

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN - SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Emmanuel Ayoola, Presiding
Judge A. Raja N. Fernando
Judge George Gelaga King
Judge Renate Winter
Judge Geoffrey Robertson, QC

Registrar: Mr Robin Vincent

Date filed: 6 September 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL - 2004 - 14 - T

**ADDITIONAL AUTHORITY CITED IN "PROSECUTION APPEAL AGAINST THE
TRIAL CHAMBER'S
DECISION OF 2 AUGUST 2004 REFUSING LEAVE
TO FILE AN INTERLOCUTORY APPEAL"**

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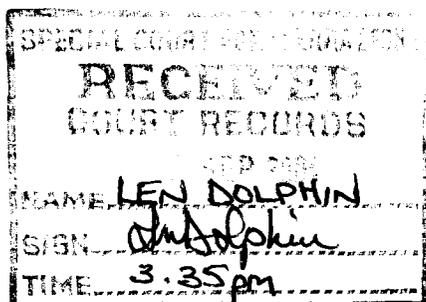
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The following is an additional authority cited in “Prosecution Appeal Against the Trial Chamber’s Decision of 2 August 2004 Refusing Leave To File An Interlocutory Appeal.”

Michael Cottier, commentary on Article 8(2)(b)(xxii) of the ICC Statute in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999).

Authority

**Michael Cottier, commentary on Article 8(2)(b)(xxii) of the ICC Statute in Otto Triffterer (ed.),
*Commentary on the Rome Statute of the International Criminal Court (1999).***

Otto Triffterer (ed.)

Commentary on the
Rome Statute of the
International Criminal Court

Observers' Notes, Article by Article



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human dignity"³⁴¹. The Trial Chamber held these prohibitions had a residual function³⁴² and could provide the criminal basis for all grave breaches or all acts under common article 3 since each prohibition is inconsistent with principles of humanity. By inference the residual function of inhuman treatment and cruel treatment covers outrages upon personal dignity within the meaning of article 8 para. 2 (b) (xxi).

The *Celebici* Judgement held the following acts to constitute an attack on ones human dignity: forcing a father and son to physically beat each other³⁴³, leading detainees to plead for mercy so as not to be stunned by an electric cattle prod³⁴⁴, or, forcing brothers to perform oral sex on each before other prisoners³⁴⁵.

Although neither *Furundžija* nor *Celebici* distinguish between physical assaults, such as oral rape, and non-physical components of sexual violence, such as forced public display, when determining what constitutes outrages on personal dignity it appears certain that sexual violence as well as acts not characterized by a sexual nature violate the prohibition against outrages on personal dignity, in particular humiliating or degrading treatment. A finer analysis might evolve from the jurisprudence of the ICC when one considers the present construction of article 8 para. 2 (b) (xxi) compared to subparagraph (xxii). The later lists "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or other form of sexual violence also constituting a grave breach of the Geneva Conventions," separately from acts of outrages³⁴⁶.

The foregoing interpretation extends to *internal* armed conflict under article 8 para. 2 (c) (iii) that prohibits outrages on personal dignity, humiliating and degrading treatment.

(xxii) Rape and other forms of sexual violence (*Michael Cottier*)

Literature:

Kelly D. Askin, *WAR CRIMES AGAINST WOMEN* (1997); Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 *EUR. J. INT'L L.* 326 (1994); Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 *HASTINGS WOMEN'S L.J.* No. 2 243 (1994); Sharon A. Healey, *Prosecuting Rape under the Statute of the War Crimes Tribunal for the former Yugoslavia*, 21 *BROOK. J. INT'L L.* No. 2 327 (1995); Françoise Krill, *The Protection of Women in International Humanitarian Law*, 249 *INT'L REV. RED CROSS* 337 (1985); Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 *AM. J. INT'L L.* 424 (1993); Dorothy Q. Thomas/Regan E. Ralph, *Rape in War: Challenging the Tradition of Impunity*, 14 *SAJS REV.* 81 (1994); Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 *NOTRE DAME L. REV.* 847 (1995).

a) Normative origins and drafting history

200 The inclusion of article 8 para. 2 (b) (xxii) constitutes a major victory for the cause of the protection of the rights of women. In past humanitarian law codifications, rape was not articulated at all or only as a crime against "honor" or "dignity" rather than a crime of violence. Fitting rape within other categories of crimes such as "inhuman or

³⁴¹ *Ibid.*, para. 544.

³⁴² *Celebici* Judgement, paras. 543, 544 and 552.

³⁴³ *Ibid.*, paras. 1067-1070.

³⁴⁴ *Ibid.*, paras. 1052-1059.

³⁴⁵ *Ibid.*, paras. 1062-1066.

³⁴⁶ The separation of acts between article 3 para. 2 (b) (xxi) and article 8 para. 2 (b) (xxii) apparently is a deliberate attempt by the drafters to remove any connotation of the harm inflicted by sexual violence being focused on the shame, loss of honor or moral turpitude of the victim/survivor or that persons family.

degrading treatment" as was often the case in past judicial decisions however trivializes the extreme physical and psychological harm caused by rape. It was, therefore, critical to women's human rights advocates not only to enumerate rape and other sexual crimes as a separate category of war crimes in its own right, but also to ensure that sexual violence would also be prosecuted before the ICC as forms of other grave breaches subject to universal jurisdiction under humanitarian law. The success underscores that these crimes are equally serious forms of violence contrary to the law of armed conflict, makes explicit the Prosecutor's mandate to prosecute such acts, and eliminates the need (as has occurred in the *ad hoc* Tribunals) to establish each time sexual violence occurs that the acts in question can be subsumed under another category of grave breaches.

Towards the end of the 20th century, it has been increasingly recognized that rape is both a war crime and a grave breach. Many national military codes have criminalized rape by soldiers already in the early 20th century or even earlier, an example of which is the Lieber Code of 1863³⁴⁷. Despite such formal prohibitions, military commanders often explicitly or implicitly acquiesced to their troops' practice or "right" to rape the women of the enemy as an instrument of rewarding soldiers for fighting, an example of which is the institutionalization of sexual slavery by the Japanese Army during the Second World War. In many cases, rape was also used as a means of warfare, war strategy or policy as illustrated by the use of rape and forced pregnancy as an instrument of ethnic cleansing in Bosnia-Herzegovina. Thus, rape was often viewed as a natural consequence of war and relatively few troops committing sexual violence were prosecuted or punished.

On an international level³⁴⁸, rape and "[a]bduction of girls and women for the purpose of enforced prostitution" were included in the list of violations of the laws and customs of war prepared by the Responsibilities Commission of the Paris Peace Conference in 1919³⁴⁹. However, at Nürnberg following the World War II, though rape and other sexual crimes were reported and documented, they were omitted from the jurisdiction of the International Military Tribunal Charter, were not charted in the indictments and were not prosecuted. Like the Nürnberg Charter, the Charter of the International Military Tribunal for the Far East did not specifically list rape or other sexual crimes. However, the Tokyo Indictment did allege rape of civilian women and medical personnel under "Conventional War Crimes" under categories of crimes such as "inhumane treatment"³⁵⁰. Several national laws criminalize rape or sometimes also forced prostitution as a war crime when committed in an armed conflict³⁵¹.

³⁴⁷ F. Lieber, *supra* note 78, article 44 (and 47), reprinted in: D. Schindler/J. Toman (eds.), *LAW* 10.

³⁴⁸ As early as 1646 Grotius stated that whoever committed rape, "even in war, should everywhere be subject to punishment", however, also pointing out that in many places the raping of women in time of war was considered permissible, H. Grotius, *Rights of War*, Bk. III, Chapter 4, Section XIX, 637.

³⁴⁹ 14 *AM. J. INT'L L.* 114 (1920).

³⁵⁰ B. V. A. Röling/C.F. Rüter (eds.), *TOKYO JUDGMENT* 385 (Vol. 1); *ibid.*, 965, 971-72, 988-89 (Vol. 2). For further references, see Th. Meron, *Rape* 426, fn. 14. Enforced prostitution during World War II was also prosecuted by some national courts, see *LAW REPORTS*, Vol. XV, 121. See also *In re Yamashita*, U.S. Military Commission in Manila, 7 Dec. 1945, reprinted in: L. Friedman (ed.), *THE LAW OF WAR 1599* (Vol. II 1972). Control Council Law No. 10 included rape as a crime against humanity, Control Council for Germany, *Official Gazette*, 31 Jan. 1946, at 51.

³⁵¹ For instance the Australian Law Concerning Trials of War Criminals by Military Courts, *LAW REPORTS*, Vol. V, 95; article 374 (1) of the 1994 Penal Code of the Republic of Slovenia ("coercion