

# A FEMINIST CRITIQUE OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

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## **Introduction:**

Sociologically feminism can be defined as,....“*a movement for social, cultural, political and economic equality of men and women. Though the issues of feminism might vary from culture to culture but they are globally tied together in their campaign to end gender-based discriminatory practices – and violence - against women<sup>2</sup>*”. No singular feminist perspective or unified theoretical framework exists around but essentially they all agree that socially and culturally institutionalized patriarchy and hierarchical structure of power between men and women are the source of all forms of violence and discrimination against women.

Demonstrating, how women-specific-violence is far more serious in its nature and effects, lacunas in the international human rights law (IHRL) and international humanitarian law (IHL) will be pinpointed from a feminist perspective. Women’s rights are pushed to the margins of IHRL and IHL, save offering additive and compartmentalized protections during armed conflicts and genocides. No denying a fact that remarkable changes are underway but in terms of structure and content, the law is inherently deficient and biased. Other than enforcement problem, overdeveloped role of the patriarchal state and societal-order also cause a barrier towards change. Where improvements are admirable, its impact and behavioural change is yet to be seen (Gardam J. 1998). Feminists claim that both national and international law is gendered, putting it rightly, male-gendered, conceptually, technically and procedurally. Jurisprudential framework and substance largely favour men (Fellmeth, A.X. 2000, 268-270). Drawing on feminist theory and research methodology, the proposal in hand aims to underline violence against women, particularly during genocides and armed conflicts, and proposes adequate reforms in the legal and political structures to eliminate the evil.

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<sup>2</sup> Definition of Feminism, See: <http://ezinearticles.com/?Definition-of-Feminism&id=1697184>

### **Violence against Women during Genocide and Armed Conflicts:**

Ethnic cleansing or wilful elimination of an entire social group by violent means, spurred by the state or a powerful faction of society, constitutes genocide. Civil war, war over religions, territories and ethnicity between one or more than one groups, happening internally or internationally, characterizes armed conflict. Although mass killing of men is inseparable from genocides and armed conflicts, women are specifically subjected to brutal physical violence and sexual assaults. Mostly it is women who face the terribly intensive, horrifying and bestial acts of violence in a genocidal situation and at times in armed conflicts too. Violent bands usually rape, humiliate and torture women to disgrace an adversary, a separatist group or a warring faction. History is witness that women have been brutally assaulted in Indian Gujrat 2002, Bosnia 1995, Rwanda 1994, Uganda 1979, East Pakistan 1971, Cambodia 1970-1975, Nanjing 1937 and several other places of conflict (Mojab, S. 2003: 1-2, Stewart, J.G: 2003, 313-315).

Horrendous torture was inflicted upon Tutsi women in Rwandan 1994. Coupled with rape, spears, arrows or sharp objects were pierced into their vaginas or women were shot into their genitals. Characteristic organs of Tutsi women such as pointed nose or long fingers were cut off. Tutsi women were rewarded to Hutu men for killing maximum Tutsis. Women were forced to have sex in exchange for temporary shelter or held captive for sexual slavery by the youth militia or military. (AI, 2004: 2-5). Abdomens of pregnant women were slashed open to throw their foetuses into the fire during the genocidal attacks on Muslim minorities in Indian Gujrat 2002. Along with sexual assault Hindu religious symbols were carved on women's bodies. *Bharat mata*, 'the motherland of India' was ideologically blended with the persona of Hindu women. Retrospective Muslim rule, interpreted as the mythological rape of Hindu women, justified the rape of Muslim women to reclaim *the motherland of India* (IIJ, 2003: 4-21). In the former Yugoslavia, striping off, public assault and humiliation of women was used as weapon of terror and ethnic cleansing.

The pattern of violence suggests that women's bodies are particular site of brutalities with innovative forms of torture during a conflict. Their bodies are assumed to be the reproductive medium of an ethno-religious identity (Sarkar, T. 2002). In their violent attempt of shifting the demographic ratio, the rapists describe their act as changing the victim's identity that reflects nationalist patriarchal notion of male 'germ' constituting an identity and woman's body

serving as medium. Humiliating women is perceived vital in constructing the masculine image of patriotic nationalist order (Panwani J. 16, IJ 2003: 30).

Rape often results in pregnancy, disease, divorce, stigma and stereotyping. Avoiding 'shame' victim women are usually abandoned or killed by their male relatives (Rowland, R. 1995: 12). Rape survivors and widows are discriminated or ostracised within their own communities. Contracting HIV/AIDs, fistula, trauma and other psychological disorders cause social humiliation. Many keep silent fearing stigmatization and marginalization. Many do not seek medical assistance, even if it is available, to cover the 'shame' of having been raped. Others can never get married (AI 2004: 5-7). Law enforcement agencies remain silent or collaborate with the powerful during genocides or armed conflicts. Numerous criminals cannot be brought to justice because of the patriarchal biases of the judges and prosecutors (AI 2005).

### **Inadequacy of International Human Rights and Humanitarian Law:**

'Intent' or *deliberate inflicting on group the conditions bringing about its physical destruction*' is defining characteristic of genocide, emphasising on 'the purpose of the offender' not the 'outcome.' For women the 'outcome of rape' is as serious as 'intent'. The term 'genocide' and its' subsequent definition ignores several aspects and impacts of genocide, women specifically experience. Therefore feminists prefer using 'gendercide<sup>3</sup>' i.e. sex-selective mass killing, coined by Marry A. in 1985. It sounds neutral but the rubric mostly covers humiliation and rape of women followed by murder (Gendercide Watch 2010). Gendercide happens both in times of peace and war. Nation-building, state-formation, identity-preservation and patriarchal culture are the key culprits causing genocide and armed conflicts. It is not a mere coincidence that patriarchy and state-violence go side by side. Actually all the state apparatuses and institutions are intertwined with patriarchal structure. Feminists argue that violence against men is classified as a matter of public concern, calling for state intervention, while rape and torture against women is identified as a private matter to be resolved by the individuals implicated (Fellmeth, X.A 2000: 668).

Suffering from a prolonged and deafening silence, it was only after the ICTY<sup>4</sup> 1995, that sexual violence against women was declared as grave breaches of human rights. Still the

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<sup>3</sup> Marry A Warren first coined in the term in her book, *Gendercide: The implications of sex selection* in 1985. She says that, by analogy, gendercide would be the deliberate extermination of persons of a particular sex (or gender)... The term also calls attention to the fact that gender roles have often had lethal consequences, and that these are in important respects analogous to the lethal consequences of racial, religious, and class prejudice" Her analysis mainly focuses of anti-female gendercide. Source: Gendercide Watch.

<sup>4</sup> International Criminal Tribunal on Former Yugoslavia (ICTY).

provisions of IHL and its subsequent protocols dealing with the protection of women address women's issues in relationship to men not as a subject on their own right. The clauses dealing with 'women's honour' actually call for protecting the attributes seen important to men, say modesty, chastity or reproductive role of women. The concept of men's honour, however is complicated, mainly circulating around his mental integrity. The said law assumes harms to 'a person' as harm to the state. States normally feel reluctant in claiming compensation for the persons politically and economically less significant i.e. mostly women. The UN Compensation Commission pertaining to Armed Conflict, however, recognizes claims for mental and bodily harm resulting from sexual assault but in practice the progress is slow. Protecting girl-child in armed conflicts, who are equally vulnerable, still receives little attention. Fair-trial demands and need for protecting victim and witness women remains tenacious, not necessarily inconsistent (Gardam & Charlseworth 2010).

Although UN World Conference (1993) declared violation of women's human rights as violations of fundamental human-rights principles and humanitarian law, stressing on states' effective response and laying emphasis on integrating women's rights into the mainstream of human rights that was followed by the declaration on the Elimination of Violence against Women acknowledging women's vulnerability during armed conflicts (Fraser A. 1999). But the existing regime does not consider the reality of women in letter and spirit, feminists believe. Once again the lacklustre behaviour of the state was observed in case of horrible sexual abuses against women in Rwanda. Deplorably, it took four years in prosecuting the first rapist and that too after a massive pressure from international women activists. Reports suggest that sexual violence against women in various types of conflicts is rather on the rise (Judith Gardam, 1998).

More than a decade down the road, it is clear that Vienna's success was limited. Despite its own assertion to 'integrate women's rights in the UN system' women's concerns continue to be marginalized. It even fails to insert the word 'women' where 'racial' religious, ethnic, linguistic, or other forms of oppression make a mention. Women's issues are lumped together on the margins. In reality, women face multiple oppressions, and 'additive approach' can hardly address it. Claiming rights as part of a group is easier than evoking provisions of gender-based discrimination and violence. IHRL's and IHL's tendency of ignoring or trivializing women's human rights is still the same. Women's point of reference is far removed from the international jurists undermining the range and impact of abuses on women. Entirety of their experiences falls 'outside' the scope of those theorizing and formulating law. Despite working group's enormous efforts, their recommendations could hardly move beyond the preliminary documents (Mertus & Goldberg 2000).

Authorising the state to eliminate abuses holds little significance to women as it means more powers to men and patriarchal orders within the state. State-sovereignty structurally undermines men's oppression of women. Manoeuvring public-private classification, men halt state intervention to eliminate injustices. The very division is manipulative, failing to contribute in policy measures favouring women. Women suffer violence more at the hands of men than from the state. Little change, hence-while, has occurred despite state's commitment in CEDAW to eliminate sexism from their societies. Several states are still reluctant even to sign in CEDAW (Fellmeth, X.A. 2000: 669-677, 695). The terms 'people' and 'everyone' used in UDHR ignores the fact of men wielding power and subjugating women. Subordinating compliance to the politics of culture UN undermines built-in violence against women. Male dominated definitions of 'rights' and 'freedoms' make women's rights' infringement invisible (Rowland, R. 1995: 9). Given the present order, holding expectations from the state to free women from cruel, inhumane and degrading treatment is a wild goose chase (Charlesworth & Chinkin 2000).

### **A Feminist Approach towards the Issue:**

Ontologically, reality is a social construct. So is the knowledge. Therefore, social deconstructionist<sup>5</sup> methodology to analyse, and constructivist approach<sup>6</sup> to resolve the problem are the most appropriate for the purpose. This simple idea holds profound implications in favour of women. Like all social knowledge, it presumes, IHRL & IHL has been created, framed and expanded or limited by our own experiences. Shaped and constructed by men, the present international regime, reflects and promotes their perceptions of reality and interests. Precisely, deconstructionist approach could be described as *"signifying a project of critical thought whose task is to locate and 'take apart' those concepts which serve as the axioms or rules for a period of thought"*.<sup>7</sup> From a feminist perspective, this method deconstructs, analyzes and understands the rules and values constructed by men, critique them, and strives to reconstruct knowledge from women's point of view. This method exposes the underlying prejudices and assumptions of the apparently gender-neutral laws. Despite their diversified theoretical positions most feminists agree on the strength and outcome of this method. Coupled with the deconstructivist method, feminist practical reasoning as a method of research can also help understanding women's

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<sup>5</sup> The method was popularised by the philosopher Jacques Derrida but later on used by several social scientists to analyse social problems, Sociologists in particular.

<sup>6</sup> Constructivism is a theory of knowledge or epistemology arguing that that humans generate knowledge and meaning from their experiences. The approach draws on the constructivist and experiential learning ideas of Jean Piaget. Piaget's theory of constructivist has had wide ranging impact on learning theories. Please See: <http://en.wikipedia.org/wiki/Constructivism>,

<sup>7</sup> David D. Allison as cited in What is Feminist Deconstruction: <http://deconstructingwoman.com/articles/about/>,

perspective, their feelings and experiences. The method prefers context, diversity and individual experiences over the abstract theories and notions, usually constructed by men. Disciplines like Sociology and Political Science are overly inclined towards generalizing social realities often ignoring disparities based on gender (Fellmeth, X.A: 2000).

What is significantly different and important in this approach is examining what's happening around and how to combat it through a women's lens, keeping in mind not to isolate women from multiplicity of factors affecting human rights. It observes that the 'additive approach' of putting women's concerns within the masculinity-defined categories and theories without altering the existing frameworks – of power, politics, rights and freedoms – is no less than a forced fusion bound to fail in practice. Conventional approach and women's rights cannot coexist. It is the epistemological framework that is meant to change entirely (Mertus & Goldberg 2010).

Contrasting conventional human-rights theorization – which is abstract, deductive and hierarchical - feminist approach is empirical, considerate and compassionate. It is self-conscious, tentative and rooted into the socio-political and economic realities. Conventional jurisprudence, essentialising human persons as legal entities, boils down international human rights into international politics. In-depth analysis reveals law to be inherently a gendered and oppressive system, vehemently purported by liberal nation-states. Feminist analyses underpin the insights of life that women experience differently from women (Binyon G. 1995: 2-5).

Several questions need to be raised while looking at the inherent lacuna of IL and its' failure to address violence against women in genocides and armed conflicts. Say, who constitutes law and in which socio-cultural context? It must be asked who is looking into the problem and how does he interpret it? What is the focus of his - as it is mostly a man - investigation? What does he infer from the way it occurred? How representative is the jury mainly with respect to gender? How much closer or removed the jurists are from reality? Whose views count? Also, questioning the place of 'rape' in domestic and international system of law is crucial.

Broadly it is important to ask whether the problem is being addressed as a human-rights problem or simply a breach of law. Are structural or institutional factors being considered? In other words, asking a women-question, that feminists always do, is very important. Questioning how the norms, practices and rules affect women is equally essential? This is less important to ask what efforts states are making to prevent violence against women. What is important to ask is whether the state is struggling to change the processes and

material conditions that regenerate male oppression and violence? What are the norms and values tolerating, condoning or supporting violence? In what manners state and patriarchal institutions encourage these conditions, why and who benefits from (Julie Mertus & Pamela Goldberg 2010)?

### **A Feminist Way Forward:**

The proposed research stresses on more inclusive, diversified and broad-based international human rights framework. A more expansive and broader epistemology of human rights will emerge from women's leadership, input and experiences. As a result an integrated spectrum of human-rights will come along with potential measures to eliminate gender-based violences. Examining human-rights with a gender-lens is almost a new strategy, more realistic and human-friendly, removed from bureaucratic, hierarchical and conventional complexes, woven by men in their favour. This approach is meant to dismantle public-private dichotomy suggesting viewing violence against women as violence against a dignified human person. It proposes to place systematic violence and oppression against women together with all other forms of systematic violences. Demanding women's equal representation in the institutions of power, justice and law enforcement agencies, it strives for a revolution.

Based on genuine and in-depth agreement of both men and women, including the flexibility of agreeing to disagree, it is the most powerful approach of understanding and constituting law. Balancing law, by removing its lope sided tendencies, justice can follow through. With feminist efforts will help incorporating not only women's experiences but of all the oppressed and powerless sections of society. A re-examination of Geneva Conventions, IHL, IHRL and UDHR from women's perspective is demanded, calling for a substantial change in content not of form only. Women assuming the leadership and decision making role in resolving and transforming conflicts, the problems might be resolved or at least minimised quickly. Precisely, inclusion and plurality is the essence of feminist approach. Broader outcome of feminist contribution in human rights is not women-specific; rather it engenders a profound impact for the betterment of whole society.

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