

Protection of Women in Non International Armed Conflict- A Feminist Perspective

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Abstract – The legal regime of international humanitarian law is meant for protection for victims of armed conflict. It distinguishes two types of armed conflicts, namely: IAC, opposing two or more States, and NIAC, between governmental forces and nongovernmental armed groups, or between such groups only. This regime, however, has given an inadequate cover to non-international armed conflict and has been subject to severe criticism in this regard. The aim of this article is to critique the law for non international armed conflict in respect of women which is unknown, rarely discussed and addressed. During an armed conflict, women as civilians are generally forced into poor living conditions and are prone to accidents, injuries, and disease. This paper is an attempt to reaffirm the inadequacy of the law on non international armed conflict and that has little to do with the protection of women. Thus, the methodology follows the normative research by analyzing the laws available for armed conflict, especially on non international armed conflict. Various treaties, customary international laws, and case decisions have been discussed in this regard. This paper will not offer a complete literature on international armed conflict. However, it will discuss the provisions of international armed conflict containing protection of women to compare and contrast the protection for women under non international armed conflict. International law as a concept is gendered. Therefore it is not new to discover international humanitarian law is being gendered. The feminists on this area explain and question this. It is high time to go for an amendment or formation of new laws in International Humanitarian Law on women. Bringing a UN resolution on NIAC can work to fill the gaps of protection of women in this zone.

Key words: Women, Non international armed conflict, feminism

‘It is crucial that women’s voices are heard and their work on the ground is recognized, valued and supported. Decisions should be made with them, not for them’ – Elisabeth Rehn& Ellen JohnsonSirleaf

Violence against women is intertwined with traditions, practices and are entrenched in cultural values of societies there being no north- south difference in this regard. Infringement of human rights against women include sexual harassment, assault, domestic violence, incest and incidents of rape. Resort to obscenity against women, unwelcome advances, perverted acts, forced pornography and forceful prostitution are abhorrent expressions of relegating women to subjection. The concept of gender based violence necessarily includes both the aspects of violence, which arise out of asymmetrical power relations resulting in gender based discrimination inherent in the socialization process. When a state of affairs arising through an armed confrontation it is women who become most vulnerable .The bitter experiences of women and the traumas and trials which they have to undergo sometimes even leading to their deaths are not given commensurate adequate attention and commensurate heedfulness.

Out of the estimated more than one billion people that live in poverty today the majority are women. While there is a deplorable gender discrimination and undermining of women it is an unfortunate fact that it is left only to women writers to draw attention to the innumerable problems faced by women

It must be stated that the report written by .Radhika Coomaraswamy, UN rapporteur on violence against women, its causes, and consequences in the course of armed conflict is an outstanding document which has been used as a source document in my article .One hopes for more documents of this nature and not to confine them only to women writers

The legal regime of international humanitarian law is meant for protection for victims of armed conflict. It distinguishes two types of armed conflict, namely: International Armed Conflict (hereinafter IAC), conflict between two or more States, and Non International Armed Conflict (NIAC)ie between governmental forces and nongovernmental armed groups, or between such groups only. The international legal regime(IHL), , has given only an inadequate cover to NIAC and has been subject to severe criticism in this regard .This particularly applies to the failure in providing effective safeguards for the protection of women victims of armed conflict. Women not only experience conflict as civilians, but also often as female combatants because a large number are directly involved as combatants. The protection to women combatants through the provisions of separate dormitories and conveniences for women prisoners of war does not deal adequately with issues faced by womenⁱⁱ

Currently, the world is witnessing a number of armed conflicts such as in Syria , Iraq, Turkey, Yemen, Greater Sachel , Lake Chad Basin, Democratic Republic of Congo, South Sudan, Afghanistan, Myanmar, Ukraine, and Mexico. When one analyses the nature of these conflicts it has to be recognized that NIAC has now emerged as the most prevalent form of warfare. It has far outnumbered IAC.

The aim of this article is to critique the law for NIAC in respect of women a subject area which is , rarely discussed and addressed. During an armed conflict, women as civilians are generally forced into poor living conditions and are prone to accidents, injuries, and disease. Besides, they also suffer from risks of pregnancy and inadequate basic health services. ⁱⁱⁱOne of the important concerns during armed conflict is the issue relating to the reproductive health of women. There are severe shortages of medicine, reliable birth control measures and medical treatment during NIAC. This issue was discussed extensively in the context of treatment of Muslim women in the former Yugoslavia.^{iv}

The structure of this article is as follows; In the first place there is a need to understand the nature and magnitude of non international armed conflict; next as to protection for women is available in IAC and NIAC and is to identify the gaps that exist in protection for women in international armed conflict(IAC) and non international armed conflict(NIAC) This examination would reveal and bring about a realization that the law for non international armed conflict is not developed and lacking in balanced gender perspectives. Whatever provisions that are available do not make much difference. Therefore there is a timely need to evolve protective measures for women in NIAC.

OBJECTIVES OF THIS PAPER

Answering following questions

1. What are the laws on International Armed Conflict and Non International Armed Conflict?
2. How is the protection of women addressed in the law of armed conflict?
3. To what extent does the law of Non International Armed Conflict cover women?

METHODOLOGY

This paper is an attempt to reaffirm the inadequacy of the law on NIAC with the protection of women. Thus, the methodology follows the normative research of analyzing the laws available for armed conflict, especially on NIAC. Various treaties, customary international laws, and case decisions have been discussed in this regard.

LIMITATIONS

This paper does not cover a comprehensive literature survey on international armed conflict. However, it will discuss the provisions of IAC containing protection of women to make adequate comparison and contrast the protection for women under non international armed conflict.

2. FINDINGS

DISCUSSION AND

A. INTERNATIONAL ARMED CONFLICT AND NON INTERNATIONAL ARMED CONFLICT.

, Treaty and custom are the two important sources of International Humanitarian Law (IHL) required to discuss the laws of IAC and NIAC and Treaties are often the codification of customs that are the reflection of state practices. Other than these two main sources, reports of international law commission also play a significant role in identifying and interpreting the existing customary international humanitarian laws. Treaty law on IHL also establishes a distinction between IAC and NIAC in the meaning of common Article 3 of the Geneva Conventions of 1949 and NIAC falling within the definition provided in Article 1 of Additional Protocol II.

Geneva Conventions, customary international law and additional protocol I cover the IAC. Meanwhile, Common Article 3 and additional protocol II (Principle of such control over a part of its territory as to enable to carryout sustained and concerted military operations and to implement the present protocol) are dealing with NIAC.The law relating to NIAC is also a part of the public international law. Therefore the sources of international law will be applicable to the law of NIAC as well. So treaties, customs, general principles, judicial decisions and the writings of publicists are providing the sources of law in this regard.^v

Also, the study of sources of law regulating the NIAC will not be complete without attention to states and non state armed groups that include monitoring namely their adhoc commitments, These adhoc commitments of states and armed groups include agreements concluded between the parties, unilateral declarations and instructions or regulations that are internal to a party of the conflict .Determining whether an armed conflict is an International Armed Conflict or a Non International Armed Conflict is not easy as it seems to be. A proper definition was evolved in the *Tadic* decision^{vi}is that,“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 such groups within a state” .Most of the time applicability of international rules to NIAC is followed by the practice of states and non state armed groups which are actually included in NIAC. For example, following the end of the armed conflict in Sri Lanka in 2009, US made an assessment of the conduct of the parties to that conflict, to set out its own view of the customary international law status of certain rules relating to the conduct of hostilities.^{vii}

At the treaty level, the International Humanitarian Law of NIAC includes Common Article 3, Additional Protocol II, Hague Convention on Cultural Property and its second protocol. It also includes various weapons treaties, such as the chemical weapons convention, the Biological Weapons Convention, The Convention on certain conventional weapons and Protocols like Ottawa Convention on Anti- Personnel Mines, and the Cluster Munitions Convention. Further International legal instruments belonging to other areas of international law do play a role in NIAC, particularly, the Convention on the Rights of the Child and the Optional Protocol on Children and Armed Conflict, Guiding Principles on Internal Displacement, and the Rome Statute of the International Criminal Court. In addition to these, there are instruments at regional level to cover NIAC such as African Union Convention on Internal Displacement and The Cairo Declaration on Human Rights in Islam. In addition to this, the *lex generalis* International human rights law plays the role in filling gaps in law in the context of NIAC.

B. WOMEN UNDER NON INTERNATIONAL ARMED CONFLICT

The purpose of this study is to focus on the humanitarian protection of women in NIAC. In order to differentiate the protection offered under IAC and NIAC, there will be a need to analyze humanitarian protection of women in IAC. Even though the status of women in IAC was recognized in order to provide protection , these provisions were limited to the physical integrity of women and the honor of their family. For example Treaty of Amity and Commerce mentions that “If war should arise between the two contracting parties ... all women and children... shall not be molested in their persons”.^{viii} Application of rules relating to the protection of civilians and persons in non international armed conflict started with the instructions of General Dufour during Swiss Civil War in 1847 and Colombian War of independence in 1820. Following this Common Article 3 of the 1949. Geneva Conventions reflected those rules. As an aftermath of the developments of IHL, several provisions were introduced to cover the humanitarian protection for women in IAC. These are Article 2 of General Winfield Scott's General Orders, the Lieber Code, the Brussels Declaration and The Hague Regulations on Land Warfare of 1899 and 1907 and the Commission on the Responsibility of the authors of the War and on Enforcement of Penalties, 1919. All the above

mentioned legal instruments ensure the equal protection of women in the context armed conflict. The loopholes of these laws will be discussed in comparison with those of NIAC.

Despite criticism of the Geneva Conventions and their 1977 Additional Protocols for taking an archaic view of the role and value of women as exclusively 'vulnerable', there are a number of provisions within these treaties dealing with protections afforded to women as combatants. The provisions dealing with the protections afforded to women as combatants and prisoners of war are increasingly important. IHL is located within the concept of formal equality, and one sees reiterated throughout the Conventions and their 1977 Additional Protocols the requirement that protections should be provided 'without any adverse distinction founded on sex ...'.^{ix} In relation to women who find themselves as prisoners of war, article 14 of Geneva Convention III reinforces this concept through the obligation that women should receive treatment 'as favorable as that granted to men'. Article 16 confirms this in the statement: 'Taking into account the provisions of the present Convention relating to rank and sex ... all prisoners of war shall be treated alike by the detaining Power'. Added to these claims of formal equality, IHL provides a range of specific protections to women, in particular for women detained as prisoners of war. For instance, women are required to be provided with separate dormitories and conveniences from men, even when undergoing disciplinary or penal punishment.^x

Furthermore, in the allocation of laboring tasks due consideration must be given to the sex of the prisoner.^{xi} Disciplinary measures and punishments for women are not to be more severe than that accorded to males.^{xii} It must be noted that unlike female civil internees, female prisoners of war have no specific rights to only be searched by a woman, which states that a woman internee shall not be searched except by a woman.^{xiii} Today we can see rules such as the principle of humane treatment and rules relating to humanitarian assistance, and rules that relate to the protection of particular categories of persons like wounded and sick, the missing and the dead are all applicable in NIAC as well. In general the principle of humanitarianism is the basic principle that provides humanitarian protection to civilians and combatants in NIAC through Common Article 3 and Additional Protocol II.^{xiv}

Especially when it includes the humanitarian protection of women, such as principles relating to violation of personal dignity and sexual violence do play an immense role. Outrages upon personal dignity and sexual violence both fall under norms of customary international humanitarian law. According to ICTY, outrages upon personal dignity are essentially a subset of the broader prohibition on inhuman treatment.^{xv} Similarly sexual violence like rape, enforced prostitution, indecent assault and threats thereof are all prohibited in Additional Protocol II.^{xvi} Rome Statute Article 8 (2) (e) (vi) also lists rape, sexual slavery, enforced prostitution forced

pregnancy, enforced sterilization and other forms of sexual violence, as war crimes in their own right, rather than a subset of the prohibition on outrages upon personal dignity. Applying IHL laws to NIAC does not shield armed groups from the state. But they have no scope to prohibit the targeting of persons taking a direct part in hostilities, including non-state armed groups. Importantly, IHL has no provision dealing with detention, prosecution, the punishment of armed groups for criminal offences under domestic laws or prohibition of deliberate attacks against civilians.

Apart from these, there are efforts by UN like the UN Security Council resolutions to cover IAC and NIAC. Prof. Gregory Fox and Kristen Boon argue that the resolutions by Security Council have in fact imposed a set of obligations on NIAC parties and on third parties over the last few decades. Resolutions over Syria and Ukraine are examples. The Security Council shall determine threats to peace and breach of peace.^{xvii}. Accordingly under Article 25 of UN Charter, 'all members of the UN agree to accept the decisions of the Security Council in accordance with the present charter'. A number of Security Council resolutions have directly impacted on women in IAC and NIAC. Resolution 1325 on women, peace, and security (2000) deal with the impact of armed conflicts on women and girls. Also, resolution 1820 (2008) on sexual violence in conflict and post conflict situations have aimed at sexual violence against civilians in conflict zones.

Under these, rapes and every other form of sexual violence can be treated as a war crime, a crime against humanity, or a constitutive act of genocide

.Further, resolution 1888 and 1889 (2009) respectively deal with the protection of women and girls from sexual violence in armed conflicts and the protection of women and girls in post conflict situations. But there is not a single standalone Security Council resolution to exclusively focus on NIAC.

C. PERSPECTIVE

FEMINIST

It is not new to discover that international humanitarian law is being gendered. Most of the scholarship in this area explains and questions this aspect. Writings of Judith Gardam, Christine Chinkin, Amy Barrow and Helen Durham are such examples. There are enough writings highlighting the need for a law on NIAC since the IAC is having barriers such as state sovereignty to intervene in internal conflicts.

This article attempts to discuss the issue from a gender perspective. Women being the most affected party in NIAC do not meet with necessary justice in domestic courts. Therefore

feminist perspective voices are raised to bring common standard laws. Feminists have two criticisms on the International law in general which is applicable to IHL as well. They are the absence and exclusion of women in the international law making and role of gender in the formulation of international law. Systematic inequalities in international humanitarian law have always been a concern of feminists. For example, even though the UN Security Council 1325 recognizes women in armed conflict, it is still a question as to how much is it in practice.

The take of feminism on this topic points out that the laws on women in NIAC give more concern on dignity but not the offense by itself. Also the other problem with legal documents in NIAC is that they only focus on sexual violence on women ignoring other socio-economic effects on women during the internal conflict. It is true the decisions of Akayesu^{xviii} and Delalic^{xix} have been progressed by identifying rape and forced pregnancy as crimes against humanity. But the further recognition in International Criminal Court is unanswered in Lubango by not answering the gender based crimes.^{xx}

3.

CONCLUSION

The Law of NIAC has been developed since mid of 1990's and is being further developed. Even though there are provisions relating to this area under Article 3 of Geneva Convention and Additional Protocol II through the reflection of customary international law, yet, there are gaps to be filled specially in the context of protection to women. There is not even influence of customary international law in this regard. Only domestic courts exercise their discretion in this matter. Under substantive law notions of combatant immunity and prisoners of war which are relating to women need to be considered. There is no guarantee for the status of prisoners of war also in the law of NIAC. Members of the military wing of the non state armed group who are captured do not benefit from provisions on prisoners of war. An important aspect of non international armed conflict is that it suffers from a particular matter of the relationship between the non-state armed group and the persons and objects in territory under its control. But as states see non-state armed groups as criminals or traitors, terrorists, there is no place for immunity. No rule of IHL or customary International Law related to the relationship of non state armed group and persons and objects in territory under its control is in place. The protection of women under IAC is without answers and protection of women under NIAC is without questions. It is high time to go for an amendment or formation of new laws in International Humanitarian Law on women. Bringing a UN resolution on NIAC can work to fill the gaps of protection of women in this zone.

ⁱ Beijing declaration and platform for action, UN.GAOR.UN DOC.A/Conf.177/20 (1995)

ⁱⁱ Geneva III, Art 14, 25, 29

ⁱⁱⁱ Amnesty International Report of 1995

^{iv} Report on European Community investigative mission into treatment of Muslim women in the former Yugoslavia 1993

^v ICJ Statute, Article 38

^{vi} Prosecutor V Tadic, IT-94-1-AR72, Decision on the Defense motion for interlocutory appeal on Jurisdiction, 2 October 1995, para 70

^{vii} Observations report, US Department of State, Report to Congress on incidents during the recent conflict in Sri Lanka -2009

^{viii} Between the United States and Prussia, 1785, Article XXII

^{ix} Geneva Convention I, art.12; Geneva Convention II, art.12; Geneva Convention III, art.16; Geneva Convention IV, art. 27; Additional Protocol I, art. 75; Additional Protocol II, art. 4

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- ^x Geneva Convention III, arts 25, 29, 97 and 108
- ^{xi} Geneva Convention III, art. 49
- ^{xii} Geneva Convention III, art. 88
- ^{xiii} Geneva Convention IV, art. 97
- ^{xiv} Common Article 3(1) 'shall in all circumstances be treated humanely'; Additional Protocol II, Part II contain this principle more than all this principle is a reflection of norm of customary law.
- ^{xv} Prosecutor V Aleksovski, IT-95-14/1-A, Judgement ,24 march 2000, para 26
- ^{xvi} AP II, Part IV, Article 3 (1)& 4(1)
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