade pillagers that is normally known to historians as ‘the French Army’. By doing so, they subtly but decisively changed the basic ground-rules of the whole game, and determined how it would continue to be played throughout the remainder of the ‘Napoleonic’ period.

\[109\] Redlich (1956), pp.64-65.
\[110\] For pillage and contributions see Graber (1949), pp.235-236. By the late 19th century, although the majority opinion was that requisitions and contributions violate the principle of the sanctity of private property hence should be abandoned, for practical reasons they were kept but strictly regulated by law. Graber (1949), p.256.
\[112\] Ibid., pp.72, 75-76.
\[113\] Ibid., p.76.
Convoys of gold, silver, tapestries, books and artworks were looted and sent to Paris. The French Army was fed through pillage whenever they could get away with it.\footnote{Ibid., p.55-57. Also see Quynn (1945), p.438, 440-441, 443.}

The French Revolution and Napoleon ignored the rules of warfare that started to emerge in the 18\textsuperscript{th} century particularly with their pillage system. They practiced a “slash and burn philosophy” and bypassed conventional methods of warfare.\footnote{Griffith (1998), p.58; Blanning (1983), pp.318-319.} For instance, after the Battle of Friedland, Napoleon reviewed and rewarded his soldiers in front of the Russian Emperor Alexander to embarrass him, where they talked about the ways they killed the Russians, took a flag, a cannon, drove Russian troops into the water to perish.\footnote{Von Müffling (1997), pp.22-23.} For the Allied troops, it was “disagreeable and disgusting” to follow the French army because along the road, “lay corpses or dying men; the prisoners taken had death stamped on their faces; in short it was impossible to think, without horror, of sleeping on the same spot, perhaps on the same straw, as these fever-stricken army, which had moreover infected the inhabitants on their route and consumed all the provisions.”\footnote{Ibid., p.388.}

According to Redlich, there were five main reasons for the revival of pillage in the 19\textsuperscript{th} century:\footnote{Redlich (1956), pp.76-77.} The first reason was connected to the fact that the purpose and scope of war changed dramatically, i.e. the wars were no longer the wars of the previous century-wars of the sovereigns of the ancien regime fought by small professional and mercenary forces for territorial and economic advantage but they were wars of a “nation in arms” fought for a high moral purpose by the whole nation.\footnote{Johnson (2005), p.62.} That meant conscription. These conscripted armies of 19\textsuperscript{th} century were not as good as the professional armies of the 18\textsuperscript{th} century in terms of discipline. Hence, although conscription ultimately helped the elimination of pillage, because it eliminated the need for booty as bait for enlistment, it temporarily worsened the situation.\footnote{Redlich (1956), pp.78.} Plus, the Napoleonic Wars lasted a long time, along with food scarcities which damaged the discipline further. French Armies were underfed and under-clothed making them want to
“live off the land.” The fact that domestic French resources were insufficient to pay for the hundreds of thousands of soldiers in ever-expanding wars made it almost necessary to feed the army off of the conquered lands and in turn conquer more lands to maintain a balanced budget and order. Thirdly, they started to sustain the troops from the capital and income of the captured lands like in the 17th century, instead of provisioning them out of magazines. In fact, Napoleon decreed that a half of the soldiers’ pay would be given in coin rather than paper money, which could only be financed by increased contributions in the occupied areas. Also the fact that French soldiers were paid only after they returned home aggravated the situation. Lastly, instead of military camps that could be easily controlled, they quartered the soldiers in towns and villages.

Although Napoleon’s official policy was rejecting the practice of pillage, he in fact, allowed it. He wrote to his brother Joseph, when he became the King of Naples:

The security of your dominion depends on how you behave in the conquered province. Burn down a dozen places which are not willing to submit themselves. Of course, not until you have first looted them; my soldiers must not be allowed to go away with their hands empty.

Napoleon not only allowed pillage but he provoked his soldiers to loot as well:

Soldiers! You are naked and underfed. The government owes you much, but it can give you nothing. Your patience and the courage you display among these bare rocks, are admirable; but they bring you no glory and shed no brilliance upon you. I want to lead you into the most fertile plains in the world. Rich provinces and great cities will fall under your power: there you will find honor, glory and riches. Soldiers of the ‘Italie’, will you fail to show courage or constancy?

Griffith interprets this speech Napoleon gave to the Armee d’Italie as “one of the most brazen and bare-faced incitements to pillage that has ever been issued in the whole history of warfare.” “The ragged and starving soldiers” were expected to be more interested in the riches than honor and glory and it turned out to be the case in the end.

123 Ibid., p.58.
124 Magazines were the depots where the goods and ammunitions necessary for the army were stored.
128 Ibid., p.55. See also Quynn (1945), p.440 for Napoleon’s incitement for constant search for booty.
By succumbing to the temptation of pillaging, the French Army sacrificed its military security, its moral rectitude and revolutionary virtue and with its human barbarity it “set the international standard for pillaging...[driving] forward a notable degradation in the professionalism of warfare and the valuation of life.”

As a result, all European armies looted during these wars. A Prussian officer during the Napoleonic Wars, Von Muffling describes this situation in his memoirs: When the Allies took possession of Vitry in 1814, “The troops were billeted and fed by their hosts, as the season was still too rough to bivouac regularly, and live by requisition on the villages, which, at the same time would have made pillaging unavoidable.”

Because of the mode of warfare, after laborious marches, as soon as the Russian and Prussian troops got to a bivouac, they started looting the villages to obtain provisions. They ended up taking from the inhabitants all they had and also practiced some cruelties along the way despite the personal efforts of the Field-Marshal and Generals. “Houses were pulled down for the soldiers to cook and warm themselves. Thus a whole village often disappeared in a night. This could not be helped; but such situations make soldiers hard-hearted and cruel.”

The discipline in both armies [Prussian and Russian] also suffered from the pillaging during the Napoleonic Wars. Even after the fall of Paris, the situation kept its gravity. The French in the country, incited by Bonapartist officers, started to attack Allied convoys for booty so that Allies had to go around with escorts. It was like a turn backwards, a “regress” in a world of “progress”: From the 18th century when not only ideas about the progress of European civilization became very popular but also practical rules about the conduct of warfare started to take roots, to the Revolutionary Wars where human barbarity along with this kind of insecurity returned. Hence came the next important period in Europe’s history when “codifying and creating law to govern international relations” through international conferences starting with the Congress of Vienna and culminating with The Hague Conferences. “An enthusiasm of humanity”

---

130 Redlich (1956), pp.76-77.
132 Ibid., pp.470-471.
133 Ibid., pp.470-471.
134 Ibid., p.513.
(coming from the Enlightenment and shocked by what it saw during the Revolutionary Wars) would lead to the improvement of international law.\textsuperscript{136} Therefore, pillage, “which by 1500 was taken as a matter of course, by 1815 became a practice to be condemned and eliminated.”\textsuperscript{137} Between the Napoleonic Wars and the writing of The Hague Regulations, the practices of the European nations would steadily develop towards the ideal of protecting private property in war.\textsuperscript{138}

\textit{The difference between 18\textsuperscript{th} and 19\textsuperscript{th} century warfare:}

The wars of the 18\textsuperscript{th} century were fought by small professional armies with the purpose of defeating the other side through outmaneuvering at the smallest cost in life and money if possible. Hence civilian lives and property were spared not only on moral grounds but also because attacking them did not help this kind of war effort. Spending limited military resources on such militarily unnecessary attacks was unsound. The Revolutionary and Napoleonic Wars changed this model of warfare. The new style incorporated the whole ‘nation’ including the civilians into the war. Added to this was the invention of new technologies which made war ever more destructive.\textsuperscript{139} Indeed, “Napoleon utilized the powers of the nation at his disposal to their utmost to carry on war ‘without slackening for a moment until the enemy was prostrated.’”\textsuperscript{140} The first response to this massive destructiveness on the part of Europe, starting with the Congress of Vienna (1815), was to search for political or diplomatic ways to prevent war such as the Concert of Europe.\textsuperscript{141} After the system begin to fail (as revealed by the Crimean War (1854) where great powers appeared on both sides of the conflict), the focus shifted towards strengthening the laws of war.

\textsuperscript{136} Ibid., p.846. The pillage of artwork should also be mentioned in this context since it was one of the most widespread forms of pillage during the Napoleonic Wars. Although artwork was taken by the state, it was pillage (not requisition) because it was not for meeting the needs of the army or the administration of the occupied territories and there was no way or plan of returning them/paying back. In fact, Napoleon rationalized the pillage by saying that all great artists and minds are in fact French, they just happened to be born elsewhere. Therefore, their work belonged in Paris.

\textsuperscript{137} Redlich (1956), p.78.

\textsuperscript{138} Bentwich (1907), pp.26-27.

\textsuperscript{139} Johnson (2005), pp.62-63.

\textsuperscript{140} Ibid., p.66.

\textsuperscript{141} Concert of Europe is the Congress System established by the great powers in Europe. The idea was for the great powers to meet periodically to discuss the political situation in Europe so that they can prevent another widespread war like the Napoleonic Wars.
c) Late 19th century- Prohibition of Pillage:

Beginning with the talks on private property in Congress of Vienna, states made various attempts throughout the 19th century to codify the laws of war which included developing a prohibition regime against pillage (Lieber Code [1863], the Brussels Conference [1874], the Oxford Code [1880], and the Geffcken Code [1894]). These efforts culminated in The Hague Conferences (1899 and 1907) that said “The pillage of a town or place, even when taken by assault, is prohibited. Private property cannot be confiscated. Pillage is formally prohibited.”

According to Graber, the changes in the landmark codes, the military manuals and the publicists’ works between 1863 and 1914 were driven by “the need for a law which would give the maximum protection from the rigors of war to the population of occupied regions without hindering the military objectives of the occupant.” The emphasis was on military necessity in Lieber Code whereas it was on humanitarianism in Brussels Code. The Hague was in-between. The laws that were favorable to the occupant by promoting order in the occupied regions were accepted by the states more easily.

The Hague Conventions were “a late codification of a body of law adopted in an atmosphere of nineteenth century liberalism, shaped by the basic philosophy of that era.” For instance, looking at the memoirs of Andrew White, the American delegate to The Hague Peace Conference, gives an idea of the perspective on private property at the time. He was instructed by his government to secure the immunity of private property at sea in time of war as “a long desired improvement in international law.” When the subject could not be handled by the second committee due to Russian opposition, it is particularly remarkable to see how some of the other powers in Europe supported the American proposal: Mr. Van Karnebeek, for instance, the Dutch delegate, said although his country’s interests required the retention of the present system, he supports the idea of

---

143 See Graber (1949).
144 The Hague Conventions (1899), articles 28, 46 and 47. See Appendix A.
146 Ibid., p.290.
147 Ibid., p.291.
148 Ibid., p.35.
149 White (1912), p.6, 20.
the protection of private property at sea as “a question of right” and “the proper development of international law.” According to his memoirs, Andrew White spent even the intervals during the Conference working on the subject with the idea that even if private property at sea cannot be secured at The Hague, they “must at least pave the way for its admission by a future international conference.”

The debates during The Hague Conferences over the protection of private property including the prohibition of pillage are also significant in terms of understanding the mindset of the day. The original draft convention said: “Family honor and rights, and the lives and property of persons, as well as their religious convictions, and their practice, must be respected. Private property cannot be confiscated.” Mr. Odier, the Swiss delegate, thought this did not provide sufficient protection for private property so upon his proposal the Article was modified to mention private property twice: “Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected. Private property cannot be confiscated.” During the second conference in 1907, Austria-Hungary proposed to modify Article 46 into: “Family honor and rights, the lives of persons, religious convictions and practice, as well as in principle private property, must be respected.” This restriction over the protection of private property was unacceptable to the other delegates. Upon the warning of the president of the conference, Mr. Beernaert (Belgium) saying that the addition of the words “in principle” seemed to “express a reversal of the ideas admitted in 1899,” Major General Baron Giesl von Gieslingen (Austria-Hungary) withdrew the amendment.

The articles dealing with the prohibition of pillage are Article 28 and Article 47, which are taken directly from the Brussels Code (1874) although the wording of Article 28 is somewhat different from Article 18 of the Brussels Code. The adoption of these articles was fairly straightforward without much debate over them. According to Graber, “the subject of pillage receives less detailed attention in this period than in previous ones,

---

150 Ibid., p.40-41.
151 Ibid., p.68.
152 Scott (1920), p.488. The Article would be modified once again before it took its final form but the double-emphasis on private property as well as the vagueness of family rights and honor would stay the same. See Appendix A.
153 Scott (1920b), v.III, p.128.
154 Ibid., p.128.
apparently on the assumption that pillage is universally condemned and recognized as illegal so that the point no longer needs stressing” although what is considered pillage changed a lot.155 Even when there was disagreement on the exceptions to the sanctity of private property during war, there was absolute agreement that they should not take the form of pillage.156

The growing ideas and principles about “civilization” and “civilized behavior,” carried on to the 19th century with increasing force. In fact, the belief in progress was virtually unchallenged during most of the 19th century.157 With the growing influence of Darwinism, the idea that humanity advances continuously towards higher forms of being grew in strength. The doctrine “that which is strongest on the whole must therefore be good, and the ideas which come to prevail must therefore be true”158 strengthened the already existing ideas about human civilization (starting with the European civilization) and its objectives towards perfection.

The nineteenth-century historian was so loath to admit retrogression that he liked to fancy the river of progress flowing underground all through the Dark Ages, and endowed the German barbarians who overthrew Mediterranean civilization with all the manly virtues. If a nation, or a religion, or a school of art dies, the historian explains why it was not worthy to live. In political science… on the theory of progress, what is ‘coming’ must be right. …159

According to Inge, until WWI people believed that “civilized man had become much more humane, much more sensitive to the sufferings of others, and so more just, more self-controlled, and less brutal in his pleasures and in his resentments.”160

Even the armies, which resist any change that may be at odds with the security concerns of the state, reformed themselves along the lines of the new morality that emerged out of these ideas about progress and civilization. For example, the Victorian England saw a shift from the efforts to have “mindless brutes” as soldiers who can survive and obey under vicious discipline. Instead, “moral discipline” in accord with the

156 Ibid., p.216.
159 Ibid., pp.169-170.
160 Ibid., p.174.
new morality of the rest of the society became the objective in order to have men with moral welfare.\textsuperscript{161}

Therefore, writing up international laws limiting and prohibiting “barbaric” practices of war was very much considered part of the new and enlightened civilization. The publicists of the 19\textsuperscript{th} century had these ideas about civilization, too. In the words of Lieber, “[t]he fundamental idea of all international law is the idea that all civilized nations of our race form a family of nations.” Thus, the Europeans were civilized enough to meet the standards of an international law and preserve international (European) peace.\textsuperscript{162} He wrote in a letter about his Code: “I think [the Code]… will do honor to our country…I is a contribution by the United States to the stock of common civilization.”\textsuperscript{163}

Similarly, when the state delegates to The Hague Peace Conference came together before the tomb of Hugo Grotius in 1899 (July 4\textsuperscript{th}) at the initiation of the United States delegation for celebrating 123\textsuperscript{rd} anniversary of American independence, they were talking about this forefather of international law as “one of whom all civilized lands are justly proud”\textsuperscript{164} and who brought the feelings of mercy and humanity (in war) into the modern world.\textsuperscript{165} According to Andrew White, the US delegate, not only the nations who Grotius knew to be civilized but also the nations which are now civilized (known to Grotius as barbarous) as can be understood from their presence at the Peace Conference were there to pay tribute to him.\textsuperscript{166} Since Grotius’s day “the progress of reason in theory and of mercy in practice has been constant on both sides of the Atlantic,”\textsuperscript{167} what is happening is the “diminishing of bad faith in time of peace and cruelty in time of war.”\textsuperscript{168} According to White, what was special about Grotius was that he wrote his theory of international law at a time, which was immoral (i.e. Machiavelli’s time)\textsuperscript{169} as opposed to the present

\textsuperscript{161} Trustram (1983), pp.155-156.
\textsuperscript{162} Nabulsi (1999), p.164.
\textsuperscript{163} Raymond (2005), p.70.
\textsuperscript{164} Proceedings at the Laying of a Wreath on the Tomb of Hugo Grotius in the Nieuwe Kerk in the City of Delft, July 4th, 1899, p.13.
\textsuperscript{165} Ibid., p.18.
\textsuperscript{166} Ibid., p.15.
\textsuperscript{167} Ibid., p.22.
\textsuperscript{168} Ibid., p.22.
\textsuperscript{169} Ibid., p.24.
time, which was inspired towards morality thanks to people like him. 170 He did not only write on what international law was at his (immoral) time but also wrote about what ought to be so that nations can be instigated from “That Power in the Universe not ourselves, which makes for Righteousness.” 171 Hence, the fact that while Western civilization on both sides of the Atlantic progressed towards a more moral, righteous or “liberal and humane” 172 existence through “the permanent law of civilized nations” 173 thanks to the insights of people like Grotius, the Peace Conference gathered to end the horrors of war was a sign that the rest of the world was approaching there as well. White seemed to hear Grotius from his tomb saying:

Go on with your mighty work...Guard well the treasures of civilization with which each of you is entrusted...Go on with the work of strengthening peace and humanizing war: give greater scope and strength to provisions which will make war less cruel: perfect those laws of war which diminish the unmerited sufferings of populations. 174

It is possible to see the place of the idea of “civilization” and the fact that what is being written is merely the reflection of the already achieved standards of the civilized peoples appears in the very text of The Hague Regulations as well:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. 175

These growing ideas about civilization and being civilized continued to gain power during the late 19th century and started to lead to the development of norms against what is perceived to be “uncivilized” (including disrespect for private property shown particularly by a “barbaric” practice like pillage) or brutal conduct in war. Those ways of

170 Andrew White mentions Francis Lieber, who wrote the code for making American Civil Law more humane, as the leading disciple of Grotius. Ibid., p.17.
171 Ibid., pp.26-27.
172 The president of the Institute of International Law and the Netherlands delegate to the Conference, Mr. T.M.C. Asser mentioned the United States as having the opportunity of establishing liberal and humane principles of international law on various occasions. Ibid., pp.42-43.
conducting war were ultimately embodied in prohibition regimes, laws or rules in the later part of the 19th century climaxing with The Hague Conventions.\footnote{Gregory Raymond makes this distinction between principles, norms and rules, which may be helpful in clarifying how regimes develop. Raymond (1997), pp.218-219.}

V. The Geneva Conventions (1949)

Although a prohibition regime against pillage was created by The Hague Conventions, it was further developed and reinforced with the later Conventions. When we look at the Geneva Conventions’ (1949) handling of pillage, we see that while obligation and precision continue to be high, the moderate delegation of The Hague is strengthened: The Geneva Conventions continue to bring a high degree of obligation on the state parties to observe the prohibition against pillage by both repeating the fact that it is prohibited and by including “appropriation of property” in grave breaches along with other war crimes such as:

\begin{quote}
[W]illful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial, taking of hostages.\footnote{See Appendix A, p.iii, iv.}
\end{quote}

Precision is also high when it comes to pillage since Article 33 openly says, “Pillage is prohibited.”\footnote{As for a detailed description of what counts pillage, the Geneva Conventions do not go into much detail but since those had been put into international law previously by The Hague Conventions, there is no need to look for a repetition there.}

The Geneva Conventions provide a system of delegation by requiring domestic legislation and prosecution for violations in the case of grave breaches. Therefore, pillage, which is included in the grave breaches as “appropriation of property” is subject to delegation since “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned,
provided such High Contracting Party has made out a prima facie case."\(^{179}\) Applying the indicators of delegation to determine the level of delegation, it is safe to conclude that this provision brings about “binding internal policies-legitimation of decentralized enforcement” at the very least and even “binding regulations with consent or opt-out”\(^{180}\) which lead to the conclusion that delegation becomes high in this case.

The Draft Convention (IV) prepared by the ICRC and submitted to the Conference in 1949, did not prohibit pillage. The only article that mentioned it was Article 13 of the Draft (Article 16 in the final text), which said:

As far as military considerations allow, each Party to the conflict shall facilitate the measures taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

This article stayed the same in the final text without any change although it cannot be interpreted as prohibiting pillage by the occupying forces since it is about search, care and protection of civilians in general.

The other important article regarding the protection of private property was Article 30 (Article 33 in the final text), which did not mention pillage:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties are prohibited. Measures of reprisal against protected persons and their property are prohibited. Any destruction of personal or real property which is not made absolutely necessary by military operations, is prohibited, as are likewise all measures of intimidation or terrorism.\(^{181}\)

This Article ended up being divided into two Articles in the final text with some additions to the first part. Article 33 says:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

\(^{179}\) See Appendix A, p.iv.
\(^{180}\) See Appendix B.
\(^{181}\) Revised and New Draft Conventions for the Protection of War Victims, Texts Approved and Amended by the XVIIth International Red Cross Conference, Geneva August 1948, p.118, 123. (ICRC-A) These two are not the only articles related to the protection of property. Articles 46, 97 and 98 are some other articles though they are dealing with separate issues such as the property of internees or the restrictions on the use of property.
Pillage is prohibited.
Reprisals against protected persons and their property are prohibited.

The second part became a new article, Article 53:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Pillage entered into Article 33 and destruction of property became a new article during one of the Committee meetings while the delegates were debating another matter, i.e. collective penalties. When Article 30 of the draft Convention (IV) (Article 33 in the final text) on the issues of collective penalties and reprisals against protected persons and their property was being discussed, the Italian delegate, Mr. Maresca said that the provision of Article 30 prohibiting such acts in the future was as important as that introduced by Article 47 of The Hague Convention prohibiting pillage. The Article had the same moral force as the Preamble of the Draft Convention forbidding torture. Brigadier Page, the British delegate, took the opportunity of the mention of pillage and said that “since reference had most opportunely been made to Article 47 of The Hague Convention forbidding pillage,” he thought that Article 30 should be supplemented by a prohibition of pillage. The Indian delegate, Mr. Haksar demanded an exact definition of public and private property while the Chinese delegate, Mr. Wu opposed to place the destruction of property under the title of reprisals because that would minimize the crime. He said they should either omit the destruction of property from Geneva Conventions since it was already covered by international law, i.e. The Hague Conventions, or write it into a separate article.182

Later, after a long and heated discussion over whether the protection of private property should be extended to state and collective property (which was proposed by the Soviet Union), Articles 30 and 53 took their final form. The United Kingdom’s proposal to add the prohibition of pillage was accepted but the Committee dropped the word “formally” which appears in Article 47 of The Hague Conventions IV because they did

---

182 Diplomatic Conference of Geneva, Committee III ( Civilians Convention) meetings, Twelfth meeting (10 May 1949). (SFA)
not want to weaken other prohibitions by adding adverbs to some of them.\textsuperscript{183} Likewise, Italian delegate’s proposal to add “systematic” before “destruction” in Article 53 was rejected on the grounds that this “might by implication appear to authorize destruction which was not systematic.”\textsuperscript{184} The wording of Article 130 of the draft Convention (Article 147 in the final text) regarding grave breaches was also carefully drawn with respect to property. The Italian and Danish delegates suggested the addition of the words “and seizure” after “destruction” of property to make sure that all forms of violation of property would be included in grave breaches. Upon the proposal of the Australian and British delegates the word “appropriation” was used instead.\textsuperscript{185}

We should note that the delegates were very sensitive about not implicating that any pillage and/or destruction of property could be excusable while they had no such concern about Article 27 dealing with rape. It is also remarkable that the States carefully reformulated and inserted the prohibition of pillage and destruction of property into the Geneva Conventions although it already existed in international law. The Report of Committee III to the Plenary Assembly makes it clear that they wanted to reemphasize those prohibitions that were violated during WWII in the Geneva Conventions.\textsuperscript{186} Why was reemphasizing something that already exists in international law more important or preferable than emphasizing something (rape) that was not in international law yet happened as parts of the WWII atrocities? I will address this question in Chapter 4. However, first I will go back to The Hague Conventions and their lack of interest in prohibiting rape.

\begin{itemize}
\item \textsuperscript{183} The Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva (27 July 1949), p.23. (SFA)
\item \textsuperscript{184} Diplomatic Conference of Geneva, Committee III (Civilians Convention) meetings, Thirty-first meeting (16 June 1949). (SFA)
\item \textsuperscript{185} Fourth Report of the Special Committee of the Joint Committee, Report on Penal Sanctions, 12 July 1949, p.9. (SFA)
\item \textsuperscript{186} The Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva (27 July 1949), p.22. (SFA)
\end{itemize}
Chapter III
The (Non-)Prohibition of Rape in War: The Hague Conventions (1899, 1907)

The known history of rape in war goes back to Biblical times. And “the prevalence of rapes committed during modern warfare has kept pace, if not exceeded, the sexual violence of ancient conflicts.” Yet, it continued to be as invisible as before. Opportunistic rapes happened in wars by soldiers who perceived women as inferior sexual objects to be dominated and according to Susan Brownmiller, who, in her 1975 book wrote the groundbreaking and silence-breaking chapter on rape in war, armies often used rape as a weapon due to its effectiveness in the demoralization of the enemy and giving morale to the soldiers by symbolically proving the victory of the victorious side. As she puts it, “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.” According to time and context, it served different purposes and different people interpreted both rape itself and its purposes or functions in different ways. But one thing stayed constant: it has been invisible.

According to Bassiouni and McCormick “For the most part, rape, along with pillage, has been viewed as an ‘inevitable’ aspect of war.” If some combination of strategic material interests and ideational changes culminating in a normative shock led to the creation of the regime against pillage should we look for and can we find a similar combination for rape?

---

1 Brownmiller (1975). She gives a history beginning with the ancient Hebrews and coming up to 1970s Bangladesh and Vietnam cases through ancient Greeks, Roman Empire, Crusades, World War I and World War II.
2 Patricia Sellars (the Office of the Prosecutor’s Legal Office on Gender Issues in ICTY) cited in ICTY Bulletin N 15/16, p.1.
5 For instance, rapes of German women by the Russian troops in 1945 were largely acts of revenge to counter the rapes of Russian women by the Germans earlier in the War. German women also served the purpose of being the easiest targets to the bitter Russian soldiers’ humiliation by their own officers throughout the War. See A Woman in Berlin: Eight Weeks in the Conquered City: A Diary. (2005), p.xix.
We do not see any change in the cost-benefit balance for allowing or encouraging rape at any point in history, at least on a large scale. The reality of women’s oppression continued to determine the meanings and to make the world by associating women with honor and presenting them as property of men. Societies interpreted attacks on women as an attack on honor of the men who ‘own’ the women as well as an attack on the community (which is composed of the men as the public sphere) up until 1977 when, at least in the eyes of the international law, women gained “personal dignity.” Hence, for centuries, the physical pain of women has been translated into a social pain through the meanings attached, which has been useful in winning wars at basically no cost. Due to this understanding of the violation of women’s bodies as the violation of men’s and community’s honor, the men and the community who owned the women felt collective humiliation because of the rapes that happened. That is why, for instance, when _A Woman in Berlin_, the diary of a woman who experienced and witnessed the mass rapes of German women during the Soviet occupation of 1945, was published in 1959 in German, some Germans got very upset that these stories were being told and they accused the author of “besmirching the honor of German women.” What they meant was the besmirching of the honor of Germans. According to them, women should not have told their stories of personal pain and violation because what was hurt was German honor; the raped women symbolized the raped country/people. As a result of this widespread social perspective on rape, it has been used as a valuable weapon deeply hurting the enemy.

As far as the ideational changes are concerned, we do not see a significant change of perception on rape from the medieval times to the 19th century. Since rape was considered as an aggressive manifestation of sexuality, in war it made a perfectly normal combination of two normal things: aggression (normal in war) and sexuality. Rape is not

---

7 As we will see in Chapter 4 in more detail, the definition of rape as an outrage upon women’s honor in the Geneva Conventions (1949) was changed in 1977’s Protocol Additional II to the Geneva Conventions where rape was defined as an outrage upon personal dignity. See Appendix A.


9 That is why historically the expression “the rape of country/city X” is used to indicate not only the rapes of women during the conquest of that country/city but also the pillages or the conquest itself. For example “the rape of Nan King,” “the rape of Europa,” “the rape of Europe,” “the rape of Russia” or “the rape of Iraq.”
shocking in a normative context where assumptions about the uncontrollability of male lust, women as the object of that male lust and rape as an expression of that male lust prevail.\textsuperscript{10}

Why did being civilized or liberal, which were the driving ideational forces behind the prohibition regime against pillage, not lead simultaneously to a prohibition on rape? Why were women property enough to be raped but not property enough to be protected? Why did states not consider the practice of raping women in war at least as uncivilized and barbaric as pillage? How did this normative context normalizing rape take this shape, how was it perpetuated, how did it influence the situation of women during and after wars and how did it eventually change at least to lead to international legal change?

I. The Law

As discussed in Chapter I, The Hague Conventions (1899-1907) contain no obligation for state parties to prevent rape by their armed forces. The document does not even mention rape and the closest thing to it, Article 46 requiring respect for “family honors and rights” does not even stipulate prevention. The language of “respect” rather than prohibition leads to very low obligation even if we presumed that “family honor and rights” indirectly referred to rape.

The Hague Regulations are very problematic in terms of precision with respect to rape. The text does not explain what “family honors,” “family rights” as well as “respect for them” entail. Even asking whether or not they include rape is a stretch since laws need to be clear and the imprecision in this case does not warrant such derivation.\textsuperscript{11}

Since obligation and precision are highly problematic in The Hague Conventions with respect to rape, delegation does not exist either. Even if prosecutions happen for violations of the Convention, the likelihood that they will include charges for rape is almost non-existent given that it is not clear if states had a responsibility to prevent rape.

\textsuperscript{10} Ellis (1989); Scheffer (1999).
\textsuperscript{11} Especially in the case of rape, not mentioning the word “rape” in law codes is considered critical by some feminists because the word rape has a “unique indignity” and replacing it with other words obscures the seriousness of the act. See Estrich (1987), p.81.
Therefore, we cannot consider The Hague Conventions (1899-1907) as the legal documents that created the prohibition regime against rape.

In order to understand why The Hague Conventions exclude rape from its prohibitions, it is necessary to go back to the Brussels Declaration of 1874 since the drafters of The Hague Conventions copied most of the articles regarding the laws of war from it; therefore, the vagueness of “family honors and rights” in Article 46 of The Hague Regulations originated in Brussels. It is also necessary to look at the Lieber Code since it is where Brussels Declaration was taken from although the Lieber Code was very explicit in prohibiting rape.

*Lieber Code (1863)*

It is particularly interesting that The Hague Regulations exclude rape from its prohibitions since they rely heavily on the Lieber Code (1863), which openly mentions rape among the list of prohibited acts during war. One peculiarity of the Lieber Code was that although the publicists of his time devoted far more space and specificity to the protection of private property than the protection of personal rights, the Lieber Code has eight articles about the protection of personal rights and property rights: four on personal rights, three on both personal and property rights and one on property rights only. The Lieber Code states that:

> All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense” (Section II, Article 44) and Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only

---

12 Askin (1997), p.39. Davis says that the First Hague Peace Conference’s (1899) discussions on the laws of war on land required relatively little effort because the Commission revised the Declaration of Brussels (1874) and practically turned it into a convention. Davis (1976), p.27. But given that the Declaration of Brussels, which also does not mention rape, was based on the Lieber Code (1863) (See Graber (1949), p.20; Carnahan (1998), p.215), the question may be why did the drafters of the Brussels Declaration exclude rape?

punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred.” (Section II, Article 47)

**Brussels Declaration (1874)**

By the mid-19th century, the conduct of war was still based upon customary law and the only international codification of the laws of war was the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864). The war of 1870-1871 between France and Germany became a stage for major differences leading to reprisals because of the uncertainties with regard to the laws of war. Inspired by the ICRC’s (the International Committee of the Red Cross) proposal about a convention to govern the conduct of belligerents, Russia’s Tsar Alexander II called the Brussels Conference with the intent of codifying the laws and customs of war.14 Frederic de Martens, a Russian scholar of international law and a diplomat, influenced by Lieber, prepared the draft Convention.15

The original draft of the Brussels Code (Article 50) said, “the religious convictions, the honor, the life and the property of pacific populations should be respected by the enemy army.”16 They later added the protection of the “family rights” to the draft upon the proposal of the Italian delegate Mr. Lanza. German delegate Mr. Voigts-Rhetz proposed to delete the word “honor” from the article because the word was employed under similar conditions in another chapter and it would be suitable to act the same way here. His proposal was defeated.17 The commission declared that by maintaining the word “honor” its intention is to establish the obligation to respect the honor of the families.18 The discussion on the honor issue ends this way but the discussion on the parts of the article dealing with private property continues. The Italian delegate Mr. Lanza said that, in the first Russian draft, there was an article which formulated a restriction on the absolute respect for private property and he demanded that the exception be restored in order not to prevent, in the event of need, the occupation of a

---

16 Actes De La Conférence De Bruxelles 1874. (1899), p.20. (my translation)
17 Ibid., p.207.
18 Ibid., p.20. (my translation)
house, a field… etc. Mr. Lambermont, the Belgian delegate, responded by saying that the current article poses the principle of the respect of the private property generally; the restrictions are dealt with in the article relating to the requisitions which handles permitted and prohibited means of war. As a result, they modified article 50 (article 38 in the final text) into “The religious convictions, honor and family rights, life and property of the population must be respected.” Later it was changed again into “The honor and family rights, life and property of individuals, as well as their religious convictions and exercise of their worship must be respected” and upon the proposal of the French delegate, Mr. Baude “Private property cannot be confiscated” was added to it.

As we can see from these debates, the delegates discussed the matter of family honor very briefly, what it included or excluded, how it needed to be addressed or explained, whether there was any need for amendments did not become issues and they did not mention rape or women even once. In contrast to this situation, the discussion on private property and pillage was very detailed and most delegates paid great attention to the framing of the prohibitions regarding them.

The Hague Conventions (1899, 1907)

The Hague Regulations originated from the Lieber Code and incorporated all of these prohibitions of the Lieber Code including pillage (as well as other prohibitions protecting private property), except rape. The delegates at The Hague were aware of this exclusion. The Belgian delegate Beernaert complained that the phrase “family honor and rights” in Article 46 (Article 38 of the Draft Convention) was too vague. But, during the Conference, when Mr. Beernaert made this comment on the subject of honor, a long debate started on Article 46, which (interestingly) resulted in a clearer prohibition of any appropriation of private property and no change in terms of the prohibition of rape. General den Beer Poortugael from Netherlands said, “it is neither necessary nor possible to define more in detail the sense of this article, the purport of which is evident.” Then,
Colonel Gross von Schwarzhoff, the German delegate, wanted to add a further restriction to the article: “as far as military necessities permit.”\textsuperscript{24} This proposal was obviously unacceptable to the other delegates since the whole point of writing this Convention was to protect the people against military necessities. Chevalier Descamps, the Belgian delegate, said that “it is impossible to admit the destruction of human rights as a legal thesis although recourse is occasionally had thereto if necessary.” Mr. Rolin, Siamese delegate, adamantly opposed the amendment by saying that it is wrong to weaken the principles by giving them a doubtful declaration. He said Article 38 is about the general principle of respect for honor, the lives of individuals and private property. The restrictions regarding military necessity existed in the other articles (as regards to requisitions for the confiscation of property under military necessity for instance).

As a result of the reactions the amendment was withdrawn although Colonel von Schwarzhoff said he is withdrawing it with the condition that it is thoroughly established that Chevalier Descamps’ declaration is the exact interpretation of the article.\textsuperscript{25} He wanted to establish his opinion that even though everybody would be accepting that in principle/legally human rights cannot be violated in some instances when a state can prove that violating parts of this article was absolutely necessary from a military point of view it should be acceptable to all. One can interpret this reasoning as a statement for the idea that if violations of a particular prohibition have the potential of being justified with military necessity, states can take on legal obligations that may be difficult to implement at times. The extension of this logic to the cases of pillage and rape would be, while the acquisition of private property can be justified on the basis of the basic needs of the soldiers like hunger (and even compensated later), the rape of women (especially “honorable” women of “honorable” gentlemen) is not possible that way. This makes it all the more important to evade any clear obligation of its prevention for states.

What is also interesting is what happened after this debate: While they were discussing this “military necessity” proposal, everybody forgot about Mr. Beernaert’s suggestion to clarify “family honors and rights,” however they realized that the draft article did not protect private property sufficiently. It said: “Family honor and rights, and

\textsuperscript{24} Ibid., p.488.
\textsuperscript{25} Chevalier Descamps (Belgium) and Mr. Rolin (Siam) in particular opposed the amendment. Ibid., p.488.
the lives and property of persons, as well as their religious convictions, and their practice, must be respected. Private property cannot be confiscated.” Mr. Odier, the Swiss delegate, thought this did not provide sufficient protection for private property so he proposed to change “property of persons” into “private property whether belonging to individuals or corporations.” Mr. Beernaert suggested another formula so that all private property regardless of whom it belongs to would come under the protection of the article. His proposal was adopted so they modified the Article into, “Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected. Private property cannot be confiscated.”26 Apparently, the delegates thought “family honor and rights” was sufficiently clear in terms of the object of protection it indicated while “property of persons” was not clear enough. Alternatively, they did not think it was clear but as Graber puts it, the vague terms used in describing some of the practices such as the protection of “honor” or “family rights” aimed at making the general acceptance of them easier “since these terms are broad enough to permit a multitude of interpretations to suit individual opinions.”27 As Mr. Beernaert put it upon a hot debate on another issue:

[H]owever great our willingness may be, I am afraid that if we wish to regulate everything and to decide everything conventionally, we shall meet the same difficulties as before [like in Brussels]. In my opinion there are certain points which cannot be the subject of a convention and which it would be better to leave, as at present, under the governance of that tacit and common law which arises from the principles of the law of nations.28

If that is indeed the case, the next question is why did the delegates need the rules referring to the protection of women be vague and open to interpretation? What made even debating the subject so impossible?

One possibility is the Europeans of the 19th century, with their emphasis on decency, finesse, manners and propriety did not want to spell out a word like ‘rape’, particularly in a diplomatic document. From the mid-18th century onwards as a result of

"26 Ibid., p.488. The Article would be modified once again before it took its final form but the double-emphasis on private property as well as the vagueness of family honor and rights would stay the same. See Appendix A.


28 Scott (1920), p.502."
the rise of the idea of delicacy, or “the new prudery,” sexuality in any form offended people. “[T]he first new generation of the nineteenth century [was] more strait-laced, inhibited, and conventional than its parents, so that sons discussed their fathers’ wild oaths, and daughters worried about their mothers’ loose sexual behavior.”

Also, it can be argued that the language of diplomacy in the 19th century was French and the word for rape in French, ‘le viol’ is a vulgar word enunciating an animalistic violent act that civilized people do not engage in neither do they talk about. However, given the language used in Article 46 versus the other articles prohibiting other acts, it is not realistic to put all the burden of the absence of a prohibition against rape in The Hague Conventions on delicacy. If the delegates really wanted to prohibit rape, one would expect at least the language of prohibition besides a mentioning of women in the article. They could have said “Violation of women is prohibited,” (in French, “La violation de femmes est interdite”) or “Outrages upon women are prohibited” (“Les indignations sur les femmes sont interdites”) or even “Women should be protected” (“Les femmes devraient être protégées”). It still would not qualify as a prohibition regime but at least show that the reason they could not mention rape was propriety and given its limits they did everything they can to prohibit rape. Besides, Francis Lieber was a 19th century European, too, and it did not prevent him from putting rape into his Code along with a precise prohibition.

In addition to these, other debates during the Conference illustrate the fact that the states were very much aware of the impact of clarity versus vagueness of law in terms of creating an obligatory prohibition that they needed to comply. So, while they try to exclude those measures that they believe they cannot comply from the law, in cases where cannot exclude, they try to make the provisions as vague as possible to make it less obligatory.

An interesting example of this happened during a plenary meeting (in the 1899 Conference), when General Sir John Ardagh, the British delegate brought up the question

---

30 The words “violation” or “violate” are used three times in The Hague IV. See articles 3, 40 and 41.

82
of dum dum bullets although an article prohibiting their use had already been accepted three weeks ago. The accepted Article was:

The use of the bullets which expand or flatten easily in the human body, such as exploding bullets, bullets with hard jackets whose jacket does not entirely cover the core or has incisions in it, should be prohibited.

General Ardagh said:

It seems to me that the use of these words describing technical details of construction will result in making the prohibition a little too general and absolute. It would not seem to admit of the exception which I would desire to provide for, that is, the present or future construction of some projectile with shock sufficient to stop the stricken soldier and put him immediately hors de combat, thus fulfilling the indispensable conditions of warfare without, on the other hand, causing useless suffering.  

He then goes on to explain in detail how each type of bullet that are used in wars work, how many millimeters they are, which ones cause more suffering, which ones penetrate the body and which ones do not “work” at all sometimes by citing published results of experiments with these bullets. He says in order to provide their soldiers with sufficient protection, they want to “reserve entire liberty to introduce modifications” in the construction of projectiles given that they will not cause useless aggravation of suffering. He also argues that wars between civilized nations and wars against savages are different. Civilized nations’ soldiers are incapacitated easily with small projectile while savages, such as Indians, continue to advance even after being shot for several times with them and eventually cut off your head since they do not abide by the laws of war. Therefore, the English wants to use more capable bullets against “savage races.” For being able to use these bullets, they need the law to be vague with less detail about the construction and functions of the projectiles so that when they use them against the “savage races” they would not be violating the laws.

Accordingly, the United States delegate Captain Crozier suggested a change of wording in the article to omit the details: “The employment of bullets which inflict uselessly cruel wounds, such as explosive bullets and in general every kind of bullet which exceeds the limit necessary in order to put a man hors de combat at once, is

---

33 Ibid., pp.276-278, 286-287. Also see pp.343-348 for the prior debates in the subcommission meeting.
forbidden.” This new wording clearly makes the prohibition weaker and less clear by throwing out the technical details of the bullets’ construction (like their shape, how they enter human body, what they do there, their structure etc.) and instead bringing in subjective assessments like “inflicting uselessly cruel wounds” blurring what is prohibited and what is not. The judgment is left to each state to determine whether a particular bullet inflicts “enough” pain to be included in the prohibition hence lessening the obligation and precision of the article. The president of the meeting, Belgian delegate Mr. Beernaert asks “What would remain of the article if they were to accept [this] modification.” Agreeing with the president, the Russian delegate and the Dutch delegate also remarked that this new wording is “far too vague.”

Similar to this debate in terms of states’ desire to clarify/blur their obligations under certain articles, a big discussion happened when Article 55 in the draft Convention (Article 59 in the final text) came up. The Article was:

A neutral State may authorize the passage through its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor material of war. In such a case, the neutral State is bound to take whatever measures of safety and control are necessary for the purpose.

The delegate from Austria-Hungary wanted to add “which exceed the amount necessary for the care of the sick and wounded of the convoy” after the phrase “personnel nor material of war.” Mr. Beernaert (Belgium) said that such is really the sense of the Article so they decided to mention the interpretation of the Article in the minutes without adding it to the final text. This incident is another example that even when the exact meaning of an article is evident and there is no need for explanation in the actual article, states want to at least mention it during the conference and insert the explanation into the conference minutes when they want the obligations to be clear. Given that the phrase “family honor and rights” in Article 46 has no such self-evident meaning and clearly needs explanation and given that a delegate actually mentioned this situation and demanded some clarification to no avail indicate the intentional state resistance to clarify the content.

---

34 Ibid., pp.278-279.
Going back to the debate over Article 55, we find that a rather long debate over General Mounier’s (France) proposal to substitute “may authorize” with “shall authorize” to make sure that the neutral states will treat the two belligerent parties equally to avoid special advantages to one of the parties. He thinks the passage of the wounded across the neutral territory may grant advantage to one side by opening up the line of communication to the army. This proposal to impose a clear obligation on the neutral states met strong protests from the small states. Delegates from Belgium in particular vehemently opposed any such obligation since as a small neutral state “often trampled cruelly” between the eternal rivals of the time, France and Germany, they did not want to find themselves in an impossible situation. Rather than putting themselves under such obligations, they said they would prefer the status-quo, i.e. the absence of any regulations although in previous debates they continuously emphasized their desire for clear laws for rights and duties of the neutral states.\(^{36}\)

As we can see from these deliberations, which are among many, states do not want to sign on to obligations that they believe they cannot adhere to (whether due to inability or lack of desire). When such a possibility rises they try to make the obligation as vague as possible with little or no detail in order to evade being portrayed as a violator in case such an incidence happens. They want to be able to say that the prohibition does not include the specific act (like using dumdum bullets that do not inflict “too much” suffering or committing rape which may not being included by the provision on the protection of “family honor and rights”) that they committed hence there is no violation.

In order to understand why states believed that they could not comply with a law prohibiting rape hence preferred that Article 46 omitted it, we need to turn to the normative context in which The Hague Regulations were written.

II. The Normative Context

Since we are trying to understand the social conditions under which the international laws underprotecting women (as opposed to private property) had emerged, it is necessary to look at the normative context, i.e. the environment in which the web of

\(^{36}\) Ibid., pp.500-502, 504.
intersubjective meanings shared by the European States in the 19th century with respect to women. Therefore, I will focus on the treatment of women by law especially in relation to property.

Ursula Vogel argues that in the 19th century Europe, “husband’s property rights over woman’s body merged into the demands of public order and protected by the state.”37 It was because of the emancipatory potential of political modernization for women that this happened: “To reinforce the security of sexual property at the center of the marriage relation [as] a way of controlling this process [the process of political modernization] and a way of shifting its costs.”38 According to John Stuart Mill, in the 19th century “the wife is the actual bond-servant of her husband: no less so, as far as legal obligation goes, than slaves commonly so-called.”39 The fact that a wife was the property of her husband in common law was one of the most important signs of this marital slavery.40 Engels also wrote, in 1884, the modern families, which had their roots in the victory of private property, are established on the domestic slavery of the wife. According to him, the preservation and inheritance of property required the establishment of monogamy, which in fact is expected monogamy for the wife plus hetairism for the husband, and male supremacy especially for the ruling classes. As a result, sexual acts outside of marriage are considered crimes for women with serious legal and social consequences but honorable or a “slight moral blemish” for men that they wear with pleasure.41

In order to understand the normative context surrounding the writing of The Hague Conventions, I will look at the elements of this process in Europe, mainly in Victorian England and post-Revolutionary France as its centers. First, I will look at the law, in particular marriage laws including the laws regulating adultery and property laws. Secondly, I will look at the social class element in this context, which can help explain the vague treatment of rape in international law, which was written by people from a certain class. Thirdly, I will turn to the situation of sexual violence.

38 Ibid., pp.149-150.
a) The Law:

The 19th century Europeans constructed women both as powerful and powerless, as sexual agents but also victims, as dangerous but also in need of protection, therefore, regulating the female body became a priority, which was done through the introduction of more sophisticated legislation.\(^\text{42}\) Marriage and property laws are the most important aspects of this legislation reinforcing men’s and states’ rights over women’s bodies.

**Marriage and adultery laws:** According to Carol Smart, “marriage was a major signifier in the process of constructing the meaning of Woman in legal discourse in the latter part of the nineteenth century; a systematic mode of regulating the dangers… posed by the potential unruliness of women’s bodies.”\(^\text{43}\) Among other things (like child custody laws), two major areas in marriage laws are significant for our purposes: divorce and adultery and sexual violence within marriage.

In 19th century England, the divorce laws treated male and female adultery in completely different ways. The only ground for ‘divorce a vinculo’ (divorce granted by the Parliament) was a wife’s adultery. The distinction between the adultery of a husband and a wife was based on, Keith Thomas argues, “the desire of men for absolute property in women.”\(^\text{44}\) In 1854 in the British Parliament, Lord Cranworth said that it would be too harsh to bring the law to bear against a husband who was “a little profligate.”\(^\text{45}\) Therefore, through law, the state tried to manage the “unruliness” of the female body by denying women the right to divorce an adulterous or violent husband all the while stripping her of all rights (like continuing her marriage or getting child custody) if she committed adultery. According to Ursula Vogel, these adultery laws were established “on the assumption that any leniency on the part of the law would be exploited, to the disadvantage of men, by the depraved members of the female sex.”\(^\text{46}\)

\(^{42}\) Smart (1992), p.8, 11, 13. This idea of women’s powerlessness was used for much different legislation. In 1874, in search for the reinstitution of flogging, “Colonel Egerton Leigh rose in the House of Commons to ask the government to impose increased punishment for crimes of violence against women” and then he said “he was merely seeking ‘fair play for the fairer sex.’” Shanley (1989), p.162.


\(^{45}\) Ibid., p.40.

\(^{46}\) Vogel (1992), p.159.
Since what people considered to be posing danger to the well-being of the society hence what the state wanted to regulate was the female body, rather than the male body, sexual violence within marriage was a non-issue.\(^47\) In 1888, a judge declared:

The sexual communion between them [married couples] is by virtue of the irrevocable privilege conferred once for all on the husband at the time of the marriage, and not at all by virtue of a consent given upon each act of communion, as is the case between unmarried persons.\(^48\)

One of the 19\(^{th}\) century feminists, Elizabeth Wolstenholme Elmy wrote in relation to marital rape laws: “The only absolute right I should claim for a woman as against a man is that she should never be made a mother against her will.”\(^{49}\) However, the Parliament did not agree with her. The list of possible aggravations that could justify a woman seeking divorce (in combination with adultery) that was debated in the House of Lords had rape, sodomy, desertion, transportation, penal servitude, incest, bigamy and cruelty. Out of these possibilities they accepted only incest, bigamy and cruelty to be in the Divorce Act of 1857. As Mary Shanley puts it,

[T]hey did not regard crimes of sexual violence or prolonged absence by the husband as fatal to the marriage bond. The Lords did not even consider sexual violence within marriage. A husband had the [exclusive] right of access to his wife’s body, and by definition could not be charged with marital rape.\(^50\)

In post-Revolutionary France, the initial revolutionary enthusiasm and egalitarian spirit that started to give women more rights including property and divorce rights started to subside soon after which the bourgeois fear of inheritance going to the children of adultery shaped marriage and adultery laws.\(^51\) The risk of bringing “bastards into the family” was too much to handle for the 19\(^{th}\) century state that it firmly established inequality between men and women by bringing back the crime of adultery, which the revolutionary codes had abolished, into the new penal code (1810).\(^52\)

---

47 This understanding of the need of regulating the female body rather than the male body is interesting in terms of understanding why the international laws on rape are so vague or non-existent.
According to Alexandre Dumas, French obsession with adultery began with the Napoleonic Civil Code (1804). The abolition of primogeniture (right of the firstborn child or eldest son to receive the family inheritance) was one of the first policies of the new regime due to this practice’s inherent inequality and due to the new regime’s objective of dividing up large estates for a more equitable wealth distribution.\textsuperscript{53} This legal change made adultery, which was a joke called cuckoldry in the 17\textsuperscript{th} century, a crime. The husbands who were sure that their first male child were their own and would inherit their title and fortune felt comfortable under primogeniture and when the Napoleonic Code required the equal division of wealth among children they became obsessed about not letting children who were not theirs get a portion of their inheritance.\textsuperscript{54} Besides, the association between the life-style of aristocracy and adultery in the minds of the people contributed to the post-Revolutionary hatred towards the phenomenon.

The Napoleonic Code suppressed women’s rights by retreating from the Revolution’s ideas about equality. It restricted divorce to the cases of adultery by the wife, adultery by the husband if he kept his concubine in the family home, cases of brutality and conviction of a serious crime. It made divorce by mutual consent of the spouses tied to so many conditions that it became awfully difficult to get one.\textsuperscript{55} Besides the laws establishing women’s inequality legally, “scientific publications” became abundant seeking to rationalize women’s subordination, one of these rationales being their reproductive functions.\textsuperscript{56}

Similarly, in England, adultery by the wife could be a basis for divorce but adultery by the husband could not unless there were other aggravating offences. In 1853, the Royal Commission on the Law of Divorce stated that “the difference between the adultery of the husband and the adultery of the wife (socially speaking) is boundless.”\textsuperscript{57} It was evident that this “boundless” difference had its roots in the vital importance of

\textsuperscript{53} Mainardi (2003), p.9.
\textsuperscript{54} Ibid., pp.2-3. Mainardi regards Dumas’ description oversimplified because of the regional differences in French inheritance laws though she finds his analysis on the obsession about adultery accurate.
\textsuperscript{55} McBride (1992), p.750.
\textsuperscript{56} Offen (1987), p.341.
\textsuperscript{57} Perkin (1989), p.23.
protecting property rights through rightful inheritance. In 1857, during a speech in the House of Lords, Lord Chancellor Cranworth said:

A wife might, without any loss of caste, and possibly with reference to the interests of her children, or even of her husband, condone an act of adultery on the part of the husband: but a husband could not condone a similar act on the part of a wife. No-one would venture to suggest that a husband could possibly do so, and for this, among other reasons… that the adultery of the wife might be the means of palming spurious offspring upon the husband, while the adultery of the husband could have no such effect with regard to the wife.\(^{58}\)

With the advent of modern civil law ownership rights in another person (like slavery and feudal servitude) lost their legitimacy, however, the husband’s right to the wife’s body did not, Vogel argues, because “it is sheltered by claims made on behalf of the public good.”\(^{59}\) In 1840, for instance, on the case of a husband who imprisoned his wife in her room because she wanted to leave him, a judge in England ruled that the husband can do so because the law, “reflecting public opinion,” allowed a husband to enforce his right to his wife’s body by a writ of *habeas corpus*.\(^{60}\)

“The action for criminal conversation” is another good signifier of this situation reflecting women’s place in 19\(^{th}\) century England. It was the action of a husband suing a man charging him with adultery with his wife. If the man is found guilty, the husband recovers “damages.” The wife was not a party to these transactions, she was not allowed to testify in her own defense since it was an action between men for damage to the husband’s property.\(^{61}\) Historically and conceptually, “the right that the adulterous woman violates refer to different claims as well as different claimants. They refer to a man’s ownership of children, to his control over property (estates) and lineage, and to his right of exclusive access to the wife’s body and sexuality. But it is not only the property right of a private person that is at stake here, but the collective interest of society represented by the state.”\(^{62}\) Society’s interest required the women to be chaste and the lineages to be

---

\(^{58}\) Ibid., p.24.
\(^{59}\) Vogel (1992), p.149.
pure ensuring that inheritances go to the rightful children\textsuperscript{63} so that the families will be “in order” making social order possible.

This situation was particularly evident in post-Revolutionary France. Although they built the whole system of private law on the principles of individual liberty and equality, the civil code became a double standard due to the reactions that came after the reign of terror. Divorces that women initiated were regarded as the symbols of a society in disarray; hence they designed the laws in a way to make sure “social disorder” does not happen. The argument was “that the wife’s adultery might result in a ‘foreign child’ usurping the husband’s property and that as a consequence the order of the society itself would descend into anarchy.”\textsuperscript{64}

Adultery committed by a woman required her to be punished (like it can be a cause for divorce) but in fact it was not regarded as an act of a real legal person as far as the woman was concerned; rather the woman was just the tool and her usage in the process required the communication of two men, especially when it came to law. This situation resonates very much with what happens when it comes to rape. Rape, especially during war is a way of male communication, women being only the instruments of that communication.

Since society considered women not only tools of communication between men but also men’s property both socially and legally, their property also belonged to their husbands. In 19\textsuperscript{th} century England, common law doctrine of spousal unity eliminated the women’s legal personality upon marriage making it impossible for a wife to hold property in her own name. That was because “a wife was herself the ‘property’ of her husband, since he could claim her earnings and her body when she cannot make similar claims upon him.”\textsuperscript{65} Later, several social and economic trends of the 19\textsuperscript{th} century encouraged the legislators to reform the marriage law (with respect to property), hence

\textsuperscript{63} Susan Moller Okin focuses on Rousseau’s writings regarding women as representative of the whole Western tradition: his obsession with establishing paternity hence the requirement of the subjugation of women as the unlimitedly powerful sex in the area of sexuality. Okin (1979), pp-99-101.

\textsuperscript{64} Vogel (1992), pp.151-153. Prussia also changed its civil code to the detriment of women after the Napoleonic Wars to secure wife’s special obligation of chastity and to insulate the bourgeois family against the consequences of men’s sexual freedom. Vogel (1992), p.154, 159.

\textsuperscript{65} Shanley (1989), pp.22-23. However, there was a loophole in common law, i.e. setting up trusts to allow women to own and govern their property by the laws and courts of equity. See Reiss (1934).
they decided what would happen to women’s property under certain conditions according to the interests of certain men. For example, the shift of wealth from land to movable property and the uncertainties of 19th century economic life made men want their wives’ property to remain free from their creditors in case they went bankrupt. This meant, since the 19th century businessmen were engaging in trade and transactions that could easily result in bankruptcy (unlike the stability that being part of the landed aristocracy ensured), they did not want to lose all of their property in that case. Instead, their wives holding on some of their property separately hence immune from sequestration economically made more sense. Besides, creditors who gave credit to a woman before she got married wanted protection so that they could get their money back from the husband who owned woman’s property after marriage. This meant they wanted married women to be able to hold on to their own properties and thus pay back their debts. As a result, the Parliament passed the “Creditor’s Bill” (Amendment to the Married Women’s Property Act of 1870) in 1874 quite easily since “that tradesmen- electors and fathers- should be cheated, was to Parliament intolerable,’ while that married women should be deprived of all their property except their earnings was not.”

We can conclude that in 19th century, the law-making process excluded women and their interests, although women resisted the process in many ways. Hence, it is not surprising to see the treatment of women by international law is as such especially given the absence of space for women’s resistance as well. While international law tried to protect men’s property vehemently, most profound attacks on women’s bodies could not find a place in the laws of war. Even if we assume that “family honor and rights” in Article 46 of The Hague Conventions secretly referred to women’s bodies, it was to the extent that they were some men’s property.

What about the men who were not major property owners? What about “their” women? Who is supposed to be protected against whom by the law? Who has “family honor and [hence property] rights” and who does not? These questions bring us to an important social factor in Europe: class.

---

66 Ibid., pp.15-16.
67 Ibid., p.108.
68 See for example Holcombe (1983) for the role of women’s movement in the change of English laws regarding married women’s property.
b) Class:

In 19th century England, the policymakers made public policy on the assumption that violence against women was mostly a lower class phenomenon.\(^{69}\) The bourgeois moralist culture portrayed lower class men as “an animalistic mass.”\(^{70}\) Even one of the feminists of the time, Harriet Taylor Mill wrote:

> The truly horrible effects of the law am ong the lowest of the working population, is exhibited in those cases of hideous maltreatment of their wives by working men, with which every newspaper, every police report, teems. Wretches unfit to have the smallest authority over any living thing, have a helpless woman for their household slave. These excesses could not exist if women both earned, and had the right to possess, a part of the income of the family.\(^{71}\)

Although most feminists believed that violence against women existed in all classes, they used the stereotypical “picture of the brutal male drunkard abusing his wife” to push for legislation dealing with violence against women because the Parliament could only accept making laws “to discipline working class males and save decent working-class women from brutal husbands” rather than acknowledging systematic violence against women.\(^{72}\) Frances Power Cobbe wrote:

> The dangerous wife-beater belongs almost exclusively to the artisan and laboring classes… drunken, idle, ruffianly fellows who lounge about the public-houses, instead of working for their families. Some of their victims are “hopelessly depraved” [but] there are among them at least as many good women as bad… sober, honest, chaste, and industrious.\(^{73}\)

Class consideration also played into the adultery and divorce laws with respect to property and inheritance:

> The notion that only a wife’s adultery justified severing the marriage bond assumed that a man’s sexual authority and the legitimacy of his offspring were the basic consideration of the marriage contract. Parliament’s disregard of the threat to a family line posed by a husband’s adultery reflected the assumption that men committed adultery with women who did not belong to the “respectable classes” and whose family life was consequently considered unimportant. If a man did

\(^{69}\) Shanley (1989), p.163.
\(^{71}\) Mill (1851), p.105.
\(^{72}\) Shanley (1989), pp.166-167.
seduce the wife of a gentleman, her husband could divorce her to protect himself against illegitimate heirs.74

Similarly, in France the concerns about the property of the upper classes and its passage to the rightful heirs practically shaped the fate of women with respect to marriage, divorce and adultery laws. An influential 18th century treatise which was eventually canonized in the Napoleonic Code said:

Adultery committed by the wife is infinitely more injurious to the proper organization of civil society since it tends to plunder the family and result in the transference of property to adulterine children who are alien to it. Adultery committed by the husband, however, although extremely criminal in itself, is, in this regard, without consequence. Furthermore the wife, who is an inferior, does not have the right to police the conduct of her husband, who is her superior. She must assume that he is faithful, and jealousy must not lead her to investigate his conduct.75

How could this kind of mentality lead to rape laws that would protect women? Given that what mattered was the protection of the property of the “respectable gentleman,” his inheritance and his family line against lower class men’s excesses, it was expected that the law would protect “family honors and rights” of the “respectable gentleman” rather than women who belonged to either upper or lower classes. Therefore, when it comes to rape in war, Article 46 of The Hague Conventions would protect women that belonged to the men in upper classes, who had “family honors and rights” while lower class women were not points of concern.76

c) Sexual violence:

In the 19th century, Europeans viewed rape as a sexual activity rather than a form of violence. For example, the concern for the abduction of heiresses that happened at the time became a concern about sexual activity rather than one of property or the well being

---

74 Shanley (1989), p.43.
76 It is also necessary to consider the role race played on the issue of rape especially in the cases of European colonies. Pamela Scully points out to the fact that in the 19th century, both people of color and some working class whites were classified under the racial classification of “the colored” and the color of the victim determined the presence or the severity of the punishments in the cases of rape. Scully (1997), pp.154-156.
of the women although women themselves were considered property.\textsuperscript{77} I will look at Victorian England, as an example of a common law legal system and post-Revolutionary France as an example of the civil law legal system in Europe to see the state of rape in order to get a grasp of the way it was excluded from The Hague Conventions.

\textit{England:}

In the 19th century, the British considered the protection of and the attention to female chastity hence honor a sign of “England’s high civilization.”\textsuperscript{78} Rape, as an attack upon this honor, started to be considered as one of the most important reasons for excluding women from the public sphere. “Magistrates, judges, and journalists dealing with rape cases began to introduce the idea that rape emperilled women’s safety in evening streets; while men could travel freely, ‘respectable’ women would be safe only at home.” It is particularly significant that these women who were considered to be under grave danger of being raped and thus who needed to stay in the safety of the private sphere were the middle/upper class women. The poor working women were open to both sexual and non-sexual male violence and that was not of concern for the judges, magistrates, journalists or other men handling rape cases. In fact, they even thought lower-class women were inherently seductresses, tainted, and inviting hence not able to be true rape victims.\textsuperscript{79} By the 19th century, chastity, which included not only physical chastity but also obedience to father (for unmarried women) and husband increasingly came to be considered a middle-class phenomenon because of its relation to property passing on to the rightful heirs. Hence chastity of lower class women which had no repercussions for property rights was of no concern to the state. They could not be raped because they were not valuable property owned by some gentlemen hence could not be the subjects of a property crime.\textsuperscript{80} When lower class women were sexually assaulted, the incidence was usually disregarded since lower class women, with their “loose” or

\textsuperscript{78} Clark (1987), p.59.
\textsuperscript{79} Ibid., pp.3-4.
\textsuperscript{80} Smith (1999), p.33. She argues that although the idea that women are property started to change in the 19th century England with the influence of the legal changes like the Married Women’s Property Act allowing women to own property themselves, women were still viewed as “sex objects” and “prey.”
“unchaste” behavior “consent to violence” or they “deserve their fate.” These ideas about consent or the victim being the “dirty” part of a rape also existed in popular music springing from traditional folk music. These songs portrayed violence as a form of seduction, which was not a crime when committed against lower class women whose “no’s meant yes.” For example, in a song called “By the light of the moon” the man sings:

How this fair maid blushed and grumbled  
Let me alone, I pray forbear;  
Pray be easy, do not tease me,  
Touch me again and I’ll pull your hair;  
How this fair maid blushed and grumbled;  
You have spoiled my gown and new galloon.  
But well pleased my Sally by the light of the moon.82

According to Anna Clark, this situation in the 19th century England was just another example of the fact that the ruling elites create and manipulate particular ideas about rape at particular historical moments.83 In the 19th century, although chivalry was glorified for men, which included control of sexual desires, this control was only towards chaste (probably upper class) women and even when rape happened it was considered as a “regrettable loss of self-control” not a criminal deed because the idea was that it is very difficult to control passion.84 Even when the perpetrators of rapes admitted to rape, they would often claim that they had been “intoxicated” hence do not remember using force.85 Besides, the fact that an innocent man could be accused of rape by a deceitful (particularly lower class) woman was so haunting to the law-makers that there was clear resistance to believe even to a possible incident of “regrettable loss of self-control.”86

Despite this understanding, legally rape was a serious crime (capital crime until 1841), but rapists were only punished when they violated the property rights of some men be it the father or the husband of the rape victim. One of the reasons that the British rape laws in the 19th century required ejaculation as a proof of rape was this matter of

84 Clark (1987), p.5.  
women’s chastity being men’s property. Ejaculation meant both “physical pollution” on her body and the possibility of an illegitimate child.\(^\text{87}\) Still, courts tended to ignore physical evidence in the rape cases because “lawyers, doctors and moralists wished to invest the power of proving rape in their own moral judgments, not in women’s words or bodies.”\(^\text{88}\)

In fact, nobody wanted women to talk about rape. They considered lower class women, who were supposedly immodest already, to be incapable of being raped. Upper class women, on the other hand, were considered too modest to comprehend and talk about what happens during rape because discussion of any sexual matter was indecent. The press also refrained from reporting sexual crimes and even when it reported some cases the details were obscured as “unfit for publication.”\(^\text{89}\) Whenever women raised their voices about rape, the newspapers and the judges silenced them because “respectable women were not supposed to know of or speak about any sexual matter” which meant the loss of the word ‘rape’ for women to define their experiences.\(^\text{90}\) If a woman could talk about what happened to her, she would be considered immodest hence incapable of being a rape victim. If she could not talk about it then it meant there would be no complaint, i.e. no case against the rapist. A Lambeth magistrate’s point about rape illustrates this mentality clearly when he said “the more decent or respectable females were, the more reluctant they were in coming forward to give public details of such gross outrages.”\(^\text{91}\) As a result, women usually could not use the word “rape” to define what happened to them because it would be perceived immoral (immorality of the victim) not criminal.\(^\text{92}\) The fact that reporting and testifying on rape was blocked and women were silenced is well illustrated by a British newspaper in 1826:

\[\text{[N]o female not uninitiated into vice, or neglected in education, can possibly go through the ordeal of a public trial; and the father is not to be envied who would not rather allow the injury to his daughter to escape punishment, than hear the}\]

\(^\text{87}\) Ibid., pp.6-7, 59, 61.
\(^\text{88}\) Ibid., p.62.
\(^\text{90}\) Clark (1987), p.8, 59-60, 63. Ignorance of sexual matters on the part of women was considered a characteristic of “civilized society.” Edwards (1981), p.27.
\(^\text{91}\) Clark (1983), p.25.
daughter answer those questions, which… must be put to her, before a conviction can be obtained.  

Public morals, which were damaged by the shame that is put on public by all the indecent talk about the details of a rape case, were more important than punishing rapists. Judges sometimes directed juries to acquit (or even imprison rape victims) in order to prevent the case from going further and damaging public morals. There were common beliefs perpetuated by the medical jurisprudence (like it was not physically possible for a man to rape a healthy adult woman or conception following rape indicates sexual intercourse included desire hence proves that the woman consented) which made the rape cases even more complicated. Especially for lower class women, not being the property of a husband or a father produced the result of being considered the property of all men especially if they acted as such according to the 19th century (middle-class) standards by acting outside the range of accepted female behavior. For example, in 1817, after Mary Ashford, a servant was raped and killed not only the rapist and murderer went free because they met at a public house dance but also the priest distributed copies of the inscription on her grave saying:

As a warning to female virtue, and a humble monument to female chastity, this Stone marks the grave of Mary Ashford, who, in the 20th year of her age, having incautiously repaired to a scene of amusement, without proper protection, was brutally violated and murdered on 27th May, 1817.

Similarly, in 1868, a weaver was gang-raped in front of 100 people but the rapists went free because the victim had been drinking in a pub before the event.

The British laws aimed to preserve public morality and women’s chastity, i.e. men’s property. They did not aim to protect women from violence. That is why they did not let women speak up about rape and they particularly did not let lower class women accuse their rapists in courts. Even when the women found the strength to go to court, it very rarely resulted in convictions. They even prosecuted some rape victims for perjury

---

98 Ibid., p.20.
when her prosecution for rape failed.\textsuperscript{99} What people expected from women was to stay in their homes or not to go out without a man to protect them. If they do go out without proper protection and some men who lost control of their passions attack them, women should resist even if it meant death. If they cannot resist, they should either continue living their dirty lives without accusing anyone for it or kill themselves in order to clean the dishonor they brought upon their family with their impure bodies.\textsuperscript{100}

\textit{France:}

Before the 19th century rape was very common in France as part of a system of violence. It was also harshly condemned by the laws of the ancien regime. Rape was defined as an “execrable crime” that “destroys families and defies the king”: “It is a capital crime that is punished by death; the act of a famished tiger, the deed of a stinking billy-goat, requiring a solemn and public vengeance.”\textsuperscript{101} Especially, rapes committed against virgins were considered the worst because of the harm it caused to the society by making these girls unmarriageable.\textsuperscript{102} This does not mean rapists were adequately punished (by feminist standards). In fact, the law relatively tolerated rape especially when it was committed against women who were behaving “improperly” like they belong to no-one, hence everyone and complaints were rare and judges resisted convicting in the few cases that they looked at.\textsuperscript{103} During the reign of Louis XV, which lasted for 59 years, only five rapists were punished and all of the victims were under 10 years old. However, in terms of the general tolerance both by the society and the courts, rape was not alone. It was lumped together with other types of violent crimes as the cruel deeds of “infamous and execrable monsters of nature.”\textsuperscript{104}

Also, the class of the victims and the perpetrators were significant in terms of the willingness of the judges to convict. The rank of the person was crucial in determining

\textsuperscript{100} Clark (1983), pp.23-24.
\textsuperscript{101} Vigarello (2001), p.13.
\textsuperscript{102} Ibid., p.14.
\textsuperscript{103} Ibid., p.7, 9, 16, 18.
\textsuperscript{104} Ibid., p.15-16.
the gravity of the crime and the presence or the degree of punishment. Treatises even mentioned formulas on the matter:

The quality of the person to whom the violence is done increases or diminishes the crime. Thus an act of violence against a slave or a serving maid is less serious than that against a girl of respectable condition.105

This rank-differentiation in the treatment of rape cases was common to other violence cases as well. The practice of settling outside the court, for example, was common to all violent crimes and clearly favored wealthy perpetrators against lower class victims.106 There was a hierarchy among violent crimes according to the law and rape came after highway robbery and before murder. This hierarchy on paper did not translate into practice because of the unwillingness of the courts to prosecute rape, and rape remained different from other violent crimes in terms of the shame and blame it brought on the victim. “Lust by force,” “crime of lewdness which is committed by force” and “forced debauchery” are some of the expressions the laws used to describe it in the 17th and 18th centuries.107 In this sense, rape was a moral crime rather than a violent crime. The law and the society saw the rapist as an evil man committing a crime against morality and religion rather than against a person.108

In the 19th century, we see major breaks from the ancien regime in the way the French understood and handled rape. They still tried rape rarely and rape still came after property crimes in the hierarchy of crimes, but it lost its place as the second on the list. Ancien regime’s “highway robbery, rape, murder” listing became “murder, theft, forgery” in the 19th century and rape was no longer on the top of the list.109 However, there were some drastic changes. First of all, the idea that uncivilized practices such as rape did not belong to the urban world of modernity hence can only happen in villages and hamlets left behind by progress became prevalent. They thought rape happened when there is ignorance and stupidity and did not happen where there is progress and

107 Ibid., p.30.
108 Ibid., pp.32-33.
109 Although rape still came after property crimes, it lost its place as the second on the list. Ancien regime’s “highway robbery, rape, murder” listing became “murder, theft, forgery” in the 19th century and rape was no longer on the top of the list. See Vigarello (2001), p.112.
Secondly, the use of new expressions for rape began such as “indecent assault,” which resulted in the downplaying of serious sexual crimes by erasing the word rape.\textsuperscript{111}

The Code of 1810 was an important novelty in terms of establishing a hierarchy of different types of sexual violence according to their gravity for the first time. Also it recognized some of these “indecent assaults” as acts of physical violence rather than of immorality.\textsuperscript{112} However, under the heading of the “offences against decency” where indecent assault was placed, the Code added adultery (almost exclusively by the wife), incitement to immorality and bigamy. By confirming the inequality between men and women this way, these additions not only strengthened the logic of female inferiority but also “legitimized the persistent suspicion of women in rape trials.”\textsuperscript{113} As far as the way the press portrayed the rapes, the class factor seems to continue to be important. On the subject of a gang rape case in 1844 in Paris, for example, the \textit{Gazette} said that the fact that the perpetrators were 20 year-old factory workers confirmed the “almost congenital immorality of the working classes.”\textsuperscript{114} In the mid and late 19\textsuperscript{th} century, particularly the newly emerging public sensibilities against violence and bloodshed led to increasing hostility towards sexual violence especially those acts against children. However, in the cases of rape of adult women, the number of complaints and conviction rate remained low.\textsuperscript{115} As a result, 19\textsuperscript{th} century France witnessed a major change in the way law defined, categorized and understood rape but little change in the way courts judged it.

By the end of the 19\textsuperscript{th} century, with the influence of evolutionary theory and the obsession with progress, the way science and society portrayed rapists changed as well. It was no longer the “evil men” of the ancien regime that were committing these crimes but the “primitive organisms” who were left behind during the course of evolution because of the regressive tendencies in their genes. They were closer to animals in the evolutionary scale with their lust for blood and instinct for rape. This new interest in the criminal

\textsuperscript{110} Vigarello (2001), pp.107-108.
\textsuperscript{111} Ibid., p.105, 121-122.
\textsuperscript{112} Ibid., pp.116-118.
\textsuperscript{113} Ibid., p.126.
\textsuperscript{114} Ibid., p.148, 151, 154.
\textsuperscript{115} Ibid., pp.148-151.
himself even led to the first use of the word “rapist” as a pervert rather than “perpetrator of rape.” However, in any case, in the public imagination, the rapist almost always came from the poor; rape remained “an act of slums.”

As we can see in both the British and the French cases, throughout the 19th century (as in previous centuries) people continued to see rape as an act perpetrated by an individual (evil or unevolved or in the case of war a soldier deprived of sex for so long) against another (usually the men who “owned” the victims) rather than a social practice and institution degrading women. Since law is an expression of the normative context, i.e. the way people think about a practice, it is not surprising that neither domestic nor international law handled rape as this oppressive institution that they needed to handle.

III. The Actors

19th century feminism:

In the 19th century, women started to assert themselves more forcefully in large part due to the increasing constrictions put on them by the Victorian (class-based) ideals about “true femininity.” Victorian feminists concentrated on liberal political theory with its emphasis on individual liberty and bodily autonomy in order to struggle against the ideological and legal subordination of women. They intervened into the Parliamentary debates on many issues like the Divorce Act, married women’s property and child custody rights as well as suffrage. Marion Reid, for example, one of the important feminists of the time published a book, *A Plea for Women*, in which she argued that the private sphere limits women especially in terms of intellectual development. However, she did not renounce the domestic responsibilities of women, instead she argued for more rights for women (like the right to vote and property rights) in the public sphere along with their traditional roles in the private sphere. The fact that 19th century liberalism was blind to the inequalities in the family realm like this was due to its public-private distinction. Its individualist ideas were severely limited by its

116 Ibid., pp.177-178.
117 Ibid., p.187.
assumption about “the inevitable existence and legitimacy of the patriarchal family” made it impossible for principles of equality and consent to be applied to the relationship between men and women as well as state and women.\textsuperscript{121}

These limitations have their roots in the fact that throughout centuries, functionalist mode of thinking about women dominated the thinking about women not only in society but also in political theory and in the law. What were women good for? Reproduction? Since women’s place in society, as well as in war and in the law, were determined by the necessities of the patriarchal family, society and the state, the answer had been yes. The public sphere, i.e. the political and economic life, depended on women performing their functions as wives and mothers secluded in the private sphere. Even the liberal society and the liberal state required this arrangement.\textsuperscript{122} For the male citizens to be able to participate in politics and economic life, women needed to take care of the house and the children. For making sure that the heirs to the property of the male citizens were legitimate, women had to be constricted as much as possible.

The liberal state did not fulfill its promise of protecting individual interests for women since it treated the family rather than the individual as the basic political unit. The family’s interests were protected which meant the interests of the male heads of the families. Women’s interests were automatically assumed to be the same as those of their families.\textsuperscript{123} Therefore, the state never took women and their political and legal rights into consideration while making decisions. These decisions surely included writing international law.

However, some of the important elements of liberalism would ultimately help feminists such as the idea of progress. John Stuart Mill was one of the important theorists of the time who wrote extensively on the subordination of women in British society from a liberal perspective. According to Mill, if a society, as well as an individual, is not constantly progressing it means it is deteriorating. The subordination of women not only hinders the progress of society by keeping it under the morals of an underdeveloped time, the time that enslaved women but also by preventing the potential individual

\textsuperscript{122} Okin (1979), pp.233-247, 281.
\textsuperscript{123} Ibid., p.282.
contributions of half of the society to further improvement.124 A family based on a relationship of power and obedience between man and woman cannot produce future citizens who understand and appreciate freedom and who will have the proper moral training to be able to contribute to human progress.125 These arguments about the loss of potential contribution of women to the improvement of mankind due to their political and legal subordination became very important for 19th century feminists in their struggles for political and legal rights.

Although 19th century feminists mainly concentrated on suffrage, access to education and jobs and women’s property, divorce and custody rights there had been occasional anti-rape activism. In the US, for instance, in 1868, the prominent suffragists Elizabeth Cady Stanton and Susan B. Anthony took up the cause of Hester Vaughan, a domestic servant who was seduced, impregnated and fired by her employer and then convicted for the death of her infant. They persuaded the governor to pardon her and used this case as an opportunity to draw attention to the sexual vulnerability of women. Their newspaper, Revolution, supported the death penalty for rapists as well.126 Also in the late 19th century, women raised their voices against the systematic sexual abuse of black women in the intersection of sexism, racism and economic oppression.127

In England, feminists successfully pushed for the repeal of “Contagious Diseases Acts” of 1864 allowing the government to examine women suspected of prostitution around army bases for venereal diseases. Out of this campaign came the social purity movement of 1880s which fought against prostitution, rape, incest, sexual abuse of children and other types of sexual harassment. The feminists in this movement argued that “male sexual urge was a social and not a biological phenomenon” and male sexual behavior that is damaging to women in many forms should be changed by enjoining chastity upon men.128 British suffragists like Elizabeth Wollstenholme Elmy and Frances Swiney also wrote extensively on the sexual oppression of women both within and outside of marriage and promoted sexual self-control for men in order to ensure full

124 Mill (1878), p.82, 193-194.
125 Ibid., pp.84-85.
127 Ibid., pp.21-25.
control for women over their own bodies. They unsuccessfully campaigned against the “Criminal Code Bill” (1880) which included the idea that there cannot be anything as marital rape.\(^{129}\)

In France, feminists not only fought against the “Civil Code” (1804), which eliminated the right to divorce and established subordination of women in marriage and absolute paternal authority, but also against the vulnerability of women to rape reinforced by the absence of legal protection. French feminists like Suzanne Voilquin published stories about rape in order to draw attention to this social fact and the sexual oppression of women in general.\(^{130}\)

European feminists also began to organize beyond borders starting in the mid-19\(^{th}\) century. In 1848, in the Seneca Falls Convention the European and American suffragists came together for the first time.\(^{131}\) They called for suffrage, egalitarian marriage, divorce and property laws, equal access to employment, education and the church among other things. There was no mention of rape, sexual violence or the laws regarding it. These seeds of international feminism that flourished in the aftermath of the Revolutions of 1848 made feminists see their local struggles as parts of an international movement and activated the connections between feminists with radical views across borders. This first movement weakened by 1860s as a result of the US Civil War and the increasing political repression in Europe.\(^{132}\) The late 19\(^{th}\) century would witness the rise of an international women’s movement (a Western one), which would ultimately tackle the issue of rape but not before the early 20\(^{th}\) century.\(^{133}\)

Women’s concerns about sexual violence against women could not reach The Hague in 1899. The fact that there were no women state delegates to raise their voices and no women’s organizations with an agenda set on sexual violence did not help the situation either. In 1907, the International Council of Women (ICW) which was an

---

\(^{129}\) Ibid., pp.636-639.  
\(^{130}\) Moses (1984), pp.84-85.  
\(^{131}\) In 1840, American feminists, who had first organized under abolitionism (the anti-slavery movement), went to London to attend the World Anti-Slavery Conference but they were not allowed to participate in the assembly. This situation motivated the American feminists to hold the Seneca Falls Convention 8 years later. See Bolt (1993), p.68.  
\(^{132}\) Anderson, “The Lid Comes Off: International Radical Feminism and the Revolutions of 1848.”  
\(^{133}\) See Rupp (1997).
organization made up of women’s groups from 23 countries, participated in the peace movement’s enthusiastic appeal to the Second Conference to ensure peace and disarmament. It submitted a petition signed by two million people demanding peace. Yet, sexual violence was not on their agenda.

Feminists would eventually start voicing their resentment against the effects of war on women in the international arena but not until after 1907 and not as forcefully as they would a century later. In 1913, the Peace Committee of the ICW decided to target the issue of rape in war. Carrie Chapman Catt, the founder and president of the International Woman Suffrage Alliance argued that the “conditions of war subvert the natural instincts of many men of all races, who temporarily return to the brutal practices of the most savage primitive races.” Similarly, Rosika Schwimmer, a Hungarian suffragist and peace activist who was also active in the International Woman Suffrage Alliance, said the “victimizing of children, young girls, and women of all ages so common in peaceful times, because under the double standard of morals men are not outlawed for sexual crimes, is multiplied in war time.” They called women to come together internationally to be able to influence the upcoming Hague Conference:

[The moral and physical sufferings of many women are beyond description and are often of such a nature that by the tacit consent of men the least possible is reported. Women raise their voices in commiseration with those women wounded in their deepest sense of womanhood and powerless to defend themselves.]

In its May 1914 meeting, the ICW adopted a resolution on “Woman and War.” Although it largely concentrated on peace and suffrage, the resolution also called for women’s concerns to be included in the next Peace Conference at The Hague which was scheduled to be held in 1915 and it specifically mentioned the need for the protection of women from rape in war by international law. This resolution is particularly interesting because besides mentioning the word rape and breaking the silence in this respect, it was demanding a practical solution to the problem of rape (among other things) and it was

134 “The Hague Appeal for Peace.”
135 International Woman Suffrage Alliance would change its name to International Alliance of Women in late 1920s.
137 Oldfield (2003), V.I, p.213.
attempting, briefly, to explain the phenomenon as the expression of violent inclinations in some men coming out due to the violent environment of war:

That the International Council of Women, protesting vehemently against the odious wrongs of which women are the victims in time of war, contrary to international law, appeals to the next Hague Conference to consider how a more effective international protection of women may be secured, which will prevent the continuance of the horrible violation of womanhood that attends all wars.

…

In the late Balkan war non-combatants (generally women) were not only starved but massacred, while rapes and mutilations were reported. Outrages upon women are common in all wars; bestial horrors, which are crimes indeed, await the women of a country. The brutality lying dormant in some men is kindled by bloodshed; the ape and tiger, the “tooth and claw,” come to the surface. War seems to be a concentration of crimes. Under its standard gather violence, malignity, fraud, rage, perfidy, and lust.\(^\text{138}\)

Similarly, during the First World War, women’s groups brought up (though infrequently) the issue of rape in war in their publications. In the April 1915 issue of Jus Suffragii, the monthly organ of the International Woman Suffrage Alliance, one of the prominent British suffragists, Millicent Garrett Fawcett wrote:

> It is idle to attempt a sum in arithmetic, and exactly compare the sufferings of men and women in war time. The agony of both is incredible, and not to be measured. Let any man imagine, if he can, what must be the mental and moral anguish of a woman condemned to bear a child begotten in rape and hatred by a victorious enemy. Such women, in no small numbers, are facing their shattered lives to-day, and in one case, at any rate, a Government has considered in what way such women can best be helped to bear their almost unfathomable misery. However hideous the sufferings of men in war, have they had to face any position which makes them loathe their own flesh and the light of day?\(^\text{139}\)

It is particularly interesting to see the subject of forced pregnancy as a result of wartime rape put on the agenda in 1915 since it will ultimately be one of the basic tenets of feminists’ framing of “rape as genocide” in their campaign leading to the prohibition of rape in war in the 1990s.

However, these voices had gone unheard not only because there was a World War going on but even after because no one was willing to hear them. Just like the voices of

\(^{138}\) Ibid., p.213.
\(^{139}\) Oldfield (2003), V.II, p.89.
the rape victims of domestic rapes, the voices of the victims of wartime rapes and the voices of the feminists were not heard. The advocacy by the women’s organizations, like the First International Women’s Congress gathered in The Hague in 1915, were ridiculed as “amiable chatter of a bevy of well-meaning ladies” among other things. As for the records of rape in war, the silence and invisibility that we see in the domestic rape cases in 19th century Europe reflected on the works of the historians as well. Between 1746 and World War I it is particularly difficult to find the documentation of rape in war whereas the periods before and after are successful in terms of documenting them.

In the end, the normative context can explain the silence of The Hague Conventions on rape as an attack on women. According to 19th century Europeans women (especially lower-class) were simply not human enough to be protected. However, it does not explain why they were not even property enough worthy of protection. It is necessary to turn to the way rape, rape in war in particular, was conceptualized by the European society (and states) which can explain why states did not want to put themselves under the obligation of preventing rape in war.

Understanding “Rape in War”:

Because the 19th century Victorians assigned the sexual characteristics of purity and morality to women and inherent lust to men, they interpreted rape as a deprivation of the victim as a result of her inability (hence the blame was on her) to control the natural behavior of the attacker. Prominent behaviorists of the 19th century compared male sexuality to its counterparts in the animal world as “the active motile element” as opposed to the “passive quiescent” females. The sexually aggressive or “unchaste” women who did not conform to the standard of the passive female (not having the demeanor of modesty) were considered to be either socially depraved (as in the case of

---

142 Donat and D’Emilio (1998), p.37. Even the language that is used in place of rape in the 19th century indicates the trivialization of the rapists’ actions, i.e. “seduction, attempted ravishment and indecent or outrageous assault.” See Edwards (1981), p.121. The trivialization in the 20th century is done through distinguishing between “ordinary rape” without the “mitigating or aggravating features” and grave cases which involve “violence” like choking or using a knife. Edwards (1981), p.157.
lower class women) or biologically dysfunctional due to various gynecological causes one of which was overproduction of male hormones.\textsuperscript{144} Hence, the underlying assumptions about the male aggressiveness and female passivity with respect to sexuality normalized the “male urge to rape” tying it to the biological characteristics of men such as their hormones whose abundance in a woman would lead to sexual aggressiveness as well.\textsuperscript{145}

As we saw with the way the domestic rape cases were handled, this understanding of rape as a “natural” phenomenon was prevalent. “Loose” women were already fair game and their rapists usually walked free. However, the rapes of “chaste” women, who conformed to the middle-class standards of feminine behavior, did not bring about many convictions either. If a chaste woman is raped, it was seen as her fault for three reasons: Firstly, she should not get into a situation where she can be raped. The fact that she got out of the private sphere without proper male protection made her a target so it is her fault that she was raped. Secondly, if she got herself into that situation, she is expected to defend her chastity at all costs by resisting till death. If she did not, it is her fault. Lastly, and most important for our purposes, is that if she did anything that is considered remotely provocative (like being in the wrong place) that justifies the rapist’s actions since men cannot be expected to control their urges when there is temptation.\textsuperscript{146}

The 19\textsuperscript{th} century sentiment about rape was seeing it as “an extension of the social construction of male sexuality as active, dominant and aggressive.”\textsuperscript{147} Particularly in the context of war where being “active, dominant and aggressive” is the norm and “sex-starvation” of the soldiers in the barracks happens a lot, the merger of sexuality and aggression made even more sense to people. When Nietzsche declared in 1883 that “man should be trained for war and women for the recreation of the warrior: all else is folly,”\textsuperscript{148} he was not expressing an idea that was too far from what was commonly thought.

\textsuperscript{144} Edwards (1981), p.53.
\textsuperscript{145} At the same time these assumptions raised expectations from women to defend themselves against that aggression particularly by placing themselves under the protection of their fathers or husbands (thus the confinement in the private sphere) like all chaste women should do.
\textsuperscript{146} Smith (1999), pp.33-34.
\textsuperscript{147} Clark (1987), p.6.
\textsuperscript{148} Nietzsche (2003), p.50.
In 1880s and 1890s, the first sexologists, Krafft-Ebing and Ellis, who were influenced by the Darwinian doctrine of sexual selection, came up with theories that contrasted the Victorian picture of pure and chaste women, yet reaffirmed the notion of ultimate passivity and need for domination. Krafft-Ebing declared that “gratification of the sexual instincts [is] the primary motive in man as well as in beast.”149 Ellis also argued that women hide their sexual desires by “playing the role of hunted animal and adopting a demeanor of modesty” in order to make the men more eager and forceful. This makes the hunt more “sexually charged” and contributes to natural selection because a woman who says “NO” to “the assaults of the male” will be “putting to the test man’s most important quality, force,” so in fact she is saying yes.150 These theories became parts of the popular culture throughout the 20th century and influenced how men (which means states and militaries controlled by men) thought about sex, violence and rape.151

In Victorian England, soldiers were considered to be slaves to their “animal passions” not only because of the assumptions about men’s uncontrolled sexual drive but also due to the military life-style; hence they saw brothels that emerge around army garrisons and camps as inevitable. In fact, the British Army even maintained brothels in India for its soldiers.152 Therefore, although soldiers’ sexual behavior led to widespread venereal diseases hence loss of efficiency for the army, they did not try to regulate soldier behavior but instead they sought to regulate prostitution by checking women regularly for venereal diseases and detaining the ill ones. Although the state made various efforts to “civilize” the soldiers in many areas according to Victorian morality, these efforts never included civilizing their behavior as “sexual brutes.”153

When the first incidence of rape of Okinawan women by the US military personnel happened just after the arrival of Admiral Perry in Okinawa in 1854, the first incidence of not seeing it as a crime happened as well. Perry responded to his crew member’s crime by demanding the prosecution of the local men who chased the rapist

152 Skelley (1977), p.54. As an extension of the same policy of “the alleviation of the evils of enforced celibacy in the forces, both at home and in India” short-service enlistment was also considered in 1870. See Ibid.
resulting in his fall and death. While the local men were prosecuted and sentenced to banishments, “Perry demonstrated his ‘keen sensitivity’ by presenting to the rape victim a ‘handsome present’ consisting of a few yards of cotton cloth.”154

Even when rape in the domestic context saved itself from the image of the “normal” extension of uncontrollable male sexuality, it could never escape it in the context of war. In France, for instance, one exception to the picture of the evil rapist attacking morality drawn by the laws of the ancien regime was rape in war. It was considered a symbol of the conquest of a territory rather than a deed by an evil man. Stories told: “Rapes of young girls and young boys, children torn from their parents’ arms, mothers of families abandoned to the enjoyment of the victors” or “women who always love soldiers more than the rest, their violence only increasing their appetite.”155

Given this normative context with the core norms of women’s inferiority and property status clearly reflected on the domestic marriage, divorce, adultery and property as well as rape laws and cases, it is not surprising to see the exclusion of rape from The Hague Conventions as a prohibited act against the citizens of the rival state. Clearly, the absence of women during the Conferences both as delegates and members of a strong international women’s movement affected the law-making process as well. The international women’s movement was very young and lacking political rights in most countries, women were missing within the state apparatus’ of the parties at The Hague.

However, the non-existence of rape, even as a property crime is a question that requires us to turn to another part of the normative context: the gendered ideology of rape, i.e. the beliefs of the 19th century states and societies on what rape was. The fact that they thought it was an inevitable because of the biological nature of men and women made it virtually impossible, in the eyes of the states, to prevent it especially in war. Therefore, not wanting to commit to a prohibition that was bound to be violated by their armed forces, states made sure that they would not be accused of the violation of international laws.

154 Fukumura and Matsuoka (2002), pp.243-244.
155 Vigarello (2001), p.15. In 1635, during the Flanders campaign, a group of soldiers actually turned their weapons against their colonel who prohibited pillage and rape.
Whether the legal and ideological situation change in the 20th century as women’s participation in both domestic and international politics increased and what the changes and continuations would be are the foci of the next chapters.
Rape entered into international law immediately after World War II, with the next important text of international humanitarian law after The Hague Regulations (1899-1907), namely with the Geneva Conventions (1949). After the end of World War II, at the initiative of the International Committee of the Red Cross another conference to write a convention on the conduct of war, this time concentrating on the protection of the victims of war, convened. The fact that the atrocities of WWII were still fresh in the minds of the people contributed to the success of the Conference. Fifty-nine states initially signed the Conventions and over the years ultimately 199 states ratified it. Where is rape located in this success story?

As we get to the post-World War II period, we start to see slight changes in the way international regimes and laws approached rape if not in the prevalence of its use in armed conflicts. In this chapter, I will look at both the Geneva Conventions of 1949 and the Additional Protocols of 1977. For each of these, I will start by looking at the way each law treats rape in war both in terms of substance and the way this substance came about. Secondly, I will look at the normative context and the main actors of the era out of which these laws emerged in order to understand the sources of both the advances that were made and the ultimate failure of these Conventions to provide a prohibition regime against rape in war.

A. The Geneva Conventions (1949)

I. The Law

It is important to note that the Geneva Conventions is a huge improvement over The Hague in terms of its treatment of rape at least in terms of mentioning it as an unacceptable practice. However, it still has significant problems with respect to obligation and delegation. Article 27 says, “Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of
indecent assault.” The provisions are protective not prohibitive\(^1\) as opposed to other practices, such as pillage, for which there is clear statements of prohibition.\(^2\) In fact, if we look at the writing of the Geneva Conventions, we can see how states wrote and kept Article 27 as a moral declaration rather than a prohibition that would be sanctioned.

In order to trace the writing of this Article, firstly we need to go back to the Preliminary Conference of National Societies of Red Cross (la Conférence Prélminaire des Sociétés Nationales de la Croix-Rouge) in 1946 and the Conference of Government Experts for the Study of Conventions for the Protection of War Victims (la Conférence d’experts gouvernementaux pour l’étude des Conventions Protégeant les victimes de la Guerre) in 1947, both in Geneva. The Red Cross Conference (1946) started to write a draft with the idea that the terrible experiences of WWII and the urgency of international regulations relative to the protection of civilians as well as the insufficiency of The Hague Regulations set this project into motion.\(^3\) The commission that dealt with the protection of civilians thought that the violations of the conventional arrangements should be considered like a war crime and punished accordingly.\(^4\) The Conference of Government Experts started its work with these ideas and prepared a draft that would be submitted to the Red Cross Conference in 1948. The Red Cross Conference then completed the draft and submitted it to the Geneva Conference in 1949 which would finalize the Geneva Conventions.

The preliminary documents submitted to the government experts by the Red Cross start out by saying that “the International Committee consider that the measures suggested in favor of civilians of all nations, and consequently the nationals of any belligerent State, should include treaty stipulations regarding... (2) the principle of the

---

\(^1\) Gardam (1997), p.57.
\(^2\) See Appendix A.
\(^3\) 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 to August 3, 1946, *Documents furnished by the International Committee of the Red Cross, Volume III*, Situation and Protection of Civilians, Introduction. (ICRC-A)
\(^4\) *Rapport sur les travaux de la Conférence préliminaire des Sociétés nationales de la Croix-Rouge pour l’étude des Conventions et de divers problèmes ayant trait à la Croix-Rouge* (Genève, 26 July-3 August 1946), Geneva, January 1947, p.97. (My translation.) (ICRC-A)
The protection of women against every form of outrage. After these general remarks comes the most important and interesting part regarding the situation of women in time of war: Chapter III of the same document titled “Protection of Women” says,

Article 46 of The Hague Regulations of 1907 prescribed the recognition of “family honor and rights, individual rights and the respect of private property, religious beliefs and their observance.” The question of respecting the decency and dignity of women calls for more precise definition in the new treaty stipulations. Countless women of all ages, and even small girls were the victims of the most abominable outrages during the war. In occupied territories, very many cases of rape occurred, and unheard of brutalities were perpetrated, sometimes accompanied by mutilations and indecent assault upon women and young girls. Wherever troops have passed or been stationed, venereal diseases have increased to an alarming degree. Thousands of women were placed in disorderly houses against their will, or were obliged to submit to the troops. When contaminated, they were cast out, or sent to concentration camps or prison hospitals. A principle should be embodied and proclaimed in the new Convention, to provide that the women of all countries of the world, irrespective of nationality, race, religion belief, age, description or social standing, have the right to be treated with unconditional respect to their honor, decency and dignity, in all circumstances whatsoever.

We need to go over and stress a couple of things regarding these comments. First the commission makes the observation that Article 46 of The Hague Regulations regarding the protection of family honor and rights is not precise enough in terms of calling for the protection of women. Secondly, the outrages that women had to face during WWII especially in the occupied territories (by the Germans and the Japanese) require a new form of handling of the issue. And lastly, this new form will be a “principle” proclaimed in the Convention to provide women with “respect” to their honor, decency and dignity.

The way these remarks had been incorporated into the recommendations gives us a better idea of what the Commission meant by “principle” and “respect” (instead of prohibition) as well as what they meant by “precise.” Article 4 of the recommendations

---

5 Commission of Government Experts for the Study of Conventions for the Protection of War Victims (Geneva, April 14-26 1947), Preliminary Documents Submitted by the International Committee of the Red Cross, Volume III, Condition and Protection of Civilians in Time of War, p.41. (ICRC-A)

6 Commission of Government Experts for the Study of Conventions for the Protection of War Victims (Geneva, April 14-26 1947), Preliminary Documents Submitted by the International Committee of the Red Cross, Volume III, Condition and Protection of Civilians in Time of War, p.47. (ICRC-A)
says, “Women shall be treated with all consideration due to their sex, and children with all consideration due to their age and their helplessness” as opposed to some of the following articles, for instance, regarding reprisals and hostages, which openly (state and) prohibit them by saying they are prohibited.

The XVIIth International Red Cross Conference in Stockholm in August 1948 wrote the final draft Convention and submitted it to the Diplomatic Conference in Geneva in 1949. Therefore, it is particularly important for us to understand what happened in this Conference and thereafter with respect to the status of women and some other related topics like the issue of grave breaches.

If we start by looking at the writing of the preamble of the Civilians Convention, we see a list of things that the subcommissions of the Legal Commission (des Sous-Commissions de la Commission Juridique) proposed to be prohibited. Among these propositions are:

- the persons will be protected against all attacks on their dignity,
- taking hostages is prohibited,
- there will not be any executions without prior judgment pronounced by an instituted regular tribunal and assorted indispensable judicial guarantees like those recognized by the civilized peoples,
- all torture is prohibited.

After a discussion about adding an article about prohibiting medical experiments (demanded by the Danish delegate), “and bodily integrity” was added to the first article of the preamble. The resulting document submitted to the Conference consists of these

---


8 Ibid., p.3. Later on in the documents, the Commission says that “[i]t] endorsed in general manner the ideas set forth by the ICRC in Vol. III of their Reports regarding particular treaty guarantees which would be ensured to women and children of all nationalities. (Chapter II and III). The Commission considered these guarantees as a minimum, which it would be desirable to extend and specify.” One might think that this means a recommendation about the status of women; however, the Commission continues to say that the ICRC needs to further study the question in cooperation with other bodies, particularly with the International Union for Child Welfare, which gives the impression that the guarantees that they suggest to be specified are the ones related to children rather than women per se. Commission of Government Experts for the Study of Conventions for the Protection of War Victims (Geneva, April 14-26 1947), *Recommendation of Commission III* with regard to the Protection of Women and Children, p.16. (ICRC-A)


10 Ibid.
same prohibitions, therefore it does not mention rape. Part III of the final draft of the Red Cross Conference on the Status and Treatment of Protected Persons forbids several practices like torture and corporal punishment (Article 29), measures of reprisals, the destruction of movable property or real estate (Article 30) whereas Article 27 says “Women shall be specially protected against all attacks on their honor or dignity”\textsuperscript{11} with no reference to rape but interestingly enough it refers to “dignity,” which we will find to be dropped from the related Article in the Geneva Conventions (1949).

One last important aspect of this draft is about the issue of grave breaches\textsuperscript{12} that is very important in terms of the creation of prohibition regimes by the Geneva Conventions since in this case the obligation and delegation aspects of law-making are fulfilled by them. An ICRC report to the Conference starts out by stating that “The humanitarian Conventions resemble other national and international laws in this respect: if they are to be observed, there must be provision for sanctions. Without any such sanctions, even intensified supervision over the implementing of these Conventions would be of no avail.”\textsuperscript{13} Therefore, the Draft Convention comes up with Article 130:

Each contracting party shall be under obligation to search for the persons alleged to be guilty of breaches of the present Convention, whatever their nationality, and in accordance with its own laws or with the conventions prohibiting acts that may be defined as war crimes, to indict each person before its own tribunals, or to hand them over for judgment to another Contracting Party.\textsuperscript{14}

We see that after the Stockholm Conference the ICRC revised the first draft and Article 130 became:

\textit{Within a maximum period of two years, the governments of the High Contracting Parties shall, if their penal laws are inadequate, enact or propose to their...}

\textsuperscript{11}Revised and New Draft Conventions for the Protection of War Victims, Texts Approved and Amended by the XVllth International Red Cross Conference, Geneva August 1948, p.123. (ICRC-A) The Article uses “especially” instead of “specially” in the previous draft prepared by the ICRC. See XVII\textsuperscript{th} International Red Cross Conference, Stockholm, August 1948, Draft Revised or New Conventions for the Protection of War Victims, International Committee of the Red Cross, Geneva May 1948, pp.164-166. (ICRC-A)

\textsuperscript{12}Grave breaches put obligation on the state parties to either bring the violators of these crimes before domestic courts or hand over them for trial by other parties. See Article 146, Appendix A.

\textsuperscript{13}XVII\textsuperscript{th} International Red Cross Conference, Stockholm, August 1948, Repression of Infringements of the Humanitarian Conventions, Report by the International Committee of the Red Cross (Under Item III of the Agenda of the Legal Commission), Geneva June 1948, p.1.’(ICRC-A)

\textsuperscript{14}Draft Revised or New Conventions for the Protection of War Victims, International Committee of the Red Cross, Geneva May 1948, pp.211-212. (ICRC-A)
legislative assemblies the measures necessary for the repression, in time of war, of all acts contrary to the provisions of the present Convention. Each contracting party shall be under obligation to apprehend, regardless of their nationality, the persons accused of acts contrary to the present Convention, and in conformity with its own laws or with the Conventions prohibiting acts that may be defined as war crimes, to indict such persons before its own tribunals, or if it prefers, to hand them over for trial to another Contracting Party.\textsuperscript{15}

Finally, in the final text that was sent to the governments along with the invitation to the Diplomatic Conference of Geneva, those breaches that needed to be sanctioned, which the first documents generalized as “prohibited acts” or “war crimes,” were further specified and the exclusion of rape became even more evident. The text had an additional article, Article 130bis, defining what grave breaches are. Those acts that are considered to be grave violations are “murder, inhumane suffering, grave attack on physical integrity or health, on liberty or dignity of persons, important destruction of goods/possessions, acts by their nature or repetition manifesting a systematic contempt of this convention.”\textsuperscript{16}

As a result, the draft that the ICRC prepared in cooperation with government experts did not mention rape either as a word (at first) or as a prohibition to be sanctioned despite the initial calls for making protection of women more precise due to what happened during WWII. Looking at the processes through which it was written, we see that it was not even considered an issue to be debated. Likewise, as we go into the Diplomatic Conference of Geneva, we will see many discussions in many committees about the inadequacy of many prohibitions that lasted for months, but we will not see any major discussion about the inadequacy of the single Article that is supposed to protect women nor the idea of sanctioning this single Article through its inclusion among grave breaches.

However, before we look at the Geneva Conference, we need to address one major historical intervention that came just before it; namely the changing of the wording of Article 27 of the ICRC Draft thanks to two non-governmental organizations called

\textsuperscript{15} Revised and New Draft Conventions for the Protection of War Victims, Texts Approved and Amended by the XVI\textsuperscript{th} International Red Cross Conference, Geneva August 1948, pp.159-160. (ICRC-A)

International Alliance of Women (IAW) (l’Alliance internationale des Femmes) and the International Abolitionist Federation (la Fédération abolitionniste internationale.)

When the Alliance Board met in London in March 1949, the President reported that she had been asked to support in the name of the Alliance a clause defining rape, enforced prostitution, and offences against women’s honor and dignity as crimes against which women should be specifically protected. This she had done, and the clause had been incorporated in the Draft Convention to be submitted to a Diplomatic Conference in April. The Alliance societies had been asked to support the Draft Convention with their Governments and to get women included in the delegations to the Conference.\textsuperscript{17}

Who, among the Board members, asked the President to make this intervention and why the IAW did not write parts of the suggestion, like a definition of rape are unclear. It is understandable that they wrote the article by referencing rape as an attack on honor since it was likely that states would not accept it any other way given the normative context of the day.\textsuperscript{18} In fact, it is praiseworthy that they dared to mention the word “rape” in their proposal for the article given the avoidance of the word as “distasteful.” Even the French prosecutor at the Nuremberg trials, “when asked about the rape of French women said ‘the tribunal will forgive me if I avoid citing the atrocious details.’”\textsuperscript{19} But given this courage and assertiveness why the IAW became inactive during the writing process at the Conference or work for the inclusion of rape among the grave breaches are not known.

It seems as if the IAW did not think of this intervention and the resulting achievement as a big deal. They refer to the Geneva Conventions as “Red Cross Convention for the Protection of Civilians in War,” which gives the impression that it was a Convention limited in scope. They also apologized in the Report because the past three years (1946-1949) had not been impressive in terms of important achievements because of the lack of funds, sufficient staff and time.\textsuperscript{20} Besides, they did not mention this addition to the Geneva Conventions among the list of developments that they express

\textsuperscript{17} International Alliance of Women, \textit{Report of the 15\textsuperscript{th} Congress}, Amsterdam, July 18-24, 1949, p.12. (SSC)
\textsuperscript{18} Interview with a leader in the women’s movement, September 11, 2007.
\textsuperscript{19} Balthazar (2006), p.44. The prosecutor, however, did ask about the “atrocious details” of the Nazi torture.
\textsuperscript{20} International Alliance of Women, \textit{Report of the 15\textsuperscript{th} Congress}, Amsterdam, July 18-24, 1949, p.13. (SSC)
satisfaction for. The list includes the recognition of the equality between men and women by the United Nations (UN) Charter and the Universal Declaration of Human Rights (UDHR) but not the Geneva Conventions.\textsuperscript{21} In fact, the only place that they mention the Geneva Conventions in their 1949 Report is the above quote.

The programme for 1949-1952 includes a requirement for concentration on the enfranchisement of women, political equality, economic and social equality, educational opportunities, equal pay, appointment of qualified women in policy-making posts and increased opportunity for training for such posts.\textsuperscript{22} It also includes working towards the widest possible circulation and discussion of the UDHR and towards strengthening the UN, studying and supporting the draft Covenant of Human Rights, the draft Convention for the Suppression of traffic in persons and the exploitation of the prostitution of others and the Convention on Genocide (to secure ratification).\textsuperscript{23} No such plan was made for working on strengthening or securing the ratification of the Geneva Conventions. In fact, any intervention into the writing of the Geneva Conventions was not stipulated in the 1946 Congress either.\textsuperscript{24}

In any case as a result of this small-scale intervention by this women’s organization, the text that the Geneva Conference started to work with had an Article 27 that said: “Women shall be specially protected against any attacks on their honor, in particular against rape, enforced prostitution and any form of indecent assault.”

Despite this change in the wording, which I will further get into when I discuss precision, the fact that the text treated rape differently than other practices gives the impression that states are not legally obligated to prevent it from happening but they are recommended to try to protect women from this “unpleasant” practice. Therefore, in terms of obligation on preventing rape in war, the Geneva Conventions are at the lower end of the legalization spectrum.

Although the Geneva Conventions is the first international legal document to mention rape, Article 27 has only moderate/low precision when it comes to rape because

\begin{itemize}
  \item \textsuperscript{21} Ibid., p.35.
  \item \textsuperscript{22} Ibid., p.51.
  \item \textsuperscript{23} Ibid., p.51.
  \item \textsuperscript{24} International Alliance of Women, \textit{Report of the 14th Congress}, Interlaken, August 11-16, 1946. (SSC)
\end{itemize}
there are “broad areas of discretion”\textsuperscript{25} in terms of being ambiguous about what constitutes rape as well as whether or not it is prohibited since the Article uses the language of “protection” which does not have a clear meaning. If we go back to the debates during the Diplomatic Conference though, we will see that every single word written down was discussed and chosen with utmost care and the delegates knew exactly what they meant when they used different terms in different Articles. Thus, it is reasonable to assume that in the case of rape when they did not change the “protection” language that existed in the draft before them, they did so consciously.

Take the long discussions on Article 29A (Article 32 in the final text) for instance. During the 26\textsuperscript{th} plenary meeting, French delegate Mr. Cahen-Salvador points out to a disparity in terms between Article 2A (Article 3 in the final text) of the preamble and Article 29A, which deal with the same issues of prohibiting violence to life and person, taking of hostages, outrages upon personal dignity and sentences and executions carried out without previous judgment. Mr. Cahen-Salvador says this “slight” disparity causes him a certain anxiety and the two articles’ terms should be harmonized because he continues:

Our Convention is intended to become an integral part of international law, and in my capacity as a lawyer I have to point out to you that it would be extremely dangerous to allow any discrepancy to exist between the terms used, because as soon as there is disparity lawyers and legal authorities—which might here be the High Contracting Parties—might discuss indefinitely the reasons for this difference. Any Powers, the good faith of which was in doubt, might use such a discrepancy as a pretext to renounce the obligations which we have just established.\textsuperscript{26}

Mr. Cahen-Salvador’s legal opinion about the importance of terms used in writing international law is further supported by the debates over several other Articles and words including the importance of the term “prohibition.”

During the tenth meeting of Committee III writing the Civilians Convention a very interesting discussion came up with regard to the prohibition of corporal punishments and torture in Article 29 (Article 32 in the final text.) The Soviet delegate said that the acts committed during the last war would remain one of the darkest chapters

\textsuperscript{25} See Appendix B.
\textsuperscript{26} Diplomatic Conference of Geneva, \textit{Plenary Meetings}, Twenty-sixth meeting (3 August 1949), p.8. (SFA)
in human history. The provisions of the Convention must take account of the lessons of the last war in order to render any repetition of such crimes impossible. The text as drafted seemed inadequate. He wanted to replace “torture and corporal punishments are prohibited” in Article 29 with “the contracting States undertake to qualify as a serious crime, murder, torture and maltreatment causing death including medical experiments as also all other means of exterminating the civilian population.” The American delegate could not agree because the Soviet amendment dealt with war crimes, that was studied by the Joint Committee, hence any discussion or proposal regarding war crimes should be referred to that Committee. Also, the subject of the amendment was similar to the Genocide Convention under consideration of the UN. The English text of the Soviet proposal (not the French) “torture and maltreatment causing death” could be read as meaning that torture which did not cause death was permitted, a defect all the more regrettable because the Soviet amendment suggested the deletion of the words “torture and corporal punishments are prohibited.” For those reasons Article 29 should be retained as it stood. The Australian delegate Colonel Hodgson said he was certain that no Delegation wished to avoid discussion on the substance of the Soviet amendment. It should be noted, however, that the amendment seemed to be a moral declaration rather than a prohibition and might therefore overlap with the Preamble. Acceptance of the amendment as submitted would mean that the words “torture and corporal punishments are prohibited” would be omitted and would not be replaced by any prohibition properly so called. The expression “undertake to qualify as a serious crime” could hardly be interpreted as a formal prohibition. Nevertheless, the Australian Delegation was prepared to consider the proposed amendment regarding it as a list of prohibited atrocities.27 The discussion did not even end there.

During the next Committee meeting, the issue came up again and upon the remarks of the American delegate that it would be dangerous to give way to emotional impulses, that crimes could not be outlawed merely by the drawing up of a convention that the aim of the Conference was to define, as simply as possible, the duties of Governments towards war victims and that the duty of those Governments was to apply

27 Diplomatic Conference of Geneva, Committee III (Civilians Convention) meetings, Tenth meeting (6 May 1949). (SFA)
in good faith the Convention they had ratified. The American delegation continued to say that the use of a vague phraseology might lead to unforeseen interpretations of the Convention. The National Socialists had resorted to torture. It would be regrettable if torture was not specifically prohibited under Article 29 and they submitted a new amendment, which eventually became the final text.28

Committee III’s report to the plenary assembly further illuminates the fact that the writers of the Convention made a specific differentiation between acts that the Convention prohibited and acts it did not prohibit but were subjects of moral declarations. When talking about the Article (Article 25 at this stage as it was combined with the original Article 25) about the protection of women, the report says: “The new second paragraph was transferred here from Article 27 because it lays down an equally general principle i.e. respect due to women.”29 When it comes to the other Articles, the report’s wording completely changes: “Articles 29 to 31 (including 29A) lay down certain prohibitions which, in the light of the principles underlying our Convention, take first place and which unreservedly condemn the atrocities committed during the last war. A certain number of these prohibitions already appear, as regards occupied territory, in the Laws and Customs of War on Land (pillage, Article 47, collective penalties, Article 50.)”30 Moreover, the report suggests that even a slight change in the wording could weaken a prohibition so, for example with respect to Article 30 (Article 33 in the final text), what the Commission did is to drop the word “formally” which appears in Article 47 of the said Laws and Customs because they considered that as it is not used in the other prohibitions its use there would weaken them. “All the prohibitions under consideration are absolute, and adverbs, be they ever so incisive, add nothing.” What they were talking about was the prohibition of pillage, which was added to this Article as a new second paragraph.31

28 Diplomatic Conference of Geneva, Committee III (Civilians Convention) meetings, Eleventh meeting (9 May 1949). (SFA)
31 Ibid., p.23. Also see Figure 1 showing what the prohibitions in the Convention were according to the Working Party.
As opposed to these delicate arguments about all these practices, including pillage, that needed to be prohibited, what we see and do not see during the Conference meetings is any comprehensive and careful handling of Article 27, on the issue of rape. Article 27 came up as a subject of discussion only in the ninth and tenth meetings of Committee III (It did not come up at all during the plenary meetings.) Only two delegates commented on the Article’s section related to women. The first one was the Indian delegate who suggested that the standard of treatment to be given to the category of persons to whom Article 27 related should not be better in the national territory than the treatment given to the nationals of the country, while in occupied territory it should be no worse than the standard prevailing in the occupied country prior to the occupation. The Italian delegate suggested that “in view of the extreme gravity of offences against the honor and dignity of women, a specific reference should be made to the responsibility of the Commander of the armed forces as in the similar provisions of Article 51 of The Hague Convention.”32 Looking at the final text, we can see that the Conference did not take these suggestions and looking at the meeting minutes, we can see that they did not even discuss them.

What should we conclude from all this explicit discrimination against rape in terms of being excluded from the prohibitions that were handled with such care as well as from the discussions? Obviously, the call for more precise measures to ensure respect for women during wars made by the Government Experts in the 1947 Conference was responded in two ways: some more precision (at least compared to The Hague Regulations) came along thanks to the efforts of two NGOs but the measures remained in the gray area of “respect,” “protection” or “moral declaration” rather than prohibition in the end. No one took Article 27 seriously enough to discuss its wording, (as opposed to other articles included in prohibitions as I discuss in the case of pillage) or applications and it stayed outside the scope of the main prohibitions of the Convention as a low precision regulation.

32 Diplomatic Conference of Geneva, Committee III (Civilians Convention) meetings, Tenth meeting (6 May 1949). (SFA)
Preliminary Provisions (1)

The following acts shall be prohibited and shall remain prohibited at any time or in any place whatsoever:

a) human beings shall not be subjected to attempts against their life or injury to their physical integrity. The following shall be considered grave crimes: murder, torture, mutilation, including scientific experiments, as well as any other means for the extermination of the civilian population;

b) the taking of hostages;

c) deportations, either individual or collective;

d) attacks against the dignity of persons, in particular humiliating or degrading treatment or discriminatory treatment based upon differences of race, colour, religion, beliefs, sex, birth or social status;

e) the pronouncement of sentences and penal sanctions carried out without preliminary trial by a regularly constituted tribunal giving all the necessary legal guarantees recognised by civilised nations as indispensable;

f) collective penalties as well as any measures of intimidation or terrorism; the destruction of any real and personal property belonging to private individuals or to the State, as well as to social or cooperative organisations when this is not rendered absolutely necessary by military operations;

(1) it will be necessary to delete the following items from this text:

Article 29: the word “torture and” in the second paragraph;
Article 29 A: 
Article 30: the second sentence of the first paragraph;
Article 31: 
Article 45: first paragraph;
Article 61: first paragraph.

Figure 1. Civilians Convention, Text Adopted by the Working Party- Corrigendum, 8 July 1949. (SFA)
The Geneva Conventions has a high degree of delegation with regard to its provisions on the enforcement for those who committed grave breaches since it obligates states to either bring them before domestic courts or hand over them for trial by other parties. How about rape and its status with respect to delegation?

Article 130 of the Draft Convention (Article 147 in the final text) says:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The Article does not mention rape, and judging from the effort that was put into writing this Article and ensuring its clarity, including the use of the words “grave breaches,” before and during the Conference, we can conclude that it is not something they forgot to put in there and none of the other acts mentioned could be interpreted as containing rape.

Going back to the Stockholm Conference (1948), we know that the ICRC strongly recommended a provision for sanctions to make the Convention effective and added Article 130 and 130bis defining breaches of the Convention and how they will be sanctioned. These issues came up several times during the Committee meetings as well as the plenary meetings. Especially, the insistence of the Soviet Union on using the word “crime” for the violations of the Convention stirred up a lot of debate. The Soviet delegation submitted several proposals both to Commission III (Civilians Convention)
and to the Joint Committee (Articles common to all four Conventions) by arguing that the text using the term “grave breaches” was too vague and it seems like it is nothing more than a recommendation.  

Although the majority rejected the recommendation because of the idea that “crime” was a technical term used in Penal Law thus had a specific meaning that did not suit this Convention, some of the other delegations supported the Soviet proposal considering what had happened in the last war. As a matter of fact, the issue of what to include in grave breaches became the topic of long discussions during the Joint Committee meetings. A Finnish amendment to replace the expression “maltreatment” that was used in an earlier draft and which was considered unduly vague, by the words “inhuman treatment” was accepted. However, the Soviet delegate’s proposal that express mention should be made of certain acts which Article B (of Article 130) did not cover and which are also grave breaches was rejected. As a result, the Special Committee wrote the grave breaches language that we see in the final text and reported that:

In order to allow for reluctance to include all breaches even trifling ones in penal legislation, we limited the obligation to enact legislation to grave breaches which no legislator would object to having included in the penal code, and left the Contracting Parties free to take their own measures for the repression of breaches which do not come within the category defined as grave breaches. This category has been carefully defined, so as to avoid including acts which allow for various degrees of gravity and could not therefore be considered to be grave breaches if only committed in their less serious forms.

At the end, whether the writers of the Convention thought of rape as an insignificant thing that naturally occurs in wars or whether they thought it had various degrees of seriousness (maybe depending on the degree of “honor” of the victims?), they did not put it among the grave breaches, they did not even discuss it.

---

36 Commission III, Compte rendu in extense de la 30e séance tenue (15 Juin 1949); Special Committee of the Joint Committee, Twenty-ninth meeting (27 June 1949), Thirtieth meeting (27 June 1949); Joint Committee, Tenth meeting (16 July 1949). (SFA)
37 Report of the Joint Committee to the Plenary Assembly, 26 July 1949: Article 40/44/119A/130A. (SFA)
38 Commission III, Compte rendu in extense de la 30e séance tenue (15 Juin 1949). For instance Hungarian, Polish and Romanian delegates. (SFA)
39 Report of the Joint Committee to the Plenary Assembly, 26 July 1949: Article 40/44/119A/130A.
40 Special Committee of the Joint Committee, Thirty-first meeting (28 June 1949). (SFA)
Therefore, on the hard-soft legalization scale the Geneva Conventions are soft when it comes to rape since rape is not included among the grave breaches. This flaw in delegation combined with the problems with obligation and precision makes rape in war open to manipulation as occurred many times after WWII through extensive rapes in various conflicts that happened with legal and political impunity.\textsuperscript{42}

We need to conclude that the Geneva Conventions (1949) do not fulfill obligation and delegation requirements of a prohibition regime although it provides an important step in terms of increasing precision by mentioning the word rape.

II. The Normative Context and the Main Actors

\textit{What changed?}

The two World Wars had been stages for previously unseen range and forms of violence against civilians in front of the world. Especially the horrors of the Second World War triggered the initiation of an effective legal framework for preventing similar events\textsuperscript{43}.

The post-World War II tribunals did not deal with rape properly. The Nuremberg tribunal mentioned rape neither in its charter nor in its decisions and did not prosecute anybody for rape and the Tokyo tribunal prosecuted some charges about the rapes in Nanking but none about comfort women.\textsuperscript{44}

Although the Universal Declaration of Human Rights, adopted by the UN in 1948, does not mention the right to be free of violence and rape for women, it has provisions stipulating equal rights for men and women. Also women’s organizations managed to get similar provisions on gender equality into the UN Charter (1945) as well besides leading the way for the establishment of the Commission on the Status of Women (CSW) in the UN to further women’s causes and increasing women’s presence in the international arena.\textsuperscript{45}

\textsuperscript{42} Some examples are the rapes during the independence war of Bangladesh (1971), the Vietnam War (1956-1975), the civil wars in various Latin American countries in particularly high numbers in Guatemala, Colombia, Peru and Haiti (1961-present), the civil war in Sierra Leone (1991-2000) and the first Gulf War (1990-1991).


\textsuperscript{44} See Askin (1997), Askin and Koenig (1999) and Appendix A.

After the achievement of suffrage in most Western countries by 1930s, women increasingly participated in their countries’ governments. They made up 5.8% of the state delegations in the 1949 Conference. At last there were women’s voices. When the issue of whether to call grave breaches “breaches” or “crimes” was being debated, the Romanian delegate Mme Manole, as the only woman delegate that spoke on the issue of grave breaches, said that she did not understand why new repressions aimed at the perpetrators of such grave crimes should not be created and why we should pity the perpetrators of such brutalities towards men, women, and children, of torture, arson. She was the only delegate to speak of women with regard to the subject of grave breaches and probably the only one to think about women when the subject matter of grave breaches was debated.

The first attempts to specifically outlaw rape were not made until 1949.46 However, by participating in the drafting of the Universal Declaration of Human Rights (UDHR) women at least ensured that the language of the Declaration encompassed women within the framework of human rights. These included not only the female delegates (and the chairman, Eleanor Roosevelt) of the Commission on Human Rights and the Commission on the Status of Women but also representatives of NGOs like the International Council of Women, the International Union of Catholic Women’s Leagues and Women’s International League for Peace and Freedom.47

As I previously mentioned, the IAW was also one of the leading organizations of the time. It was granted consultative status in the UN in early 1948 hence was very active in the drafting process of the UDHR.48 It was a reformist organization which learned not to “scare” the states by being “too radical” the hard way. In 1930, for instance, the League of Nations organized a conference at The Hague, the International Conference for the Codification of International Law, in order to clarify and coordinate the existing body of international law. The IAW saw this as a great opportunity to further its cause at the time, i.e. equal nationality rights for women. Hence, it sent a proposal to the Conference demanding the right to control their nationality for married women equal to that of men.

48 Whittick (1979), pp.163-164.
Because the League of Nations found this proposal too radical, it excluded the IAW (along with all other women) from the drafting process. Women were even banned from the grounds of the Conference to prevent them from “harassing” the (all-male) representatives. Under the light of this event (and probably other similar ones), the reason that the IAW would later write Article 27 of the Geneva Conventions (1949) the way it did, with a relatively imprecise definition of rape referring to “honor” and “protection,” becomes clearer.

As for the writing of the Geneva Conventions (1949), although women’s organizations were not among the official participants of the Conference, they participated in the writing of the draft convention by the ICRC Conference in 1948. For example, World’s Young Women’s Christian Association (WYWCA) asked the ICRC that their input on certain articles regarding women were taken into consideration during the ICRC Conference that would be held in Stockholm in 1948 to write the draft Geneva Conventions. In her letter to the Vice President of the ICRC, Helen Roberts, secretary general of the WYWCA, proposed several amendments to the articles concerning women in the Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) and the Prisoners of War (Convention III). For instance, for Article 13 of the draft Prisoners of War Convention, she stated:

> Our very various and numerous experience in the service of the women and the girls in about 70 countries, allows us to estimate this article at its fair value. There are in effect numerous countries particularly in the East and in Africa where women, even if they acquired rights equal to those of the men constitutionally, are indeed often considered and treated by tradition as very lower to the men and it appears to us fair and essential to have assured a disposition such as: “and benefiting in any cases by a favorable treatment as the one that is granted to men.”

For Article 20 of the draft, on the places and methods of interment, she asked that the Article mention “specifically the necessity to have women of trust in camps or

---

49 Joachim (2007), pp.52-54.
50 The only official NGO participants of the Conference were the ICRC and the League of Red Cross Societies, both as experts.
sections of camps that are committed to the women prisoners of war, so that the particular interests of the women are *precisely* taken in consideration.” 52 With regard to the Civilians Convention (IV), she just said it had already taken into account their previous comments.

According to the response from the ICRC to her letter, the ICRC accepted the proposition on draft Article 13 and said that they are still studying the question with regard to the draft Article 20 concerning how to specify the separation of sexes in internment camps more precisely. 53

Another important women’s organization, the International Council of Women also participated in the ICRC Conference after their request for participation was accepted by a letter saying “the delegates of the international organizations invited to participate in this conference, will have not only advisory voice in the plenary sessions, but will also be able to take part in jobs of the envisaged commissions and introduce proposals” and that the ICW can participate and introduce its opinions. 54 Similarly, the International Federation of University Women was invited to send a representative to the Conference in the capacity of a visitor. 55

*What had not changed?*

Despite the fact that women started to participate in politics both domestically and internationally in greater numbers, despite the fact that human rights emerged as a powerful framework in which women were included at least on paper (such as the Universal Declaration of Human Rights), despite the fact that sexual violence was “shockingly” widespread during WWII and despite the intervention of the IAW to the wording of Article 27 of the Geneva Conventions, rape was still excluded from the list of grave breaches. The idea that rape in war is inevitable was still prevalent and it seems to carry the largest burden for the lack of change.

---

52 Ibid.
53 Letter to Miss Helen Roberts, Secrétaire Générale d’Alliance Universelle des Unions Chrétiennes de Jeunes Filles from Claude Pilloud, Chef de la Division Juridique du Comité International de la Croix-Rouge. 5 August 1948. (my translation) (ICRC-A)
55 Letter to Mr. Robert Haas, Secrétaire Générale du Comité International de la Croix-Rouge from the International Federation of University Women. 14 June 1948. (ICRC-A)
Even when historians talked about rape in war as an atrocity, the mentality of its inevitability surfaced. For example, in his propaganda book on the German atrocities during WWI, Newell Dwight Hillis describes how German soldiers were tested for syphilis in order to qualify to “use” the women kept in the military camps and the punishment for disobedience by a disqualified soldier was death in order to avoid the spread of the disease in the army. Then he comments that “under this restriction the syphilitic soldier has but one chance, namely to capture a Belgian or French girl.”

General Patton, for instance, a US Army general in WWII writes that “in spite of my most diligent efforts, there would unquestionably be some raping” by the soldiers. Another interesting observation by General Patton on the perception of rape, in this case even by the men of the occupied territory reveals the widespread mentality on the inevitability of rape in war. He writes in his memoirs of the invasion of Italy during WWII:

One very funny thing happened in connection with the Moroccan troops. A Sicilian came to me and said he had a complaint about the conduct of Moroccans, or Goums, as they are called. He said that he well knew that all Goums were thieves, also that they were murderers, and sometimes indulged in rape- these things he could understand and make allowances for, but when they came to his house, killed his rabbits, and then skinned them in the parlor, it was going too far.

Even many women thought rape was inevitable. In 1945, German women in Berlin, waited, in fear and anguish, for the Soviet soldiers to arrive and the “inevitable” to happen. Days before the arrival, some started to dress like men and some tried to appear old and dirty because when the soldiers came their major concern would be to escape from their “lust.” After the Soviet soldiers arrived, the expected happened to approximately 110,000 women. Apparently, Stalin’s declaration prohibited “this kind of

---

56 Hillis (1918), pp.55-56.
58 Ibid., pp.71-72.
59 A Woman in Berlin: Eight Weeks in the Conquered City: A Diary (2005), p.xviii, 21. Despite this widespread expectation that the rapes were bound to happen, the author of the diary also observed that if alcohol was made unavailable to the Soviet soldiers, half of the rapes would not have happened. She argues that the soldiers had to “goad themselves on to such brazen acts” and alcohol helped to “drown their inhibitions.” p.173.
thing” but as a Soviet officer said “it happens anyway.”61 One of the victims of these rapes describes rape as “something foreseen and feared,” “all somehow part of the bargain,” “a case of urges and instincts having been unleashed.”62 In Berlin, the officials even invented an expression to cover up the rather distasteful word, rape. “This kind of thing” that “happens anyway” was called “forced intercourse” which gives an idea about the way rape in war was perceived as unpleasant yet unavoidable and ultimately trivial.63

The comments of Stalin on these rapes are even more revealing in terms of how “normal,” “inevitable” and “excusable” the perception of rape was:

Does Djilas, who is himself a writer, not know what human suffering and the human heart are? Can’t he understand it if a soldier who has crossed thousands of kilometers through blood and fire and death has fun with a woman or takes some trifle?64

The fact that Stalin considered rape as “having fun” after going through the difficulties of war and find it understandable despite the fact that he formally prohibited it for Soviet soldiers expresses the double-standard about rape in war quite well. In what other instance does a state excuse the violation of orders by soldiers like this? Given that the whole military apparatus and the conduct of war depends on the maintenance of military discipline, chain of command and the enforcement of rules and orders, it would be senseless for a leader to accept the violation of his orders by his soldiers and treat the situation with such understanding except in this case of rape. Knowing this trivial treatment that the violation of orders against rape usually gets, soldiers did not hesitate conduct the “inevitable.” Aleksandr Solzhenitsyn, who was a Russian soldier in WWII, wrote:

For three weeks the war had been going on inside Germany and all of us knew very well that if the girls were German they could be raped and then shot. This was almost a combat distinction. Had they been Polish girls or our own displaced Russian girls, they could have been chased naked around the garden and slapped on the behind- an amusement, no more.65

62 Ibid., p.147, 150.
63 Ibid., p.215.
64 Djilas (1962), p.95.
After the War and the rapes were over a Russian newspaper editor interpreted the rapes in a similar manner: “We were naturally not one hundred percent gentlemen; we had seen too much.”

Germany documented the use of rape by German soldiers during WWII and these documents were presented at the Nuremberg trials in 1946. The reason that they documented the rapes was that they wanted to be seen as having a concern for legality so much that they were even gathering reports of unofficial atrocities. “The official German position was that ‘uncontrollable elements’ were responsible for the ugly excesses.”

Another mass rape occurred in Nanking in 1937 when the Japanese Army invaded the Chinese city. The case was brought before the Tokyo Tribunal after the War. However, looking at the comments on the rape of Nanking in its decisions, the Tokyo Tribunal did not seem to divest itself from the idea of the inevitable (and excusable) rapes that are bound to happen during the first days of the capture of a city as a result of the exhilaration of conquest. In its judgment convicting the perpetrators of rape the Tribunal explained:

Even girls of tender years and old women were raped in large numbers throughout the city, and many cases of abnormal or sadistic behavior in connection with the rapings occurred. Many women were killed after the act and their bodies mutilated… The barbarous behavior of the Japanese army cannot be excused as the acts of a soldiery which had temporarily gotten out of hand when at last a stubbornly defended position had capitulated- rape, arson and murder continued to be committed on a large scale for at least six weeks after the city had been taken.

This wording suggests that the Tribunal thought that if the Japanese Army did not continue raping for six weeks after the conquest and if the rapes did not accompany “abnormal” behavior like murder and mutilations especially on children and old women, the Tribunal could have excused the “normal” behavior, i.e. rapes as the acts of boys that got out of control.

Cynthia Enloe argues that one solution that the state officials have historically found to the problem of “inevitable rapes” is providing organized prostitution to soldiers.

---

67 Ibid., p.55.
In other words, the connection in the minds of the states between the “need for sex,” the use of brothels and rape brings hence their beliefs about the impossibility of preventing rape in war led to their tolerance, encouragement or in some cases even active contribution of the use of prostitutes to the armed forces. According to Enloe officials conceive rape and prostitution together. They imagine that providing organized prostitution to male soldiers prevents the same soldiers from raping women.69

The “comfort women,” for instance, represents such a case.70 During the 1930s and 1940s, the Japanese Army partly recruited and forced women into prostitution to serve in military brothels, giving “comfort” to the “famished tigers” of the Japanese armed forces. They started the process in early 1930s and accelerated after 1937. According to the military correspondence of the Japanese Army in 1930s, there were various reasons for the large-scale use of “comfort women.” Firstly, Japanese soldiers had raped Chinese women in occupied areas on numerous occasions, which increased the anti-Japanese sentiments making the management of occupied territories complicated. Secondly, contact with Chinese women could lead to the leak of military secrets. Thirdly, the government wanted to control the spread of venereal diseases in the Army in order to prevent the reduction of military effectiveness.71 General Yasuji Okamura, the Vice Chief of Staff of the Shanghai Expeditionary Force of the Japanese Army at the time wrote:

There were not ianfu (comfort women) in former years of military campaigns. To speak frankly, I am an initiator of the comfort women project. As in 1932 during the Shanghai Incident some acts of rape were committed by Japanese military personnel, I, Vice Chief of Staff of the Shanghai Expeditionary Force, following the example of the Japanese naval brigade, asked the governor of Nagasaki prefecture to send comfort women groups. As a result, rape crimes totally disappeared, which made me very happy.

At present each army corps was accompanied by a comfort women group, as if the latter constitutes a detachment of its quarter-master corps. But rape acts did not disappear in the Sixth Division, even though it was accompanied by a comfort women group.72

71 “Who were the Comfort Women?-The Establishment of Comfort Stations.” Also see Hicks (1995).
72 “Okamura Yasuji taisho shiryo I: senjo kaisohen,” Tokyo, 1970 quoted in “Who were the Comfort Women?-The Establishment of Comfort Stations.”
Similarly, the German Army kept prostitutes, in particular for preventing venereal diseases and increasing “morale” despite the Nazi regime’s ideological opposition to prostitution as an institution not in line with the Nazi objective of “a nation of chaste families.”

During France’s colonial rule in Indochina, the French Colonial Forces had a mobile field brothel attached to it. Against attacks on the institution from a moral point of view, people argued that it was “providing the soldiers with a controlled sexual release, thus cutting down on desertions, on rapes of hapless girls of the surrounding civilian population, and also on venereal disease.” General Patton, being one of the people who believed in the necessity of such an arrangement to avoid “unpleasant” but “inevitable” incidences like rape, wanted to make this kind of arrangement for the American soldiers during WWII. As a general who “always understood the needs of his troops,” he had to give up the idea because of its potential consequences of outraging the wives and mothers in the US and slowing down the war effort.

These historical examples clearly show, the “official” use of prostitution had been a military response to a practice they did not believe they could prevent. By satisfying the “sexual hunger” of the soldiers through the use of brothels, militaries tried to limit the rape cases (among other things) to a certain extent but as the Japanese general in the Nan King case admitted, it had not proven to be an effective policy for the most part. Soldiers, “revved up by war” seemed to resort to rape whether they were “hungry” enough or not. Therefore, writing a clear prohibition into law and establishing rape as an illegal besides an illegitimate practice, when the probability that some of your soldiers will inevitably rape did not seem attractive to states.

B. The Additional Protocols (1977)

The ICRC gathered four international conferences between 1974-1977 because of the increasing sufferings of civilians during the wars in 1950s and 1960s due to the new

---

74 Fall (2005), pp.132-133.
75 Ibid., p.133.
weapons technologies and civil wars. They were ratified by 167 states, the US being an important exception. While being an extension of the Geneva Conventions (1949), in terms of their scope and tone scholars consider them to be somewhere in between the Law of The Hague and the Law of Geneva because they regulate both the methods of warfare/conduct of hostilities and the protection of civilian victims of war.

I. The Law

In the two Additional Protocols to the Geneva Conventions the issue of rape was revisited. In these additional texts, in terms of delegation, nothing changed because rape is still not included among the grave breaches. However, there are some developments in obligation and precision: Although there is no change in the First Protocol related to the Protection of Victims of International Armed Conflicts in terms of the degree of obligation, the Second Protocol, on the Protection of Victims of Non-International Armed Conflicts, adopted a language of prohibition instead of protection. Also, in both Protocols, rape is no longer mentioned as an attack on the honor of women.76

Looking at the handling of the issue at the Diplomatic Conference in Geneva that met between 1974-1977, we get a deeper understanding of international lawmakers’ perceptions and intentions. The Additional Protocols (1977) ended up with continuing problems of obligation and delegation with regard to rape even with the minimalist approach used here, which accepts high degrees of obligation and precision combined with at least a low degree of delegation to be the necessary requirements of a prohibition regime. Protocol I continues to use a language of “protection” instead of “prohibition” creating the problem of obligation and rape is excluded once more from grave breaches by refraining to mention it specifically among grave breaches, creating the problem of delegation.

Obligation problem in the Additional Protocols:

The problem of obligation in the Additional Protocols emerges out of the use of the word “protection” rather than “prohibition” in Protocol I when it comes to rape. Article 76 of Protocol I says “Women shall be the object of special respect and shall be

76 See Appendix A.
protected in particular against rape, forced prostitution and any other form of indecent assault.” What does “women shall be protected against rape” mean? Who is supposed to protect them against the attacks of whom? Will anybody be punished if they do not protect women from being raped, or will anybody be punished if they rape women? What will happen to them? One might think the difference between protection and prohibition is just a nuisance and that the writers of the law did not even think of it as having different consequences. The evidence shows otherwise. The importance of clarity and specificity in law is a known fact. The lawmakers that wrote the Additional Protocols were aware of this fact, too. Especially when their objective was to make these laws effective, we see a clear effort on their part to clarify even the smallest details on the subject. For example, during the debates on the protection of the civilian population, “certain delegates stressed the need for a still better definition of military objectives and civilian property, so that a clear distinction was preserved between these two concepts; such a distinction was essential in order to ensure effective protection for civilian property.”

Precisely because of the problem of clarity and specificity, the debates over Protocol II became troublesome endangering its adoption or ratification until the delegation of Pakistan, after consultation with other delegations, had prepared a version of Protocol II (CDDH/427 and Corr.1), which was simplified. Mr. Hussain, the Pakistani delegate, said they prepared it on the thesis that “its provisions must be acceptable to all and, therefore, of obvious practical benefit; the provisions must be within the perceived capacity of those involved to apply them and, therefore, precise and simple.”

Likewise, we can find the indications of the significance of wording in many places. During the debates over Article 2 of draft Protocol II (CDDH/402) a proposal (CDDH/430) to add at the end of paragraph 1 the following words was made: “It shall not be ordered that there shall be no survivors.” On that note, the Canadian delegate, Mr. Miller said that the Canadian delegation had no objection to the adoption of that amendment, but would point out that its sponsor had based the wording on the text of

---

Article 2 of draft Protocol II (CDDH/402). He suggested that the same wording should be used: “It is prohibited to order that there shall be no survivors.”  

Again during the debates at Working Group B, “certain delegations stated that it was desirable that corporal punishment should be expressly prohibited.”  

Agreeing that such punishment should be described in the words “or any form of corporal punishment,” they sent it to Committee I. At its 39th meeting, on 11 April 1975, Committee I considered article 6 of the draft Protocol II. It voted on the last phrase, placed in square brackets, in paragraph 2 (a), i.e., the words (proposed in English) “or any form of bodily harm.” The Committee rejected those words by 7 votes to 2, with 42 abstentions. Next it voted on the first phrase placed between square brackets, in paragraph 2 (a), i.e., the words “or any form of corporal punishment.” Those words were adopted by 46 votes to 2, with 11 abstentions. Paragraph 2 (c) was adopted by consensus, after the words “in the form of acts of violence committed against those persons” had been deleted by a vote of 26 votes to 17 with 19 abstentions.

Similarly showing the diligence of delegates in writing the wording of the law, when it came to Article 65 of draft Protocol I (fundamental guarantees) Mr. Herczegh from Hungary said… his delegation “supported the amendment by Ireland (CDDH/III/308), because the prohibition of torture could not be too strongly reinforced.” He also said Hungary approved the amendment sponsored by Austria and the Holy See (CDDH/III/310) and viewed with sympathy amendment CDDH/III/311, although it “feared that the obligation to accommodate as family units families held in the same place of internment could not always be fulfilled by countries in armed conflict” and “the insertion of the words ‘as far as possible’ would make it easier to accept the texts” on the subject (paragraph 4 of Article 65). He also supported the comment made by the Yugoslav representative that “a better place for that paragraph would be Article 67, which dealt with the protection of women” which was the article dealing with rape. So, for Mr. Herczegh, the exclusion of Article 67, hence the issue of rape, from the fundamental guarantees did not constitute a problem but the issue of family units that

---

79 Ibid., p.87.  
81 Ibid., p.49.
needed to be excluded from fundamental guarantees (due to the difficulty of its implementation) had to be thrown into Article 67. He said that his delegation associated itself with the efforts made to enlarge the judicial guarantees that were the subject of paragraph 3 but it was a very complex question because of the differences between the criminal law systems of the various countries.82

The interesting thing about this last discussion is that the Hungarian delegate not only supports a stronger prohibition of torture and is satisfied with rape not being among fundamental guarantees, but he also wants to exclude something (accommodating family units in prison) from the fundamental guarantees by saying that they may not be enforced effectively and therefore the language on this subject should be softened (by saying “as far as possible”) and that this softened item should be put together into the same article as the protection of women. In the end, accommodation of family units stayed in Article 65 (Article 75 of the final text) but the discussion gives us an idea about the way protection of women was viewed at least by some of the delegations, which could explain the lack of attention hence lack of obligation in the case of rape.

What is remarkable in this case is the situation with Protocol II. We see rape being included among paragraph 2 of the fundamental guarantees as a prohibition (Article 4, paragraph 2(e)). This happened thanks to the suggestion of the delegate of Madagascar who pointed out that paragraph 2 (e) embodied the same concept (“outrages upon personal dignity, in particular humiliating and degrading treatment”) as Article 6 bis (which was the article about “the protection of women” from rape in the draft Protocol II). He proposed that rape should be mentioned in the sub-paragraph as in that article.83 Mr. Hussein, the delegate of Pakistan supported that proposal and suggested that the word “rape” should be added after “enforced prostitution.”84

Therefore, when it came to Article 6 bis following Mr. Hussein’s suggestion to delete it since the content of Article 6 bis was the same as that of paragraph 2 (e) of Article 6, the delegate of Canada, Mr. Miller indicated that he would have opposed the change, if it meant the deletion of “rape” from the Protocol but changing the place of the

83 Official Records (Bern, 1978), V.7, p.89.
84 Ibid., p.89.
word was fine. He said he recalled that “his country had always been profoundly concerned with the question of the protection of women and children.” Since, however, the representative of Pakistan had agreed to add the word ‘rape’ to paragraph 2 (e) of Article 6, he was satisfied and would not vote for the retention of Article 6 bis. Hence Article 6 bis was deleted by consensus.\(^85\) This is the only debate concerning the status of rape in the Protocol.

It seems that the delegate of Madagascar made this suggestion for the sake of parsimony since there is no discussion on the matter of protection versus prohibition with respect to this matter and it is interesting that these lawmakers who parse every word when it comes to other issues, suggested and accepted such a change with no debate or effort for justification at all. Should we think this is the case because they did not think it was an important change? If that is the case, why not make the same parsimonious change in Protocol I and put rape into Article 75 (fundamental guarantees), paragraph 2(b), instead of leaving it as a separate article on the Protection of Women and Children? What is the role of the fact that Protocol II applies only to domestic wars as opposed to international wars here? Is it possible that most delegations did not consider Protocol II as important as Protocol I hence did not care to debate on it? Can the American delegation’s evaluation of the Conference give a clue about this matter? According to its report “the worst combination of results was achieved” because,

Committee III adopted relatively rigorous provisions for Protocol II, and Committee I adopted a relatively high threshold of application...as a result, the goal of strengthening the law applicable to internal armed conflicts has been dealt a serious blow; even if ultimately adopted by the Conference...there is substantial doubt that the provisions of Protocol II would ever be applied.\(^86\)

The American delegate to the Conference Mr. Aldrich later wrote that:

As for Protocol II, I regret that the Diplomatic Conference largely failed. Though of some value, that Protocol has much too high a threshold of application and too little in the way of substantive rules. The Conference allowed this to happen in

\(^85\) Ibid., pp.90-91.
\(^86\) Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation of International Humanitarian Law Applicable in Armed Conflicts, Second Session, Geneva- Switzerland, February 3- April 18, 1975, Prepared by Ronald J. Bettauer. The term “high threshold of application” refers to the definition of the parties who are supposed to apply the Protocol. The term “high threshold of application” refers to the definition of the parties who are supposed to apply the Protocol. The insurgents, for instance, in internal wars should meet certain criteria (like being under responsible command or controlling a territory) in order to be in a position to apply the Protocol.
order not to endanger Protocol I and because of the adverse reaction of many
developing countries to the draft Protocol II developed by the three main
committees at the Conference. So long as governments worry that they might
enhance the status of rebels merely by agreeing to treaties restricting how rebels
may be treated, the treaty route may not be the most promising way of developing
the law.\textsuperscript{87}

Alternatively, we can think back about the difference between the Lieber Code
(1863), which was written for a civil war and The Hague Conventions which were going
to apply to international laws in terms of their inclusion and exclusion of rape. How much
does the idea of inevitability of rape change according to the type of conflict that we are
dealing with? Commenting on the Vietnam War which preceded the writing of the
Additional Protocols and affected important aspects of them, Susan Brownmiller points
to the fact that incidents of rape are fewer in civil wars\textsuperscript{88} because it is seen as a struggle
of brother against brother. Given that rape was uncommon during the American Civil
War too, she attributes this rarity to the “code of honor” among men which bans attacking
“one’s sister or one’s buddy’s sister.”\textsuperscript{89}

Under the light of these facts, the prohibition of rape in the Lieber Code makes
more sense. Given that Lieber, who wrote the prohibition of rape into the first codified
law of war, wrote it for a civil war helps us understand why he did it as opposed to the
writers of The Hague Regulations. After all, Lieber was deeply involved in the War
himself being the father of three sons fighting on both sides, a literal fight of brother
against brother. The stress this situation produced gave Lieber not only a realistic
approach to laws of war but also a “strongly humanitarian feeling.”\textsuperscript{90} It seems that he
thought when it comes to women who may be the wives or daughters of your brother
instead of some unknown women belonging to the evil enemy, rape should and could be
avoidable. It is also necessary to reemphasize the fact that the Lieber Code was written as

\textsuperscript{87} Aldrich (1997), p.510.
\textsuperscript{88} This is when she talks about the rape cases between the South and North Vietnamese, not the rapes
committed by the American forces. Although rape cases committed by the South Vietnamese increased as
the war progressed, Northern forces never resorted to rape. Brownmiller (1975), pp.88-90. Also, the civil
wars with low rates of rape that she talks about are not the ones with ethnic and religious divisions which
would be high-rape wars in the later part of the 20\textsuperscript{th} century like former Yugoslavia and Rwanda.
\textsuperscript{89} The rarity of rape during the American Civil War can also be tied to the fact that it was prohibited by the
Lieber Code clearly and enforced as such.
\textsuperscript{90} Freidel (1947), p.325.
an army code, not international law. This means it would not bring any obligations on the United States the way a multilateral treaty like The Hague Conventions would bring. Hence it is possible to expect less attention paid to the possibility of compliance and less maneuvering on the part of a state to clarify or not clarify the exact obligation.

Although Protocol II brings about the most important change with respect to rape, there is one important development with Protocol I: the elimination of “honor” as the object of the protection of women from rape. This development happened with the initial draft prepared by the ICRC. Mr. Surbeck, the representative of the ICRC at the Conference introduced the change by saying that:

[A]t the present state of international humanitarian law women were protected only by a few scattered provisions. That was evident in the Geneva Conventions of 1949, especially in the fourth Convention. Women who were not in a special situation such as pregnant women or those responsible for young children were protected as such only by Article 27, second paragraph which stated that ‘Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution or any form of indecent assault.’ That wording had been repeated almost completely in article 67 which was before the Committee. In the wider application of Section III of Part IV of draft Protocol I, of which article 67 was a part, paragraph 1 envisaged extending to all women without exception the protection which was granted to them by the second paragraph of Article 27 of the fourth Geneva Convention.91

The removal of “honor” from the article is interpreted as a “minor drafting change”92 and there is no comment on its importance during any of the meetings. The wider application that is referred to here is about the extension of the scope of the article to all women on the territory of the Parties to the conflict with no distinction rather than only to those who fulfill the conditions of Article 4 of the Fourth Convention (those who are not the nationals of the power on the territory.)93

As a result, the Additional Protocols bring about important changes, both by getting rid of the word “honor” and using the word “prohibition” in Protocol II but Protocol I, as the Protocol establishing the rules in international wars continues to create an obligation problem by failing to “prohibit” rape.

91 Official Records (Bern, 1978), V.15, p.56.
92 Bothe et al. (1982), p.469.
Delegation problem in the Additional Protocols:

The delegation problem in the Additional Protocols with respect to rape arises from their failure to include rape among grave breaches once again (just like the original Geneva Conventions) although the Conference added new items on to the list of grave breaches (with Article 85) and even attempted to establish an International Criminal Tribunal to take the cases related to them. I will analyze this failure under three subheadings: first, I will look at the new grave breaches added to the Conventions; second, I will look at the process of adding these during the Conferences and third, I will look at the failed attempt to establish an International Criminal Court.

a) New grave breaches:

Upon the suggestion at the 1971 Conference, a “questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions” was sent to State Parties. According to the replies from them, ICRC prepared a new draft extending the repression of the breaches system of the Conventions. Consequently, Article 85 (Draft Protocol Article 74) was written dealing with grave breaches. Paragraph 3 and paragraph 4 lists the new set of unacceptable behavior that will be classified as grave breaches in addition to the grave breaches mentioned in Article 11 that handles the prohibition of medical and scientific experiments, mutilations, the removal of tissues and organs for transplantations, blood transfusions and other acts that may endanger the physical or mental health and integrity of the person. These new grave breaches are:

* making the civilian population or individual civilians the object of attack;
* launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, making non-defended localities and demilitarized zones the object of attack;

* making a person the object of attack in the knowledge that he is hors de combat;

95 See Appendix A.
*the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and
sun or of other protective signs;
*the transfer by the Occupying Power of parts of its own civilian population into the
territory it occupies, or the deportation or transfer of all or parts of the population of the
occupied territory within or outside this territory;
*unjustifiable delay in the repatriation of prisoners of war or civilians;
*practices of apartheid;
*making the clearly-recognized historic monuments, works of art or places of worship
the object of attack;
*depriving a person protected by the Conventions or referred to in paragraph 2 of this
Article of the rights of fair and regular trial.

As we see from this long list, grave breaches started to include some new issues
like apartheid in addition to some less severe issues (compared to rape) like making
historic monuments and art the object of attack but still excluded rape.

b) The Process:

As we can see, just like the Geneva Conventions of 1949, the Additional
Protocols also do not mention rape as a grave breach of the humanitarian law. In the
matter of how these new grave breaches were added to the Protocol and whether they just
forgot to add rape, we can look at Bothe et al. According to them, during the Conference,
the delegations had a near consensus on the necessity of a clear distinction drawn
between grave breaches and other breaches and only certain acts should become grave
breaches, but there was a big disagreement on which acts.96 Some Eastern European
states along with some countries from the Third World and certain individual delegations
from Western Europe wanted to follow the model of war crimes tribunals and also to
include breaches committed on the battlefield (Parts III and IV of the Protocol, which
includes Article 76 related to the protection of women). However, the majority of
Western European states and other countries “advocated proceeding with the utmost care
over the inclusion of breaches committed on the battlefield. They argued that such
breaches were only loosely formulated in the basic provisions of the Protocol concerned

and that it would also be difficult to produce proof of such acts. In any event a much stricter definition of such acts would be necessary. 97

One would think that if the formulation of the acts was the problem, reformulating them would be the next step instead of leaving them loose in the articles and ignoring them altogether when it came to enforcing them. In fact, that is what happened with the new grave breaches created by Article 85. Article 85, which brings together the grave breaches of the Geneva Conventions (1949) and the law of The Hague was very controversial at first. Since many delegations were opposed to this combination what they did was to define each individual item on the Article with great caution, i.e. concrete and strictly clear definitions with a solid basis in the Protocol. 98 Rape was not one of them. Some attempts to add other things on the list of grave breaches failed but no delegation tried to include rape on the list.

Examining some of these attempts, though, gives us an idea about the degree of diligence the delegations showed in writing this new article, which sheds light, once again, upon the fact that they left out rape and did not think it was already there hidden in one of the grave breaches. When the Philippine delegation introduced an amendment (an amendment to add a new sub-paragraph (g) to paragraph 3 of Article 74 (CDDH/418) making the use of weapons prohibited under The Hague Declaration of 1899 and the Geneva Protocol of 1925 a grave breach), Mr. Aldrich, the United States delegate criticized the attempt by saying that:

At the present stage of international legal development, the criminal law [is] not the proper vehicle for dealing with the problem of weapons. Grave breaches [are] meant to be the most serious type of crime; Parties [have] an obligation to punish or extradite those guilty of them. Such crimes should therefore be clearly specified, so that a soldier would know if he was about to commit an illegal act for which he could be punished. The amendment, however, [is] vague and imprecise. 99

The Australian delegation also had problems with the new grave breaches as they explained them with their vote on Article 74 of draft Protocol I (Article 85 in the final

97 Ibid., p.512.
98 Ibid., p.514, 522.
Their argument was that Article 74 was both “vague and impracticable” and “inconsistent with the basic tenets of criminal law.” The reason for these flaws was that:

Any behavior which could give rise to punishment on the basis of universal jurisdiction should, among other things, be carefully identified. Not only should the nature of the offence be clear but the subject and object of the offence should also be clearly identifiable. It is essential that those who engage in warfare should not be confronted with accusations and criminal proceedings for matters which they could not reasonably expect to be a grave breach.

Therefore, Australia demanded greater precision in Article 74 to ensure better implementation of the article and greater justice for all.100

It is clear that these states selected what they wanted to be considered a grave breach, ensured that they are stated in the law very clearly and made it their job to emphasize that these acts and only these acts (which did not include rape) would be treated as grave breaches. Bothe et al. indicate to this point when they discuss Norway and Sweden’s attempt to add breaches of Article 54 of the final text of Protocol I (Annex B to CDDH/I/324 and CDDH/I/SR. 64, para. 8) into the list of grave breaches. The article deals with the protection of objects indispensable to the survival of the civilian populations. When it came to the discussion of whether or not attacks against the natural environment (covered by Article 55, which also prohibits attacking the natural environment by way of reprisals) qualifies as an attack to the objects indispensable to the survival of the civilian population, the ICRC argued that the natural environment was not an “object” (CDDH/III/SR.20, para.7). Bothe et al. say,

But, why then does Art. 55 form part of Chapter III on civilian objects and why are reprisals against the natural environment prohibited if it is not an object? In the course of the discussion it was also argued that the question whether such attacks should be regarded as grave breaches was not correctly put: this question belonged to the problem of whether reprisals were legitimate or not (US, CDDH/III/SR.24, para.39). This leads to the question of the relationship between grave breaches and reprisals. Both are forms of implementation. Under a system where grave breaches are prosecuted not by an international institution but by States Parties both are unilateral measures. There are, however, no general rules which would generally prohibit reprisals in cases where a prosecution of grave breaches is possible, nor any which provide that all acts which are prohibited as reprisals are automatically also grave breaches. There may be a presumption that an act which is prohibited as reprisal should also be a grave breach (in view of its

100 Ibid., p.297.
gravity), but it is not more that a presumption and it is up to the legislator whether he is willing to follow it or not.\textsuperscript{101}

There is no way to presume an act, because of its relationship to another act that is on the list of grave breaches or because of its gravity, to be an implicit grave breach of the Geneva Conventions and expect State Parties to act accordingly, not only because there is no international institution to interpret the law but because the law was written as such.

c) An International Criminal Court:

Some of the experts that the ICRC consulted for writing the draft Additional Protocols envisaged an international criminal court on the model of the Nuremberg Tribunal despite ICRC’s resistance to the idea.\textsuperscript{102} With the proposal of Philippines delegation (CDDH/56, Add.1 with Rev.1), they added a new section (“New Section III-Draft Code of International Crimes in Violation of the Geneva Conventions of 1949 and the Additional Protocols\textsuperscript{103}”) to the draft Protocol I outlining an international criminal court or tribunal although it would never be part of the actual Protocol. According to Article 12 of this new section,

There is established an International Criminal Court or Tribunal to try persons accused of grave breaches of or crimes under international law, or the law of war, as may be provided in conventions or special agreements among States Parties to the present Convention.\textsuperscript{104}

What would be the grave breaches that would be handled by this Court? Article 2 (“Classification of crimes against humanity”) and Article 4 (“Classification of crimes against the laws and customs of war” listing grave breaches) mention many acts that would be tried by the Court among which we do not find rape. Anything that can come close to it would be Article 4(a): “Any act perpetrated against, and causing bodily harm to, women, children, the sick, and the aged,” which is very imprecise and unclear. While they ignored rape again in these two Articles, what is interesting is that pillage is

\textsuperscript{101} Bothe et al. (1982), p.522.
\textsuperscript{102} Ibid., p.507.
\textsuperscript{103} Official Records (Bern, 1978), V.4, p.126.
\textsuperscript{104} Ibid., p.132.
prohibited five times in various forms four of which (Article 4) are considered to be grave breaches: “plunder of populations” (Article 2 (n)), “the destruction or seizure of the enemy’s property” (Article 4(l)), “pillage of any town or place” (Article 4(n)), “confiscation of private property” (Article 4(o)) and “forcible requisitions” (Article 4(p)).

States did not want to handle rape even within the context of debating over an international criminal court that did not have a chance to come into being in the political context of the time. However, they found it necessary to reemphasize the protection of private property forcefully at every opportunity.

The next question is “what was the normative context at the time that made some improvements in international law regarding women possible but could not take it far enough?”

II. The Normative Context and the Main Actors

After World War II, two things increased the pace of change (that started in the 19th century) of the normative context which regarded women as property of men: the emergence of ‘human rights’ as a central concept in world politics and later the emergence of women’s movements on a global scale. Women’s struggles particularly during the 1950s, 60s and 70s for political, legal and economic rights of women, especially their activism at the UN, would lead to an increase in the ‘visibility’ of women in the international arena as ‘full’ candidates for human rights. These changes ultimately problematized the treatment of rape by international law.

However, before I turn to global women’s movement and rape’s appearance on its agenda, I will look at the anti-rape movement in order to understand the emergence of rape as a central topic for feminists. For this, it is necessary to look at second wave feminism, which emerged in the 1960s and continued into the 1970s in the Western world before it spread out into the ranks of international feminism in the late 1970s and early 1980s.

Second wave feminism emerged in the 1960s (particularly in the United States) when women’s frustration both in the workplace and in their homes began to radicalize as

---

105 Ibid., pp.128-129.
they faced discrimination or exclusion from the public sphere after the end of World War II. The motto of the second wave was equality, not only in terms of political rights as the first wave had accomplished with suffrage, but also in terms of economic and social rights. Western feminism’s demands for “true equal partnership with men” and an end to “the relationship of dominance and subordinance” would soon lead feminist concerns over the female body to surface. In 1968 and 1969, feminists protested the Miss America contest as objectifying and diminishing women. In 1971, Juliet Mitchell wrote that for the liberation of women four areas of women’s lives needed to be transformed: production, reproduction, sexuality and the socialization of children. Consciousness-raising groups were formed where women came together to “share, recognize and name” their oppression, for “speaking the unspoken.” One of these “unspokens” was rape and some second wave feminists took on the issue as emblematic of women’s oppression and vulnerability. As a result an anti-rape movement developed in the 1970s parallel to the second wave of feminist movement. It started in the US and would eventually spread to the rest of the world starting in mid-1970s and 1980s.

Speaking out about rape broke up the taboo of silence on the issue on the part of women. This silence that has been imposed on women (as we see in the 19th century cases) not only prevented prosecution and punishment of perpetrators over the centuries but also reinforced the view that rape is a form of sex (hence inevitable) that one needs to be discreet about.

The speak-out also helped women to learn that rape is not necessarily the product of the diseased minds of perverts that happen to some unfortunate women; instead it is a pervasive tool of oppression that makes its presence felt in every woman’s life. In 1971, the New York Radical Feminists organized a “rape speak-out” and a rape conference and the first rape crises center in the US, “the Bay Area Women against Rape,” was formed. The same year, one of the leading radical feminists, Susan Griffin’s landmark article, “Rape: The All American Crime” was published questioning why women have always had to live with the fear of being raped. The issue of rape was accelerating the

---

107 Mitchell (1973), pp.101-120.
divergence of radical feminists from the mainstream liberal women’s movement in the United States which wanted to retain a “respectable” image and societal approval and thought “offensive” or “taboo” concepts like sexuality and rape could damage that. However, liberal feminists would eventually start anti-rape work in 1973.110

Rape was different from the other topics on feminists’ agenda in that there seemed to be no place for controversy in it. While there could be deep divisions not only among feminists but also within the society on the issue of abortion, for instance, it is unimaginable for anyone to be pro-rape (although whether or not feminists need to put it on the agenda caused some stir among them.) The legal treatment of rape throughout much of history seemed to be confirming this double-standard since on paper rape has always been a crime. However, feminists would help surface the fact that behind this façade there was an underlying “rape culture” where “sexual assault is tolerated, violent and sexual images are intertwined, women are blamed for being raped, sexist attitudes prevail, and male sexual privilege goes unquestioned.”111 They had to deal with the problem of the dismissal of rape’s seriousness as a crime by both the legal and medical authorities and the society at large, they had to challenge the rape myths (like “inappropriate behavior” brings on rape or that uncontrollable male sexual drive/passion especially sex starvation cause rape) and they had to develop a “pro-woman understanding of rape” in order to make lawmakers take rape seriously.112

As the anti-rape movement started to emerge within the feminist movement with the purpose of destroying the rape culture and the rape myths one of the most important books of the movement was published in 1975 providing the basis of the feminist anti-rape ideology. In her groundbreaking book Against Our Will, Susan Brownmiller argued that historically rape has played the critical function of holding women under male dominance by means of “a conscious process of intimidation” and all political and legal systems are created to perpetuate that fear and hold women “in their place.”113 Her claim that rape is not about sex or passion but about violence would be one of the basic tenets of the anti-rape movement. By using research and victims’ testimonies, anti-rape activists

111 Ibid., p.9.
112 Ibid., pp.9-10, 58-59, 63.
113 Brownmiller (1975).
tackled (among other myths) the rape myth about the sex-starved man raping to fulfill his sexual needs. Instead, they maintained that what triggered rape has always been the desire for power, control, brutalization and humiliation.\footnote{Bevacqua (2000), p.63. The psychiatric profession is partly responsible for reinforcing the myth that uncontrollable sexual urges of men or some psychological problems related to them lead to rape. See Brownmiller (1975). pp.176-179.}

Therefore, starting in the 1970s, in the United States, the anti-rape movement managed to create a new awareness of rape both at the societal level and at the public policy level by forming coalitions among different women’s groups, holding media campaigns and lobbying legislatures for new rape laws. Many women in the legal profession joined the anti-rape movement providing legal expertise for the push for legal reform as well as legitimacy to the anti-rape cause through their “appeal to law-and-order sensibility.”\footnote{Bevacqua (2000), p.106. Anti-crime sentiments and the conservative politicians who wanted to play into those sentiments through the law-and-order approach for political gain helped the anti-rape legal agenda though it meant feminists had to compromise their struggle for reframing rape as a form of male domination. Instead, the lawmakers and the society at large considered the new rape laws as a chance to “protect women” from just another crime rather than as a step towards ending sexism by ending the violation of women’s bodily integrity. Ibid., p.121.} The rape cases around which feminists organized and rulings and statements by the courts belittling rape and rape victims which were widely publicized by the media also helped to raise public consciousness, sympathy for victims and eventually helped the legal changes by proving feminists’ point about rape myths and women’s victimization through them. Women legislators also played a crucial role in terms of introducing and furthering anti-rape legislation particularly at the federal level.\footnote{Ibid., pp.127-131, 135-136.}

Through achieving changes in the “redefinition of rape in laws, evidentiary rules, statutory age offenses and penalties,” anti-rape activists aimed at “increasing the reporting of rape,… prosecution and conviction rates, improving the treatment of rape victims in the criminal justice system, achieving comparability between the legal treatment of rape and other violent crimes, prohibiting a wider range of coercive sexual conduct [and] expanding the range of persons protected by law.”\footnote{Ibid., p.93.}

As a result, rape stopped being a taboo that cannot be spoken of or something women should blame themselves for. Feminists also were able to push for new policies on issues like marital rape, rape-shield laws (to prevent the admittance of victim’s sexual

\begin{footnotes}
\item Bevacqua (2000), p.63. The psychiatric profession is partly responsible for reinforcing the myth that uncontrollable sexual urges of men or some psychological problems related to them lead to rape. See Brownmiller (1975). pp.176-179.
\item Bevacqua (2000), p.106. Anti-crime sentiments and the conservative politicians who wanted to play into those sentiments through the law-and-order approach for political gain helped the anti-rape legal agenda though it meant feminists had to compromise their struggle for reframing rape as a form of male domination. Instead, the lawmakers and the society at large considered the new rape laws as a chance to “protect women” from just another crime rather than as a step towards ending sexism by ending the violation of women’s bodily integrity. Ibid., p.121.
\item Ibid., pp.127-131, 135-136.
\item Ibid., p.93.
\end{footnotes}
history in court) or corroboration requirement (the necessity of independent evidence for rape prosecution to corroborate the identity of the assailant, penetration and victim’s non-consent) among others.

In addition to the legal changes, rape crises centers became widespread providing support for the victims and collaborating with the law enforcement and medical professionals to ensure justice for the rape victims as well as helping the campaign for rape law reform by locating the weaknesses in the law through their proximity to the legal process.118 By achieving considerable change in public opinion about women (like the recognition of women as free individuals entitled to determine their own life styles and plans) feminists managed to break the silence about women’s oppression through customs and law pertaining to rape. By 1996, all states in the US reformed their rape laws including the marital rape laws.119 Eventually, the anti-rape movement spread in the Western world and as a result, rape laws in most Western countries were changed to respond to women’s demands for sexual integrity.120

One other important development that accompanied the social activism of women against rape and rape myths was the new academic work into the causes of rape that started to deconstruct the idea of inevitability. Besides the previously mentioned feminist theorizing with its emphasis on the sexual inequality and power relations as the sources of rape,121 scholars applied the social learning theory in psychology to rape in the late 1970s-early1980s.122

According to social learning theory, proposed by a leading psychologist, Albert Bandura in the 1960s and 1970s, people learn behavior through observation and imitation

---

118 Ibid., p.105. Also see Matthews (1994).
119 Patricia Smith regards the changes in rape laws as surprisingly few (especially in terms of the definition of rape) given that cultural attitude towards rape changed considerably since 1970s. See Smith (1999), p.35. Alternatively, Susan Estrich considers the changes in law very comprehensive but she thinks the law change did not bring about much change in the attitudes towards rape (by the 1980s) especially by the courts. Estrich (1987), p.80.
120 Besides the changes in all states in the US (by 1996) and Canada (1983), 22 European countries changed their rape laws between 1980 and 2003; 21 of these changes happened before 1998. Regan and Kelly (2003).
hence through the interaction of cognition and environment.\(^{123}\) The implications of this theory to the theorization of rape was an understanding of sexual behavior manifested in rape as a behavior learned, transmitted and reinforced through repeated exposure to social interpretations of sex roles. These socially constructed sex roles portray women as the passive sex that is to be dominated and cultivate an aggressive and forceful masculinity for men. Social attitudes that excuse or justify rape further act as negative reinforcements for rape by eliminating the idea that it is an unacceptable behavior.\(^{124}\) In other words, men learn sexual aggression through their exposure to violent pornographic materials, various rape myths like “no means yes” or through sex role scripts and the fact that society does not effectively discourage it as a non-excusable behavior perpetuates the social learning process.\(^{125}\)

This theory was obviously in stark contrast with the widely held social beliefs about the cause and nature of rape that produced the idea of “inevitability.” In combination with the feminist theories on rape, it also started to shape the way feminists framed their arguments about rape hence exposing both the lawmakers and policymakers and the wider public to the idea that rape is not inevitable. Instead, it is a learned behavior that has been reinforced by the lack of adequate social and legal emphasis on its illegitimacy. In the case of wartime rape, the idea that the militarized culture of “enemy,” “soldiering,” “victory” and “defeat” enables the practice would ultimately become another important point.\(^{126}\) Hence, if rape is learned it can be “unlearned” if among other things (like education and control over pornography) reporting and prosecuting rape become easier.\(^{127}\) Therefore, besides the changes in the domestic rape laws, ultimately women’s movement would take on the issue of international law’s treatment of rape.

\(^{123}\) Bandura (1973, 1977), Bandura and Walters (1963). Although there had been others who proposed some type of a social learning theory before, Bandura was the first to study modeling as a form of social learning and the idea that the time lapse between cause and effect during the learning process can be long. He also popularized the theory within the discipline of psychology.


\(^{125}\) For example scholars and activists like Catherine MacKinnon and Andrea Dworkin led the feminist anti-pornography movement starting in the late 1970s singling out pornography as an important source of sexual violence against women. Gerhard (2001), pp.173-174.


Global women’s movement and rape:

In the 1970s, women’s groups were very much divided at the international level (just like within national boundaries) over issues such as race, class, ethnicity, sexual orientation, geographic location (the North-South gap in particular), religion and ideology. However, the number of women in key international institutions such as the UN was increasing fast and forming alliances both among themselves and with the other movements at the time, namely the human rights movement and the anti-colonial movements. The UN became an important forum for these new alliances. The traditional women’s organizations which pioneered the establishment of the CSW in the UN in 1946, also participated in the Commission’s work with consultative status. One of these organizations was the International Alliance of Women (IAW).

In 1972, with the initiative of the women’s organizations, a woman delegate from Romania introduced a resolution calling for the designation of an international women’s year with a World Women’s Conference during the same year. While the idea met some opposition from some states like Saudi Arabia the resolution was ultimately accepted. As a result 1975 became International Women’s Year (with three themes of equality, development and peace) and the beginning of the UN Women’s Decade. Women’s NGOs proliferated and three world conferences took place where NGOs brought their concerns about the issue of violence against women before the mainstream CSW and CEDAW (Committee on the Elimination of Discrimination against Women). Neither the CSW, which was established (1946) in the Economic and Social Council (ECOSOC) of the UN for advising on problems relating to women’s rights, nor CEDAW, which was established (1981) to oversee the implementation of the Convention on the Elimination of All Forms of Discrimination against Women by state parties, had focused on violence against women let alone rape. Moreover, the International Covenant on Civil and Political Rights (ICCPR), created in 1966 (entered into force in 1976) to make the UDHR into a binding law, did not mention rape or sexual violence. Therefore, raising awareness of these

---

128 For a background on the establishment of the CSW see The United Nations and the Advancement of Women, 1945-1996. Also for the contestations during its establishment see Joachim (2007), pp.69-71.
mainstream UN institutions with close ties to the states about the violence issues was an important task for women’s organizations.\textsuperscript{130}

The first women’s conference was held in Mexico in 1975. The focus of the Conference was “equal legal capacity, education, economic means, access to family planning and [more] women in decision-making positions”\textsuperscript{131} and the issues of sex or violence against women were did not come up. Was it the lack of confidence on the part of women to bring such a controversial topic up or was it the fact that the agenda of the Conference was ultimately controlled by men?\textsuperscript{132} It is significant that although a big portion of the delegates were women, the president of the Conference was still a man. Also, most of the women delegates were chosen because of their personal relationships to the powerful (male) political figures rather than their expertise or interests in women’s issues.\textsuperscript{133} Another interesting example for the difficulties that women faced in terms of controlling the Conference’s agenda occurred when women’s NGOs prepared a proposal for revisions to the official text of the program of action. They found out that they could not present it to the delegates of the Conference because official rules prevented “unaccredited individuals or groups” from submitting proposals. The Secretary of the Conference told them “to go home and work on implementing the World Plan of Action” instead.\textsuperscript{134}

According to Jutta Joachim there were four reasons for the silence of the Conference on violence. First one is the rivalry between the three blocs among the UN members, i.e. the North/West, the East and the South with the corresponding agendas of equality, peace and development (the themes of the Conference) did not leave any space for gender violence. They politicized the Mexico City Conference (as well as the Copenhagen Conference in 1980) which became a battleground for the conflicts between the blocs. The media also paid more attention to the inter-bloc conflict than women. Secondly, the alignments to these blocs stripped the women’s groups from women allies within state delegations because the women delegates preferred their blocs’ causes over

\textsuperscript{130} See Tinker (1999) on the activism of NGOs within the UN.
\textsuperscript{132} Antrobus (2004), p.43. She asks the same question without an answer.
\textsuperscript{133} Joachim (2007), p.92.
\textsuperscript{134} Ibid., p.81.
women’s causes. Thirdly, the women’s organizations were also divided over not only the North-South/East-West conflicts but also over their feminisms. While liberal feminists supported the UN and the Women’s Conferences to further their agenda, radical feminists saw them as window-dressing for the patriarchal governments’ interests (until 1995-Beijing Conference). Lastly, women’s organizations did not have sufficient experience in the agenda-setting and lobbying processes in these settings. They also did not have much expertise in the issue of violence against women since the subject was still a taboo and information was still unavailable in most countries.\(^{135}\)

In 1976, as a counteraction to the Mexico City Conference, some feminists organized the International Tribunal on Crimes against Women in Brussels in order to disassociate themselves from what they see as the establishment of the oppressors. Women from around the world testified about the gender violence they experienced to politicize the issue. In the midst of many contestations, conflicts and disruptions, the Tribunal managed to create a “we-feeling” among the (predominantly Western and some Third World) women and it stimulated both national and international actions against violence against women.\(^{136}\)

In 1979, the General Assembly of the UN adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which came into force in 1981. Although the Convention addressed many forms of discrimination, violence against women was not one of them.\(^{137}\) A participant in the writing of the Convention attributes this silence to the fact that violence against women, domestic violence and rape in particular, were the “world’s dirty little secret,” something that happened but was not talked about publicly. Although the drafters considered it, they did it very carefully and covered it obliquely with the articles on prostitution and penal provisions discriminating against women (Articles 6 and 2(g)) rather than mentioning it

\(^{135}\) Joachim (1999), pp.144-146. When, for instance, Australian delegation proposed a definition of sexism to be used for a common action against discrimination, it was rejected because many of the delegations thought it would be “preoccupation with sex.” Joachim (2007), p.78. Given this attitude, why violence issues, sexual violence in particular, could not be brought to the table becomes clearer.\(^{136}\) Joachim (2007), pp.105-112.

\(^{137}\) Later during the decade (in 1989), the Committee on the Elimination of Discrimination against Women, the UN body overseeing the implementation of CEDAW, adopted general recommendation 12, which says that although CEDAW does not mention violence against women, the articles 2,5,11,12 and 16 of the Convention require the protection of women against violence.
openly.\textsuperscript{138} Still, what is particularly striking about the exclusion of violence against women from the CEDAW is that women drafted it. According to Arvonne Fraser, the CSW gave its women members, women’s NGOs and female UN staff “a free space” in the drafting process.\textsuperscript{139} However, apparently free space did not mean “no constraints.” As she also explains on the issue of reservations and ratification, among all international human rights treaties, CEDAW has the highest number of reservations that were entered with ratifications due to the changes it requires for “the most basic legal and cultural assumptions about women.”\textsuperscript{140} This situation illustrates, one more time, the role of a strongly entrenched gender ideology in international law-making and its resistance to change even after women’s involvement in the process as important political actors.

\textit{Rape in War:}

The assumption about the inevitability of rape, its being connected to the nature of masculinity even found ways into the feminist movement. Especially during the early phases of the anti-rape campaign in the early 1970s, feminism could not come up with a theory of rape because it did not challenge the definition of masculinity as inherent or biologically determined.\textsuperscript{141} Even in 1992, a self-proclaimed feminist though an opponent of the anti-rape movement, wrote “Hunt, pursuit, and capture are biologically programmed into male sexuality” in her attempt to “teach” women what rape is about, i.e. a biological reality that one needs to accept in order protect one’s self from it.\textsuperscript{142} Of course, it was a marginalized view within feminism and by the 1990s it would be even more marginalized (at least politically incorrect) in the Western societies at large but it would not be a smooth process for feminists to come to that point. The rape myths were well-entrenched in the social, political and legal systems.

In 1979, for example, a Connecticut judge said “you cannot blame somebody for trying” about a case of attempted rape.\textsuperscript{143} Along the same lines, in 1983, in a Michigan

\begin{footnotesize}
\begin{enumerate}
\item Interview with a leader in the women’s movement, September 11, 2007.
\item Fraser (1995), p.77.
\item Ibid., p.91.
\item Davis (1987), p.8.
\item Bevacqua (2000), p.131.
\end{enumerate}
\end{footnotesize}
court case, the prosecutor argued that the rapist’s marital problems leading to unsatisfied sexual desires justified his actions (raping two 13 year-old girls).  

After the independence war of Bangladesh against Pakistan (1971), a Bengali politician’s answer to the question of why rape happens in war is striking in terms of understanding this kind of mentality too: “What do soldiers talk about in barracks? Women and sex. Put a gun in their hands and tell them to go out and frighten the wits out of a population and what will be the first thing that leaps to their mind?”

Along similar lines, we find an American squad leader in the Vietnam War, John Smail commenting about the rapes in Mai Lai: “That’s an everyday affair... you can nail just about everybody on that- at least once. The guys are human, man.”

“The guys are human,” rather human males with a pressure-cooker inside that may explode at any moment. This line of thinking was why the American Military allowed the establishment of brothels on Army base camps in Vietnam and controlled their operations for health and security reasons. The Military emphasized the control of venereal disease in particular through official brothels and even giving daily penicillin shots to prostitutes, anti-VD training films and merit ratings where high VD count would be charged against the merit rating of a battalion. However, there was no training against rape and given that “you can nail just about everybody on that at least once” the number of prosecutions and convictions for rape are quiet small. During the eight year period between 1965 and 1973, only 86 soldiers were court-martialed for sexual crimes, 50 were convicted and they received very light sentences.

Even when people try to explain why rape did not happen in a particular war (which happens although rarely), they could not escape from appealing to the idea that “men need sex, men need even more sex in war when they lack access to women for long periods of time, hence men rape when they have the opportunity to satisfy this need.” Peter Arnett, the Associated Press correspondent in Vietnam during the Vietnam War thought that one of the reasons that the Vietcong forces did not rape was their “sense of

---

144 Estrich (1987), p.82.
146 Brownmiller (1975), pp.104-105.
147 Ibid., pp.92-95.
dedication to their revolutionary mission.” According to him, just like the few American officers who did not use the brothels during their stay in Vietnam because of their dedication to victory, “they literally did not need sex” and they “could control their lust from… [their] sense of dedication.”

In 1972, some feminist groups organized around the issue of rape in war for the first time as a reaction to the rape of 200,000 Bengali women by the Pakistani soldiers during Bangladesh’s independence war of 1971. Although the organizations restricted themselves to providing aid to the victims, they got the Western press to show interest in the misfortune of the Bengali women. Western media started paying attention to the brutalities of some “uncivilized” people over somewhere in Asia but it forgot them quickly. When asked about the rapes, “Pakistani officers [would] maintain that their men were too disciplined ‘for that sort of thing’” and the rest of the world would be more than willing to accept their word for it.

As we see in the case of Vietnam War and the loss of the voices of thousands of Vietnamese women who were raped, by the mid-1970s women’s movement was not able to call large-scale attention to rape in war yet. “The time was not right.”

149 Ibid., p.91.
150 Ibid., p.80.
152 Brownmiller (1975), p.113.
Chapter V


In 1990s the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) set the precedents for prosecution of rape as a crime against humanity, a grave breach, a form of genocide and finally a war crime, through their decisions. However, as the next legal step in the prohibition of rape, I will examine the inclusion of rape in the Statute of the permanent International Criminal Court (ICC). Although the ICTY and the ICTR indicted\(^1\) individuals for rape before 1998, I do not focus on their work primarily as the next steps of the legal change because the rape-related judgments of both (the ICTR- Akayesu case-September 2, 1998 and the ICTY- Celebici case- November 16, 1998) came after the Rome Statute was signed (July 17, 1998), and they both refer to the Rome Statute in those judgments.\(^2\)

I. The Law

The Rome Statute (1998), establishing the ICC, is one of the legalization examples in the world that ranks the highest on the hard-soft law spectrum.\(^3\) It puts the highest degree of obligation on the State Parties by requiring them to prevent, investigate and prosecute the violations or turn the violators in to the ICC for prosecution for all crimes under its jurisdiction.\(^4\) With regard to rape, obligation is clear, too. Article 8, which defines war crimes explicitly, mentions rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence.\(^5\)

Both Article 7 concerning Crimes against Humanity and Article 8 on War Crimes include not only rape but also other forms of sexual violence: “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence.”

---

\(^1\) The ICTY indictment for rape was in June 1996 in the case of Gagovic et al. (ICTY-96-23) The ICTR indictment for rape in the Akayesu case came in June 1997. (ICTR-96-4-I)
\(^2\) See Judgment of ICTR-96-4-T, The Prosecutor versus Akayesu; Judgment of ICTY-96-21-T, The Prosecutor versus Delalic and Delic (Celebici case). It has been argued that the explicit language of the Rome Statute with respect to sexual crimes had an impact on the jurisprudence of the ICTY. See Oosterveld (2004), p.647.
\(^3\) Indeed Abbott et al. give the International Criminal Court as an example for an institution where all of the elements of legalization, obligation, precision and delegation, are at the highest, p.406.
\(^4\) See Appendix A.
\(^5\) See Appendix A.
sexual violence” are declared to constitute grave breaches of the Geneva Conventions. These put the Rome Statute on the highest end of the precision scale since these detailed explanations of what exactly is prohibited can lead to “only narrow issues of interpretation.” The ICC has jurisdiction over all of the crimes mentioned in the Rome Statute, which makes delegation at the highest point for everything prohibited by the Statute. We can conclude that with very high degrees of obligation, precision and delegation, the Rome Statute created the prohibition regime against rape in war.

II. The Normative Context and the Main Actors

The idea of an international criminal court had been around since the end of WWII. In 1948, (Resolution 260) the General Assembly asked the International Law Commission “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.” Although the UN prepared a draft statute in 1951 and then revisited the idea in 1970s as well as 1989, it would not be realized until 1990s. The preparations for the establishment of an international criminal court started again in the post-Cold War period’s context of civil and ethnic conflicts around the world, widespread violence targeting civilian populations and enormous publicity these events had gained due to the revolution in communications technology. The arguments for a permanent international criminal court gained power especially after the atrocities in former Yugoslavia (1992-1995; 1999) and the genocide in Rwanda (1994). In 1993, the UN Security Council established an ad hoc tribunal for the war crimes committed in former Yugoslavia. Then the International Law Commission at the UN prepared a draft statute for a permanent international criminal court with this awareness of the atrocities in former Yugoslavia and Rwanda and presented it to the

---

6 See Appendix B. The precedents set by the ICTR and the ICTY, which gave more detailed definitions of what constitutes sexual violence, also made those interpretations.
7 See Appendix A. Although the ICC has one of the highest degrees of delegation among the existing body of international law (and the highest for international humanitarian law), we need to recognize that it does have some weaknesses caused by the principle of complimentarity. It means the ICC cannot take a case if the State with the jurisdiction over it is investigating, prosecuting or already investigated that case and it decided not to prosecute. Article 17 says that in such cases, the ICC can only prosecute if the State is “unwilling or unable genuinely” to investigate and prosecute. See Schabas (2004), pp.85-89.
9 See Keck and Sikkink (1998).
While the Security Council established another ad hoc tribunal, this time for the genocide in Rwanda (1994), the General Assembly decided to go ahead and create a preparatory committee (PrepCom) to develop the draft statute for the ICC into a finalized text that can be submitted to an international conference.

By this time, non-governmental organizations (NGOs) already started their work to push for the establishment of an international criminal court. Twenty-five organizations established a coalition of NGOs, “a vanguard model type of coalition” in 1995 and by the time of the Rome Conference the participants to the coalition would be around 450. According to one of the members of the Coalition for the International Criminal Court (CICC), ICC negotiations would never have happened if we did not have those tragedies that happened in former Yugoslavia and Rwanda. “Nations, NGOs and UN people alike were motivated by very powerful emotions and psychology having to do with the very recent atrocities of this kind” that it became much easier for them to bond as legitimate participants in the process with a clear desire to make the thought of “never again” (which was thought after WWII) a reality. The outrage and the sense of urgency pushed the process forward.

According to the International Criminal Court Monitor the resolution that the UN General Assembly passed eventually in 1996 for the establishment of the ICC (A/RES/51/207) represents a major victory in this respect that the governments who argued against the ICC or who were saying that an international criminal court can only be established maybe in 50-100 years only two years ago were unable to express public opposition. After all that happened before the world, it became more difficult to say no to an institution that could potentially prevent them from happening again. As a result, the atrocities in former Yugoslavia and Rwanda became major referral points for all advocates of the ICC, they were brought up again and again during the process in order to

---

10 For instance during the 2350th meeting at the UN, the special rapporteur Mr. Thiam (Senegal) brings up an earlier argument about the effect of the Second World War on the international laws that had been created and the suggestion that the present drafts has to be renamed according to the recent events in former Yugoslavia and Rwanda. Yearbook of the International Law Commission, 1994, Volume I, p.145.
11 Interview with a member of the CICC, July 27, 2007.
12 http://www.iccnow.org/?mod=cicchistory
13 Interview with a member of the CICC, July 27, 2007.
14 Benedetti and Washburn (1999), p.3.
show that the world needs an international criminal court. We see lots of examples of this
tone when we look at the publications and speeches of the time by the prominent actors:

Time and again, we have been helpless in the face of the failure of national
criminal-law systems to punish the perpetrators of atrocities and those behind
them. Genocide, mass executions of political opponents, “ethnic cleansing,”
系统性强奸作为“战争”的一种方式——来自柬埔寨、Vukovar和Srebrenica的震惊的电视报告
仍在我们的脑海中。16

The horrors of the Balkans and Africa’s Great Lake district will not be the last of
their kind. In conflicts the world over, civilians are increasingly being used as
military targets. This tide of barbarism must be stemmed. The world may not be
able to deter war; it is capable, however, to more effectively deter war crimes. To
do so the world needs to set up an International Criminal Court— a permanent
tribunal, with global jurisdiction, with the power to indict and try individuals for
war crimes, crimes against humanity and genocide.17

The Making of the ICC: The Role of the NGOs:

One of the most striking features of the process that gave birth to the ICC was the
huge impact of the NGOs, particularly their impact on the Rome Statute. The United
Nations Diplomatic Conference of Plenipotentiaries in Rome (June 15-July 17 1998)
wrote the Rome Statute based on the draft prepared by the International Law Commission
and revised by the Preparatory Committee meetings (PrepComs) between 1996 and 1998.
For the first time in history, they managed to play such an important role in the writing of
international law.18 What publicists of the 19th century did for The Hague Regulations
and what the government experts (with the leadership of the ICRC) did for the Geneva
Conventions for the most part, the human rights NGOs did for the Rome Statute. As a
result of the greater access to the international conferences NGOs gained after the end of
the Cold War, they managed to influence what went on unlike the previous decades when
they were excluded from the negotiation process to a large extent.19

16 Kinkel, December 1997, p.4.
18 Interview with a member of the CICC, July 27, 2007. Also see Van Der Vyver (2003), pp.426-427.
Besides this new opportunity of access, the fact that so many NGOs came together under a very well-organized concerted effort\(^\text{20}\) and the degree of expertise\(^\text{21}\) within the Coalition particularly on international criminal law were also very important for ultimate influence since they helped in terms of gaining credibility in the eyes of the states. As one of the CICC members put it: “The CICC early on realized that if its views/lobbying was to be accepted as appropriate, useful and listened to, it would be necessary to show that lobbying and presentation of views and pushing for objectives came from a strong body of expertise.”\(^\text{22}\)

The members of the Coalition were broken into 13 teams and several caucuses each responsible for a certain section of the Statute. They monitored the debates and then negotiated with the state representatives with regard to their section. Later they discussed those negotiations and their results at the Coalition meetings which led to new arrangements to meet with different delegations for further lobbying efforts.\(^\text{23}\) Their publications, particularly the high quality papers and documents listing and examining the arguments both for and against the position of the NGO that was publishing the paper as well as the daily newsletters explaining what was happening in the negotiations on a particular day were very instrumental in informing the delegates about different issues. These activities gained much respect and appreciation among the country delegations for the NGOs including women’s NGOs.\(^\text{24}\) These excerpts from CICC’s newsletter, *the ICC Monitor* is interesting in terms of depicting the array of their activities during the writing of the Statute:

Twenty participating organizations of the NGO Coalition were able to attend the second session of the PrepCom\(^\text{25}\), including representatives of NGOs in Africa, Asia and Eastern Europe, thanks to the generous support of funders including the European Communities, the Ford Foundation and the governments of Denmark, the Netherlands and Sweden. The sizable NGO presence allowed the Coalition to conduct numerous meetings and discussions with delegations and PrepCom officers. Luncheon meetings between the Coalition and members of the like-

---


\(^{22}\) Interview with a member of the CICC, July 27, 2007.


\(^{24}\) Interview with a member of the CICC, July 27, 2007.
minded group were hosted by Germany, Finland and Denmark, and the Coalition held additional meetings with members of the delegations from France, China, the United States, Russia, India, the Nordic states and countries in Latin America, Africa and Southeast Asia. Useful meetings were also conducted with members of the Bureau of the Preparatory Committee.25

Not content to merely monitor the negotiations, NGO (non-governmental organization) representatives engaged in a flurry of activities during the Rome Conference – from gala receptions in elegant Rome nightclubs to dense policy papers on issues before the Rome delegations. The Sudan Room, a large meeting space assigned to NGOs at the conference, was the site of frenetic activity as NGO representatives debated with each other, drafted text, faxed and emailed reports to their headquarters, and tried to follow the official meetings broadcast on close circuit television from two monitors in the room.26

According to the ICC Monitor, “lobbying involved chatting with members of national delegations, usually at the beginning and end of sessions and during intermissions” which they did very carefully in order to avoid any offense to national sensitivities.27

The CICC as a whole contributed to the entrance of the prohibition against rape into the Rome Statute. One of the reasons that the whole NGO community was involved in the initiative to include rape and other forms of sexual violence in the ICC statute was the fact that the rapes particularly in the conflict in former Yugoslavia came to the forefront of the public understanding of what had happened there. There was widespread publicity on what was going on in the so-called “rape camps” in the context of an ethnic cleansing campaign, which made the advocacy for an ICC concentrate on the issue of sexual violence against women in war a great deal. The fact that the initial draft statute prepared by the ILC in 1994 did not include rape among the war crimes (although it included rape among crimes against humanity) after all these tragedies further increased the need for advocacy. Hence it is possible to find rape and other forms of sexual violence at the forefront of the debate in various documents and publications of the Coalition. Several NGOs within the Coalition were working for express jurisdiction over gender-related crimes as one of the top issues on their agenda. They were actively

25 The International Criminal Court MONITOR, Issue 2, October 1996, p.2. (CICC-A)
26 The International Criminal Court MONITOR, Issue 10, November 1998, p.11. (CICC-A)
27 The International Criminal Court MONITOR, Issue 6, November 1997, p.8. (CICC-A)
supporting the women’s groups in their efforts to make crimes against women be expressly mentioned as distinct subcategories rather than as sub-classes of humiliating or degrading treatment or outrages upon personal dignity.\(^{28}\)

In a working paper submitted to the PrepCom in 1997, the ICRC also proposed to specify the crimes under grave breaches with explicit attention given to rape:

We have divided our list of war crimes into three categories. Under the first category, we have listed grave breaches of humanitarian law committed in international armed conflicts. We would like here to draw your attention to sub-paragraph (a)(iii) which specifically mentions rape, thus making unambiguous its being a grave breach.\(^{29}\)

Several documents published during the process of the writing of the Rome Statute such as Dakar Declaration for the Establishment of the International Criminal Court by 25 African states as well as several NGOs (February 6, 1998), the letters by various mainstream NGOs participating in the CICC called for the same thing: Making rape a war crime and a crime against humanity as precisely as possible, in a separate section from the prohibition of outrages upon personal dignity to make clear that they are crimes of sexual and gender violence.\(^{30}\)

Another example to the same demands can be found in the speech given by the Amnesty International observer during the Rome Conference:

Abuses against women had been widespread in the conflict in Bosnia and Herzegovina. To combat rape as a weapon of war and crimes against humanity, Amnesty International called for the establishment of a permanent international criminal court... The Statute expressly recognized that rape and other forms of sexual abuse were war crimes and crimes against humanity. However, Amnesty International was disappointed that a few powerful countries appeared to hold

\(^{28}\) Broomhall, June 1998, p.15.
\(^{29}\) International Committee Of The Red Cross War Crimes Working paper prepared by the ICRC for the Preparatory Committee for the Establishment of an International Criminal Court New York, 13 February, 1997, p.5. (CICC-A)
justice hostage and seemed to be more concerned with shielding possible criminals from trial than with introducing a charter for the victims.31

Rape, its centrality in the ethnic cleansing campaign in former Yugoslavia and the necessity to prevent it were emphasized numerous times at every platform for the ICC. Human Rights Watch, for instance, issued an action alert just before the Rome Conference stressing it one more time:

Women are commonly the targets and victims of egregious international crimes and have frequently been denied access to justice at both national and international levels. The conflicts in Rwanda and the former Yugoslavia are only the most recent examples of horrifying levels of violence against women, including acts of rape, sexual slavery, enforced prostitution and other forms of sexual assault. The ICC must be fully empowered to prosecute sexual and gender violence if it is to fulfill its mandate to end impunity for the most serious violations of international law. Toward this end, the ICC statute should explicitly recognize the court’s jurisdiction over these crimes against women and adopt legal principles and procedures that would facilitate the prosecution of these crimes without prejudice to the accused.32

What the former Nuremberg prosecutor Dr. Benjamin Ferencz said during an interview is illustrative of particularly the effect of former Yugoslavia on the public conscience and in turn on the Conference:

There were Pol Pots and mass killings around the world. The world paid no attention. I cried and I wrote books and I screamed and nothing happened. Until Yugoslavia. The crimes were so outrageous there. The mass rapes of Muslim women, “ethnic cleansing” as genocide (such a terrible term, there’s nothing clean about that process at all), so outraged the public community that they finally created an ad hoc international criminal tribunal to try those special crimes for that special time. And as you know they followed through with the same thing in Rwanda. This was a great step forward, but was totally inadequate. Justice does not depend on a particular time and place. Justice is universal and should apply to everywhere. That’s why I’m so excited about the prospect of an international criminal court and about the progress that’s been made.33

31 Speech by Mr. Sane, the observer for Amnesty International at the Rome Conference, in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, New York, 2002, v.II, pp.80-81; 129. (CICC-A)
33 Dr. Benjamin Ferencz, Former Nuremberg Prosecutor, in “Perspectives on the ICC and Rome,” The International Criminal Court MONITOR, Issue 8, June 1998, p.8. (CICC-A)
This effect is further illustrated by the fact that most participants including many of the state delegates and in particular the members of the like-minded group\textsuperscript{34} were very vocal about the necessity to include rape in the Statute and they were very effective in helping the NGO agenda.\textsuperscript{35} The like-minded group was a group of states committed to some of the principles also represented by the NGO community like an independent prosecutor for the Court, independence of the Court from the Security Council, the prohibition of reservations and an inherent jurisdiction of the Court over the core crimes. These were mostly at odds with the premises supported by other states. These 60 like-minded states dominated the organization of the Rome Conference as the critical allies of the NGOs providing a political opportunity structure for influencing the agenda.\textsuperscript{36} We see several delegates from the like-minded group raising the gender issues during the plenary meetings:\textsuperscript{37}

Ethnic cleansing and systematic rape and torture were of such gravity that they must be included in the ambit of the Court's jurisdiction.” (Mr. Downer (Australia))

Rape, sexual slavery and other forms of sexual violence must be recognized as war crimes in the Statute, reflecting the landmark decision made at the United Nations Conference on Women. (Mr. Axworthy (Canada))

As a party to the Geneva Conventions of 1949, Lithuania endorsed the list of crimes set out in those Conventions. In negotiations on the laws applying to armed conflicts and the definition of serious violations, it was in favor of recognizing a deliberate change in the demographic situation of occupied territories as a crime. Moreover, rape, sexual abuse and other forms of sexual violations should be recognized as war crimes and crimes against humanity. (Mr. Pakalniskis (Lithuania))

Speaking as a woman and as Minister of Justice of her country, stressed the need to give the International Criminal Court full powers to deal with all crimes in

\textsuperscript{34} See Schabas (2004), p.16.
\textsuperscript{35} Interview with a member of the CICC, July 27, 2007. The interviewee mentioned that though the like-minded were very important in terms of furthering the NGO agenda there were other states that were not members of the like-minded but were very sympathetic to their cause, such as Japan.
\textsuperscript{36} See Joachim (2007) for the way influential allies help NGOs by providing the institutional resources and access.
which the dignity of women was violated. The Statute must therefore include the crimes of rape, sexual slavery, prostitution and forced sterilization, as well as the recruitment of minors into the armed forces. (Ms. Nagel Berger (Costa Rica))

The sexual abuse of women committed as an act of war or in a way that constituted a crime against humanity should be deemed particularly reprehensible. The crime of rape should be gender-neutral and classified as a crime against persons. (Mr. Baja (Philippines))

A gender perspective had to be incorporated into the Statute and the crimes of rape and sexual violence enumerated in the Statute needed to be retained without change. (Ms. Trotter (New Zealand))

Rape and other crimes of sexual violence committed in armed conflicts should be properly defined and explicitly listed as war crimes in the Statute. (Mr. Jensen (Denmark))

Some states that were not part of the like-minded also felt the need to mention rape at least once during their speeches in order to show that they cared about the issue:38

The prosecution of abduction, rape, enslavement and other forms of child abuse should be prominently reflected in the Statute. Gender concerns should also be taken into account. (Mr. Kirabokyamaria (Uganda))

His delegation endorsed the views of the speakers who had called for the inclusion of sexual violence, including acts of aggression against women in the course of war crimes, rape, sexual slavery and pedophilia in the Court's terms of reference. (Mr. Al Kulaib (Kuwait))

The jurisdiction of the Court must extend to internal armed conflicts and crimes against humanity, including rape and other grave sexual violence. (Mr. Richardson (United States of America))

Even when they wanted to challenge some part of the articles related to sexual violence, the states seem to feel the need to first put forward their support for the prohibition of rape. It is also interesting to note that for the most part the objections were presented through female members of the delegations:

Regarding (p bis), rape was a punishable crime under Libyan legislation. Enforced pregnancy was the result of rape and it was the act itself that should constitute a crime. Under Libyan legislation, abortion, too, was a crime. That

---

paragraph therefore warranted further consideration. Under (t), her delegation preferred option 1. (Ms. Shahen (Libyan Arab Jamahiriya))\textsuperscript{39}

On subparagraph (p bis), she agreed with previous speakers that enforced pregnancy should be mentioned in the context of rape. She accepted subparagraphs (q), (r) and (s) as drafted and preferred option 1 of subparagraph (t). (Ms. Mekhemar (Egypt))\textsuperscript{40}

This picture is clearly different from what we see during the preceding conferences that wrote The Hague as well as the Geneva Conventions in terms of the emphasis put on dealing with the crimes against women during wars. The NGOs played a big role in terms of creating the atmosphere where rape became one of the most important items on the agenda. After all, “no one can say we want rape” but making it unavoidable to be talked about and taken seriously as a legal issue was the success of NGOs and the biggest part of this role was played by women’s NGOs. Therefore, I turn to the long struggle (since the writing of the Additional Protocols in 1977) through which women’s organizations managed to create the prohibition against rape in war first by preparing the normative basis, i.e. the core norms over which all NGOs could build upon and then making the final push for the legal change through the ICC.

\textit{Women’s NGOs and the ICC:}

In this section, I will track down the steps through which women’s NGOs gradually created the normative context where women’s rights came to be considered as human rights, one of the most important core norms of the post-WWII period. Then I will focus on the way they helped the creation of a “normative shock” out of the horrendous violations in former Yugoslavia (and to a certain extent Rwanda) by not only building on the normative context that was being created but also by associating these events with other already existing core norms such as the norm against genocide in order to make the “shock” produce legal change. In other words, I will look at the efforts to develop a norm against the use of rape as a weapon in wartime as well as the legalization of the norm in


171
the context of 1990s as they gained pace and force although the basis of the issue, i.e. the recognition of women’s rights as human rights, has been prepared over long decades of struggle by the feminist movement.

I propose the war in Bosnia-Herzegovina with its horrors (and to a lesser extent the genocide in Rwanda) as the “shock” that made these efforts possible while at the same time causing a huge jump in the norm development process itself. As the former president of the ICTY Theodor Meron puts it: “Indescribable abuse of thousands of women in the territory of former Yugoslavia was needed to shock the international community into rethinking the prohibition of rape as a crime under the laws of war.”

In the post-WWII, particularly the post-Holocaust world the protection of human rights emerged as one of the most powerful international norms. The integration (or attempts to do so) of women’s rights into this human rights framework was not a new phenomenon when the news about widespread abuse of women’s human rights was coming from former Yugoslavia in the early 1990s. However, the movement had just started gaining momentum. Between 1945 and 1991, core norms like the sanctity of human rights and, thanks to the work of women’s organizations, women as human beings evolved and reinforced preparing the basis for the norm change on rape.

In 1980 Copenhagen Women’s Conference, the radical feminist groups (or women’s liberation movement), who had been working to bring attention to the role of violence and constructions of female sexuality in domination and subordination of women, had a chance to join other women’s groups to bring attention to sexual violence against women. One of these feminist groups was ISIS, a group based in Rome, which raised violence against women as an issue in the international arena for the first time. The final platform for action in Copenhagen stated that:

Legislation should also be enacted and implemented in order to prevent domestic and sexual violence against women. All appropriate measures, including

---

42 Women’s organizations moved the issue of women’s rights from the initial framework of discrimination (then development) prevalent through 1960s and 1970s toward the “human rights” framework in late 1980s and 1990s. See Keck and Sikkink (1998), p.180, 184.
44 Interview with a leader in the women’s movement, September 11, 2007.
legislative ones, should be taken to allow victims to be fairly treated in all criminal procedures.\textsuperscript{45}

This statement was the first voice against violence which was groundbreaking since domestic and sexual violence had not been pronounced explicitly in any of the official documents of the UN before due to the cultural sensitivities on the topic. The rest of the decade would be different as a result of the “activities, research and publicity” created by various women’s groups.\textsuperscript{46}

In the Western countries the criticisms against the domestic rape laws by feminists were at last producing results in the 1970s and 1980s. The rape laws started to move from being mainly preoccupied with protecting men from false accusations towards protecting women from being raped.\textsuperscript{47} Women’s groups were finally bringing the issue of violence against women to the international arena after almost two decades of struggles over it in the domestic sphere. Those groups which attended the Women’s Conferences had a chance to find common grounds and transcend the political differences that had divided the women’s movement.\textsuperscript{48} One of these common grounds would be rape, which would become a central backdrop for unification for feminists word-wide.\textsuperscript{49}

In the 1985 Nairobi Women’s Conference, the issue of peace and conflict emerged as ‘mainstream’ concerns on the agenda, with violence against women situated in a human rights context.\textsuperscript{50} This conference was the beginning of the real fight about rape because a major change was happening. Up until then, the subject of “women and war” was closely associated with the situation of women during armed conflict as they participated in the war as mothers and care-givers. The focus was shifting to a better recognition of issues in conflicts affecting women in their own right.\textsuperscript{51}

Women were better organized and focused compared to the previous Women’s Conferences, too. They learned to overcome their differences and agree on common

\textsuperscript{45} Final Report of the World Conference of the UN, 14-30 July 1980, Chapter I, Section A.
\textsuperscript{46} Fraser (1987), p.52.
\textsuperscript{47} For example the rape law reforms were passed throughout the 1970s in several states in the US. Canada rape law reform passed in 1983. See Berger et al. (1988).
\textsuperscript{49} Edwards (1981), pp.157-158.
ground to work together becoming a global social movement. This new ability to overcome the reflections of the North-South and East-West conflict that divided women in Mexico City and Copenhagen and the new strategies women developed during these Conferences would ultimately be the basis of women’s NGOs’ achievements in the 1990s.\textsuperscript{52}

In 1986, social scientists and members of women’s NGOs met in Vienna at the meetings of the UN Division for the Advancement of Women. These meetings started to produce the basis of the recognition of violence against women as an international problem and states as being responsible to stop it through legal practices hence formulating the issue within a criminal justice frame.\textsuperscript{53}

In 1991, the NGO activists decided to make violence against women a primary subject in the efforts for “women’s rights as human rights.” Upon their demands on the UN bodies, the CSW, ECOSOC and CEDAW took some steps to address the issue.\textsuperscript{54} These agenda-setting efforts of the women’s groups within the UN were critical in terms of preparing the basis of the normative change since the UN serves a “collective legitimization function” slowly redefining the ideas, interests and identities of its member states.\textsuperscript{55}

Violence against women became the master framework that not only brought together women from all over the world together but also attracted allies from mainstream human rights organizations.\textsuperscript{56}

By 1992, the emergence of a normative context where human rights including individual security and bodily integrity are important and where women are included in this circle of humans with rights is apparent. It is also significant that war hence rape in war had been absent in Europe for almost 50 years. The outbreak of war in Former Yugoslavia changed this situation. Hence, the real movement began in 1992 as the news about mass rapes and rape camps had begun to come.

\textsuperscript{52} Joachim (2007), pp.93-99.  
\textsuperscript{53} Joachim (2007), pp.116-122.  
\textsuperscript{54} Gaer (1998), p.23.  
\textsuperscript{55} Joachim (2007), Risse and Sikkink (1999).  
\textsuperscript{56} Keck and Sikkink (1998), p.183, 186.
In April 1992 a war of ethnic conflict started in the middle of European civilization, in Bosnia-Herzegovina, which became a stage for murders, concentration camps, tortures and rapes as part of an ethnic cleansing strategy by the Serbs. The first refugees who fled to Croatia reported the rapes for the first time in June 1992 and later in August an American journalist Roy Gutman provided a complete report about them. In September 1992, the International Human Rights Law Group launched its Women in the Law Project and prepared a report (published in 1993): *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*. This was the first serious consideration of gender-based violence in war by human rights NGOs.

After almost 50 years of “progress,” i.e. lack of horrific human rights violations like genocide and mass rape in war in Europe, a “regress” was happening. People were being subjected to ruthless practices of war in the middle of “civilized” Europe. Things that Europeans thought belonged to either the pictures of medieval cruelty or a different world and different culture were happening to white people in Europe. This situation was indeed a potential normative shock. However, it is also known that not every tragedy becomes a normative shock, especially a normative shock strong enough to change particular norms. For example, it is known that approximately 110,000 German women were raped by the Russian troops at the end of WWII along with hundreds of thousands of other women that were raped both in Europe and Asia throughout the war but these did not produce a normative shock. They did not even produce any indictments in Nuremberg. In fact, even after all that happened in former Yugoslavia, in the original

---

57 Although violations of the laws and customs of war were committed by all sides of the conflict, in the majority of them the perpetrators were Serbs and the ethnic cleansing campaign was conducted by the Serbian forces against the Muslim population.


61 The estimated total number of German women who were raped by the Allied soldiers in the Eastern Sector in 1945 is 1.9 million. See Sander (1992), cited in Engle (2005), p.811. 110,000 is the number of German women raped in Berlin when Soviet soldiers were capturing the city in 1945. Also for the rape of Italian women by Moroccan soldiers of the French Army in 1943-1944 see Niarchos (1995), pp.665-666. Also for the rapes in Asia by Japanese soldiers see Chang (1997).

62 Unlike Nuremberg, in Tokyo there were rape charges (for failing to prevent the crime at the command level) brought and prosecuted through the evidence introduced by affidavit and missionaries who remained in the city, although no victim had testified in person. However, those charges were limited by some of the
draft statute for the ICC prepared by the ILC in 1994, rape was not included among the war crimes although it was on the list of crimes against humanity.\textsuperscript{63} Then, how did former Yugoslavia become a shock that led to the creation of the prohibition regime against rape in war with the ICC?

The question about the shocks is, as I mentioned earlier, “what counts as a shock, how shocking must shocks be and what will we say about the shocks that reinforce rather than change existing collective beliefs.”\textsuperscript{64} In the prohibition of rape in war, the shockingness of the shock and the direction of the development of new norm and policies as a result of the shock were determined by the norm entrepreneurs, particularly women’s NGOs. Once the shock happened they provided the alternative policy prescriptions, which are deriving from or building on their previous work for putting women’s rights on the agenda. This means a shock will not be a shock without the agitation of the norm entrepreneurs but at the same time the norm entrepreneurs cannot agitate successfully without an event that has the potential to become a shock. “Norm entrepreneurship is necessary but it is never sufficient.”\textsuperscript{65} The relationship we find between the shocking events in former Yugoslavia and the legalization of rape as a war crime proved once again the fact that “calamitous circumstances are needed to shock the public conscience into focusing on important, but neglected, areas of law, process and institutions.”\textsuperscript{66} However, there have to be people agitating in order to bring the issue on the agenda and present it in a way that will ensure that it will be taken seriously.\textsuperscript{67}

Since human rights shocks, especially on an international scale, are often not that obvious until some people make them to be, one tactic that was employed by the women’s NGOs was working on the existing norms and associating the new issue to these existing norms. “No norm exists in a vacuum,” i.e. the new norm that will be proposed by the proponents of the norm has to fit coherently with other prevailing

\textsuperscript{63} The International Criminal Court MONITOR, Issue 2, October 1996, p.8. (CICC-A)
\textsuperscript{64} Kowert and Legro. (1996), pp.473-474. They give the example of the Japanese attack on Pearl Harbor as a shock reinforcing American identity.
\textsuperscript{65} Florini (1996), p.375.
\textsuperscript{66} Meron (1998), p.204.
\textsuperscript{67} See Rochon (1998).
But, the crucial thing is that this fit has to be emphasized strongly in order to make the case: when the existing norm that will be referred is already in international law, emerging norm must convince the audience that it is the logical extension of that law or necessary change to it if the existing law will fulfill its function at all. This combination of an already existing framework on which the new norm can be built and the efforts of the norm entrepreneurs to use it appropriately, i.e. “grafting” as Price calls it was a very important part of women’s advocacy. In the case of norm creation against the use of rape as a weapon of war the background norm was the norm and laws against genocide and norm entrepreneurs built their arguments on the ethnic cleansing campaign in former Yugoslavia (as well as the genocide in Rwanda.)

How exactly did this process of shock creation worked? It is necessary to turn to the actions of the women’s groups.

On February 1993, Security Council (SC Res. 808) called for the establishment of an international tribunal for the crimes that had been going on since 1991 on the territories of former Yugoslavia. And on 25 May 1993 Statute of the International Tribunal (ICTY) was adopted. The Statute does not mention rape among graves breaches, violations of the laws and customs of war or acts of genocide but as a result of the struggles of women’s groups it included rape as a crime against humanity.

The next important step was one of the most critical events in the process of creating the normative shock, hence very illustrative of the impact of the war in Former Yugoslavia on the normative context: the UN World Conference on Human Rights in

68 Florini (1996), p.376. This is what Florini calls “coherence.”
71 Although the laws of war, international humanitarian law, non-combatant immunity and principle of not causing unnecessary suffering stand at the background as well (like in the case of land-minds, Price (1998), p.629), and in fact the genocide norms stand on them, these had not been sufficient to bring about reconceptualization of the use of rape as a horrible, unintelligible grave breach, (that means a shock) thus change.
72 Speech of Ms. Sajor (Observer for the Asian Centre for Women's Human Rights), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, New York, 2002, v.II, pp.119. (CICC-A) The reflection of women’s activism on the cases in the ICTY is apparent as well. Of the cases, 20% involved charges for sexual assault and three focused on rape in particular. Engle (2005), p.781. It is significant that the Statute of the ICTY does not mention rape among war crimes although it mentions it as crimes against humanity because the threshold for “crimes against humanity” is higher requiring the crime to be systematic which is very hard to prove in the case of rape. See Steains (1999), pp.361-362.
Vienna (1993). Up until that point, the division between women’s rights and human rights had been causing problems for women’s groups in terms of accessing the human rights agenda. Under the leadership of the Center for Women’s Global Leadership, a US-based women’s organization, a campaign started in preparation for the Conference. The 3-year campaign established “women’s rights as human rights” as a powerful frame, which not only helped bring together women from different cultures solving many problems of division among women but also resonated well with the global constituency in general.\footnote{Joachim (2007), pp.122-125.}

In Vienna, women’s NGOs had followed various strategies in order to influence the agenda of the Conference: firstly, they held an NGO Forum before the Conference and it prepared a unified NGO document to be addressed in the Conference.\footnote{Bunch and Reilly. (1994), pp.100-101.} And the forum meeting (200 miles away from former Yugoslavia) “at a time when international community was reeling from testimony on the rape of Bosnian women as a tactic of war” added the demand for “the establishment of an international penal court with jurisdiction over all kinds of crimes, including gender-specific abuses such as rape, sexual slavery, forced sterilization, and forced pregnancy” among its conclusions.\footnote{Gaer (1998), p.35.}

Secondly, as part of the NGO Forum, a Global Tribunal on Violations of Women’s Human Rights was held where testimonies of 33 women from 25 countries were heard to protest the failures of existing human rights laws and mechanisms vis-à-vis women. The Forum also included a worldwide petition campaign calling for the Conference to address violence against women which was becoming the unifying issue for global feminism.\footnote{Testimonies of the Global Tribunal on Violations of Women’s Human Rights (1994), p.3. See Keck and Sikkink (1998), Price (1998), Joachim (2007) for the way NGOs use testimonials in their campaigns.}

Thirdly, a professionally staffed and financed media campaign was held to make women’s rights visible and legitimate in the eyes of the world as human rights.\footnote{Gaer (1998), p.33.} Over 1500 NGOs were present at the Conference, they were inside and outside the conference.
halls, keeping pressure on delegates for recognizing violence against women as a violation of human rights.78

Also, the UN Development Fund for Women (UNIFEM) organized a caucus in the area where government delegates were meeting. Through these NGOs negotiated and brought suggestions to the official drafting process.79 Consequently, they managed to create such an atmosphere that almost every government delegation felt obligated to make a speech during the Conference denouncing violence against women.80

The end product of the Conference - the Vienna Declaration and Programme of Action was a success for women on the issue of violence: violence against women in armed conflict (among other things) is explicitly recognized as violations of human rights and humanitarian law. As Connors puts it:

This was a direct result of NGO activism which had identified the issue as of immense significance to women in all areas of the world. This view was undoubtedly reinforced by evidence of the sexual violence perpetrated against women in the conflict in the former Yugoslavia, which had been the subject of eighteen NGO submissions to the Human Rights Commission at its 49th session in 1993.81

Though there is no explicit reference to the ICTY Statute’s exclusion of rape from the list of grave breaches, the violations of the laws and customs of war and acts of genocide, we see the issue was emphasized strongly and explicitly in the Vienna Declaration and Programme of Action:

The World Conference on Human Rights expresses its dismay at massive violations of human rights especially in the form of genocide, “ethnic cleansing” and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped.82 (Emphasis mine)

Similarly, it called for “the elimination of gender bias in the administration of justice” as well as the declaration that,

80 Interview with a leader in the women’s movement, September 11, 2007.

179
Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.\(^{83}\) (Emphasis mine)

In the aftermath of the Conference, the UN Commission on Human Rights appointed a Special Rapporteur on Violence against Women. This development was a very significant. The Commission requested the Special Rapporteur to:

(a) Seek and receive information on violence against women, its causes and consequences from Governments, treaty bodies, specialized agencies, other special rapporteurs responsible for various human rights questions and intergovernmental and non-governmental organizations, including women’s organizations, and to respond effectively to such information;
(b) Recommend measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences;
(c) Work closely with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities and with the treaty bodies, taking into account the Commission’s request that they regularly and systematically include in their reports available information on human rights violations affecting women, and cooperate closely with the Commission on the Status of Women in the discharge of its functions.\(^{84}\)

These requests meant the Rapporteur would be in a position to expose states for engaging in, sponsoring or allowing violence against women and hold them responsible before the international community.\(^{85}\)

Also, the UN General Assembly (GA) adopted the Declaration on the Elimination of Violence against Women (GA Res. 48/103, December 20, 1993) which is the first international human rights instrument dealing with the issue of violence against women explicitly and exclusively as a political issue (rather than a private matter).\(^{86}\) It basically repeats the Vienna Declaration.

During the preparatory meeting for Beijing held in Vienna in October 1994, when the war in former Yugoslavia was still going on, women’s NGOs introduced a resolution

\(^{83}\) Ibid., section 2/ article 38.
\(^{84}\) http://www.unhchr.ch/html/menu2/7/b/women/
\(^{85}\) See Penn and Nardos (2003).
\(^{86}\) http://www.un.org/rights/dpi1772e.htm
about rape as a war crime at which point “all hell broke loose.” The Yugoslav delegation argued that by turning the attention of the Conference on to rape and sexual violence, women’s groups were “picking on them” and that it was not just Muslim women that were being raped. These reactions from the Yugoslav delegation about the attention the issue had drawn did not find an ally and the resolution was passed. According to one of the leaders of the women’s groups at the meeting, that was another watershed in making “rape as a war crime” a public issue.87

On November 8, 1994 SC Res 955 established the International Criminal Tribunal for Rwanda (ICTR). The call by women’s organizations (documented in the Vienna Declaration and the UN Declaration) for recognition of sexual violence against women, particularly rape, in armed conflict found response here, in the adoption of the Statute of the ICTR. The Statute included within the jurisdiction of the court the prosecution of rape (among other things) as a crime against humanity (Article 3) and as serious violations of Article 3 common to the Geneva Conventions (1949) for the Protection of War Victims, and of Additional Protocol II (1977) (Article 4). However, getting indictments and sentences for rape was not a smooth process. Not only there would not be any sentence for rape until 1998 but also getting the first indictment would take more than two years.88

In 1995 the fourth World Conference on Women was held in Beijing. The Beijing Declaration and Platform for Action is the first document that calls for accountability for rape, i.e. committing governments to investigate and punish perpetrators as well as a reaffirmation that rape in armed conflict constitutes a war crime and under certain circumstances a crime against humanity and an act of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide. A controversy erupted during the Conference over the use of “systematic rape” in UN resolutions as the only way to refer to the subject of rape because of the prevalence of systematic rape in

87 Interview with a leader in the women’s movement, September 11, 2007.
88 There is one indictment at the ICTY in 1996 for rape. See Judgment of ICTY-IT-96-23, The Prosecutor versus Gagovic et al. The judgment was not issued until 2001. The first indictment in the ICTR for rape was in the Akayesu case issued in June 1997. (ICTR-96-4-I) According to one of the judges (1995-1999) and later the President of the ICTR (1999-2003), Judge Navanethem Pillay, after 2 years and 21 indictments there was not a single count of rape when finally the judges picked up that the witnesses were testifying to rape and paved the way for the amendment of the charges by the prosecutor. See If Hope Were Enough (2000).
the former Yugoslavia at the time. Women’s NGOs protested against this usage since it gives the impression that rape is a serious offense only when it is systematic. As a result of their efforts the Platform for Action (paragraph 132) said “rape, including systematic rape.”

For women’s groups, the next significant step was the ICC. According to Gassoumis et al. during the early stages of the PrepCom meetings (March-April 1996, August 1996), i.e. before women’s groups started their work, it was apparent that women would once again escape from the attention of the states as major targets of human rights abuses. No delegate spoke about the need for touching women’s issues in the context of the new law that the ICC will be creating at all.

The Women’s Caucus for Gender Justice was founded in January 1997 for the purpose of integrating gender issues in the ICC preparatory process by lobbying government delegations writing the ICC Statute. By tapping into the networks that emerged in the Women’s Decade Conferences women established the Caucus and by being part of the CICC, they organized themselves better than they have ever done in similar negotiations before. Only after the Women’s Caucus started its efforts during the February (1997) PrepCom by preparing and distributing a draft text integrating women’s concerns into the draft statute did the delegations start mentioning gender issues. As a result, the February PrepCom increased the precision of the proposed Statute by expanding the language and scope of the article prohibiting rape as a crime against humanity: the words “other sexual abuse and enforced prostitution” were added to rape as a result of the advocacy of Women’s Caucus. However, a proposal by the delegations of New Zealand and Switzerland (based on an ICRC paper) to include rape on the list of war crimes was rejected by the February PrepCom with the excuse that the

---

90 Gassoumis et al., May 1997, p.5.
92 Interview with a member of the CICC, July 27, 2007; interview with a former member of the Women’s Caucus, February 6, 2008.
93 Gassoumis et al., May 1997, p.5.
list of war crimes should replicate the language of grave breaches of the Geneva Conventions (1949).95

The setbacks continued during the August PrepCom (August 4-15 1997). Some delegates and some NGO participants told the Women’s Caucus that the proposal for “the incorporation of a gender perspective throughout the ICC statute is too ‘specific’ to be dealt with in all areas and aspects of the ICC.” Those delegates and NGO participants also said that “although they understood the need for the incorporation of ‘gender issues’ into the definition of the ‘core crimes’ the issues at hand during the August PrepCom had nothing to do with gender.” According to them “if the statute were to deal with ‘gender concerns’ then, in all fairness, it would also have to deal with the concerns of other disadvantaged groups, such as children, the disabled, etc.”96 Hence, in preparation for the December PrepCom the Women’s Caucus started distributing working drafts of recommendations, commentary and draft text, in order to engage in dialogue with delegates and make their voice better heard.97 In these documents, they specifically demanded that the definition of war crimes include sexual and gender violence as part of the most serious violations of international criminal law. Addressing the December PrepCom, Women’s Caucus included the following recommendations and comments among others:98

1. The Statute should clearly reject the prior treatment of rape and other sexual violence as simply “humiliating and degrading treatment” or as linked to a particular offense by eliminating the reference to rape and other sexual violence in this regard.

2. Following the approach of the article on crimes against humanity, the enumeration of war crimes in both internal and international armed conflict should include a subparagraph identifying rape, sexual slavery, enforced prostitution, forced sterilization and other forms of sexual and gender violence as war crimes in themselves.

3. One of the essential and defining characteristics of criminal law is gradation in the characterization or naming and punishment of crimes. In this way, society differentially condemns the perpetrator and recognizes the suffering of the victim. This is why, as

96 Facio, November 1997, p.5
discussed below, the Geneva Convention's treatment of rape and other forms of sexual violence as simply “attacks against honor” and “degrading and humiliating treatment” and not as forms of the gravest violence is discriminatory as well as a profound insult to women. While the ICRC has made a partial advance in linking rape solely to “wilfully causing great suffering or serious injury to body or health,” this still underestimates the severity and character of various forms of sexual and gender violence.

4. While the line between torture and inhuman treatment is not a sharp one, it exists to encompass cases of sexual and gender violence which may not rise to the level of torture. The Women's Caucus cautions, however, that it is inappropriate to substitute these categories for rape and other sexual and gender violence which does and should properly be recognized and prosecuted as torture. For this reason, Recommendation 6 calls for deletion of the exclusive linkage of rape and other sexual violence to “willfully causing great suffering...” in paragraph A(c) of the grave breaches section of the Chair's text.

5. The Women's Caucus recommends following the precedent set in the definition provided by ICTY, and ICTR Art. 5(g) of Crimes Against Humanity where sexual violence is identified in a separate paragraph as well as potentially chargeable as other enumerated crimes. It is necessary to add this paragraph enumerating forms of sexual and gender violence as well as to mainstream sexual violence for a number of reasons. Sexual and gender violence are severe and particular and their particularities should not be lost by mainstreaming. Where not explicit, they are too often ignored, even today. Moreover, even while sexual violence can meet the elements of the other enumerated crimes, criminal law provides definitions of rape, enforced prostitution, and forced sterilization and other forms of violence and abuse that are different from that of the enumerated crimes.

Since the draft text included “reference to rape and sexual violence as an affront to personal dignity” they successfully advocated that “rape and sexual violence should be prosecuted separately as forms of the most serious crimes such as genocide, torture, enslavement and mutilation” and that a separate section which will specify that rape and sexual violence should be prosecuted as serious forms of violence in themselves should be put into the Statute. In the end, the December PrepCom came up with a draft that was very comprehensive in terms of defining war crimes. According to the ICC Monitor, there was near unanimous agreement about referring “to the crime of rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization and other forms

---

of sexual violence not merely associated with the crime of committing outrages upon personal dignity.”

Once the Rome Conference had started, the process would not get easier for women. The fact that the delegates were predominantly lawyers and military people with no particular expertise on gender issues made the negotiation process even more difficult for the Women’s Caucus. When a controversy erupted during the Conference because of the inclusion of “enforced pregnancy” among the war crimes and the use of the concept “gender balance,” the Women’s Caucus lobbying efforts focused on these issues. The Holy See delegation, some Catholic and some Arab states and a group of anti-choice organizations were against the enforced pregnancy part arguing that it can be used against anti-abortion laws. They thought that once states ratify the Statute, it will be part of their national laws hence someone might challenge the national laws prohibiting abortion by using the enforced pregnancy article in the ICC Statute and arguing that not having access to abortion is enforced pregnancy. They proposed to delete the provision on enforced pregnancy arguing that since rape and unlawful detention were covered by the Statute, enforced pregnancy is covered, too. Bosnia-Herzegovina, Australia, Canada, New Zealand, Azerbaijan, Rwanda, Turkey, Nigeria, Solomon Islands and India opposed this proposal by saying that it will mean denying a “distinct and terrible crime.”

However, the most contentious selection criterion for judges was for “gender balance” in the draft. This means bringing a quota system to ensure the election of women judges to the Court. The word “gender” was highly problematic for some delegations wherever it appeared (including Article 7(2) h, which mentions persecution on gender grounds, among others, as a crime against humanity). An Arab delegate said

---

100 The International Criminal Court Monitor, Issue 7, February 1998, p.8. (CICC-A)
102 The controversy over the “enforced pregnancy” provision started during the December 1997 PrepCom and continued during the March-April 1998 PrepCom where the Holy See proposed to replace “enforced pregnancy” with “forcible impregnation.” But it was not accepted on the basis of the fact that what happened in Bosnia-Herzegovina with not only forcible impregnations but following detentions to force women bear the babies of the rapists, “forcible impregnation” would be inadequate. The text forwarded to the Rome Conference contained “enforced pregnancy.” See Steains (1999), pp.365-366.
“‘gender balance’ was unacceptable to his delegation as it could mean ‘equality!’” Also, many Arab (and some other) delegates had been convinced by anti-choice lobbyists that the use of the word “gender” in the Statute would mean that the state parties would have to permit same sex marriages. Equal treatment of women and recognition of rights of homosexuals were unacceptable to them.106

According to one of the NGO observers of the Conference, this situation not only stalled the negotiations but also caused problems within the Coalition between the mainstream human rights NGOs and the Women’s Caucus. At times mainstream NGOs felt uneasy about women’s NGOs’ insistence on the use of the word gender or the concept of enforced pregnancy which could potentially jeopardize the ICC.107 One of the members of the CICC agrees that there was some tension between the Women’s Caucus occasionally and other members of the CICC having to do with their styles. From time to time, the leaders of the CICC felt that the Women’s Caucus’ approach particularly in dealing with the officials of the negotiations and governments were “unnecessarily strident and intrusive.” Because of that there was a danger that this style of strident insistence and extreme persistence by the Women’s Caucus might make it more difficult for other CICC members to work with the same people.108 The problem became so complicated that some thought that it started to jeopardize rape becoming a war crime:

A dispute between women's groups and the Vatican over a legal term has broadened into a battle of religion and gender politics that could jeopardize agreement on whether rape will be declared a war crime by an international criminal court...Women's groups have fought to have the treaty include “enforced pregnancy” as a war crime for the act of impregnating women and forcing them to bear children as tools of ethnic reprisal. The Vatican agrees that such rapes are war crimes, but it is troubled by the term ‘enforced pregnancy,’ fearing it could be interpreted as an invitation to challenge anti-abortion laws in many countries.109

In the end, the two sides negotiated a compromise. Though “gender” was the term they used in the Statute, a special definition was stated: “For the purpose of this Statute, it

---

105 Those states which argued against the use of “gender” due to their concern over the possibility of it including homosexuals were Guatemala, Venezuela, Syria and Qatar. See Steians (1999), p.372.
106 The International Criminal Court MONITOR, Issue 10, November 1998, p.4. (CICC-A)
108 Interview with a member of the CICC, July 27, 2007.
is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” (Article 7 (3)) Also a definition for what became forced pregnancy was put in as a footnote saying: “‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.” (Article 7 (2)f)

The solution of the stalemate was possible partly thanks to the forceful style of the Committee of the Whole chairman Philippe Kirsch (Canada). However, the major actors in the process were NGOs and some government delegations though interestingly enough not women’s NGOs:

It was necessary to show understanding and respect for the concerns of the Arab countries and some members of the Women’s Caucus found it very difficult to do that because of the attitudes toward women within those Arab countries. It is significant therefore that much of the negotiation which resolved into these two compromises was carried out by NGOs other than members of the Women’s Caucus and by the government delegations especially the delegation of Norway whose chief Mr. Fife was a fluent Arabic speaker.

Hence, while women’s work was central to the integration of women’s issues into the ICC Statute, the fact that they had influential allies within the mainstream NGO community and the government delegations proved to be critical, too.

III. The Normative Shock

Former Yugoslavia and Rwanda appear to be at the forefront of the whole effort both before and during the Rome Conference. First, given that these atrocities were portrayed as major violations of human rights, women’s organizations needed to formulate what women had gone through during these conflicts in terms of human rights violations to make the case more effective. In other words, activists used the existing

---

111 Interview with a member of the CICC, July 27, 2007.
framework to make their point that women’s human rights were violated. Second, since they were going to push for legal change, these cases were used as evidence to the flaws in the existing body of law. In order to do this, they applied what Keck and Sikkink call “human rights methodology” which is “promoting change by reporting facts.”¹¹² Some of the examples of the actions taken by women’s groups include bringing together victims and witnesses from Bosnia and Rwanda as well as experts who had worked with the ICTY and the ICTR to share the failures and achievements of the institutions during the PrepComs,¹¹³ and reminding the delegates of the horrific crimes committed against women in those conflicts every time they tended to surpass gender issues. For them “it [was] critical that the stories of survivors and those working with them continue to influence the negotiations so that once the ICC is set up it will be well-positioned to do justice, having taken fully into account the lessons from past efforts at achieving justice in the international arena.”¹¹⁴

The importance of framing is widely emphasized in the literature on agenda-setting geared towards norm and law change. Identifying the problems with the existing order of things, presenting them in a way that will convince the important actors and the general public that there is a problem and there is a particular solution to that problem have been the key components of framing.¹¹⁵ “What is at issue” and “what is to be done” are determined by “the naming and framing” of policies.¹¹⁶

Women’s NGOs working to get rape to be included in the Rome Statute named and framed the issue in such a way that rape emerged as a major humanitarian problem and international law is identified as the remedy for that problem. In order to push for immediate legal change, women’s NGOs needed to create a sense of urgency for showing that this, i.e. the creation of the ICC was “the” opportunity to stop horrific things that were happening. Hence, they needed to demonstrate that the existing legal framework was a burden on the conscience of the world by showing what was happening to women during wars from a “shocking” perspective.

¹¹³ “Excluding Crimes against Women from the ICC is not an Option,” p.38. (CICC-A)
¹¹⁴ Ibid., p.39.
As Bedont and Martinez argue they received the support of most states on the basis of what had happened in former Yugoslavia and Rwanda in the absence of adequate treatment of sexual violence.\textsuperscript{117} Hence, the argument was that horrific human rights violations (which people believed belonged to history\textsuperscript{118}) came back to the ‘civilized world’ including massive violation of women, which is a direct result of the inattention paid to legal arrangements to prevent them. Their argument had an implicit assumption that law change would prevent these crimes from happening. In other words, if the reason that they are happening is the past impunity enjoyed by the perpetrators (as well as the perpetrator states), then this means if we have the law and enforce it they will not happen again (or get minimized). Law reform is identified as the key objective to further gender advances.\textsuperscript{119}

Women “viewed the negotiations for the ICC as an historic opportunity to address the failures of earlier international treaties and tribunals to properly delineate, investigate, and prosecute wartime violence against women.”\textsuperscript{120} In other words, the claim about the “absence of adequate (legal) treatment of sexual violence” causing the evil led to the claim that these events had happened due to previous impunity and flaws in the law. The underlying assumption was “the historic failure of States and the international community to recognize and effectively punish serious gender violence as a grave human rights violation” as well as “the invisibility of sexual and gender violence and the presence of sex-stereotyped assumptions in these areas… historically insulate[d] perpetrators of that violence from accountability” brought us where we are.\textsuperscript{121} As the director of the Women’s Caucus Alda Facio puts it:

It is precisely because the vast majority of laws, legal instruments and institutions have been created without a gender perspective that the everyday violations of women’s human rights are invisible to the law and the most atrocious violations have been rendered trivial.\textsuperscript{122}

\textsuperscript{117} Bedont and Martinez. (1999), p.77.
\textsuperscript{118} Vranic (1996), p.234. She suggests that these violations were shocking reminders of the Second World War horrors in which case the appeal to human rights became all the more powerful.
\textsuperscript{119} “Introduction,” p.2.
\textsuperscript{120} Bedont and Martinez (1999), p.65.
\textsuperscript{121} The International Criminal Court MONITOR, Issue 5, August 1997, p.6. (CICC-A)
\textsuperscript{122} Facio, November 1997, p.10.
Besides the reminder of past events where the abuse of women escaped from punishment, there is, again, the emphasis on former Yugoslavia and Rwanda. “Building on their successes in drawing attention to atrocities suffered by women in recent conflicts in Bosnia and Rwanda, [they] ensured that history did not pass women by again.”

Yugoslavia and Rwanda were brought up again and again as examples that women’s human rights are violated during wars due to the incompetence of international community in making the necessary laws that will bring about accountability hence prevention. Even in the first publication of the CICC, an article emphasizing this point was published. It was written by Beverly Allen, who is the author of *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia*, the book that introduced the idea of “genocidal rape” in the context of former Yugoslavia:

Adequate legal, jurisprudential, and jurisdictional recognition of crimes not previously enumerated by international conventions and protocols is of the utmost urgency if we wish the ICC to be strong. Recent knowledge of sex-based crimes such as genocidal rape demonstrates that, while sex-based crimes are not by any means limited to female victims, they are perpetrated in overwhelming numbers of cases on women and girls. Therefore, by maintaining a strong and constant awareness of sex and gender-based crimes against humanity and developing legal instruments for the ICC that will address these, we shall assure that the Court will be a viable institution for present-day atrocities and a strong tool for the coming century.

The recommendations that the Women’s Caucus submitted to the PrepComs also underlined the importance of former Yugoslavia and Rwanda for our thinking of what constitutes a war crime or a crime against humanity: In former Yugoslavia and Rwanda, women were the victims of sexual slavery in prisons, occupied towns, and rape camps where they were detained and repeatedly raped. So, the question that delegates should ask was ‘how will we prevent them from happening ever again?’

Women’s NGOs efforts to show the extent of tragedies that was caused by the inadequacy of the law prohibiting rape hence the lack of accountability were not limited to publishing articles on the topic or emphasizing the point in the recommendations they

---

submitted to the PrepComs or the Conference. They also made sure that the public as well as the state delegates see and hear what these atrocities really entailed. For example, producing and showing films and documentaries with testimonials from the victims was part of the campaign, too: The documentary “Calling the Ghosts” is the story of two women, who were beaten and raped by Serbian soldiers at the Omarska detention camp in the former Yugoslavia and who fought to get rape classified as a war crime by the ICTY; the documentary “If Hope Were Enough” documents the struggle of women to get the ICC to address violation of women’s human rights. Whether by producing or showing these films at every chance, women’s organizations targeted to promote legal change that ensures the protection of women’s human rights.

During their advocacy for the ICC, women’s NGOs relied heavily on the discourse of “women’s rights as human rights.” Their human rights framed approach, that is bringing human rights discourse and feminist goals together within the framework of violence issues as the basic violation of human rights has two aspects: legitimizing their agenda within a legitimate discourse (human rights discourse) while at the same time “transforming the human rights concept from a feminist perspective.” While the emphasis on ‘gender’ and ‘women’s rights’ is prevalent in their documents, it is also possible to detect endeavors to use a neutral language. Some examples include:

Gender violence is violence that is targeted at women and men because of their sex and/or their socially constructed gender roles… The recent conflicts in the former Yugoslavia and Rwanda have seen many examples of gender violence. Examples include: the forcible recruitment of young boys into the army who are put through violent indoctrination, and then made to perform suicidal missions in order to prove their masculinity; and the killing of pregnant women by the slashing of their wombs and removal of their fetuses…. Women’s bodies, security or livelihood may be targeted because of their role as guardians of cultural traditions and because of their reproductive capacity. Men and boys may be

---

126 The International Criminal Court MONITOR, Issue 4, May 1997, p.8. (CICC-A)
127 “If Hope Were Enough” was produced by the Women’s Caucus.
128 Coomaraswamy (1997), p.7; Keck and Sikkink. (1998), p.166, 196. When the Women’s Caucus is talking about the way they have to deal with the strong opposition and challenges in the ICC negotiations, they say that they are “emphasizing the need for all working on the issue of women’s rights from a human rights perspective to evolve strategies to effectively deal with these challenges,” in “Objective,” Women’s Caucus for Gender Justice Publications, p.1.
129 Bunch (1990), p.496.

191
targeted because they are identified as powerful or prominent, or as potential leaders or soldiers.\textsuperscript{130}

Expertise in gender and sexual violence is necessary at all levels of the ICC because of the complex gender issues that are often part of genocide, war crimes, and crimes against humanity. Lack of expertise at any stage could prevent the Court from achieving justice\textsuperscript{131} [emphasis mine]

Gender balance... refers to a balanced composition of women and men in order to bring equality to the current male-dominated international institutions.\textsuperscript{132} [Patriarchal structures are only seen as potential threats to the gains women make\textsuperscript{133} rather than something entrenched in these \textit{male-dominated} institutions.]

It is obvious that they needed this language particularly in hard cases such as the demand by eleven Arab countries for excluding crimes of sexual and gender violence when committed within the family or as part of religious or cultural concern.\textsuperscript{134} After all that happened to women in front of the world whether in former Yugoslavia or Rwanda or many other places, after all the publicity that these events attracted and after all the advocacy women’s groups made for decades to ensure the recognition of equality for women and in a time where no one can come up and say “raping women is normal” or “we should not prohibit rape” any more,\textsuperscript{135} this was still not an easy case for women. Some of the most intense controversies happened over the articles dealing with violence against women.

An incident that happened at the ICC negotiations is a good example of the difficulty women faced: During a session when gender issues were discussed NGO participants were ordered to leave the room on the request of several delegations.\textsuperscript{136} Even at Beijing (1995), which was a platform rather than a conference writing a binding

\textsuperscript{130} “Clarification of the Term Gender,” Women’s Caucus for Gender Justice Publications, p.1.
\textsuperscript{131} Ibid., pp.1-2.
\textsuperscript{132} Ibid., p.2.
\textsuperscript{133} “ICC and Women,” Women’s Caucus for Gender Justice Publications, p.2.
\textsuperscript{136} Saland (1999), p.216.
international treaty, negotiations were so tense that they went on until 4 am in the
morning because of the contention over the issues of abortion and gay rights.¹³⁷

During this rough process of lobbying for legal change on rape, something that
helped Women’s Caucus in the strengthening of the women’s human rights discourse
hence paving the way for the creation of the normative shock by linking rape with
genocide, something that has already been rejected by the world public opinion.¹³⁸ What
would ultimately turn out to be shocking for the public conscience and the conscience of
the writers of the ICC Statute more than the suffering of hundreds of thousands of women
(which is basically the violation of non-combatant immunity and causing unnecessary
suffering) was that rape could be a tool for genocide. It was a portrayal of rapes in Bosnia
as “worse than ‘normal’ oppression.”¹³⁹ Emphasizing this association was one of the
major tactics of activists for having the activity criminalized (and to a certain extent for
creating the shock.) The primary claim of the feminists was that these systematic mass
rapes were part of the general policy of genocide: “This is ethnic rape as an official
policy of war in a genocidal campaign for political control.”¹⁴⁰

They also evoked the Holocaust for that purpose.¹⁴¹ Rape/death camps in Bosnia
were the parallels of the concentration camps in World War II. The view before the eyes
of the world public was “shocking reminder of Nazism,” which people believed belonged
to history¹⁴²; and rape was presented as an alternative way of conducting genocide made
possible by the weakness of international law dealing with women.¹⁴³

¹³⁷ Interview with an observer at the Rome Conference (1998), Beijing (1995) and Vienna (1993), May 10,
2007.
¹³⁸ The use of the concept “genocidal rape” by some feminists like Beverly Allen (see Allen (1996)) and
Catharine MacKinnon (see MacKinnon (1994)) in the context of Bosnia and Herzegovina was contested by
other feminists at the beginning of the feminist campaign. They argued that emphasizing rape as a tool for
genocide downplays the other rapes in war perpetrated without any intention of genocide or ethnic
cleansing. However, the contention subsided once the campaign started with the establishment of the ICTY.
Of course, the way all these arguments would reach the public and governments and galvanize them, then make legal action possible has been through the media.\textsuperscript{144} As Stiglmayer puts it: “It was the pressure of publicity caused by press reports that led to this mysterious turnaround. Thus one of the war crimes has been exposed, at least, triggering worldwide outrage.”\textsuperscript{145} Especially the fact that what was happening in the former Yugoslavia was happening in Europe, to white women, after Europe decided that it will never see the type of atrocities that happened during WWII again are significant in understanding why this case drew this much attention from the Western media as well.

However, we have to acknowledge the role of human rights organizations in using the media appropriately. Research shows that the more international NGOs, especially on the issue of human rights, get involved with an issue/case, the more media coverage that issue gets.\textsuperscript{146} When it came to keeping the atrocities and rapes in former Yugoslavia on the agenda, the same thing happened. Whenever the issue dropped from the front pages, a book, a medical report or a statement by the human rights organizations helped it to surface again.\textsuperscript{147} This method of keeping the public eye open to push for change was apparent during the ICC negotiations, too. In Rome, they constantly organized press conferences to brief the media on the progress of the negotiations (since almost all of the conference was closed to the press.) The CICC’s experts met with the members of the press providing them with the analyses of what was going on. The email newsletters, constant updates on their websites and the daily conference newspapers were some of the other means they employed to keep the media attention and awareness intact.\textsuperscript{148}

Because of all the lobbying women’s NGOs did at the PrepCom meetings since 1997 as well as the Rome Conference, the Statute emerged as a “revolutionary document…”[which] codifies a mandate for the Court to adopt specific investigative,

\textsuperscript{144} Meron mentions the role of media in this case as the distinguishing factor from the previous atrocities. Instant reporting as the key for sensitization of public opinion, thus making immediate response to the tragedy possible, in Meron (1998), p.204. Vranic also emphasizes the role of media, particularly American media in stimulating public consciousness, in Vranic (1996), p.28. Also see Keck and Sikkink (1998), pp.180-181.


\textsuperscript{146} Ramos et al. (2007), p.390, 401.

\textsuperscript{147} Vranic (1996), p.235.

\textsuperscript{148} “NGO Activities in Rome,” The International Criminal Court MONITOR, Issue 10, November 1998, p.11. (CICC-A)
procedural, and evidentiary mechanisms that are essential to ensure gender justice.”\textsuperscript{149} After the efforts of Women’s Caucus rape was put into the Statute as a grave breach along with an extra success: the recognition of other forms of sexual violence such as forced pregnancy, sexual slavery, enforced prostitution, and enforced sterilization as war crimes despite the opposition of a few governments to the inclusion of some of those in the treaty.\textsuperscript{150} According to Bedont and Martinez:

Few, if any, government delegations would have been willing to expend the political capital needed to secure the [gender-related] provisions… without the persistent lobbying efforts of the Women’s Caucus. Indeed, even the few willing to do so would not have been successful without the pressure exerted by the Women’s Caucus members on governments.\textsuperscript{151}

As a result, Articles 7 (1) (g) says that “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” are crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Article 8 (2) (e) (vi) states that “Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f)\textsuperscript{152}, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions” are war crimes. Also, “imposing measures intended to prevent births within the group” “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” constitute genocide (Article 6 (d)).

Besides these achievements of the inclusion of rape and other sexual violence in international law under the jurisdiction of the ICC, the Women’s Caucus, along with

\textsuperscript{149} CRLP Publications (1999), p.15.
\textsuperscript{150} The Vatican, Ireland and a group of anti-choice organizations were against the forced pregnancy part. CRLP Publications (1999), pp.10-11. Also there had been a contest over the terms “gender” versus “sex” between them and women’s groups; at the end though “gender” was the term that has been used, a special definition was stated in the treaty: “For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.” (Article 7 (3))
\textsuperscript{151} Bedont and Martinez (1999), p.69.
\textsuperscript{152} “‘Forced pregnancy’ means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.” (Article 7 (2) f)
other NGOs also managed to infuse a gender perspective into the structure of the ICC. On the issue of Court personnel with expertise on sexual and gender violence, after strong opposition to a requirement of nominating judges with expertise on gender by certain states, a compromise was reached by making the obligation of states to nominate judges with expertise on sexual violence more vague.\(^{153}\) Article 36 (8) b said that “States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.” Article 42 (9) was accepted without much opposition as “The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.”

The witness protection measures (Article 43 (6), Article 54 and Article 68) also passed without much opposition (except the use of the word “gender”) during the Conference although Women’s Caucus along with other NGOs played very important roles in terms of formulating the exact language.\(^{154}\)

After Rome

Between 1998 and 2003, since the ICC has not taken any cases yet, and since the crimes committed against women in the ethnic conflicts in former Yugoslavia and the genocide in Rwanda were not fully punished yet, advocacy on these issues continued. It is easy to find committees to work for “the production of a memorandum to the Office of the Prosecutor of the ICTR and the ICTY on how rape should be charged in the indictments and will examine the issue of command responsibility with regard to crimes of sexual violence”\(^{155}\) in the programs of different women’s organizations which continuously follow up the decisions of the Tribunals. Women's human rights NGOs also filed amicus curiae briefs (legal opinions or information given to a court by volunteers) with the ICTY and the ICTR, which produced “discretionary reconsideration, resulting in

\(^{153}\) Madagascar, Syria, Qatar, Oman, Iran, Libya, United Arab Emirates, Kenya, Kuwait, Indonesia, Egypt and Iraq were some of these states. See Steains (1999), p.381.


\(^{155}\) The Newsletter of the NGO Coalition on Women’s Human Rights in Conflict Situations produced by the International Centre for Human Rights and Democratic Development (ICHRDD) May 1999. (CICC-A)
revision of the investigations and indictments at issue.”\textsuperscript{156} For instance, in the Akayesu trial in the ICTR, “rampant sexual violence would not even have been charged but for the consistent and expensive monitoring, documentation and interventions, ultimately as amicus curiae, by women's human rights NGOs.”\textsuperscript{157}

On 2 September 1998 came the first judgment about rape by the ICTR: \textit{The Akayesu Judgment}\textsuperscript{158} Paragraph (d) of part 6.3.1 states that “Imposing measures intended to prevent births within the group, [which includes] rape” is included in the Statute’s definition of genocide. Akayesu was found guilty of genocide, which included “rapes resulted in physical and psychological destruction of Tutsi women, their families and communities. [Also] sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”\textsuperscript{159}

After two months another important decision came from the ICTY: \textit{The Celebici Judgment}\textsuperscript{160} (16 November 1998). This Judgment entails the first conviction of an accused person for rape as torture. Rape as torture is important because in the basic documents of international humanitarian law (Geneva Conventions (1949) being the most prominent) torture is explicitly mentioned as a grave breach - a violation of the laws and customs of war.\textsuperscript{161}

The next important case came from the ICTY again. This was \textit{the Furundzija judgment}, issued on 10 December 1998.\textsuperscript{162} Here, besides reiterating the standard for torture it adopted in Celebici the ICTY noted that “International case law . . . evinces a momentum towards addressing through the legal process, the use of rape in the course of detention and interrogation as a means of torture.” In concluding that the "elements of


\textsuperscript{157} Women’s Caucus for Gender Justice in the International Criminal Court “Recommendations and Commentary for December 1997 PrepCom On The Establishment Of An International Criminal Court,” United Nations Headquarters December 1-12, 1997, p.28. (CICC-A)

\textsuperscript{158} Judgment of ICTR-96-4-T, \textit{The Prosecutor versus Akayesu}, pp.96-97.

\textsuperscript{159} Judgment of ICTR-96-4-T, \textit{The Prosecutor versus Akayesu.}, p.132.

\textsuperscript{160} Judgment of ICTY-96-21-T, \textit{The Prosecutor versus Delalic and Delic} (Celebici case).

\textsuperscript{161} When a crime is called “grave breach,” states become obligated to search for persons who are alleged to have committed this crime and if found within their territory to bring them before courts.

\textsuperscript{162} Judgment of ICTY-95-17/1, \textit{the Prosecutor versus Furundzija}. 

197
torture were met” in Furundzija, the ICTY explained, “the physical attacks as well as the threats to inflict severe injury, caused severe physical and mental suffering to [the victim] . . . The intention of the accused . . . was to obtain information.” Although Furundzija did not personally commit the rapes, the ICTY found that “the accused is a co-perpetrator of torture [so] he is individually responsible for torture.” As such, he is “guilty of a violation of the law or customs of war (torture),” in violation of Article 3 of the ICTY Statute. This case also advanced international jurisprudence on rape by expanding the legal definition of rape drawing on the basic definition of rape by the ICTR (Akayesu) which means the broadening of the scope of rape crimes to include forced oral and anal sex.163

Meanwhile rape returned to Europe with the Kosovo conflict in 1999. This resulted in the “re-doubling [of human rights advocates’] campaign for the strict enforcement of international laws against rape and other sexual crimes.”164 In June of 1999 a conference was held in Vienna.165 The name of the conference report is “Rape is a war crime: How to support the survivors.” The document repeats the message over and over again: the same things are happening again because rape is not punished appropriately. It mentions rape as a war crime emphasizing the need to recognize “rape and sexual violence as a crime against humanity under national and international law.”166 A pressing need for clearer and more specific laws is one of the focal points.167

In June 2000 the UN General Assembly held a special session "Women 2000: Gender Equality, Development and Peace for the 21st Century,” i.e. "Beijing plus 5" to evaluate the five years that had passed since the Fourth Women's World Conference. This session served to bring the issue of “women’s rights as human rights” on the world agenda once more.

After the reappearance of these kinds of events in the Balkans and the issue appearing on the world agenda once more thanks to the women’s groups’ efforts, the last important judgment came from the ICTY: The Trio case (22 February, 2001).168 Kunarac,  

---

165 Organized by the International Centre for Migration Policy Development (ICMPD) within European Union Odysseus Project in cooperation with the governments of Austria and Sweden.
167 Ibid., p.15.
168 Judgment of ICTY-IT-96-23 and IT-96-23/1, The Prosecutor versus Kunarac, Kovac and Vukovic.
Kovac and Vukovic, three Bosnian Serb soldiers, were charged with rape, as a crime against humanity, and as a violation of the laws or customs of war. This judgment clearly established rape as a war crime in a judgment for the first time in history. In addition to this as the three were convicted of sexual enslavement too, the definition of slavery was expanded to include sexual abuse, which means the first recognition of sexual slavery as a crime against humanity. Another important point about the decision is that the charges were made both on the basis of command responsibility and individual criminal responsibility (which is in a way responding to the demand of Beijing Declaration for accountability in all respects.) As Julie Mertus puts it:

This case represents a significant advance in the international law pertaining to the treatment of sexual violence in wartime. First, the decision demonstrates that rape will not be accepted as an intrinsic part of war...The Tribunal sent a message that it would prosecute cases of sexual violence vigorously. That the accused were low-level soldiers was of no consequence. Judge Mumba made clear that "lawless opportunists should expect no mercy, no matter how low their position in the chain of command may be." Second, although this Tribunal, as well as the International Criminal Tribunal for Rwanda (ICTR), has dealt with rape in the past, this was the first to focus entirely on wartime crimes of sexual violence. It was also the first decision by the ICTY to issue convictions for rape as a crime against humanity. The detailed discussion of the elements of rape in the decision, including a broad survey of domestic legal systems, will serve as an important guide in future cases (see paragraphs 436-464). Third, while other international tribunals have considered the crime of torture, the Tribunal’s authoritative discussion of the law of torture and its application to sexual violence cases is groundbreaking… Fourth, the decision recognized the instrumental nature of rape in wartime…understanding of rape as an instrument of terror can be applied in other cases where the evidence does not prove the existence of a direct order to rape. Finally, this decision was the first by an international tribunal to result in convictions for enslavement as a crime against humanity.

In the end, rape (as well as other forms of sexual violence) in armed conflict became a crime against humanity, a form of genocide, a grave breach and a war crime. The International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) set the precedents for prosecution of rape as a crime against humanity, grave breach, a form of genocide and finally a war crime through their decisions. Therefore, women’s movements reshaped state interests by changing the

170 Mertus (2001), pp.4-6.
normative context and by using (and to a certain extent creating) a normative shock: Rape being part of a repulsive uncivilized practice that should be rejected by all civilized nations. If one wants to be a civilized nation, one needs to reject the practice of rape in war and participate in a prohibition regime to prevent it.

The next item on the agenda of the Women’s Caucus as well as the other members of the CICC was to ensure ratification and the entry into force of the Rome Statute as well as the completion of ‘Elements of Crimes’ and ‘Rules of Procedure and Evidence’ by the Preparatory Commission meetings. Investigation, prosecution and trial of rape and other related crimes were as important as their inclusion in the Statute, so the Women’s Caucus’s next concentration became these issues. Its focus was particularly on the nomination of women judges.

The Women’s Caucus was aware of the examples of the vital ways in which women judges previously contributed to the prosecution of the perpetrators of sexual violence, like the case of ICTR Judge Navanethem Pillay who paved the way for the prosecution for rape in the Akayesu case by evoking testimonies during the trial. During the Rome Conference, Women’s Caucus with the support of some states wanted the inclusion of “gender balance” as a condition for the presence of women judges. The term had met serious opposition and as a result “fair representation of female and male judges” had been adopted as Article 36 (8) a-iii. To make sure that there would really be fair representation, Women’s Caucus along with the other groups within the CICC started a

171 ‘Elements of Crimes’ is part of the Annex I to the Rome Statute prepared by a Preparatory Commission that met ten times between 1999-2002. It explains what each crime mentioned in the Articles 6, 7 and 8 (genocide, crimes against humanity and war crimes) of the Rome Statute includes in order to help the ICC with the interpretation and application of the Statute.

172 Steains (1999).

173 Some of the states that supported “gender balance” to ensure fair representation of women judges on the Court included Costa Rica, Bosnia-Herzegovina, Samoa, Italy, Australia, Botswana, Switzerland, New Zealand, Canada, Belgium, Slovenia, Singapore, Germany, France, Finland, India, Netherlands, Austria, the US, Mozambique, Thailand, South Africa, Philippines, Trinidad and Tobago, Slovakia, Colombia, Czech Republic, Senegal, Israel, Chile, Oman, Libya, Iraq, Burundi, Algeria, Ghana, Sweden, Namibia and Swaziland. The countries which opposed it were Syria, United Arab Emirates, Madagascar, Iran and Russia. See Steains (1999), p.378.
campaign to ensure transparent nomination processes. States finally could reach an agreement at the September 2002 Preparatory Commission meeting and taking a proposal by Liechtenstein and Hungary as the basis, they decided to require States to vote for a minimum number of six male and six female candidates for the Court for the first four rounds of voting. If they cannot elect the judges by that point, they will give up the requirement. In 2002, eight male and one female judges were nominated which triggered intensive campaigning from the Women’s Caucus. As a result, the first ICC started its work with seven women judges (out of 18 total) on its bench.\footnote{Frey (2004), pp.11-13.}

It is interesting to see two paradoxical processes happening after Rome. One is the attempts by some delegations to at least partially reverse the gains that women made and secondly the role that the inclusion of rape in the Statute played for gathering support for ratifications. In the first case, problems erupted when it came to overarching gender integration into the Annex of the Statute (for making sexual violence a crime charged also as other crimes) as well as the definition of crimes against humanity. Some delegations found gender integration unnecessary since the ICTY and the ICTR already charged sexual crimes as torture and genocide. With respect to the definition of crimes against humanity, 11 Arab countries wanted to exclude crimes of sexual violence from the jurisdiction of the ICC when they are committed within family by inserting a definition into the Annex saying that “the state or non-state entity ‘actively promote or encourage’ the criminal conduct” in order for it to be a crime against humanity.\footnote{Spees, June 2000, p.4.}

During the road to ratification, the Women’s Caucus continued organizing events later such as a Public Hearing in Tokyo (December 2000) in order to “reinforce public attention to the fact that it is partly because the crimes committed fifty years ago [against the so-called ‘comfort women’ who were made sexual slaves for Japanese soldiers during World War II] remained unpunished that similar crimes continue to be perpetrated today.”\footnote{“Public Hearings on Crimes against Women in Recent Wars and Conflicts,” p.1. (CICC-A)} Thus, they “urge all to join the larger campaign for the establishment of the ICC and help end impunity for crimes against women. It is the interest of the world and community at large to ensure that crimes against women and men are adequately
recognized and that the different ways these crimes are committed against women are reflected in law-making process.”

What seems to be remarkable is that the fact of “rape in war” along with all other horrendous crimes it resonates including genocide not only helped the push for ratification but also started to be the catch-phrases for any other tragedy in the world that needs the attention of the world public. In his address to the 56th Session of the General Assembly, UN Secretary General Kofi Annan called for the ratification of the Rome Statute and for encouraging ratification he stressed the historic nature of the Statute in advancing the rule of law by defining rape clearly as a war crime and a crime against humanity. Meetings were organized by the NGOs to raise awareness about the ICC, with special focus on gender crimes.

When it came to gathering support to end the atrocities at places like Darfur, Uganda, Central African Republic, Congo or Cote D’Ivoire, rape was one of the first things that were mentioned to describe the gravity of the situation and the need for intervention. Even the United States’ efforts to undermine the Court by signing bilateral agreements with the State Parties to prevent any American from being prosecuted by the ICC were interpreted from a gender perspective:

In responding to “Spoils of War No More,” an editorial published on February 26, the writer points out that the ruling on rape and sexual slavery by the ad hoc tribunal for the former Yugoslavia constitutes a “precedent” for the permanent ICC, “with or without the United States on board.” He further argues that by “seeking exemption for American armed services members and attempting to weaken the new court, [U.S. Senator] Helms and his followers are standing in opposition to women’s rights and in support of good old days when a sovereign nation could rape, pillage and plunder enthusiastically.”

---

177 “Crimes against Women are Crimes against Humanity,” Women’s Caucus for Gender Justice Publications, p.49.
178 The International Criminal Court MONITOR, Issue 18, September 2001, p.15. (CICC-A)
As a result, the required 60 states ratified The Rome Statute and it went into force on April 11, 2002. The ICC started its work in 2003 and since then, it issued several indictments for rape though no conviction has come out yet.
Chapter VI

Conclusions

Rape and pillage have always been parts of war throughout human history. Victors in war had free reign with regard to property and they pillaged women and goods as such. According to General Andrew Jackson, “Booty and beauty”\(^1\) were the rewards of war. However, when it came to prohibiting them the sequence of “rape and pillage” became “pillage and (a century later) rape.” The puzzle that drove this project came out of this historical fact about rape and pillage being closely associated and similarly justified as weapons of war yet delegitimized and prohibited a century apart: why did the prohibition regime that regulated pillage of property not include “pillage” of women, i.e. why did the prohibition regime against rape develop almost 100 years later than the prohibition regime against pillage?

In order to address this historical question, I used both knowledge-based and interest-based theories of regime development. I argued that three sets of conditions are necessary for the emergence of a global prohibition regime: As interest-based theories contend material factors are important and states do make cost-benefit calculations when they make international commitments such as creating international regimes on the basis of these material factors. Besides, the material costs and benefits of prohibiting a practice, another very important of these calculations is that states do not want to make international commitments with which they believe they cannot comply because non-compliance is costly. International treaties are “a public signal that a state accepts a standard”\(^2\) and once accepted the public (other states) expects compliance. However, as knowledge-based theories demonstrate states are not just utility-maximizers acting on the basis of the “logic of consequences,” they are also social beings affected by the social system surrounding them and their own beliefs about their own place or their identity in the midst of that social system. What behavior is “appropriate” for a “civilized European nation-state” is as important as the costs and benefits of behaving in a certain way. Besides, underneath the cost-benefit calculations lie ideational factors, too, such as the

\(^1\) Words attributed to General Andrew Jackson during the War of 1812. Brownmiller (1975), pp.35-36.
beliefs about the possibility of compliance and the social costs of non-compliance. Ultimately, besides a belief, on the part of the states, in the preventability of the practice, hence the possibility of compliance, a normative context conducive to the ideas at hand and a normative shock to give the final push for the normative change are necessary for the development of a global prohibition regime. Thirdly, state and/or non-state actors actively propagating these ideas to promote the creation of a particular regime should exist.

In chapter 2, I started out by looking at the historical development of the norm against pillage in war. Pillage was a normal part of war until the 18th century, when the rise of the conscripted armies made it unnecessary by ending the need for booty as a payment for the mercenary armies of the previous centuries. However, even before that there were various attempts by states to prohibit it for their own armies through military codes. The reason for these attempts was purely interest-based. They did not want their soldiers running around to pillage instead of concentrating on winning the wars. Besides this discipline-based reason, states also did not want the local populations to get too upset at their conquerors. Beginning in the 17th century states also started wanting to keep the riches of the conquered land to themselves. Until the 18th century it is apparent that state interests slowly changed the way states regarded and regulated pillage but these regulations took the form of military codes, not international treaties or conventions. This was because from the perspective of a state its own army pillaging during a war was more harmful to military objectives than pillage on its own territory by the enemy soldiers. In fact, by that logic a state would want its rivals to continue pillaging since it would hurt their discipline as well as their relationship with the local population which could lead to the loss of the war. Therefore, an interest-based approach to the prohibition of pillage does not work by itself. If states wanted to prohibit pillage on the basis of these material or security interests, they would have (and in some cases they did) prohibited it unilaterally for their own armies and they would have refrained from ever creating a global prohibition regime. Then why did the prohibition regime eventually emerge?

3 Redlich (1956).
The rest of chapter 2 addressed this question by looking at the ideational factors. The first of these is the normative context that emerged between 18th-19th centuries. The major ideological changes of the 18th century (or the Age of Enlightenment) especially with respect to private property, civilization and progress are key in understanding the new normative context. This normative context paved the way for the emergence of a prevalent norm that considers pillage an uncivilized practice that belongs to Dark Ages. After a whole century, i.e. the 18th century, lacking major wars and pillage, the Napoleonic Wars turned Europe’s self-image upside down. Widespread violations of the customary rules of war including pillage during these Wars in the early 19th century instigated the idea that there was a need to codify the customs and rules of warfare and that a prohibition of pillage should be included in this codification. Therefore, for the next 84 years (1815-1899), European jurists and publicists worked to give the “civilized” world’s wars a “civilized” face. Inspired by the Lieber Code’s achievement of being accepted by a state as the legitimate guideline for the conduct of war, the agitation on the part of these publicists for codification began. Among others, jurists of the Russian and German emperors, publicists of the laws of war in Britain and other parts of Europe would not accept failure on this subject. These jurists were undeterred by the failure of the Brussels Conference and they continued their work of writing and rewriting drafts for a possible code to be submitted to a future international conference under the Institute of International Law.4 States vehemently opposed their efforts to produce multilateral codes and renounced the texts (like the Oxford Code of 1880) prepared by them. However, despite these hurdles, the works of these publicists or ‘norm entrepreneurs’ (with the backing of certain states like Russia, Netherlands and Belgium) would bear fruit with The Hague Conventions, which included a prohibition against pillage.5

With chapter 3, the main question of this project is addressed. Why did The Hague Conventions not prohibit rape alongside pillage? Looking at the normative context of the 19th century, we can expect that rape would not have been prohibited as an outrage upon women’s bodily integrity or violation of their basic rights because no one thought of

5 This picture of non-state actors managing to push for the creation of international laws with the backing of certain states at a convenient historical moment, despite widespread opposition from important powerful states is very much like the picture we saw with the creation of the ICC.
women in these terms. However, it is puzzling that the fact that they were considered part of men’s property did not help on this issue. One can argue that that the drafters of the Brussels Code, which would become The Hague Regulations with minor changes with respect to the article that is supposed to include rape, thought that mentioning a vulgar word like rape in the context of the 19th century Europe would give the states (already suspicious of the idea of codifying the laws of war) an excuse to repudiate the project because of its lack of decency. One can also argue that the drafters themselves thought the word was improper for a diplomatic document. However, the fact that they did not even try to make the article less vague by mentioning women or a prohibition (or even protection for that matter) shows that decency was not the major problem. Therefore, we turn to other possible explanations for why women were not property enough to be protected by a regime that protects other property.

For pillage, all of the conditions that are necessary to instigate a prohibition regime were there: Pillage had become costly and its benefits of feeding the army off the land disappeared by the 19th century. There was also a favorable normative context valuing private property, progress and civilization. There were also actors, i.e. the publicists who helped develop and reinforce that normative context. Finally a normative shock happened with the Napoleonic Wars to show states there was a need for new arrangements to protect private property. Besides, states did believe that they could comply with a regime against pillage by strict discipline and by providing the troops with sufficient food, clothing and other basic needs to obliterate the motive for pillage. Moreover, if war conditions brought about some pillage, “military necessity” could always be used to justify it as long as the violations were proportional and owners could be compensated later.

In the case of rape some of the material conditions that existed for pillage were valid as well. For instance, rape was as (if not more) costly as pillage in terms of upsetting the army discipline and the local populations. However, neither of the ideational conditions for the emergence of a prohibition regime was present. States did

---

6 The fact that pillage during the Napoleonic Wars was at its worst when the French Army was without food and clothing and became less after improved supply indicates to the feasibility of preventing pillaging through appropriate measures. See Lynn (1984), p.98.
not believe that they could prevent rape in war because they believed that rape in war was inevitable. After all, drill sergeant’s ditty is: “This is my weapon, this is my gun; This is for business, this is for fun.” The common belief was that in the “most exclusive male only club,” the soldiers become “famished tigers” that it is impossible to stop them from satisfying their “hunger” with the spoils of war. This gendered assumption about male sexuality that goes out of control when unsatisfied for a period of time is apparent in the fact that military regulations always allowed and usually even encouraged access to prostitutes for soldiers when they are in military camps, too.

Societies (and militaries) interpreted the biological makeup of the male and female bodies in a way that constructed rape into this inevitable byproduct of nature. Because men have penises that can erect and interlock into the female body by force as opposed to women’s “lacking” genitalia that cannot perform such a function, men are gendered as “the able” as opposed to women, “the rapeable.” Rape is understood as something that a man does as the active sex upon a woman, the passive sex, which also ignores the fact that men can be raped by men or women as well. Since penises erect for sexual purposes, they had to find their release by fulfilling their natural purpose, i.e. entering a vagina.

According to this “pressure-cooker theory of male nature,” men as the involuntary victims of their sexual instincts have no control over their actions, which means their uncontrollable drive “has to run its course in a manner that is unfortunate, to be sure, but also unavoidable.” This line of thinking even continued into the 20th century. For instance, when Soviet soldiers were raping German women by the thousands in 1945, “Stalin was merely amused by the idea of Red Army soldiers having ‘some fun’ after a hard war.” The Japanese forced 10,000-200,000 women from all over East Asia into sexual slavery for the Japanese soldiers during World War II to give “comfort” to the

---

7 Brownmiller (1975), p.31.
8 Ibid., p.32.
10 Brownmiller (1975), ft. on p.36.
11 Even Brownmiller’s contention that “men rape because they can” is gendered in this respect.
12 For example see Yusuf (1998) for the ways in which proverbs reflect this kind of thinking in popular culture.
208
soldiers. Hence, when it came to making a commitment to stop wartime rape for the state parties at The Hague, in a context where women are considered not only property but also inevitable objects of male lust, writing a vague article was the desirable option. States believed they could not prevent soldiers, who had stayed celibate on the battlefield for long enough, from satisfying their “needs” so making a commitment to stop rape did not seem sensible. After all, it is common that “boys get out of control” and when they do it is not possible to justify it with “military necessity” nor is it possible to compensate the “owners” of the raped women properly. Therefore, it would be costly to make a commitment simply to stop rape and then be in a position where the state was unable to comply with its commitments.

The second set of the ideational factors for the emergence of a prohibition regime, which could trigger a regime protecting women as human beings, were not present for rape either. The normative context was not conducive to regard rape as an attack on women. Rather it was regarded as an attack on the honor of the men who owned the women. By looking at the major marriage, adultery and rape laws in 19th century Europe, it is easier to understand the fact that when it came to the female body, the major concern was protecting the lineages of the gentlemen (because the inheritance/property must go to the rightful heirs) and international law also reflected that mentality. Stipulation to protect the honor of the family was meant to send a signal that the “property” of the propertied class should be respected but there is no reason to punish a soldier for not “respecting” the “property” (only women) of the lower classes. Although women from all classes and backgrounds are vulnerable to rape in war, it is common knowledge that the well-off people have the resources to protect themselves or escape from war zones and the poor are disproportionately affected by wars. The women who were raped during wars were predominantly lower class women and the domestic rape laws in England and France show that rape of a lower class woman was not even considered rape. Besides, even when the war reached the upper class women, they had been protected against the

15 The possibility of compensation in cases of violation is a major concern of states. The Hague Conventions related regulations were accordingly designed to make sure that when illegal appropriation of property happens during wars, later compensations can be secured. See Kalshoven (1991).
16 See Garbarino et al. (1991) for examples of this phenomenon with respect to children. Also see Forero, April 10 2001.
common soldiers by knights and squires. In the exceptional cases that noblemen did not protect women of rank, the incidents were reported with shock and horror.\textsuperscript{17} Hence, from the perspective of the European states, lower-class women, who were the major victims of wartime rape, were not property enough to be protected because their bodies were not the sites for the protection and rightful transfer of other property.

The actors necessary to help the development of a normative context where rape is as undesirable and preventable as pillage were not effective on the international stage either. The publicists who pushed for the codification of the laws of war did not include rape in the drafts they prepared because they did not want to jeopardize their projects by putting potentially unacceptable articles in them. Hence we see Martens’ draft for the Brussels Code and later The Hague Regulations excluding rape on purpose even though his inspiration, the Lieber Code, included it. Women’s groups, on the other hand, were just beginning to organize around suffrage. Although international feminism started to emerge in the mid-19th century and although some of these feminists started to talk about sexual violence against women as an important part of women’s oppression in their individual countries, the force of the movement was not powerful enough to reach The Hague in 1899 or 1907. There were no women delegates at the Conferences. The only women who played any role during the Conferences were the peace activists like Baroness Bertha von Suttner.\textsuperscript{18} Although Bertha von Suttner was known to have influenced the Russian Czar Nicholas II hence indirectly contributed to The Hague Conventions,\textsuperscript{19} these women’s influence was mostly limited with their influence on the peace movement. As a result the normative context that can make rapes in war shocking for the public conscience, i.e. that will either present women as human beings being brutally violated or as property that is universally valuable (as opposed to class and rank determining value) did not emerge in the 19th century.

In conclusion, a prohibition regime could not develop against rape with The Hague Conventions because besides the lack of advocates for change in the process,

\textsuperscript{17} Brownmiller (1975), p.37.
\textsuperscript{18} Caron (2000), p.8.
\textsuperscript{19} Schlichtmann (2003), p.381.
neither of the ideational conditions necessary for the development of a prohibition regime was fulfilled.

In chapter 4, the next important legal documents, the Geneva Conventions are examined. The fact that they were written on account of the horrific human rights violations during World War II, including widespread sexual violence against women, makes us expect a prohibition regime against rape would develop here. However, despite mentioning rape, the Geneva Conventions fall short of creating a hard law against it. By using a language of protection rather than prohibition and by excluding rape from the list of grave breaches, they fail to provide the precision, obligation and delegation that are required for a prohibition regime. So rape escaped The Hague Conventions but why the Geneva Conventions, too? In fact, if it were not for the intervention of a women’s organization, the Geneva Conventions would not even mention the word rape. Therefore, while the women’s movements gaining ground since the late 19th century had an impact on the law by making the lawmakers at least mention rape in the Geneva Conventions, they could not erase the idea about rape’s inevitability in war and the weakness of the provisions against rape in the Geneva Conventions resulted. The fact that lawmakers could mention the word rape in the document but failed to put prohibition on it as well as the failure to include it among the grave breaches show that this was not about decency and propriety either.

Also the relative absence of women’s voices during the international law creation process had this impact that during the Conferences nobody pushed for further change. The percentage of women state delegates in the 1949 Conference was 5.8%, which was very low although it was a big improvement compared to The Hague Peace Conferences with 0%. We do know that Article 27 was changed to include rape at the proposal of the International Alliance of Women sent to the ICRC before the Conference, but there were no women’s organizations directly participating at the Conference. Similarly, the Conferences between 1974 and 1977 that prepared the Additional Protocols included some women among the state delegates. The percentage of women was 6.1%, which was not a big improvement considering the advances women’s movements achieved between 1940s and 1970s at the domestic level.
Chapter 5 is on the triumph of women’s organizations in the creation of a prohibition regime against rape with the Rome Statute after the 99 years-old international law ignored it. Starting in the late 1970s and early 1980s and building on the mostly won battle of changing domestic rape laws in individual (particularly Western) countries, women’s movements turned their attention to the international law dealing with sexual violence against women. The long struggle of the women’s movements to move women out of the category of property into the category of human and to move rape into the category of crimes against human beings has been continuing and the new norm of “women’s rights as human rights” was taking root. Women have been agitating to change domestic rape laws since the 1970s with success in the Western world. These improvements were thanks to the social, political and economic advances (domestically and internationally like in the UN) that women made over the last century owing to the work of various women’s organizations all over the world. Western feminists had also been networking around the issue of violence against women since 1970s although it was not at a scale that could have a transformative effect yet. CEDAW (adopted in 1979, came into force in 1981), for instance, did not mention rape or violence against women among the forms of discrimination that should be eliminated. However, starting with the 1980 Copenhagen Conference, women would carry the subject to the global agenda with particular attention to build it within the human rights framework. The human rights framework not only worked to bring women from all countries together around the issue but also as an already legitimate framework on the global agenda it worked to legitimize the agitation of feminists over violence against women. The UN Human Rights Conference in Vienna in 1993 would be the ground for proving this successful framing.

Meanwhile, an unexpected narrow window opened for women’s movement. This was the decade of opportunity between the end of the Cold War and the War on Terror. The “no accountability” system for human rights abuses, which was put in place because of the strategic considerations of the Cold War, had collapsed along with the Berlin Wall and the governments turned to international institutions in this euphoria of the “new world order.”

---

The idea of creating an International Criminal Court, which has been on the world agenda on and off for almost half a century, was revived in this context. People thought that freedom and human rights triumphed over autocracy and the great power rivalry at the barrel of nuclear weapons ended. Under such conditions international cooperation and international institutions continuing their mission where they left off seemed realistic for the first time since the beginning of the Cold War.

At the same time, the normative context of the 1990s, with women already categorized as human for a few decades at least in the Western world and with the belief that human civilization (especially for Europe) was at the height of its existence no longer allowed states to dismiss rape as inevitable, unpleasant to talk about or a property crime that can be selectively punished. Two centuries of feminist work to make women “human,” three decades of which saw active campaigning against sexual violence, changed the terms of debate on rape. Whether or not some people still believed in the “pressure-cooker theory” of male sexuality as the source of rape, it was no longer possible to defend it. For example, when three United States marines gang-raped a 12 year-old schoolgirl on the Japanese island of Okinawa in 1995 and their commander Admiral Richard Macke commented: “I think it was absolutely stupid. I have said several times: for the price they paid to rent the car, they could have had a girl [prostitute]” the reaction was surprising considering the trivialization of rape in the past. The US handed over the perpetrators to the Japanese authorities for prosecution and the Admiral was not only condemned but he was also forced into early retirement with reduced rank. “Boys may get out of control” was no longer an option as a defense and states could no longer afford to regard rape as inevitable even for sex-starved boys who could not satisfy their hunger with a prostitute.

It was also not possible to ignore the issue of rape in international law and sweep it under the rug without giving any explanations since women were there to question. In the Rome Conference 19% of the state delegates were women, 16 of the 267 women delegates were head or deputy heads of their delegations. NGO participation and influence in the Conference in general was at a previously unseen extent and women’s NGOs were there with full force. The major feminist actor in the negotiations, the
Women’s Caucus for Gender Justice alone was composed of over 200 women’s organizations.21

This normative context along with the outbreak of the ethnic cleansing campaign in former Yugoslavia (and later the genocide in Rwanda) with widespread and widely publicized sexual violence against women and the historical opportunity of the writing of new international law regarding laws of war (the Rome Statute) gave women’s cause the necessary boost. During the ICC negotiations, women’s NGOs could show the mass rapes in former Yugoslavia as evidence that when international law fails this kind of savagery happens and the scenes were ‘shocking’ for the self-image of the ‘civilized’ world (particularly Europe) which never expected to see them after getting out of World War II with the slogan of “never again.” If women had not been working for establishing women’s rights as human rights, these images of rape and violence would not have been shocking. After all, the rapes of the Napoleonic Wars 22 or World War II were not. Had the tragedies in former Yugoslavia not happened would the Rome Statute still prohibit rape including it both among the crimes against humanity and the war crimes? Probably not, since there is no reason to believe that women would be successful in persuading states that the provisions in the Geneva Conventions were insufficient to prevent rape.

By looking at the cases of the prohibition regime against pillage and rape, the temporal disparity between their developments, we need to conclude that for a prohibition regime to emerge three sets of conditions need to be satisfied: Firstly, materially the prohibition of the practice should not be costly. Secondly, two ideational conditions need to be fulfilled. States need to believe that they can comply with the regime and there must be a normative context responsive to a possible change along with a potentially shocking event. Thirdly, actors who promote the new norms and change should emerge along. In order to support the actors’ work to draw the attention of the policymakers hence give the final push for the legal change the potentially shocking event should be turned into a normative shock.

The premise of this project is twofold. First one is that these things do not happen independently. The shocking events that ultimately set the legal changes in motion were

---

22 See Fletcher (1998); Fremont-Barnes (2002).
not independent of the normative context. Neither the Napoleonic Wars nor the ethnic conflict in former Yugoslavia was unique and unprecedented. Pillaging armies of Napoleon or the perpetrators of the rapes in former Yugoslavia did not do anything novel that would have a particularly shocking effect on the rest of the world. But they did happen in the right normative context partly created, partly reinforced and partly used by the norm entrepreneurs who promoted change.

The second premise arises from the particular cases that I looked at. The fact that international law failed to prohibit “pillage” of women for almost 100 years after it prohibited pillage of private property illustrates the deep impact that gender has on international relations, both as an ideology (meaning the way people think about women and what happens to them) and as an institutional obstacle to exclude women from politics. Therefore, this study gave an example of how gendered structure of international relations work by illustrating the role of gender as a category on international regime change.

“Hard Laws” and Change?

“Violated or ignored as they are, enough of the rules are observed enough of the time so that mankind is very much better off with them than without them.”23

“Why does it matter?” In other words, why is the creation of prohibition regimes, particularly through legalization, important? Does more legalization bring more change on the ground?

There are three issues to be addressed here. Firstly, is international law an effective tool or just window dressing that is ignored by states at will? Secondly, does enforcement, which is one of the key features of legalization, matter in terms of making law “matter”? Thirdly, how is the record of compliance for the two cases at hand?

1. Law matters:

Signing and ratifying an international treaty is a sign that a state is accepting to abide by the rules in that treaty. More legalization may lead to more compliance by increasing the clarity (precision and obligation components of legalization) of the obligations and by making non-compliance easier to detect hence increasing its costs.\footnote{Morrow (2007). Also see Chayes and Chayes (1993), Simmons (2002).}

Although the scholars who contributed to the \textit{IO} volume on legalization show that the record of legalization leading to more compliance is mixed, they conclude that there is positive relationship between norms and more legalized institutions especially in the area of laws of war.\footnote{Kahler (2000).} In other words, legal restraints serve to change the meanings of the expected behavior from the subjects of the law. As a result the organizational culture along with public opinion, i.e. the norms change as well. This, in turn, increases the drive to comply both by imposing a “sense of obligation”\footnote{See Henkin (1968), Kelley (2007).} and by creating a pressuring domestic audience. Without a precise regime that entails clear obligations, contestations and more widespread violations are likely to occur.\footnote{Abbott and Snidal (2000). Also see Simmons (2000) for the positive effect of legalization on compliance.}

Although this research is about the emergence of the regimes, not compliance to them, most believe that having a hard law is a necessary although not a sufficient step for compliance. Precision and obligation are very important factors in “hardening” the law and inducing compliance through the creation of costs of non-compliance (reputation or reciprocity) and a sense of obligation to follow the law or audience pressure. However, the last component of legalization, i.e. delegation, is a significant factor as well. Especially for the cases at hand, enforcement makes a difference.

2. Enforcement matters:

Enforcement appears as one of the key factors for compliance with international law especially for those laws whose effectiveness depends on the behavior of individuals (here the individuals on the battlefield).\footnote{See Morrow (2007) for a comparison of cases where compliance to laws of war may vary according to their requirement of compliance by individuals versus compliance by states.} It has been documented that some laws of war,
i.e. the ones that depend on the obedience of the individual soldiers, are relatively
difficult for states to obey because states cannot always control the behavior of individual
soldiers.29 Both pillage and rape are in this category. State policy and military manuals
may prohibit these practices but in the end it comes down to the behavior of the soldiers
in the battlefield.

I do not argue that lack of enforcement necessarily leads to an ineffective regime,
but that it may lead to less effectiveness. Scholars with different perspectives studied the
role of enforcement in explaining compliance with international laws and regimes.
Realists argue that states comply with international regimes and laws only if it is in their
national interests to do so. In other words, law does not have a force of its own and since
realists assume there is no genuine enforcement in an anarchical world, when they see
states acting according to the requirements of the international law realists argue that they
would have acted the same way if the law did not exist at all.30 Neoliberals argue that
enforcement is a significant mechanism (among others) to ensure compliance because
cheating and free-rider problems may result in its absence.31 For constructivists,
compliance is about the internalization of the appropriate behavior by the states.32
Thomas Franck, for instance, describes this phenomenon as laws having a “compliance
pull of their own,” hence not requiring strong enforcement to be followed.33 However,
enforcement may help increase compliance by communicating/teaching the new norms
and rules.

I suggest that laws of war, especially the ones that require adherence of
individuals, require enforcement for better compliance because most of the other
incentives and processes that ensure state compliance (reputation and reciprocity costs at
the state level, sense of obligation or audience pressure) do not impose the same restraint
on individuals in the battlefield. James Morrow argues that all militaries (although there

30 Mearsheimer (1995), Strange (1982), Goldsmith and Posner (2005). The only exception to the
compliance to international law against one’s national interests will be when it is enforced by a more
powerful state on a weaker one.
32 Henkin (1968), Kratochwil and Ruggie (1986), Wendt (1999), Franck (1990), Finnemore and Toope
33 Franck (1990).
are some exceptions) try to control the behavior of their soldiers to prevent violations of the treaties they signed and ratified but the success of control depends on various factors like military training and the opportunities soldiers have for violations.\textsuperscript{34} According to him, two of the important factors that lead to the hierarchy of compliance among different types of laws are the possibility of retaliation and reciprocity that the violation will bring about and whether compliance depends on the behavior of individuals rather than the centralized decision-making of the state. In other words, if the violation of a certain law of war can potentially produce immediate retaliation and the decision to violate it or not is made at the state level (like the use of chemical-biological weapons), compliance will be high. When, on the other hand, the threats of immediate retaliation and reciprocity from the enemy is absent or low and when it is the soldiers on the ground that are making the decision to comply, compliance is less likely. This makes the treatment of civilians rank the lowest on Morrow’s scale of compliance because civilians lack the ability to retaliate and soldiers decide to violate the laws or not.\textsuperscript{35} Overall, it seems that soldiers on the ground need additional incentives to comply with the laws of war to which their governments have committed. They need to know that they may be prosecuted for their actions\textsuperscript{36} and enforcement, whether by governments as required by The Hague Conventions (1907) and the Geneva Conventions (1949) or by international bodies with significant powers of delegation like the ICC, seems to be the key to providing this enforcement. With this idea in mind, the women’s groups who organized around the issue of prohibition of rape by international law also turned their attention to enforcement after the establishment of the ICC. The Women’s Caucus for Gender Justice moved to The Hague under its new name “Women’s Initiatives for Gender Justice” to perform as a “gender watch” of the Court.\textsuperscript{37}

\textsuperscript{34} Morrow (2007), p.561.
\textsuperscript{35} Ibid., p.569.
\textsuperscript{36} This is all the more important in the case of rape in war since research has shown that men never think that they will be prosecuted for rape. See Mezey (1994).
\textsuperscript{37} Nainar (2004).
3. Track record for pillage and rape:

In order to see the importance of legalized prohibition regimes, I will briefly turn to examine whether in the two cases analyzed here the creation of prohibition regimes had an effect on changing practices historically.

Pillage:

Seven years after the conclusion of The Hague Conventions, World War I started and although the articles of The Hague Convention with regard to private property were violated at times particularly by Germany in Belgium and France,38 on the whole the law was obeyed.39 During World War II, instances of pillage happened on a larger scale. Besides Germany confiscating private property on the territories it occupied, looting artworks and cultural heritage was commonplace. The Soviet Union, for instance pillaged occupied Germany and Manchuria in 1945.40 Pillage continued to occur in several wars after its prohibition but most of the time the government of the offenders took steps to punish the violators.41 Prosecutions by international bodies also happened. For example, Nuremberg Tribunal’s Charter included pillage and charges were brought for it42 although the exact extent of pillage during the War was not clear. In 1949, Graber wrote that there is not enough data to evaluate occupation practices during WWII:

Contemporary accounts in newspapers and periodicals consist largely of recitals of specific instances of alleged abuses in occupied regions, and a refutation or justification of these acts, both types of accounts usually written by persons partial to either the occupant or his adversary.43

However, the claims for pillaged property are still continuing after half a century sometimes resulting in successful recoveries which show the law had force even though it did not deter violations in the first place. Especially looted art and cultural property are the subjects of these claims. Some examples are the Koenigs Collection looted from the Netherlands by the Nazis and then from Germany by the Soviet Union during WWII.

38 Hopkinson (1916).
40 Simpson (1997); Von Glahn (1957), p.189.
41 Von Glahn (1957), p.229.
http://www.yale.edu/lawweb/avalon/imt/imt.htm
Parts of it were returned in 2004. For the rest, claims are continuing. Other similar examples are the Kandinsky painting settlement in 2002, Tate Gallery settlement in 2001 for a Griffier painting and a case that was won against the Hungarian state for holding on to pillaged art (by Nazis) in 2000.  

Contemporary armed conflicts also witnessed looting including the war in Former Yugoslavia and the genocide in Rwanda. As a result, the Statute of the ICTY and the ICTR both included pillage and both Tribunals prosecuted individuals for it.

*Rape:*

Just after the Rome Statute was signed prohibiting rape, another ethnic cleansing campaign including rape as one of its tools was launched in 1999 in the Kosovo region of Yugoslavia. Though the conflict lasted for a short time due to the early intervention of NATO, British Foreign Secretary Robin Cook stated that the government seized on evidence that young ethnic Albanian women were being subjected to systematic rape by Serbian security forces and it surfaced slowly because many of the victims were reluctant to admit the events. Rape had returned to the Balkans. The *Guardian* says that although there is no evidence of a similar pattern of Bosnian rape camps in Kosovo, depending on the testimony of people like a gynecologist working in the refugee camps in Albania, there is agreement that rape had returned to the Balkans. According to Human Rights Watch documents there are credible cases of rape, but there is no evidence that rape camps existed (which was the dominant pattern in Bosnian case). Rapes were in the form of gang rapes, which sometimes resulted in pregnancies; however, there is no proof of a policy of forced pregnancy as well.

However, these do not mean that systematic rape was not used as a weapon for ethnic cleansing. It was used in order to force people to flee and never come back as well.

---


46 Watt, Traynor and O’Kane, April 14, 1999, pp.1-3.


as for destroying the community through stigmatizing women. Human rights organizations’ investigators were told that rapes had happened mostly by police or paramilitary attacking the houses and gang-raping women there or while the refugees were fleeing.\textsuperscript{49} Also there are significant differences between the two cases: the war lasted shorter and NATO intervention came much earlier compared to what had happened in Bosnia. What do these mean in terms of the effectiveness of the prohibition regime created by the Rome Statute?

There are three things that need consideration: The first is that although mass rapes occurred, they were not done overtly by establishing camps. As Julie Mertus puts it: “For the most part Serbian police, military and paramilitary groups in Kosovo have been careful to avoid [or to hide] the kind of atrocities we see in Bosnia.”\textsuperscript{50} The fact that some of the perpetrators were trying to hide their identities by wearing ski masks is also noteworthy in terms of showing fear of being detected and punished.\textsuperscript{51} Secondly, the difference between the two communities, i.e. Bosnian Muslims and Kosovo Albanians, is significant in terms of the reaction they would have given to these rapes. In the Kosovo Albanian society women are far more silenced about what had happened to them than Bosnian women because of community’s commitment to the traditional Code of Leke Dukajini\textsuperscript{52}, which covers all aspects of social activity, particularly honor and reinforcing traditional patriarchal ideas about gender roles. Because of this extreme power of the rape stigma, it was less likely that Albanian women would testify (which actually turned out to be the case).\textsuperscript{53} Therefore, although specifically law and more generally the norm that had developed against the use of rape as a weapon seemed to force the offenders to hide what they are doing, the fact that there is no way to enforce the law without the testimonials of the victims (which becomes unlikely because of the patriarchal social structures)

\textsuperscript{49} HRW Report, March 21, 2000.
\textsuperscript{50} Mertus, January 21, 1999, A19.
\textsuperscript{51} Bumiller, June 22, 1999.
\textsuperscript{52} A body of customary law under which the clans of Albania have lived since the 15\textsuperscript{th} century which says that a man who fails to exact blood revenge for the dishonor of one of his womenfolk brings shame on his entire family which leads many to think that the rape victim has brought shame on her family. Igric (1999), p.1.
prevented the law from being effective.\textsuperscript{54} The fact that women’s organizations pushed for rigorous witness protection measures in the ICC Statute indicates to this awareness.\textsuperscript{55} Finally and most importantly we need to recognize that when Kosovo conflict happened, the prohibition regime against rape was only 1 year old if we count from the signing of the Rome Statute and even not in force yet if we count it from the Statute’s ratification. It takes time for regimes and laws to become effective and the regime against rape is too young to make definitive conclusions about its ultimate effectiveness.

Some people also criticized the prohibition regime against rape in wartime as “a right development for wrong reasons,” i.e. firstly it began\textsuperscript{56} within a general reaction to human rights violations during World War II, which resulted in selective prosecutions (Nuremberg and Tokyo) since rape was not considered a war crime per se. And women’s movements could only find a real opportunity to fight against it after the two shocking events, the systematic rapes during the ethnic/civil conflicts in former Yugoslavia and Rwanda, and on the basis that these rapes were parts of the genocide. The following developments have depended largely to this argument about rape being a tool for genocide. Liz Philipose argues, for example, the legalization of the issue after these wars is because the wars were considered unjust as wars for ethnic cleansing attacking a community, not because of the violation of the human rights of women.\textsuperscript{57}

The extension of this argument is that the regime will be ineffective because the attitude towards rape and the underlying assumption that had legitimized it for centuries had not changed although the law against the use of rape as a weapon in war has developed.

\textsuperscript{54} See Vranic (1996), p.29; Skjelsbaek (1997), p.31; Susskind (1997/1998), p.2; Brownmiller (1975), p.82 for a detailed explanation of the causes of not testifying like shame, fear of retaliation, ostracism by their families or communities or the lack of witness protection. Also, see Igric (1999) for how the social stigma works to push women not to testify.

\textsuperscript{55} Articles 43, 54 and 57 of Part IV and Articles 64, 68 and 69 of Part VI are about witness protection. The Prosecutor will take the appropriate measures for witness protection is the sum of these articles but whether they will be effective in protecting the women from the social stigma in their own communities, therefore convince to testify remains as a question mark. See de Brouwer (2005) for the procedure that the ICC can follow in order to make rape cases easier on the victims as well as the sentencing and the reparation regime.

\textsuperscript{56} Even if we start the evolution process from the Middle Ages where in some exceptional cases rape was prohibited by the kings, it was related to the just war doctrine, non-combatant immunity and honor issue rather than the illegitimacy of the act itself. Meron (1998).

\textsuperscript{57} Philipose (1996), pp.56-57.
Two answers can be given to this argument: Firstly, the pattern of regime creation with its shock and grafting is common to many of the international laws, which are now internalized and with which many states comply. Secondly, law can constitute meanings that can contribute the push for further normative change that is necessary for better compliance.\textsuperscript{58} After all, perpetrators have already been prosecuted and convicted of rape by the ICTY and the ICTR and the ICC stands as the pledge to ensure punishment for future violations.

\textsuperscript{58} Keck and Sikkink (1998), Koh (1996).
APPENDIX A

THE HAGUE CONVENTIONS
(First Peace Conference at The Hague: Signed - 29 July 1899)

Laws of War: Laws and Customs of War on Land (Hague II)

Article 1

The High Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the "Regulations respecting the Laws and Customs of War on Land" annexed to the present Convention.

Article 2

The provisions contained in the Regulations mentioned in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them. These provisions shall cease to be binding from the time when, in a war between Contracting Powers, a non-Contracting Power joins one of the belligerents.

SECTION II- ON HOSTILITIES

Article 22

The right of belligerents to adopt means of injuring the enemy is not unlimited.

Article 23

Besides the prohibitions provided by special Conventions, it is especially prohibited:
(a) To employ poison or poisoned arms;
(b) To kill or wound treacherously individuals belonging to the hostile nation or army;
(c) To kill or wound an enemy who, having laid down arms, or having no longer means of defense, has surrendered at discretion;
(d) To declare that no quarter will be given;
(e) To employ arms, projectiles, or material of a nature to cause superfluous injury;
(f) To make improper use of a flag of truce, the national flag or military ensigns and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

Article 28

The pillage of a town or place, even when taken by assault, is prohibited.
SECTION III- ON MILITARY AUTHORITY OVER HOSTILE TERRITORY

Article 42

Territory is considered occupied when it is actually placed under the authority of the hostile army.
The occupation applies only to the territory where such authority is established, and in a position to assert itself.

Article 43

The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Article 44

Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited.

Article 45

Any pressure on the population of occupied territory to take the oath to the hostile Power is prohibited.

Article 46

Family honors and rights, individual lives and private property, as well as religious convictions and liberty, must be respected.
Private property cannot be confiscated.

Article 47

Pillage is formally prohibited.

Article 48

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do it, as far as possible, in accordance with the rules in existence and the assessment in force, and will in consequence be bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.
Article 49

If, besides the taxes mentioned in the preceding Article, the occupant levies other money taxes in the occupied territory, this can only be for military necessities or the administration of such territory.

Article 50

No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.

Article 51

No tax shall be collected except under a written order and on the responsibility of a Commander-in-Chief.
This collection shall only take place, as far as possible, in accordance with the rules in existence and the assessment of taxes in force.
For every payment a receipt shall be given to the taxpayer.

Article 52

Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.
These requisitions and services shall only be demanded on the authority of the Commander in the locality occupied.
The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.

Article 53

An army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property of the State which may be used for military operations.
Railway plant, land telegraphs, telephones, steamers, and other ships, apart from cases governed by maritime law, as well as depots of arms and, generally, all kinds of war material, even though belonging to Companies or to private persons, are likewise material which may serve for military operations, but they must be restored at the conclusion of peace, and indemnities paid for them.
Article 54

The plant of railways coming from neutral States, whether the property of those States, or of Companies, or of private persons, shall be sent back to them as soon as possible.

Article 55

The occupying State shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of usufruct.

Article 56

The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property.
All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.

(Second Peace Conference at The Hague: Signed - 18 October 1907) (Hague IV)

Article 3

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Article 28

The pillage of a town or place, even when taken by assault, is prohibited.

Article 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.

Article 47

Pillage is formally forbidden.
Article 52

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Article 56

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG, 1945

II. JURISDICTION AND GENERAL PRINCIPLES

Article 6

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.
PART III. STATUS AND TREATMENT OF PROTECTED PERSONS

Section I. Provisions common to the territories of the parties to the conflict and to occupied territories

Article 27

Protected persons are entitled, in all circumstances, to respect for their persons, their honor, 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 honor, in particular against rape, enforced prostitution, or any form of indecent assault.

Article 33

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

PART IV. EXECUTION OF THE CONVENTION

Section I. General Provisions

Article 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.
Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favorable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

Article 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), 8 JUNE 1977

Article 11 Protection of persons

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article I shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:
   (a) Physical mutilations;
   (b) Medical or scientific experiments;
   (c) Removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.

3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given
voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavor to obtain a written statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Article 75 Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

   (a) Violence to the life, health, or physical or mental well-being of persons, in particular:

      (i) Murder;

      (ii) Torture of all kinds, whether physical or mental;

      (iii) Corporal punishment; and

      (iv) Mutilation;

   (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

   (c) The taking of hostages;

   (d) Collective punishments; and

   (e) Threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) No one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) Anyone charged with an offence is presumed innocent until proved guilt according to law;
(e) Anyone charged with an offence shall have the right to be tried in his presence;
(f) No one shall be compelled to testify against himself or to confess guilt;
(g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
(i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
(i) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.
6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
(b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

Article 76 Protection of women

1. 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.

2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.

3. To the maximum extent feasible, the Parties to the conflict shall endeavor to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

Article 85 Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
   (a) Making the civilian population or individual civilians the object of attack;
   (b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
   (c) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
   (d) Making non-defended localities and demilitarized zones the object of attack;
   (e) Making a person the object of attack in the knowledge that he is hors de combat;
   (f) The perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.
4. In addition to the grave breaches defined in the preceding paragraphs and in the
Conventions, the following shall be regarded as grave breaches of this Protocol, when
committed wilfully and in violation of the Conventions of the Protocol;
(a) The transfer by the Occupying Power of parts of its own civilian population into the
territory it occupies, or the deportation or transfer of all or parts of the population of the
occupied territory within or outside this territory, in violation of Article 49 of the Fourth
Convention;
(b) Unjustifiable delay in the repatriation of prisoners of war or civilians;
(c) Practices of apartheid and other inhuman and degrading practices involving outrages
upon personal dignity, based on racial discrimination;
(d) Making the clearly-recognized historic monuments, works of art or places of worship
which constitute the cultural or spiritual heritage of peoples and to which special
protection has been given by special arrangement, for example, within the framework of
a competent international organization, the object of attack, causing as a result extensive
destruction thereof, where there is no evidence of the violation by the adverse Party of
Article 53, sub-paragraph (b), and when such historic monuments, works of art and
places of worship are not located in the immediate proximity of military objectives;
(e) Depriving a person protected by the Conventions or referred to in paragraph 2 of this
Article of the rights of fair and regular trial.
5. Without prejudice to the application of the Conventions and of this Protocol, grave
breaches of these instruments shall be regarded as war crimes.

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12
AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF
NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II), 8 JUNE 1977

PART II. HUMANE TREATMENT

Article 4 Fundamental guarantees

2. Without prejudice to the generality of the foregoing, the following acts against the
persons referred to in paragraph 1 are and shall remain prohibited at any time and in any
place whatsoever:
(a) violence to the life, health and physical or mental well-being of persons, in particular
murder as well as cruel treatment such as torture, mutilation or any form of corporal
punishment;
(b) collective punishments;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment,
rape, enforced prostitution and any form or indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage;
(h) threats to commit any or the foregoing acts

234

Article 2

Grave breaches of the Geneva Conventions of 1949
The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
(a) willful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) willfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war
The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 5

Crimes against humanity
The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 8 November 1994

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.

Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) Collective punishments;
(c) Taking of hostages;
(d) Acts of terrorism;
(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) Pillage;
Article 5

Crimes within the jurisdiction of the Court
1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
   (a) The crime of genocide;
   (b) Crimes against humanity;
   (c) War crimes;
   (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 7

Crimes against humanity
1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
   (a) Murder;
   (b) Extermination;
   (c) Enslavement;
   (d) Deportation or forcible transfer of population;
   (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   (f) Torture;
   (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
Article 8

War crimes

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(xvi) Pillaging a town or place, even when taken by assault
Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Convention

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
(v) Pillaging a town or place, even when taken by assault;
(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

Article 11

Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.
APPENDIX B (from Abbott et al., p.410, 415, 416.)

Indicators of Obligation

High
Unconditional obligation; language and other indicia of intent to be legally bound
Political treaty; implicit conditions on obligation
National reservations on specific obligations; contingent obligations and escape clauses
Hortatory obligations
Norms adopted without law-making authority; recommendations and guidelines
Explicit negation of intent to be legally bound

Low

Indicators of Precision

High
Determinate rules; only narrow issues of interpretation
Substantial but limited issues of interpretation
Broad areas of discretion
“Standards”; only meaningful with reference to specific situations
Impossible to determine whether conduct complies

Low

Indicators of Delegation

a. Dispute Resolution

High
Courts: binding third-party decisions; general jurisdiction; direct private access; can interpret and supplement rules; domestic courts have jurisdiction
Courts: jurisdiction, access or normative authority limited or consensual
Binding arbitration
Nonbinding arbitration
Conciliation, mediation
Institutionalized bargaining
Pure political bargaining

Low

b. Rule making and implementation

High
Binding regulations; centralized enforcement
Binding regulations with consent or opt-out
Binding internal policies; legitimation of decentralized enforcement
Coordination standards
Draft conventions; monitoring and publicity
Recommendations; confidential monitoring
Normative statements
Forum for negotiation

Low
BIBLIOGRAPHY


“Clarification of the Term Gender,” Women’s Caucus for Gender Justice Publications.


“Crimes against Women are Crimes against Humanity,” Women’s Caucus for Gender Justice Publications.


“Excluding Crimes against Women from the ICC is not an Option,” Women’s Caucus for Gender Justice Publications.


“The Hague Appeal for Peace.”


“If ICC and Women,” Women’s Caucus for Gender Justice Publications.


*If Hope Were Enough* (2000), Women's Caucus for Gender Justice / WITNESS.

ICTY Bulletin N 15/16, “…And the First on Rape and Sexual Assault Charges Since Tokyo.”


“Introduction,” Women’s Caucus for Gender Justice Publications.


Judgment of ICTR-96-4-T, The Prosecutor versus Akayesu.

Judgment of ICTY-95-17/1, The Prosecutor versus Furundzija.

Judgment of ICTY-96-21-T, The Prosecutor versus Delalic and Delic (Celebici case).
http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e-1.htm

Judgment of ICTY-IT-96-23 and IT-96-23/1, The Prosecutor versus Kunarac, Kovac and Vukovic (Trio case).


256


http://www.yale.edu/lawweb/avalon/imt/imt.htm

“Objective,” Women’s Caucus for Gender Justice Publications.


http://www.guardianunlimited.co.uk/Kosovo/Story/0,2763,42296,00.html


**Archives:**

(SFA) The Swiss Federal Archives in Bern, Switzerland.

(ICRC-A) The Archives of the ICRC in Geneva, Switzerland.
(SSC) The Sophia Smith Collection in Smith College Library, Northampton, MA.

**Interviews:**

Interview with a member of the CICC, July 27, 2007.
Interview with a leader in the women’s movement, September 11, 2007.
Interview with a former member of the Women’s Caucus, February 6, 2008.