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## **LAWS OF ARMED CONFLICTS**

### ***A FEMINIST ANALYSIS***

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#### **Abstract**

Conflict impacts women differently from men. But the laws of armed conflict seem to ignore this reality of conflict or warfare. In this paper, we attempt to show that the laws of armed conflict do not address the concerns faced by women in armed conflict, precisely because of their gender. In order to analyze this, we are looking at both domestic (national) and international dimensions of the theme. The paper especially discusses various provisions of the Fourth Geneva Convention dealing with laws of war, which are called the International Humanitarian Laws (IHL). Most of the provisions of IHL treat women as mothers or pregnant women (not as a person who has an agency of her own). Rape has been used as a weapon of war since ancient times, but surprisingly rape has been declared as a *war crime* only in the 1990s. The international peace-keeping forces, which are deployed by the United Nation in conflict-ridden regions in order to “keep peace”, but they themselves are reported to have been involved in the crimes against women. The paper concludes by arguing that the laws of armed conflict must be gender sensitive and women have a bigger role to play in peace-building as mandated under the UNSC Resolution 1325.

#### **INTRODUCTION**

Laws of armed conflict fails to take account of the reality of warfare for women. States have addressed the situation of women in armed conflict under the category of 'non-combatants'. Women are subsumed in the category of male combatants, despite the fact that warfare impacts women in different ways because of their gender.<sup>1</sup> For millennia, women and girls have suffered rape, sexual slavery, forced pregnancy and other brutal forms of sexual and gender violence during armed conflict. Like other forms of war related brutality, such violence is often sanctioned, tolerated or ordered by military, paramilitary or other governmental actors.<sup>2</sup> Although the international community has made some strides in outlawing and punishing atrocities committed during armed conflict through the development of international humanitarian law, gender-based violence has been consistently marginalized or dismissed as a natural consequence of war.<sup>3</sup>

## WOMEN AND ARMED CONFLICT

Feminist scholars and activists argue that “Conflict and war are not isolated events, but processes that begin before a conflict and continue long after the conflict is over. This process is backed by the ideology of militarism that brings militarist values into civil society, justifying violence by both the State and the civil society. Militarism is entwined with patriarchy, and both sustain and reinforce each other”.<sup>4</sup> Military is a *male* preserve, run by men and for men according to masculine ideas and relying solely on *man* power.<sup>5</sup> Women do remain invisible in military policy making, reflecting taken-for-granted international assumptions about the *maleness* of war. Violence against women in war is widespread, often systematic, multi-faceted, and heinous. It is important to examine the many faces of women confronting war: the distinct impact that war or conflict has on women due to their gender and the various ways that women respond.

<sup>1</sup> Judith Gardam, “Women and the Law of Armed Conflict: Why the Silence?”, vol 46, Issue 1, 1997, *International and Comparative Law Quarterly*, p.67

<sup>2</sup> Barbara Bedont and Katherine Hall Martinez, “Ending Impunity for Gender Crimes under the International Criminal Court”, vol. VI, Issue 1, 1999 *The Brown Journal of World Affairs*, 65-85

<sup>3</sup> *ibid*

<sup>4</sup> Anuradha M. Chenoy, “Gender Perspectives for Peace and Decision-making” in *Report of the Regional Conference: Asian Women for a Culture of Peace*, 6-9 December, 2000 Hanoi.

<sup>5</sup> Cynthia Enloe, *Does Khaki Become You? The Militarization of Women's Lives*, (London: Pluto Press Limited, 1988)

Jennifer Turpin explains the various impacts of war or conflict on women.<sup>6</sup> These are mainly torture, losing loved ones (homes, communities), wartime sexual violence, wartime domestic violence, loss of work, environmental destruction etc.

Victoria Brittain identifies five major impacts of war on women through her empirical research carried on in East Timor, Cambodia, the Balkans, Colombia, Palestine, Rwanda, Democratic Republic of Congo, Somalia, Sierra Leone, Liberia and Guinea. These are displacement, psycho-social health (including HIV/AIDS), economic impoverishment, destruction of education and finally sexual violence.<sup>7</sup> Sexual violence includes rape, sexual slavery, prostitution, trafficking and domestic violence.<sup>8</sup> Rape has been used as a weapon of war since ancient times. In Vietnam War, American soldiers used to take a number of girls and rape them in front of everybody as a deliberate attempt to terrorize the whole village.<sup>9</sup> It has only been since the early 1990s that international human rights standards have begun to address seriously violence against women.<sup>10</sup>

The effects of gender-based abuses suffered during times of conflict endure long after armed conflict has ended. There is widespread discrimination against mothers of children produced by conflict-related rapes. We come across the practice of *honour killings*, suicides, and self-inflicted harm following sexual abuse or rumors of such abuse.<sup>11</sup> For women, there is no abrupt cut-off between war and post-war. Sometimes, the post-war period is better called inter-bellum, a pause before fighting begins again. Survivors are traumatized, and the trauma is gendered.<sup>12</sup> Because, life in refugee camps is equally dangerous and stultifying. Women are continually at risk of and rape from camp guards and male inmates. Among the displaced people, boys are most often seen living in the streets, but most women disappear in prostitution.

<sup>6</sup> Jenifer Turpin, "Many Faces: Women Confronting War", in Lois Ann Lorentzen and Jenifer Turpin (eds), *The Women and War Reader*, (New York University Press, New York, 1998)

<sup>7</sup> Victoria Brittain, "The Impact of War on Women", vol 44, Issue 4, 2003, *Race and Class*, p. 43

<sup>8</sup> Human Rights Watch, *The War Within the War in Eastern Democratic Republic of Congo*, 2003, quoted in Victoria Brittain, "The Impact of War on Women", vol 44, Issue 4, 2003, *Race and Class*, p.44

<sup>9</sup> Victoria Brittain, "The Impact of War on Women", vol 44, Issue 4, 2003, *Race and Class*, p. 46

<sup>10</sup> Karima.Bennoune, 2006. "Do We Need New International Law to Protect Women in Armed Conflict?" vol. 38, Issue 363, 2006-07, *Case Western Reserve Journal of International Law*, p. 371

<sup>11</sup> ibid

<sup>12</sup> Cynthia Cockburn, "The Gendered Dynamics of Armed Conflict and Political Violence", in Caroline O.N. Moser and Fione C. Clark (eds), *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence*, (Kali For Women, New Delhi, 2001), p.25, 26

## THE DOMESTIC DIMENSIONS

Concepts like state, law, nation, national interest, national security etc. are not natural concepts but are constructed. These ideas are not neutral, but contain a specific gender bias. It is possible to identify a particularly Machiavellian strand in much realist thought.<sup>13</sup> The realist conception of the state as actor of international relations has been built upon the notion of a 'sovereign man', which is underpinned by a conception of warrior, Prince or modern-day practitioner of *Realpolitik*.<sup>14</sup> The state as described by Hobbes, Machiavelli or Morgenthau envisages a masculinized conception of sovereign man. Women were excluded from the citizen body because they constituted a threat to men both personally and politically. Since women were a potential source of conflict and divisions among men, women were both a sign of their original weakness and a threat to men's self control.<sup>15</sup> In *Politics Among Nations*, Morgenthau argued that the starting point of theorizing about international relations was the 'nature of man', whereas Tickner shows us that there is nothing objective about this 'nature of man'.<sup>16</sup>

Coming to the concept of 'nation', it falls to women to become the guardians of national culture, indigenous religion and family traditions and these same traditions and values are used to justify imposing particular constraints on women's activities, thus keeping women within the boundaries prescribed by male elites.<sup>17</sup> It is because women embody the symbolic values of chastity and motherhood that incidences of rape in the armed conflicts that frequently accompany independence struggles have to be seen as political acts through which the aggressor attacks the 'honour' of the other man.<sup>18</sup> We all know that a state always pursues its national interests. But, who determines the so called national interests? How many women representatives are there in the Indian Parliament?

<sup>13</sup> Jill Steans, *Gender and International Relations: An Introduction*, (Cambridge, Polity Press, 1998), p.48

<sup>14</sup> Ashley, R. "Untying the Sovereign State: A Double Reading of the Anarchy Problematique", vol 17, Issue 2, 1998, *Millennium Journal of International Studies*, pp.256-257

<sup>15</sup> Jill Steans, *Gender and International Relations: An Introduction*, (Cambridge, Polity Press, 1998), p.48

<sup>16</sup> Ann Tickner, "Hans Marganthau's Six Principles of Political Realism: A Feminist Reformulation" in Grant R. and Newland, K., *Gender and International Relations*, (Milton Keynes, Open University Press, 1991)

<sup>17</sup> D. Kandiyoti, "Identity and its Discourses", vol 20, Issue 3, 1992 *Millennium Journal of International Studies*, p.429

<sup>18</sup> *ibid*

As per various reports, globally, we have less than 10 per cent women law-makers. Since women are not there in the realm of law-making, then how can expect that laws would address the concerns of women. In order to protect “national security”, we come across various draconian laws which ignore women issues in order to fulfill “Military necessity”.

Although patriarchal customs preceded state formation, the state played a critical role in structuring patriarchy in all its institutions.<sup>19</sup> Women's role in the domestic sphere and their relegation to secondary status in state and society has been legitimized by the state policies and is reflected in legal rights and economic, social and political positions in the state structures.<sup>20</sup> The state further formalized gender power relations by retaining male domination of the top personnel within states (for example, a disproportionate number of men in the coercive structures of the state like army, police etc. whereas women are employed in the service sector jobs like teachers, doctors, clerical support etc.). It is because of the long history of patriarchy and exploitation and its legitimization by state structures, that the entwining of patriarchy and political system became so acceptable, and appeared apolitical and natural.<sup>21</sup>

## THE INTERNATIONAL DIMENSIONS

Far from being a value-free, normative moral order, international law itself is a gendered system. It has evolved from a particularized socio-historical context which often has failed to reflect the experiences or needs of women.<sup>22</sup> Violence against women often has fallen beyond the purview of international law, as it occurs within the domestic sphere both within the home and within national boundaries. History shows that international law, founded on a statist conception that values sovereignty over

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<sup>19</sup> Anuradha M. Chenoy, “Gender Perspectives for Peace and Decision-making” in *Report of the Regional Conference: Asian Women for a Culture of Peace*, 6-9 December, 2000 Hanoi.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid

<sup>22</sup> Suzan M. Pritchett, “Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court”, vol 17, 2008, *Transnational Law and Contemporary Problems*, pp.265-305

individualized responsibility for violations of human rights, has neglected to account for discriminatory violence that targets women and girls.<sup>23</sup>

International legal systems have primarily been statist, with a focus on state sovereignty, political independence, territorial integrity, and legitimation of force.<sup>24</sup> Issues such as violence against women, which have occurred primarily within the domestic sphere of both the home and national boundaries, traditionally have been matters of non-intervention for the international community.<sup>25</sup> While sexual violence was enshrined in the Geneva Convention, it was hardly accounted for in international criminal prosecutions. Neither the Nuremburg nor the Tokyo Tribunals held at the end of World War II explicitly enumerated rape or sexual violence as war crimes or crimes against humanity.<sup>26</sup> Indeed, scholars have noted that “rape remains the least condemned war crime; throughout history, the rape of hundreds of thousands of women and children in all regions of the world has been a bitter reality.”<sup>27</sup>

International Humanitarian Law (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<sup>28</sup> International Humanitarian Law, philosophically based on chivalric ideals of women, addresses women in terms of their relationships with others and not as individuals in their own right. Out of the forty two provisions focusing upon women in the 1949 Geneva Conventions and their 1977 Additional Protocols, nineteen

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<sup>23</sup> *ibid*

<sup>24</sup> Hilary Charlesworth, Christine Chinkin & Shelley Wright, “Feminist Approaches to International Law” no. 613, 614, 1991 *American Journal of International Law*.

<sup>25</sup> Suzan M. Pritchett, “Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court”, vol 17, 2008, *Transnational Law and Contemporary Problems*, pp.265-305

<sup>26</sup> Women’s International League for Peace and Freedom, Jurisprudence on Sexual and Gender Violence, online available at <http://www.peacewomen.org/un/icj/sexcrimes.html>, quoted in Suzan M. Pritchett, (2008), “Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court”, *Transnational Law and Contemporary Problems*, vol 17, pp.265-305

<sup>27</sup> Human Rights Watch, (2002), *The War Within The War: Sexual Violence Against Women and Girls in Eastern Congo*

<sup>28</sup> Judith Gardam and M. Jarvis, *Women, Armed Conflict and International Law*, The Hague, *Kluwer Law International*, 2001), p.93

deal with women as mothers. These provisions are totally inadequate and incorporate a gendered hierarchy in the sense that the rules dealing with women are regarded as less important than others and their infringement is not taken seriously.<sup>29</sup> IHL's limited focus upon the "biological" difference of women and contend that even the treatment of sexual violence is couched in terms relating to chastity and modesty. "Generally, women are valued in IHL in terms of sexual and reproductive aspects of their lives"<sup>30</sup>

In IHL, the provisions relating to women are articulated in terms of protection rather than prohibition. For example, the Fourth Geneva Convention, relating to the treatment and protection of civilians during armed conflict, stipulates that "women shall be especially *protected* against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."<sup>31</sup> Surprisingly, sexual violence is not mentioned in the "grave breach" provisions, as if it is a "military necessity". The laws of war have been formulated deliberately to privilege military necessity at the cost of humanitarian values.<sup>32</sup> These rules may appear humanitarian in nature but they serve other interests.<sup>33</sup> The regime of protection afforded to prisoners of war (mostly men) compared to the lack of regulation relating to the refugee camps (mostly women).<sup>34</sup> Another major criticism of IHL is its unrealistic boundaries. It seeks only to limit suffering during times of armed conflict, not to redress social inequalities or assist in rebuilding post-conflict communities.<sup>35</sup> Women suffer a double disability in armed conflicts in comparison to their male counterparts. Their status and treatment are not only inferior as civilians but doubly so as women civilians.<sup>36</sup>

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<sup>29</sup> Judith Gardam, "Women and the Law of Armed Conflict: Why the Silence?", vol 46, Issue 1, 1997, *International and Comparative Law Quarterly*, p.56

<sup>30</sup> J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law*, The Hague, Kluwer Law International, (2001), p.93

<sup>31</sup> Accessed on 26<sup>th</sup> November, 2014, available at <https://www.icrc.org/ihl/INTRO/380>

<sup>32</sup> Charis af Jochnik and Roger Normand, "The Legitimation of Violence: A Critical History of Laws of War", no.35, 1994, *Harvard International Law Journal*, p.50

<sup>33</sup> Ibid.

<sup>34</sup> Helen Durham, "Women, Armed Conflict and International Law", no.847, 2002 *International Review of the Red Cross*, p.655-659

<sup>35</sup> J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law*, The Hague, Kluwer Law International, (2001), p.94 quoted in Helen Durham, "Women, Armed Conflict and International Law", no.847, 2002 *International Review of the Red Cross*, p.655-659

<sup>36</sup> J. Gardam, "Women and the Law of Armed Conflict: Why the Silence?", vol 46, Issue 1, 1997, *International and Comparative Law Quarterly*, p.56

By continuing to appeal to the state as the central custodian of women's rights, feminist and human rights advocacy has failed to address the ways in which power is dispersed and the fact that power does not operate exclusively in terms of inequality, maldistribution and exploitation. Power is also articulated in terms of domination, subjugation and subject constitution.<sup>37</sup> As Michel Foucault argued, it is the power that circulates through the social — whether in terms of discipline or capital or other forms of bio-power — that needs to be addressed and transformed, rather than adopting a top-down, state-centric approach to power.<sup>38</sup>

Hilary Charlesworth argued that even though rape during armed conflict clearly violated international law, international law was concerned about women's honour (and therefore about the men who were harmed by the attack on this honour) or about genocide, not about women—*qua women*—as subjects of international law.<sup>39</sup> The most commonly discussed dichotomy was the public/private distinction. For some critics, the distinction actually existed; international law only applied to the public sphere. Torture, for example, might well lie outside international law to the extent that it involved private individuals. And while state *action* might bring torture within the scope of human rights law, state *inaction* with regard to violence against women was likely to leave women outside international law's scope. Thus, a radical reordering of the international legal order was called for. In particular, human rights law needed to apply to non-state actors. Ideas about 'femininity' and 'masculinity' are incorporated into international legal rules and structures, silencing women's voices and reinforcing the globally observed domination of women by men.<sup>40</sup>

International law has historically avoided regulating sex-based violence directed toward women in times of war. States saw little strategic interest in addressing such

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<sup>37</sup> Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995).

<sup>38</sup> Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Colin Gordon et al trans, Harvester Press, 1980), quoted in Ratna Kapur, "Gender Security and the Rise of Sexual Security Regime in International Law and Post-colonial India", vol 14, 2013 *Melbourne Journal of International Law*, pp 317-345

<sup>39</sup> H Charlesworth, "Feminist Methods in International Law", *American Journal of International Law* 379, 386–87, quoted in Karen Engle (1992), "*International Human Rights and Feminism: When Discourses Meet*", *Michigan Journal of International Law*, p.517

<sup>40</sup> *ibid*



“private” concerns in the public arena of treaties or international courts. As armed confrontation between and within states was generally carried out by male combatants, the laws of war were generally constructed from the vista of a soldier’s need for ordered rules within which to wage war on behalf of the state.<sup>41</sup> Sex-based violence means a wide variety of violent and victimizing acts directed at women because of their gender.<sup>42</sup> There is ongoing intellectual and legal resistance to accepting the extensive empirical evidence that women’s bodies have been targeted as a method and means of war, not ancillary to military objectives, but innately linked to them.<sup>43</sup>

Women are raped in all forms of armed conflicts, international and internal, whether the conflict is fought primarily on religious, ethnic, political or nationalist grounds, or a combination of all of these. They are raped by men from all sides – both enemy and ‘friendly’ forces. In times of war and post-conflict prosecution and reconciliation, women’s experience of violence has fallen to the bottom of the agenda as international systems value peace over justice and stability over the voices of women.<sup>44</sup> The international peace-keeping forces, which are deployed by the United Nation in conflict-ridden regions in order to “keep peace”, but they themselves are reported to have been involved in the crimes against women.

## CONCLUSION

According to the *International Committee of the Red Cross*, "If women have to bear so many of the tragic effects of conflict, it is not because of any shortcomings in the rules protecting them, but because those rules are not observed."<sup>45</sup> But, from the discussion in the paper, it is quite clear that some aspects of the IHL rules regarding

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<sup>41</sup> Fionnuala Ni Aolain, “Sex-based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law”, vol 12, 2000, *Yale Journal of Law and Feminism*,, p.1

<sup>42</sup> ibid

<sup>43</sup> Seth Mydans, et al, (1998), “Jakarta Groups Document Mass Rapes of Chinese”, INT’L HERALD TRIB., June 10, quoted in Fionnuala Ni Aolain, (2000), “Sex-based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law”, *Yale Journal of Law and Feminism*, vol 12:YY, p. 2

<sup>44</sup> Suzan M. Pritchett, “Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court”, vol 17, 2008, *Transnational Law and Contemporary Problems*, pp.265-305

<sup>45</sup> International Committee of the Red Cross, “Women and War”, 1995, accessed on 28/11/2014, online available at <https://www.icrc.org/eng/resources/documents/misc/57jqj3.html>

women are archaic and reflect the very stereotypical ideas about women that perpetuate discrimination. In October 2000, the UN Security Council passed resolution 1325 on women, peace and security, which underlined the vital role of women in conflict situation, and mandated a review of both the impact of conflict upon women and their role in peace-building.<sup>46</sup> Resolution 1325 has become almost a talisman for those involved or interested in women and war, and women and peace making.<sup>47</sup> Therefore, the paper concludes with a positive note that the laws of armed conflict must be gender sensitive and women have a bigger role to play in peace-building as mandated under the UNSC Resolution 1325.

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<sup>46</sup> UNSC Resolution 1325, online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement>

<sup>47</sup> Victoria Brittain, "The Impact of War on Women", vol 44, Issue 4, 2003, *Race and Class*, pp. 41-51

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*Journal of International Studies*, p.429.

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