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Gendered laws of war

Editorial

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Editorial

Fabrice VIRGILI

Published in 1995, the first number of our journal *Clio, Histoire, Femmes et Sociétés* set out to explore the connections between war and gender. Françoise Thébaud's editorial situated this first themed issue, [*Résistances et Libérations: France 1940-1945*], in the context of the ceremonies marking the fiftieth anniversary of the end of the Second World War, and she deplored the almost total silence surrounding the introduction of universal suffrage in 1944, and the small number of French studies of the role played by women in that war.¹

Almost twenty years later, the present issue, No 39 of the journal, now entitled *Clio. Femmes, Genre Histoire*, is also appearing in a year of commemoration: 2014 marks the centenary of the outbreak of the First World War, but also – because one anniversary can sometimes hide others – the seventieth anniversary of the Liberation, the bicentenary of the occupation of France by the armies of the Triple Alliance in 1814, or closer to us in time, the twentieth anniversary of the genocide of the Tutsis in Rwanda, with French troops present in the country. Twenty years of research, twenty years that have seen further wars: Afghanistan, the Congo, Iraq, Sierra Leone, Chechnya, ex-Yugoslavia... And over this period, there have been many studies of women as participants in these conflicts, and of gender as one of the analytical tools necessary for an understanding of societies in wartime. The events of the 1990s played some part in these developments. In No 5 of *Clio HFS*, devoted to civil wars [1997], Catherine Marand-Fouquet's editorial referred to the traumas caused by the massacres taking place at the time on the European continent.²

¹ Thébaud 1995: 5-14.

² Marand-Fouquet 1997: 9-19.

As the twentieth century ended, wars between states appeared to be losing ground to other more widespread forms of conflict, sometimes thought to be of lesser intensity, or to civil wars, internal conflicts with political, social, ethnic or religious dimensions, whether or not there was any foreign intervention.

The last two decades have also witnessed an increase in the professionalization and feminization of western armed forces. In 2004, No 20 of *Clio HFS* (“*Armies?*”) called for further historical reflection on this topic, which is the more necessary since some armies are today, in peace time, recruiting women as soldiers in identical conditions to those of men. Such moves towards feminization, although far from widespread, have been criticized by many commentators.³

The recruitment of women into armies has met and is still meeting resistance, not only from military institutions themselves, but perhaps even more from the outside world, including academic milieux.⁴ Nevertheless, this process which was long confined to certain paramilitary sectors (medical, communications, secretarial) has been extended to almost all kinds of training. In France, only the submariners until 2014 and the Foreign Legion now remain all-male institutions.

In her article in this issue on the state of current research, Françoise Thébaud considers the distance travelled since 1995, showing how the development of research on this topic has been marked by several historiographical debates, for example concerning the possible role of war in women’s emancipation, or women’s roles as both victims and actors in conflicts and violence. Whether in social history, cultural history, or the history of private life, on all fronts gendered identities have been challenged.

War on trial

Another conspicuous feature of present-day warfare, reflected in the research of the last quarter-century, has been the question of law. The law of war, national and international justice systems, war crimes, genocide, crimes against humanity, purges, amnesties, reconciliation – all these terms have become familiar references in current conflicts.

³ Capdevila & Godineau 2004: 5-14.

⁴ Van Crefeld 2001.

That is because since the collapse of the Communist bloc, and the resolution of several other centres of conflict (South American dictatorships, South Africa) much research, especially in political science, has been devoted to the question of justice in transitional periods.⁵ At the same time, the conflict in former Yugoslavia and the genocide of the Tutsis in Rwanda led to the setting up of international tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) one year later. On 1 July 2002, the International Criminal Court (ICC) was established in the Hague. Alongside these developments, in the wake of the 1995 International Women's Conference in Beijing, crimes of sexual violence have been increasingly stigmatized, with rape being for the first time defined as an element in genocide in 1998, by the ICTR (the Akayesu affair), and as a crime against humanity in 2001 by the ICTY (the Kunarac affair). In a further article on recent research, Isabelle Delpla surveys the last twenty years of developments in international law and the place now accorded there to violence against women. One aspect of this conjuncture in research is that it is a concern both for international justice and for investigative journalism. Isabelle Delpla points out that the intermingling of these approaches may produce bias: for example omitting to study defence witnesses, and a perspective that always casts women in the role of victims.

The present concern with law arises at a time when the kinds of conflict which have led to criminal trials (ex-Yugoslavia, Rwanda, but also Sierra Leone, Cambodia, Ivory Coast) have indeed not been governed by the conventions elaborated almost a hundred years ago for the regulation of warfare. The status of prisoners of war, or of the civilian population, and the guarantees accorded to combatants in regular armies seem to have been completely disregarded in the new conditions of confrontation. These very recent events have therefore masked to some extent the history of attempts to regulate warfare by treaties, laws or conventions, and the sentences passed on those who did not respect them. Most accounts merely content themselves with a brief reference to the Nuremberg trials (1945-1946) as the birthplace of international justice and of the desire to "criminalize

⁵ Dobry 2000; Lefranc 2008.

history”, in the words of Antoine Garapon⁶ – forgetting that this wish to bring regulation to warfare has much earlier origins.

This number of *Clio FGH* has two aims: first, to indicate the extent to which the desire to regulate behaviour in war, and therefore to punish those who transgress, can be observed over different periods of history. These examples may not be the result of international agreements, but whether through national judicial systems, military codes, canon law, or customary law, it was rare for a conflict to take place in the past without some kinds of limit being applied by the societies involved. Secondly to show the extent to which gender sheds light on the definition of these forms of regulation. *The gendered laws of war* provide three ways of defining the parameters of the combat zone: are both men and women authorized to take part in it? How are sexual norms imposed in war? And does the legitimate use of force extend to sexual violence?

The first of these refers to the Augustinian distinction between the just and the unjust war. For a war to be defined as just, it was important to make a radical distinction between combatants and non-combatants, a dividing line of which the differentiation between the civil and the military was only one later form. Discrimination between men and women was often superimposed on it. The assigning of roles to men and women within warlike activity was a way of distinguishing the “good warrior” from the savage, the disciplined soldier from the brute, one’s own army from that of the enemy.

Violence towards the other sex thus appears not as a custom “true of all time”, but on the contrary a limit which might or might not be overstepped. Whether on a large scale or as an exceptional occurrence, rape is moral and sometimes legal evidence of transgression. That in turn has entailed the need to cover it up or forget it whenever it has occurred.

And finally, within this aspiration towards regulating behaviour in wartime, massacres have not necessarily been prevented if carried out with discipline, which is a way of imposing a sexual norm on the soldiers, on their wives, and on conquered populations. The laws of war are also laws of sexuality.

⁶ Garapon 2008.

War as an all-male activity?

Although infrequent at first, and expressing surprise at the exceptional nature of such forms of transgression, there are now many studies depicting women as combatants and as perpetrators of acts of violence.⁷ Our concern here is not so much the story of such combatants as the use of law in regulating them. This issue opens with an article by Philippe Clancier on the Ancient Near East, more precisely on Mesopotamia in the first millennium BCE, which analyses references to women both as affected by war and as participants in it.⁸ There was no explicit law of war at a time when, the author tells us, the victor's might gave him free reign to do whatever he wished to the conquered. Nevertheless with the Code of Hammurabi (c.1750 BCE), and this was confirmed by later laws, certain rules governed the situation of a married couple if the husband became a prisoner of war: legal delays before remarriage was permitted, ownership of property, the rights of the children of the first or second marriage. Philippe Clancier shows the degree to which the socio-economic consequences of war for families preoccupied the authorities. They were similarly concerned, when victorious, with the precise evaluation of the spoils of war, of which human beings were the most valuable: this is demonstrated by the listings of prisoners by age and sex. It was a fundamental question to divide prisoners between men and women, when one realizes that the deportation of these populations in either direction could "increase the fruitfulness" of such wealth into new territories.

Yet alongside the increasingly frequent assigning of separate roles for men and women in wartime, there are often exceptions which deserve a survey over the long term. For the medieval period, Joan of Arc has had such posthumous fame that she has become the icon of the woman combatant. Sophie Cassagnes-Brouquet has nevertheless chosen to take the case not of Joan, but of Matilda of Tuscany, a

⁷ Capdevila 2003; Cardi & Pruvost 2012; Dauphin & Farge 1997[online book review in French: <http://clio.revues.org/209>]; Alison 2009; *Revue historique des armées* 2013: 51-60 (see also Anna Krylova's book review in the same number).

⁸ This was the second article published by *Clio* on this period, after one by Cécile Michel, « Femmes au foyer et femmes en voyage: le cas des épouses des marchands assyriens au début du II^e millénaire av. J.-C. », *Clio HFS*, 28, 2008, p. 17-38.

wartime leader who lived some three hundred years earlier. By retracing the major stages of the development of canon law relating to war, taking its inspiration both from Greco-Latin antiquity and from the Bible, Sophie Cassagnes-Brouquet shows how in the eleventh century, the military role played by Matilda of Tuscany alongside Pope Gregory VII added another source of dispute, concerning the rights of women to wage war, to the Investitures Quarrel then at its height. Viewed as usurping masculine authority by the partisans of the Holy Roman Emperor, Matilda was seen as incarnating the *miles Christi*, the soldier of Christ, by supporters of the Pope. The latter considered her to be a legitimate military leader in the name of the Just War. Moving from the just war to the holy war, Sophie Cassagnes-Brouquet takes the question further to explore the participation of women in the Crusades, their presence being attested in the Christian army, something which disturbed chroniclers on both sides: yet canon law continued to oscillate between a ban and allowing exceptions. For contrary to the Roman era, when women's non-citizenship barred them irremediably from taking arms, the ordered society which took over in about the year 1000 distinguished *oratores* from *bellatores* and *laboratores*, and did not always coincide with gender barriers.

Imposing sexual norms

Marianna Muravyeva in her article demonstrates how in the sixteenth century, in a juridical transposition of the principle of the Just War, lawyers and writers on the theory of warfare, such as Alberico Gentili, incorporated into their texts and codes a condemnation of sexual violence, of which more below. The death penalty was applied as a punishment in many armies of the time. But the gendered laws of war do not only concern what happens on the battlefield. Marianna Muravyeva shows that the construction of modern armies, that is of a fighting force which would be amenable to control and ready to fight, was only achieved through the strict regulation of masculine sexuality. The countless military codes and regulations (almost 500) which were drawn up in Europe in the sixteenth and seventeenth centuries were devoted to this end, by imposing a heterosexual and marital norm on the men who made up the armies. This was to be the norm in wartime

but also in peace time, since adultery, bigamy, sodomy, bestiality, pimping and rape were all indiscriminately punishable offences.

Through extreme forms of sanction, such as burning at the stake, beheading or “severe corporal punishment”, the legal penalties applied to sexual relations between men were a major example of the repression of deviant forms of sexuality. This is the explanation for the presence alongside armies of large numbers of women as camp followers (despite prostitution being forbidden). Canteen and catering women, in the eyes of the general staff, were supposed to limit the temptations of “unnatural behaviour” as well as the many rapes. By extension, military codes of behaviour created a judicial context for sexual norms throughout the population.

In a very different context, several centuries later, the Nazi occupiers of Alsace and the Moselle after July 1940 also enforced heterosexual norms. For contrary to the situation in Germany, where Article 175 of the penal code made homosexual relations a criminal offence, in France at the time, while it was possible to experience police harassment, sometimes considerable, for offences against public decency, homosexuality as such was neither a crime nor a misdemeanour in the eyes of the law. Régis Schlagdenhauffen shows that the victory of the Wehrmacht in 1940 meant that Alsace-Moselle was sexually annexed. Third Reich norms were imposed, at first in practice, then from 30 January 1942 with the force of law, as the territory was then attached to Germany. Here the laws relating to sexual behaviour allow us to outline the contours of conquest: the Nazification of Alsace-Moselle took the form of, for example, banning the French language, or wearing a Gallic beret, but also of outlawing homosexual practices and any form of non-reproductive sexuality. In the rest of occupied France, which was not annexed, that is not subject to *Volksgemeinschaft*, “the people’s racial community”, the occupier was not particularly concerned to prohibit homosexual relations, since anything that might reduce the French birth rate was seen as of benefit to Germany.⁹

⁹ Virgili 2009.

The difficulties of punishing sexual violence

Sexual violence, long more or less hidden from history, has recently been the subject of much study: rape in particular has become an established field of historical enquiry.¹⁰ Such violence was a recurrent marker in wartime practice. Although almost always forbidden by customary or canon law, by military regulations, or by international law, sexual violence was nevertheless often cited as a way of denouncing the crimes committed by the enemy, and punishable as a method of disciplining one's own troops, but also tolerated as a way of imposing power over the adversary and sometimes even organized, as a way of forcing the conquered population into submission.

Alain Blum and Amandine Regamey in their contribution and Christine Lévy in her article provide two different narratives about the place of sexual violence in memories of the Second World War. The first case relates to Lithuania, which was under Soviet rule until it became an independent state in 1990, and the other to Japan. In the first case, a rape committed in wartime had to be erased from the record, so as not to tarnish the image of the rapist, a Soviet partisan declared a war hero in 1958, but also subsequently that of his victim, who became a martyr on the way to beatification in 1999.

In Japan on the other hand, the debate has concerned what lies behind the euphemism of “comfort women”, *Ianfu* in Japanese: was this simply “traditional” prostitution, in return for money, as the Japanese revisionists argued? Or a gigantic system of sexual slavery serving the imperial army, as many studies have demonstrated?¹¹ As a war crime inadequately dealt with by the courts in the immediate post-war period, it gave rise to an International Women's Tribunal in 2000. This body, like the central committee of the Lithuanian Communist party forty years earlier, was asked to pronounce on the reality of sexual violence.

These two cases are unrelated, but the deliberations of the tribunals underline both the very imperfect handling of sexual violence by the official bodies set up to process them, whether military tribunal,

¹⁰ Branche & Virgili 2012; Heineman 2011; Mibenge 2013. See also the reviews of books by J. Le Gac, R. Mühlhäuser, M.L. Roberts [in the French edition of this issue].

¹¹ Tanaka 2001; Yoshimi 2000.

criminal tribunal or international court, and the impact of such mis-handling on the definition of war crimes, as well as the extraordinary dimensions of sexual violence in people's memory. Both these articles are based on rich documentary sources. The judgement passed by the women's international tribunal in Tokyo can be downloaded from the internet.¹² The three documents in the Lithuanian case, dating from 1959, come from the Special Archives of Lithuania (*Lietuvos ypatingajame archyve*) held in Vilnius. They have now been translated from Russian by the authors of the article below, and are now also available in English to readers of *Clio*: a letter from the plaintiff whose daughter was raped and killed by the partisan Čeponis; a summary of the deliberations of the bureau of the central committee of the Lithuanian Communist Party; and the report of the commission of inquiry, addressed to Moscow. These three documents demonstrate how seriously the question was taken by the authorities. There was of course no public debate, but there was a genuine inquiry, in order to make sure that one of the most important distinctions it was possible to be awarded in the USSR should not be dishonoured by the behaviour of one of its War Heroes.

On the usefulness of gender

The war in former Yugoslavia, as we have seen, has marked a whole generation of historians, since a war reaching extreme levels of violence took place on European soil, a "mere two hours by plane from Paris," as people often put it. The shock effect this produced on many of us should not however make us forget earlier shocks such as that of the Algerian war of independence. Our themed dossier is closed by a first-person account by the medieval historian Christiane Klapisch-Zuber, one of the founders of *Clio* and a current member of the editorial board. She describes to Michelle Zancarini-Fournel what "her" Algerian War was like: her participation in the Curriel network in early 1960, her imprisonment for having harboured an Algerian activist in September 1960, and her captivity in the Petite Roquette prison until July 1961. The fighting was of course taking place on the

¹² <http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/judgement.html>

other side of the Mediterranean, but in France too, choices had to be made: moral support, draft-dodging, civil disobedience or commitment to a cause. There were deaths in Paris too: notably during the events of 17 October 1961, which Christiane Klapisch-Zuber cannot remember without emotion. As a young woman, she lived with the effects of the gendered laws of war since, unlike young men of her own age, she was not called up. Instead, as an activist, she committed herself to the cause of Algerian independence and therefore also experienced clandestinity and then imprisonment.

As a historian, Christiane Klapisch-Zuber has not worked on either warfare or on the Algerian war. But what she tells us about her personal experience shows us how much a war, even fought in another country, can disrupt one's life, and how the law, gendered in this case, could exclude young women from combat, but could lock them up together in the wing for political prisoners in La Petite Roquette, a women's prison.

An academic journal is not an encyclopedia, and other choices could have been made in this number to illustrate these laws of war. Our aim was to find a balance between on the one hand, different kinds of gendered regulations (laws, customs, symbolic judgements), and on the other, to show how exceptions could challenge these normative stances. The combat zone, to use an expression from the First World War, can be precisely traced, but is nevertheless porous. The geographical and chronological extension of that zone which we have pursued here is one way of underlining the usefulness of gender as an analytical tool to apply to warfare. That is why we have chosen the term *genrée* [= gendered] in French, since whichever places or periods are discussed in this number of *Clio*, the laws that helped define the adversaries, describe actions and impose norms were all gendered. There has been much controversy about the use in French of this term, (generally accepted in the English-speaking world, but still seen by some in France as an undesirable neologism) just as there have been arguments about the linguistic appropriateness of 'feminizing' certain occupational terms. But we have chosen in the French edition of this issue to use a term that unambiguously locates warfare within an analysis of gender relations, as an event which generates normative frameworks applied to both men and women,

and which sets up models of feminine or masculine behaviour. Within this perspective, the articles in this number aim to understand how each society, group or individual reacts to such norms, whether accepting or rejecting them.

Translated by Sián REYNOLDS

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