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## Wartime Rape and International Law

by Stefan Kirchner

Wartime rape continues to be a common phenomenon.<sup>1</sup> While it gained some international attention during the Yugoslav Wars, it is often only seen as one of many problems associated with armed conflict.

### ***Rape is prohibited under International Humanitarian Law***

Rape and other forms of sexual violence in times of war are prohibited by International Humanitarian Law.<sup>2</sup> These prohibitions can be argued to amount even to *jus cogens*,<sup>3</sup> that is, to rules of international law which take absolute precedence over other rules. In fact, as wartime rape is an old problem, the prohibition of rape in times of war has been around for some time as well: already the Lieber Code (LC)<sup>4</sup> prohibited rape in Art. 44 LC and already the Hague Regulations respecting the Laws and Customs of War on Land which were contained in annexes to the 1899 and 1907 Hague Regulations prohibited rape through the protection of "family

honour and rights".<sup>5</sup> While the Nuremberg Charter did not refer to rape *expressis verbis* did the Tokyo Tribunal indict Admiral Toyoda for – among other crimes – "ordering, directing, inciting, causing, permitting [...] and failing to prevent [...] Japanese Naval personnel [...] under his command [...] to rape, kill and commit other atrocities."<sup>6</sup> After the end of World War II, Law No. 10 of the Allied Control Council for Germany (Control Council Law No. 10) included rape as a crime against humanity and Art. 4 (2) lit. e of the 2<sup>nd</sup> Additional Protocol to the Geneva Conventions prohibits rape "at any time and at any place", thereby elaborating on Art. 27 of the 4<sup>th</sup> Geneva Convention which calls for special protection for women in times of war, "in particular against rape, enforced prostitution, or any form of indecent assault." Art. 27 of the Fourth Geneva Convention (GC IV) gives particular protection to women against "rape, enforced prostitution or any form of indecent assault".<sup>7</sup> Although this rule does not protect women against acts by the authorities of the state of which they are citizens,<sup>8</sup> the protection offered by the conventions is extended by the First Additional Protocol (AP I) to the Geneva Conventions to everyone who is in the territory of a party to a conflict.<sup>9</sup> Also Art. 75 (2) and Art. 76 AP I prohibit rape in times of war: Art. 75 (2) of the same protocol prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault" with regard to both sexes.<sup>10</sup> But the additional protocol goes further in protecting women in as far as it demands that women are particularly respected. Art. 76 demands that women are to be "the object of special respect and shall be protected in particular against rape, forced prostitution and any other forms of indecent assault". These rules

<sup>1</sup> See recently Stefan Kirchner – *Hell on Earth – Systematic Rape in Eastern Congo*, in: 13 JOURNAL OF HUMANITARIAN ASSISTANCE, (2007), 6 August 2007, <http://www.jha.ac/2007/08/06/hell-on-earth-systematic-rape-in-eastern-congo/#fn-1186442655171> with many references to literature on wartime rape in different conflicts.

<sup>2</sup> For a good overview over how international law deals with gender-related crimes cf. Christine Chinkin – *Rape and Sexual Abuse of Women in International Law*, in: 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW (1994), pp. 1 *et seq.* and Helen Durham – *Women, armed conflict and international law*, in: 84 INTERNATIONAL REVIEW OF THE RED CROSS (2002), pp. 655 *et seq.*

<sup>3</sup> Cf. Kelly Dawn Askin – *The Quest for Post-Conflict Gender Justice*, in: 41 COLUMBIA JOURNAL OF TRANSNATIONAL LAW (2003), pp. 509 *et seq.*

<sup>4</sup> Instruction for the Government of Armies of the United States in the Field, General Orders No. 100, 24 April 1863.

<sup>5</sup> Yuogindra Khushalani – *Dignity and Honour of Women as Basic and Fundamental Human Rights* (1982), p. 10.

<sup>6</sup> So quoted by C.P.M. Cleiren / M.E.M. Tijssen – *Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues*, in: 5 CRIMINAL LAW FORUM (1994), p. 481.

<sup>7</sup> Kofi Annan – *Women, Peace and Security* – Study submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000), p. 34.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

contain not only an obligation not to harm women, but a positive obligation, requiring that women are being protected.

Female POWs, internees and detainees are to be treated in accordance with Art. 13, 25, 29, 85, 97, 108 of the Third Geneva Convention and Art. 75 (6) of the First Additional Protocol.

When it comes to punishments against POWs, the maximum punishments applicable to male POWs must not be exceeded with regard to women, Art. 88 GC III.<sup>11</sup> Particular rules applied to criminal sanctions imposed on pregnant women and mothers of young children by virtue of Art. 76 (3) AP I and Art. 6 (4) AP II.<sup>12</sup>

Mothers of young children and pregnant women receive an ever higher degree of protection based on Art. 18, 20, 21 GC IV,<sup>13</sup> in particular when it comes to receiving food (Art. 23, 50 and 89 GC IV and Art. 70 AP I)<sup>14</sup> and medical care (Art. 50, 91 GC IV, Art. 70 AP I),<sup>15</sup> but also with regard to their physical safety (Art. 14, 17, 18 and 20 GC IV)<sup>16</sup> and finally with regard to their release, repatriation and their accompaniment in neutral countries (Art. 132 GC IV, Art. 76 AP I).<sup>17</sup>

### **Rape is punishable under International Criminal Law**

In 1999 the UN Sub-Commission on the Promotion and Protection of Human Rights demanded that all acts of sexual violence be condemned and prosecuted<sup>18</sup> and today wartime rape constitutes a war crime<sup>19</sup> which can be prosecuted by the

International Criminal Court (ICC) in The Hague<sup>20</sup> under Article 8 of the Rome Statute and which in the past has already been prosecuted for example before the International Criminal Tribunals for Rwanda (ICTR)<sup>21</sup> and the former Yugoslavia (ICTY):<sup>22</sup> In *Akayesu*, the ICTR convicted the defendant for rape as a form of genocide,<sup>23</sup> in *Delalic*, the ICTY held that sexual violence can constitute torture<sup>24</sup> and in *Kunarac* the defendant was convicted for sexual slavery, rape and violations of human dignity which the ICTY considered war crimes and crimes against humanity,<sup>25</sup> to give just a few examples.

In all of these cases, though, it has to be kept in mind what has been said initially, that is that rape is only one of many problems associated with armed conflict

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during *Obstacles*, in: 21 BERKELEY JOURNAL OF INTERNATIONAL LAW (2003), pp. 288 *et seq.*; Kelly Dawn Askin – *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (1997), pp. 262 *et seq.*

<sup>20</sup> Art. 8 (2) lit. b (XXII) and Art. 8 (2) lit. e (VI) ICC-Statute; cf. Human Rights Watch – *International Justice for Women: The ICC marks a New Era*, 1 July 2002,

<http://www.hrw.org/campaigns/icc/icc-women.htm>; Valerie Oosterveld – *Sexual Slavery and the International Criminal Court: Advancing International Law*, in: 23 MICHIGAN JOURNAL OF INTERNATIONAL LAW (2004), pp. 605 *et seq.*

<sup>21</sup> Kelly Dawn Askin – *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwanda Tribunals: Current Status*, in: 93 AMERICAN JOURNAL OF INTERNATIONAL LAW (1999), pp. 97 *et seq.*; Stephanie K. Wood – *A Woman Scorned for "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda*, in: 13 COLUMBIA JOURNAL OF GENDER AND LAW (2004), pp. 274 *et seq.*

<sup>22</sup> Catherine N. Niarchos – *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, in: 17 HUMAN RIGHTS QUARTERLY (1995), pp. 649 *et seq.* See also Kelly Dawn Askin – *War Crimes against Women: Prosecution in International War Crimes Tribunals* (1997) and Richard Goldstone – *The United Nations' War Crimes Tribunals: An Assessment*, in: 12 CONNECTICUT JOURNAL OF INTERNATIONAL LAW, pp. 227 *et seq.*

<sup>23</sup> ICTR – *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998.

<sup>24</sup> ICTY – *Prosecutor v. Delalic*, IT-96-21-T, Judgment, 16 November 1998.

<sup>25</sup> ICTY – *Prosecutor v. Kunarac*, IT-96-23-T, Judgment, 22 February 2001.

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<sup>11</sup> cf. *ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Annan, p. 34.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> United Nations High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights – *Systematic rape, sexual slavery and slaverylike practices*, Sub-Commission resolution 1999/16, 26 August 1999.

<sup>19</sup> On wartime rape as a crime cf. Theodor Meron – *Rape as a Crime Under International Humanitarian Law*, in: 87 AMERICAN JOURNAL OF INTERNATIONAL LAW (1993), pp. 424 *et seq.*; Aiko Utsumi – *How the Violence against Women were dealt with in War Crime Trials*, in: Indai Lourdes Sajor (ed.) – *Common Grounds* (1998), pp. 187 *et seq.*; Kelly Dawn Askin – *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, En-*

which brings with it the risk that systematic wartime rapes are not combatted with the urgency the problem requires.

### ***The Protection of Children Against Wartime Rape***

Children require particular protection against wartime rape. International Humanitarian Law grants children special protection in times of armed conflicts and demands that they are respected ("All children shall be the object of special respect and are to be protected against sexual assault."<sup>26</sup> AP I).

But it is not only International Humanitarian Law and International Criminal Law, rules which apply in times of armed conflict, which prohibit rape. International Human Rights Law, does so, too. To give just one example, we will have a short look at the Convention on the Rights of the Child:

Young girls are particularly vulnerable in armed conflicts. International Humanitarian Law therefore grants children special protection in times of armed conflicts and demands that they are respected ("All children shall be the object of special respect and are to be protected against sexual assault."<sup>27</sup> AP I), at the same time the Convention on the Rights of the Child (CRC) continues to protect children in times of armed conflict (Art. 38 CRC). In times of war, states parties to the CRC undertake to respect and ensure respect for rules of IHL applicable to children.<sup>28</sup> Furthermore, states parties to the CRC have to take all feasible measures to ensure protection and care of children who are affected by the armed conflict.<sup>29</sup>

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which entered into force as late as on 18 January 2002 and 12 February 2002, respectively, add to the protection afforded to children under international law and need to be taken into account accordingly.

### ***After the war***

Also the aftermath of an armed conflict holds dangers to women and accordingly, international law is also concerned with "abuses associated with armed conflict or its aftermath", such as forced prostitution and trafficking in women and girls.<sup>30</sup> International law provides a number of tools to address this issue: the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was adopted by the General Assembly of the United Nations (UN GA) in 1950 and is supported<sup>31</sup> by Art. 6 CEDAW, Art. 34 and 35 CRC, the International Labour Organization's 1999 Convention on the Worst forms of Child Labour (ILO Convention 182) and the UN Convention against Transnational Organized Crime and its supplementary protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, all adopted by the UN GA in 2000 as well as by the relevant OHCHR principles.<sup>32</sup>

### ***Conclusions***

All conventions, though, are worthless if they are not enforced adequately. The most effective measure in this context is the application of International Criminal Law. Yet, this is not to say that combating wartime rape is the exclusive domain of International Courts and Tribunals. To the contrary. The broad consensus against wartime rape evidenced by the human rights and International Humanitarian Law documents mentioned above indicates that wartime rape, which has affected women around the world for millennia, has finally become everybody's concern. ♦

### ***Abstract:***

Wartime rape continues to be a common phenomenon. While it gained some international attention during the Yugoslav Wars, it is often only seen as one of many

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<sup>26</sup> Annan, *supra*, p. 35.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid., at p. 37.

<sup>29</sup> Ibid.

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<sup>30</sup> Ibid.

<sup>31</sup> cf. *ibid.*, pp. 37 et seq.

<sup>32</sup> Report to the Economic and Social Council, E/2002/68/Add.1

problems associated with armed conflict. Rape and other forms of sexual violence in times of war are prohibited by International Humanitarian Law.<sup>33</sup> These prohibitions can be argued to amount even to *jus cogens*,<sup>34</sup> that is, to rules of international law which take absolute precedence over other rules. Rape is punishable under International Criminal Law but that does not mean that combating wartime rape is the exclusive domain of International Courts and Tribunals. To the contrary. The broad consensus against wartime rape evidenced by the human rights and International Humanitarian Law documents mentioned above indicates that wartime rape, which has affected women around the world for millennia, has finally become everybody's concern.

### About the author:

After a career as an Emergency Medical Technician with the German Red Cross, Stefan Kirchner studied law in Germany, Britain, the Netherlands, Finland and Turkey. He holds a Diploma in International Law (with distinction) from the University of Helsinki as well as a Diplom Humanitäres Völkerrecht (ICRC Geneva – IFHV Bochum – DRK Bonn) and graduated Referendar jur. in late 2005. Since early 2006 is undergoing a two-year post-graduate training (Referendariat) at the Higher Court of Appeals (Oberlandesgericht) of Frankfurt am Main. He is currently on assignment to the Law Firm of Pawellek & Partner in Frankfurt am Main and is a M.J.I. Candidate, doctoral student and former Lehrbeauftragter (Associate Lecturer) at the Faculty of Law of Justus-Liebig-University in Giessen Germany.

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<http://www.jha.ac/2007/08/06/hell-on-earth-systematic-rape-in-eastern-congo/#fn-1186442655171>; *Sexual Abuse of Children Abroad – A German Perspective on the Antalya-Case*, in: 8 GERMAN LAW JOURNAL (2007) pp. 777-784; *Third Party Liability for Hezbollah Attacks against Israel*, in: 7 GERMAN LAW JOURNAL (2006), pp. 777-784; *State Responsibility for Transboundary Ecological Damage: the Case of the Amur River Benzole Spill in China*, in: Krishna Kumari (Hrsg.), WATER POLLUTION: PROBLEMS & PERSPECTIVES, ICFAI Books, Hyderabad, im Erscheinen (2007); *Strafrechtliche Prinzipiengewährleistung durch die Verfassung für Europa*, in: Felix Böllmann / Susanne Hemme / Ömer Korkmaz / Friedrich Kühn / Arndt Sinn (eds.), DIE MENSCHENRECHTE ALS GRUNDLAGE FÜR EINE GESAMTEUROPÄISCHE RECHTSENTWICKLUNG UND IHR EINFLUSS AUF DAS STRAFRECHT, DAS ÖFFENTLICHE RECHT UND DAS ZIVILRECHT – TÜM AVRUPA'DAKI HUKUKSAL GELİŞMELERİN DAYANAĞI OLARAK İNSAN HAKLARI VE BUNUN CEZA HUKUKU, KAMU HUKUKU VE ÖZEL HUKUKTAKİ ETKİLERİ – AUSGEWÄHLTE VORTRÄGE UND REFERATE DER SOMMERAKADEMIE IN FOÇA/İZMİR/TÜRKİE VOM 18.–30. SEPTEMBER 2005 UND DER SOMMERAKADEMIE IN KEMER/ANTALYA/TÜRKİE VOM 15.–28. SEPTEMBER 2003, Deutsch-Türkische Rechtsstudien, Band 5, 1<sup>st</sup> ed., BWV Berliner Wissenschafts-Verlag, Berlin (2006), pp. 127-148; *Target Area Bombing*, in: Natalino Ronzitti / Gabrielle Venturini (eds.), CURRENT ISSUES IN THE INTERNATIONAL HUMANITARIAN LAW OF AIR WARFARE, 1. Auflage, Eleven International Publishing, Utrecht (2006), pp. 87-105 (together with Thilo Marauhn) and *Transnational Law in Commercial Arbitration - A Comparative Analysis of the Scope of the Choice-of-Law Competence of International Commercial Arbitration Tribunals*, in: ICFAI JOURNAL OF INTERNATIONAL BUSINESS LAW (forthcoming).

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<sup>33</sup> For a good overview over how international law deals with gender-related crimes cf. Christine Chinkin – *Rape and Sexual Abuse of Women in International Law*, in: 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW (1994), pp. 1 *et seq.* and Helen Durham – *Women, armed conflict and international law*, in: 84 INTERNATIONAL REVIEW OF THE RED CROSS (2002), pp. 655 *et seq.*

<sup>34</sup> Cf. Kelly Dawn Askin – *The Quest for Post-Conflict Gender Justice*, in: 41 COLUMBIA JOURNAL OF TRANSNATIONAL LAW (2003), pp. 509 *et seq.*