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## Armed Conflicts and Sexual Violence Against Women: An Inevitable Accompaniment?

*Silahlı Çatışmalar ve Kadınlara Yönelik Cinsel Şiddet:  
Önlenemez Bir İkili Mi?*

### Abstract

Violence against women – rape and all kinds of sexual assault – during armed conflicts is a practice which was known but ignored by human rights discourse and humanitarian law for many years. When states and ideals legitimize killing and other acts of violence, rape is seen as an unfortunate by-product. Therefore, it is common to think about sexual violence against women in armed conflicts as “coincidental”. However, normalizing rape and sexual assault contains the risk of permitting sexual violence and legitimizing its use as a weapon of war. This article will analyse the development and mechanisms of International Humanitarian Law, which is also known for the law of war, with a feminist perspective. It will be argued that International Humanitarian Law lacks effective measures to counter sexual violence.

**Key Words:** Feminism, International Humanitarian Law, sexual violence

**JEL Codes:** N40

### Introduction

During armed conflicts, whether as combatants or civilians, women are subjected to the usual violence of war, just like men. Just like men they are killed, tortured, dislocated, captured, starved or enslaved. However, sexual violence is mostly gender-specific. Although sexual violence targets men and boys from time to time, it is the

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women and girls who are the primary victims. Acts of sexual violence against women during armed conflicts are performed in various ways. These may include rape, forced sexual intercourse or other sexual acts with family members, forced impregnation, sexual mutilation, sexual humiliation, performing medical experiments on female reproductive or sexual organs, forced abortion, forced sterilization, forced prostitution, forcing women to offer sexual services in exchange for necessary materials and services, forcing women to offer sexual services for the protection of their children, forced human trafficking, forced sexual slavery and forcing women to become objects in pornographic materials (Schneider, 2007:917 – 918). Forced impregnation and forced sterilization are types of violence specific only to women.

1990s have witnessed the emergence of a feminist questioning of the International Humanitarian Law. This criticism was both an outcome and a result of the widespread occurrence of sexual violence in Bosnia and Rwanda and the formation of the International Criminal Court. Feminist criticisms mainly focused on the ineffectiveness of International Humanitarian Law in protecting women from sexual violence. Analysing Humanitarian Law from feminist perspective requires examining both the unique experiences of women during armed conflict and analysing the existing legal protection systems. Therefore, this paper aims at providing a general outlook of the International Humanitarian Law with respect to sexual violence against women. By following the aforementioned perspective, this paper will firstly focus on the feminist arguments aiming to develop a rights based approach to violence against women. Then, the second part will deal with the development of prohibition of sexual violence in Humanitarian Law. The existing legal scheme will be discussed lastly.

### **1. Women's Rights As Human Rights**

Sexual violence contains many elements which are mainly based on patriarchal practices. Patriarchal hierarchies and protectionist values intensify in times of conflict, which makes women an easier target for sexual violence during conflicts. Since ancient times, the protection of women was considered a part of the male honour. Women have been seen as a part of men's property and her chastity is protected by men, therefore, sexual violence against women was regarded not only as a crime committed against the woman herself, but as an act of humiliation committed against her owner - her father, her husband, etc. (Brownmiller, 1984: 44-45). When taking care of women is the main indicator of male success, it naturally follows that the winners of war will not only freely loot the property of the defeated, but also his women. Women were perceived as spoils, and rape was used as a promise to motivate soldiers during war propaganda throughout the history (Brownmiller, 1984: 80). It is the concept of honour situated in women's bodies that makes war time sexual violence such an effective tool of terror (Farwell, 2004: 394). Therefore, raping women gives the fighting men the message that they are too weak to protect their women, and sexual violence is used as a weapon of war to arouse fear in the hearts of civilians (Cole, 2011:48-49). As Brownmiller puts it, "the body of the raped

woman is a ritualistic field of war, a parade field for the band and flags of the winner. The game played over the woman's body is a declaration sent from one man to another, an undeniable proof of victory for one side and of defeat and destruction for the other" (Brownmiller, 1984: 45). When men's honour is defined in relation to women, rape will be perceived as a humiliation of the society in general and sexual violence will turn into a weapon of war.

Another issue to be considered when examining sexual violence against women is the destruction of women's ethnic and national roles in the patriarchal mentality: continuation of the lineage and doing this in a legitimate way. Through control of the bodies by male members of the society, it is possible to maintain a pure lineage and a pure ethno-cultural identity. Therefore, women are targeted at armed conflicts not only because they are women but also because they are members of a race, nation, ethnicity or a religion which is specified as an enemy by the assailants. When patriarchy and enmity is combined, sexual violence turns into a war strategy. Therefore, it is obvious that "sexual violence is not only an attack on the male territory of assured female chastity, paternity, and procreative rights as constructed in patriarchal terms; it is also a strategy to carry out political objectives of ethnic cleansing and genocide" (Farwell, 2004: 395). As the following sections reveal, it was found out in Bosnia Herzegovina and Rwanda that the intention of assailants in both countries was not only having the pleasures of a spoil or terrorizing people, systemic rape and sexual violation was used as genocidal assaults.<sup>1</sup>

The feminist movement aims at defending and developing women's rights as the rights of half of humanity, within the general framework of human rights discourse. The movement is principally based on the premise that women's problems are not separate from global human rights agenda, but that they are a neglected aspect of it. In this context, the movement considers women's possession of an equal status with men in various areas of life (women's equality) as a fundamental human right. The equality of women, half of humanity, is played down to a matter of private life whereas men's main concerns in the public life (i.e. mainly first generation rights such as freedom of speech, freedom from torture etc. These are defined in relation to public life, whereas women's roles are mainly defined in the private sphere. For example, the internationally accepted definition of torture requires the presence of or the knowledge of a state authority -

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<sup>1</sup>Japanese "Comfort Women" might be regarded as a different case, though. The term "comfort women" refers to the sexually enslaved women during World War II by the Japanese army. Women in invaded territories by the Japanese army (or with the promise that they will work at different jobs in the Japanese army) and turned into sex slaves for the Japanese soldiers fighting in different regions of the Japanese Empire. It has been asserted that this was a method for running the war machine rather than using sexual violence as a means of terror or humiliation. The purpose here is not to impregnate the women to change the lineage of the invaded lands but the increase the morale of the Japanese soldiers, to offer safe and accessible sexual intercourse, and to avoid the impression that the "honourable" Japanese soldiers tortured the people of the invaded lands by raping their women (Askin, 2001: 21)

Torture Convention, 1984, Article 1.1. On the other hand, most women witness systemic torture domestically, which does not comply with the international definition and therefore, no protections were foreseen) are considered as the main problems of the humanity. Therefore, the consideration of women's rights separate from human rights maintains the treatment of women as second-class citizens on a global scale (Charlesworth, 1995: 105).

The violations of women's human rights are mostly based on gender discrimination. Forms of discrimination and violations which disregard women's human rights occur only because the victim is a woman (Bunch, 1990: 486). Although the necessity to establish a concrete and direct connection between human rights and women's rights is ironic, the fact that gender inequality is the most urgent human rights problems proves that a self-evident fact (i.e. that women's rights are human rights as women are human, too) can be easily overlooked within the circle of deep-rooted and maintained ideas and practices (Hawkins, 2012: 159). In this context, the women's human rights movement has focused on human rights abuses caused by gender discrimination. These abuses women witness because of their gender have become the most outstanding and important matter which the movement had to deal with (Bunch, 1990: 487).

The failure to perceive women's rights as human rights maintains the misconception that women's rights are of a lower status than "men's" rights. In other words, detachment of "women's rights" from men's rights reflects and reinforces the tradition that their violation does not constitute a violation of the law. A major part of the argument underlying the feminist criticism of the human rights theory is that the criteria developed to define and measure the human rights violations is based on the male norm. In this case, it is necessary to develop a new human rights theory. To sum up, the feminist legal theory regards international human rights as something patriarchal, formal and hierarchical.

### **1.1. Disregarding Women's Experiences**

One of the reasons why women's problems and the violation of their rights is a neglected aspect of the human rights agenda is that the international human rights law reflects on the experience of men rather than that of women. Human rights works within a framework aimed at solving the problems of men face in the public sphere (Charlesworth, 1994: 68). The majority of human rights definitions and the mechanisms prioritize the violations of rights which concern the male individuals and citizens (Bunch, 1990: 487).

Feminist movement not only emphasized that the conceptualization of human rights and its mechanisms are based on male experience but also draws attention to the fact that the operation of the existing human rights law is formed on the basis of gender discrimination. In this context, the movement has emphasized that men dominate the law making organs of the international legal system. For example, Felice Gear emphasized

the structure of UN while explaining why women's issues were not addressed in the human rights society (Gaer, 1989). According to Gaer, all organs of UN tend to focus on civil and political rights rather than socioeconomic rights when addressing human rights. Gaer claims that there is a lack of awareness among the human rights organizations in relation to social gender inequality. Finally, Gaer asserts that there exists a widespread understanding in the UN General Assembly that discrimination is a private matter and that it lies outside the states' scope of responsibility. That the content and operation of the existing human rights mechanisms is male dominant casts a shadow on the universality and objectivity of international human rights law (Charlesworth, 1995: 103). Therefore, the feminist movement has managed to place sexual assault, rape under police supervision, domestic violence, forced prostitution, wife battering, violation of reproductive rights, infant murders and insufficient access to healthcare services, all of which are women's experiences that are inadequately represented and neglected in the present human rights framework, at the centre of attention and struggle.

Women's human rights violations traditionally focus on whether women can adequately use their civil and political rights or on the violations which are committed by state officials and concern the bodily integrity of the individual. On the other hand, feminist criticism suggests that we look beyond the public domain in which violations were performed by state officials, and examine the behaviours in the private realm in order to expose the violence which the traditional human rights doctrine ignores or does not want to deal with. Bunch defines numerous mechanisms in which "sexism kills". For example, the usage of amniocenteses to determine the gender before birth results in more abortions of female foetuses. In many countries, girls are less nourished than boys and breastfed for a shorter period of time. They receive less frequent medical care and controls, and they die or are handicapped mentally or bodily at higher rates than boys due to malnourishment. Violations against women include wife battering, incest, rape, dowry death, female genital mutilation, and sexual slavery (Bunch, 1990: 488 - 489). Furthermore, the majority of refugee groups consist of women and children, which gives rise to shelter, food, medical treatment centre and in some cases nationality right issues.

Women are also the most obvious victims of armed conflict. In a report prepared for the UN Commission on Human Rights, it is stated that:

[...] Rape is defined in gender-neutral terms, as both men and women are victims of rape. However, it must be noted that women are at more risk of being victims of sexually violent crimes and face gender-specific obstacles in seeking redress (McDougall, 1998: 8).

Further, women experience war and its aftermath differently from that of men. Violence that women experience during and after armed conflict usually take many forms such as rape, slavery, forced impregnation or miscarriages, kidnapping or trafficking, forced nudity, and disease transmission (Manjoo and McRaith, 2011). It is relatively common for a society to experience an increase in trafficking, forced

prostitution, domestic violence, and rape following a major war. Some of these issues, more particularly domestic violence and trafficking increase after the conclusion of a war than were experienced during war (Manjoo and McRaith, 2011).

## 1.2. Public/Private Dichotomy

In order to handle gender discrimination within the human rights discourse in a meaningful way, it is necessary to discuss various fundamental theoretical issues first. How much should human rights concerns deal with the private sphere which was traditionally left outside the state regulation? What is the state's responsibility in the actions and the human rights violations of the citizens in the private sphere?

Historically, the division between "public" and "private" is based on the "public" world of economic and social relations and the "private" world of the family and domestic life. These two areas have been linked to male and female genders respectively. This distinction is used to explain the gender based division of labour and restricts women's participation in the "public" sphere. Asymmetrical values which prioritize the male world and legitimize the male dominance (Charlesworth et. al, 1991: 626-627).

Distinction between public and private spheres is central to the liberal theory and is useful in explaining male domination in liberal societies. Within the theoretical boundaries of liberalism, regarding something as "private" denotes that there is no social responsibility for its correction. Therefore, "private" is situated outside the reach of the liberal state. According to the feminist perspective, as long as privacy occurs within the "private" sphere of the family and lies outside the legal sanctions, it becomes a mechanism which secretly supports violence against women (Schneider, 1991: 975 - 984). The concept of privacy is legitimized by the human rights doctrine and is seen as a source of oppression and a social structure which sustains the secondary position of women within the family. Therefore, this dichotomy institutionalizes the inequality between genders.

By claiming that "the personal is political", feminist theory asserts that the relations experienced between men and women in the so-called "private sphere" (i.e. privacy) are political in essence because they embody the domination and subjugation structures (Schneider, 1991: 977). The term "private sphere" is generally used for the personal choices, actions and interpersonal relations which the state should not interfere. However, this term is also used in relation to domestic sphere. Therefore, the point here is not whether the state has the right to intervene personal privacy, but whether it should intervene domestic life and the family.

Feminist movement has drawn attention to the public - private spheres as the reason for the disregard of women's rights as an integral part of the human rights framework. The conceptualization and operation of human rights are traditionally concerned with the forms of oppression which occur as a result of the doings or

overlooking of the state. In other words, historically, international law has focused on the violations committed by the state against the individual. The fact that the most severe violations of women's human rights occur in the private sphere instead of the public sphere makes the human rights law and mechanisms' state-centred perspective biased against the women. Human rights generally and primarily operate in the public sphere; which is the world of the governments, politics, economics and business, and leaves out the private sphere (i.e. the world of the family and the home) where women's human rights have been mostly violated through social gender based violence and abuse.

The violation of women's human rights is a fact which occurs most commonly and severely in the private sphere (Charlesworth, 1994: 72). Therefore, the violation of women's human rights occurs in situations where not only the state but also private individuals are perpetrators. Private individuals who violate women's human rights are the members of communities, work places and families in which women are a part of. In this context, feminists have drawn attention to the fact that, although states are not directly responsible for the human rights violations where private individuals are perpetrators, they can be held responsible for allowing such violations.<sup>2</sup>

## **2. Protection of Women In Humanitarian Law**

Rules concerning armed forces and civilians during armed conflicts are addressed by International Humanitarian Law. However, this does not mean that human rights are completely suspended during armed conflicts, war or other public emergencies. The International Covenant on Civil and Political Rights of 1966 list the non-derogable fundamental rights as the right to life (Article 6), freedom from torture (Article 7), freedom from slavery (Article 8 –paragraphs 1 and 2), freedom of movement (Article 12) and the principle of “no punishment without law” (Article 15), recognition as a person before the law (Article 16), and freedom of thought, conscience and religion (Article 18). UN Convention on the Rights of the Children (1989) obliges states to protect children from sexual assault and torture (Articles 34, 37, 38). The Convention for the Prevention of Torture (1984) states that “no exceptional circumstances whatsoever may be invoked to justify torture including war, threat of war, internal political instability or any other emergency” (Article 2). Article 15 of European Convention on Human Rights (1950) states that the right to life (Article 2), freedom from torture and inhuman treatment (Article 3), freedom from slavery and forced labour (Article 3), and the principle of no punishment without law (Article 7) cannot be derogated even during war or another public emergency threatening the life of the nation.

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<sup>2</sup> The European Court of Human Rights has taken some significant decisions claiming state responsibility in relation to gender-based violence. See *Kontrova v Slovakia* (2007), *Bevacqua and S v Bulgaria* (2008), *Opuz v Turkey* (2009), *E.S. and Others v. Slovakia* (2009).

In addition to these rights which cannot be derogated, it is also possible to mention *jus cogens* norms (peremptory law rules) such as genocide, war crimes, torture, slavery and crimes against humanity. According to Article 53 of the Vienna Convention on the Law of Treaties (1969), “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character” and “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”. As a result, the states freedom to conclude agreements is restricted with the fundamental values of the international society. The importance of the *jus cogens* doctrine stems from the fact that it demonstrates that the international community has common norms and they must be respected. Therefore, *jus cogens* principles protect the most basic and valuable interests of the international community (Charlesworth and Chinkin, 1993: 66)

The most fundamental human rights principles are considered *jus cogens*. The rules accepted by the international community are performing or allowing genocide, slave trade, murder or forced disappearance, torture, arbitrary detention or systematic racial discrimination (Charlesworth and Chinkin, 1993: 68). As a result, these actions are prohibited regardless of time and place. It will be demonstrated below that sexual violence fits in with the *jus cogens* norms – genocide, enslavement and torture and sexual violence are closely related.

### **2.1. Violence Against Women in International Humanitarian Law**

International Humanitarian Law has set forth regulations aimed at minimizing the effects of armed conflict on civilians. These regulations include the restriction of the context in which the conflict will occur, regulation of the principles of land, sea and air combats, treatment of prisoners of war, and the separation of fighting soldiers and the civilians. The basic tenet of Humanitarian Law is not targeting the civilians during war and protecting them from the hazards of war as much as possible. Articles 48 – 58 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War dated 2 August 1949 addresses the protection of civilians. These articles ensure that it is only military objects that can be targeted; not the civilians. Acts or threats of violence which are specifically aimed at terrorizing the civilians are strictly prohibited. However, the Geneva Conventions and the additional protocols acknowledge that civilian casualties are inevitable during war. Death of civilians does not denote that a war crime has been committed. The objective here is the prevention of targeting the civilians. Serious violations of Humanitarian Law puts criminal responsibility on those who do not take necessary measures to stop the violators and the crime, and who do not prevent the crime itself – particularly on the military, civilian or political leaders.

The law of war includes many provisions regulating many subjects in detail, such as the number of letters a prisoner of war can receive every month (Third Geneva

Convention, Article 71), the conditions for the usage of internees (Fourth Geneva Convention, Article 95), and the protection of the combatants and the civilians. However, it includes only a few provisions as to the situation of women (Askin, 2003: 294).

Before the 19th century, when the Humanitarian Law started to emerge, the law of war was mainly based on traditions, military rules and religious teachings. In 1300s, the Italian lawyer Lucas de Penna suggested that rape during war should be considered equal to rape in peace time. In 1474, an international court martial condemned Sir Peter Hagenbach to death for not stopping his soldiers from committing war crimes which included rape. In 1500s, lawyer Alberico Gnetili claimed that rape was illegal at times of war. In 1600, Hugo Grotius, the pioneer of international law, argued that sexual assault during wartime should be punishable (Askin, 2003: 299).

The 1863 Lieber Code which was drafted during the American Civil war is considered as a first attempt in which modern ideas about the law of war have been incorporated. The Lieber Code considers rape one of the most serious war crimes and punishes it with death or a punishment which is proportionate to the severity of the crime (Article 44). The Lieber Code has influenced the legal arrangements in Europe, and following the invitation by the Russian Czar Alexander II, 15 European countries convened in Brussels in 1874 and accepted the Brussels Declaration which regulated the rules of war through an international convention (Inal, 2013: 63). Article 38 of the Brussels Declaration states that the honour and rights of the family, the lives and private property of people, their religious faiths and prayers should be respected. The Hague Convention of 1907 also refers to sexual violence implicitly by adopting the same phrase: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected" (Article 46, 1907 Hague Convention IV respecting the Laws and Customs of War on Land).

There were no female delegates at the 1907 Hague Peace Conference, although various women groups from 23 countries joined the peace movement under the International Council of Women (ICW). Although the ICW submitted a petition which was signed by two million people requesting peace, they did not bring up sexual violence. Therefore, it is safe to say that the absence of female delegates at the Conference negatively contributed to the neglect of sexual violence against women and rape. Feminists could only start to express their reactions to the effects of war on women only after 1913 (Inal, 2011).

## **2.2. The Contributions of Ad-Hoc International Criminal Courts**

The practices of ad-hoc international criminal courts played an important role in the categorization of war crimes, genocide and crimes against humanity, and particularly with respect to the application of individual criminal responsibility for such crimes. The content of crimes against humanity, war crimes and genocide was determined for the first time through the ad-hoc courts, and each crime was categorized separately,

independently and systematically. The decisions of ad-hoc courts are of historic importance as they ensure the prosecution of individual criminal liability and lay the foundation for the formation of international humanitarian legal principles.

The War Crimes Commission established by the end of World War I declared rape and forced capture of women and girls for sex slavery a war crime along with other thirty crimes (Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 1920: 114). The Nuremberg and Tokyo Tribunals, and International Criminal Court for former Yugoslavia (ICTY) and International Criminal Court for Rwanda (ICTR) which were established to punish the individuals that committed crimes against humanity, genocide and war crimes contributed considerably to the formation of the principles of international criminal law. The decisions of these courts helped the establishment of the International Criminal Court in 1998, the formation of procedural law rules, and the trial and punishment of serious international crimes.

### **2.2.1. Nuremberg and Tokyo Tribunals**

Victorious Allies of the Second World War convened in London in June-August 1945 and signed the "Agreement for the prosecution and punishment of the major war criminals of the European Axis" and drafted the Charter of the International Military Tribunal (Nuremberg Tribunal). The Tribunal was established in Nuremberg on 20 November 1945 and consisted of one judge and one prosecutor from each of the four Allied states (USA, Great Britain, USSR and France). Suspects representing the Nazi diplomacy, economy, policy and military leadership were prosecuted for "crimes against peace, war crimes, and crimes against humanity". Article 6 (b) of the Charter which defines war crimes as murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. Article 6(c) defines crimes against humanity as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population; or as persecutions on political, racial or religious grounds. Both of these definitions can constitute a basis for the prosecution of crimes committed against women; however, the tribunal opted not to address these issues openly (Askin, 2003). Nuremberg Tribunals allowed the prosecution of individuals in the international law and the possibility of prosecuting sexual violence against women arose. However, it was not until the decisions of Rwanda and former Yugoslavia Tribunals that sexual violence against women and rape was prosecuted as a war crime. It is a fact that sexual violence was used as a weapon of war during World War II; according to hospital records, more than 100,000 women were raped in Berlin in the last two weeks of the war (Brownmiller, 1984: 79-97).

The second important prosecution process was the Allied Control Council's authorization of German courts to render decisions as to the crimes committed by

German citizens against other German citizens and stateless individuals during the war with the Law No. 10. In Article 2 (d), torture and rape were defined as crimes against humanity. In this context, there were not any rape cases among the 925 cases which were prosecuted; however, the doctors who conducted unethical experiments on women, the officials who permitted forced sterilization, forced abortion and sexual mutilation in concentration camps were punished (Askin, 2003: 302).

Another post-World War II *ad-hoc* tribunal was the International Military Tribunal for the Far East (Tokyo Tribunal). It was established to prosecute Japanese war criminals and followed the example of Nuremberg Tribunal. Therefore, the statutes of both of these tribunals are identical save for minor differences in the definition of crimes. The crimes which fell in the jurisdiction of the Tokyo Tribunal were crimes against peace, war crimes, and crimes against humanity. Charter of the International Military Tribunal did not address rape and sexual assault, just like the Nuremberg Charter. However, unlike the Nuremberg Tribunals, it prosecuted the rape of civilian women and medical personnel. The Tokyo Tribunal convicted top level Japanese administrators and commanders, including the Minister of Foreign Affairs, Koki Hirota, for not preventing the actions of the personnel under their command (Cole, 2011: 49). Commanders who did not prevent, stop or punish the crimes committed by their subordinates are held responsible for the crimes they commit. Although the Tokyo Tribunal did not reach a verdict as to “comfort women”, civil cases have been filed and resolved starting from 1990s regarding sexual enslavement of 200,000 women for the Japanese army.

The death of millions of civilians during the World War II, revealed the necessity to amend the 1864, 1906 and 1929 Geneva Conventions. Four new conventions, Geneva Conventions of 1949 were drafted. These conventions are not only a part of the international law but are universally binding rules whether states are party to it or not (Tadic Decision of the Former Republic of Yugoslavia International Criminal Court (Prosecutor v. Tadic, 1999)).

1949 Geneva Convention regulates the treatment of sick, wounded and shipwrecked members of the armed forces, civilians and prisoners of war. Of all of the 1949 Geneva Conventions, only the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention) contains a provision concerning rape. Pursuant to Article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention):

“Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”

The 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict by the United Nations General Assembly does not mention sexual violence at all. Article 5 of this non-binding Declaration considers all kinds of oppression, cruel and inhuman treatment of women and children during military operations and in occupied territories a crime. However, although rape and other sexual violence acts are the most frequent inhuman treatments applied to women in occupied territories and during armed conflicts, destruction of dwellings and forcible eviction were mentioned in the text of the declaration whereas rape and other sexual violence acts were not explicitly mentioned.

Sexual violence was mentioned only once in both of the Additional Protocols annexed to the Geneva Conventions in 1977. Pursuant to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault” (Article 76, para. 1). Pursuant to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” (Article 4, para. 2(e)) are and shall remain prohibited at any time and in any place whatsoever.

On the other hand, it is worth mentioning that there are several clauses that might be designed as a protection mechanism for women against sexual assault. Article 25 of the Third Geneva Convention (relative to the Treatment of Prisoners of War) requires that “in any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them” and by Article 29 “in any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them”. Similarly, Article 85 of In the context of non- international armed conflicts, Additional Protocol II requires separate quarters for women internees or detainees, (unless accommodated as a family), and that they be under the immediate supervision of women Article 5 para 2 (a) of Additional Protocol II.

Despite the fact that the sexual violence experienced by women and girls are known, this subject has not been addressed in fundamental texts, and they have not been mentioned at all until the decisions of Former Yugoslavia and Rwanda International Criminal Courts in 1990s. This neglect can only be explained with the patriarchal perspective of those who create and apply the international law. The feminist theories assert that the operation of international relations and the state are gendered and that the non-existence of women in these processes results in disregarding women’s issues (Enloe, 1990). Feminist international relations theory suggests that the fundamental reason

underlying women's failure to make themselves heard in international relations is that they lack the "armed civic virtue". As the holders of "armed civic virtue", men are considered active individuals because of their contribution to the protection of sovereignty and security whereas women are correlated with peace and perceived as dependent and weak victims who need the protection of warrior males. Since they do not contribute to the protection of the sovereign state, women are invisible in the political arena and they cannot hold powerful positions (Tickner, 1992). In this case, one should not be surprised by the exclusion of sexual violence from the international law instruments which are created by an international system dominated by male members. Not having access to the development process of international law hinders women's agenda to a great extent (Inal, 2011: 40). On the other hand, two out of three chief prosecutors in the Former Republic of Yugoslavia International Criminal Tribunal and Rwanda International Criminal Tribunal are women. The presidents and numerous judges employed in those courts were also women (quoted by Askin, 2003: 2008, footnote 40).<sup>3</sup>

### 2.2.2. International Criminal Tribunes of former Yugoslavia and Rwanda

International Criminal Tribunal for the former Yugoslavia (ICTY) was established in order to prosecute persons who were responsible for the crimes which included serious violations of international humanitarian law in former Yugoslavia. ICTY dealt with severe violations of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity. Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia regulates crimes against humanity by situating rape openly as a crime against humanity. For the first time in history, sexual violence within the context of an armed conflict has been regulated as a crime necessitating individual criminal responsibility (Askin, 2003: 318).

Another criminal court which was established by the UN Security Council is the International Criminal Tribunal for Rwanda (ICTR). The disputes between the Hutus and Tutsis in Rwanda escalated into a conflict in 1994 and Hutus massacred more than 500.000 Tutsis within a relatively short period of 5 months. After the conflicts ended, the UN established the ICTR in 1994 with the Security Council Resolution No. 955. The Rwanda Tribunal was very similar to the Yugoslavia Tribunal in terms of structure since it was modelled after it. Article 3 of the Statute of International Criminal Tribunal for Rwanda considers rape as a crime against humanity. Unlike the Yugoslavia Tribunal, the

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<sup>3</sup> It is also worth mentioning that during the Appeals Chamber Judgement Prosecutor v. Furundzija at the Former Yugoslavia Tribunal, the Defence demanded the presiding judge, Florence Mumba to be disqualified due to the appearance of bias. The claim was that prior to her election as a Judge at ICTY, Mumba had served as a representative of Zambia on the United Nations Commission on the Status of Women, during which the Commission rigorously condemned wartime rape and urged its punishment. The Defence was implying that a feminist judge would be biased in a trial dealing with wartime rape (see Prosecutor v. Furundzija, Judgement, IT-95-17/1-A, 21 Jul. 2000).

Statute of the Rwanda Tribunal did not only consider sexual violence act a crime against humanity, but stipulated in Article 4 that rape was an illegal act committed against the honour of the person and was a violation of the Geneva Conventions and its Additional Protocols.

The establishment of ICTY and ICTR played a very important role in criminalizing sexual violence. The Statutes of the Tribunals and their decisions have been vital in the identification of sexual violence as a war weapon instead of a natural consequence of war. No other form of sexual violence except for rape and forced prostitution was expressly regulated in the Statutes of Yugoslavia and Rwanda International Criminal Tribunals. In addition, the Tribunals referred to all forms of sexual violence within the scope of crime against humanity, genocide and war crimes in their judgements. A few of the landmark cases will be mentioned below.

The Akayesu case of the Rwanda Tribunal (ICTR-96-4-T, 1998) introduced the definition of rape and sexual violence in international law (para. 688). Rape was defined as “a physical invasion of a sexual nature committed on a person under circumstances which are coercive”. The Judgement in Akayesu does not define sexual violence only as a physical act; forcing someone to get undressed and stay naked in public, and all kinds of coercion which relied on threat, intimidation and fear were considered sexual violence. Akayesu decision underlines the fact that rape and other forms of sexual violence may be used as a means of genocide (para. 688) and that widespread and systemic assault against civilians is considered a crime against humanity.

Genocide is a crime which is based on the elimination of groups of people and which threatens the existence of mankind. Genocide has been defined in Article 2 of the 1948 Genocide Convention. Pursuant to the said article, “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group”. These actions are as follows: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

In fact, genocide is a coordinated plan of different actions aiming at the destruction of essential foundations of the life of a national, racial, ethnic, or religious group. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. It is widely accepted that following the entry into force of the 1948 Genocide Convention, its provisions became *jus cogens*.

Genocide is not a crime which was expressly included in the Statutes of Nuremberg and Tokyo Tribunals. The first statement of claim based on genocide was accepted by the Yugoslavia Tribunal, and the first prosecution and punishment was carried out by the Rwanda Tribunal. In this sense, the Akayesu judgement has a historic meaning and importance due to the fact that it was the first decision to establish the criminal responsibility of individuals on account of genocide. The Yugoslavia Tribunal Statute, on the other hand, accepted the crime of genocide and quoted the relevant provisions of the Genocide Covenant verbatim. The International Criminal Court Statute, which functions as a universal court, adopted Article 2 of the Genocide Covenant verbatim, and filled all gaps in the law by setting forth detailed regulations about genocide. In this sense, individuals are held responsible for the genocide crime on both national and international level and are punished accordingly for the first time in history.

In the Akayesu judgement, the first connection was established between the acts of sexual violence and genocide, and the ICTY concluded that rape was one of the actions that constituted the crime of genocide. According to the decision, rape and other acts of sexual violence had to be considered genocide on condition that they were committed with the intent of destroying a national, racial, ethnic or religious group in part or in whole. The sexual violence acts which are performed to destroy women's ability to maintain the unity of a family, to harm a woman's reproductive ability, and to devalue a woman in the eyes of the society shall constitute a genocide crime if they are committed with the above-mentioned incentives. Rapes which are performed for genocide are usually systemic, and they are accompanied with forced impregnation or social alienation of women (Engle, 2005: 788). In the Akayesu judgement, it was stated that the measures taken for the prevention of pregnancies in the group did not have to be physical, and that pregnancies in the protected group could be prevented via psychological measures. For example, if a woman refused to bear children due the trauma she experiences as a result of a rape, this would be considered a prevention of pregnancies in the group and accordingly genocide. Therefore, various measures aimed at preventing pregnancies within the same group will lead to the crime of genocide. These might be mutilation of sexual organs, sterilization, forced birth control, separation of men and women and prohibition of marriage.

The ICTY also developed gender jurisprudence. Two important cases were *Celebici* (IC-96-21-T, *The Prosecutor v Zejnir Deliac et al*, 1998) in which the ICTY held that rape constituted torture, and *Foca* (IT-96-23-T, *The Prosecutor v Dragoljub Kunarac et al*, 2001) where it held that rape was a crime against humanity, and convicted the defendant of sexual enslavement. In the *Furundzija* judgement of the ICTY, the systematic rapes performed by Serbs for military reasons were considered as actions aiming at the continuation of the Muslim society, and changing the demographic nature in a specific area.

### 3. Recent Developments in International Humanitarian

The precedents set by ICTR and ICTY regarding rape is believed to provide a new avenue for remedy and protection for rape victims, which had not previously been available under international law (Manjoo and McRaith, 2011). In fact, the jurisprudence of these ad-hoc international tribunals coincided with the final drafting of the (Rome) Statute of the International Criminal Court (ICC), and ICTR and ICTY were seen as important foundation for the codification of sexual violence in the Rome Statute. The Statute was adopted in Rome on 17 July 1998 and the ICC came into force on 1 July 2002. The ICC is the world's first permanent international criminal tribunal set up to prosecute individuals for genocide, war crimes, crimes against humanity, and aggression (Spees, 2003).

In comparison to the Statutes of the ICTR and the ICTY, the Rome Statute is more comprehensive on sexual violence. The Rome Statute cites rape and other forms of sexual violence as crimes in their own right. Rape has been interpreted by the ICC as constituting genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group," (Rome Statute Article 6) a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," (Article 7) and a war crime "when committed as part of a plan or policy or as part of a large - scale commission of such crimes" (Article 8).

The Rome Statute, does not limit sexual violence to rape and defines a broad spectrum of crimes which include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and any other sexual violence of comparable gravity (Article 7 (1) (g)). Furthermore, persecution is included in the ICC Statute as a crime against humanity and the Rome Statute specifically recognized the gender basis of persecution.

However, the ICC is criticized for failing to fulfil its obligation to investigate, charge and prosecute these crimes in Lubanga (ICC 01/04 01/06), Katanga and Ngudjolo (ICC 01/04 01/07) and Bemba (ICC-01/05-01/08). ICC's failure to fully charge sexual violence may have serious repercussions. With no or limited judgements on sexual violence, it is questionable that these prosecutions will deter States from carrying out rape and other forms of sexual violence.

In the last few years, rather than the drafting of more treaties or conventions, many of the responses to calls for increased protection for women have involved soft law approaches, such as the UN Security Council Resolutions. In the year 2000, the Security Council adopted its Resolution no. 1325, claiming women's increased representation in conflict resolution and peacekeeping. Resolution no. 1820 of 2008 defines rape and other forms of sexual violence as war crime and asks for the elimination of sexual violence. Resolutions 1888, 1889 and 1894 of 2009 all aim to reinforce the protection of women and

children against sexual violations during armed conflict, as well as the role of women in post-conflict peace-building as was expressed in Resolution 1325.

### Conclusion

To sum up, it can be concluded that armed conflicts have the capacity to exacerbate existing inequalities in the society, and the patriarchal gender roles victimize women. The analysis of the International Humanitarian Law reveals its gendered perspective and incapacity to protect women from sexual violence.

The violent conflicts in former Yugoslavia and Rwanda has made it clear that sexual violence is not a natural by-product of war, but a strategy and tool which might even be used to the level of ethnic cleansing. Still, beginnings of the new millennium witnessed the categorization of sexual violence as war crime, crime against humanity and genocide. The jurisprudence of the ICTY and ICTR have been revolutionary. As noted before, genocide, slavery, torture, war crimes and crimes against humanity are violations of *jus cogens* norms, and both in the judgements of ad-hoc courts and the Rome Statute of ICC, many forms of sexual violence is considered as war crimes, crimes against humanity or even constituting genocide. Therefore, it is possible to claim that sexual violence - at least rape - has risen to the level of a *jus cogens* norm. This acknowledgement will be helpful in challenging the idea that sexual violence is a less important crime and will force states to protect women during armed conflicts.

It can be said that all these developments have made the international community sensitive towards sexual violence, which can openly be seen in the serial resolutions of the UN Security Council. However, these gains shall not be undermined by tolerance to violations of human rights of women and gender-blind judgements of the International Criminal Court.

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## SİLAHLI ÇATIŞMALAR VE KADINLARA YÖNELİK CİNSEL ŞİDDET: ÖNLENEMEZ BİR İKİLİ Mİ?

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### Özet

Silahlı çatışmalarda kadınlara yönelik şiddet - tecavüz ve cinsel saldırının her türü - insan hakları söyleminin ve insancıl hukukun bilinen fakat görmezden gelinen bir boyutu olmuştur. Devletler ve uğruna savaşılan düşünceler öldürmeyi ve diğer şiddet türlerini meşrulaştırınca, tecavüz savaşın talihsiz bir yan ürünü olarak görülmektedir. Bu sebeple silahlı çatışmalarda kadınlara yönelik cinsel şiddeti "rastlantısal" olarak görmek yaygındır. Ancak, tecavüzü ve cinsel saldırıyı normalleştirmek cinsel şiddete yol açmakta ve onun bir savaş silahı olarak kullanılmasını meşrulaştırmaktadır. Bu makale, savaş hukuku olarak da bilinen Uluslararası İnsancıl Hukuk'un gelişimini ve işleyişini feminist bir bakış açısından ele alacaktır. Makale, Uluslararası İnsancıl Hukuk'un cinsel şiddetle başa çıkacak yeterli önlemleri olmadığını öne sürmektedir.

**Anahtar Kelimeler:** Feminizm, Uluslararası İnsancıl Hukuk, Cinsel şiddet

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