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ISLAMIC AND INTERNATIONAL HUMANITARIAN LAW ON RAPE DURING ARMED CONFLICT: A COMPARATIVE ANALYSIS

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Since time immemorial, rape has been a regular practice in all kinds of wars waged throughout the world. Sometimes, it is deliberately practice as a tactic of war to demoralise the enemy nation's population as a whole. So far, such practice during armed conflict has been outlawed under both Islamic and International Humanitarian Law (IHL). Nevertheless, this does not stop combatants of all backgrounds from committing rape in armed conflict. Accordingly, this paper aims at comparatively analysing the legal position of rape during armed conflict from both Islamic and IHL perspectives.

INTRODUCTION

The issue of rape in armed conflict has a long history and it is still on-going. The IHL did not have a clear definition of rape until recently.[1] The documents from the Nuremberg trials and Geneva Conventions in the aftermath of the World War II offered rather imprecise definitions of rape.[2] The outbreak of horrific wars in

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Yugoslavia and Rwanda in the early 90s shocked the world with incidences of mass rapes.[3] These wars, followed by the establishment of *ad hoc* tribunals for both, the ensuing proceeding and documents clarified the understanding and definition of rape.[4] The United Nations (UN) Security Council adopted resolutions that related the incidence of rape during armed conflict to the previously established terms of war crimes, crimes against humanity and even genocide.[5] As for the sources and documents of the Islamic law, there are numerous references to address the issue of rape in armed conflict.

The treatment of rape in Islamic International Law, Islamic Humanitarian Law, and Islamic Human Rights borrows the definition of rape from the Islamic Criminal Law. This definition and legal sanction of rape in Islamic Law is much stricter in comparison with those available under the Public International Law.[6] In contemporary times, there has been a great deal of debate about the issue of rape in Muslim countries. These debates have taken place in the larger context of violations of the Human Rights and Humanitarian Law by certain militant groups that use the prefix 'Islamic'. The response of the contemporary Muslim scholars has once again restated the position of the Islamic law *vis-à-vis* rape repudiated the claims and misconceptions about rape by both, Muslim extremists and Western writers.[7]

RAPE DURING ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW

Following the decades of evolution, the IHL has finally arrived at a concise definition of one of its key terms 'armed conflict'[8] and it identifies two categories such as international armed conflict and non-international armed conflict.[9] The norms for these two types of armed conflicts are obviously set in the major international humanitarian law conventions, especially the Additional Protocol I[10] and Additional Protocol II.[11] The traditional classification of hostilities into international armed conflict and non-international armed conflict enshrined in the Geneva Conventions[12] and Additional Protocols. These references to the two types of armed

conflict failed short of the proper definition.[13] The definition of the two kinds of armed conflict was coined in the chambers of *International Criminal Tribunal* for the former *Yugoslavia* (*ICTY*)[14] in the case of *Prosecutor v. Tadiæ*.[15]

The prevalence and incidence of rape internationally has reached alarming proportions, and the particularly disturbing circumstance surrounding it is relatively meek response of lawyers, judges and legal scholars in general.[16] This comes rather as an astonishing facet of it if we bear in mind clear condemnation of rape by the UN and classification of this type of crime in other documents of international law, not least the treaties of the international humanitarian law.[17] A perusal of the documents of the international humanitarian law in chronological perspective reveals that such direct condemnation of rape is relatively recent. The aftermath of the World War II and its judicial epilogue during the Nuremberg trials classifying it in moderate terms as a violation against a woman's honor or a harm perpetrated in private and domestic realm in the 1949 Geneva Convention (IV) is, for instance, unacceptable if we judge it by the yardstick of the present-day standards of the international humanitarian law.[18]

Ever since the Nuremberg trials and the Geneva Convention (IV) of the 1949, some significant steps in rape prevention have been made in national jurisdictions, albeit under instigation by the international institutions.[19] These positive steps and developments have taken place through treaty law as well as customary international law. These initiatives coming from the international treaties and customary law helped made States to pass national laws on rape prevention.[20] An important issue in this context has been the definition of rape, i.e., if this definition has to include some elements from the international law or it can be coined by the domestic judiciary. Since the international humanitarian law itself did not utilise a single definition of rape, the assistance in this regard came from the *ad hoc* tribunals of the UN in the late 90s.[21] It may be pertinent here to mention that Islamic International law had an impact on the development of public international law. A number of classical writers, the likes of

Francisco de Victoria (1480-1546), Suarez (16th-17th centuries), and Hugo Grotius (1563-1645) all were acquainted with the principles of International Islamic Law and were influenced by it.[22]

The sources and documents of international law offer extensive treatment of the crime of rape. Two aspects of this crime have particularly extensively been treated in the scholarly works in the field of international law, namely, the prohibition and definition of rape. Regarding the prohibition of rape, explicit passages and sanctions of it can be found in what is called treaty law and customary international law. The treaty law documents categorise rape as a crime that may be viewed within the context of a violation of the prohibition of torture. Moreover, this area of international law looks on rape from the perspective of gender discrimination.[23] Finally, the criminal act of rape is sometimes classified under the large category of an invasion of the right to privacy. The most serious prohibition of rape is pronounced when it is treated as a form of torture and discrimination. Here, as argued by majority of experts and practitioners of the treaty law, the prohibition is subsumed under a customary level and also constitutes an *jus cogens* or peremptory norm.[24] The prohibition of rape is clearly spelled out in two documents of international treaty law, namely, in the Geneva Conventions of 1949[25] and Rome Statute of the International Criminal Court.[26] This prohibition has been further developed and referred to in the proceedings of *ad hoc* tribunals, particularly the ICTY and International Criminal Tribunal for Rwanda (ICTR).[27] In addition to these the prohibition of rape has also reached a level of customary law in the Lieber Code and Martens Clause and in a number of UN Security Council Resolutions.[28]

Ever since the issue has been dealt with and sanctioned by the UN's organs, it has also become obligatory upon the States to adapt their national legislation towards prohibiting the crime of rape. However, what is missing in these UN Security Council resolutions is the appropriate definition of rape.[29] As is the case with many types of crime the conclusion of various cases at the

tribunals helped to arrive at a clearer view and definition of rape. Therefore, the definition of rape in international law is mostly derived from the judicial decisions of *ad hoc* tribunals.[30] Due to the gaps in international law, the tribunals, to a large extent, had to draw on general principles of law in order to narrow down the content and definition of rape. Although court decisions and verdicts constitute a subsidiary source of law and since their law-determining function is reserved to international law, for the evolution of the sexual violence regulations, judicial verdicts by the *ad hoc* tribunals and regional human rights courts have been the primary source of law.[31]

Dealing with gruesome reality of recent mass cases of wartime sexual violence and rape, the ICTR defined sexual violence and rape as: "any act of a sexual nature which is committed on a person under circumstances that are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact".[32] The ICTY, in its *Prosecutor v. Anto FurunÆija* case, arrived at a more graphic 'mechanical' definition of rape as follows:

(i) the sexual penetration, however slight:
   (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
   (b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against a victim or a third person.[33]

These definitions have been referred to in a number of other cases of both, ICTR and ICTY.[34] One of the most significant rape cases at the *ad hoc* ICTY tribunal has been the case of a Bosnian Serb paramilitary Dragan Zelenoviæ[35] who pleaded guilty "of personally committing nine rapes, eight of which were qualified as both torture and rape. He has also been found guilty of two instances of rape through co-perpetratorship, one of which was qualified as both torture and rape, and one instance of torture and rape through aiding and abetting. Four of the rapes he took part

in were gang rapes, together with three or more other perpetrators".[36] All these rape cases were committed against Bosnian Muslim women. Zelenovic was sentenced to 15 years imprisonment and after serving two thirds of his sentence, he was released from prison in September 2016.[37]

From the viewpoint of international humanitarian law and international human rights, it may be particularly important to stress that the UN Security Council, in its Resolution 1820, pointed out that: "…rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and stresses the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation".[38] This landmark resolution underlies that wartime rape may be tantamount to war crime, crime against humanity and constitutive to genocide and thus cleared the ambiguity and possibility for impunity in the definition and legal status of rape within the context of international law. Such stricter treatment of wartime rape can be deemed as being closer to the position of Islamic Humanitarian Law and Islamic Human Rights.[39]

RAPE DURING ARMED CONFLICT UNDER ISLAMIC HUMANITARIAN LAW

The Islamic Humanitarian Law delineates and elaborates both *jus in bello* (the rules regulating the conduct of war) as well as *jus ad bellum* (the justifications for resorting to war). It has elaborate writing and rules not only for international wars, but also for domestic or non-international wars. Regarding the question of the treatment of these fields in present-day scholarly writings, there are two challenges or tendencies towards subjective approach,

one by modern Muslim scholars and the other by Western authors.[40] Regrettably, scholars from both camps sometimes twist the objective data in their haste to prove their theses. Modern Muslim writers from the field of Islamic Humanitarian Law deal with the Islamic *jus ad bellum* sometimes owing to their perceived need to engage in misrepresentations of this area and the subject matter of *jihad* by some Western scholars while to some extent neglecting the Islamic *jus in bello*. On the other hand, their Western counterparts usually focus 'solely on giving various interpretations of the Islamic *jus ad bellum*, but have almost ignored the Islamic *jus in bello*'.[41]

Islamic Humanitarian Law draws on a number of verses from the Quran and several *Hadith* in its clarification about the groups of people who have immunity during military campaigns. These groups of civilians include, women, children, the elderly, the clergy (monks and priests), and the *al-Asif* (the hired men; workers hired by the enemy to do work not related to fighting). People from these five groups are deemed non-combatants and they must not be harmed during military activities at war.[42] As it can be seen here, the first in the list are women and children. Women from the enemy camp ought to be treated with full recognition of their honor and dignity, and unless they are directly involved in fighting against Muslims or inciting/financing others to fight the Muslim army, they must be protected from violations of their human and humanitarian rights, including and perhaps more so, violations of their honor that might be harmed through rape attacks or other forms of sexual violence.[43]

Although the Quran does not mention the issue of rape directly, it does contain some verses about adultery (*zina*). One such example is mentioned in 17:32, which warns Muslims against approaching *zina*. This verse is mentioned in the context of grave sins (*kabair*), and its manner, the circumstances surrounding *zina* are named as evil. In a number of other verses, we can find the elaboration on the proper punishment for those who committed *zina*, and this section will be dealt with closer scrutiny in a section below.[44] The classical collections of *Hadith* offer traditions on both

rape and *zina*. Rape and the punishment for it are mentioned in the following *hadith*: "Alqamah bin Wa'il Al-Kindi narrated from his father: 'A woman went out during the time of the Prophet Muhammad (*s.a.w.*) to go to *Salat*, but she was caught by a man and he had relations with her, so she screamed and he left'. Then a man came across her and she said: 'That man has done this and that to me'. Then, she came across a group of the Emigrants (Muhajirin) and she said: 'That man did this and that to me'. They went to get the man she thought had relations with her, and they brought him to her. She said: 'Yes, that's him'. So, they brought him to the Prophet Muhammad (*s.a.w.*), and when he ordered that he be stoned, the man who had relations with her, said: 'O Messenger of Allah, I am the one who had relations with her'. So, he said to her: 'Go, for Allah has forgiven you'. Then, he said some nice words to the man (who was first brought). And he said to the man who had relations with her: 'Stone him.' Then he said: 'He has repented that, if the inhabitants of Al-Madinah had repented with, it would have been accepted from them'".[45] In the commentary below the *hadith*, it is stated that: If a rape is proven against the will of the woman, according to Imam Malik and Shafi'i she deserves the dowry and the court has to help her in getting her right. In the view of Imam Abu Hanifah and Sufyan she does not deserve the dowry.[46]

Moreover, in a *hadith* narrated by Safiyya bt. 'Ubayd and recorded by Al-Bukhari, there is an account how rape cases during war were treated. In this *hadith*, a state-owned slave boy raped girl who was confined as war booty. It is further reported that 'Umar (*r.a.*) had the boy flogged and exiled, while the girl from the war booty was not punished as the intercourse was against her will.[47] As we can see here, similar to the treatment of rape cases in peacetime and drawing from the manner in which Islamic criminal law defines and treats rape cases rapists and the raped – the Islamic Humanitarian Law pronounces its fair and strict stance against rapists, while it protects the rights of the victims of rape, even if they are from the enemy prisoners of war.[48]

The treatment of prisoners of wars in Islamic Humanitarian Law is largely based on the reports of prisoners of wars treatment after the Battle of Badr. The majority of jurists therefore agree that prisoners of wars should be given food and clothes, following the model action set by the Prophet Muhammad (*s.a.w.*) with one of the prisoners taken at Battle of Badr. Thus, the Muslim army is responsible to safeguard prisoners from the heat, cold, hunger, thirst and any kind of torture. Moreover, it is not allowed to subject enemy prisoners of wars to torture as to obtain some important information about strategy and tactics, and that it is prohibited 'to execute enemy hostages under its (Muslim army's) control, even if the enemy slaughtered the Muslim hostages they held'.[49] Moreover, as it is the case with the Article 82 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, the Muslim jurists agree that, "during the prisoners' captivity or enslavement, members of the same family should not be separated; children should not be separated from their parents or grandparents or siblings".[50]

The concept of human rights in Islam is an interdisciplinary one and as such it is inextricably tied to other related fields such as Islamic criminal law, international Islamic law, and even Islamic metaphysics and psychology.[51] Without intention to touch on the latter one as it exceeds the frame of this research paper, it is perhaps more suitable to limit the exposition of the Islamic human rights relation with its kindred legal fields, along with its view of rape in contemporary time.[52] The field of human rights in Islam is necessarily seen together with duties of an individual towards society, and this is perhaps the major difference between the Islamic concept of human rights and the predominantly Western secular notion that underlies the letter and the spirit of the bulk if not all international documents on human rights.[53] Compared with Western approach to human rights, which focuses mainly on the rights of individuals, Islamic concept emphasises the need to consider rights together with duties. Interestingly, this was for a long time the approach held by Western intellectuals, starting from classical Greek thinkers, such as Aristotle, through medieval

ones like Thomas Aquinas, all the way to the modern Western thinkers, the likes of Hobbes, Locke, Rosseau and Mill. It is only in the last century or so that the Western notion of human rights shifted from its initial community-based understanding to prioritising the individual.[54]

The concept of human rights in Islam, drawing on the primary sources of Islam (the Quran and the *Sunnah*) aims to protect five fundamental human values: (1) the faith and religion; (2) self; (3) mind or intellect; (4) honor, family and lineage; and (5) wealth.[55] Having listed these five fundamental human values it can be safely said that Islamic concept of human rights views rape as violation of these human values, particularly (4) from the above list, and does not in any way show tolerance to it. It is also important to stress that Islamic concept of human rights acknowledges the definition and procedure of rape prevention, adjudication and punishment as they are established in the Islamic criminal law.[56]

Regarding rape and human rights in Islam, we can further say that, since the effects of rape are as traumatic experience suffered by the victim and since rape is regarded as the violation of the right of Allah (*s.w.t.*) and human being as well as violation of person's honor and dignity.[57] Since, it is very difficult for victim of rape to cope with physical, emotional and spiritual effects because it is destructive and the victim will usually suffer for a long time.[58] For all these aggravating effects of rape, the position of Islamic Human rights *vis-à-vis* rape is much tougher and stricter than the stand of contemporary secular view on it.

CONTEMPORARY CHALLENGES

The last decade and a half, ever since 9/11, has seen a proliferation of challenges for the Islamic humanitarian law and international humanitarian law. These challenges mostly come from the quarters of extremist's groups, terrorists and fighters who claim their fight is based on the primary sources of Islam. Whether confirmed or not, the reports of torture of civilians, mass rapes, slaying journalists and aid workers in most brutal manner, all purportedly committed by various groups using the terms 'Islam' or 'Islamic' in their

names, these reports require proper address by the mainstream Muslim scholars from various fields of knowledge.[59] Today, it is probably more important than ever before to reiterate the objective principles of Islamic humanitarian law, to interpret them for the sake of misguided Muslims and misinformed non-Muslims, who learn about Islam through shallow and, at times, highly subjective, prejudiced and biased media reports.

There are several gross violations of Islamic humanitarian law by the militant groups. One of them is the use of suicide bombings in warfare, particularly against the non-combatants a practice that has no precedence in early history of Islam and the act unequivocally condemned by the present-day Muslim scholars.[60] Brutal killings of non-combatants, mass rapes and destruction of historical monuments are yet other types of Islamic humanitarian law violations that have been duly addressed by a number of Muslim scholars recently. Since a more detailed account of these un-Islamic acts goes beyond the scope of this paper, we will shift back to alleged cases of mass rapes and their status within the Islamic humanitarian law.[61]

Recent media reports about the mass rapes, allegedly committed by the militant group which calls itself "DAESH" have caused consternation among people in general, and Muslim legal scholars in particular.[62] It is important to emphasise here that this group, like most other militant groups that abuse the prefix 'Islamic' or use other terms from the Islamic tradition, are non-state actors and that their violent acts are viewed more from the perspective of Islamic human rights, rather than International Islamic humanitarian law that mostly concerns itself with interstate relations and legal issues springing from them.[63] The reports that "DAESH" committed mass rapes against the ethnic minority of Yazidis in northern Iraq, even though unconfirmed by the UN and other relevant bodies, has sparked a debate about the status of rape within Islamic law and Islamic human rights.[64]

These reports as well as other items of media coverage on this militant group have prompted a number of contemporary Muslim scholars to issue an open letter to the leader of "DAESH" and self-

proclaimed caliph Abu Bakr Al-Baghdadi.[65] In this letter, Muslim scholars reiterated a number of tenets of the Islamic law: "…It is forbidden in Islam to kill the innocent…Jihad in Islam is defensive war. It is not permissible without the right cause, the right purpose and without the right rules of conduct…It is forbidden in Islam to harm or mistreat—in any way—Christians or any 'People of the Scripture'…It is obligatory to consider Yazidis as People of the Scripture…It is forbidden in Islam to force people to convert…It is forbidden in Islam to deny women their rights…It is forbidden in Islam to deny children their rights…It is forbidden in Islam to torture people".[66] These are only some issues addressed by the Muslim scholars in their letter. Regarding the issue of mass rapes that allegedly happened on the pretext of appropriating women as slave-concubines as part of war booty, it is committing acts of lewdness on earth.[67]

Muslim scholars reminded al-Baghdadi: "After a century of Muslim consensus on the prohibition of slavery, you have violated this; you have taken women as concubines and thus revived strife and sedition (*fitnah*), and corruption and lewdness on the earth. You have resuscitated something that the *Shari`ah* has worked tirelessly to undo and has been considered forbidden by consensus for over a century. Indeed, all the Muslim countries in the world are signatories of anti-slavery conventions. Allah (*s.w.t.*) says: '… And fulfil the covenant. Indeed, the covenant will be enquired into (Al-Isra', 17:34)'. You bear the responsibility of this great crime and all the reactions which this may lead to against all Muslims".[68] It is therefore clear that such abominable acts and gross violations of the Islamic concept of human rights and the Islamic humanitarian law cannot be justified at all.[69] Their condemnation by the group of Muslim scholars with careful reference to the authoritative sources upholds the principles of the Islamic International Law and refutes the views of renegades and impostors. Rape has never been condoned by Islam, and the strict stance of the complete body of the Islamic law on this issue cannot be refuted by either self-proclaimed *'ulama* or *khulafa*.

CONCLUSION

The debate on rape, internationally and within the context of the Islamic Law is as vigorous as ever. The clarification of its definition, sanctions and treatment in peacetime and armed conflict settings highlights some important differences between the Islamic legal position and the stance of the international law. For a better understanding of rape and its fairer treatment in international courts as well as other forums, it is necessary to clarify its definition as understood and presented by the authoritative and objective scholars from both sides. This kind of approach assists us to preclude labeling and other forms of offensive acts and speech at times when extremists from both sides threaten to hijack the scholarly debate and exchange, and to sway the masses in undesirable direction. Thus, further research on this issue is required from different angles, historical, legal, comparative scholarly presentations, with a hope that it would clarify much confusion and ambiguity in a multi-civilisational world.

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