LAW + IMPUNITY = LEGITIMACY?

RETHINKING LIBERAL LEGITIMACY
OF INTERNATIONAL LAW
WITH A FEMINIST CRITICAL APPROACH

Emelie Weski

5/22/2012
# Contents

1. Summery......................................................................................................................... 2

2. Introduction ....................................................................................................................... 3
   2.1 Research question and aim ......................................................................................... 3
   2.2 Background .................................................................................................................. 3

3. Method and Methodology ............................................................................................... 5
   3.1 Material ....................................................................................................................... 6
   3.2 Case selection ............................................................................................................. 7
   3.3 Limitations .................................................................................................................. 8

4. Theory ............................................................................................................................. 9
   4.1 Liberalism and legitimacy .......................................................................................... 9
   4.2 Feminism, justice and positive peace ........................................................................ 12
   4.3 Political decision-making ......................................................................................... 14
   4.4 Summery ................................................................................................................... 15

5. Analysis .......................................................................................................................... 17
   5.1 The political fit .......................................................................................................... 17
      5.2 Do the international criminal tribunals *uphold* international law in cases of sexual violence? ........................................................................................................... 20
      5.3 Do the international criminal tribunals *implement* international law in cases of sexual violence? ........................................................................................................... 23
      5.4 Theoretical conclusions ......................................................................................... 27
   5.5 The moral consensus ................................................................................................. 29
      5.6 Is there a moral consensus supporting the praxis of the international criminal tribunals? .................................................................................................................. 40
   5.7 Legitimacy .................................................................................................................. 42

6. Conclusions ...................................................................................................................... 45

7. Bibliography ..................................................................................................................... 49
1. Summery

In here, the criminalization of sexual violence is a manifestation of increased recognition of feminism, and proof of international law reaching at liberal criteria for legitimization. Though, in making conclusions other necessary criteria for fully recognized legitimacy are acknowledged (such as other types of rights, types of security and other levels for analysis). Though, from a strict feminist critical approach the criminalization of sexual violence, and the extent of such criminalization can by itself prove legitimacy or illegitimacy.

The criminalizing of sexual violence took place over 100 years ago, yet the systematic use of it in warfare was not publicly condemned until the ICTR (International Criminal Tribunal of Rwanda) and the ICTY (International Criminal Tribunal of former Yugoslavia) (Buss, 2009, p. 356) took on the duty to prosecute and convict. Still today women’s security and sexual violence are research fields that awake a lot of hostile emotions.

Findings show that there is few, if any, affects for those tribunals that fail to bring justice to rape victims; calling for an analysis of Walzer’s political fit. The international praxis of impunity supports feminism in an existing ‘male truth’ risking the security of women. The legitimacy of the institution of international law is, however, not dependent on one legal procedure.

Liberalist and feminist different interpretations of adequate necessity to create peace frame after 15 224 words a utilitarian illusion which slows down the pace of the implementation of a feminist security agenda. However, the progress is still evidence of strife towards the Kantian society of states. An inconsistent moral consensus finally results in the conclusion that this thesis cannot confirm the institution of international law illegitimate, arguably validating legitimacy.
2. Introduction

2.1 Research question and aim
The aim is to explore a feminist perspective on the liberal idea of legitimacy (political fit and moral consensus), specifically, that of international law; and to find and discuss reasons for what seems like a lack of giving justice to the victims of sexual violence in armed conflicts.

Scanning the research field phenomenologically the issues of interest was quickly narrowed down to four initial starting points: (1) How does impunity for sexual violence affect peace? (2) Who is ‘peace’ for? (3) How can a liberal legitimacy of international law be discussed with feminist perspective? (4) Can the strict rules of the categorical imperative give further insight to women’s security?

With feminist IR-theory liberalism’s original criteria for legitimization were, consequently, shaped into two research questions:

3.1 Do the international criminal tribunals uphold and implement international law in cases of sexual violence?
4.1 Is there a moral consensus supporting the praxis of the international criminal tribunals?

2.2 Background
With the increased recognition of the existence of sexual violence in armed conflicts and the increased debate concerning its political importance students of IR have a duty to the field to conceptualize and theorize. The physical harm sexual crime inflict on its victim is brutal and stand to have consequences, like all war crimes. However, without conceptualizing and theorizing we will not know what those consequences are in the absence of punishment, or know where change is necessary, if at all necessary.

It is in the time of today, where internal armed conflicts are increasing while international armed conflicts are decreasing, that equality and liberty turn even more vital for international law. It is not soldiers fighting soldiers any longer, but often military abusing civilians instead. To treat every person as an end instead of means (Kant cited in Donaldson, 2002, pp. 139) become a necessary tool to bring about peace;
internal stability and liberal democracies. However, in reflecting on what sort of social contract international law represents, an idealist cannot forget the realist concerns. There is no hegemonic power to coheres verdicts or initiate prosecutions. Though, the establishment of the ICC (International Criminal Court) is evidence enough to awake some hope about a development of a global legislative system with purpose to invoke justice.

On the precondition that such an international system exists (recognition of the international tribunals and courts), if not on the same counts as the one designed by Kant so on similar grounds, today’s system could be compared to that society of states. A society that is governed by international law, where liberal democracies coexist relatively peacefully (which in here will be referred to as legitimate states ratifying and fulfilling the UN-treaties as well the lack of international armed conflicts between those liberal democracies) and the ICC and the UN have become an alternative to realists’ hegemonic status quo. A society where most sanctions are only carried out on those states which do not adhere to the international law or costume, and where military interventions are only enforced on those states that are not legitimate.

In expanding the security agenda and including women’s security and justice; positive peace, as well as motives for either emphasizing it or not will be vital. Do we include women’s rights in the justice process? What are the arguments for giving women’s rights political importance or to not give it political importance.
3. Method and Methodology

In performing a *mis-fitting case study*, I will seek to demonstrate that the international law is not legitimate as conceptualized by liberalism out of a feminist perspective. This will be carried out in a manner similar to Moses & Knutsen provided analytical table in *Ways of Knowing* (2007, p. 138).

<table>
<thead>
<tr>
<th>Type</th>
<th>Function</th>
<th>Logic</th>
<th>Corresponds to Lijphart (1971)</th>
<th>Corresponds to Eckstein (1975)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mis-fitting</td>
<td>Explore the limits of a general proposition; theory testing</td>
<td>Falsification</td>
<td>Theory-confirming</td>
<td>Crucial case</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Theory-infirming</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Deviant</td>
<td></td>
</tr>
</tbody>
</table>

The table marks a naturalist approach in finding evidence (or lack of evidence), however, the liberal idea of legitimization – especially that of the *moral consensus* – demands naturalist methods in finding constructivist proof. Interpretation of such findings should be handled delicately.

In striving to have as few dependable variables as possible; the political fit has been narrowed down to one theory-confirming and one theory-infirming variable – both possible to quantify and perceive with naturalist methods. However, references and analysis may be made on constructivist assumptions concerning the moral consensus.

<table>
<thead>
<tr>
<th>Type</th>
<th>Function</th>
<th>Logic</th>
<th>Corresponds to Lijphart (1971)</th>
<th>Corresponds to Eckstein (1975)</th>
</tr>
</thead>
<tbody>
<tr>
<td>There is a political fit</td>
<td>• Is sexual violence criminalized in international law?</td>
<td>• Liberalism and legitimacy</td>
<td>Sexual violence; criminalized or not punished or not</td>
<td>International law</td>
</tr>
<tr>
<td></td>
<td>• Is sexual violence punished by law in the international criminal tribunals?</td>
<td>• Feminism, justice and positive peace</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Praxis is moral consensus</td>
<td>• What is the moral consensus?</td>
<td>• Legal documents</td>
<td>Liberalism Feminism (Other)</td>
<td>SBS: seven circumstances</td>
</tr>
<tr>
<td></td>
<td>• What priority has sexual violence in the international society?</td>
<td>• Legal procedure</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Female consensus</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The table above illustrates the structure of the research leading up to this thesis, and demonstrates the relation between method, theory, research and analysis. Research is made to challenge two ‘types’ (*international law is legitimate* and *praxis is moral consensus*) by using four ‘functions’ (questions). These functions rest on feminist analysis and are tools to explore the limits of liberalist criteria for legitimacy, as well as tools to discuss the sufficiency of the concept of ‘legitimacy’.

The ‘logic’ will further be developed in the theory-chapter. But in short; it is likely to assume that sexual violence within criminal justice increases the risk for a divide between liberalism and feminism; a consequence of differences in negative and positive ‘understanding’ of peace.

### 3.1 Material

Law in analysis is the legal framework and the Judgements of the ICTR and the ICTY, and the Special Court of Sierra Leone; special reports from the UN Commission on Human Rights (UNCHR); and analytical framework published by Human Rights Watch (HRW). Certain articles in analysis are extracted mostly from The Hague Convention and Regulations of 1907; the Geneva Conventions of 1949; the Vienna Convention on the law of Treaties; and the Rome Statute of the ICC. The analysis will be rooted in the international official purpose found in the Universal Declaration of the Human Rights (UDHR), the UN Charter and the International Covenant of Civil and Political Rights (ICCPR).

Literature for understanding and debating the lack of international convictions for sexual violence covers: the female role in conflict, motives for targeting women and the nature of sexual violence used to target women. Especially used for this purpose is *Victims, Perpetrators or Actors? – Gender, Armed Conflict and Political Violence* (Moser et.al., 2001) a collection of several researchers findings in investigating sexual violence. But also other articles published more recently are used to make an assessment in term of legal procedure and victims’ and/or witnesses’ experience, such as: “‘When We Wanted to Talk about Rape’: Silencing Sexual Violence at the Special Court for Sierra Leone” (Kelsall & Stepakoff, 2007); and “An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture” (Pearce, 2003).
To map the moral consensus (for convicting or giving impunity for sexual violence in armed conflicts); I will also be using the decision-making theory of Snyder, Bruck and Sapin (SBS) mostly described in “Decision-Making as an Approach to the Study of International Politics” (2002) as well as course literature on security threats’ – e.g. *International Security - An Analytical Survey* (Sheehan, 2005).

Basic principles of liberalist and feminist security are grounded in readings of *International Security – An Analytical Survey* (Sheehan, 2005). Liberal ethics are grounded in readings of *Traditions of International Ethics* (Nardin et.al., 2002) as well as Tesón’s interpretation of Kant (1992) and Kant’s own writing *The Principle of Political Right*, while most feminist arguments derives from *Victims, Perpetrators or Actors? – Gender, Armed Conflict and Political Violence* (Moser, 2001). Finally Walzer will contribute with insight as to legitimacy.

### 3.2 Case selection

In the practical making of this research a case study was carried out in line with Lijphart’s definition of an *idiographic case study* (1971). Idiographic is a human inclination to specify; the need to understand the meaning of often unique and subjective phenomena.

The decision was made to focus in particular on gendered violence, especially sexual violence; since research shows that women are the main victims of such crimes; and since offenders of such crimes did not seem to be punished, alternatively exist. In the search of international law criminalizing sexual violence; research came to include international law concerning both torture and slavery, crimes which are not only banned. Torture and slavery was of specific interest as previous research in the field confirmed their criminalization of *rape*. Torture and slavery are *jus cogens crimes*, two of the most ‘vicious crimes’ there is and therefore, also reasonable sources to look for a minimum of legitimacy.
3.3 Limitations

The inquisitiveness of this thesis opens up many doors for excavated research. This thesis could both be narrower and broader - depending on the reader’s quantitative or qualitative interest in methodology. Some limitations, though, are expected.

This essay will indirectly and briefly cover women’s role in armed conflict as well as the violence used to target women. However, this is not done in order to frame specific roles women have, or to exclude that women are targeted with other violence than sexual violence.

In terms of specifying moral consensus, for praxis of convictions and/or impunity for sexual violence in armed conflicts, there may be several factors (not only different, but also within the same field as covered in this thesis) shielding important insight to its true nature. These factors are discounted upon their either lacking linkage to feminism, or because the instituted length of this thesis. They are, however, not overlooked; just not within the span of this essay.

A final note: this sort of feminist reinterpretation of a liberalist point of view of legitimacy can at most be compared to an exploratory study; to further understand the correlation between international policy and female reality. Though, the thesis show eminent historical character, which in many ways can be recognized as science (Moses&Knutsen, 2007, p. 139). Generalizations are, as usual, refrained from. In this case, especially because of the new (since year 2008) International Criminal Court and the Rome Statute which may shift the validation of a political fit. However, it is likely to believe that, though the procedure and law changed, the system and the norms might not be so fluctuant.
4. Theory

Since this essay strives to retest liberal legitimacy of the institution of international law within the feminist framework, a rather deep theoretical discussion is necessary. Starting off with liberalism and its discussions about legitimacy; continuing with feminism and its understanding of justice and positive peace; and finally finishing off with decision-making theory to illustrate one way to rationalize underlying causes for moral consensus.

4.1 Liberalism and legitimacy

Liberalism being a large theory developing on many ideas concerning the legitimate can give insight to the idea of the political society and a clue to some key ingredients for its construction.

An international society

In coining perpetual peace Kant suggests two main ingredients. Firstly, the expansion of the republican type of governance, and secondly, that legitimate states by definition are to be free (Tesón, 1992, p. 54). Kant developed his idea in the 18th century, an idea which at that time was highly unorthodox. He suggested that free, republic states (in this essay interpreted similar to international relations as liberal democracies) inevitably will form union or alliances (Kant, 1971).

Tesón interprets Kant’s perpetual peace not as a vision of a world government, but as an envisioned political agenda, realized through international law (1992). International law, as well as domestic law, is the organ through where such unions possibly can be actualized. If entered voluntarily by free republics, represented by elected representatives, these unions can become the great foundation of an international society (Tesón, 1992, p. 59) or what Kant called a ‘federation’. And today, over 200 years of collected data later, empirical evidence show that liberal democracies do not seem to engage in war with each other (Doyle, 1983, pp. 209-217).

Whether or not the new world order will continue to expand liberal democracy, or it simply portraits a chic normative is yet to be found out. By some perpetual peace has
been taken for a futuristic utopia. Feminism rather seem to approach it with a question - *is peace really the sufficient formula?*

**Internal stability**

Kant’s two ingredients for peace could be interpreted as an extended version of “birds of a feather flock together”. Though this interpretation would end up in a conclusion of that, no matter the sort of regime, similar regimes will tend to get along with one another. Dictatorships and despotisms would, equally well as liberal democracies, form peace by respectfully upholding the principle of non-intervention (Tesón, 1992, p. 81). But would a world of despotism instead of human rights be to prefer? I hardly see maximization of amorality and tyranny becoming that of our choice to make an equation of the *categorical imperative*. Rather it is the uncertainty of a world order established by states, all legitimized by their enforcement of principles of human rights, that we prefer.

Doyle is however right in describing these liberal values as “ambiguous” when property is at stake (Doyle, 1983, p. 324). And perhaps he is right in criticizing the fact that as the expansion of liberalism continues, the number of failed interventions follows its pace (Doyle, 1983, p. 324). States continuously make reservations for future wars and build up armies, contradicting the idea of perpetual peace, which instead come to look a lot like a ‘cold’ race of arms. Risking that “[s]pecific wars… arise from fear as a state seeking to avoid a surprise attack decides to attack first” (Tesón, 1992, p. 80). Though even realist voices have come together in what now is called common knowledge; that international peace must be built through internal stability. This since no rational person will agree with an irrational law. St. Thomas Aquinas develops on *reason* in “The Essence of Law”:

> “Now as a reason is a principle of human acts, so in reason itself there is something which is the principle in respect of all the rest: wherefore to this principle chiefly and mainly law must needs be referred.”

(Reprinted: 1915, Question 90)

By Tesón’s standards Kant seem to be firmly against any constitutional right to revolution, suggesting he even found it “self-contradictory”, since no constitution can be legitimate if not co-legislated by rational representatives (1992, pp. 67-68). If the
regime is not legitimate the inhabitants have every right to dismiss it, citizens who does
not dismiss it might in fact by utilitarian standards be “incompetent” and deserving of
such a regime no matter how tyrannical (Mill, 1977, p. 87). Walzer however, protesting
against a regime and failing to make a difference does not either illegitimate the regime.

Morality and justice

A state’s sovereignty “is dependent upon the state’s domestic legitimacy” (Tesón, 1992,
p. 54) and by emphasizing Kant’s *categorical imperative*, we discover grounds for basic
universal values, such as liberty and equality. Tesón goes further than I will need to, by
calling the *categorical imperative* a justified reconstruction of political theory which
allows emphasis at *socioeconomic rights* in conjunction with *civil and political rights*
(Tesón, 1992, p. 65). It is, however, at the *categorical imperative* the discussion of
justice based on human rights begins, and the idea of international law as a ring bearer
of justice together with, or in supreme hierarchic position to, peace. Walzer, however,
argues that no matter there be supreme values, political leaders have a duty to choose

Miller explains that legal justice demands four equal parts of *punishment, reward,
equality before the law*, as well as *remedy* (2003, p. 116) Though, our moral can be
‘nuanced’ in these matters when *thick and thin* moral contradict each other. *Thick moral*
being that one based on social customs such as sex, relationships and law, among
others. While *thin moral* concerns our basic principles about murder, torture and

It is often thick moral which prevails thin moral, however, it is the duty of the UN and
international law to “effectively protect and guarantee individual rights”. If such
international organs fail, or “actively violate their rights” all individuals are released
from their duty to obey such laws and may overthrow the institution (Locke cited in
Miller, 2003, pp. 71-72). Rousseau develops this thesis by establishing that any
engagements, which bind us to a social body, may be solely obligatory while it is
*mutual*: “we cannot work for others without also working for ourselves” (Rousseau
cited in Miller, 2003, p. 81).

Legitimacy
Liberalist philosophers have gathered on this point and found that for there to be legitimacy there must be illegitimacy. Not perhaps what Hobbes had in mind subordinating every citizen to the Leviathan. John Stuart Mill is not either of such liberate costumes. However, Mill does acknowledge the existence of the illegitimate in his utilitarian rhetoric, though convincing the reader that no help should be given to those who suffer the governance of tyrants. If the tyrant is not a result of a moral consensus it does neither by itself justify outside help in the form of an intervention (Mill cited in Walzer, 2006, pp. 87-88). Paguans who do not revolt themselves against such regime deserve there misery.

No matter the utilitarian ‘justified’ misery or not, an institutional power must be legitimate, the evidence above show a general agreement among liberalists on this matter. The above also lean towards two axioms for such legitimacy: (1) an institutional power must convey with the political principles which by it was established, and (2) if the institutional power fails to do so the subordinates are free to submerge in civilian disobedience. Michael Walzer sums this up in Just and Unjust Wars, while expanding on the idea of intervention; what legitimize a power is simply the political fit and the moral consensus (2006, pp. 86-108).

To deal with the institution of international law “is not the same as theorizing about international politics” (2002, p. 154), taken into consideration Chollet and Goldgeier’s concern. Tribunals such as the ICTR does not by itself make up international politics, however it can be dealt with as an institution cohering to Chollet and Goldgeier’s idea of appropriate theorizing of political policy-making (2002, p. 154).

4.2 Feminism, justice and positive peace

In retesting the legitimacy of international law from a feminist perspective two valid points must be made. First, politics tend to consider “females rather as women than human beings” (Wollstonecraft cited in Miller, 2003, p. 102). Secondly, this is alone reasonable ground for commencing frequent retesting of the legitimacy of international law, even if its already been proven legitimate from a feminist framework, or any other. The institutionalized power needs to collaborate with all interest groups to efficiently be able to govern and gain legitimacy for its politics (Naurin, 2001, p. 20), and by so also the existence of feminism becomes constitutionalized. Secondly, even if this essay
find ‘rationale’ to legitimize the political fit from a feminist point of view, those values which it is suppose to represent might not be just from the beginning.

To understand the retesting of liberalist legitimacy feminism is explained on two levels of analysis: the international security level and the individual level. Both levels affect the outcome of legislation. Contractarians and legal experts may emphasis the legalist supremacy but empiri shows that political decision-making highly affects legal praxis. Referencing to Walzer’s thick and thin moral a renewed feminist model can be drawn which relate to the philosophical idea of positive and negative political action.

**International security**

There are three main objectives of feminism within IR, they are: essential feminists, liberal feminists and postmodern feminists (Sheehan, 2005, pp. 115-132). It is the postmodern idea of justice to build positive peace, which especially problematizes the purpose of the UN.

Security cannot by feminist understanding be described as international peace. Instable system-reduction should subsequently be carried out differing on the level the threat exists. Noted that liberalism suggests some form of internal stability as well (the political fit and the moral consensus).

Postmodernist feminism deals with security as connected to justice rather than the traditional security, by postmodernists’ referred to as a male pre-emptive condition (Sheehan, 2005). They claim that security for women can only be established with determined actions for justice such as bans of impunity and amnesty for rape violators.

**The individual**

In war women and men “die different deaths and are tortured and abused in different ways” (Cockburn, 2001, p. 22). It is the structural portraying of women as victims and men as warriors or heroes that shape their different experiences. Modern feminist views point at a moral consensus to interpret women as being non-actors and men as being actors. A woman’s advancement from non-actor to actor can assumingly fundamentally change the outcome of decision-making. This can be compared to liberal feminist arguments for emphasis on female participation in politics.
There are some biological differences between women and men but this essay does not recognize their value for the content of debate. However, there are socially constructed roles which affect women and men in society and so also in conflict. Liberal feminists emphasize that we are all equal in terms of our underlying beliefs and stands, and our ability to rule (Sheehan 2005:121). Original essential feminism on the other hand finds women and men fundamentally different, prescribing women peaceful qualities. Most important to this essay on legitimacy may however be the liberal feminist theory of the relative male truth. Liberal feminists stress that an experience of an event will be shaped differently depending on questions asked and pre-decisive ideas on how to behave towards women and men (Sheehan, 2005, p. 121). But also on how institutions interact legal-wize with the two sexes. For example, this can affect how the jurisdiction of a tribunal is interpreted and executed through the type of questions that may, or may not, be asked in court.

4.3 Political decision-making

To understand the gap between law and praxis, between the political fit and the moral consensus, the political decision-making process becomes vital.

“Decision-making is a process which results in the selection from a socially defined, limited number of problematical, alternative projects of one project intended to bring about the particular future state affairs envisaged by the decision-makers. “

(SBS, 2002, p. 78)

Investigations of decision-making can be made mainly using two different perspectives: (1) description and measurement of interactions, and (2) formulation of decision-making and execution of that policy (Hudson, 2002, p. 5).

In the process of decision-making Chollet and Goldgeier describe individuals’ pattern of satisficing, and stresses that most units settle for the first adequate decision rather than a more time and resource consuming optimal decision (2002, p. 157). In deciding upon what could be an adequate decision the unit starts with creating a shared reality which the unit (aka. decision-maker) can build its decision making on, also known as a ‘co-authored story’ (Hudson, 2002, p. 14). This so called ‘co-authored story’ is made up by
situational circumstances which affect the order of decision. These are narrowed down to a formula of seven types (SBS, 2002, pp. 71-72) of situations worthy of consideration. These seven types have been interpreted to provide with situations relative to the case.

1. Stability/Instability
2. Duty
3. Purpose
4. Affects
5. Truth
6. Procedure
7. Other – (Uncontrollable factors or factors that cannot undergo precise evaluation - will not be explored in this essay)

SBS further explores the limitations for executing a certain decision by emphasizing the need for official acceptance; most decisions are made with *techniques of legitimation*. These are techniques which attracts decisions made based on: past experience (e.g. acceptance of impunity), ideals based on ultimate values (such as justice and women’s rights), protection of reputation (e.g. the organizations’) and alleged consequences for carrying out or not carrying out a certain decision. (2002, p. 136)

The *techniques of legitimation* can be empowered or disempowered by the flow of information; perception, communication, (manner of introducing information) and source of information (SBS, 2002, pp. 87-88). An increase of female participation in the tribunals as judges, prosecutors, witnesses and victims is one way to influence the official acceptance. It can also be empowered or disempowered by increased or decreased numbers of women’s organizations and their foreseen strength.

### 4.4 Summery

Among the bricks of this thesis’ is the Kantian axiom, of an internationally accepted normative society which upholds the *balance of status quo*, for the sake of peace. Accepting the legitimacy of its power, in here ‘international law’, is in itself an acceptance of a possible illegitimacy of the same power. Liberalists have made a theoretical framework for analyzing legitimacy based on *political fit* and *moral*
consensus. This assists us in structuring two important questions for research about legitimacy of international institutions:

1. Does the institution uphold and implement the human rights?
2. Is praxis a result of moral consensus?

Feminist values and historical contradictions to such legitimacy (general impunity for sexual violence as well as failure to protect females in war) give reason to reconstruct and reinterpret the existing theoretical framework. The political fit will specifically touch upon law concerning gendered sexual violence in armed conflicts (historically violations of women before men). While moral consensus will be divided into action versus no action. Two factors which appear essential for liberalism, correlative for feminism, have been selected to represent negative and positive action: (1) the ability to convict crimes or (2) the inability to convict (prosecuting procedure or the principle of giving impunity). Snyder, Bruck and Sapin (SBS) decision-making theory is a tool to further map the moral consensus; why do the tribunal convict or why do they not?
5. Analysis

This chapter goes on to answer the two research questions in categorical order. (1) do the international criminal tribunals uphold and implement international law in cases of sexual violence? And (2) is there a moral consensus supporting the praxis of the international criminal tribunals?

5.1 The political fit

When answering “Do the international criminal tribunals uphold and implement international law in cases of sexual violence?” we first need to know what sexual violence in armed conflicts look like and how it corresponds to women’s rights. And then whether or not international law has any mentioning of sexual violence – is sexual violence in armed conflicts criminalized?

Armed Conflict

Hannah Arendt’s in On Violence describes how violence is taken for granted and in politics often is approached as a normality (1970, p. 8). Conflict, though, does not necessarily have to be violent; there is such a thing as a ‘non-violent conflict’. Conflicts can reach peace agreements before violence break out. However, when violence breaks out and is propelled by the use of weapons the conflict reaches the level of an armed conflict. (Moser & Clark, 2001, p. 6)

The Trial Chamber of the ICTR described in 2000 the ‘material criterion’ for armed conflict (Musema, 2000, §247-248): “the existence of open hostilities between armed forces which are organized to a greater or lesser degree”. However, since most conflict of today are internal armed conflicts a further description is necessary.

In the case of Rutaganda the Trial Chamber referred to Article 3 common to the Geneva Conventions, by describing internal conflicts to be of similar character as of an international conflict, though, territorial limited by the boarders of a single state (1999, §92-93). However, the Akayesu case necessarily “rules out situations of internal disturbances and tensions.” (1998, §620) and suggests an evaluation-test for grading the severity of the conflict as well as the intensity of “organization of the parties in the conflict” (Bagilishema, 2001, §101). Violence which directly fall outside the narrow of
internal conflicts are those recognized by Protocol II, Article 1(2): “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.” (Kayishema and Ruzindana, 1999, §171).

The Trial Chamber of the ICTR also commented on the link between acts of violence and geographic context, emphasizing that violence in internal conflicts are not limited to those occurring on the actual ‘war front’. Rather it is the whole territory where the conflict is occurring that frames the legal jurisdiction (Rutaganda, 1999, §102-103).

**Gendered and sexual violence**

Violence is, by its very nature, the act to inflict harm on others, both physically and psychologically (Moser&Clark, 2001, p. 6). In line with Matthews, Cockburn agrees with the idea that the broadening of a concept needs justification (2001, pp. 13-29). Moser on the other hand goes even further and explains that a gendered framework needs to be developed “as an entity in itself” (Moser, 2001, p. 31). Even so, this essay uses ‘gendered’ as a description of a certain violence, and the description is meant to be used merely as an adjective.

The gendered violence is, importantly, not by itself a new phenomena, though, it was not accepted as a human rights issue until 1993, together with the United Nations Vienna Declaration. To deal with yet another human right’s violation the broadened violence-reduction framework needed a sufficient justification. Automatically, it becomes obligatory to conceptualize ‘gendered violence’.

Gendered violence is, therefore, to be understood as violence targeting one gender while not targeting the other. Gendered violence may target men, however, it is generally understood as targeting women. Gendered violence is not necessarily of a sexual nature, but sexual violence is usually gendered. Gendered violence exists on all levels of society; socially, economically, and politically. Sexual violence is, however, in many cases yet considered to be a matter of the ‘private domain’ (Moser, 2001, p. 33).

In realizing the existence of gendered violence Moser (2001, p. 30) argues two main assumptions are being made: (1) women and men (both as victims and perpetrators) experience violence and conflict differently, and (2) there is a divide in resources between women and men during conflict (CIDA, 1998).
Sexual violence is a term used in this essay to describe certain violence. It is not a new offence; it is an international crime banned by law. Rape is described by the UN Commission on Human Rights (UNCHR), and to be used in this essay, to be within the ‘broader category’ of sexual violence (McDougall, 1998, §21). Human Rights Watch (HRW) submitted an analytical framework for analyzing international law and its application in 2004, which further highlight that the ICTR values not describing ‘rape’ down to technicalities (2004, p. 44). However, there are legal definitions of the crime. The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 in 1992 did describe ‘rape’ as:

“the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim's vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim.”

The Trial Chamber in year 1998 of the ICTR extended the description, which also illustrates the political development that took place in between the years. Describing ‘rape’ as a coercive “physical invasion of a sexual nature” that “may include acts which do not involve penetration or even physical contact” (such as ordering a victim to undress and do gymnastics naked) (Akayesu, 1998, § 596-598, 686-688). Insertions of objects might be of a nature which is not considered to be ‘intrinsically sexual’ (Musema, 2000, §220-221, 226-229). Following; coercion is a presumed circumstance during armed conflict and, therefore, there is no need for the prosecutor to proof non-consent (McDougall, 1998, §25). In existing legal framework both victim and perpetrator are gender neutral. However, notice should be made that women are generally at a higher risk and are victimized sexually in a greater extent (Pearce, 2003, p. 536).

Research has also been conducted on motives and reasons for committing acts of sexual violence, and it has been proven there are a divide between the motives for targeting men versus women (Cockburn, 2001, p. 22). However, the approach of this essay is not to investigate these different motives, but investigation on the motives behind sexual violence is advisable in making rape significant to the discussion of the security agenda. However, noted by SBS; motive is usually inferior to causation (2002, p. 115).
Whatever motives there might be, rape’s primary functions are to injure and intimidate the victim, sexual satisfaction is, if anything, subordinated (Pearce, 2003, p. 552). This can especially be said in cases of rape where the perpetrator is also a victim (e.g. a prisoner is forced to carry out an act of rape on another prisoner).

Most relevant to this essay is, however, not the motives of statesmen, commanders, and rapists, but the motives behind the general impunity for sexual violence in international courts. Public officials as well as policemen rest their lack of action on old beliefs that rape is carried out individually and not systematically (Pearce, 2003, p. 557).

5.2 Do the international criminal tribunals uphold international law in cases of sexual violence?

Much literature and research has been conducted on the similarities between torture and rape. The ECOSOC report, as well as the European Court of Human Rights and the Inter-American Commission on Human Rights, confirms that rape can be prosecuted as torture (ECOSOC, 1998, §53). In studying the Economic and Social Council report by McDougall a historic timeline for law regulating sexual violence is lined up. The report traces possibilities of rape conviction all the way back to The Hague Convention and Regulations from 1907; Article 46 of the Hague Convention (IV, 1907) is concerned with ‘family honor and rights’. The Economic and Social Council argues that these family honor and family rights should be understood to include crime of rape (McDougall, 1998, §60).

Grave breaches common to the Geneva Conventions (GC) (1949), referring to war crimes, are further prohibiting sexual violence, since sexual violence is an act which leads to another person’s great suffering both to body and health. Grave breaches is read as such:

“willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

(Geneva Convention, 1949, I: Art. 50, II: Art 51, III: Art 130, IV: Art 147)
The International Committee of the Red Cross (ICRC) enforce this estimation by concluding that rape “obviously” is covered by Article 147 of the fourth Geneva Convention (ICRC, 1992), referring to the act of *deliberately inflict harm to body and health*. McDougall makes a note (1998, §59) that also Article 27 of the fourth GC, explicitly, covers rape:

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

The Additional Protocol I goes on to state in Article 76(1) that:

> “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”

However, Additional Protocol I did not enter into force until 1977 and only relates to international armed conflicts, which is insufficient for most of today’s conflicts (being internal). The second Additional Protocol dictates the terms of entering into force in internal armed conflict, but it has in the past been considered too narrow to include most of internal disturbance.

**Slavery**

The Economic and Social Council does however not suicide with interpreting rape but argue that slavery, the first *jus cogens* crime, was the first to make sexual violence a non-customary norm (McDougall, 1998, §28).

Slavery, the recognized definition of the 1926 Slavery Convention, is a crime for both states and individuals and convict both in war time and peace time (McDougall, 1998, §27-28). Sexual slavery which is a adjective form of slavery is always to be recognized as slavery and be prosecuted as a *jus cogens crime* (McDougall, 1998, §30).

Sexual slavery includes all forms of prostitution, as well as ‘rape camps’ and the ECOSOC recommends that in cases of prostitution it is legal-wise more optimistic to prosecute under the law of slavery to reach a conviction (McDougall, 1998, §30,33). Sexual slavery does not only include rape but also other forms of forced gender based labour. But this essay notes that in times of conflict and war legal forced labour can be
carried out in terms of enemy prisoners, which would compose the third Geneva Convention (relating to prisoners of war) to enter into force.

**Torture**

Torture is in customary law understood and defined as in Article 1.1 of the Convention Against Torture(…) containing two elements where the first is related to four rationales. The first element is the “act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” on the rationale (a) “to obtain from the victim or a third person, information or a confession”, (b) “to punish the victim for an act he/her or a third person has committed or is suspected of having committed”, or (c) “to intimidate or coerce the victim or a third person”, or (d) “for any reason based on discrimination of any kind”.

The second element is that of the “public official requirement”. Such an act as described above becomes a crime of torture when committed by or instigated or with the consent of a “public official or other person acting in an official capacity.”.

In time of war women are often used to “pass messages, hide others, provide care as well as partaking in political activity [otherwise] usually ascribed to men” (Pearce, 2003, p. 537), circumstances making them vulnerable to torture. Even if women themselves are not politically involved in the conflict, many women are targeted in order to extract information on their husbands’ whereabouts, e.g. seen in the witness testimonies of the Akayesu trial. Reflecting on the rationales, Ruth Seifert has conducted extended research on rape used as a tool to extract information, punish, and intimidate not only women but also the men around her (1995), increasingly supporting torture’s legal application as well as the illustration of risk of torture for women.

However, there is a difference between the Convention Against Torture (used in municipal legal systems) and a possible conviction of torture in international court system. The international legal system demands that torture be defined as a crime against humanity for a possible conviction. This necessitates three further elements to satisfy: it must be a part of ‘widespread or systematic attack’, targeting civilians, on ‘discriminatory grounds’ (Akayesu, 1998, §593-595, 681).

‘Widespread’ and ‘systematic’ refers to the whole attack, it is possible there be only a single act of rape, nonetheless, if it is a part of the greater attack it is still systematic
The presence of non-civilians does not take away a population’s status as civilians (Akayesu, 1998, §582).

The Trial Chamber in the Semanza-case made a further distinction, between torture as a crime of the original Convention Against Torture, and torture as a crime against humanity. By cohere to international customary law which has eliminated the element of “public official requirement” in time of conflict (Akayesu, 1998, §597, 687 and Semanza, 2003, §342-343). However, this element is not deleted from the definition of torture in legal context of war crimes.

5.3 Do the international criminal tribunals implement international law in cases of sexual violence?

To find evidence for conviction or impunity, for sexual violence in the 20th century, just a few historical illustrations is enough to shed light on the overall situation.

- 1994, genocide in Rwanda
  - The UN estimates that 100 000-250 000 Rwandan women were raped in the pace of three months (UNDPI, 2007)
  - In year 2011 there had been seven rape verdicts in the ICTR, and 1 of sexual assault (ICTR, n.d.)
- 1992-1995, Bosnian War
  - The UN estimates about 60 000 women were raped (UNIFEM, 2007)
  - In year 2010 there had been 12 rape verdicts, and 1 of forced marriage (International Criminal Tribunal of Former Yugoslavia, n.d.)

In 2010 Margot Wallström (a Swedish social democratic politician and diplomat, currently holding the post of Special Representative of the Secretary-General (SRSG) on Sexual Violence in Conflict) announce to the Washington Post that the gap (between rape crimes and verdicts) illustrates "the magnitude of the problem." (Cerkez, 2010).

Other examples of gendered violence of sexual nature written out of the historical picture are the ‘rape camps’. Recently disclosed information of their reality in The Second World War and the Bosnian War appear to be more or less avoided or dismissed by both press and scientists (Koljonen, 2012).
Göteborg University reports that both local cases of sex slavery along with organized prostitution camps occurred in the Second World War, as well-documented as all other German conduct in the war (Koljonen, 2012). The finding of these documents is told to reveal, until now, a never known aspect of the Holocaust. However, the amount of documented sexual violence in armed conflicts during the 20th and 21st century suggests that, while overlooked by science, it cannot have been an unknown aspect of warfare.

Anthias and Yuval-Davis arguments for a strong connection between *nationalism* and sexual violence as a weapon of war (Buss, 2009, p. 4) add to the picture. Suggesting that rape is not a deviant phenomenon but a weapon used through history.

> “Throughout the world, sexual violence is routinely directed against females during situations of armed conflict. This violence may take gender-specific forms, like sexual mutilation, forced pregnancy, rape or sexual slavery. Being female is a risk factor...”

*Shattered Lives*

*HRW, 1996*

Though, the finding of these documents stirred up outbursts of denial and confusion (Koljonen, 2012), the *normality* of sexual violence in armed conflicts direct us to a conclusion that there be an accepted characteristic description of sexual violence - collateral damage. Readings show that if sexual violence in armed conflict is not identified as individual domestic incidents, it is attributed to victory as a medal for winners of war (Seifert, 1995).

In the Swedish documentary film ‘Resolution’ (2011) on Margot Wallström’s operation concerning Resolution 1960, a rape victim expresses her worries against the lack of governmental response to systematic rape. She emphasizes the problem with governments’ lack of action and the traditional social constructions on what a woman is supposed to be; ‘a good girl’. In the interview she says:

> “Maybe it would be better if all women would just collapse.”
“What if we would just stay on the ground and disintegrate, what would happen then?”1

Until the Akayesu-case (1998) in the ICTR sexual violence had in general been given amnesty or impunity; somehow sexual violence had been divided from traditional violence and politically lost all interest. Jean-Paul Akayesu was a Mayor who was convicted guilty to 9 out of 15 counts, among those counts was the killing of 2 000 people and genocidal rape. Making the Akayesu-case the first to convict a person for systematic rape and defining rape as genocidal. The sudden change in legal praxis is a landmark that tells about development and liberal legitimacy as well as it pleases feminist theory.

The conviction of Akayesu on grounds of sexual violence is interesting for the particular reason that women were especially persecuted in the genocide of Rwanda and because it was the first time the international arena recognized it as an issue to be dealt with in a legal system on international level. If all of the victims have the same social status and belong mostly to the same group (women) is it really possible to justify their pain and deaths as collateral damage...Women’s justice had become securitized.

“It has probably become more dangerous to be a woman than a soldier in armed conflicts.”

Major General Patrick Cammaert, UN force Commander of the Eastern Democratic Republic of Congo

Maybe the case of Akayesu reached a verdict because it became so obviously clear that the targeting of women with sexual violence was a systematic policy rooted in the negative emotions towards Tutsi women’s sexuality. Not collateral damage, and not without intent and motive. This is not to say that not also men and Hutu women were desecrated by systematic sexual violence.

Though, the conviction of Akayesu is historical and of theoretical importance, I found two puzzling phenomenon in the Judgement of case ICTR-96-4-T. The Prosecutor versus Jean-Paul Akayesu. First of all, the Akayesu case was the first to convict a

1 Excerpt from 'Wallströms Resolution': "Det kanske vore bättre om alla vi kvinnor bröt ihop. Å då skulle vi ju vara många. Det e så farligt att vi är så duktiga… Ja, ja nu går vi vidare. Tänk om vi låg där på marken och bröt ihop, vad skulle hända då?"
person for genocide and crimes against humanity because of acts of rape. Secondly, count 13 to 15 concerning rape and other sexual violence were not submitted as amendments to the Indictment until the 24th of May 1997; over a year later than the original Indictment (submitted on the 13th of February 1996) (Akayesu, 1998, §9-10, 23). It was like the Prosecutor first not been concerned with rape since they been unknowing or unable to collect evidence of its execution.

HRW (‘Problems documenting Gender-based Crimes’) reports that rape “testimonies are not documented” and that “abuse of women is overlooked” causing impossible indictments that never would reach a verdict for war criminals (1996). In interviews with women in Rwanda it turned out that women had either “no knowledge of or little confidence” in the ICTR to prosecute sexual violence (HRW, 1996).

“I have never heard of a woman accusing someone of rape. I didn’t know that rape could be prosecuted. I was only asked about the way my daughter was killed and if I saw it myself. I was crying. It was not worth it to say that she was raped.”

HRW/FIDH interview
Rusatira commune, Butare prefecture
March 24, 1996.

According to Pearce sexual violence is equal to torture in its sadistic praxis and in its political motive, according to the UN genocidal rape is the most vicious crime there is. But in society, combat and even law it is still not recognized as a prioritized problem. Resolution 1325 (2000) is however, a recent established gender-mainstreaming tool instigating some hope. It can somewhat be compared to the instrumentalizing and implementing of a soldiers right to disobey commanders’ orders. Still, women are expected to forget that rape ever happen to them (Wallströms Resolution, 2011). A rational person would however, not forget, and would not let such violations on once dignity, pass unnoticed. A critical contradiction bearing resemblance with Wollstonecraft’s point that women often are perceived as women, not humans.
5.4 Theoretical conclusions

Miller’s emphasis on equal parts of punishment, reward, equality before law and remedy does not seem to illustrate the history of sexual violence. Pearce explains that there is a hierarchic problem with gendered violence. Torture which is higher up in the hierarchy of violation of persons is combated in both national and international law as a threat to international security (2003). Statesmen, soldiers and all other government personal have to be educated on the prohibition of torture, and educated on the precautions that are to be made to prevent it from happening. This is not the case with sexual violence.

Somewhere along the way it was decided that Mill was right, “no rational person will agree with an irrational law”. There were no obvious complaints from neither victims of rape (women did not know they could testify or decided that a testimony was not worth) nor from jurists who are professed educated and rational persons. The male pre-emptive condition clogged the priori assuming similar to liberal feminists that women and men are equal in beliefs and stands. However, in so failing to acknowledge that women often lack the required knowledge or power to enforce their rationality.

The rejection of recent exposed facts and documents concerning rape camps articulates an exposal of a ‘false’ or ‘not true’ shared reality. Past experience demonstrates proof of a male truth (rape is not used as a weapon of war), however the rejection and denial of that male truth seem to illustrate an inconsistency with ultimate values. Amnesty and impunity for sexual violence do prove a failure to bring about a political fit, though; denial of the existence of sexual violence does not necessarily prescribe international law and its tribunals and courts a thick moral. Alternatively it may demonstrate a priori based on male posteriori interpreted as a universal “thirst of retaliation” (Mill, 1871, p. 142) which rape victims seemingly lack.

The Kantian criteria for the legitimate, universal values of liberty and equality are found in the UN purpose to protect and guarantee individual rights (1945). Though; sexual violence is a matter of individual rights, and liberty and equality being established in both theory and legal documents; the categorical imperative can questionably be used both in arguments for international verdict and impunity. E.g. rape is not a weapon in warfare, but incidents carried out of individual soldiers, consequently of municipal substance and needs no consideration within the field of IR. Or e.g. sexual violence is
fundamentally different from traditional violence; consequently it necessitates a fundamentally different legalist response and cannot be dealt with in the same tribunals. It is such interpretation of the categorical imperative which seems to create the most difficulties for upholding and implementing international law in cases of sexual violence.

Rape has at several occasions been described as a violation of a woman’s honor resulting in testimonies and prosecutions being structured and/or organized to protect the woman’s honor (HRW, 1996). The few successful prosecutions have however, encouraged the belief that it is the raped woman who is damaged goods and not the perpetrator (ECOSOC, 1998, §105).

However, this legacy of marginalization is at a shift, as evidenced by the adoption of General Assembly resolution 48/104 of 20 December 1990 in which the Assembly, recalling that the Economic and Social Council had recognized “that violence against women ... had to be matched by urgent and effective steps to eliminate its incidence”, proclaimed the Declaration on the Elimination of Violence against Women. Procedural change, expansion of legal jurisdiction (e.g. genocidal rape) together with sexual violence integrated to thin moral; increases the awareness of thick moral. The gap between equality in rule of conduct and the sentiment is reduced (Mill, 1871, p. 141).

Though, the slow pace creates questions about the UN’s approach to uphold and implement international law. Are the tribunals simply taking action as far as their duty pushes it instead of what legitimacy demands of it? Is the number of verdicts and convictions an adequate interaction to sexual violence in armed conflict?

Liberalism asks for a system which establishes the human rights and an instrument where they can be implemented. Sexual violence is evidently criminalized in several aspects and in several paragraphs; protection from rape is a human right. As demonstrated; perpetrators are, however, not brought to justice. Furthermore, sexual violence is often met with ignorance, denial and unprofessionalism. Women do not seem to know their rights or have the power to enforce them; in some cases they do not even have knowledge about the ongoing tribunals. Though, the international criminal tribunals uphold international law in cases of sexual violence, it does not implement it. There is not a political fit.
5.5 The moral consensus

A paradox arises when you as a student come up with the intriguing idea to use liberalism to investigate the legitimacy of international law, from the point of view of feminism. Being so that Kant, and many of his liberal colleagues, is not the biggest advocator for women's rights; conveying a worldview still existing today. However, even Kant argued that women *legitimately* have a right to security.

"Nature was concerned about the preservation of the embryo and implanted fear into the woman's character, a fear of physical injury and a timidity towards similar dangers. On the basis of this weakness, the woman legitimately asks for masculine protection."

*(Kant, Anthropology from a pragmatic point of view, p. 219)*

From a western perspective my interpretation is that this sort of protection, at a minimum would agree to include the jus cogens. As already developed in the *political fit* the jus cogens includes the narrow concept of sexual violence – rape. So it is that international law criminalizes sexual violence. Some historical illustrations were made todemonstrate the praxis of legal conduct concerning sexual violence. Next in line is to find the international justifications and the morality behind such praxis. Using SBS’s *seven circumstances* with the standpoints of liberalism and feminism in mind will hopefully generate some comparative notes to draw conclusions at. However, *justification* and *morality* is not necessarily the same as a moral consensus.

Demonstrated structural tendencies, concerning sexual violence, in the international organs suggests that sexual violence is considered to be of a *particular* kind. Other priorities may, therefore, subordinate sexual violence and give *rationale* to the gap between *equality in rule of conduct* and *the sentiment*.

1. Stability

**Liberalism**

There are two obvious situational circumstances operating on international system level, firstly; anarchy or perceived anarchy which traditionally is recognized as affecting the stability of anything operating on an international level. Wars as well as cold wars (World War I and II, The Cold War, The Vietnam War, The Gulf War, etc.) are
trademarks for the 20th century, a century which also was the time for decolonization. The global map was a constantly changing hybrid.

Liberalism argues that in order to create stability states’ will form alliances and make economic investments; *morality even justifies cooperation* (Donaldson, 2002, p. 142). Not surprising than that the 20th century was the beginning for many of today’s organizations: e.g. the UN, the EU, the AU. Western states also began, or continued, to make investments in the former colonies (see neo-colonialism). The ratifying of treaties and the respect for customs of trade, indicate at a minimum; universal value as *the principle of non-intervention and international stability* (peace).

A second situational circumstance in the 20th century was the focus on *negative peace* and securing the international, much because of the first situational circumstance and the divide between the private and the official. The idea of positive peace was not coined until the 80s. International instability had been too great until then, there had been no time (or no interest) to reflect on what sort of peace we wanted. In such instability politicians may satisfice with adequate stability (negative peace a.k.a. no war). A peace which merely restricts the narrow type of violence: intervention and the act which leads to another person’s death.

Liberalism however, emphasizes democracy and internal stability as well as adequate stability; stressing that a state’s sovereignty “is dependent upon the state’s domestic legitimacy” (Tesón, 1992, p. 54). Barry Buzan, develops on international distributive justice, emphasizing that social groups (such as women) have “the potential to destabilize states” (Sheehan, 2005, p. 49). On the other hand, Buzan submerges to the traditional idea of security by subordinating security threats from collectives of individuals to other threats (1991, p. 5). Buzan does, nevertheless, acknowledge that anarchy might just be a consequence of collectively established identity (1991, p. 19). Therefore, all collectively established identities call for justice; without justice the risk for anarchic spillover effects may set the state, as well as the international, in imbalance.

**Feminism**

Feminism makes clear that there are more than two possible international scenarios (war or no war). And ‘no war’ does not necessarily mean there is no conflict, or even security. Postmodern feminism emphasize that even in stable post-conflict periods,
women are still experiencing massive human rights violations and lack of dignity. Violence towards women continues in the same pace and manner up to two months after a conflict ends before it begins to abate (Cockburn, 2001, p. 22). Adding to that is the legal jurisdiction of crimes against humanity, which can take place outside the frame of conflict, in times of peace. This can explain the broadening of the concept of armed conflict which today also can describe some internal disturbances. War is for women usually much more extracted than war is for men – even socially. Often sexual violence is followed of a social stigma, often referred to as a ‘second rape’.

This sort of internal stability is vital for international peace according to feminism – both the security of women and the legitimacy of international tribunals; dependent on the other. As Richard Ullman described it: limiting security threats to military and the state does not only lead to an underestimation of other security threats, but it also militarizes international relations, and in so, jeopardizes what states value the most; international security (Sheehan, 2005, p. 46).

Though this internal disturbances are not of an eminent risk to a state, for every post conflict year there is an increasing risk that the consequences will escalate into full blown international or internal conflicts. On one hand in the shape of children growing up in hate without caring parents; increasing the risk for these children searching for other group belonging such as gangs and criminal organizations, where family is exchanged for brotherhood (Moser C. , 2001, pp. 34-39). On the other hand, in the shape of a simmering pot of revenge, one day destined to boil over.

2. Duty

Liberalism

Status quo, international law, with the UN as its normative institution, can in here be perceived as an internationally accepted hegemony-like power which tries to uphold the balance of status quo. In so accepting Kant’s ideal without promising the perpetual. By this definition balance of status quo means the power to uphold peace; international normative signify the liberal democratic values it transcends and may cohere onto other states. Accepted as a hegemony-like power also substantiates the recognition of international tribunals. If satisficing with this figurative idea, which most states at least formally do by ratifying the most vital treaties and by respecting principles of the UN
charter – it demonstrates at the minimum a duty to respect the principle of non-intervention.

However, the sole duty to respect the principle of non-intervention does not sit with the values of liberalism. The priori that morality justifies cooperation (Donaldson, 2002); and that if the international does not protect or guarantee our rights, it releases us from our duties (Locke cited in Miller, 2003, pp. 71-72); justifies a broader and more inclusive thin moral. To efficiently conduct thin moral and found legitimacy for policies, the international needs to interact not only with states but also with interest groups that represent or abide thick moral (Trägårdh, 2010). The UN has continually interacted with the international as well as national civil societies. The first international women’s organization (established in 1888), International Council of Women, for one collaborated with the League of Nations already in the 1920s; and it holds today consultative status within e.g. the ECOSOC.

**Feminism**

Adequate decision-making together with contractarian perspective or fundamental faith in the legalist paradigm can be an explanation for rationalization in the 20th century. A rationalization which does not adhere to a broader thin moral including principles concerning sexual violence. E.g. in the Nuremburg tribunal rape was committed by both sides, however, the Constitution of the International Military Tribunal constitutes that only the European Axis and their accomplices will be prosecuted (1945, Art 1). An argument could be made that since the act of sexual violence was carried out by also others than the European Axis (the winners), it was made impossible to criminalize it in the case of the Axis. This possibly conveying to the idea that rape is a trophy for the winner in war. The same phenomena can be found in the ICTR where women testify of experiencing distrust when bearing witness of a Hutu woman being raped instead of a Tutsi woman (Buss, 2009).

Up to 2002 the duty to reach a verdict for sexual violence seems to have been excessively frail. The editors (Rochelle Saidel och Sonja Hedgepeth) of Sexual Violence Against Jewish Women During the Holocaust were in 2006 confronted by a Holocaust expert. He strongly opposed the idea that there would have been any raped Jewish women during the Holocaust (Koljonen, 2012). In fact research on women’s
experience in war has during a long time been regarded as a ‘distasteful research field’ encouraging competitions such as ‘who suffered most’ (Koljonen, 2012).

The ECOSOC report was one of the steps that were taken in aspiration to gender mainstream the legal prosecution process. Finally, it led up to the explicit mentioning of genocidal rape in the Rome Statute entering into force in 2002. The report failed in arguing for a broad understanding of existing law, but nonetheless succeeded in arguing for the inclusion of sexual violence. Crimes such as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or “any other form of sexual violence of comparable gravity” are now fully described in the jurisdiction of the International Criminal Court (ICC) to prosecute and convict (see Rome Statute, 2002; Art 7, §1g, h; Art 8, §2.b(xxii), e(vi)).

Whether or not the Rome Statute will succeed in bringing justice to victims of sexual violence in the 21st century is yet to see. However, I fear that even the report from the Commission of Human Rights might have been taking the small number of convictions too lightly; though, sharing its optimism for the ad hoc tribunals who finally broken the impunity for the sexual crimes (McDougall, 1998, §12).

3. Purpose

Liberalism

The UDHR together with the UN Charter and the ICCPR set the general structure for the UN and provide us with a general aim and motivation for the organization and its institutions.

“We the people of the United Nations Determined... to reaffirm faith in fundamental human rights... in the equal rights of men and women... to establish conditions under which justice and respect for the obligations... can be maintained..”

“And for these ends... to practice tolerance and live in peace... to unite our strength to maintain international peace and security... that armed force shall not be used, save in the common interest...”

The UN Charter, Preamble (1945)
The first paragraph mentions the overall aim and the second paragraph demonstrate the general method to reach there. The reader finds that the liberal basic values of human rights are mentioned already at the beginning, and that cooperative measures have a supreme role within the organization.

International law is a tricky topic, not only because of that is encourages most crimes to firstly be prosecuted through municipal legal systems but also because of the political games and all the reservations states make for future wars. Thick moral may set e.g. language rights or social origin rights aside to please another categorical imperative. E.g. the non-intervention principle and every legitimate state’s right to sovereignty (The UN Charter, 1945, Art 2 §1,4).

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant...”

Article 4.1, ICCPR

There is, however, another, more unorthodox, obstacle threatening justice, namely peace. Justice and peace might at first look strictly linked but investigating the matter further alight the gap. In the the UN Charter, Art 1(1), it is written:

“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...”

In deconstructing the article the reader will find that “to that end” is written to emphasize that international peace and security is the purpose of the UN and that “in conformity with the principles of justice and international law” define justice as the principles international peace and security is to be instrumentalized by.
Since peace is the main purpose one must understand that there might be times when rules and principals are overlooked for the ‘greater good’. The article does not exclude other principals by which peace can be instrumentalized. On the international arena we can, therefore, assume that justice is not considered to be based on pure reason and a Kantian *priori* is not suitable “regardless of all empirical ends” (Kant, 1971, p. 73). Instead states are now and historically drawn to the loopholes of utilitarianism, and liberal belief to preserve allies at all costs.

**Feminism**

Globalization and the expanding reach of international law raise question on whether or not we can still separate the two concepts of peace and justice. Positive peace is resource-demanding business, but even without universal ethical relativism justice have become the road to collaboration and stable peace building. However, traces of a male pre-emptive condition can be found in several places of the documents.

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

*Art. 1, the UDHR (1948)*

Already in the first article a ‘brotherhood’ is mentioned. However, the purpose of the UN is to protect *all* individuals and guarantee their equal rights (Locke cited in Miller, 2003, pp. 71-72), just as this article stresses - we are ‘born free and equal’. Free and equal off course only in terms of dignity and rights, which draw our attention to justice and legislation. Brotherhood should, therefore, perhaps be interpreted as a concept of companionship and loyalty instead, rather than an actual focus on men. Though, feminism argues that language may be just as important as action, hiding an underlying construction to give men advantages and women disadvantages.

Equality before law is reinforced further in article 2: “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” (1948). The risk being off course that states will satisfy with entitling some of the collectives’ with rights and freedoms, instead of all.
Even the gender mainstreaming resolution 1325 asks of us to bear in mind that “the primary responsibility of the Security Council… [is] the maintenance of international peace and security…” (2000, pp. 1).

4. Affects

**Liberalism**

Mutilation of genitals, incontinence, group rape, forced to rape your own daughter, tortured until you lose your productive ability. These are some of the sexual methods used in warfare. The acts are carried out with machetes, glass bottles, brooms etc. Sexual violence in armed conflicts destroys nations, ethnicities, and women. It is carried out systematically and no state is safe from its possible conduct. However, the motives behind the violence may be rational and even reasonable: “reason is the faculty that discovers moral principle” (Donaldson, 2002). Collateral damage is however, not one of the justified descriptions. The inability to give sentiment seems to have much to do with the lack of affects that international tribunals and the UN experience.

**Feminism**

The ECOSOC submitted report exposes the ‘paradox’ that while international law and legal framework exist to prosecute sexual violence in armed conflicts, some governments “claim the law is new or does not exist” (1998, p. 7). Even though the many outbursts on how violations of women’s human rights in armed conflict “are violations of the fundamental principles of international human rights and humanitarian law” and that these “require a particularly effective response” (UN General Assembly, 1993, §38). The number of arrests does not balance the few prosecutions, or affect the behavior of committing sexual violence (des Forges, 1999, s. 572). However, Buss disagree; pointing at the percentage of verdicts claiming that the verdicts bear much more importance than some feminists argue (2009).

5. Truth

**Liberalism**

Resolution 1325, adopted by the Security Council on 31st October 2000, concerning gender mainstreaming of conflict resolution and peace processes, is especially interesting speaking of international ethics. While the UN is embraces parts of the
feminist idea of ‘positive peace’, peace based on justice (Sheehan, 2005, p. 124); the third paragraph reads; bear in mind that “the primary responsibility of the Security Council… [is] the maintenance of international peace and security…” (2000:1).

Liberal peace is built on cooperation and sanctions. As a community of states and state policy the UN has to respect liberal democracies rule of conduct and court its allies. In international negotiations deals can be made, to compromise on some values, to gain others. The UN is particular fragile to succumb to political negative pressure since states are the ones with voting rights in the UN, and the most powerful states are the ones with veto rights.

Tesón argues that legitimacy of international society rests on its ability to integrate political and social rights, and although, Kant emphasize the value of liberal democracy; such values existence presume peace. Realist Reinhold Neibuhr is telling us that there is no moral which not includes pieces of ‘self-love’ (Neibuhr, 1944). The UN displays a relatively similar priori in terms of ‘peace-love’.

**Feminism**

The inability to prosecute sexual violence as torture can be traced to social constructions. The traditional idea that women are non-actors in conflict is affecting the possibility of conviction negatively. The social construction assumes that women have no information of importance to extract, so why would torture be used on them to extract information they do not have. This is why feminism has tried to explain the importance of inviting women in as actors instead of as victims.

Exhibit 25A (the Prosecutor versus Jean-Paul Akayesu), a letter from the headquarters on the definition of the term enemy reads: there are two categories “the primary enemy” and the “enemy supporter” and these are mainly from the social groups of “Tutsi refugees”, “Tutsi within the country”, “Hutu dissatisfied by the current regime”, “Foreigners married to Tutsi women” and the “Nilotic-hamitic tribes in the region”. Under §128 of the Judgement it is also read that the majority of the Tutsi victims were non-combatants, mainly women. It is understood by the Judgement that Tutsi women per se were not a threat to the government; nonetheless, they were persecuted as primary enemies.
This can be explained by the perceived female agency concealed in the Tutsi bloodline. The Tutsi bloodline is not inherited by the offspring from the mother, but the father. When a Tutsi woman has a child with a Hutu man; she will be impregnated with a Hutu child. This cultural fact explains why women were targeted in such mass numbers in the genocide, as well as it insinuates that Tutsi women were enemies not only because they were Tutsi but also because they were women. De Brouwer, professor in Criminal Law and expert of the International Expert Framework on International Criminal Procedure, came to the same conclusion as I in establishing that genocide was used against Tutsi women because of (1) their ethnicity, they were Tutsis and because of (2) their gender, they were women (de Brouwer, 2005, p. 45).

Social construction of agency also makes elements of a torture prosecution impossible. CEDAW, for example, has expressed its concerns that also the idea of women as divided individuals without group belonging radically affects women’s possibility to enjoy their human rights (CEDAW, 1992, §6). That women, by themselves, are not recognized as a group, and that women are not recognized as members of other groups (political or other) because of that they are women; are parts of why there have been no such torture convictions (CEDAW, 1992, §6). The social belief that women are not a single homogenous group has yet not feminism helped women overcome. Rather feminism has in many ways made the divide greater, at least on the surface.

With a perception that women lack military importance and an assumption of their domestic place; very little will be done to violence-reduce on a perceived military level such as international law. If not the woman is militarized, why should states militarize her security. As well, if there is no awareness of the ‘male truth’, there is no duty to convict and, therefore, there is neither any affects if there is impunity for sexual violence in international law. A ‘male truth’ of women’s exclusion from the political level creates structural ignorance which leads way for unawareness on social level. In the running of rape prosecutions in the ICTR many women who were questioned did not even know that the tribunal existed (Pearce, 2003, p. 545).

6. **Procedure**

*Liberalism*
It is, furthermore, irrational to simply assume that political change, especially a resource expensive one as feminism, automatically will become an integral part of international law without organizational change. Organizational decision-making will, because of bureaucracy, continue to use fixed-in-advance standard operating procedures rather than compel to rational-comprehensive decision-making (SBS, 2002).

E.g. in 2004 did the Special Court for Sierra Leone decide to exclude all counts of sexual violence already in Trial Chamber I (Kelsall & Stepakoff, 2007, p. 356). About a year later the same court made a majority decision to that “all evidence of sexual violence should be rendered inadmissible” (Kelsall & Stepakoff, 2007, p. 356). This meant that even the fair mentioning of rape in the court room suddenly was banned, since it would force the court to instigate a prosecution.

“At the Special Court, the judges were given a wide ambit of discretionary power to conduct the proceedings ‘in the interest of justice’... the majority judges themselves described the phrase as having a ‘rubber-band’ quality, subject to ‘some elastic device which, in the exercise of judicial discretion by the Court, can either be distended or constricted’, depending on the circumstances”

Leave to Amend Decision,
‘supra n 4 at para 71

Rape indictments are time consuming and in a utilitarian manner the expression “in the interest of justice” turns into not to convict all crimes but all necessary to prevail an adequate justice which ensures stability. In the Special Court of Sierra Leone the jurisdiction of the tribunal was limited in managing the prosecutions of sexual violence (Kelsall & Stepakoff, 2007, p. 363). The utilitarian morality (if really utilitarian morality) resulted in testimonies of torture and murder being precluded as well since witnesses could not mention the method used: rape. Other testimonies of e.g. beatings and captivity as well as loss of reproduction ability, turned out to loose context when circumstances and other injuries could not be explained without the mentioning of sexual violence (Kelsall & Stepakoff, 2007, p. 370).

Feminism
The biggest critique given to resolution 1325 is that it only views an essential feminist system where women are subordinated to men, women’s lack of resources, and marking women as victims by removing their ability to act. The references to women as participating agents has increased in UN documents but still, often when women are mentioned, it is together with children, undermining their agency. By constantly reporting about ‘people’ and ‘groups’ instead of breaking it down to gender differences, the UN will not be able to consider women’s special needs.

In UN documents, gender is often given a separate section, instead of being incorporated into the main body of the report. On the other hand, by making women to a separate group dismisses them from other groups with individual rights and simply defining them from biology (Puechguirbal 2010:173-176).

5.6 Is there a moral consensus supporting the praxis of the international criminal tribunals?

In order to interpret the seven circumstances and analyze the moral consensus research could have been focused on just one of these circumstances. Or research could have been carried out focusing on one case or tribunal. However, the wish was to give a relatively fair picture of the major circumstantial situations during the 20th century; which moderately could illustrate one alternative moral consensus; which reasonably could explain the praxis of not prosecuting sexual violence. Nevertheless, just touching upon these circumstances with the point of view of liberalism and feminism has resulted in some comparative notes which can assist in discussing the moral consensus.

Liberalist interest to make a categorical imperative of basic values, as well as recognizing internal stability as a tool for creating international stability; the 20th century expresses a clash between peace and justice. Whether or not human rights actually presume international peace, praxis in the 20th century argues for an existing belief in that such is the case. Postmodern feminism argues instead that justice will result in international peace. Feminism is arguing for a bottom-up perspective and liberalism is flexible in perception. However, it is beneficial to assume that both bottom and top operate simultaneously (Chollet&Goldgeier, 2002).
The UN has decided on a top-bottom perspective, though the UN Charter state that its purpose is to make sure that “justice and respect for the obligations… can be maintained” (Preamble); however, even the gender mainstreaming tools state that “the primary responsibility of the Security Council… [is] the maintenance of international peace and security…” (Res. 1325, 2000, pp. 1). Legal documents possibly argue that the moral consensus is to prioritize peace and security before the punishment of sexual violence.

Opinions on theorizing sexual violence as a ‘distasteful research field’ consequently creates questions about whether or not also law regarding sexual violence is considered distasteful. Who or what is it that international law is to protect? The honor of perpetrators?

The liberal values are transparent consistently through international law. Looking into praxis for traditional violence in the international courts and tribunals there is a linkage between punishment, reward, equality before law and remedy. However, the peripheral liberty of interpretation of international law seem to be subjugated to a ‘male truth’; significantly effecting the “in the interest of justice”. Positive peace, where sexual violence is integrated to the concept of justice, is denigrated by a utilitarian morality which ends up providing benefits to militarized social groups.

Though, the male truth might just as much be a moral consensus; the historical Akayesu-case suggests an alternative interpretation. The decision of the ICTR to convict Akayesu was not a matter of new legislation, but rather a matter of new interpretation and praxis of the same legislation, even though the coining of genocidal rape. The status of rape has in the last century leveled from; family concerns, to municipal law, to jus cogens, to genocide. This indicates that there is a moral consensus pressuring international law to also arise to equality in rule of conduct and effective sentiment regarding sexual violence. A development which seems to be consistent with the increased call for women’s right and increased female participation. But also consistent with the change of casualties of war; from soldiers in the early 20th century, to women and children in the early 21th century. This suggests that the praxis is not subjected to a moral consensus, but that moral consensus is in the process of pressuring praxis into changing.
Internal instability may create an anarchich spillover (Ullman cited in Sheehan, 2005, p. 46), though it has not yet happened and the lack of affects for sexual violence seem to contribute to the lack of action. Both that women are perceived as non-actors and their low representation in the international seem to contribute to an acceptance of the idea that women and men simply die different deaths. If the posteriori of this idea is based on a male preemptive condition, women as rational beings, are released from their duties. Though, the lack of obvious female protest could both prove satisfaction with an adequate reality, or lack of power to regain basic values; making it difficult to theoretically draw any conclusions about female moral consensus. 

However, interviews with women and questionable normative legal procedures suggests that there is no female consensus.

5.7 Legitimacy

Just as Walzer argues, it seems like there is a “conflict between collective survival and human rights” (2006, p. 325) somewhere where thick and thin moral interact to settle an adequate praxis for justice. Walzer further argues that political leaders have to submerge to utilitarian morality when survival clashes with rights (2006, p. 326). However, the international is not a state but a political society built on cooperation. It is rather the loss of investments than pure survival which is at stake here. International law which is arguably detached from the political could in concept separate itself from the traditional necessity of survival. Though, as demonstrated earlier, international instability is threat which like a ghost haunts even the gender mainstreaming strategies.

Lack of research, media attention and female participation contributes to a shared reality constructed on male preemptive conditions. The UN satisfice with adequate justice, which will not damage its reputation or risk bearing consequences. The international tribunal and courts seem to ignore the female posteriori due to ultimate values; however, legal procedure demonstrates a solid thick moral working at social level which is not open for change. Thick moral ultimately necessitate that women in both reality and norm turn from non-actors to actors.

Arguments have been made on sexual violence inclusion to the human rights and their categorical imperative. Ultimate values have however, been proven to extend outside the purpose of the UN. Not outside the idea of the UN, but neither duties nor affects are
detected in the execution of praxis. Perhaps there are no affects because there is no duty. Feminism opposes the interpretation and emphasizes the ‘veil’ of male truth. Postmodern feminism is stressing the need for internal stability and justice to establish a trustful peace; enlighten the issue with impunity for sexual violence even more.

Victims of sexual violence and women as a group; neither demands retaliation. However, if any had protested and failed in so, it would still not necessarily make the institution of international law illegitimate (Walzer, 2006, p. 87). However, liberal feminism argues that women and men are equal in persona and rights – the lack of protests does not mean that victims of rape do not have a right to legal justice.

“The rights of the member states must be vindicated, for it is only by virtue of those rights that there is a society at all. If they cannot be upheld (at least sometimes), international society collapses into a state of war or is transformed into a universal tyranny.”

(Walzer, 2006, p. 59)

In the investigations on women’s security it was found that there is a general praxis to endorse impunity, for those who submerge to sexual violence in armed conflicts. This together with a radically increased number of female casualties in armed conflicts, over the last 100 years, give reason to question the legitimacy of international law. Developments within legal praxis show similar concerns in the international. These developments are consistent with the liberal idea that perpetual peace is made by liberal democracy which expand in order to create international stability. Development and expansion of basic values give reason to justify the institution, even though, it is not yet inclusive in terms of sexual violence.

In using liberal theories and a feminist critical approach, this essay has searched to retest the legitimacy of international law from the point of sexual violence. The findings have on one hand been disappointing in terms of bringing justice to women; on the other hand there is reason to believe that the moral consensus is pushing tribunals to prosecute sexual violence. Moreover, rape victims and women have yet not released themselves from their national or international duties. Altogether it suggests that the institution of international law is legitimate. However, even if it were illegitimate
there seem to be few alternatives, other than to continue to push for improvement. How could one escape the international?
6. Conclusions

War was during the 20th century perceived as a business for men, more specifically the military, while women were perceived as home-makers and non-actors in armed conflict. Because of the perceived instability; focus was on cooperation and preserving the peace. Peace, rights and violence were all perceived with a narrow perspective; peace was the non-existence of war, rights were adequate justice and violence was the act which leads to one or more persons’ death.

This thesis began as an experiment to explore the legitimacy of international law as focusing on sexual violence; generalization of which validation and falsification off course should be made cautiously. It was found that there is international law criminalizing sexual violence in armed conflicts. By quantifying the implementation of that law it was gathered that sexual violence rarely is prosecuted.

The canalizing of the findings through liberalism or the masculine truth had to be made with consideration. And to explore the moral consensus behind praxis is the same as subjected research to divided moralities, political games, different interpretations of the world system and alternative truths. In short, though a naturalist approach there are constructivist concerns.

The findings:

- **There is international law criminalizing sexual violence**
  It was made obvious that sexual violence mainly targets women, a group without collective rights and whom individually are restricted by social constructions and male pre-emptive conditions. Resources are often divided unevenly between the sexes which might give some insight as to why some state’s deny ever hearing about law on sexual violence.

  Sexual violence has been criminalized on international level since The Hague Convention and Regulations (1907), and is as in torture and sexual slavery a *jus cogens* crime. In 1998 the first conviction of sexual violence as genocidal rape was indicted.

- **Sexual violence in armed conflicts is habitually not punished**
Some historical illustrations demonstrated that there is a huge gap between acts of sexual violence in armed conflicts, and prosecutions and verdicts. During the genocide of Rwanda about 100 000 women were raped, during the Second World War, the Korean War and the Bosnian War women were forced into prostitution and sexual slavery. Yet, in e.g. the ICTR only 12 individuals have been convicted for sexual violence. And the Special Court for Sierra Leone even forbade all mentioning of sexual violence in the court rooms.

Morally risky and highly problematic was the finding that research on the topic is almost requested to be refrained from. Both scientists and the public are unaware of the severity of the crime, the spread of its conduct and the international inability to punish it. The ‘male truth’ appears to override rationalization; often necessity and impunity is defended by a utilitarian method which contradicts the basic values.

- **Legal documents request peace and security before punishing sexual violence**

Amended resolutions have developed in line with feminism, however, gender mainstreaming within the UN seem to contribute to social construction. So far, the UN is not quite yet agreeing with postmodernist ideas of that justice can in certain cases be even more valuable than peace (Sheehan, 2005, p. 122). However, every step from impunity of sexual violence can be considered to be a step closer that postmodern idea.

Inconsistencies were found in the purpose of the UN; in one place calling peace a method in another calling it the supreme goal. The constitutions of different tribunals were left open to male pre-emptive interpretations. E.g. ‘in the interest of justice’ became a loophole for male truth to exclude sexual violence completely from international justice. Centralization may be in opposite direction to liberty from interferences of the cultural freedom or the judges’ interpretation-capacity; nevertheless the extent of legal diversity is internationally problematic in terms of legal reliability.
The development in the Akayesu-case suggests that there is a pressure to change praxis

The pace of progress in term of feminist values is slow, creating questions as to what the basic values actually represent and as to scientific objectivity. On the other hand, the slow pace may be exactly the right pace for developments in line with the feminist security agenda; since sexual violence is not only a case of change in praxis but also in organization.

The ‘radical’ verdict of genocidal rape in the Akayesu-case brought the thick moral closer to the thin moral. Though, there is an obvious legal resistance to comply with pushing morality, the concept of systematic rape in warfare is increasingly recognized, in science as well as in the public. Even that it being a struggle in procedural method and social construction it suggests a new born morality which contradicts a consensus.

Documented interviews and legal procedure suggests that there is no female consensus

Women have not demanded that international law is to be made illegitimate and there have been only a few political breakthroughs because of protests. However, some legal concerns were raised in looking into testimonies. The testimonies indicated that numerous women had no knowledge of the ongoing tribunals or very little confidence in them; pointing at rather than giving moral consensus women had no power to demand vindication.

The institution of international law is legitimate

Feminism has yet to try to open up international politics for ‘positive peace’, a peace where peace not subsequently is the supreme goal if not built on justice. International law criminalizing sexual violence exists; but there are few or no convictions of the crime; however, the moral purpose of the UN is peace, not justice. The male pre-emptive is both a factor for consensus and not. The legal acceptance for impunity and women’s lack of protest against it show a moral consensus which accepts the institution of international law. On the other hand, does the same legal acceptance for impunity as well as a female inability to protest show a moral consensus which agree with the idea of a male truth.
So, state’s unconditional love for peace and fear of war has its legal consequences, however, the impunity and amnesty for sexual violence is not enough to render the institution of international law to illegitimacy. The liberalist legitimacy becomes a redefining of the original social contract which feminism can continue to contribute to.

**Additional comments**

Conclusions drawn at Pearce lead to assumptions of a legal system that rather cause individual causation, than systematic response. Inability to reach verdict in one criminalized act may cause uncertainty towards the entire institution. The UN being a living political organism has to take caution to its capital of trust, it is the most sensitive and risky capital there is.

Peace is important, and it is for everyone. The connection between nationalism and sexual violence hands us a clue to that globalization and cooperation, liberal values, are of vital importance in fighting sexual violence. However, gender mainstreaming, such as education for the soldiers, must be an integral part of security. Rape camps or systematic rape cannot be written out of history because it is considered to be a private matter or individual acts.

The categorical imperative cannot be to always hierarchically decide to not prosecute sexual violence. If human rights are morally justified, protection from sexual violence is too. On the other hand a reversed categorical imperative creates another ethical dilemma. If prosecution and verdicts increase in numbers; who could legitimately be convicted? Individual soldiers are not usually responsible for the overall warfare (Walzer, 2006, p. 304). Akayesu was a commander and mayor with military power to give order to initiate systematic and widespread rape, however, the soldiers preforming the rape could debatably have no or very little legal responsibility.
7. Bibliography

Literature


Political Economy of Rape - An Analysis of Systematic Rape and Sexual Abuse of Women During Armed Conflict in Africa.


**Article in journal**


**Electronic documents**


Available at: [http://www.hrw.org/reports/1996/Rwanda.htm](http://www.hrw.org/reports/1996/Rwanda.htm)

[Accessed 19 May 2012].
Available at: http://www.hrw.org/reports/1996/Rwanda.htm
[Accessed 19 May 2012].

Available at: http://www.icrc.org/eng/resources/documents/misc/57jpg4.htm
[Använd 22 May 2012].

International Criminal Tribunal of Former Yugoslavia, n.d. [Online]
Available at: http://www.icty.org/
[Accessed 18 May 2012].

Available at: http://www.genus.se/meromgenus/genusflodet/genusflodetdetalj//sexuellt-vald-under-forintelsen-lyfts-fram-i-ljuset.cid1057289
[Använd 19 May 2012].

[Accessed 22 May 2012].

[Accessed 22 May 2012].

Available at: http://www.un.org/en/documents/udhr/
[Accessed 22 May 2012].

Available at: http://www.un.org/preventgenocide/rwanda/backgrounder.shtml
[Accessed 12 May 2011].

Available at: http://www.un.org/preventgenocide/rwanda/backgrounder.shtml
[Accessed 10 April 2011].

Media
