

Diplomarbeit

Zur Erlangung des akademischen Grades einer Magistra der Rechtswissenschaften
an der Karl-Franzens-Universität Graz

Women and the law of armed conflict **Sexual violence, detention and judicial guarantees**

eingereicht von
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Graz, Dezember 2009

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In Liebe und Dankbarkeit
meiner Familie und Javier,
die immer an mich geglaubt haben.

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Abbreviations

AP I	Additional Protocol I
AP II	Additional Protocol II
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CSW	Commission on the Status of Women
DEVAW	Declaration on the Elimination of Violence against Women
ECOSOC	Economic and Social Council
GA	General Assembly
GV	Geneva Convention
IANWGE	Inter-Agency Network on Women and Gender Equality
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
POW	Prisoners of War
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNIFEM	United Nations Development Fund for Women
UNSC	United Nations Security Council

“Injustice anywhere is a threat to justice everywhere.”

(Dr. Martin Luther King Jr.)

Introduction

Women and the law of armed conflict is a very delicate subject, even in the 21st century. After a very long process of female lobbying against discrimination, a relatively new women’s approach of international law has emerged, and yet, has not come to an end. Women and their rights have been an excluded issue in the international law arena for many years. Moreover, there was literally an absence of women in making law and therefore a lack of representation of the half world population. Only in recent years the legal system has acknowledged its ignorance after feminist legal scholars, women organizations and individuals, who fought against repression, have raised many concerns. How is the situation now, after all the efforts which have been made, after many women-friendly provisions that have been introduced, after all the women, who have stood up?

The intention of this work is to look at cases of armed conflict and the law of armed conflict from a gender specific point of view. Many questions are to be considered, for example the question of protection of women under international law. Looking at international human rights law and international humanitarian law as well as the case law of the International Tribunals of Yugoslavia and Rwanda and the International Criminal Court, general provisions will be pointed out, which equally apply to men as well as to women. My aim is to analyze the different impact of these rules on both sexes. In addition, taking into consideration the legal provisions, which were drafted particularly for women, the issue to be discussed is how efficient international law implements the different needs and experiences of women in war situations.

This scientific work will be structured into five parts. Feminists claim that international law does have a male perspective on armed conflict; from this it follows that the rules of armed conflict might represent some type of discrimination against women. In the First Chapter it will be looked at feminist theories and their argumentation of international law failing to protect women in sufficient ways. Feminist jurisprudence raises concerns over

rules dealing with women rights having a lower status than those concerning men. Feminists directly challenge society and the unequal situation of male and female participants in conflict situations. In this Chapter, I will discuss the different approaches of feminist theories along with their critical views of society, law making and the law itself.

In Chapter Two, there will be outlined what happens to women in armed conflicts. First of all, what exactly qualifies as a conflict situation? And second of all, what exactly do women experience in war times? In this work it is argued, that the law of armed conflict discriminates women because it does not pay adequate attention to diverse impacts of war on women compared to the ones on men. In order to assess the situation, the realities of warfare for women will be examined to be able to compare them with actual provisions of international law, which is important for a consequent analysis in the following chapters. Finally, it will be looked at the work of the International Committee of the Red Cross. This well-known institution is able to identify the most urgent needs of women facing conflict situation from a practical point of view, since it is actively involved in the situation on the ground.

In Chapter Three, the focus will be on the law of armed conflict itself. What has been achieved from the legal point of view in order to improve the situation of women over the years? How efficient are the provisions of international law for women and how much do they meet their actual needs in armed conflicts? Therefore, the development of legal standards until today will be examined in the field of international human rights law and international humanitarian law. The work of the United Nations is also going to be looked at regarding the subject of women and armed conflicts. What part do UN Security Council Resolutions and peacekeeping missions play in this matter? And could the work done by the UN lead to a remarkable step forward in the worldwide improvement of the situation? Furthermore, international criminal law does play an important role in the development of the law of armed conflict. For this reason, the International Tribunals of Yugoslavia and Rwanda as well as the International Criminal Court together with its statutes are going to be introduced. It will be looked at general provisions of international law, which are applicable to everyone, together with provisions designed just for the good of women.

The analysis of “women and the law of armed conflict” will proceed in the next Chapter to a deeper analysis of specific subjects, which will be singled out in order to gain a better insight into the material. First, it will be looked at special legal provisions, which can be found in international law. Primarily, it will be worked with standards developed by international jurisdiction; therefore, case studies of the International Tribunals of Yugoslavia and Rwanda and the International Criminal Court will be scrutinized closely. Looking at the Statutes, the case law, landmark decisions regarding sexual violence, detainment and judicial guarantees, attention will be drawn to the judicial development of legal principles in order to circle out the most important and clear examples of female suffering and hence, discrimination against women. How well are women rights actually implemented in practice?

Finally, in Chapter Five, I will draw my conclusions in respect of international law, as it exists today, and its claimed denial of appropriate protection for women in cases of armed conflict. Gender can be used as an instrument for the study of law. How far has there been an improvement and what defects still need to be addressed? My goal will be to highlight the failures of the system as it stands in 2009.

As I will have a critical view through my research, I do hope that with my conclusions, I will be able to make a contribution to the reconsideration of existing standards and accordingly, to highlight possible fields where a change for a better legal environment of women in the case of armed conflicts could be obtained.

I. GENDER AND FEMINIST THEORY

A. Lack of Women

Feminist jurisprudence has only emerged since the early 1990s and until today it constitutes a legitimate part of legal analysis.¹ Before this time, feminist legal scholars were very much absent from the stage of international law.

The suppression and discrimination of women in society combined with the lack of legal instruments for affirmative action in order to fight for equality were certainly forcing a shortage of female actors also on the political stage. Moreover and most importantly, the international legal system is seen to be a male dominated world by many feminists around the world.² As the historical background documents, a deficit of female participation has always been reality not only in the process of law making but also in the area of public rights, like citizenship and suffrage. The overall issue women had to tackle in the first place was the achievement of gender-equality as a basis for further actions.³ It was male politicians who enacted laws in all fields in the domestic as well as in the international domain. Following, it is no surprise, that women are still under-represented and excluded in national parliaments⁴ as well as in decision-making bodies today.⁵ Taking the United Nations (UN) as an example, the most significant and influential international organization in the world, fact is, that men head the secretariat and also state representatives are mostly male.⁶ In 1998, only nine out of 185 member states placed women in high positions.⁷ According to the Report of the Secretary-General on the improvement of the status of women in the United Nations system, in 2006 only 37,7%

¹ See *Buss, Doris; Manji, Ambreena*, International Law, Modern Feminist Approach, Oxford and Portland in Oregon (Hart Publishing) 2005, 1-3

² See *Charlesworth, Hilary; Chinkin, Christine; Wright, Shelley*, Feminist Approaches to International Law, in: American Journal of International Law, Vol. 85 (1991), No. 4, 621 et seq.

³ *Ibid.* 619-621

⁴ See *Charlesworth, Hilary; Chinkin, Christine*, The Boundaries of International Law, A feminist analysis, Manchester (Manchester University Press), 2000, 10

⁵ See *Charlesworth, Hilary; Chinkin, Christine; Wright Shelley* (1991), 621-624

⁶ See *Charlesworth, Hilary; Chinkin, Christine* (2000), 171-186

⁷ *Ibid.*, 174

of women was represented in high offices and professions.⁸ The two reasons for this low numbers might firstly be the deficit in the employment of women by the member states themselves and secondly, by the UN having failed to appoint more women to high status positions.

Therefore, we can draw the conclusion that the international legal system is a gendered system. A distinction is made between gender and sex; latter is the biological description of physical characteristics of women and men, while gender refers mostly to social aspects.⁹ In this work I am concentrating on the gender aspect.

B. Public/private split

As we heard, international law takes place in a male dominated world, where the female sex is very much absent. Many feminists criticize a gender bias of neutral structures of international law;¹⁰ they are concerned with a public/private distinction. The woman is seen more likely behind the oven in the private sphere and therefore less attention is paid to her needs.¹¹ The private sphere is female, which is opposed to the international legal order, where states ruled by men are the main actors, functioning in the public sphere. This consideration and following the critics of the public/private dichotomy leads to the conclusion that: “the private world is uncontrolled”.¹² Women are more often victims of rights violations by private actors. This is true especially in conflict situations, when women are suddenly alone, left by their men, particular vulnerable for any kind of assault.¹³

In my opinion, this pictures a deep going social problem, which is the consequence of social stereotypes of an average family structure. Silencing women’s voices and not

⁸ See *Mayanja, Rachel*, A Verbal Report in Response to General Assembly Resolution 62/137 of 20 December 2004 on the Improvement of the Status of Women in the United Nations System, 27 February 2008

⁹ See *Charlesworth, Hilary; Chinkin, Christine* (2000), 3-4

¹⁰ See *Zimmermann, Andreas; Giegerich, Thomas*, Gender und Internationales Recht, Berlin (Duncker&Humblot GmbH), 2007, 217-221

¹¹ See *Charlesworth, Hilary; Chinkin, Christine; Wright, Shelley* (1991), 625-627

¹² *Ibid.*, 627

¹³ See *Zimmermann, Andreas; Giegerich, Thomas* (2007), 207-212, 232-234

paying enough attention to the improvement of their legal situation, excusing it with a well accepted ignorance of the private sphere, international law should rather shift to the protection of the individual then of the state.

The lack of women in politics as well as in the business environment is significantly reflecting a disadvantaged position of women in international law. This is the reason why women's requests are easily denied. Even though women step up in front of governments or international organizations, they cannot demand their rights to be implemented. There is a big need of change in raising women's participation in politics and law making. Then, there might as well be a better protection of the private sphere.

C. Feminist Jurisprudence

Since the beginning of the 1990s, feminist theory finally began to change in a positive way. With the publication of 'Feminist Approaches to International Law'¹⁴ in 1991, an avalanche was set off. Many publications and articles followed with a similar idea: to raise awareness about suppression of women in international law.¹⁵ In this context, the male structure in the public international arena was challenged and a proper representation of the other half of the population was requested.

1. Feminist Approaches

A common feminist scholarship does not exist: "efforts to systematize sit uneasily with simultaneous trumpeting of the diversity within feminist thought".¹⁶ The goal among feminists was basically the same but they differed in their theoretical approach. There can be five categories distinguished between feminist theories: liberal feminism, cultural

¹⁴ See *Charlesworth, Hilary; Chinkin, Christine; Wright, Shelley*, *Feminist Approaches to International Law*, in: *American Journal of International Law*, Vol. 85, (1991) No. 4

¹⁵ See *Buss, Doris; Manji, Ambreena* (2005), 1-6

¹⁶ See *Réaume, Denise*, *What's Distinctive about Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law*, in: *Legal Theory*, Volume 2 (1996), Issue 04, 269

feminism, radical feminism, post-modern feminism and the third world feminism.¹⁷ Nevertheless, this categorization is not final; sometimes feminists cannot be associated with any of these theories, sometimes with more than one.

The first feminist theory it is going to be looked at is the one of liberal feminists. This theory is aimed at the achievement of a total equality of rights and chances for men and women in the area of law as well as in society. No deviation from this extreme position is allowed, which only accepts total equality and the same treatment of both sexes in all areas. However, this can sometimes force women to adapt to a male world around them.¹⁸ On the contrary, cultural feminism precisely points out the differences between men and women and praises the gender-specific qualities, which particularly characterize the female sex.¹⁹ The dangers are the ones of keeping stereotypes alive; female work is likely to be downgraded and women are easily kept in their traditional roles.

Radical feminism neither concentrates on equality nor on differences but rather on power and hierarchy. According to this theory men sexually and politically dominate women and a gendered law system does keep women out of the male, public domain.²⁰ Catharine Mac Kinnon, a famous supporter of this approach, has said: “Take your foot off our necks, then we will hear in what tongue women speak”.²¹ On the other hand, talking about male power again and again might have the negative effect of actually giving men more power, leading to the contrary as originally intended.

The next theory, which is analyzed, is the post-modern feminism. As a relatively new approach, it is very liberal, it avoids the old picture of sex-categorization and it tries to shift the balance from scientific researches to reality and specific problems of women.²² Some voices might criticize this approach to be incongruent with scientific analysis because the here missing theoretical foundation is always needed in order to be able to draw a conclusion from a practical point of view.

¹⁷ See Zimmermann, Andreas; Giegerich, Thomas (2007), 202-207

¹⁸ See Charlesworth, Hilary; Chinkin, Christine (2000), 39

¹⁹ Ibid., 40-42

²⁰ Ibid., 42-44

²¹ See MacKinnon, Catharine, *Feminism Unmodified, Discourses on Life and Law*, Cambridge (Harvard University Press), 1987, 45

²² See Charlesworth, Hilary; Chinkin, Christine (2000), 44-46

Last but not least, the third world feminism is a very particular approach to international law by a special group of women in the South. Women from the third world created this approach in order to point out the difference of their problems compared to the ones from women in the North. An example is the fight for independence in developing countries.²³ This theory basically states that women from the South are exposed to a dual discrimination: they have been affected by race as well as gender discrimination at the same time. Third world feminists criticize two major points: first, they claim international law to be ignorant or not interested in problems of the female population from the South, and second, they accuse feminism itself for concentrating on complete different issues.²⁴ For my part, there is a piece of truth to be found in all five approaches. The overall goal must be to bring together divers ideas, learn from each other and strengthen the position of feminists worldwide to fight for a better world for women.

2. Feminist analysis

What does feminist theory want to achieve? After already having established an assumption of international law being a male domain, now a closer look is going to be taken at the oppression of women and a gender bias of rules, which is challenged by feminist analysis.²⁵ The main focus is placed on the examination of existing rules of international law. How do they apply in the context of war from a gender perspective? Another emphasis of feminists' attention lies on deficits in the protection of women under the law of armed conflict.

Principles of international law can obviously not be neutral if voices of women are silenced and therefore, cannot be heard. Gender studies in the public law arena exposed the international system having failed to pay sufficient attention to the diverse experiences of men and women in conflict situations, thus an adequate protection of the female population cannot be guaranteed. Since women have not been part of the law

²³ Ibid., 46-48

²⁴ See *Buss, Doris; Manji, Ambreena* (2005), 59-62

²⁵ See *Charlesworth, Hilary; Chinkin, Christine; Wright Shelley* (1991), 613-614

making, the law itself tends to disregard women specific topics.²⁶ When drafting legal texts, men were ignorant of a gender perspective and a female point of view. Now, feminist scholars try to reveal the hidden discrimination against women in this supposing neutral system of norms. Since a direct discrimination has overcome its daily presence, it is more likely neutral provisions, which produce indirectly disadvantageous positions for women.²⁷ The choices of areas, which are subject of international regulations, also demonstrate a gender bias. For example, the principle of extra-territorial jurisdiction is rather concentrated on violations of competition law than on the trafficking of women and children; consequently, in the latter case this principle is non-applicable.²⁸

However, there are in fact many provisions, which are especially assigned to women. Over the years, the continuing dedication of many women's organizations and lobbies, feminist writers and politicians met with success in many fields. Despite a big step forward towards a better position of women was taken, feminists still claim that international law of armed conflict does only relate to biological differences between men and women.²⁹ One of their main critiques is that the provisions exclusively designed for women only value them "in terms of the sexual and reproductive aspects of their lives".³⁰ From my point of view, this reality represents a discriminatory behaviour towards the "inferior" female sex. Looking at the law of armed conflict, especially the 1949 Geneva Conventions and their 1977 Additional Protocols, most of the forty-two provisions, which are dealing in particular with women, are concerned with pregnancy, maternity cases as well as women being victims in situations of sexual violence.³¹ Women are pictured in relationships with others and in need of protection rather than being an independent individual.

²⁶ See *Charlesworth, Hilary; Chinkin, Christine* (2000), 49-50

²⁷ See *Zimmermann, Andreas; Giegerich, Thomas* (2007), 285-286

²⁸ See *Charlesworth, Hilary; Chinkin, Christine* (2000), 19

²⁹ See *Gardam, Judith G.; Jarvies, Michelle J.*, *Women, Armed Conflict and International Law*, The Hague (Kluwer Law International), 2001, 93 et seq.

³⁰ *Ibid.*, 94

³¹ See *Durham, Helen*, *Women, Armed Conflict and International Law*, in: *International Review of the Red Cross* No. 847, 2002, 655 and also *Charlesworth, Hilary; Chinkin, Christine* (2000), 48

Another controversial matter is a so-called “hierarchy of rules” in international law. Feminists argue that rules, which are mainly concerned with women, are not considered to be as important as other rules dealing with general issues; the same applies to the their breach.³² For example, rape, which mainly affects women in conflict situations, is not explicitly mentioned as a grave breach of the four Geneva Conventions. Even though it was not the original intention of the drafters to pay attention to the subject of rape at all,³³ jurisdiction recognized rape to be a tool of war and started to subsume rape under grave breach provisions of the law of armed conflict.

Feminists also challenge a certain picture of women, which is drawn by international law. More precisely, since men are involved in law making, it is men who created an ideal of a woman, assigning her a common character, deepening a certain view of women.³⁴ Historically, men had to take care of the honour of their wives and daughters. Women are measured by their honourable lives and this is reflected in provisions of international law.³⁵ The law of armed conflict produces certain stereotypes; simply being a masculine construct, as well as it reflects a western view of warfare. The problem arising is that experiences of women locally involved in crisis situations are not taken into account. Fact is, women all over the world, coming from diverse cultures and backgrounds, experience conflict situations in most different ways. In my opinion, men designing the “ideal woman” and dressing her with categorized rules, is not an appropriate protection of women in armed conflict.

Feminists try to simply highlight diverse problems women have to face in situations of armed conflict with their discussions. In doing so, feminist scholars hope to shift the focus from women being a mother and child-bearer to women being an individual.

³² See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 99

³³ *Ibid.*, 100

³⁴ *Ibid.*, 94-95

³⁵ *Ibid.*, 107-112

II. THE REALITY OF ARMED CONFLICT

What in fact is a conflict situation, what is war? What specific problems do women have to face? In this Chapter, it will be explained what exactly constitutes a conflict situation from a legal point of view as well as from a practical point of view. However, the focus will be placed on the reality of armed conflicts, on problems women are confronted with in war situations and on the differences between female and male experiences.

In this work it is argued, that the diverse impact of armed conflict on women compared to the one on men is not adequately implemented in the law of war and therefore constitutes sex discrimination. The purpose of this study is to identify problems of women in order to see how far provisions of international law meet specific female needs. As a result, the existing inefficient protections should clearly be named.

I will try to give a practical view; by doing so, it is easy to outline a contrast between the reality of warfare and the theoretical approach, which is important for consequent analysis in the following chapters.

A. Conflict Situation

Before starting to discuss what happens in conflict situations, it is important to define armed conflict itself. When do we talk about a conflict situation?

First of all, a binding definition of war in international law does not exist. Since this work is dealing only with international law, hence there must be a clear distinction between domestic law and international law.³⁶ However, it is broadly confirmed that war is a contest between states, but it can also be carried out between two or more parties within one single state. In other words, like the International Criminal Tribunal of the Former Yugoslavia (ICTY) has stated in the Tadic case: "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between governmental

³⁶ See *Dinstein, Yoram, War, Aggression and Self-Defence*, Cambridge (Cambridge University Press), 2001, 3-4

authorities and organized armed groups or between such groups within a State.”³⁷ In summary, the law of armed conflict is dealing with international armed conflicts as well as non-international armed conflicts. The distinction is important for the application of provisions, since non-international armed conflict is governed by rules only to a limited extent.³⁸ Article 1 of the Additional Protocol II to the four Geneva Conventions of 1949, which is exclusively dealing with non-international armed conflicts, applies to conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

The majority of provisions of international humanitarian law, the strand of law most relevant to the protection of women, undoubtedly cover international armed conflicts. Common Article 2 of the four 1949 Geneva Conventions broadly recognizes the situation of war as soon as any troubles between two states exist. In addition, Article 1 (4) of the Additional Protocol I even includes wars of self-determination in the category of armed conflicts.

War in the technical sense begins with a declaration of war; war in the material sense arises without such declaration, only hostilities between the parties indicate the term “war”.³⁹ In the best case, conflicts end in a peace treaty or another formal step, after hostilities have ceased.⁴⁰ Article 6 (3) of the Fourth Geneva Convention 1949 relative to the Protection of Civilian Persons in Time of War, even goes so far as to extend its application a year after the general close of military operation in the case of occupied territory.

Besides different provisions applying in international- and in non-international armed conflicts, particular crimes are classified under *jus cogens* status: especially gross human rights violations, such as genocide, torture, slavery, apartheid, some war crimes and

³⁷ See ICTY, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1AR72, Appeals Chamber, Judgment of 2 October 1995, para. 70

³⁸ See Common Article 3 to the Four Geneva Conventions of 1949 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June of 1977

³⁹ See *Dinstein, Yoram* (2001), 9

⁴⁰ See for example Article 5 of the First and the Third Geneva Convention and also Article 6 of the Fourth Geneva Convention

crimes against humanity. In this case, the principle of universal jurisdiction can be invoked, which allows every state to punish these very serious crimes, regardless the location of the crime or the nationality of the criminal.⁴¹ On the other hand, customary international law emerges from a widely accepted state practice with the cognition of a legal obligation.⁴²

Over and above, peacetime also embraces regulations and rules, which need to be obeyed and also govern a limited use of force.⁴³ In Chapter III the law of armed conflict itself will be discussed to a large extent.

B. The impact of Armed Conflict on Women

Women experience conflict situations differently than men. Why and what difficulties do women have to deal with on the grounds?

“All too often, conflict happens in societies that can least afford it, takes its toll on those who least deserve it and hits hardest those least equipped to defend themselves. Civilians have become the main targets of warfare. From rape and displacement to the denial of the right to food and medicines, women bear more than their fair share of the burden.”⁴⁴

(Kofi Annan)

Feminists argue that women are not protected sufficiently because of discriminatory interpretation and application of international law, ignoring specific female problems.⁴⁵ It is argued, that men and women experience armed conflict in different ways and that this diverse impact is not adequately implemented in the law of war. Therefore, it is important

⁴¹ See TRIAL (Track Impunity Always), Bringing Justice to Victims of International Crimes, Universal Jurisdiction, <http://www.trial-ch.org/en/intl-law/universal-jurisdiction.html> (11 November 2009)

⁴² See *Askin, Kelly D.; Koenig, Dorean M.*, Women and International Human Rights Law, U.S. (Transnational Publishers, Inc.), Volume 1, June 1999, 44-45

⁴³ See *Dinstein, Yoram* (2001), 15-17

⁴⁴ See *Secretary General Kofi Annan*, United Nations Day for Women’s Rights and International Peace, Secretary-General stresses Need to Remove Barriers to Women’s Involvement in Decision-Making, in Women’s Day Address, UN Press Release, SG/SM/7325, WOM/1190 (6 March 2000)

⁴⁵ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 2

for the analysis of women and the law of armed conflict to address the harms suffered by women in war situations in order to see how far the law responds to specific needs arising from conflicts.

The examination of the reality for women in conflict situations is a difficult task. Millions of women worldwide are war-damaged. All types of assaults occur before, during and after a conflict. It is nearly impossible to have a framed and clear picture, since several criteria need to be taken into account. When trying to assess the effects of armed conflicts on women, factors such as race, ethnicity, nationality, class, age, disability and sexuality have to be considered next to different cultures from all continents.⁴⁶ Anyway, common aspects can be outlined, which women provably experience differently to men in conflict situations.⁴⁷

1. Female combatants and civilians

As already mentioned, warfare traditionally happens between two states and takes place on the battlefield. It is combatants who are most affected by the outcome of war. Even though women are typically affected by hostilities as civilians, they also appear in the role of combatants.⁴⁸ For example, the United States armed forces have been consisting of 10 percent female combatants in the Iraq and Afghanistan conflict since 2002.⁴⁹ Women in armed forces have the same problems as their male comrades; the loss of shelter, shortage of medical and food supplies, the same enemy and weapons directed against them.⁵⁰ Besides, women are confronted with gender specific difficulties, like the lack of sufficient sanitary facilities or sexual assaults.

Nowadays, the war between states mostly turned into civil wars; consequently death and injuries of civilian population have significantly increased over the last years.⁵¹ In World

⁴⁶ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 19

⁴⁷ *Ibid.*, 6 and 20

⁴⁸ See *Charlesworth, Hilary; Chinkin, Christine* (2000), 250 et seq.

⁴⁹ See NPR (National Public Radio), United States, Women in Combat, <http://www.npr.org/templates/story/story.php?storyId=14964676> (11 November 2009)

⁵⁰ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 6

⁵¹ See *Askin, Kelly D.; Koenig, Doreen M.* (1999), 47

War I, civilians covered only 5 percent of the dead, in World War II already 45 percent civilians suffered by military strikes and finally in the 1990s more than 90 percent of conflict-related losses were civil population.⁵² There is a small community of male non-combatants but women and children form most of the civilian part. This reflects a typical family structure and the roles women take on in society: the mother is staying at home to take care of the children.⁵³ At the Fourth World Conference on Women, Action for Equality Development and Peace it was stated, “while entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex.”⁵⁴ A certain sight of female gender and existing stereotypes may force a special behaviour towards the female sex in conflict situations.

Women are left alone in a dangerous situation, being especially vulnerable to assaults. Both, opposing parties and friendly forces, can become perpetrators and may sexually harass or abuse them in performance of their mission as well as private actors committing acts of domestic violence.⁵⁵ In addition, the deliberate killing of women is not rare. Civilians are all too often used as human shields.⁵⁶ A political position, a special profession like being a doctor, journalist or judiciary often is the reason for a well-directed attack.⁵⁷ In this respect, advantage is taken from their suffering for propaganda purposes, to strengthen society against the enemy in pointing out mistreatment of the weaker sex rather than providing help.⁵⁸

As a consequence, the problem of mass movements, which means a high number of civilian refugees, can be found whenever fighting evolves. Life-threatening attacks on civilian population give rise to million people all over the world fleeing their countries

⁵² See *Thanassoula, Marilena*, Krieg und Gender: Krieg zur Förderung der Frauenfreiheit, in: Neue Rheinsche Zeitung, Online-Flyer Nr. 65 (10 Oktober 2006), <http://www.nrhz.de/flyer/beitrag.php?id=10231> (11 November 2009) and also *Charlesworth, Hilary; Chinkin, Christine* (2000), 250-251

⁵³ See *Gardam, Judith G.; Jarvies Michelle J.* (2001), 20

⁵⁴ See Fourth World Conference on Women, Action for Equality Development and Peace, Beijing Declaration and Platform for Action, UN Doc. A/Conf.177/20 of 17 October 1995, para 135

⁵⁵ See *Bennoune, Karima*, Do We Need New International Law to Protect Women in Armed Conflict?, in: *Case Western Reserve Journal of International Law*, Volume 38 (2007), Issue 2 , 368

⁵⁶ See *Gardam, Judith G., Jarvies, Michelle J.* (2001), 21-22

⁵⁷ *Ibid.*, 21-22

⁵⁸ *Ibid.*, 36

and hence conflict situations. Women, are particular vulnerable in this situations. Problems arise solely from the status of being a female displaced person, which makes women prone to sexual assaults and security difficulties. Moreover, they are missing a legal status, because sometimes documentation is only provided to male family members in order to prove a refugee status.⁵⁹ In addition, female fugitives have to face catastrophic conditions in refugee camps: no female support personnel or essential supplies and no freedom to move as a family.⁶⁰

The danger of landmines for women is another threat for their health during and also after wartime; physical, mental, and economic disability as a result of landmines sadly is the reality for many civilians. Every year many people get killed, the majority are mainly women and children younger than 15 years. Besides, women are often not informed about particular endangered areas because they are not able to read specific safety signs, which is the result of high rates of illiteracy.⁶¹ Moreover, documented landmine-related amputees act as a deterrent for refugees to come back in their homeland after the war.⁶² Summarized, it can be said women are particularly endangered in any case, irrespective of which position: combatants or civilians.

2. Gender specific harms in conflict

The reality of armed conflicts for women is a different one than for men. What exactly happens to women and what do they experience? The gender approach circles out specific problems, which unfold for women in terms of warfare.

One specific type of harm for women in armed conflict is violence, a typical accompaniment of conflict situations, which is mainly directed against women. As a matter of fact, violence is considered to be the biggest problem women have to face incessantly all over the world. It is considered to be one way to control women in a

⁵⁹ See Progress Report on Implementation of the UNHCR Guidelines on the Protection of Refugee Women, UN Doc. EC/SCP/74 of 22 July 1992, para 7, 12-30

⁶⁰ Ibid., para 8-11 and also *Gardam, Judith G., Jarvies, Michelle J.* (2001), 34

⁶¹ See *International Committee of the Red Cross, Women and War*, Geneva (ICRC), February 2008, 16

⁶² Ibid., 24

patriarchal system.⁶³ Relevant for the perpetrator is the will to demonstrate power with the goal to debase the opponent; violence centres on superiority and degradation.⁶⁴ The less a state functions, not being able to protect its citizens, the more likely violence can spread without being sanctioned.

Among gender-based violence⁶⁵ many types can be subsumed, as most records are kept of rape, sexual assault, sexual humiliation, pornography, sexual mutilation, medical experimentation on organs, enslavement, forced marriages, forced impregnation, forced pregnancy and abortion, enforced sterilization, forced prostitution, trafficking in women and girls, strip-searching and forced veiling or unveiling.⁶⁶ Reports, articles and public statements have lately been containing several references to rape and sexual violence, especially due to the emerged atrocities in the World Wars, Vietnam or in the Former Yugoslavia and Rwanda.⁶⁷

Rape and sexual assault is often likely to result in a deliberate infection with HIV/AIDS.⁶⁸ Moreover, pregnancy is a normal consequence of sexual violence and often results in illegal abortion and infant mortality; in this case, medical treatment is mostly not available in the dimension needed during situations of conflict.⁶⁹

Being a woman also is a risk factor considering health issues in exceptional circumstances. Conflict situations impinge upon women's health, which is interrelated to the health of the rest of the family, especially of the well being of children. Health care in wartimes is not sensitive enough for special vulnerabilities of women. I would even go as far as to say, that in many cases adequate facilities are not available at all. Women facing

⁶³ See United Nations Declaration on the Elimination of Violence against Women, UN Doc. A/RES/48/104 of 20 December 1993, 2

⁶⁴ See ProFrau, Gewalt, Definition, <http://www.profrau.at/de/gewalt/definition.htm> (11 November 2009)

⁶⁵ See General Recommendation 19 of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), UN Doc. A/47/38 of 29 January 1992, para 6

⁶⁶ See *Bennoune, Karima* (2007), 365-366 and also *Gardam, Judith G.; Jarvies Michelle J.* (2001), 25-26

⁶⁷ See *Gardam, Judith G.; Jarvies Michelle J.* (2001), 27-29 and also *Charlesworth, Hilary; Chinkin Christine* (2000), 252-253

⁶⁸ See *Zimmermann, Andreas; Giegerich, Thomas* (2007), 209

⁶⁹ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 44-45

war are confronted with hunger, lack of sanitary conditions and appropriate health care, which is likely to result in malnutrition and the loss of life.⁷⁰

The medical focus during conflicts mainly is placed on disease, acute life threatening illness and medical attendance. Even though people become aware of the fact that not only physical health is important but also the psychological well being, the latter is generally ignored.⁷¹ First, basic needs have to be satisfied. As long as there is a lack of basic aid, nobody is willing to deal with depression, anxiety-state or post-traumatic stress.

Another gender specific problem in conflict situations is the daily struggle for survival, which is left to the ones who stay home with their children.⁷² Considering the social public/private split, it is women who are obliged to take on the role of caretakers around the community, while their men leave to engage in battles. Suddenly women are the head of the family with the responsibility to support and feed their children and relatives, basically to hold the family together. This often turns out to be a mission impossible since the opportunity to acquire education or work experience has never been given to them.⁷³

It may force desperate persons, who are hit by unemployment, to accept illegal jobs, catapulting themselves outside the legal order; following, less protection can be guaranteed.⁷⁴ In addition to economic hardships, women often loose social positions as a consequence of sex-related abuse or even unwanted pregnancy.⁷⁵ Besides, the work at home should never be forgotten, which needs to be done in any case, and women end up being double burdened. Women have to perform many tasks: being a mother and a housewife and most importantly being the caretaker of the sick and the wounded.

Widows are especially concerned; besides being financially unaided, they have to deal with the loss of family members, often not knowing what really has happened to the loved ones.⁷⁶

⁷⁰ Ibid., 43 and also *Bennoune, Karima* (2007), 367

⁷¹ Ibid., 45-46

⁷² See *Charlesworth, Hilary; Chinkin, Christine* (2000), 255

⁷³ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 40-41

⁷⁴ See *Amnesty International, Violence against Women in Armed Conflict*, USA, New York, 2009

⁷⁵ Ibid., 39

⁷⁶ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 37-38

In the end, I would like to call attention to negative experiences of women in the aftermath of war. Suffering does not stop once the fighting is over and exceptional circumstances have turned into daily routine again; discrimination against rape-victims and shame imposed on families result in honour killings, or less dramatic, in unthinkable re-marriages in many cases.⁷⁷ The impact of armed conflict is obviously a very deep one and has an effect on all family members in the long run.

3. Positive aspects

Nonetheless, conflict situations might also offer exceptional advantages in some instances. First of all, women have the great opportunity to set foot in the public world and improve new abilities.⁷⁸ Once dominant, mostly but not necessarily male, family members are gone, the newly achieved freedom might give women more confidence. Secondly, war and its extreme conditions might help the female sex to become more aware of different positions they are able to achieve in society, realizing their strength to fight for a change.

The subordination of women seems to be overtaken, the gender-gap closed; women are bread earner as well as accountable for the family income. Unfortunately, women loose their new powerful status too fast after the conflict has come to an end. Achieved social and political positions and structures are lost and are sacrificed for the traditional gender-model.⁷⁹ In my opinion, this might be frustrating and look unsuccessful; but in the end, female knowledge of their competences and skills is the most important for a further change in thinking overall.

However, in the long run, women will never forget what they were able to achieve; for sure, they will keep fighting for their rights and improvements both in the political and social situation. For this reason, feminism has become so powerful and has already achieved so much; the international community accepts women's rights to be a subject of constant debate.

⁷⁷ See *Bennoune, Karima* (2007), 367

⁷⁸ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 40-41

⁷⁹ *Ibid.*, 257

On the whole, the masculine ideology of war is reflected in the whole structure of warfare, in the reality of war, in different roles of women in and around war and in provisions of the law of war. Gender plays a very important role, underscoring a special type of discrimination. Abuses of women, in all kinds of variations, are particularly widespread in conflict situations. The reality of armed conflict demonstrates very gender specific experiences, and various problems, which need to be addressed in the process of law making.

C. The International Committee of the Red Cross

The International Committee of the Red Cross (ICRC), based in Geneva, Switzerland and founded in 1863 by Henry Dunant and four other Swiss citizens, brought the International Red Cross and Red Crescent Movement, a neutral and independent humanitarian organization, into being. Despite a common belief that the ICRC is a typical non-governmental organization, it is defined as a private association under Swiss law. The legal mandate is based on the four Geneva Conventions of 1949 and also on the Statutes of the International Red Cross and Red Crescent Movement itself. States of the international community have given the mandate to the ICRC to protect and provide assistance for victims of conflict situations on the ground.⁸⁰ The ICRC offers its help to all parties to the conflict and reminds them of their responsibilities under the law. It also distributes knowledge of humanitarian rules for everyone involved in the conflict and performs visits to prisoners in order to investigate conditions of imprisonment and detention. Therefore, the organization is the only authority mentioned under International Humanitarian Law (IHL), which has some controlling power. After a visit took place, the ICRC can recommend special steps to improve the situation, as well as reports about the findings of the ICRC are exclusively prepared for the detaining authorities. If the cooperation does not work out in a positive way, these reports will be made public.⁸¹

⁸⁰ See *International Committee of the Red Cross*, International Humanitarian Law, Answers to your Questions, Geneva (ICRC), 2002, 2, 23, 32-33

⁸¹ See *Lindsey, Charlotte*, Women facing War, ICRC Study on the Impact of Armed Conflict on Women, Geneva (ICRC), October 2001, 160-162

The application of international human rights law and international humanitarian law by the ICRC in conflict situations on the ground has contributed to a better understanding of actual problems in reality. Next to other actors in the international law arena, the ICRC has recognized the importance of paying attention to the different impact of war on women compared to men, and that those women's issues deserve a closer examination. Hence, the organization tries to take a gender perspective into account while performing its operational tasks.⁸²

In the light of the work of the ICRC, much has already been done. At the 27th International Conference of the Red Cross and the Red Crescent, an official statement was made to focus on the experience of sexual violence against women and girls.⁸³ Most importantly, the study "Women facing War"⁸⁴ on the impact of armed conflict on women was commissioned by the ICRC in order to be able to better react to female needs and wants in its operations, circling out real concerns women have to face in war situations.⁸⁵ In this context, it was examined how the law of armed conflict responds to mentioned concerns in actual provisions. The outcome of the study shows that provisions of international law do contain all necessary considerations about the special status of women and girls in armed conflict; the problem rather is an inefficient implementation by the relevant parties, not observing the standards set out.⁸⁶ Furthermore, according to the study of the ICRC, women are not just helpless victims in conflict situations. More and more women are active in the role of combatants or even in peace building duties and it is important to include this reality into the analysis too.⁸⁷

The ICRC has been working hard to move away from a western experience of conflict situations and to apply international law in a universal way to make it useful all over the world. All together, it is safe to say that the ICRC has pointed out common interests of

⁸² See *Durham, Helen* (September 2002), 658

⁸³ See Pledge Statement of the ICRC at the 27th International Conference of the Red Cross and Red Crescent, To promote the Respect of Women in Armed Conflicts, ICRC, 3 November 1999

⁸⁴ See *Lindsey, Charlotte*, ICRC Study on the Impact of Armed Conflict on Women, Geneva (ICRC), October 2001

⁸⁵ See *Durham, Helen* (September 2002), 658

⁸⁶ See *Lindsey, Charlotte* (October 2001), 213-214

⁸⁷ See *International Committee of the Red Cross*, Women and War (February 2008), 2, 18-21

persons affected by war; even better, it has achieved standards in its work, which are also noticed by the rest of the international community.

Nevertheless, much still needs to be improved. For example, the ICRC is fighting against impunity or is trying to seek better redress for victims among other things. The organization makes investigations, establishes knowledge and stays aware of the must to be flexible working on the ground in order to be able to quickly adjust to fast changing situations.⁸⁸ The importance of the ICRC can certainly not be undermined, but networking and a better communication with other actors and field workers should be advanced.

⁸⁸ See *International Committee of the Red Cross, Overview of the ICRC's Operations in 2009*, Geneva (ICRC), 27 November 2008

III. THE INTERNATIONAL LAW OF ARMED CONFLICT

This Chapter is approaching “women and the law of armed conflict” from the theoretical point of view. Feminists claim, that international law establishes a special picture of a woman, who has to be protected.

Provisions of international law will be scrutinized to see how far they meet the actual needs of women especially in conflict situations. Besides pointing out the achievements in international law, the goal is also to demonstrate the failures of the provisions in recognizing the distinctive impact of in armed conflict on women. Therefore, it will be looked at instruments to protect women within the regime of the United Nations. The UN Security Council Resolutions developed some international legal standards, which need to be analyzed in a gender context. Furthermore, I will try to point out what was done in UN peacekeeping missions in order to make these standards operational on the ground.

Dealing with armed conflicts, three categories of rights, which are interrelated and mutually reinforcing, are applicable: international humanitarian law, international human rights law and refugee law. In this work only the first two tracks of international law are building the very legal foundation of the protection of women in armed conflicts. In the beginning, I will look back at the early beginnings of the legal framework and show important developments in the course of time. Then, in regard of the modern body of law, I will present general and specific provisions, especially the ones that are for the benefit of women.

In the end, the International Tribunals of Yugoslavia and Rwanda and the International Criminal Court will be introduced. What functions do the International Courts play in the protection of women in armed conflicts and why are they important for a further development of legal standards in the international law arena?

Feminists argue international law to be discriminative against women. How true is their asserted gender bias of a neutral system of norms? By looking at the legal order, this will tried to be answered.

A. The UN Security Council Resolutions and Peacekeeping

According to the importance of the United Nations as one of the most powerful international organizations worldwide, problems of women in armed conflict situations became a subject of international concern. In 2008, the United Nations was composed of 192 member states, nearly encompassing universal membership and following, playing a major role; its legal standards serve as a basis for the international legal system. Moreover, compliance with UN regulations and its monitoring are of great public interest because of the enormous power of the organization.

The fifteen-member United Nations Security Council (UNSC)⁸⁹, seated in New York City, is one of the main and most important organs of the UN and its core task is to maintain international peace and security. The mandate of the UNSC directly stems from the United Nations Charter⁹⁰ and it operates by adopting UN Security Council Resolutions, which are to be considered binding decisions according to Article 25 of the UN Charter; it is also able to authorize military actions. UNSC Resolutions can contain many different concerns in many diverse matters, including gender rights and politics. In the UN system, women and their suffering in conflict situations have also been of great solicitude, and it is going to be looked at two important resolutions regarding this subject. Moreover, one of the Security Council's duties is the planning and realization of peacekeeping operations. Therefore, I want to examine peacekeeping operations, their implementation and their tasks in the context of a gender perspective. How are the rights and needs of women realized in training guidelines, materials and courses? How is the practical approach to the theoretical background?

⁸⁹ The UNSC consists of five permanent members and ten elected members on a two-year term basis, whereas five are replaced each year. The five permanent members are China, France, Russia, United Kingdom, United States; the ten elective members are Burkina Faso, Costa Rica, Croatia, Libya, Vietnam, Austria, Japan, Mexico, Turkey, Uganda, as at 2009. See UN Security Council, official webpage, Members <http://www.un.org/sc/members.asp> (11 November 2009) and also Charter of the UN, 26 June 1945, Article 23.

⁹⁰ See Charter of the UN (1945), Chapter V, Article 24(2) refers to the duties, which are laid down in Chapters VI, VII, VIII, and XII.

1. Security Council Resolutions

A Security Council resolution attracts the attention of the international community and therefore is an important instrument of arousing public interest. The UN Security Council reacts fast to risky situations occurring in the world with resolutions, which are dealing with issues threatening international peace and security. Moreover, it is tried to improve the situation of people who really need help, like children and women in conflict situations. In fact, only in recent years special attention has been given to women's issues. Looking at resolutions, which are especially relevant for the protection of women in armed conflict, I would like to show how important and influential actions of the UN really are and respectively how far remarkable changes took place. Notably the most important resolutions are Resolution 1325 and 1820.

a. SC Resolution 1325

At the beginning of 2000, the Security Council realized the importance to connect peace and gender equality. Women are needed to be part of peace negotiations in order to establish peace by all means.⁹¹ It was a great step towards gender recognition in armed conflict. Following, the UN Security Council unanimously passed the landmark Resolution 1325 on Women, Peace and Security in October 2000.⁹² It is one of the most known of all resolutions of the UNSC and has been translated into many languages. Five international organizations⁹³ came together with the United Nations Development Fund for Women (UNIFEM), which is working on women's empowerment and gender equality, to draft a text on gender issues. The Resolution 1325 offers a practical basic structure on gender, peace and security issues as well as it gives recommendations on specific needs and required actions to improve the suffering of women and girls in conflict situations. It was the very first time that effects of armed conflicts on women

⁹¹ See Inter-Agency Network on Women and Gender Equality (IANWGE), Taskforce on Women, Peace and Security, From the Charter to Security Council resolution 1325, <http://www.un.org/womenwatch/ianwge/taskforces/wps/history.html> (11 November 2009)

⁹² See SC Resolution 1325 (2000) on Women and peace and security, S/Res/1325 of 31 October 2000

⁹³ The coalition included: Women's International League for Peace and Freedom, International Alert, Amnesty International, Women's Commission for Women Refugees and Girls, the Hague Appeal for Peace.

were specifically mentioned and the importance was stressed of a better understanding of different problems women have to face. The resolution contains 18 points, which are concerned with four main gender thematic issues: the participation of women at decision-making and peace process stages, the protection of women and girls in times of armed conflict, gender education in peacekeeping missions and gender mainstreaming within the UN system. It builds the framework for UN organs and governments to act on and implement these issues and it “calls on all parties to the conflict to take special measures to protect women and girls from gender-based violence”⁹⁴ in conflict situations. The resolution also reflects the will of the international community to fight against impunity for perpetrators of committing war crimes including those relating to sexual or other violence against women. It initiated action plans on gender mainstreaming within the UN system; moreover, many gender specific reports were submitted to the Security Council.⁹⁵

Even though Resolution 1325 does raise awareness about women affected by armed conflict, there is a lack of cooperation between states for a proper assessment of the effects on women and girls.⁹⁶ Another critical point is a too general view of the impact of armed conflict on women, ignoring different situations on the ground.⁹⁷

However, UNSC Resolution 1325 is a great development all together, pointing out women as a vulnerable group in conflict situations with the need of special protection. It builds the basis for further analysis of the impact of war on women and girls, incorporating the gender issue into the policy of the UN, hence being best example for the rest of the world. In my point of view, this resolution is a milestone for the subject of women in armed conflicts and the acknowledgment of different experiences of women.

⁹⁴ See SC Resolution 1325 (2000), para 10

⁹⁵ See IANWGE, <http://www.un.org/womenwatch/ianwge/taskforces/wps/history.html> (11 November 2009)

⁹⁶ See *Kirk, Jackie; Taylor, Suzanne*, UN Security Council Resolution 1325, in: *Forced Migration Review, Sexual Violence: Weapon of War, Impediment to Peace* (2007), Issue 27, 13

⁹⁷ *Ibid.*, 13

b. SC Resolution 1674

The Security Council confirms the special impact of armed conflict on women in its Resolution 1674 on the Protection of Civilians in Armed Conflict, which was adopted in 2006.⁹⁸ Furthermore, the special needs of women in the post-conflict phase are addressed for the very first time and member states are obliged to enact particular measures. The SC condemns violence against women, especially sexual violence, ensuring to prevent such acts at least in its peace operations. The zero-tolerance policy in regards of exploitations and assaults committed by military, police and civilian personnel in UN operations is reaffirmed, calling upon the states to fight against these human rights violations.

Resolution 1674 shows an ongoing commitment of the SC to protect women in armed conflicts and stresses the need to further act through development and democracy. In my point of view, this resolution is especially important because the UN recognizes its responsibility for its own troops and personnel having committed war crimes against women. It sets a good example for the international community; other states are motivated to also call to account perpetrators, who fall under its jurisdiction.

c. SC Resolution 1820

In 2008, the UN Security Council complemented Resolution 1325 with another groundbreaking resolution, namely Resolution 1820 on Women, Peace and Security.⁹⁹ The United States Secretary of State Condoleezza Rice affirms the question of whether or not sexual violence falls within the mandate of the UNSC.¹⁰⁰ Resolution 1820 addresses sexual violence as a threat to international peace and security and as a tactic of warfare. The Security Council repeats the need to shield women from assaults, recognizing the lack of proper prevention in conflict situations; it stresses to abandon sexual violence during and after armed conflicts and calls on all parties to the conflict to take adequate measures to secure women in such. Most importantly, it is confirmed that “rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a

⁹⁸ See SC Resolution 1674, Protection of Civilians in Armed Conflict, S/Res/1674 of 28 April 2006

⁹⁹ See SC Resolution 1820, Women and Peace and Security, S/Res/1820 of 19 June 2008

¹⁰⁰ See SC/9364, Security Council 5916th Meeting (AM&PM), Department of Public Information, News and Media Division, New York of 19 June 2008, 1-2

constitutive act with respect to genocide”¹⁰¹, which leads to the indirect assumption of sexual violence constituting a punishable act under international criminal law.¹⁰² The fight against the impunity of perpetrators, which is still seen as one of the biggest threats to international peace and security, is noted to be a main goal of the international community. Appropriate implementation measures, as there are training programs for the personnel, are provided for all peacekeeping missions of the UN. Police, troops and its group leaders, operating on the ground, are asked to follow the so-called “zero tolerance of sexual exploitation and abuse”¹⁰³ policy of the UN, not tolerating any deduction.

The effectiveness of the resolution can be analyzed on the basis of a report¹⁰⁴, provided by the Secretary-General, on the implementation to the Security Council. This report states that the implementation of the Resolution 1820 has been very weak in the area of remedy and reparations for victims of gross violations. Most of the states have failed to provide sufficient protection against violence to women; for example, a better access to formal and informal justice sectors must be assured and impunity must be combated. Furthermore, a significant representation of female military and police personnel in peacekeeping missions has to be established, provided with adequate training in order to carry out their responsibilities. The report calls on member states to improve their cooperation among each other and to submit detailed country-specific reports. It contains proposals and recommendations on how to reduce sexual violence, after having evaluated peacekeeping operations and trends of gendered violence.¹⁰⁵

The international community is responsible for setting a good example; in the end it is up to the member states of the UN to hold its soldiers to account. Resolution 1820 is a very positive step forward; many improvements, like guidance and training resources for the peacekeepers locally involved, have been made. Nevertheless, there are gaps and failures,

¹⁰¹ See SC Resolution 1820 (2008), para 4

¹⁰² See *Zumach, Andreas*, Vergewaltigung wird Kriegsverbrechen, in: Taz.de, Politik (21 June 2008), <http://www.taz.de/1/politik/europa/artikel/1/vergewaltigung-wird-kriegsverbrechen> (11 November 2009)

¹⁰³ See SC Resolution 1820 (2008), para 7

¹⁰⁴ See Report of the Secretary-General pursuant to Security Council resolution 1820, S/2009/362 of 15 July 2009

¹⁰⁵ *Ibid.*, 22 et seq.

like the lack of quality of the monitoring and reporting system when it comes to sexual violence against women.¹⁰⁶

The UN reacts with its Resolution 1820 to the continuing high-level abuses against women in conflict situations. A monitoring and reporting system has now to be taken serious by all actors involved. The continuing debate of how to reduce sexual violence against women in conflicts shows the commitment of the UN to women's issues. The importance to cooperate directly with women's organizations has been understood as well as the need to include women's participation in conflict prevention, conflict resolution and post-conflict peace building. Hopefully, Resolution 1820 can contribute to a better situation of women in armed conflicts around the world.

Fact is, women in armed conflicts experience gender based violence, especially in form of sexual abuses. The question of how far specific legal measures exist in order to protect women in a sufficient way remains. Looking at SC resolutions, the subject of women facing violence in conflict situations is certainly addressed. Not only one resolution is pointing out gender specific suffering and certain problems women are confronted with. Hence, the international community tries to improve the situation on the ground. Standards have been set by the UNSC and its power ensures these standards to be internationally accepted, followed and taken as an example for further measures in the law of armed conflict.

2. UN Peacekeeping

Peacekeeping is another way to maintain peace and security. The UN states that "peacekeeping is a way to help countries torn by conflict create conditions for sustainable peace."¹⁰⁷ Therefore, it is left to the UN Security Council to authorize the mandate for peacekeeping operations under Chapter V, VI and VII of the UN Charter. The very first

¹⁰⁶ See *Torry, Gina*, Sexual Violence in Conflict Zones at Last Recognized as a Matter of International Peace and Security, Press Release, New York (NGO, Working Group on Women, Peace and Security), 19 June 2008, http://www.womenpeacesecurity.org/news-analysis/news/2008/sexual_violence_resolution.html (11 November 2009)

¹⁰⁷ See United Nations Peacekeeping, Meeting New Challenges, <http://www.un.org/Depts/dpko/dpko/faq/q1.htm> (11 November 2009)

mission was set up in 1948 and since then over 60 peacekeeping missions have been established with personnel provided from more than 130 countries all over the world.

UN peacekeepers, also known as “blue helmets” because of their light blue helmets, are responsible for creating a safe environment for the population and for establishing the rule of law. Soldiers, military officers and police are authorized to protect civilians under threats of physical violence; moreover, they are supposed to develop post-conflict strategies, including measures to prevent sexual violence. Sadly, evidence is provided, that peacekeepers, the only ones to safeguard civilians on the ground, are among those raping and abusing women. After the outcome of a report from the Special Committee on Peacekeeping in 2005¹⁰⁸ on the issue of sexual exploitation by UN peacekeeping personnel, the UN Security Council publicly addressed the problem for the very first time, stressing “the shared responsibility of the Secretary-General and all Member States to take every measure within their purview to prevent sexual exploitation and abuse by all categories of and to enforce United Nations standards of conduct in that regard.”¹⁰⁹

Looking at the Code of Conduct¹¹⁰ for all UN peacekeepers, it is clearly stated that sexual abuses are condemned by all means. Shifting from the exclusive responsibility of the member states calling its troops to account to a common responsibility for such acts within the UN system, a big step was taken. The fight against the impunity of perpetrators was recognized to be most essential for a better protection of women.

The UNSC Resolution 1265 on the protection of civilians in armed conflicts notes the importance of advising and training the personnel in provisions dealing specifically with women rights and human rights in general.¹¹¹ Resolution 1325 has introduced the gender adviser in peace missions, educating UN personnel in gender issues. Moreover, information about local cultural customs should be spread to foster a better understanding

¹⁰⁸ See GA/PK/186, Special Committee on Peacekeeping Operations 185th Meeting (AM), Special Committee on Peacekeeping Operations begins Review of Report on Sexual Exploitation of 4 April 2005

¹⁰⁹ See SC/8400, Security Council 5191st Meeting (PM), Security Council condemns ‘In the Strongest Terms’ all Acts of Sexual Abuse, Exploitation by UN Peacekeeping Personnel of 31 May 2005

¹¹⁰ See United Nations Department of Peacekeeping Operations Training Unit, Ten Rules Code of Personal Conduct for Blue Helmets <http://www.un.org/Depts/dpko/dpko/Conduct/> (11 November 2009)

¹¹¹ See SC Resolution 1265 (1999), On the Protection of Civilians in Armed Conflict, S/RES/1265 of 17 September 1999

as well as gender experts should be established as a contact point for field workers and abused women in order to create a better environment.¹¹²

Nowadays, gender mainstreaming is constantly included in UN policies. The United Nations raised international awareness on the subject “women, armed conflict and peacekeeping”. In my opinion, the right steps have been taken; namely, first to become aware of the facts happening on the ground and second, to fight against any form of abuses. Instances of sexual exploitation through UN personnel in peacekeeping operations, was publicly addressed. As a result, gender matters are incorporated into all peacekeeping missions as well as the notion of gender equality; gender training materials and programs are part of every operation today. Measures for a better protection of women during UN peacekeeping missions have been established and therefore, adequate attention is given to the subject, being part of the law of armed conflict.

B. International Human Rights Law

International human rights are applicable in armed conflict situations. There are general provisions, which are applicable to everyone, as well as other provisions exclusively applying to women. In this chapter, the development of legal standards will be scrutinized to see how provisions of human rights improve the situation of women in armed conflicts. Recently, women’s movements have become stronger, drawing international attention to women’s issues and in doing so, influencing human rights law in general. According to the global campaign “women’s rights are human rights”, women recognize human rights to be the most important, well known and even obligatory system, to openly fight for their rights; a platform for addressing specific experiences in armed conflicts has been found. However, feminists argue that typical female problems are not easily transformed into legal provisions. In this chapter, it is going to be analyzed

¹¹² See *Amnesty International*, Amnesty International’s 15 point Program for Implementing Human Rights in International Peacekeeping Operations, in: *Gender&Peacekeeping Online Training Course*, Modul 5, 2002, 79, 88 and also *WomenWarPeace.org*, *Peacekeeping, Women, War, Peace and Peacekeeping* <http://www.womenwarpeace.org/node/10> (11 November 2009)

how efficient provisions of international human rights law are and how far specific needs of women in armed conflicts are implemented.

First of all, to better understand the law of armed conflict, the relationship between international human rights law and international humanitarian law (IHL) has to be explained. When does what set of rules apply? International humanitarian law, which is the body of law exclusively dealing with armed conflict, the conduct of hostilities and the protection of combatants and civilians, replaces human rights law once an armed conflict has occurred. However, human rights law does not cease in such situations. The International Court of Justice (ICJ) adopted in one of its decisions the *lex specialis doctrine*, namely that international humanitarian law prevails but human rights law stays applicable and can be directly applied in conflict situations.¹¹³ However, this theory is very controversial, notably in context with women's rights in armed conflict. Feminists argue that the *lex specialis doctrine* is not always applicable and human rights are to be preferred because of the difficult situations of women in war and other violations of human rights, not covered by IHL. On this subject, the latest decision from the International Court of Justice in 2004 agrees on three possibilities, which there exist: "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both branches of international law."¹¹⁴ In the latter case, IHL is mentioned to be *lex specialis*. As a matter of fact, the relationship between the two tracks of international law in armed conflict is still unsolved and subject of an ongoing international debate.

Why is this so important? Human rights law is able to offer all persons to be protected in their dignity, whether or not they are combatants.¹¹⁵ Women form most of the civilian part in conflict situations and consequently, not all provisions relevant for conflict

¹¹³ See ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Judgment of 8 July 1996, *ICJ Reports*, para. 25, 106

¹¹⁴ See ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion), Summary of the Advisory Opinion 2004/2, Judgment of 9 July 2004, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=5> (11 November 2009)

¹¹⁵ This might especially be the case in terms of non-international armed conflicts, where the division between combatants and civilians is mostly invisible. See *Lubell, Noam*, Challenges in Applying Human Rights Law to Armed Conflict, in: *International Review of the Red Cross*, Volume 87 (2005), Number 860, 749

situations apply to them and they are often outside of the legal protection. Then, human rights come into play; governments must abide developed standards in wartime as well as in peacetime. In other words: “where IHL treaties are silent, human rights law might be offered as an answer.”¹¹⁶

In international law, usually states are the main actors, but individuals only to a limited extent. Human rights law is the exception, ensuring human dignity; states grant individuals the right to have standing in front of the national system and international bodies to claim their rights.¹¹⁷ However, international protection is only complementary available after the domestic legal process has been exhausted.¹¹⁸ States must fulfil their obligations, respect and protect their nationals, provide safeguards and punish any human rights violations. Violations from private actors are also covered under human rights law, which is especially important for women because they are provable the main victims of violence in the private sphere. It is the responsibility of the state not to fail its duty to protect the people in its territory.¹¹⁹ Modern developments claim human rights to be universally applicable.¹²⁰ No discrimination or deprivation of any basic right is to be justified under whatever circumstances. Therefore, the international legal system of human rights turned out to be the best starting point for women to raise their voices against their suppression and to fight for a better protection in armed conflict situations.

¹¹⁶ Ibid., 746

¹¹⁷ See *Rehman, Javaid*, *International Human Rights Law, A Practical Approach*, Harlow (Longman), 2003, 14

¹¹⁸ See *Neuhold, Hanspeter; Hummer, Waldemar; Schreuer, Christoph*, *Österreichisches Handbuch des Völkerrechts*, Band I, Wien (Manz), 4. Auflage, 2004, 262 et seq.

¹¹⁹ See *Schmidt-Häuer, Julia*, *Menschenrechte – Männerrechte – Frauenrechte, Gewalt gegen Frauen als Menschenrechtsproblem*, Berlin-Hamburg-Münster (LIT Verlag), 2000, 284

¹²⁰ See *Askin, Kelly D., Koenig, Doreen M.* (1999), 5-6

1. Women's Rights are Human Rights

Where are the women in the human rights system and what about their rights? Feminists claim that international law, including human rights law, is a male system where women are mainly absent. How should there be a better legal status for women in war situations if women's issues are not even well addressed in general human rights provisions?

In fact, it was not until 1945 that the notion of equality seriously was addressed in the UN Charter, which was adopted in the same year. "The equal rights of men and women"¹²¹, were officially written down as well as the responsibility to promote and encourage "fundamental freedoms for all without distinction as to race, sex, language, or religion".¹²² It is believed, that these principles set out in the Charter have become part of customary international law. A new approach to human rights, being applicable for everyone, was born. Women fought hard for their rights and after many centuries of being ignored and absent in international law, it was a big and important step forward; the first step of a fundamental chance. Nonetheless, a sufficient protection of women under the law of armed conflict was still to be achieved.

a. Historical developments

The protection of women in armed conflict situations is a matter of human rights. However, this was not always the case. In December 1948, the General Assembly of the UN unanimously adopted the Universal Declaration of Human Rights (UDHR).¹²³ It is a very broad instrument and an important precursor of women's human rights, stating in its Article 1 "All human beings are born free and equal in dignity and rights". Article 2 constitutes a general requirement for non-discrimination based on sex. The UN Commission on the Status of Women (CSW), established by the Economic and Social Council (ECOSOC) in 1946, was lobbying for women and guaranteeing their involvement in the process of drafting the UDHR.¹²⁴ The new approach to human rights was strengthened with two other legal instruments, which were officially binding: the

¹²¹ See Charter of the United Nations of 26 June 1945, Preamble

¹²² Ibid., Article 1(3), see also Article 13 (1)(b), 55(c) and 76(c)

¹²³ See Universal Declaration of Human Rights, GA Resolution 217 A (III) of 10 December 1948

¹²⁴ See *Buss, Doris; Manji, Ambreena* (2005), 111-112

International Covenant on Civil and Political Rights (ICCPR)¹²⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹²⁶ Discrimination based on sex is again prohibited¹²⁷ and Common Article 3 is emphasizing the equal rights of men and women to the securing of all provisions set out in both covenants. A few exclusive references to women are made, mostly connected to women as mothers or within the family, for example Article 10 (2) ICESCR grants special protection to mothers being pregnant and giving birth while Article 6 (5) ICCPR prohibits death penalty “carried out on pregnant women”.

In 1967, a declaration of the UN General Assembly, focusing on the elimination of discrimination against women was published, openly announcing that women rights are an issue of human rights.¹²⁸ The declaration directly lead to the legally binding Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹²⁹ in 1979, many organizations pushing for a better protection of women around the world. The problem of inequality between women and men has been picked up, recognizing the impact of female downgrading on all levels, including armed conflict situations. CEDAW offers a broad definition of discrimination in its Article 1, encompassing direct and indirect forms of discrimination,¹³⁰ clearly aiming at equalization in all areas.¹³¹ In 1999, the Optional Protocol to CEDAW¹³² was adopted. The possibility for individuals to forward complaints to a Committee is set up in Article 2; the proposal for the Committee to make recommendations to the parties involved is regulated in Article 7.

¹²⁵ See International Covenant on Civil and Political Rights, GA Resolution 2200 A (XXI) of 16 December 1966

¹²⁶ See International Covenant on Economic, Social and Cultural Rights, GA Resolution 2200 A (XXI) of 16 December 1966

¹²⁷ See Article 2 (1) ICCPR and Article 2 (2) ICESCR

¹²⁸ See Declaration on the Elimination of Discrimination against Women, GA Resolution 2263 (XXII) of 7 November 1967

¹²⁹ See Convention on the Elimination of all Forms of Discrimination, GA Resolution 34/180 of 18 December 1979

¹³⁰ See *Buss, Doris; Manji, Ambreena* (2005), 117

¹³¹ See Article 1 CEDAW (1979)

¹³² See Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, GA Resolution A/54/4 of 6 October 1999

However important CEDAW and its Optional Protocol are in the fight against discrimination against women, many member states' reservations undermine its effect, it seems the convention is not taken seriously.¹³³ Another weak point is the ignorance of the problem of gendered violence, which turns out to be the same unmentioned like a better protection of women in armed conflict. CEDAW does however refer to problems, which are indirectly related to conflict situations, like trafficking in women and exploitation of prostitution of women or equality of access to health care.¹³⁴

Despite its failures, CEDAW was a very important step forward for women's human rights. It certainly helped to change the view of women worldwide with a turn for the better. In my opinion, even if states continue the praxis of reservations to the convention, any ratification makes a contribution to the improvement of the situations of women in one way or the other.

However, no attention was paid to gender specific problems of women in armed conflicts. After the Human Rights Conference in Teheran the subject was first picked up in 1968. Especially the Commission on the Status of Women (CSW) needs to be mentioned as the pushing institution in this matter. In 1969, the CWS particularly circled out the matter of protection of women and children in emergency and armed conflict, which was following discussed at its 23rd session in 1970.¹³⁵ Also in 1972 and 1974 it was a subject of constant debate; subsequently, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict was adopted in 1974.¹³⁶ This declaration constitutes another development in the field of women's human rights, emphasizing the need to provide special protection for women in conflict situations. The states are called upon to take all steps necessary to prohibit any form of degrading treatment and violence. The declaration is non-binding; besides it does not touch every possible impact of armed conflict on women. The subject was relatively new and there was not enough information provided, even though the UN Secretary-General assisted the

¹³³ See *Zimmermann, Andreas; Giegerich, Thomas* (2007), 238-239

¹³⁴ See Articles 6 and 12 CEDAW (1979) and also *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 124

¹³⁵ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 137

¹³⁶ See Declaration on the Protection of Women and Children in Emergency and Armed Conflict, GA Resolution 3318 (XXIX) of 14 December 1974

CWS with many reports on the situation on the ground submitted by special agencies, the ICRC and NGOs.¹³⁷ More detailed studies were needed, in particular on the subject of sexual violence. The major problem of sexual abuses of women in armed conflicts was mainly ignored at that time. Many opponents were criticizing the resolution for imposing special privileges for women, instead of recognizing the need for a better protection of a special group at risk. Notwithstanding, women were mostly seen in need of protection being mothers and caretakers, it was the very first time the subject was recognized and discussed under international law.¹³⁸

Regrettably after 1974, the subject of women and problems they have to face in armed conflicts seemed to be forgotten. The UN Economic and Social Council (ECOSOC) was concerned with the situation of women in specific cases and issued resolutions on women and children in Arab territories, Namibia or women being refugees.¹³⁹ However, a general debate on distinctive female experiences in wartimes and on the improvement of conditions on the ground was interrupted. In my point of view, the foundation was laid for the subject of women in armed conflicts and their specific experiences in such situations. Although it was sadly kept quiet for many years, at least the problems were recognized.

b. The new approach to Women's Human Rights

It is clear that the notion of women's human rights had already been a matter of discussion in the international community since the 1940s. The International Decade for Women (1975-1986), which the General Assembly brought forward, further reinforced the special focus on women's issues and movements all over the world.¹⁴⁰ Gender became a subject to be discussed in the international law arena and feminist activism ensured that women were not overseen any longer.

It was not until the 1990s that a real change in the approach to women's rights and their status in the international law of armed conflict took place. Diverse instances of sexual

¹³⁷ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 138

¹³⁸ *Ibid.*, 138, 142

¹³⁹ *Ibid.*, 143

¹⁴⁰ See *Askin, Kelly D.; Koenig, Dorean M.* (1999), 92, 121

violence strongly reawakened the interest for women's experiences in armed conflicts;¹⁴¹ in 1985, the World Conference to Review and Appraise the Achievements of the UN Decade for Women in Nairobi tried to further improve the situation of women at the national, regional and international level, pronouncing violence against women to be of major significance, understanding armed conflict to be a special threat to women and children.¹⁴²

The Committee of CEDAW adopted its general recommendation about violence against women in 1992. Around this time, women all over the world started to make pressure to act, publicizing violations against women's human rights; following, the Global Campaign for Women's Human Rights evolved.¹⁴³ The goal was the international acknowledgement of women's human rights in the UN World Conference on Human Rights, which was held in Vienna in 1993. This conference was the beginning for many activities combating violence against women. Furthermore, the Vienna Declaration and Programme of Action was adopted, stating, "All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."¹⁴⁴ The most important outcome, the unification of all three generations¹⁴⁵ of human rights, also led to the view of women's human rights being an "inalienable, integral and indivisible part of universal human rights."¹⁴⁶ Violence against women was at once classified a problem of human rights!

In rapid succession, the General Assembly adopted the Declaration on the Elimination of Violence against Women (DEVAW) in December 1993.¹⁴⁷ It was the first instrument of human rights, which solely addressed the problem of violence against women. Article 1

¹⁴¹ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 144-146

¹⁴² See Report of the World Conference to Review and Appraise the Achievements of the UN Decade for Women: Equality, Development and Peace, United Nations, Nairobi, 15-26 July 1985, <http://www.un.org/womenwatch/confer/nfls/Nairobi1985report.txt> (11 November 2009)

¹⁴³ See *Askin, Kelly D.; Koenig, Dorean M.* (1999), 92-93

¹⁴⁴ See Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights held in Vienna from 14 to 25 June 1993, UN Doc. A/Conf.157/24 of 13 October 1993

¹⁴⁵ The first generation of human rights is civil and political rights, the second generation is social, economic and cultural rights, and the third generation is collective rights.

¹⁴⁶ See Vienna Declaration (1993), para 18

¹⁴⁷ See Declaration on the Elimination of Violence Against Women, GA Resolution 48/104 of 20 December 1993

offers a definition of “violence against women”, which is further categorized into physical, sexual and psychological violence in Article 2. States do have the obligation to eliminate any form of violence. DEVAW constitutes merely a declaration of intention, without the possibility to demand its implementation; nevertheless it has been an essential step forward in the overall process.¹⁴⁸

Human rights offer a platform for women to claim their rights and women’s human rights help gender specific problems, notably violence, in armed conflicts being recognized. Systematic sexual violence was understood to be a weapon of war and rape camps as a war tactic to achieve military objectives.¹⁴⁹ However, the focus was solely on sexual violence and other gender specific conditions affecting women in armed conflict stayed unnoticed.

2. Further developments after 1993

As discussed before, in 1993 the main subject to be debated within the international community was violence against women. Nonetheless, it was just the beginning of a process, which led to a broader view of women and armed conflict. The time was ripe for a fundamental change in the law of armed conflict and a better female protection under international human rights law.

a. Special Rapporteur on Violence against women

Another important outcome of the constant lobbying for women’s rights was the appointment of the Special Rapporteur on Violence against Women, including its Causes and Consequences.¹⁵⁰ In March 1994, the UN Commission on Human Rights introduced the first Rapporteur Ms Radhika Coomaraswamy from SriLanka for a 3 years period; afterwards, the mandate was ongoing extended, the latest in 2003 with Dr Yakin Return

¹⁴⁸ See *Neuhold, Brita; Pirsnter, Renate; Ulrich, Silvia*, Menschenrechte – Frauenrechte, Internationale, Europarechtliche und Innerstaatliche Dimensionen, Innsbruck etc. (Studien Verlag), 2003, 107

¹⁴⁹ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 146

¹⁵⁰ See Commission on Human Rights Resolution, Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women, CHR E/CN.4/RES/1994/45 of 4 March 1994

from Turkey.¹⁵¹ The mandate of the Special Rapporteur comprises the examination of violence against women, more precisely “all violations of the human rights of women in situations of armed conflict, and in particular, murder, systematic rape, sexual slavery and forced pregnancy”.¹⁵² In this matter, the Rapporteur has to report annually to the UN Human Rights Council on progress made and activities undertaken.¹⁵³ The states are supposed to assist in any way possible, with independent experts or with working groups. Until today, many country reports have been filed, but most importantly, there have been worked out two specific reports on violence against women in armed conflicts. The first report was published in 1998 on Violence perpetrated and/or condoned by the State¹⁵⁴ and the second report was released in 2001 on Violence against women perpetrated and/or condoned by the State during times of armed conflict.¹⁵⁵ In these reports, the Special Rapporteur dealt with legal standards and ongoing problematic issues; some country case studies were also contained. In addition, recommendations were made to provide a better human rights- and gender training for UN peacekeepers, to fight against impunity, to concentrate on reconstruction and rehabilitation in post-conflict times and finally, to mainstream women’s human rights in all areas.¹⁵⁶

The UN Rapporteur on Violence against Women took up the subject of violence against women; for this reason accurate studies on the situation were initiated and following new perspectives could be introduced.

b. The Beijing Fourth World Conference on Women

In 1995, the Fourth World Conference on Women took place from the 4th to the 15th September in Beijing. In the course of the conference, the Beijing Declaration and the

¹⁵¹ See Sari/Equity, UN Special Rapporteur on Violence against Women http://www.sariq.org/pages/focus_areas_vawc_un_special_rapporteur.aspx (11 November 2009)

¹⁵² See Preliminary report submitted by the Special Rapporteur on Violence against Women, CHR E/CN.4/1995/42 of 22 November 1994, para 7

¹⁵³ See Office of the UN High Commissioner for Human Rights, Special Rapporteur on Violence against women, its Causes and Consequences, Annual Reports, <http://www2.ohchr.org/english/issues/women/rapporteur/annual.htm> (11 November 2009)

¹⁵⁴ See Report of the Special Rapporteur on Violence perpetrated and/or condoned by the State, CHR E/CN.4/1998/54 of 26 January 1998

¹⁵⁵ See Report of the Special Rapporteur on Violence against Women perpetrated and/or condoned by the State during Times of Armed Conflict (1997-2000) CHR E/CN.4/2001/73 of 23 January 2001

¹⁵⁶ See Both Annual Reports: CHR E/CN.4/1998/54 (1998) and CHR E/CN.4/2001/73 (2001)

Beijing Platform for Action were both adopted as Annexes to the conference resolution and report of the fourth world conference on women.¹⁵⁷ It was another fundamental cornerstone in the fight for a better legal situation of women around the world. One of the subjects to be addressed was women and armed conflict, which gave member states and civil society cause for concern.

Annex I to the resolution contains the Beijing Declaration, in which the governments reaffirm their commitment to equal rights and dignity of women and men. Furthermore, states reassure that women's rights are human rights and a proper implementation of these rights, meaning sustainable gender-sensitive policies, should be achieved in order to erase all shapes of discrimination in society. Most notably, the declaration understands "women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power" to be "fundamental for the achievement of equality, development and peace."¹⁵⁸

The Beijing Platform of Action, which is attached as Annex II to the conference report, circles out gender equality and social justice to be its main concerns. There are twelve main critical areas identified, including violence against women as well as women and armed conflict. In regard to violence, acts committed in situations of armed conflict like murder, rape, forced pregnancy or sterilization or abortion, are taken into consideration and are going to be theme of the discussion.¹⁵⁹ The Platform for Action claims violence against the weaker sex to be grounded in history, cultural pattern and the unequal treatment of men and women.¹⁶⁰

Looking at women and armed conflict, it is tried to broader investigate the diverse impacts of armed conflict on women and better understand these, including displacement, loss of home, poverty, family separation and disintegration.¹⁶¹ The Platform of Action also outlines women and children being the majority of civilian victims targeted in armed conflict.¹⁶² A new and comprehensive approach to female vulnerability in armed conflict

¹⁵⁷ See Fourth World Conference on Women, Action for Equality Development and Peace, Beijing Declaration and Platform for Action, UN Doc. A/Conf.177/20 of 17 October 1995

¹⁵⁸ Ibid., Annex I, para 13

¹⁵⁹ Ibid., Annex II, para 114, 115

¹⁶⁰ Ibid., Annex II, para 118, 135 and also *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 162-163

¹⁶¹ Ibid., Annex II, para 135

¹⁶² Ibid., Annex II, para 133

and a new commitment of the states can be identified. The multitasked and special roles women take on in armed conflicts are acknowledged. For example, women are seen as caretakers for the injured and elderly, left alone being a sole parent at home and manager of the household; another example is women suddenly struggling with poverty, as a consequence of the downfall of their community.¹⁶³

After having identified the problems regarding women and armed conflict and the concerns of the international community, the Beijing Platform of Action itself tries to offer answers to these. The Platform recommends six different strategic objectives and actions to be taken to improve the situation: to increase the participation of women in all institutions and peacemaking programs, to reduce the excessive use of military arms, to promote human rights in conflict situations and women's contribution in peace missions, and finally to provide protection and assistance to special groups at risk and women of colonies.¹⁶⁴ The need for gender trainings and programs for UN peacekeepers is emphasized, provided by governments and international institutions, in order to prevent further assaults.

In my opinion, the international community pays adequate attention to the very importance of female participation in post-conflict peace process for the first time. Long-lasting peace cannot be imposed until women are part of developing policies and programs against consequences of armed conflicts; therefore, research on possible effects on women are to be carried out in order to be able to better react to all kinds of situations, which might occur.¹⁶⁵ Women's contribution to peace is essential for the establishment of peace. Besides, the Beijing Fourth World Conference on Women has pointed out all possible consequences of armed conflict on women, shifting away from the sole concept of sexual violence.

c. A Post-Beijing observation

What has been achieved in the area of human rights law regarding women in armed conflict? A post-Beijing view discloses some important international developments. As a

¹⁶³ Ibid., Annex II, para 133, 138 and 139

¹⁶⁴ Ibid., Annex II, para 142-149

¹⁶⁵ Ibid., Annex II, para 146 and also *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 164

result of lobbying of women's groups and international feminist networking around many world conferences, a new human rights framework could be established, giving rise to a broader approach to women's rights.¹⁶⁶ The acknowledgment of women's rights being human rights was the most important outcome of the Beijing conference. Some of the matters discussed about women's equality and rights were and still are extremely controversial, especially when it comes to sexuality, reproductive rights and families; as a consequence, many reservations were made by participating states in these contexts.¹⁶⁷ It is a hot topic to be touched upon, since many governments have the opinion that private matters are solely a domestic concern; another reason might be the clash of various cultures. Mainstreaming women's human rights into all levels, from the adoption of documents and resolutions to the implementation process of a gender perspective of armed conflict, became the main priorities. The Fourth World Conference in Beijing called the attention of the international community not just to violence against women but to all kinds of different possible impacts of armed conflict on women. Offering a very comprehensive approach, the subject was examined in every facet, trying to incorporate all factors women are forced to deal with in such situations.

Much has been achieved; gender is a checkpoint on every international conference agenda today. The problems of women in armed conflict have fully been recognized, special measures for protection have been enacted and new measures are going to be prepared to further improve the legal situation for women. In 2000, the General Assembly reviewed the progress made by the international community towards the implementation of the Platform for Action following the Beijing Conference, identifying an increased acknowledgment of the different impacts of armed conflict on men and women.¹⁶⁸ The biggest problem addressed was the lack of effective implementation by states and other actors. Following, the situation still remains challenging after Beijing.

The international community has constantly discussed the issue of women in conflict situations. As a result, specific provisions are dealing with the subject of women in armed

¹⁶⁶ See *Askin, Kelly D.; Koenig, Dorean M.* (1999), 101 et seq.

¹⁶⁷ *Ibid.*, 126-127

¹⁶⁸ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 169-170

conflict and a wide range of studies, reports and recommendations are available. All in all, international human rights law is certainly a useful tool for the implementation of an adequate protection of women in armed conflicts and a change for the better.

C. International Humanitarian Law

Now, it will be looked at the next branch of law, which is applicable in armed conflicts and therefore important for the analysis of women and the law of armed conflict, and that is international humanitarian law (IHL). As a part of international law, IHL has the task to establish a legal order, based on peace, justice and human dignity. The law of war, as it is often referred to, comes into play once states, or armed groups inside the territory of one state start to engage in hostilities. IHL is a set of rules, aiming at the mitigation of human suffering caused by conflict situations in international and non-international armed conflicts.¹⁶⁹ Roughly speaking, IHL concentrates on the protection of victims in conflict situations as well as on the conduct of hostilities: first, the protection of persons who are not or no longer taking part in hostilities, as civilians, medical personnel as well as the sick and the wounded, injured combatants, shipwrecked and prisoners of war; second, IHL restricts the means of warfare, as special weapons and military tactics.¹⁷⁰

The protection of women in wartimes is going to be analyzed by both sets of rules.

A fundamental principle of IHL is its neutral application to all parties to the conflict, no matter who is the attacker or invader.¹⁷¹ States are obliged to the right use of force; unlimited methods and means of warfare are strictly forbidden, especially the use of weapons, which cannot distinct between civilians and military objectives as well as any form of treachery.¹⁷²

¹⁶⁹ See *Kalshoven, Frits; Zegveld, Liesbeth*, Constraints on the Waging of War, An Introduction to International Humanitarian Law, Geneva (International Committee of the Red Cross), March 2001, 12

¹⁷⁰ See *International Committee of the Red Cross*, What is International Humanitarian Law?, Fact sheet providing a Summary Description of the Sources, Content and Field of Application of International Humanitarian Law, Geneva (ICRC), 31 July 2004, 2

¹⁷¹ See *Greenwood, Christopher*, The Law of War, International Humanitarian Law, in: Malcolm D. Evans, International Law, Oxford (Oxford University Press), 2003, 790-791

¹⁷² *Ibid.*, 802

The legal framework of the law of war comprises the conventions of The Hague and Geneva, treaty law, customary international law, and the case law of the international criminal tribunals and the criminal court, whereof the most relevant rules are the four Geneva Conventions of 1949 and its Additional Protocols I and II of 1977. It is going to be looked at general as well as specific provisions, which are applicable for women in armed conflict. The law of war is binding for state parties to the relevant treaties, as well as there are many customary rules of IHL, which are also compulsory for non-parties to the conventions. They also apply in non-international armed conflicts for acts committed by private persons or rebel groups; common Article 3 to all Geneva Conventions and Article 1 (4) of the Additional Protocol I (AP I) also regulate these kinds of conflicts to a minimum extent.¹⁷³ The primary and exclusive legal instrument dealing with the conduct of non-international conflicts is Additional Protocol II (AP II) of 1977, guaranteeing basic principles of methods and means of combat.

Some provisions are more representative for women; others are even solely applicable for them because of gender specific contents. After the most important issues for women in armed conflict under IHL have been circled out, the relevant provisions will be scrutinized in the light of a gender perspective. The main goal is to discover and to examine the quality of women's protection. Feminists claim, IHL to be a gendered system and consequently, a lack of personal safety for women in armed conflicts still exists today. This chapter will hopefully contribute to identify positive achievements as well as gaps, which still need to be filled in the law of armed conflict.

1. Early protection of Women in IHL

First lawful developments of the protection of women in armed conflict situations can already be found in early legal texts. At these times, women were mostly seen as the property of men and provisions were basically dealing with the physical integrity of women, the honour of women and their family role.¹⁷⁴ Going back to 1385, before the law of war was even codified, a national military code established by Richard II, gave

¹⁷³ See *Green, Leslie C.*, *The Contemporary Law of Armed Conflict*, Manchester (Manchester University Press), 2000, 55-56

¹⁷⁴ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 56

instructions to always respect the infirm and women, together with disciplinary measures.¹⁷⁵ In the sixteenth century, French knights were obliged to honour women and violence against them was forbidden under penalty of death.¹⁷⁶ During these times, gendered atrocities, especially rape as a tactic of warfare, were already forbidden in violent conflicts.

a. The Lieber Code

One of the most important documents trying to regulate the conduct of war during the American Civil War and predecessor of the humanitarian law was the Lieber Code from 1863.¹⁷⁷ In its Articles 37 and 44, it is referred to the special protection of women, stating: “All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.” Furthermore, in Article 47 rape is characterized being punishable, falling under the category of war crimes. Even though the Lieber Code was only binding on the United States itself, it influenced the rest of the world because of its first worldwide-recorded practices in warfare.

b. The Law of The Hague

The standards set out in the Lieber Code finally resulted in the adoption of the Hague Conventions on the Land Warfare with Annexed Regulations in 1899 and 1907. The very first conventions, regulating the conduct of war and methods of warfare however did not include the treatment of the sick and the wounded, as the Geneva Conventions do. Out of sixteen conventions and four declarations, which were adopted in both peace conferences

¹⁷⁵ See *Green, Leslie C.*, *The Contemporary Law of Armed Conflict*, Manchester (Manchester University Press), 1993, 22

¹⁷⁶ *Ibid.*, 23

¹⁷⁷ See *The Lieber Code*, General Orders No. 100, Instructions for the Government of armies of the United States in the Field, Section I of 24 April 1863, <http://www.civilwarhome.com/liebercode.htm> (11 November 2009)

of The Hague 1864 and 1907, only one single Article of the Convention (IV) Respecting the Laws and Customs of War on Land from 1907¹⁷⁸ is engaged with the protection of women. Article 46 states that "family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected". The Law of The Hague became part of customary law and therefore is binding to all parties to the conflict.

2. Modern International Humanitarian Law

The Law of Geneva forms the fundamental basis for humanitarian protection in armed conflicts around the world. In 1863, a treaty was established for a better treatment of the sick and wounded, on the basement of a book written by Henri Dunant, the man who also founded the ICRC; in this book he incorporated his bad experiences of witnessed suffering in battlefields.¹⁷⁹ As a result the Convention of the Amelioration of the Condition of the Wounded in Armies in the Field was adopted in 1864, which was the beginning of many attempts for further improvements of these standards.

Women were not recognized to be a special group at risk in wartime situations; however, civilian suffering and the recognition of the need for a conduct of war build the basic foundation for a later protection of women under the law and certainly had a positive impact on successive developments.

a. The Geneva Conventions

Today, the four Geneva Conventions of 1949 constitute the main framework for international humanitarian law in situations of armed conflicts. These four treaties are primarily concerned with the treatment of the wounded and the sick on land,¹⁸⁰ the

¹⁷⁸ See Convention (IV) Respecting the Law and Customs of War on Land, The Hague of 18 October 1907, <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument> (11 November 2009)

¹⁷⁹ See *Kalshoven, Frits; Zegveld, Liesbeth* (2001), 27

¹⁸⁰ See First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949

wounded, sick and shipwrecked at sea,¹⁸¹ prisoners of war¹⁸² and civilians.¹⁸³ The suffering of people affected by war should clearly be mitigated. In addition, the international community amended the Geneva Conventions with three protocols in 1977 and 2005. Additional Protocol I of 1977 refers to the protection of victims of international conflicts,¹⁸⁴ whereas Additional Protocol II of 1977 deals with non-international armed conflicts.¹⁸⁵ A total number of 194 member states are party to the Geneva Conventions,¹⁸⁶ the Additional Protocol I comprises 167 member states and 163 states are party to the Additional Protocol II.¹⁸⁷ All documents contain fundamental human rights issues and most of the provisions are accepted or claimed as customary international law. The Law of Geneva applies whenever hostilities occur; in states of occupation, the conventions and protocols cease to apply once the occupation has ended, as it is stated in Article 3 Additional Protocol I.

After all, a big effort was made to protect victims of warfare and the human dignity of all. One fragile group to be especially protected in armed conflicts is women, because they are among those suffering the most, as already mentioned in chapter 2. For an exact analysis of women and the law of armed conflict, the most relevant provisions for their protection are to be circled out; these are found in the Third and Fourth Geneva Conventions about the protection of prisoners as well as civilians in armed conflicts, and in both Additional Protocols of 1977. In fact, general provisions of IHL cover women and men to the same extent under the categories of civilians, combatants and prisoner of wars. A core Article for minimum-security standards is certainly Article 3 common to all four

¹⁸¹ See Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949

¹⁸² See Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949

¹⁸³ See Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949

¹⁸⁴ See Protocol Additional I to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts of 8 June 1977

¹⁸⁵ See Protocol Additional II to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.

¹⁸⁶ See ICRC, The Geneva Conventions: the Core of International Humanitarian Law, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions> (11 November 2009)

¹⁸⁷ See ICRC, State parties to the main treaties, State Parties to the Following International Humanitarian Law and Other Related Treaties as of 9-Jul-2009, http://www.cicr.org/eng/party_ice (11 November 2009)

1949 Geneva Conventions. According to Article 3 (1) each Party to the conflict shall be bound to prohibit: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture (lit a); taking of hostages (lit b); outrages upon personal dignity, in particular, humiliating and degrading treatment (lit c); the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples (lit d)”. Persons, not being part of ongoing combats, are to be treated in human ways in all possible circumstances. Article 3 and its standards set out, are applicable to both, women and men, without any adverse distinction founded on sex. These minimum standards have to be applied in the same way; differentiation is only allowed as long as its impact is favourable.¹⁸⁸ The principle of equal treatment is also to be found in other provisions established by IHL. Article 12 of the First and the Second Geneva Convention also prohibits any discrimination founded on sex. The equality provisions found under the Third Geneva Convention (GV) are more comprehensive; taking into consideration a disadvantage a female prisoner of war might have being a woman. Article 14 states that “women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men”, and the detaining power may not restrict this equalization. Complementary does Article 88 of the GV III require, that in no case a woman prisoner of war may be awarded or sentenced to a punishment more severe than a male member of the armed forces of the detaining power dealt with for a similar offence. The treatment of women must be at least as favourably as of the male prisoner.¹⁸⁹ Moreover, a differentiation between prisoners of war is welcome as far as it takes into account the provisions relating to rank and sex, as it is described in Article 16.

In cases of internal conflicts, Article 2 (1) of AP II prescribes the protocol to be applicable “without any adverse distinction founded on race, colour, sex [...] or on any other similar criteria”. The prohibition of "adverse distinction" and the demand for equal

¹⁸⁸ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 61

¹⁸⁹ *Ibid.*, 61-62

treatment “regard due to women” are designed for physical weakness, honour and modesty as well as pregnancy and childbirth.¹⁹⁰

Summarized, women benefit from general provisions of international humanitarian law to the same extent as men. However, some of these general provisions might be of greater importance to women than others. Additional Protocol I regulates the right of families to know the fate of their relatives;¹⁹¹ since it is mainly women, who remain at home, being worried for the lives of their husbands and sons who have left to engage in hostilities, it is women who mostly call upon these rules.

Furthermore, humanitarian law also offers provisions, which apply exclusively for women and hence, are more important for their protection in armed conflicts. Out of all provisions provided by the Geneva Conventions and the Additional Protocols, only forty-three address particularly women. Most rules relevant for women are found under the Fourth Geneva Convention relative to the protection of civilians in time of war.¹⁹² These provisions are mostly dealing with pregnant women and mothers; others are dealing with the honour and modesty of women. On this account, feminists claim IHL to relate only to sexual offenses against women, so-called **honour** crimes, or to aspects of sexual and reproductive health.¹⁹³

Starting with the first category, provisions dealing with the protection of women against sexual assaults, honour and family rights are clearly reflected.¹⁹⁴ Article 27 of Geneva Convention IV states that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault”, although it only applies to the Parties to the conflicts. The scope is extended to

¹⁹⁰ See *Sharma, Roman*, Protection of Women and Children during Armed Conflicts under International Humanitarian Law, in: *SharmaLawCO* (2005-2009), 5, <http://www.sharmalawco.in/publications.htm> (11 November 2009) and also *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 62

¹⁹¹ See Articles 32, 33, 34 of the Additional Protocol I

¹⁹² See Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and also *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 60

¹⁹³ See *Gardam, Judith G.; Charlesworth Hilary*, Protection of Women in Armed Conflict, in: *Gender&Peacekeeping Online Training Course*, Modul 5, 2002, 127 and also *Gardam, Judith G.; Jarvies Michelle J.* (2001), 96

¹⁹⁴ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 64

military as well as civilian personnel in Additional Protocol I.¹⁹⁵ The fundamental guarantees set out in Article 75 (2), though rape is not included in the enumeration, constitute a general protection for men and women. However, Article 76 is solely assigned to women, as its title already expresses, in addition is rape particularly mentioned. Thus, Additional Protocol I completes the protection for women against sexual assaults.

Finally, regarding non-international armed conflicts, Additional Protocol II prohibits in its Article 4 (2) (lit a) and (lit e) violence against all persons who do not take a direct part or who have ceased to take part in hostilities, as for example the prohibition of any violence to the life, health and physical or mental well-being of persons as rape or torture or and any form of humiliation.

When it comes to the category of expectant mothers and maternity cases, feminists claim that suitable provisions, which are nineteen in number and therefore nearly the half of all special rules dealing with women, just seem to care for the well-being of the unborn child and of small children, rather than to care for the mother as an individual herself.¹⁹⁶ This expresses the significance of the family, which is reflected in provisions found under the subject areas of personal safety and shelter, food, health and medical care, judicial guarantees and provisions dealing with aliens in occupied territories.

Parties to the conflict are obliged to take care of the physical safety of pregnant women and mothers of children under seven. Under Articles 14 and 15 of the Geneva Convention IV, hospitals, safety zones and neutralized zones to provide shelter from the effects of war have to be established by the parties. Beyond that, Article 76 (3) AP I is responsive to cases of pronouncing penalties for offences; the death penalty must not be executed on pregnant women and mothers. Sometimes it also is locally agreed upon by the parties to remove maternity cases from encircled areas.¹⁹⁷ As these provisions reflect are women recognized to be especially vulnerable and important for the care of her (unborn) children.

¹⁹⁵ Ibid., 64

¹⁹⁶ Ibid., 96

¹⁹⁷ See Article 17 of the Fourth Geneva Convention

Another example is provisions, which are dealing with food supplies to pregnant women or mothers. Article 23 of the Fourth Geneva Convention requires the parties to authorize free passages of essential foodstuff. In situations other than occupation, where civilians are not adequately provided with supplies, relief actions must be granted with priority to children, expectant mothers, maternity cases and nursing mothers.¹⁹⁸ Women are definitively treated in a special way.

In cases of health care, it is clearly stated in Article 16 of the Fourth Geneva Convention, “The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect”. In addition, medical treatment for women is guaranteed under Article 91 of the GV IV; maternity cases must be admitted to any institution where adequate treatment can be given. The term “wounded and sick” is defined in more detail in Additional Protocol I, including maternity cases and expectant mothers.¹⁹⁹ All wounded and sick must be respected and treated humanely; however, medical privileges are assigned to pregnant women and mothers, giving always priority to their well-being.

Privileges for women can also be found in provisions dealing with fundamental judicial guarantees. For example, Article 76 (2) of Additional Protocol I requires cases of pregnant women and mothers having dependent infants, who are arrested, detained or interned for reasons related to the armed conflict, to be considered with the utmost priority. Perhaps a more significant statement about a special protection for women is the refusal to carry out the death penalty for offences committed by pregnant women or mothers of young children, which can be found under Article 76 (3) as well as Article 6 (4) of the Additional Protocol II regarding non-international armed conflicts.

Finally, preferential treatment has to be given to expectant mothers and mothers of children under seven years in occupied territories to the same extent as to the nationals of the state concerned.²⁰⁰ Furthermore, Article 50 of GV IV extends the application of any preferential measures in cases of occupation to the areas of food, medical care and protection against the effects of war. Preferential treatment includes the granting of

¹⁹⁸ See Article 70 of the Additional Protocol I

¹⁹⁹ See Article 8 (a) of the Additional Protocol I

²⁰⁰ See Article 38 of the Fourth Geneva Convention

supplementary ration cards, special welfare, and exemption from specific forms of work or transfers to neutral countries.²⁰¹

After having observed some of the relevant provisions for women in conflict situations, it seems to be true that women are protected not because they are women but because of the nursing function of pregnant women and as parent. Fact is, the majority of the rules dealing with women are concerned with expectant women and mothers.

In order to bring effectiveness to provisions of IHL, the question of individual criminal responsibility in cases of rights violations remains. Necessarily, violations affecting women should result in successful penal consequences.²⁰² Article 129 of the Third Geneva Convention obligates the contracting parties “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention”.²⁰³ Grave breaches are defined in Article 130 GV III, including inhuman treatment, wilfully causing great suffering or serious injury to body or health; however, sexual violence and rape are not explicitly mentioned. Finally, Additional Protocol I offers a detailed and far-reaching picture of grave breaches in its Articles 85 and 86, including “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects”. Furthermore, Additional Protocol I establishes in its Article 90 an enforcement mechanism, namely an impartial Fact Finding Commission. This Commission shall be competent to “inquire any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol”, as well as it should facilitate the restoration of an attitude of respect. Since women form most of the civilian population during times of armed conflict, it is the female population, who are affected by indiscriminate attacks. The Fact Finding Commission is the right institution to investigate war crimes in a neutral way, giving women back their confidence and a believe in justice.

²⁰¹ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 67

²⁰² *Ibid.*, 73-74

²⁰³ See also Article 146 and Article 147 of the Fourth Geneva Convention

Provisions dealing with war crimes and grave breaches neither expressly refer to women nor include specific crimes against women. Nonetheless, other serious violations of standards established by the law of armed conflict, which are especially relevant for women, as sexual violence, sexual slavery, enforced prostitution or rape are also liable to prosecution.²⁰⁴ The international criminal courts are of great importance for the implementation of the law of Geneva in order to further develop standards and principles of the law.

Women have to be protected from threats in war situations like the rest of the population; under international humanitarian law no discrimination based on sex is allowed. Nonetheless, general provisions are usually not taking the very distinctive experiences of women in war situations into account. In order to address the specific impact of armed conflict on women, provisions are exclusively drafted for a special protection. For example, sexual offences are prohibited and the parties to the conflict are required to ensure personal safety and offer health care. Women are protected being pregnant or mothers of young children for a good reason, namely because of their special vulnerability in such cases. Otherwise, provisions mainly dealing with (expectant) mothers could be seen in a negative way, that women are downgraded as individuals and valued in terms of their reproductive aspects only.²⁰⁵ In my point of view, there exists quite a set of rules, which positively incorporates a realistic view about the impact of law on women. However, many shortcomings regarding other issues can still be identified, as the lack of adequate sanitary facilities for women, no specific rules for redress and compensation for the female victims of war crimes.²⁰⁶

b. The Law of New York

There is another section to be mentioned as being part of international humanitarian law, and that is the United Nations, an international organization headquartered in New York.

²⁰⁴ See Article 7 of the Rome Statute of the International Criminal Court, UN Doc. A/Conf.183/9 of 17 July 1998

²⁰⁵ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 94

²⁰⁶ For a further discussion about compensation for victims of armed conflict see *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 87 et seq.

The UN is interested to improve the situation of people affected by armed conflict and therefore mostly enacts human rights resolutions for different people, countries, wars, and problems. Under the United Charter, human rights are the main issue of interest, as already discussed in the chapter about international human rights.

Another focus of the UN is an individual responsibility of war criminals. After World War II,²⁰⁷ in order to penalize war crimes, two Tribunals were set up for the prosecution and punishment of war crimes, namely the Nuremberg Trial in 1945 and another one in Tokyo in 1946. The Charter establishing the Nuremberg Trial described “crimes against the peace, war crimes and crimes against humanity” to be within the trials jurisdiction. Nowadays, the so-called “Nuremberg principles” are known throughout the whole international law community, and are building a fundamental basis of international law.²⁰⁸ Based on this fundament, many further developments concerning humanitarian law have taken place.

3. A Gender Assessment of IHL

How does international humanitarian law respond to women and armed conflict? After having looked at the provisions of armed conflict relevant for women, it is a matter of fact that there exists a broad range of possible female protection. The international community has enacted rules responding to specific problems women have to face in conflict situations. However, feminists claim IHL to be a gendered system and provisions to be “inherently discriminatory”.²⁰⁹

“IHL takes a particular male perspective on armed conflict, as a norm against which to measure equality. In a world where women are not equals of men, and armed conflict impacts upon men and women in a fundamentally different way, a general category of rules that is not inclusive of the reality for women cannot respond to their situation.”²¹⁰

(Helen Durham)

²⁰⁷ See Kalshoven, Frits; Zegveld, Liesbeth (2001), 29

²⁰⁸ Ibid., 29

²⁰⁹ See Gardam, Judith G.; Charlesworth, Hilary (2002), 127

²¹⁰ See Durham, Helen (2002), 654

First of all, the fact to be identified is, that it was men who drew provisions especially applicable for women. As already discussed in these work, women are absent in the law arena, consequently they are only represented to a minimum number in the process of legislation. Like Charlesworth and Chinkin revealed the problem, that “the invisibility of women at decision-making levels has affected the treatment not only of women’s issues, but also the way all international concerns are understood.”²¹¹ Therefore, a male experience of armed conflict is the basis for provisions in international humanitarian law; since armed conflict affects men and women in different ways, these provisions cannot be sufficient for women.²¹² Generally, the unequal position of women and men in society is mostly overseen. Even though there exist specific rules for women, these are very limited in its scope and mostly address biological differences of men and women.²¹³ Provisions for the protection of civilians, being of great importance to women, are not as detailed as the rules covering combatants, which address the majority of men. This reflects the masculinity of war.

Second of all, another problem of women’s protection under IHL is a hierarchy of rules, as argued by many feminist scholars. Special provisions for women are regarded as less important than others. The usage of a different language gives us simple evidence;²¹⁴ the word “protection” is rather used than “prohibition” because latter has a much stronger meaning. For example, Article 76 (1) of Additional Protocol I states that “women shall be protected in particular against rape, enforced prostitution or any other form of indecent assault”, whereas the general provision Common Article 3 of the Geneva Conventions is talking about the prohibition of acts described herein.

In the end, provisions for a better protection of women in armed conflicts need to be designed by women, use a stronger language, and take into account different experiences of women and value women as individuals, not as mothers. Then, the reality of women in armed conflicts would adequately be identified and realized.

²¹¹ See Charlesworth, Hilary; Chinkin, Christine (2000), 171

²¹² See Gardam, Judith G.; Charlesworth, Hilary (2002), 127

²¹³ See Gardam, Judith G.; Jarvies, Michelle J. (2001), 93-95

²¹⁴ Ibid., 99-101

D. International criminal law

As important as the provisions of international law is international criminal law, which is an independent branch of law, dealing with international rights violations. It is concerned with international criminal responsibility, a pretty new touch to the classical international law, where mostly states are accountable for any breaches of the law. International Tribunals and the Criminal Court prosecute individuals for gross rights violations, war criminals being under the jurisdiction of the courts for the very first time; in doing so, important principles of the law of armed conflict are established.²¹⁵ The international law of armed conflict needs a coercive implementation mechanism to be effective. The idea of international criminal law is to repair society and to bring perpetrators to justice once a conflict has stopped; the post conflict goal is to establish “positive peace”.²¹⁶

Only the offences expressly mentioned in the statute of the international tribunals fall under their jurisdiction, the so-called “core crimes” of genocide, crimes against humanity, war crimes and the crimes of aggression.²¹⁷ Crimes against humanity, like rape, enforced prostitution and enforced sterilization, as well as genocide originally were out of international court jurisdiction; however, with time and history the need to set up international tribunals to punish war crimes became a matter of IHL. It was only after the Second World War and the outrages, which had been committed, that two International Military Tribunals were set up in order to prosecute war crimes, one in Nuremberg and the other one in Tokyo for the Far East. In the course of war, violence particularly against women escalated. Even though brutal acts were well documented, they were prosecuted only to a very limited extent.²¹⁸

Only after a long time in 1993, the UN Security Council set up the next tribunal after the war in Ex-Yugoslavia, the International Criminal Tribunal for the Former Yugoslavia (ICTY). The genocide in Rwanda resulted in the establishment of the International Criminal Tribunal for Rwanda (ICTR) in 1994. The two tribunals, set up by UNSC resolutions, are supposed to deal with individual criminal liability for cases of war

²¹⁵ See *Buss, Doris; Manji, Ambreena* (2005), 274 et seq.

²¹⁶ *Ibid.*, 276

²¹⁷ See *Cryer, Robert; Friman, Håkan; Robinson, Darryl; Wilmshurst, Elizabeth*, *An Introduction to International Criminal Law and Procedure*, Cambridge (Cambridge University Press) 2007, 2

²¹⁸ See *Askin, Kelly D.; Koenig, Doreen M.* (1999), 52

crimes, grave breaches and crimes against humanity. Most importantly, due to major public pressure, women's rights violations are mentioned in its statutes for the very first time. The world was shocked about reported mass rapes, which have taken place as a tactic of warfare.²¹⁹ The tribunals played an essential role with its case law in the further development of women's rights in armed conflicts, acknowledging and punishing crimes against the weaker sex.

Finally in 1998, after a long period of preparation, the international community has established a permanent International Criminal Court (ICC) during a conference in Rome. On grounds of great lobbying for a better recognition of sexual violence against women, the famous Rome Statute covers detailed elements of physical offences, as well as better care and protection for victims of sexual crimes, especially in criminal procedures.²²⁰

For the analysis of women and the law of armed conflict, it is going to be looked at the Statutes of the International Criminal Tribunals of Yugoslavia and Rwanda and the Statute of the International Criminal Court, especially at their relevant case law and key findings.

1. ICTY – International Criminal Tribunal for the former Yugoslavia

The atrocities committed in the war in the former Yugoslavia, called upon the international community to act. Massive human rights violations led to the creation of a Commission of Experts by the UN for the investigation of actions and circumstances on the ground. The Commission gave an account of grave breaches of international humanitarian law, high numbers of killings and displaced people among other violations in its report.²²¹ The world was watching and great pressure led to the decision of the Security Council to pass Resolution 827 under Chapter VII of the UN Charter in 1993,²²² establishing the International Tribunal for the former Yugoslavia. The ICTY is seated in The Hague and its Statute provides for individual prosecution of war crimes in order to

²¹⁹ See *Zimmermann, Andreas; Giegerich, Thomas* (2007), 259-260

²²⁰ *Ibid.*, 261-262 and also *Buss, Doris; Manji, Ambreena* (2005), 274

²²¹ See United Nations, International Criminal Tribunal for the former Yugoslavia, About the ICTY, <http://www.icty.org/sid/319> (11 November 2009)

²²² See SC Resolution 827, Adopted by the Security Council at its 3217th meeting, S/Res/827 of 25 May 1993

end impunity. The Statute defines the organization and working structures of the ICTY, consisting of 3 organs: the Chamber, which comprises three Trial Chambers and one Appeal Chamber, the Prosecutor and a Registry.²²³ The Statute assigns the ICTY to have jurisdiction over the territory of Ex Yugoslavia as well as to be in charge of prosecution of organizations, individuals, political parties or military personnel. Most importantly, the Statute is enumerating crimes and acts, which fall under the jurisdiction of the ICTY. Articles 2, 3, 4 and 5 list grave breaches of the Geneva Conventions of 1949, which are violations of the laws and customs of war, genocide and crimes against humanity to be prosecuted. The ICTY and national courts have concurrent jurisdiction, with the ICTY having the power to take over national proceedings.

2. ICTR – International Criminal Tribunal for Rwanda

Due to the fact of serious human rights and humanitarian law violations as well as documented massacres of the Hutu tribe against the Tutsi tribe in Rwanda, the Security Council established the International Criminal Tribunal for Rwanda through SC Resolution 955 in 1994, acting under Chapter VII of the UN Charter.²²⁴ The ICTR copied the ICTY to prosecute individuals for genocide and other serious violations of the law of armed conflict, which happened in the territory of Rwanda or of neighbour states during the period between 1 January 1994 and 31 December 1994.²²⁵ The seat of the tribunal was decided to be in Arusha, Tanzania.²²⁶

The ICTR functions in the same way as the ICTY, the organs and the prosecutor's competences equal each other. The Statute of the ICTR is an annex to the Resolution 955 and its Article 14 is the basis for the adoption of the Rules of Procedure and Evidence by the judges. Among punishable acts under the Statute of the ICTR are genocide, crimes

²²³ See Article 11 of the ICTY Statute

²²⁴ See SC Resolution 955, Adopted by the Security Council at its 2453rd meeting, S/Res/955 of 8 November 1994

²²⁵ See United Nations, International Criminal Tribunal for Rwanda, General Information, <http://www.ictr.org/default.htm> (11 November 2009)

²²⁶ See SC Resolution 977, Adopted by the Security Council at its 3502nd meeting, S/Res/977 of 22 February 1995

against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, as set out in Articles 2, 3 and 4.

3. ICC – International Criminal Court

A milestone was reached in July 1998, when the Rome Statute, which builds the legal basis for the International Criminal Court, was adopted by 120 states in Rome. The very first independent and permanent international criminal court was established, not pursuant to a UNSC resolution but rather based on a treaty.²²⁷ After the 60th ratification, the Statute could enter into force on 1 July 2002; as of October 2009, 110 countries are currently member states of the Rome Statute of the ICC.²²⁸ The ICC is seated in The Hague, even though its proceedings can take place anywhere.²²⁹

The establishment of the ICC was a very great step forward in the fight against many terrible acts committed in armed conflicts, extending the possibilities to prosecute in matters of time, territory and also criminal acts. The Court consists of four organs, the presidency, the appeals and trials divisions, the prosecutor and the registry.²³⁰ According to Article 12 of the Rome Statute, the Court enjoys jurisdiction once a crime has taken place in a contracting state or the accused is a national of a contracting state.

The states parties to the Rome Statute are obliged to cooperate with the investigations to the highest possible degree. Only the most serious crimes and violations of international law are to be prosecuted in order to end impunity for the perpetrators. Article 5 of the Rome Statute contains crimes like the crime of genocide (lit a); crimes against humanity (lit b); war crimes (lit c); and the crime of aggression (lit d) to be within the jurisdiction of the Court. The further Articles 6, 7 and 8 broadens the scope of these indictable offenses, being very comprehensive.

²²⁷ See International Criminal Court, About the Court, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (11 November 2009)

²²⁸ Ibid. The States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (11 November 2009)

²²⁹ See Articles 3 and 4 of the Rome Statute

²³⁰ See Article 34 of the Rome Statute

The Rome Statute also provides for the possibility of compensation, rehabilitation and reparations in its Article 75 in order to bring some justice to victims of war crimes; thereby, peace can be better maintained in post conflict times.

4. Gender approach of International Criminal Law

How well is attention paid to women affected by armed conflict in international criminal law? Criminal courts prosecuting war crimes provide a platform for women to seek redress and to compensate physical as well as psychological suffering. Not all crimes can be brought to justice and many victims are still unheard, however, the symbolic relevance is of great importance. Specific forms of violence and experiences of women need to be acknowledged in order to address these issues in the right extent during trial. According to cultural discrimination of women and their fear of denunciation in society, it is often difficult for them to speak openly in public about details of assaults committed against them. Luckily, rules of procedure and evidence used in criminal proceedings, established by international criminal tribunals and courts, are of great importance for women; notably, special protective measures are offered, which might help women to feel more secure.²³¹ Specific female needs during trial have to be taken into account.

Not until recently were serious crimes, as rape and sexual violence, categorized as grave breaches of the Geneva Conventions 1949; therefore, these acts were not punishable under international criminal law. So far, many amendments took place, especially when it comes to the prosecution of sexual violence.²³² But much still needs to be done. The international community is called upon to take up most serious violations of the law of war and to address gender issues in a sensitive way. Female expertise in gender issues should be appointed to positions as judges, prosecutors or other.²³³ However, an international consciousness about specific crimes against women and the need to take into consideration particular vulnerabilities in the process of prosecution already arose.

²³¹ See Charlesworth, Hilary; Chinkin, Christine (2000), 324 et seq.

²³² See Gardam, Judith G.; Jarvies, Michelle J. (2001), 187 et seq.

²³³ Ibid., 217-218

International criminal law has contributed to important developments in international legal standards that govern a better protection of women affected by conflict situations. Through the establishment of the International Criminal Tribunals, the possibility arose to prosecute individuals responsible for war crimes. The case law of the ICTY, ICTR and ICC and its advanced standards certainly helped to make specific problems and experiences of women in armed conflicts public. In my opinion, international criminal law is one of the most important factors to further develop the protection of women under the law of armed conflict. Where the law does not address specific needs of women, jurisprudence is able to close the gap.

E. ICRC – as an Institution

As already discussed in the previous chapter, the International Committee of the Red Cross is the most important organization on the ground. Its standards applied at work in crisis regions, studies about special problems of groups at risk as well as reports and recommendations made, are constantly helping to improve the situation of armed conflicts. The ICRC, being an impartial and independent humanitarian body, is allowed to “offer its services to the Parties to the conflict”, according to Common Article 3 (2) of the Geneva Conventions.

Besides its work and help offered to persons, who are affected by war, the ICRC also plays a major part in further developing the law of armed conflict. It established some important basic principles in the law of armed conflict, which has become international customary law. These principles were adopted by the General Assembly of the UN in its Resolution 2444²³⁴, which basically adopts the goals set out in Resolution XXVIII of the 20th International Conference of the Red Cross in Vienna in 1965. State parties to the Geneva Conventions, which also attended the conference, showed their commitment to humanitarian law for the very first time.²³⁵ Most importantly, coercive warfare, which is a method of warfare against an entire population in order to force the adverse party to

²³⁴ See GA Resolution 2444 (XXIII), Respect for Human Rights in Armed Conflicts of 19 December 1968

²³⁵ See *Kalshoven, Frits; Zegveld, Liesbeth* (2001), 33

surrender, was stated to be unjustifiable under the law of armed conflict. The UN General Assembly further invited the Secretary-General to carry out studies in close collaboration with the ICRC in order to be able to ensure a better protection for civilians, combatants and prisoners. The teamwork of governments, the UN and the ICRC played an essential role in the development of legal standards. For example, the ICRC drafted texts of a convention on the improvement of the protection of victims in armed conflict in order to work with other actors in the field of humanitarian law, which finally resulted in the adoption of the Protocols Additional to the Geneva Conventions in 1977.²³⁶

An early knowledge of specific problems women have to face in conflict situations, together with concrete studies of a special impact of war on women, helped “women and the law of armed conflict” to become a subject of constant debate in the international law arena. The ICRC certainly has achieved much, including raising public awareness of female suffering in war. The organization is one of the main actors in the law arena, taking part in the law-making process as well as providing actual protection in armed conflicts on the ground.

²³⁶ Ibid., 33-34

IV. SEXUAL VIOLENCE, DETENTION, JUDICIAL GUARANTEES

“War does not determine who is right – only who is left.”

(Bertrand Russell)

In this chapter, three examples are circled out in order to go deeper into the subject of special experiences of women in armed conflicts, the law of armed conflict addressing this particular problems and the assessment of the protection provided; namely the examples of sexual violence, detention and judicial guarantees. Hopefully, after having analyzed these three areas, we will be able to better understand how women are affected by armed conflict and how sufficient the provisions of international law are for their protection. Women and children have to suffer the most from all persons concerned in conflict situations; besides, women inimitably experience gender discrimination and specific gender violence in such situations. By going into detail of concrete violations such as sexual violence and detainment, I want to demonstrate the vulnerability of women and discriminations against them from the theoretical as from the practical point of view. In the end, the focus will shift from war to post conflict assessments of different needs of women in the course of trials before the international tribunals.

First, in each case it will be worked with special provisions, which can be found in international human rights law as well as international humanitarian law. Principally, it will be focused on the relevant case studies of the International Tribunals of Yugoslavia and Rwanda and the International Criminal Court. Articles of the Statutes and landmark decisions will demonstrate how well women’s concerns are implemented in the end.

As a result, it is my intention to give examples of real experiences of the female population to finally be able to draw a comparison between theoretical rules and the practical approach.

A. Sexual Violence

Women are exposed to sexual violence in armed conflicts to a great extent. Going back in time, it always has been a sad reality in wartimes, but it was not well reported.²³⁷ All parties to the conflict are usually involved and women have to fear assaults being committed from all sides, the opposing party, their own society, protectors and peacekeepers.²³⁸ Besides being a cruel side effect of armed conflicts, sexual violence has become far more than that. Nowadays, it can be considered a method of warfare, like the use of systematic rape in order to destroy a whole community.²³⁹ A big silence hovered above the issue far too long; finally, the silence was broken, especially after the atrocities committed during conflicts in the former Yugoslavia and Rwanda. Due to many press releases about high number of rapes, the public was shocked and it finally resulted in serious attempts to really improve the situation of women on the ground.

Sexual violence is one form of gendered violence, an offense against the physical and psychological integrity.²⁴⁰ It can occur in many different forms like rape, forced impregnation or pregnancy, forced abortion, sexual mutilation or humiliation, trafficking in women, medical experimentation on women's sexual and reproductive organs, forced sterilization, forced prostitution and many others.²⁴¹ Even though also men are victims of sexual violence in the course of armed conflict, this practice rather has far reaching consequences for women. It very often results in unwanted pregnancies as well as in a subsequent outcast by society. Children born of rape represent a social stigma; family or husbands reject raped women because of the honour they seem to have lost.²⁴² Other serious health consequences, like the possibility of getting infected with HIV/AIDS, or even posttraumatic stress disorders, are also affecting women as long-term damages and sufferings.

²³⁷ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 27-29

²³⁸ See *Askin, Kelly D.; Koenig, Dorean M.* (1999), 47-49

²³⁹ See *International Committee of the Red Cross, Women and War* (February 2008), 12

²⁴⁰ See *Askin, Kelly D.; Koenig, Dorean M.* (1999), 42

²⁴¹ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 25-26

²⁴² See *Zimmermann, Andreas; Giegerich, Thomas* (2007), 183

Only lately the international community has focused on the subject of sexual violence against women in armed conflicts.

1. Early Approaches and Subsequent Developments

As long as sexual violence in times of armed conflicts exists, as long is the notion of rape being a crime settled in the head of people. Like already mentioned in Chapter Three, women were to be honoured and protected in wartimes and rape was a prohibited act. For example, the Lieber Code punished rape with the highest possible penalty, namely the death penalty.²⁴³ Anyway, public awareness arose much later, once sexual violence has become a subject of international lawsuits. The two Tribunals set up after the Second World War, in Nuremberg and in Tokyo, did not really contribute to the issue. In the Nuremberg judgments no explicit reference to women being victims of sexual violence was made;²⁴⁴ however, in Tokyo at least in some cases rape was charged and few perpetrators were found guilty.²⁴⁵

Only years later, the subject finally started to be of public interest. About 200 000 Japanese women, the so called “Comfort Women” of World War II, who were forced into sexual slavery by the military of Japan gave rise to public awareness because of their official fight for redress. These women finally asked for justice in 1991 but no reparation and no compensation has been given to these women by Japan.²⁴⁶ Even though very little has been obtained in the concrete comfort women cases, it was an important step forward, calling international attention to their suffering and to the subject of sexual violence in wartimes.

²⁴³ See Article 44 of the Lieber Code

²⁴⁴ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 78-79, 205

²⁴⁵ *Ibid.*, 80, 206-208

²⁴⁶ *Ibid.*, 144-145, 230-231

2. International framework – Special provisions

When it comes to the law of war, there has been a great focus on sexual violence, its prevention and its prohibition. Starting with a look at international human rights law, the emphasis is placed on the reduction of violence against women, as it is a reality of women's experiences in conflict situations. Besides, the overall but unwritten right to peace, the human right to life, liberty and the security of person,²⁴⁷ the human right to freedom from torture, inhumane treatment or punishment²⁴⁸ and the prohibition of slavery²⁴⁹ constitute some basic standards in human rights law, which are also of great relevance for the protection of women in armed conflicts.

CEDAW, the legally binding Convention on the Elimination of All Forms of Discrimination Against Women from 1979, does not explicitly contain provisions about sexual violence against women in armed conflicts. However, in 1992, the Committee on the Elimination of Discrimination against Women declared violence to be a form of discrimination against women in its general recommendation 19 on “Violence against Women”.²⁵⁰ Furthermore, the recommendation related to Article 6 of CEDAW, indicates that “wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.”²⁵¹

The United Nations also played a very active part in the further development of standards about the protection of women against sexual violence. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁵², which came into force in 1987, comprising 146 state parties today, is a human rights treaty for the prevention and prohibition of torture around the world. Torture is defined in Article 1 of the Convention as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a

²⁴⁷ See Article 2 of the UDHR (1948)

²⁴⁸ See Article 5 of the UDHR (1948)

²⁴⁹ See Article 4 of the UDHR (1948)

²⁵⁰ See CEDAW, General Recommendation No. 19, 11th session, UN Doc. CEDAW/C/1992/L.1/Add.15 of 1992, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (11 November 2009)

²⁵¹ Ibid., para 16

²⁵² See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, <http://www2.ohchr.org/english/law/cat.htm> (11 November 2009)

third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. In violent conflicts, rape is often used as a method of torture for various reasons, as for example for the obtainment of political information. Under this convention, women are protected against being tortured in armed conflict situations. Furthermore, Article 14 provides the opportunity for victims taking domestic legal actions in order to obtain redress; Article 22 allows individuals to file a direct complaint with the Committee against Torture.

In 1993, the UN World Conference on Human Rights, which was held in Vienna, constituted a milestone in to the subject of violence against women, since it attracted the attention worldwide.²⁵³ The Vienna Declaration and Programme of Action was adopted, which acknowledges the problem of sexual violence in times of armed conflict for the very first time. It states: “Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.”²⁵⁴

The Declaration on the Elimination of Violence against Women (DEVAW) from 1993 formally mentions the special danger of sexual assaults women are likely to experience and it condemns sexual violence against women at all. In 1994, the UN Commission on Human Rights appointed the Special Rapporteur on Violence against Women, including its Causes and Consequences. In 1998, a detailed report on the situation of sexual violence against women in armed conflicts in legal and practical matters was released.

Another significant step took place in Beijing in 1995, where the UN General Assembly, which recognized the deep impact of armed conflict on women’s lives, held the Fourth World Conference on Women. Sexual violence during armed conflict was one of the main points to be addressed. Acts like murder, rape, forced pregnancy or sterilization and abortion were understood to be an impediment to equality and peace in general. Violence

²⁵³ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 147

²⁵⁴ See Vienna Declaration (1993), para 38

against women was specially outlined and defined as act, which results in physical, sexual and psychological harm or suffering.²⁵⁵ Other acts, such as murder, systematic rape, sexual slavery and forced pregnancy were also categorized as violence;²⁵⁶ moreover, health problems like HIV/AIDS were acknowledged to be a consequence of sexual violence.²⁵⁷ One strategic action to be taken in order to improve the situation, next to call upon the states to respect the law of war, was the inclusion of women into every decision making level in all institutions in the process of international law.²⁵⁸

In 2006, a comprehensive report of the UN Secretary-General, an in-depth study on all forms of violence against women,²⁵⁹ was submitted to the UN General Assembly (GA), another principal organ of the UN. Data had been collected on violence against women, its consequences and implementation. The main concern was impunity being a major threat to the protection of women against sexual assaults and recommendations were made to bring impunity to an end. The same year, in 2006, the GA of the UN adopted the Resolution on the Intensification of efforts to eliminate all forms of violence against women.²⁶⁰ The member states were called upon to protect women in armed conflicts because women are more likely to be targets of violence, compared to men. Everything possible should be done in order to improve the situation as well as to fight against the impunity of perpetrators. Even though GA Resolutions, which are general statements representing the opinion of the international community on global issues, are not to be enforced, they are of great importance. Since all member states have equal representation, the GA may be the most democratic body within the United Nations system and its resolutions express the majority opinion of the international community. In 2008, the General Assembly adopted another resolution, the Resolution on “Eliminating rape and other forms of sexual violence in all their manifestations, including in conflict and related

²⁵⁵ See Beijing Declaration and Platform for Action (1995), Annex II, para 113

²⁵⁶ *Ibid.*, Annex II, para 114

²⁵⁷ *Ibid.*, Annex II, para 83 (m), 98, 269

²⁵⁸ *Ibid.*, Annex II, para 144, 145

²⁵⁹ See GA In-Depth Study on all Forms of Violence against Women, Report of the Secretary-General, A/61/122/Add.1 of 6 July 2006

²⁶⁰ See GA Resolution 61/143, Intensification of Efforts to Eliminate all Forms of Violence against Women, A/Res/61/143 of 19 December 2006

situations”.²⁶¹ Member states were called upon to take measures to eliminate rape and other forms of sexual violence in conflict situations.

International humanitarian law also gives some special protection to women. Many provisions are found under the Geneva Conventions, the core of the law of war. Common Article 3 to all four Geneva Conventions is concerned with threats to the personal dignity, prohibiting degrading treatment in non-international armed conflicts; as well as Article 14 of the Third Geneva Convention entitles prisoners of war to be treated with honour and respect. Though, the Fourth Geneva Convention certainly is more relevant, not just because the GV about protection of civilians covers women and their issues in armed conflicts the best, but also because Article 27 explicitly refers to the special protection of women, stating: ”Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” The First Additional Protocol to the Geneva Conventions from 1977 is dealing with sexual violence against women in its Article 75 (2), offering a broad range of possible acts, which are forbidden at any time, in any place whether committed by civilians or military agents. “Violence to the life, health, or physical or mental well-being of persons, in particular torture of all kinds, whether physical or mental; corporal punishment or mutilation” are prohibited under Article 75 (2) lit a, while lit b refers to the ban of “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”. Article 76 of the AP I again mentions the special respect, which has to be given to women, and the prohibition of rape, forced prostitution and any other form of indecent assault. Finally, regarding non-international armed conflicts, Article 4 (2) lit a and lit e of the Additional Protocol II prohibits following acts: “violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment” (lit a); and “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault” (lit e).

²⁶¹ See GA Resolution 62/134, Eliminating Rape and other Forms of Sexual Violence in all their Manifestations, including in Conflict and Related Situations, A/Res/62/134 of 7 February 2008

3. Rape as a threat to international peace and security

Sexual violence appears to occur in many forms, including rape; however, this was not subsumed to be a grave breach of the Geneva Conventions at all for a very long time.²⁶² Historically, rape was considered to be an offense against the honour of a man because a woman was viewed to be the property of her father or husband.²⁶³ Soon, rape became an inherent part of hostilities, being an organized, systematic and tolerated method of warfare, used by men against men.

Based on the atrocities committed in the conflicts of the former Yugoslavia and Rwanda, women's concerns could not be ignored any longer and gender crimes as rape and sexual slavery were explicitly stated to be under the jurisdiction of the two ad hoc international war crimes Tribunals.²⁶⁴ There are three possible ways to subsume rape under IHL: rape being a grave breach of the Geneva Conventions, rape as a form of genocide and rape as a crime against humanity. For the purpose of analyzing these three possibilities, I will look at the Statutes of the ICTY, ICTR and ICC; furthermore I will cite landmark decisions of the ICTY and ICTR, which are crucial for the development of the law of armed conflict in the case of sexual violence against women. Criminal law incurs individual responsibility of war criminals, being the platform for a better understanding and analysis of the women's realities in struggles at first hand. Furthermore, the jurisprudence is able to close gaps of international law.

a. War crime

The Geneva Conventions do not expressly classify rape or sexual assaults as grave breaches of IHL. Since Article 2 (c) of the ICTY Statute includes "wilfully causing great suffering or serious injury to body or health"²⁶⁵ to be a grave breach, it has been argued that also sexual violence should be subsumed under this category.²⁶⁶ In cases of non-international armed conflicts, Article 4 (e) of the ICTR Statute expressly prohibits

²⁶² See *Charelsworth, Hilary; Chinkin, Christine* (2000), pp. 314 et seq.

²⁶³ See *Askin, Kelly D.; Koenig, Dorean M.* (1999), 48-49

²⁶⁴ See *Judith, G. Gardam; Michelle, J. Jarvis* (2001), pp. 78 et seq.

²⁶⁵ See also Article 147 of the Fourth Geneva Convention

²⁶⁶ See *Charelsworth, Hilary; Chinkin, Christine* (2000), 315-316

violations against minimum standards set out by Common Article 3 of the Geneva Conventions, especially “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault”. Another problem is that victims sometimes are not protected under IHL because Article 4 of GV IV only applies to persons in the hand of a party, with whom they are not sharing nationality. First, the ICTY stated in the Tadic case²⁶⁷, that victims were not protected because they did not have a different nationality; but the Appeals Chamber finally reversed this judgment in July 1999.²⁶⁸

However, there are also other serious violations, which are considered to be a grave breach of IHL and hence, to be a war crime. For example, Article 3 of the ICTY Statute gives power to the international Tribunal to prosecute persons violating the laws or customs of war, which are regarded to be serious.²⁶⁹ The Rome Statute of the ICC defines serious violations of the laws and customs in international armed conflicts under the category of war crimes in its Article 8, subsuming rape, sexual slavery, enforced prostitution, forced pregnancy under grave breaches of the Geneva Conventions.²⁷⁰

b. Genocide

Another possibility is to categorize rape as genocide. The Genocide Convention²⁷¹, which was adopted in 1948, provides a proper international legal definition of genocide. Article 2 of the Genocide Convention describes genocide to be “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as killing members of the group (lit a); causing serious bodily or mental harm to members of the group (lit b); deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (lit c); imposing measures intended to prevent births within the group (lit d); forcibly transferring children of the group to another group (lit e)”. In particular Article 2 (d) describes a specific reality of women in

²⁶⁷ See *Prosecutor v. Dusko Tadic*, Judgment summary, ICTY No. IT-94-1-I, Judgment of 7 May 1997

²⁶⁸ See *Charelsworth, Hilary; Chinkin, Christine* (2000), 317

²⁶⁹ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 75

²⁷⁰ See Article 8 (2) lit b (xxii) of the Rome Statute

²⁷¹ See Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for Signature and Ratification or Accession by GA Resolution 260 A (III) of 9 December 1948

armed conflicts concerning genocide. Sexual violence is not expressly mentioned; however, any of the enumerated acts can be interpreted in the light of sexual violence.²⁷²

The ad hoc Tribunals and their jurisdiction did relate sexual violence to genocide for the very first time. In a conflict situation, when rape is used as a tactic of warfare in order to destroy a whole community, it can classify as genocide.²⁷³ The ICTY took the first step in this direction; the Trial Chamber invited the Prosecutor to broaden the scope of the characterization of genocide in the case of Karadzic and Mladic,²⁷⁴ after having heard the physical and psychological consequences of sexual violence against women.

In Rwanda, rape was also used as a weapon of warfare for genocide and the ICTR reacted like the ICTY, following to subsume rape under genocide. The Prosecutor amended the indictment in the case of Akayesu²⁷⁵ to include rape in the indictment to be punished as genocide. Akayesu was the major of a town, where sexual violence and rape was being committed in front of his eyes. He was not indicted to have committed such acts in person, rather that he was informed about it; since he held a powerful office, it would have been his task to prevent these violent crimes against women. The Trial Chamber decided it was enough for a charge, besides it was stated sexual violence to fall into the category of genocide, namely causing serious bodily or mental harm. In the end, Akayesu was found guilty of harms in form of sexual violence, mutilations and rape.²⁷⁶ Furthermore, rape was considered to be a useful measure to prevent birth within a group, impregnating a woman to give birth to a child, who would have a father belonging to another group.²⁷⁷ The very same finding was announced in the Musema case²⁷⁸; the Trial Chamber of the ICTR charged Musema with genocide, committed through acts of rape. Furthermore, the Trial appealed for a flexible interpretation of genocide, “taking into

²⁷² See Gardam, Judith G.; Jarvies, Michelle J. (2001), 190-192

²⁷³ See Charelsworth, Hilary; Chinkin, Christine (2000), 318

²⁷⁴ See *Prosecutor v. Radovan Karadžić, Ratko Mladić*, Review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence ICTY No. IT-95-5-R61, IT-95-18-R61, Judgment of 11 July 1996

²⁷⁵ See *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR No. ICTR-96-4-I, Judgment of 2 September 1998

²⁷⁶ See *Prosecutor v. Jean-Paul Akayesu* (1998), para 706-707

²⁷⁷ *Ibid.*, para 507-508

²⁷⁸ See *Prosecutor v. Alfred Musema*, Judgment and Sentence, ICTR No. ICTR-96-13-A, Judgment of 27 January 2000

account both the relevant evidence proffered and the specific political, social and cultural context in which the acts allegedly took place”.²⁷⁹

Besides the ad hoc Tribunals, the ICC also provides for the possibility of prosecuting criminally acts of rape, for example, subsuming it under its Article 6 (lit b) or (lit c) of the Rome Statute.

c. Crime against Humanity

Finally, the last category under which rape can be subsumed in international humanitarian law is the group of crimes against humanity. The first mentioning is found in the 1945 Nuremberg Charter, which defines crimes against humanity in its Article 6 (c) “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”. Anyway, sexual violence was not regarded as being such a crime, nor it was in the Tokyo Charter. Even so, rape was recognized to be an inhumane treatment in the indictments of the International Military Tribunal for the Far East. For the very first time, rape was expressly mentioned being a crime against humanity in Article II (1) lit c of the Control Council Law No 10,²⁸⁰ by the occupying powers in Germany after World War II. It was a framework established for the trials of German military and civilian personnel, in order to assure that the same legal standard would be applied. The Statute of the ICTY followed this example, including rape explicitly in its Article 5 (g) about crimes against humanity; the same is true for Article 3 (g) of the Statute of the ICTR. According to the Tadic case, a further clarification of the term “crime against humanity” was made, explaining that “a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual responsibility and an individual perpetrator need not commit numerous

²⁷⁹ Ibid., para 163

²⁸⁰ See Control Council Law No. 10, Punishment of Persons guilty of War Crimes, Crimes against Peace and against Humanity of 20 December 1945, <http://avalon.law.yale.edu/imt/imt10.asp> (11 November 2009)

offences to be held liable”.²⁸¹ Meaning, each perpetrator can be prosecuted for one single crime committed during a mass attack.²⁸²

The requirement of acts being “widespread or systematic” and being motivated by “national, political, ethnical, racial or religious grounds” was adjoined in Article 3 of the ICTR Statute. This is an important difference to Article 5 of the ICTY Statute, where both conditions cannot be found. In the case of Akayesu, which was brought before the ICTR, the Trial Chamber stated that rape as a crime against humanity must be committed under special circumstances, as “part of a wide spread or systematic attack; on a civilian population; on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds”.²⁸³

Both, ICTY and ICTR, expressly refer to rape as a crime against humanity; the ICC extends the traceable acts of sexual violence committed in armed conflicts, next to rape, to “sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”.²⁸⁴ Furthermore, Article 7 (1) (h) of the Rome Statute does include gender in one of the reasons for persecution; therefore, acts committed against women purely based on their sex can be an offence subsumed under crimes against humanity.

B. Detention

Women in detention are another reality of armed conflict situations; they are detained for various reasons as well as in different contexts. Throughout the course of history, not very much attention has been paid to special problems women have to face in detainment camps. Hence, not much evidence was collected about the treatment of women in these camps and the conditions for women in such. Only after the Second World War, some experiences, women had in detention camps, were recorded; in particular records of experiences in extermination camps of Nazi Germany. The public knowledge about

²⁸¹ See *Prosecutor v. Dusko Tadic*, (1997), para 649

²⁸² See *Charelsworth, Hilary; Chinkin, Christine* (2000), 320

²⁸³ See *Prosecutor v. Jean-Paul Akayesu* (1998), para 598

²⁸⁴ See Article 7 (1) (g) of the Rome Statute

cruelties, which have happened under this regime, and the public interest to examine thoroughly what actually happened in these camps, helped to bring female suffering on the surface. Constant recognition of the issue about women in detention was build up, with time and many conflicts, in which the international community got involved, raising a better awareness of the situations on the ground.

1. Discriminatory treatment

Women in detention or camps are facing different problems than men on grounds of their different sex. It simply starts with the detention of women in units designed for men, which lack any female guards or personnel.²⁸⁵ Besides, it is mostly men who are heading prison camps, equipped with male officials, being blind to the needs of women.²⁸⁶ The majority of prisoners are male and most of the times women are forced to live together with their male comrades in the same facilities. Some consequences are inefficient sanitary facilities and unhygienic conditions for women, especially in cases of menstruation or childbirth are logical; following, outbreaks of diseases are a normal result.

Another problem is the lack of security for women in camps. Violence against women in camps or imprisonment does occur more often than in other situations. Women are special vulnerable because of their weak position, not able to resist rape or other sexual assaults. Moreover, women do have to face gender specific methods of torture in detentions centres, like sexual mutilation.²⁸⁷ Also medical experimentation is more likely to happen in situations of detainment, since women are completely helpless in the face of military staff.²⁸⁸

²⁸⁵ See *Bennoune, Karima* (2007), 366

²⁸⁶ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 32-33

²⁸⁷ *Ibid.*, 35

²⁸⁸ See Ravensbruck Medical Experiments in the Women's Concentration Camp, <http://individual.utoronto.ca/jarekg/Ravensbruck/Experiments.html> (11 November 2009)

Female prisoners can often be used for forced labour, like washing and ironing the clothes of soldiers, cooking or cleaning.²⁸⁹ On the other hand, men are better for physical work or work, which is more exhausting and too hard for women.

Nowadays, a lot of proof about terrible treatments of women in detention centres all over the world exists. Especially, the work of non-governmental organizations has revealed cruel practices and instances all over the world during many different conflicts. There are many experiences women have to face in detention that are different than that of men. Women, being the weaker sex, are rather sexually exploited. Besides, unhygienic and inappropriate conditions are a much bigger threat to the health of women than to the health of men.

2. International law

How sufficient are women protected in detainment situations around the world in armed conflicts? How well are the needs of women implemented into provisions of international law?

Detention usually means that somebody is held in a special institution for reasons of punishment or interrogation. Internment is understood to be for preventive or political reasons; in times of armed conflicts, the Second Hague Convention deals with neutral countries, which often intern combatants of armed forces.

The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment defines a detained person as “any person deprived of personal liberty except as a result of conviction for an offence;” furthermore, detention is meant to be “the condition of detained persons as defined above”.²⁹⁰ Basic principles the treatment of persons in detention are set out, like Principle 1 states that “all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person”.

Looking at international legal standards, Article 9 of the UDHR does protect persons from arbitrary arrest or detention. Especially in situations of armed conflicts, tactics such

²⁸⁹ See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 35

²⁹⁰ See GA Resolution 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 9 December 1988

as arbitrary entering of houses, arbitrary questioning or arresting inconvenient people sadly are a common praxis.²⁹¹ The International Covenant on Civil and Political Rights is one of the main international instruments dealing with human rights violations of detained individuals. Article 9 (1) of the ICCPR underpins the protection against arbitrary detention. Moreover, the need to inform the person of his arrest is established as well as the right of anyone who is detained to be brought before a Court as soon as possible and to take proceeding before a Court.²⁹² Article 11 of the ICCPR further protects persons against being imprisoned “merely on the ground of inability to fulfil a contractual obligation”.

The Standard Minimum Rules for the Treatment of Prisoners, which were adopted in 1955 in Geneva by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, designed international guidelines and basic standards for the treatment of detained of imprisoned persons.²⁹³ However, the instrument is not binding but accepted by the international community for its main principles, which are to be achieved. For example, a relevant standard for women in detention is rule 8 (a), which requires different categories of prisoners to be kept in separate institutions, based on the different sex and the necessity of an adequate treatment for this reason: “men and women shall so far as possible be detained in separate institutions, at least separate quarters must be provided for women”. According to rule 53 (1) and (3), a female officer shall be responsible for the quarters which are designed for women, who should also be solely supervised of female staff. Moreover, rule 53 (2) states that “no male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.”

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment constitutes another primary international instrument for the protection of detained persons. In detention, a high number of sexual assaults committed against women are a sad fact. Many times, rape or other forms of sexual violence like mutilation or forced abortion are used as a method of torture. Torture is forbidden under any

²⁹¹ See CHR Report of the Special Rapporteur on Violence (1998), II., B., para 1-2

²⁹² See Article 9 (2), (3) and (4) of the ICCPR

²⁹³ See Standard Minimum Rules for the Treatment of Prisoners of 30 August 1955, approved by Economic and Social Council Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

circumstances; the Convention against Torture is the legal basis for the protection of women against such cruel acts. Article 10 calls upon state parties to ensure full information about the prohibition of torture, interrogation and treatment of detained people for training personnel and officials working in detention centres. Moreover, the obligation of states to keep methods and practices of interrogation under constant review is set out in Article 11 of the Convention. The Committee against Torture, which is the monitoring body, is very important for the implementation and observance of the convention. The Committee has the power to examine and investigate systematic practices of torture in the state parties; however, this competence is only optional and the Committee is not allowed to such investigations inside the country once a state does not accept.²⁹⁴

The cooperation in this field with other institutions at the international and regional level is very important in order to avoid double standards. Therefore, the Committee against Torture is working together with the European Committee for the Prevention of Torture²⁹⁵ especially in the cases of country visits, as well as with the United Nations Voluntary Fund for Victims of Torture,²⁹⁶ which is responsible for monetary compensation to victims of torture. Another body concerned is the UN Special Rapporteurs that are persons, who are holding a mandate to investigate and monitor specific human rights problems and submit recommendations in reports. In cases of detention, the Special Rapporteur on Torture as well as the Special Rapporteur on violence against women and the Special Rapporteur on extrajudicial, summary or arbitrary executions, are of great importance; following, they have to work with each other in order to achieve the best standards. The Commission on the Status of Women also provides reports regarding violence against detained women.

International humanitarian law offers many provisions for the protection of detained or interned persons. There are general standards, which cover men and women to the same

²⁹⁴ See Article 20 of the Convention against Torture

²⁹⁵ See European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted by the Council of Europe of 26 November 1987. For overseeing compliance the Convention set up the Committee for the Prevention of Torture.

²⁹⁶ See GA Resolution 36/151, UN Voluntary Fund for Victims of Torture of 16 December 1981

extent; like the very basic principle about humanely treatment of prisoners of war at all times, which is set out in Article 13 of Geneva Convention III. Prisoners of war and camp life is extensively covered by provisions of the Third Geneva Convention about the treatment of prisoners of war (POW). Hygienic living conditions, food rations, access to medical attention, family tracing, sending personal news to family member and more are accurately regulated.²⁹⁷ Besides a general protection, IHL provides special provisions, which apply exclusively to women in detention. According to Article 14 of the GV III, prisoners of war and their honour are to be respected: “women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men”. The Fourth Geneva Convention also protects women in general against “any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault” in Article 27.

The Geneva Conventions of 1949 and their Additional Protocols of 1977 provides for special provisions for the benefit of women when it comes to separate quarters and conveniences for female prisoners or internees. For example, Article 25 of the Third Geneva Convention requires separate dormitories for women prisoners of war in any camps; which Article 29 completes, stating, “In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them”. The same is true for female prisoners, who have to undergo disciplinary punishment in separate quarters; moreover, Article 97 of the GV III also regulates the need of women to be under the immediate supervision of women.²⁹⁸ Also the Fourth Geneva Convention requires in Article 85 separate sleeping quarters for women internees as well as suitable bedding and blankets taking into account the age, sex and state of health of the internees. The only exception is to be made for members of a family, where a family unit is to be provided and men and women are interned in the same place.²⁹⁹ Also according to Article 85, separate sanitary conveniences for the use of women are to be provided. In cases of non-international armed conflicts, the Second Protocol Additional to the Geneva Conventions confirms the standards, which are set out for international armed conflicts, in its Article 5

²⁹⁷ See Articles 22, 23, 26 29 of the Third Geneva Convention and also Articles 25, 106, 107 of the Fourth Geneva Convention and also Article 32 of the First Additional Protocol

²⁹⁸ See also Articles 76 and 124 of the Fourth Geneva Convention

²⁹⁹ See also Article 75 (5) of the Additional Protocol I

(2) lit a: “except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women”. Besides the demand of female supervisors for women in detention, another requirement is that only women shall search women prisoners, as Article 97 of GC IV orders.

Feminists argue that special provisions for women under IHL are mostly concerned with the unborn child or infants because women mostly receive a better protection once they are pregnant or have little children to take care of.³⁰⁰ As a matter of fact, provisions are found for a specific protection of pregnant women prisoners or mothers in cases of detention. For example, the Fourth Geneva Convention determines in Article 89 that “expectant and nursing mothers and children under fifteen years of age shall be given additional food, in proportion to their physiological needs”.

As soon as the detaining power releases some of its detainees, children, pregnant women and mothers with infants and young children shall be among the first ones to be released, as Article 132 of GV IV demands as well as the conclusion of agreements to help repair and return to places of residence or in another state. Article 76 (2) of the First Additional Protocol offers detained pregnant women and mothers having dependent infants their cases to be considered with priority. Finally, Article 88 of the Third Geneva Convention protects female detainees not to be sentenced to a punishment more severe than members of the armed force of the detaining power would be sentenced to, for a similar offence.

3. Jurisdiction of the ICTY, ICTR, ICC

The case law of the ad hoc tribunals, especially the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, developed some important principles and a better understanding of detention and its effects on women. Experiences of women in detention are not very well reported. For this reason, I decided to try to give a better understanding of female suffering in camps, as trials before the tribunals are able to contribute to a closer analysis.

³⁰⁰ See Gardam, Judith G.; Jarvies, Michelle J. (2001), 104

As we have heard, women are mostly suffering from torture in situations of detention. The first ICTY landmark decision set an important precedent in terms of the possibility to subsume rape committed in detention camps under torture; therefore it was prosecutable under IHL. In the Celebici camp cases,³⁰¹ four accused, who were custodians and commanders in the Celebici prison camp, were charged with sexual assault against forcibly detained women. The prosecutor of the ICTY decided to include sexual violence in its indictments but had to subsume it under the term torture, so it could be prosecuted under Articles 2 and 3 of the ICTY Statute. The Trial Chamber of the ICTY finally decided in its Celebici judgment that rape of detained women could come within the definition of torture and therefore, constitutes a grave breach of the Geneva Conventions. Torture is also considered to be a crime against humanity, which is prosecutable under Article 5 (f) of the ICTY Statute, Article 3 (f) of the ICTR Statute and Article 7 (f) of the Rome Statute for the ICC.

Sexual violence, as a form of torture, has also been recognized in other cases. For example in the Furundzija case,³⁰² the accused was charged with rape; he was found guilty of the violation of the laws and customs of war under Article 3 of the ICTY Statute.

During situations of armed conflict, women are vulnerable solely on the basis of their sex. Parties to the conflict are wilfully hurting women belonging to the opposing group in order to weaken them. The international community was very aware of the great danger of systematic detention and rape of women in armed conflicts for reasons of ethnic cleansing.³⁰³ The truth is that women are often detained in order to constantly rape them for a long time period; moreover, they are forced into marriage or prostitution while in situations of detention. In the Foca case³⁰⁴, another landmark decision of the ICTY, the Trial Chamber decided that rape committed by security forces against detained, helpless women, qualifies as a form of torture. In 1992, Serbian forces occupied the area around the town Foca; they held Muslim women, who belonged to the opposing party, captive in

³⁰¹ See *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, Judgment, ICTY No. IT-96-21-T, Judgment of 16 November 1998

³⁰² See *Prosecutor v. Anto Furundzija*, Judgment, ICTY No. IT-95-17/1-T, Judgment of 10 Dec 1998

³⁰³ See SC Resolution 827 (1993)

³⁰⁴ See *Prosecutor v. Dragoljub Kunarac, Radomir Kocac, Zoran Vukovic*, ICTY No. IT-96-23-T&IT-96-23/1-T, Judgment of 22 February 2001

various locations like houses or schools. Soldiers repeatedly raped women and girls; the victims were also enslaved and treated like in brothels and as personal property of the Serbian soldiers because the women had to serve them, cook for them or clean.³⁰⁵ The detention centres were most of the times unhygienic places and women were confronted with inhumane conditions. Besides the focus on torture, the prosecutor of the ICTY issued an outstanding indictment, prosecuting the enslavement of these women as a crime against humanity under Article 5 of the ICTY Statute. The case was certainly concentrated on the use of systematic sexual violence for the displacement of an ethnic group. The connection between sexual violence, enslavement and detention was established, and with it the crime of detention for the purpose of forced prostitution.

The International Criminal Tribunal for Rwanda was more reluctant to take up cases of possible threats to women in detention. Anyway, the Akayesu judgment is one of the most relevant decisions on sexual violence against women. The Trial Chamber offered its own definition of rape, stating, “Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”.³⁰⁶ This was also important for a better understanding of torture, because the ICTR classified rape as a form of torture, being a violation of personal dignity.³⁰⁷

Another possibility is the prosecution of mistreatment in detention. The Rome Statute of the International Criminal Court includes in its Article 8(2)(c)(ii) a relevant aspect for prosecution as “committing outrages upon personal dignity, in particular humiliating and degrading treatment” against a person in detention. Furthermore, arbitrary arrest or detention is prohibited as well as the deprivation of liberty, as it is set out in Article 55 (d) of the Rome Statute. The ICC is able to compensate victims of such an arbitrary detention on the basis of Article 85 of its Statute.

³⁰⁵ See *Prosecutor Gojko Jankovic, Janko Janjic, Zoran Vukovic, Dragan Zelenovic, Radovan Stankovic*, Amended Indictment, ICTY No. IT-96-23-I, as amended of 07 October 1999

³⁰⁶ See *Prosecutor v. Jean-Paul Akayesu* (1998), para 688

³⁰⁷ *Ibid.*, para 687

4. ICRC Visits to Detainees

The International Committee of the Red Cross holds a specific mandate under the four Geneva Conventions of 1949 and the Additional Protocols of 1977 to protect victims of international and non-international armed conflicts, including prisoners. One of the main tasks of the ICRC, its visits to persons deprived of their freedom in cases of armed conflicts in order to ensure a humane treatment of all prisoners, as it is demanded under IHL, is put into action all over the world.³⁰⁸ The ICRC recognizes special problems women have to face in cases of detention; the organization is especially concerned about conditions for female prisoners during its visits. In order to improve the health situation in detention centres, the ICRC tries to carry out renovations or to build separate hygienic facilities for female detainees.³⁰⁹ Furthermore, female hygienic items and clothes are distributed; women prisoners are taught in courses to learn sewing or weaving in order to assign them to do different jobs. Most importantly, the ICRC enables women to communicate with their family members.³¹⁰

Finally, after the visits have taken place, the ICRC submits confidential reports and recommendations to the authorities responsible for the detention centres. On the basis of ICRC being an independent and neutral organization, the ongoing dialogue with the detaining powers often ends in success.

³⁰⁸ See ICRC, ICRC visits to persons deprived of their freedom: an internationally mandated task, implemented worldwide, <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JRME> (11 November 2009)

³⁰⁹ See *ICRC, Women and War* (2008), 23

³¹⁰ *Ibid.*, 23

C. Judicial Guarantees

Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have lived under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus peace and justice go hand in hand.

(Antonio Cassese, former ICTY President)

As argued in my work that war situations have a different impact on women than on men and that mostly in a discriminative way, where is the justice if not in a very last step of giving redress to victims of war crimes?

The investigations of crimes like sexual violence and rape, in the course of prosecutions of war crimes brought before the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, posed many legal and practical problems.³¹¹ First of all, women were ashamed to speak publicly about things that happened to them, they feared vengeance or even social exclusion. Second, the long process, which might last many years or the challenge of credibility of rape victims often formed an obstacle for the willingness of women to testify.³¹²

How far are these problems addressed in the Statutes of the Tribunals? How well are women, as victims of war crimes and witnesses who must testify in front of courts, protected during trial? My intention is to see how efficient and satisfactory the system works.

1. Prosecution and Rules of Procedure and Evidence

Article 10 of the Universal Declaration of Human Rights from 1948 already ensures the right to a fair trial in front of an independent and impartial tribunal. The Rome Statute, regulating, inter alia, the trial and its conduct in front of the ICC, also refers to the right of a fair trial. Article 64 (2) underlines the need for an adequate protection of victims and witnesses but also to fully respect the rights of the accused. The same is stated in Article

³¹¹ See Charelsworth, Hilary; Chinkin, Christine (2000), 321

³¹² Ibid., 321-322

20 (1) of the ICTY Statute. Article 22 is the basis for the protection of victims and witnesses, which shall include the conduct of in camera proceedings and the protection of the victim's identity.

What about female victims and their treatment during trial? It does exist the possibility of prosecutions of sexual violence or mistreatment in detainment and with it, a set of rules for the protection of victims and witnesses. Specific needs of women, particularly in cases of violence, rape or sexual assault, are addressed in the Rules of Procedure and Evidence of the ICTY³¹³ and the ICTR,³¹⁴ which have a special sensitivity to female problems in the course of a trial.

Looking closely at the procedural rules used in trials in front of the ICTY, quite a few alternatives can be found. According to Rule 75 (A), a judge or a chamber is able to order appropriate measures to better protect victims and witnesses and their privacy during trial. For the safety of a person testifying in front of a court, disclosure can be prevented to the public or media, in parts or for so called closed sessions, for the purpose of keeping the identity of the victims or witnesses secret.³¹⁵ Rule 69 (A) of the ICTY also gives the power to the public prosecutor to ask for non-disclosure of a victim or potential witness who may be at risk, at least as long as such a person is brought under protection. Furthermore, Rule 89 (F) provides the opportunity for a witness to even testify in written form. The Rules of Procedure and Evidence of the ICTR are the same rules that govern the procedure in the ICTY.

In cases of sexual assault, Rule 96 is exceptionally important for women, since it regulates the procedure of taking evidence. Rule 96 states, "no corroboration of the victims testimony shall be required"; moreover, any defence of consent shall be prohibited in cases of violence or detention. Hence, it is tried to avoid any form of inappropriate questioning because of the very high level of traumatic experience of victims.³¹⁶ For women being raped or victims of sexual violence, a very modern approach to possible consequences of these committed crimes can be offered, recognizing not just a

³¹³ See Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, ICTY, IT/32/Rev. 42 adopted 11 February 1994, as amended the last in 4 November 2008

³¹⁴ See Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, adopted on 29 June 1995, as amended the last in 14 March 2008

³¹⁵ See Rule 75 (B) and Rule 79 of the Rules of Procedure and Evidence of the ICTY

³¹⁶ See *Buss, Doris; Manji, Ambreena* (2005), 283

physical but also negative psychological effects.³¹⁷ Nevertheless, the problem of a questioned credibility of a rape victim remains, and hence, a vulnerable position in the court proceeding. Not to forget the rights of the accused. Article 21 (4) lit e of the ICTY Statute provides some minimum standards for the accused, namely “to examine, or have examined, the witness against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”. The Tribunals have the difficult task to find the right balance between the rights of the accused and public interests. In the Tadic case³¹⁸ before the ICTY, guidelines on witness anonymity were established, balanced against the rights of the accused for a fair trial. The Trial Chamber identifies its obligation to protect victims and witnesses and the public interest therein, taking into account the importance of the victim for the whole case and giving the accused the right to confront voluntary witnesses.³¹⁹

The ICC Statute offers the most progressive protection of victims and witnesses in its Article 68, where the safety, physical and psychological well being, dignity and privacy shall be secured; moreover, the Court shall have regard to factors such as the nature of the crime, especially when it comes to gender violence or sexual violence.

2. Gender and the conduct of prosecution

Knowledge about gender specific crimes and gender specific problems prosecuting these crimes in front of criminal tribunals was acquired. Now, something needed to ensure an effective process of protection for victims and witnesses. Therefore, both the ICTY and the ICTR set up a Victims and Witnesses Unit under the authority of the Registrar, consisting of qualified personnel for the recommendation of protective measures for victims and witnesses; furthermore, to support them in cases of rape and sexual assault.³²⁰ Moreover, a legal advisor for gender-related crimes was appointed, with the responsibility “to provide advice on gender-related crimes and women’s policy issues,

³¹⁷ See Charelsworth, Hilary; Chinkin, Christine (2000), 324

³¹⁸ See *Prosecutor v. Dusko Tadic*, ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ICTY No. IT-94-I-T, Judgment of 10 August 1995

³¹⁹ *Ibid.*, para 56 and 77 and also Charelsworth, Hilary; Chinkin, Christine (2000), 327

³²⁰ See Rule 34 of the Rules of Procedure and Evidence of the ICTY and the ICTR

including internal gender issues such as hiring and promotion; to work with the Prosecution Section to formulate the legal strategy and the development of international criminal law jurisprudence for sexual assaults; and to assist the Investigations Unit in developing an investigative strategy to pursue evidence of sexual assaults”.³²¹

The International Criminal Court also contains various principles about gender expertise for the members of the Court in its Statute. For example, the Court is required to take adequate measures to protect the well being of the victim, taking into account all possible kinds of situations,³²² as well as the staff is supposed to include an expertise in trauma in cases of sexual violence.³²³ More precisely, in all main organs of the ICC, namely the prosecutor, the registry and the appeals and trials divisions of the Court, advisors shall be appointed with legal expertise in sexual and gender violence, as is stated in Articles 42 (9), 44 (2) and 36 (8) lit b of the Rome Statute. A sex balance in the composition of the staff is mentioned in Article 36 (8) lit a (iii), which recommends that the state parties take the need for a fair representation of female and male judges into account.³²⁴

A similar provision for the hoc Tribunals does not exist; only Rule 34 (B) of the Rules of Procedure and Evidence of the ICTY and the ICTR requires the employment of qualified women for the staff of the Victims and Witnesses Unit of the Registry. However, some steps to increase knowledge of gender issues in cases of rape or sexual violence have been made. Some examples are gender-sensitive trainings of the staff in the Office of the Prosecutor of the ICTR as well as the establishment of a Sexual Assault Team, consisting of lawyers, police and health personnel.³²⁵

The conduct of prosecution itself needs to take into consideration the gender specific needs, especially in cases of sexual violence against women. Assistance for victims or witnesses needs to be provided, who need to be conducted through the whole course of trial and taken psychological care of. For example, Article 69 (2) of the Rome Statute

³²¹ See ICTY Annual Report 1995, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc. A/50/365 - S/1995/728 of 23 August 1995, para 44

³²² See Article 68(1) Statute of the ICC

³²³ See Article 43(6) Statute of the ICC

³²⁴ See *Gardam, Judith G., Jarvis, Michelle J.* (2001), 85

³²⁵ *Ibid.* 215

gives the ICC the opportunity to record testimony of a witness by means of a video or audio technology, or even by written transcripts. Furthermore, the Preparatory Commission for the ICC has established some principles for giving evidence in cases of sexual violence.³²⁶

In my point of view, the presence of women and their participation in the prosecutions can help to address gender issues in a better way. Female investigators might be more qualified for the collection of evidence, since many women are more open to talk to the same sex about such delicate and private matters.³²⁷ Besides, staff with gender expertise might be able to understand the collected evidence in the right way.

³²⁶ Ibid., 87

³²⁷ See *Charelsworth, Hilary; Chinkin, Christine* (2000), 312

V. CONCLUSION

Having looked at the law of armed conflict, concrete situations of war and people concerned, the question is: how effective is the protection for women provided on the basis of international legal standards and how does it reflect the reality? Does international humanitarian law fail women?

It was my goal to investigate the discrepancy between the law in theory and in practice compared to the impact of armed conflict on women. In the end, I hope I was able to identify failures and discriminative effects of a gendered hierarchy of norms. Specific fields such as sexual violence, detainment and judicial guarantees helped to analyze the system and point out particular shortcomings of principles and provisions under IHL.

Feminist theory exposes the system of international law to be a patriarchal system with the aim to improve the situation of women around the world and strengthen their occurrence. The analysis of the international legal order by feminists does have two important tasks: first, it challenges existing values and a female silence in a gendered system; and second, it realizes the necessity of non-domination of women for equalization of the public and private sphere.³²⁸

International law is supposed to be universal in its coverage and application but below the surface lays a public/private dichotomy. The problem lies much deeper, namely in society itself. Social structures and the allocation of tasks between the male and the female sex better explain why women are invisible in the international law arena. Feminists try to encourage the international community to take a different way and redefine traditional thinking for a better standing of women. Everybody should be able to achieve the best and most suitable protection possible.

In my opinion, an improvement of an existing situation can only be achieved once the problems have been identified. Then, actual proposals of what needs to be changed can be brought forward. For both steps feminist theory is the right tool, however it is not the only one.

³²⁸ See Charlesworth, Hilary; Chinkin, Christine (2000), 60-61

Shifting from theory to praxis, it has to be looked at a very complex reality in wartime situations; people have to deal with a variety of factors on the ground. Nowadays, international armed conflicts are more the exception than the rule and are commonly replaced by non-international conflicts. I believe it to be very difficult for aid organizations to keep track of every event going on and to provide best help because of the wide range of possible impacts of armed conflict for victims. Experiences of women in war differ greatly, varying from violence to health issues to the point of social exclusion in society. In fact, women suffer because of their sex; they are exploited, left alone, displaced or insured and the suffering continues far beyond the actual situations of armed conflict. Long lasting physical and psychological harms are only a natural consequence of these experiences.

Men are mostly engaged in hostilities and combat operations, experiencing war in another way than women. It is crucial for the investigation of the law of armed conflict to compare its reality to theoretical provisions of the law of war in order to see how sufficient in fact the actual needs of women are covered. According to studies of the International Committee of the Red Cross, the system mainly fails occur because of inadequate implementation of the relevant provisions by the parties to the conflict. The ICRC, the 'tool' for the work on the ground, is aware of particular situations the best; therefore, it is able to react very fast to actual impacts. The ICRC has focused in its operational tasks on special needs of women and girls; furthermore, it tries to better understand their situation in armed conflicts as a whole.

The international community depends on objective people on the ground to point out inhumane treatment and to call for improvements and a better standard to be achieved in the law of armed conflict. In my point of view, the most important thing always is to mitigate the plight of people as good as possible at first; as a next step, information can be gathered. This is the foundation for an adequate analysis of the law of armed conflict.

How does the international community transform the practical experiences into legal standards regarding the subject of women in armed conflicts? Looking at the United Nations and its legal measures, someone could say that much has been achieved. Both UN resolutions, 1325 and 1820, were unique in its content about harms of women in war

situations with a particular concern with respect to sexual violence for the very first time. Moreover, peacekeeping was recognized to be a possible threat to women in conflict situations because of instances of sexual exploitation through UN personnel. Gender issues were taken up and considered to be an essential element of prevention of sexual assaults in every UN mission. The rest of the world was watching and countries had to start taking soldiers and troops into account for their terrible deeds. With the fight against impunity, an example was set and finally, something was done.

The instruments of law to protect women are broad and many standards have been achieved. One of the branches of law, which are applicable in armed conflict situations, is international human rights law. First, violence against women was considered to be a human rights violation. Second, women's rights were categorized as human rights. Gender equality to be reached was established to be one of the main goals of the international community. Third, various impacts of armed conflict on women unlike the ones on men were recognized and analyzed, which were building the platform for a better and more specific protection of women. The United Nations has played a major role in the process of human rights developments, adopting many resolutions and reports as from the General Assembly or the Commission of Human Rights. Unfortunately, the praxis of reservations to treaties and conventions of most states continues to undermine the meaning and intentional content of these legal instruments.³²⁹ Nevertheless, considerable progress has been made. A change in UN policies already took place, taking a gender perspective into account, mainstreaming human rights and training peacekeepers in gender issues in all of its actions. Women's participation in any form of post-conflict peace progress as well as a balanced representation of men and women in international organizations has been understood to be essential to peace itself. Impunity is outlined to be a major threat to the security of women and children and states are called upon to hold the perpetrators to account.

In my point of view, provisions found under human rights law adequately address the needs of women. The failure of the system is not a missing of legal standards but rather a lack of implementation.

³²⁹ See *Charlesworth, Hilary; Chinkin, Christine* (2000), 102 et seq.

Another branch of international law important for the analysis of this work is international humanitarian law, which is claimed to be a gendered system and its provisions to be insufficient for women. Under the Geneva Conventions, which are the core of IHL, women are protected to the same extent as men; its provisions are applicable for categories as civilians or combatants. However, these provisions fail to recognize a female experience of war, mainly because they are drawn by men and following, are attacked to be unjust.³³⁰ Besides general provisions, IHL offers a number of special provisions, which are designed just for the benefit of women in conflict situations. On one side, women receive needed attention through specific protection, taking extraordinary dangers especially for women into account. On the other side, these very few provisions are mostly dealing with pregnant women or mothers, and judge women on behalf of their reproductive aspects. That is why feminists are accusing IHL to be ignorant and discriminative against women as individuals. In my point of view, provisions of the law of war just represent a realistic assessment of the situation of women in armed conflicts. It is in the nature of things that women are pregnant, give birth, nurse infants and therefore, need a special treatment, care of health and sanitary facilities. Why not have specific provisions, which address the actual female problems in the law? The international community did well paying attention to a different impact of armed conflict on women. Enough provisions for a sufficient protection of women in conflict situations are found under international humanitarian law. Nevertheless, more needs to be done; gaps are still to be closed. As for example, provisions concerning proper compensation for female victims of armed conflicts are still missing. All provisions concerning women should be drawn in a much stronger language, including serious consequences in the case of violation. Women themselves should be part of the law making in order to be able to represent female experiences in wartimes. Finally, I would say, a proper framework for the protection of women exists in international humanitarian law, though it needs to be completed and gaps need to be filled.

International criminal law also contributed to the development of the law of armed conflict. Through the establishment of the International Criminal Tribunals of the former

³³⁰ See Gardam, Judith G.; Jarvies, Michelle J. (2001), 93 et seq.

Yugoslavia and Rwanda and the International Criminal Court, the possibility arose to prosecute individuals responsible for war crimes. War crimes, crimes against humanity and genocide are among those criminal offenses, which can be a reason for indictment. However, the Rome Statute of the ICC is unique in its protection of women, explicitly comprising acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, to be subject of prosecution.³³¹ Criminal law certainly helped to direct world's attention to women's issues and to certain problems, which accompany the process of trial, including the need for special gender sensitivity. For example, sexual violence traditionally was not a subject to be prosecuted under international criminal law. Violence against women was often seen as a private matter and not as a state responsibility; this is no longer the case. Over the years, crucial steps have been achieved in this subject area. In 1993 and 1994, both Statutes of the International Criminal Tribunals of the former Yugoslavia and Rwanda codified sexual violence, especially rape, as an autonomous crime for the very first time in history. Now, these crimes can be a count of an indictment, based on the work of the two ad hoc Tribunals. Adapted from the Statutes and the case law of the ICTY and ICTR in the context of rape, prosecution and individual criminal liability, the Rome Statute of the ICC from 1998 even offered a broader platform to define acts of sexual violence against women.

The international community made a great contribution to a better focus on sexual violence against women, especially because of constant lobbying of women's organizations and public pressure through media reports. For this reason, much has been done for a better protection of women.

The same cannot be said for the subject of detention, its conditions and its effects on women. International humanitarian law fails to address specific needs of detained or imprisoned women and the needs to improve the general situation in such centres. The law does not expressly refer to the problem of sanitary articles for menstruation or the possibility of sufficient access for women to reproductive health care in situations of

³³¹ See Article 7 (1) lit g of the Rome Statute

detention.³³² Many biological differences between men and women are not recognized; women are taken care of in an inappropriate way.³³³ Besides, cultural taboos or problems often pose an obstacle to women's well-being; the same rights can often not be assured for women as for men. In some cultures a woman is not allowed to be in the same room with a man and simply because no separate facilities are established, women are kept in their cells. This very often results in isolation of women. Anyway, many special provisions for the benefit of women in cases of detention exist under IHL. But provisions, for example dealing with separate sleeping quarters for women, are explained in the Commentaries of the Third and the Fourth Geneva Conventions to be for the protection of women's honour and modesty rather than their physical safety.³³⁴

However, international criminal law did uncover terrible conditions for women in cases of detention as well as committed crimes against them while being in such a vulnerable situation during prosecutions. The ICTY considered that sexual assault of women detained at a camp could be subsumed under 'torture' and therefore, could be included in the indictment. In the end, perpetrators had to face justice and pay for their deeds. In my point of view, female detainees have to face a much harder daily routine than male prisoners do. In the case of women in detention, much still needs to be done. Hygienic conditions are to be improved and the importance of social issues, such as daily tasks for women or their full inclusion in prison life, must be addressed more progressively.

Finally, it is the task of the independent and impartial organs of the Court to assure the right of the accused to a fair trial as well as the right of the victim to be protected in a sufficient way; the Court has to find the right balance. When it comes to judicial guarantees, the vulnerable position of female victims and witnesses in court proceedings, especially in cases of rape and sexual violence, is noticed and addressed during trial. Many provisions in the Statutes and the Rules of Procedure and Evidence of the ad hoc Criminal Tribunals as well as the ICC are there to be found for a better protection of women during trial. However, protection measures are hardly used in reality and the

³³² See *Gardam, Judith G.; Jarvies, Michelle J.* (2001), 104

³³³ *Ibid.*, 105

³³⁴ See *Bennoune, Karima* (2007), 376

guarantee for victims to stay anonym and keep their identity secret can never be fully given.³³⁵ The same is true for confidential information, received by the Victim and Witness Unit of the ICTY and ICTR.³³⁶ The inclusion of more women into the staff of the Court and all its organs will certainly help to address gender specific issues in a more sensitive way.

All together, after having looked at so many different aspects of “women and the law of armed conflict” my conclusion is that there exists a broad range of provisions, which protect women in a general as well as in a specific context. However, there are some gaps to be filled and sometimes not enough attention is paid to gender specific issues and different problems women have to deal with. Fact is, that the position of women in society is still not equal to the position of men. In my opinion, this is also a major problem for a better protection of women in armed conflicts; simple things, like gender mainstreaming or the full inclusion of women in politics, law-making and professional posts would make a difference. The international community is still far from total gender equality in all-different categories; but to recognize the lack of equality as a problem and to make a real effort trying to change it, is already a big step forward.

In reality, the big problem of women not being enough protected in situations of armed conflicts, is the lack of implementation. What do provisions help if they are not respected? The ICRC study on the impact of armed conflict on women reveals, that relevant parties to the conflict do not respect the rules regulating assistance for the ones in need.³³⁷ What could be done is to spread knowledge about the protection under IHL, to increase gender expertise among civil society, staff and politics and to mobilize more gender advisors on the ground.

In 2008, the global campaign “Unite to End Violence against Women” came into being, including sexual violence in armed conflicts, initialized by the UN Secretary-General Ban Ki-moon:

³³⁵ See *Buss, Doris; Manji, Ambreena* (2005), 285

³³⁶ *Ibid.*, 285

³³⁷ See *Lindsey, Charlotte* (2001), 21

“We must unite. Violence against women cannot be tolerated, in any form, in any context, in any circumstance, by any political leader or by any government. The time to change is now. Only by standing together and speaking out can we make a difference.”

(Secretary-General Ban Ki-moon)

As a whole, women are protected in a sufficient way under the law of armed conflict and their needs are addressed overall. The notion of a gender difference, the image of women in war situations and the different impact of war on both sexes finally got recognized by the international community. Great developments and improvements can be attributed to the provisions of the law of armed conflict, yet there remains a lot to be done.

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