

Bharat H. Desai
Moumita Mandal

Sexual and Gender-Based Violence in International Law

Making International Institutions Work

Foreword by Peter Maurer

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For

*All the Victims-Survivors of
Sexual and Gender-Based Violence*

Foreword

Sexual and gender-based violence (SGBV) is a heinously prevalent scourge, too common in all societies. It is also exacerbated by conflict, as well as other humanitarian crises and the climate emergency.

Its causes and drivers—gender inequality, abuse of power, social inequality, and impunity—manifest differently depending on the context, meaning that responses must also be tailored to contexts. This publication *Sexual and Gender-Based Violence in International Law: Making International Institutions Work* makes a timely, analytical, and thought-provoking scholarly ideational contribution. It seeks to understand SGBV, contributing factors such as culture and traditions underpinning this violence, the role of international institutions, and the ways in which it can be addressed. It applauds contemporary efforts made to address the impacts of SGBV on survivors, to provide the services needed for recovery, and to address discrimination. It warns that, without sustained commitment and action, gains can quickly be lost.

This kind of tailored and contextual analysis is critical if we are to make progress to globally eliminate SGBV. Addressing SGBV and its root causes sadly remains a crucial element of fostering inclusive and resilient societies in which all are protected and can enjoy their rights in equity. Domestic law and policy change are required as part of this picture—too often, domestic frameworks do not reflect international legal obligations—and these laws and policies should be robust, resourced, and implemented.

From the standpoint of the International Committee of the Red Cross (ICRC), efforts to prevent and address SGBV in armed conflict and other situations of violence, including in places of detention, are an institutional priority. This is because SGBV violates international humanitarian law (IHL) and international human rights law (IHRL) and generates immense humanitarian need and suffering. SGBV, including sexual violence (SV) in conflict, is life-threatening. Its survivors—who are disproportionately female as SGBV is a manifestation of unequal gender norms, but who can also be men, boys, and sexual and gender minorities—often have long-term and complex needs. They need access to health care, including mental health and psychosocial support, and economic and livelihood supports including control over land and resources.

Based on these needs, ICRC delegations work to support community resilience in times of crises. Our work to protect civilians includes engagement and services to support survivors of sexual violence—women, girls, men, boys, and sexual and gender minorities. ICRC also engages with weapon bearers and authorities on the prohibition of sexual violence (whether strategic or opportunistic) as a violation of IHL and the harm it generates for individuals, families, and communities.

Through our work, ICRC is confronted with the daily reality that despite the efforts of women’s groups, international organisations, and government authorities to prevent SGBV, collectively we have much to do to attain its prevention and eradication. As this publication observes, SGBV has historically been rife; and while there is much debate about the cultural factors and dynamics that drive it, it is clear that much more concerted engagement of international institutions on addressing SGBV from all angles, including adequate placement of survivors at the centre of response and of efforts to address power dynamics, is where future endeavours must concentrate. This publication contributes to the wide field of research demonstrating that SGBV is not inevitable. And indeed, if it is predictable, it is preventable.

Peter Maurer
President
International Committee of the Red Cross
Geneva, Switzerland

Preface

Sexual and gender-based violence (SGBV) prevails since time immemorial. SGBV is still a taboo, spoken in whispers and suffered in silence. It takes place during peacetime, conflicts, and post-conflict situations. Though SGBV is perpetrated against men, women, and people of the LGBT community, this study has sought to focus on women and girls as main victims-survivors. SGBV against women and girls is a manifestation of historically unequal power relations between male and female genders rooted in patriarchal systems, stereotyped gender-based norms, and harmful cultural practices (HCPs). In fact, different cultural and social norms support different types of violence. It is one of the crucial social mechanisms by which women and girls are sought to be subjugated to a position subordinate to men. As a corollary, the control over female sexuality remains central to the social, cultural, and State-driven global normative systems. There are many prominent instances of cultural practices that are harmful to women and girls.

The United Nations data shows that more than 200 million girls and women are understood to have been subjected to female genital mutilation (FGM). In 2021 alone, 4.16 million girls around the world are at risk of undergoing FGM. This work has considered culture within the framework of equality. As such the international legal framework for protection for women and girls against SGBV also addresses the organic interlinkages between HCPs and SGBV. In the wake of two year long Covid-19 pandemic during 2020–2022 and the climatic changes, there has been an exacerbation of SGBV against women and girls. This presents a new global regulatory challenge for international law, international institutions, and the scholars.

There is a growing awareness, concern, scholarly works, and multiagency coordinated roles. It indicates a healthy trend in addressing the challenge of SGBV. Ironically, the existing corpus of international law is not adequate in specifically addressing SGBV against women and girls. As explained in a chapter on legal challenges, there is an unequivocal need to a global *lex specialis* on SGBV and an urgent need for bridging the ‘normative gap’ in the field. The absence of specific legally binding instrument has pushed the international humanitarian institutions such as International Committee of the Red Cross (ICRC), UN Women, UN Office of the High Commissioner for Human Rights, and the UN Human Rights Council and

others to push for alternative non-binding instruments to address SGBV against women and girls. These instruments carry good normative value. However, they are not taken seriously by most of the States since they construe them as ‘soft’ and guiding principles.

International institutions (IIs) have been playing a pivotal role in organizing to provide legal and institutional protection to women and girls against SGBV. It is vital in the prevention and elimination of SGBV as a threat and reality against sizeable part of the global population. Most of such international institutions work under the umbrella of the United Nations (UN) as it has become catalytic symbol of multilateralism. The International Committee of the Red Cross, as the global humanitarian sentinel, also has a unique role in addressing the challenge of SGBV. As explained in the foreword of Peter Maurer, President of the ICRC, as the costodian of the 1949 Geneva Conventions, has sought to give priority attention to SGBV by regarding it as a “heinously prevalent scourge” that prevails in all the societies around the world.

Notwithstanding the stated objectives of all the legally binding agreements, soft instruments, and concerted actions of international institutions, women continue to suffer the ordeal of SGBV primarily because of their gender and sex. SGBV is cheap, easily available tool especially in armed conflicts to harm the women and girls as it hurts the targeted communities most. Ironically, SGBV remains globally prevalent with destructive consequences for women and girls due to their unequal and precarious status in most of the societies, its use as a weapon of war, and the perpetrators mostly going scot-free. In view of this sense of impunity and as international law is struggling to address the SGBV challenge, an important ideational question needs to be grappled with. How can we de-fang, de-stigmatize, and de-legitimize SGBV? This crucial question presents a big international law scholarly challenge for the future to eliminate the scourge of SGBV. This work has earnestly sought to sow some modest seeds in the scholarly realm to visualize a process for the beginning of the inevitable end of SGBV in the coming decades of the twenty-first century. Its outcome lies in the womb of the future. Only *Time* will provide an answer.

New Delhi, India
16 April 2022

Bharat H. Desai
Moumita Mandal

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Chapter 1

Introduction



Sexual and gender-based violence (SGBV) prevails since time immemorial. SGBV is still a taboo and spoken in whispers or suffered in silence. It takes place during peacetime, conflicts, and post-conflict situations. In fact, gender becomes a turf in most of the patriarchal societies. It came to the fore graphically during the years 2020–2022 of the Covid-19 pandemic wherein cases of SGBV escalated. In a graphic reality of the day, as countries imposed Covid-19 restrictions including prolonged lockdowns, “for many around the world, lockdown meant being locked with their abuser”.¹

Since SGBV has crossed the boundaries of the States, it has become an important challenge in the field of international law. In view of this, both domestic law and international law need to play a crucial role in the prevention and ultimate elimination of SGBV.²

SGBV is gender-neutral: men, women, and transgender people become the victims.³ However, studies have shown that most of the sufferers are women, girls, and children.⁴ SGBV against women and girls is one of the most prevalent forms of

¹ ICRC (2020), “2020: A year in pictures”; available at: <https://www.icrc.org/en/document/2020-year-pictures> (accessed on 29 September 2021). See also, ICRC (2020), “A conflict without borders continues to play out in Sahel”; available at: <https://www.icrc.org/en/document/conflict-without-borders-continues-play-out-sahel> (accessed on 04 April 2021); Fried, Susana T. (2003), “Violence against Women,” *Health and Human Rights*, 6(2): 88–111.

² Ulrich, Jennifer L. (2000), “Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic within Reach?” *Indiana Journal of Global Legal Studies*, 7(2): 629–654. See also, Janis, M. W. (1984) “Individuals as Subjects of International Law,” *Cornell International Law Journal*: 17(1): 61–78; available at: <http://scholarship.law.cornell.edu/cilj/vol17/iss1/2> (accessed on 04 April 2021).

³ Lewis, Dustin A (2009), “Unorganized Victims: Sexual Violence against Men in Conflict Settings under International Law,” *Wisconsin International Law Journal*, 27(1): 1–49.

⁴ Campbell, Kristen (2007), “The Gender of Transnational Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia,” *International Journal of Transnational Justice*, 1(3): 411–432; see also, the lexical meaning of woman is “An adult human female;” available

human rights violations all over the world. It does not know social, economic, political, and geographical boundaries. It is estimated that one in every three women experiences physical or sexual violence in her lifetime. Ironically, it remains enveloped by a culture of silence.⁵ It has become so pervasive that 2019 report of the World Bank has graphically underscored that SGBV or gender-based violence (GBV) is a global pandemic since:

35% of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence. Globally, 7% of women have been sexually assaulted by someone other than a partner. Globally, as many as 38% of murders of women are committed by an intimate partner. 200 million women have experienced female genital mutilation/cutting.⁶

The issue is not only alarming and devastating for the survivors and their families but also entails huge social and economic costs. It has been estimated that in some countries, the cost of SGBV is staggering and accounts for up to 3.7% of the GDP. It is more than double what most of the States spend on education.⁷ According to UN Women, the global cost of violence against women has been estimated at approximately USD 1.5 trillion. In the aftermath of 2020-2022 Covid-19 pandemic, the figure is expected to have risen due to exacerbation in violence against women. It shows gravity of this simmering global challenge of our times.

Challenge of SGBV

The term ‘SGBV’ refers to any harmful act perpetrated against the will of a person, which is based on gender differences. It also includes an act that inflicts physical and psychological or sexual harm, sufferings, threat of doing such acts or any other deprivation of liberty in private or public places. It is a serious threat as well as a violation of the women’s basic human right to life and bodily integrity.⁸

at: <https://www.lexico.com/definition/woman> (accessed on 04 April 2021); and ‘girl’ means, “A female child;” available at: <https://www.lexico.com/definition/girl> (accessed on 04 April 2021). Though there is no legal definition of ‘woman’ and ‘girl’ but for this study ‘woman’ means female, trans-female of any age and ‘girl’ means female child below the age of maturity. The age of maturity differ country to country based on culture, religion etc. though all the women include girls but all the girls may not always be treated as women. The Beijing Platform of Action has used some specific terminologies to specify elimination of discrimination against the girl child, e.g., minimum legal age; adolescent etc. See also, UN (1995), “The Report of the Fourth World Conference on Women (Beijing);” available at: <http://hrlibrary.umn.edu/svaw/law/un/undocs.htm> (accessed on 04 April 2021).

⁵ UNFPA (2016), “Gender-based violence”; available at: <http://www.unfpa.org/gender-based-violence> (accessed on 19 September 2021).

⁶ The World Bank (2019), “Gender-Based Violence”; available at: <https://www.worldbank.org/en/topic/socialsustainability/brief/violence-against-women-and-girls> (accessed on 18 October 2020).

⁷ Ibid.

⁸ Desai, Bharat H. et al. (2018), “Quest for Women’s Right to Bodily Integrity: Reflections on Recent Judicial Inroads in India”, *Economic & Political Weekly*, vol.53, no.51, 29

Though SGBV is perpetrated against men, women, and people of the LGBTI community, this study has sought to focus on women and girls (the study has used the word ‘women’ for both) as most of the victims are women. SGBV against women can emanate from individual action as well as that of a sovereign State.⁹ Women who are victims of SGBV can be the direct subject matter of international law. For example, all women in general; (civilian, combatants, or prisoners of war),¹⁰ and women with special status such as refugees or asylum seekers, returnees, internally displaced women,¹¹ stateless women,¹² and other categories of women and girls come under this protective umbrella.

SGBV against women is a manifestation of historically unequal power relations between genders that are founded upon different gender-based norms and cultural practices. In fact, “different cultural and social norms support different types of violence”.¹³ It is one of the crucial social mechanisms by which women are sought to be subjugated to a position subordinate to men. As a corollary, the control over female sexuality is central to the social, cultural, and State normative systems. This is especially so since:

Sexuality is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy, and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviors, practices, roles and relationships. Though, generally, women are sexually active during adolescence, they reach their peak orgasmic frequency in their 30s, and have a constant

December 2018; available at: <https://www.epw.in/engage/article/quest-womens-right-bodily-integrity-judicial-inroads> (accessed on 01 February 2021). Also see, OHCHR (2009), *15 Years of The United Nations Special Rapporteur on Violence Against Women (1994–2009): A Critical Review*; available at: <https://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf> (accessed on 21 November 2020).

⁹ Ulrich, Jennifer L. (2000), n.2.

¹⁰ International Commission of Jurists (2016), “Women’s Access to Justice for Gender-Based Violence: A Practitioner’s Guide;” available at: <http://www.icj.org/wp-content/uploads/2016/03/Universal-Womens-access-to-justice-Publications-Practitioners-Guide-Series-2016-ENG.pdf> (accessed on 19 January 2021).

¹¹ UNHCR (2003), “Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response”; available at: https://www.unicef.org/emerg/files/gl_sgbv03.pdf (accessed on 19 January 2021).

¹² Edwards, Alice. (2009), “Displacement, Statelessness, and Questions of Gender Equality and the Convention on the Elimination of All Forms of Discrimination against Women;” available at: http://www2.ohchr.org/english/bodies/cedaw/docs/UNHCR_CEDAW_Background_Paper.pdf (accessed on 19 January 2021).

¹³ WHO (2009), “Changing social and cultural norms that support violence” (briefings on violence prevention: the evidence), WHO: Geneva, p. 4. The briefing paper has documented evidence on cultural and social gender-based norms that encourage SGBV against women such as: (i) female children valued less in the society than men; (ii) harmful traditional practices; (iii) man has right to assert power over women; (iv) women’s freedom should be restricted; (v) sexual violence is shameful for the victims etc.,” available at: https://www.who.int/violence_injury_prevention/violence/norms.pdf (accessed on 19 January 2021).

level of sexual capacity up to the age of 55 with little evidence that aging affects it in later life.¹⁴

In view of this, different types of SGBV exist in the society, e.g. within the family, within the community, and within the ambit of affairs of the States or resulting from political violence (e.g. SGBV in war, conflicts, etc.). In this context, cultural practices often justify violence against women within the family and the community.¹⁵

Role of Culture in SGBV

Culture or tradition plays an important role in shaping the thoughts and behaviour of men and women. It has another significant part that restricts the exercise of the basic rights of women.¹⁶ It has been found that challenge comes from the cultural ‘relativist’¹⁷ assertion that rejects the universality of human rights, especially equality of women and the cultural approach which is inherently ‘misogynist.’¹⁸ Sometimes, culture becomes an obstacle to the realization of the women’s rights to equal enjoyment of their basic human rights. It is now a growing international concern. The use of discourses of cultural relativism to challenge the universal legitimacy and

¹⁴ Rao, T.S. Satyanarana, Kumar, A., and Nagaraj, M. (2015), “Female sexuality,” *Indian J Psychiatry*, 57(Suppl 2): S296–S302; available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4539874/> (accessed on 19 January 2021). Also see Baumeister, Roy F and J.M. Twenge (2002), “Cultural suppression of female sexuality,” *Review of General Psychology*, 6(2); 166–203. It states that “Control over female sexuality is one of the intention or interest of patriarchy, because it is used to prevent from realizing full potential of female. It is the accepted cultural and societal norm that only men have the right over sexuality and control over women.” Some scholars have argued that the reason behind suppression of female sexuality is stabilization of property right; desire to pass on one’s property to legitimate heirs; psychology of men to treat women as property; jealous desire to prevent their mates to have sex with other men; etc. so, men control power and maintain powerful position by this way. Women and girls are subjected to different forms of SGBV, i.e. honour killing, child marriage, female genital mutilation, etc. as consequences of the cultural or societal norm to control female sexuality. For detailed analysis of female sexuality, see, Andersen, Barbara L and J. M Cyranowski (1995), “Women’s Sexuality: Behaviors, Responses, and Individual Differences,” *J Consult Clin Psychol*, 63(6): 891–906; “General approaches, assessment strategies, and models of female sexuality are organized within the conceptual domains of sexual behaviors, sexual responses (desire, excitement, orgasm, and resolution), and individual differences, including general and sex-specific personality models;” available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2707786/> (accessed on 19 January 2021).

¹⁵ OHCHR (2009), n.8.

¹⁶ UN, *General Recommendation No. 21 (13th Session, 1994) of the CEDAW*; available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> (accessed on 19 January 2021).

¹⁷ It further explains: “Cultural relativists believe that culture is the sole source of a moral right or rule. So, the rights, practices, values etc. are determined by culture only. It keeps separate a particular culture from outsider or foreign culture. Hence, culture is used as a defence against external criticism or to justify some cultural practices”; see, Donnelly, Jack (1984), “Cultural Relativism and Universal Human Rights,” *Human Rights Quarterly*, 6(4): 400–419.

¹⁸ OHCHR (2009), n.8.

applicability of human rights norms is a serious concern. Thus, there is a growing international concern that harmful traditional practices are the root causes of discrimination and violence against women. Both scientific and social studies have shown that value or culture-based discrimination is systematic and universal.¹⁹

There are many prominent instances of cultural practices that are harmful to women. For example, more than 200 million girls and women are understood to have been subjected to female genital mutilation (FGM) in African, Asian, and Middle East countries.²⁰ According to UN Women, in 2021 alone some 4.16 million women and girls were at risk of FGM. This pernicious practice continues unabated in the name of ‘essential’ cultural or religious traditions. Similarly, the inherent preference for a son leads to female feticide and infanticide in different Asian countries.²¹ Early marriage or forced marriages take place on a large-scale in many of the Asian and African countries.

Apart from above, there are practices known as *Devadasi*, *Deuki*, or *Devaki* in countries such as India and Nepal. This comprises offering of girls to temples for providing all kinds of services, including forced prostitution.²² In Ethiopia, the traditional practice allows kidnapping and raping of girls for forced marriages. *Trokosi* is a traditional practice in Nigeria, Ghana, and Benin whereby young girls are given to fetish shrines to serve under threat as domestic and sexual slaves. There are many countries where grotesque practice still persists in making forcibly raping of girls in the name of providing justice.²³

Prevalence of other well-known harmful societal practices include dowry, honour killing, buying and selling women for marriage; offering girls for dispute resolution, etc. As a result, SGBV against women is often sought to be justified under these so-called cultural norms. Here, culture is used as a tool against women. It, in turn, subjects them to institutionalized forms of SGBV. It is also used as a defence to encourage the culture of impunity. Thus, cultural garb becomes a notorious a tool and a practice in cases of SGBV against women.²⁴

In general, it is the girls and women who become victims of SGBV in the name of traditional or cultural practices. Still, there are some specific groups of women and girls who easily fall prey to harmful traditional practices. These women belong to minority groups, indigenous women, refugee women, migrant women living in

¹⁹ United Nations (2006), “The impact of harmful traditional practices on the girl child”, UN Doc. EGM/DVGC/2006/EP.4; available at: <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/ExpertPapers/EP.4%20%20%20Raswork.pdf> (accessed on 19 January 2021).

²⁰ WHO (2018), World Health Organization, “Female Genital Mutilation;” available at: <http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (accessed on 21 September 2021).

²¹ UN (2006), n.19.

²² WHO (2009), n.13.

²³ Shamsie, Kamila (2002), “The power of Pakistan’s progressive press: Child abuse in Belgium ‘shocks the nation’-so why is gang rape in Pakistan ‘a cultural issue?’” *The Guardian*, Pakistan, 6 September 2002; available at: <https://www.theguardian.com/world/2002/sep/06/gender.uk1> (accessed on 21 November 2018).

²⁴ Ajayi, Victoria (2012), “Violence Against Women: The Ethics of Incorporating the Cultural Defense in Leg al;” *The Georgetown Journal of Legal Ethics Narrative*, 25:401.

rural or remote communities, destitute women, women in institutions or detention, female children, women with disabilities, women in conflict zones, women who are the victims of natural disasters or climate change etc.²⁵ The primary actors involved in the harmful SGBV practices against women are: family, community, and States. The State comes into the picture when it supports hegemonic interpretations of religion to debunk cultural relativism and support certain inherently violent and discriminatory cultures towards women.²⁶

In view of this, the role and response of international law become relevant to address the cultural factors that impinge upon women's basic rights. It comprises the protection of the basic human rights of women. It has led to the adoption of the term 'harmful practices' instead of 'harmful traditional practices'. It calls for "State participation in validating alternative and non-hegemonic interpretations of culture by women and encouraging cultural negotiation." Thus, engagement of international law can be regarded as a continuous process²⁷ in addressing the challenge of SGBV.

The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is prominent among relevant international legal instruments. Many of the cultural practices that involve pain, suffering, and violation of physical or bodily integrity of women come under the non-permissible threshold of customary international law. These practices invite strict penal actions and maximum security regardless of ratification of the CEDAW or any of the other international human rights treaties.

This work has considered culture within the framework of equality. The international legal framework for protection for women against SGBV also addresses the organic interlinkages between culture and violence against women. The primary roots of the universal patriarchal culture lie in gender inequality rather than in cultural expressions of people in diverse societal structures. In fact, the Committee against Torture has taken a view that it is the responsibility of the State to prevent and protect the victims of SGBV. This is especially so in cases of harmful practices such as FGM. However, the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment only refers to the crime of rape without addressing other forms of SGBV. In fact, the 2014 Report of the Special Rapporteur has explicitly mentioned this as follows:

While it may be argued that the Convention against Torture can serve as a tool for addressing violence against women, the Committee has so far only defined rape as torture, without explicitly addressing other forms of violence against women.²⁸

²⁵ UN (1993), "The Declaration on the Elimination of Violence against Women," UN Doc. A/RES/48/104, 23 February 1994; available at: <https://undocs.org/en/A/RES/48/104> (accessed on 19 January 2021).

²⁶ Ajayi, Victoria (2012), n.24.

²⁷ OHCHR (2009), n.8.

²⁸ Human Rights Council (2014), *Report of the Special Rapporteur on violence against women, its causes and consequences* (Rashida Manjoo); available at: <http://undocs.org/en/A/HRC/26/38> (accessed on 19 January 2021); UN Doc. A/HRC/26/38, paragraph 24. Similarly, another report of the Economic and Social Council (ECOSOC) explains it thus: "Since it was clear that rape or other forms of sexual assault against women held in detention were a particularly ignominious violation

It is also a fact that women victims, for a variety of reasons, seldom seek help and assistance though they have the right to get justice and protection. Therefore, it is the duty of the State as well as the international community to protect their rights and provide justice by punishing the perpetrators amidst negative cultural stereotypes. It, in turn, calls for the people to view cultural traditions with new perspective that ensures centrality of the dignity of women.

Eliminating SGBV: Role of International Institutions

At the global level, many of the international institutions (IIs) play a pivotal role in organizing to provide legal and institutional protection to women against SGBV. It is vital in the prevention and elimination of SGBV as a threat and reality against sizeable part of the global population. Most of such international institutions work under the umbrella of the United Nations (UN) as it has become catalytic symbol of multilateralism.²⁹

Some of the recent UN initiatives include the 2008 campaign of the Secretary-General Ban Ki-moon's on *UNiTE to End Violence against Women*. It aimed at preventing and eliminating SGBV around the world. *UNiTE* calls for work jointly with all the actors apart from the UN. It has considered SGBV against women as a global pandemic.³⁰ Apart from it, funding remains one of the crucial criteria for

of the dignity and right to physical integrity of the human being, they accordingly constituted an act of torture"; Commission on Human Rights, Forty-eight session, Summary Record 21st Meeting, UN Doc. E/CN.4/1992/SR.21 21 February 1992, paragraph 35; available at: <https://digitallibrary.un.org/record/138396?ln=en> <http://hr-travaux.law.virginia.edu/document/cped/ecn41992sr21/nid-2460> (accessed on 17 January 2021). Also see Economic and Social Council (1995), "Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32, paragraph 16. It states, "Methods of torture involving sexual abuse may be characterized as essentially gender-based"; <https://digitallibrary.un.org/record/226391?ln=en#record-files-collapse-header>. Professor Kooijmans, in an oral introduction to his 1992 report to the Commission on Human Rights, noted that "[s]ince it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture"; UN Doc.E/CN.4/1992/SR.21, para. 35; available at: <http://hrlibrary.umn.edu/commission/thematic51/34.htm> (accessed on 12 January 2021). The International Criminal Tribunal for Rwanda (ICTR) has also observed that: "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity", *Akeyasu Case, (The Prosecutor vs. Jean-Paul Akayesu)*, 02 September 1998; ICTR-96-4-T, paragraph 597; available at: <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf> (accessed on 17 January 2021).

²⁹ Desai, Bharat H (2020), "UN has been at the forefront of multilateralism", *The Tribune*, 02 October 2020; available at: <https://www.tribuneindia.com/news/comment/un-has-been-at-frontline-of-multilateralism-149629> (accessed on 28 December 2020).

³⁰ UN Women, "UNiTE to End Violence against Women"; available at: <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/take-action/unite> (accessed on 5 December 2020).

the movement to put an end to SGBV. Here also, the UN plays the leading role as it has released twenty-five million USD for women-led projects in the battle against SGBV, especially for humanitarian purposes.³¹ It comprises the current challenges and the SGBV issues and encourages all the sectors, including the private sector, to commit to ending SGBV. For example, it addresses the *shadow pandemic* where the issue of violence against women during pandemic has come to the before the world.³²

As observed by Phumzile Mlambo-Ngcuka, the UN Women's Executive Director:

Rape isn't an isolated brief act. It damages flesh and reverberates in memory...The end of the horrendous act would mean eliminating a significant 'weapon of war' from the arsenal of conflict.³³

The UN Secretary-general's call to *UNiTE* by 2030 to *End Violence against Women* campaign encompassed marked sixteen days of activism during 25 November to 10 December 2020 under the global theme *Orange the World: Fund, Respond, Prevent, Collect*. It indicated that SGBV against women is the most pervasive breach of human rights. The campaign has sought to build on existing international law and policy to unite and work together to end SGBV.³⁴

In 2020, the UN turned 75 years old. The United Nations Academic Impact (UNAI) hosted the *75 for UN75: 75 min of Conversations* that included a series of online dialogues with students, researchers, educators, and academics around the globe to discuss the global issues and challenges. The UNAI hosted a webinar on the theme '75 min of Conversation: Rethinking Gender' as part of the global issue on 19 June 2020 with the collaboration of UN Women and the global academic community.

³¹ UN Women (2020), "United Nations releases USD 25 million for women-led projects battling gender-based violence"; Press Release of 25 November 2020; available at: <https://www.unwomen.org/en/news/stories/2020/11/press-release-un-releases-funds-for-women-led-projects-battling-gender-based-violence> (accessed on 5 December 2020). Also see, UN Central Emergency Response Fund (2020), "United Nations Releases \$25 Million For Women-Led Projects Battling Gender-Based Violence", Press Release of 25 November 2020; available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/UN%20RELEASES%20%2425%20MILLION%20FOR%20WOMEN-LED%20PROJECTS%20BATTLING%20GENDER-BASED%20VIOLENCE.pdf> (accessed on 5 December 2020).

³² UN Women (2020), "As impact of COVID-19 intensifies, UN Women calls for concrete actions to respond to the concurrent shadow pandemic"; Press Release, 25 November 2020; available at: <https://www.unwomen.org/en/news/stories/2020/11/press-release-16-days-of-activism-against-gender-based-violence>; UN (2020), "The Shadow Pandemic"; available at: <https://www.un.org/en/observances/ending-violence-against-women-day> (accessed on 11 March 2021).

³³ UN News (2019), "A staggering one-in-three women, experience physical, sexual abuse", 25 November 2019; available at: <https://news.un.org/en/story/2019/11/1052041> (accessed on 5 December 2020).

³⁴ UN (2020), "The Shadow Pandemic"; available at: <https://www.un.org/en/observances/ending-violence-against-women-day>; UN Women (2020), "Orange the World: Fund, Respond, Prevent, Collect!", United Nations Secretary-General's Campaign UNiTE by 2030 to End Violence against Women, 16 Days of Activism against Gender Based Violence 25th November–10 December 2020, Concept Note for engagement"; available at: https://www.unwomen.org/-/media/headquarters/attachments/sections/what%20we%20do/evaw/unite%20campaign_2020_concept%20note_final.pdf?la=en&vs=2808 (accessed on 11 March 2021).

The International Day for the Elimination of Sexual Violence in Conflict is celebrated on 19 June each year. This day is also marked as the opening of the first World Conference on the Status of Women (Mexico City, 1975) that ushered a new era of action by addressing gender equality and global efforts to promote the advancement of women.

Thus, 19 June 2020, provided appropriate occasion to examine the impact of COVID-19 on the progress made for the women's human rights since the Beijing Conference 25 years ago. Mlambo-Mgcuka, Executive Director of the UN Women, stressed on the need to ensure equal access to technology for women and girls. She pointed out that COVID-19 has widened the existing gender gap in accessing technology. The importance of research and contributions of academia were duly highlighted.³⁵

In 2020, the UN celebrated the anniversary of different crucial change-making international instruments. For example, the UN Women's 'Generation Equity' campaign aims to accelerate gender equity actions and mark the 25th anniversary of the Beijing Declaration and Platform for Action to insist on global mobilization regarding human rights of all women and girls. The UN Women has also taken the initiative to celebrate the 20th anniversary of UN Security Council resolution 1325 (2000) on 'women, peace and security'; the 5th anniversary of the Sustainable Development Goals 2030. In 2019, the UN SC adopted important resolutions 2467 (2019) and 2493 (2019) under the agenda of 'women, peace and security' that focus on elimination of SGBV during armed conflicts.³⁶

Apart from the UN, there are civil society organizations, judicial institutions, and other governmental, non-governmental and intergovernmental organizations are working to end the SGBV. For example, the International Committee of the Red Cross (ICRC)³⁷ works to end SGBV against women in conflicts as well as Amnesty International³⁸ and the Human Rights Watch³⁹ address SGBV from the human rights perspective. There are judicial institutions that are also working to address SGBV against women.⁴⁰

³⁵ Desai (2020), n.29. Also see, UN, Academic Impact (2020), "75 for UN75: A Conversation on Rethinking Gender", 30 June 2020; available at: <https://academicimpact.un.org/content/75-un75-conversation-rethinking-gender>; UN (2020), "Women and Girls – Closing the Gender Gap"; available at: un75_gender.pdf (accessed on 11 March 2021).

³⁶ UN Women (2019), "About Generation Equality"; available at: <https://www.unwomen.org/en/digitalibrary/publications/2019/05/generation-equality>; (accessed on 11 March 2021).

³⁷ ICRC (2019), "Stepping up our efforts to end sexual and gender-based violence"; available at: <https://www.icrc.org/en/event/stepping-our-efforts-end-sexual-and-gender-based-violence> (accessed on 7 December 2020).

³⁸ Amnesty International, "Gender Based Violence"; available at: <https://amnesty.org.in/projects/gender-based-violence/> (accessed on 7 December 2020).

³⁹ HRW (2020), "Human Rights Watch Submission to the UN Special Rapporteur on Violence Against Women"; available at: <https://www.hrw.org/news/2020/05/22/human-rights-watch-submission-un-special-rapporteur-violence-against-women> (accessed on 7 December 2020).

⁴⁰ ICC (2014), "Policy Paper on Sexual and Gender-Based Crimes"; available at: <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf> (accessed on 7 December 2020).

Though IIs are continually working to address SGBV, still lack of uniformity among these institutions results in slowing down the law and policymaking processes to end SGBV. In view of this, the study has sought to identify the gaps in the concerted responses as well as challenges faced by the IIs and their contributions to policy-making, legal, and enforcement mechanisms. After looking at the role and contributions of the IIs to put an end to SGBV, this work calls for duly institutionalizing a concerted effective international legal framework for providing protection especially to women and ultimately eliminate SGBV from the face of the Earth.

Facing the Challenge of SGBV

Now SGBV is no longer a myth. It is a graphic reality of the modern-day world. Notwithstanding aims of all the legal instruments and international institutions, women continue to suffer the ordeal of SGBV merely because of their gender and sex. It appears from reports of the international institutions and works of scholars that SGBV affects the survivors, society, and States. It impacts negatively or creates an extra burden on the economy of the States that face economic losses as a result of and spending money on addressing the SGBV challenge.

SGBV presents a barrier for the individual, community, and States' progress and development. Hence, it necessitates effective responses that squarely address the issue as well as adoption of specific international legal instruments that would send a strong message on 'zero tolerance' for SGBV as it cannot be accepted, justified, or condoned under any circumstances. This work seeks to make a modest effort to understand, analyse, and craft a futuristic pathway for the prevention, delegitimization, and final elimination of SGBV as a scourge that afflicts the humankind especially girls and women on the planet earth.

Chapter 2

Sexual and Gender-Based Violence: A Global Concern



Introduction

Sexual and gender-based violence (SGBV) has become a global concern because of the seriousness of the issue and its perpetual consequences.¹ After a lot of scholarly works, concerns and campaigns by various stakeholders, the issue has come up on the global platform. In fact, reports of different international conferences²; international institutions such as the United Nations High Commissioner for Refugees (UNHCR), the UN Office of the High Commissioner for Human Rights (OHCHR)³; international non-governmental organizations (INGOs) and other actors, there is a greater scrutiny and calls for action by the respective governments.

In fact, reports of different international human rights and humanitarian actors have shown that women and girls are at high risk of SGBV during times of both peace and conflicts. SGBV is a violation of human rights as it denies the right to live with dignity⁴ as well as become a simmering humanitarian concern. SGBV has been also

¹ UNHCR (2016), “SGBV Prevention and Response;” available at: <http://www.unhcr.org/583577ed4> (accessed on 20 December 2020).

² ICRC (2016), International Committee of Red Cross, International Committee of the Red Cross, “32nd International Conference of the Red Cross and Red Crescent;” available at: <https://www.icrc.org/en/document/outcomes-32nd-international-conference-red-cross-and-red-crescent> (accessed on 28 November 2020).

³ UNHCR (2016), n. 1.

⁴ UNHCR (2003), “Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response;” available at: <http://www.unhcr.org/sexual-and-gender-based-violence.html> (accessed on 29 March 2021).

seen to be perpetrated and exacerbated in the wake of other emergencies like natural disasters, climate change and even pandemics such as COVID-19 (2020-2022).⁵

Though the fight against climate change has become a struggle to protect our environment, for many of the women, it is also a direct cause of different forms of SGBV.⁶ During emergencies, especially disasters due to climate change, women are at high risk of SGBV because of crisis in the family and society; and sudden breakdown of family and community structures due to forced displacement.⁷ As a result, among others, they face physical, sexual, psychological denials of resources or necessary services. Thus, it can be said that SGBV is perpetrated during peace, conflicts, post-conflicts or any other emergencies. Though it is an old crisis, now it has got heightened attention due to awareness about fundamental human rights, international humanitarian concerns and access to information through new technologies.⁸

The recent development of information and communication technology (ICT) is providing a way to prevent and respond to SGBV. In a meeting organized for the World Bank Group's 'Law, justice and Development' week, discussion took place on the risks and opportunities of growing technology concerning SGBV. On the one hand, the technology can facilitate and improve access to justice. It can also create a new risk since the perpetrators can use technology as a tool for SGBV. So, new forms of violence are coming to the fore that includes cyber violence, online SGBV

⁵ ICRC (2020), "2020: A year in pictures"; available at: <https://www.icrc.org/en/document/2020-year-pictures>; 2020—A year in review through our lens | ICRC (accessed on 31 March 2022); ICRC (2020), *A conflict without borders continues to play out in Sahel*; available at: <https://www.icrc.org/en/document/conflict-without-borders-continues-play-out-sahel> (accessed on 31 March 2022) See also, Fried, Susana T. (2003), "Violence against Women," *Health and Human Rights*, 6(2): 88–111.

⁶ Itzá Castañeda Camey, et al. (2020), *Gender-based violence and environment linkages: The violence of inequality*, Gland: IUCN; available at: <https://portals.iucn.org/library/sites/library/files/documents/2020-002-En.pdf> (accessed on 18 February 2021); UNDP(2020), "Why climate change fuels violence against women"; available at: <https://www.undp.org/content/undp/en/home/blog/2020/why-climate-change-fuels-violence-against-women.html> (accessed on 18 February 2021); UNHCR (2020) "Gender, Displacement and Climate Change"; available at: <https://www.unhcr.org/5f21565b4.pdf> (accessed on 18 February 2021); UN Women, "Climate Change, Disasters and Gender-Based Violence in the Pacific;" available at: <https://www.unclearn.org/sites/default/files/inventory/unwomen701.pdf> (accessed on 18 February 2021).

⁷ UNHCR (2003), n.4.

⁸ For this see, generally, Buckley-Zistel, Susanne and Zolkos, Magdalena (2012), *Introduction: Gender in Transitional Justice*. *Gender in Transitional Justice*, Palgrave, 2012; available at: <https://ssrn.com/abstract=2267777> (accessed on 18 February 2021).

Amanda, H. B. et al. (2016), *Ending Sexual and Gender-Based Violence in War and Peace Recommendations for the Next U.S. Administration: Peace Brief*, United States Institute of peace; available at: <https://www.usip.org/publications/2016/09/ending-sexual-and-gender-based-violence-war-and-peace> (accessed on 28 November 2020).

or ‘technology-facilitated gender-based violence’.⁹ Thus, SGBV appears to have assumed the form of a global pandemic wherein all (men, women and LGBTI) face SGBV both in the real world and the digital world.¹⁰ This necessitates identification of the problems, and find solution-based mechanisms for the simmering challenge.

This chapter contains four sections. The first section deals with some key concepts and meanings used in the study. Second section deals with the history of SGBV and the debate on and around it. It has explained how and why the concept of SGBV emerged and its historical background. The third section addresses different stages of SGBV experienced by women. Another sub-part has identified victims or survivors who face different forms of SGBV. The fourth section explains the causes and consequences of SGBV against women. It shows some practical instances of SGBV against women.

Some Key Concepts

In order to provide better understanding and explain broad contours of this study, some essential terms will be construed as per the explanations provided hereunder:

Sex

The definition of sex and gender is controversial. Biologists, sociologists, cultural anthropologists have tried to define ‘sex’. Still, the concept is not clear.¹¹ In lexical terms ‘sex’ means, “Either of the two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions”.¹² Similarly, sex means, “The state of being either male or female”.¹³ In fact, most of the biologists, especially biological anthropologists, use word ‘sex’ to show gender status. The biological sex of a child primarily determines whether the child belongs to the male or female gender and now the third one—transgender. Sex refers to the biological characteristics at the time of birth. Thus, it is determined on the

⁹ Hammond, Alicia, et al. (2019), “The good, the bad and the intersection of gender-based violence and technology,” World Bank Blog, 4 December 2019; available at: <https://blogs.worldbank.org/voices/good-bad-and-intersection-gender-based-violence-and-technology> (accessed on 11 December 2020).

¹⁰ Ibid.

¹¹ Worthman, Carol M (1995), “Hormones, Sex, and Gender”, *Annual Review of Anthropology*, 24: 593–617.

¹² English Oxford living dictionaries, “Sex;” available at: <https://en.oxforddictionaries.com/definition/sex> (accessed on 28 November 2020).

¹³ Cambridge Dictionary, “Sex;” available at: <https://dictionary.cambridge.org/dictionary/english/sex> (accessed on 28 November 2020).

basis of the reproductive functions of a human being.¹⁴ According to the literature of sociology and anthropology, ‘sex’ is biological and emanates from birth. It pertains to biological distinction between the hitherto recognised two different sexes (male and female). It is needed to include the third (trans) sex also. Though social scientists argued that sex differentiation is based on biology, yet the influence of socialization and culture cannot be ignored.¹⁵ As a result of this, the conventional definition of ‘sex’ excluded the existence of the third sex that transcends between male and female categories.

Gender

The term gender denotes, “The state of being male and female, which is typically concerning social and cultural differences rather than biological one”.¹⁶ It refers to the socially constructed characteristics between men and women as well as norms, roles, and the relationship between groups of men and women. It varies from society to society and can be changed.¹⁷ The societal roles, responsibilities, reactions, power relations among the members of any society or culture, privileges, opportunities etc. are explicitly generated by it. Human beings learn how to behave within the society. This learned behavior is known as ‘gender identity.’ Ironically, in societal structures, practices and even scholarly works, hitherto, any gender identity beyond men and women was not covered. Thus, reality of existence of trans-gender was effectively ignored and obliterated. The perception of gender is influenced by different social factors such as history, tradition, religion, and social norms.¹⁸ For instance, even Article 7(3) of the Rome Statute (1998) of the International Criminal Court (ICC) provides that ‘gender’ means only two sexes ‘male’ and ‘female’ within the context of the society.¹⁹ Thus traditional meaning of gender has excluded third gender or trans-gender people. However, this is now gradually changing as the human understanding widens. It may, in future, comprise other sexual orientations.

¹⁴ UNHCR (2003), n. 4.

¹⁵ Marini, Margaret Mooney (1990), “Sex and Gender: What Do We Know?” *Sociological Forum*, 5(1): 95–120.

¹⁶ Oxfords Dictionaries, “Definition of gender in English;” available at: <https://en.oxforddictionaries.com/definition/gender> (accessed on 11 December 2020).

¹⁷ World Health Organization, Gender, equity and human rights; available at: <http://www.who.int/gender-equity-rights/understanding/gender-definition/en/> (accessed on 11 December 2020).

¹⁸ UNHCR (2016), n. 1.

¹⁹ UN (1998), *Rome Statute of the International Criminal Court*; available at: http://legal.un.org/icc/statute/99_corr/cstatute.htm (accessed on 11 December 2020).

Violence

The lexical meaning of violence is “behaviour involving physical force intended to hurt, damage or kill someone or something”.²⁰ Article 1²¹ of the UN General Assembly Declaration on the Elimination of Violence against Women (1993) defined violence against women as gender-based violence. Article 2 of the Declaration includes different forms of sexual and gender-based violence against women.²²

In the *World Report on Violence and Health* (2002), the WHO has defined ‘violence’ as:

(T)he intentional use of physical force or power, threatened or actual, against oneself, another person, against a group or community, that either result in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.²³

This definition gives a general idea of ‘violence’ that includes physical, psychological and sexual abuse, suicide and other self-abusive acts; deprivation or neglect against both men and women. It has used the terminology ‘power’ to denote physical force.²⁴

²⁰ Oxford Dictionary, “Violence;” available at: <https://en.oxforddictionaries.com/definition/violence> (accessed on 11 December 2020).

²¹ Article 1 of the UN GA Declaration on the Elimination of Violence against Women (1993), states, “For the purposes of this Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;” available at: <https://www.un.org/documents/ga/res/48/a48r104.htm> (accessed on 11 December 2020).

²² Ibid. Article 2 provides, “Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs”.

²³ WHO, “Violence Prevention alliance, Definition and typology of violence”; available at: <http://www.who.int/violenceprevention/approach/definition/en/> (accessed on 11 December 2020).

²⁴ WHO (2002), “the World Report on Violence and Health,” explains: “The typology proposed here divides violence into three broad categories according to characteristics of those committing the violent act:—self-directed violence;—interpersonal violence;—collective violence;” available at: https://www.who.int/violence_injury_prevention/violence/world_report/en/introduction.pdf (accessed on 11 December 2020).