



Sexual and Gender Based Violence Against Women During International Armed Conflicts: From the Lens of International Humanitarian Law

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Abstract

“Women continue to pay the price of wars of men”

- Sima Bahous¹

The whole world has gone topsy-turvy due to the outbreak of armed conflicts within or between various Countries. These armed conflicts are either of an international or non-international nature. Russo-Ukrainian war (between Russia and Ukraine) and Israel-Palestinian war (between Israel and Palestine) are the two ongoing international armed conflicts which are making everyday headlines. Also, civil wars are going on in countries such as Myanmar, Sudan, Ethiopia, Syria, Yemen, Columbia, Haiti, Central African Republic, Mozambique, Bangladesh, and Ecuador. Moreover, Nigeria, Burkina Faso, Mali, Democratic Republic of Congo, etc. are facing terrorist insurgency. Among all these countries, five countries which have the most number of casualties in 2024 are Ukraine (49881), Palestine (22386), Myanmar (13049), Sudan (9201) and Ethiopia (7846)². This data is the indicator of destructive nature of the armed conflict. However, gender-based violence is the darkest side which brings out the most abhorrent picture of the war. Generally, the civilian population is the victim of such armed conflict.

This paper deals with the GBV which are committed during the international armed conflict and used by the warring parties as a tactic of war and as a form of genocide. However, the scope of paper is limited to the GBV against women who are major victims of such violence. Further, the paper also delves into the root cause of GBV which lies in the patriarchal nature of the society and analyses the provisions pertaining to GBV under International Humanitarian law. It also highlights the challenges in enforcement of IHL pertaining to GBV and suggests certain ways to overcome those challenges.

Keywords: armed conflict, gender-based violence, International Humanitarian law, sexual violence, women

Introduction

Whether it is peacetime or wartime, women have always been the sufferers. The sole difference is that, during peacetime, they suffer only in the hands of their families and communities; however, during wartime they also suffer in the hands of their enemies. GBV against women during international armed conflict merely exacerbates the pre-existing sufferings of women which they are facing even in pre-conflict era. The United Nations has termed 'sexual violence' in armed conflict as 'history's greatest silence'.³ GBV during armed conflict, for a long time was considered as an unavoidable consequence of war, also referred to as a 'by-product' of an armed conflict.

There is no precise definition of the term 'Gender based violence'. Before defining the term 'Gender based violence', it is necessary to understand the meaning of two terms: 'gender' and 'violence'. The term 'gender' is often misunderstood and sometimes is used interchangeably with the term 'sex'. However, there is a difference between these two terms. The term 'gender' is based on the social construction and 'sex' is based on the biological differences. 'Gender' is a societal construction, intricately linked with the ascribed roles in every society.⁴ 'Sex', on the other hand, is based on biological characteristics of human beings. The term 'violence' includes those actions or behaviours which involve physical force, which are generally intended to hurt, damage, or kill someone or something.⁵ The term 'violence' has also been defined by World Health Organisation (WHO) as "*The intentional use of physical force or power, threatened or actual, against oneself, another person, against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.*"⁶ Therefore, GBV is violence perpetrated based on gender. GBV is a violence that results in physical, sexual, and psychological harm based on

gender discrimination, gender stereotype and power imbalances linked to gender.⁷ International Committee of the Red Cross (hereinafter referred to as ICRC) defines GBV as "*An umbrella term for any harmful act that results in, or is likely to result in, physical, sexual or psychological harm or suffering to a woman, man, girl or boy on the basis of their gender*"⁸ Therefore, the roots of GBV lies in the gender roles attributed to men and women in a society and gender inequality persisting in the society. However, GBV is a gender-neutral violence and anyone can fall prey of it. Therefore, victims of GBV can be men, women, transgender, as well as children. GBV includes both sexual and non-sexual violence. However, it is generally manifested in the form of sexual violence and physical abuse. GBV against women includes the commission of rape, forced marriage, forcing women into prostitution, forced pregnancy, genital mutilation and many more. GBV against men include genital beatings, castration, rape with foreign objects and being forced to perform sexual acts with other detainees. It is an undeniable fact that women are more vulnerable to sexual violence and other forms of GBV than men.⁹ 'Sexual violence' is merely a component of GBV. 'Sexual violence' has been defined by ICRC as "*Acts of a sexual nature committed against any person by force, threat of force or coercion*"¹⁰. Office of the United Nations High Commissioner for Human Rights (hereinafter referred to as OHCHR) defines 'sexual violence' as a form of GBV and encompasses any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting. Sexual violence takes multiple forms and includes rape, sexual abuse, forced pregnancy, forced sterilisation, forced abortion, forced prostitution, trafficking, sexual enslavement, forced circumcision, castration, and forced

nudity.¹¹

‘Sexual and gender-based violence’ (hereinafter referred to as SGBV) is another terminology which is used interchangeably with GBV by various organisations. United Nations High Commissioner for refugees (hereinafter referred to as UNHCR) defines SGBV as: “*any act that is perpetrated against a person’s will and is based on gender norms and unequal power relationships. It encompasses threats of violence and coercion. It can be physical, emotional, psychological, or sexual in nature, and can take the form of a denial of resources or access to services. It inflicts harm on women, girls, men, and boys.*”¹²

GBV undermines the human dignity and bodily integrity of the victim. The consequences of GBV are visible even in the post-conflict period. It leaves a deep mark on the physical and psychological health of the survivors. One cannot even imagine the social stigma that the survivors have to go through after the armed conflict is over. Women survivors who fall prey of GBV are deserted by their families. They have to go through a persistent agony for the rest of their lives. Due to fear of consequences, many a times the survivors of GBV have restrained themselves from reporting such violence.

Women and Discrimination

The havoc that befalls women during armed conflict is actually a result of perpetuating discrimination that exists even during peacetime. Women are generally treated as the second-rate member of the family and society. Even before the outbreak of the conflict, they are subjected to myriads of sexual abuses and violence. Sex based discrimination needs to be addressed to prevent violence against women in conflict. The root of the violence during armed conflict goes back to the existing violence in the pre-conflict era. This discrimination clubbed together with other forms of discrimination based on religion, race, ethnicity, etc., creates harsher form of discrimination regime against

women in the society.¹³ Therefore, root cause of the issue needs to be dealt with by the law.

This view is also reflected in recent international law trend. For instance, under General Recommendation 19 by the Committee on Elimination of All Forms of Discrimination against Women (hereinafter referred to as CEDAW Committee), which clearly provides that GBV is a form of discrimination and those forms of GBV that undermines the right to equal protection according to IHL is also a form of discrimination covered by CEDAW.¹⁴ Another such view is reflected in Durban Declaration and Programme of Action which was adopted in 2001 in United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The Declaration urges States to recognise that sexual violence used as a weapon of war is a violation of International Humanitarian law and may also constitute war crime in certain situations. The States are also to recognise that the simultaneous existence of racial as well as gender-based discrimination puts women in more vulnerable position. States are required to make those who are responsible for such violence liable.¹⁵ Even the recent human rights standards back up this view.¹⁶

Sexual Violence as a Tactic of War

Before the emergence and growth of International Humanitarian Law, the means and methods of warfare which could be resorted to by the parties to the conflict were unbridled. The motive of wars was not limited to the defeat of the other party, but to turn them into ashes. Therefore, it can be said that earlier wars knew no rules. Therefore, the earlier wars were fought in the cruelest manner. Unnecessary harms were made to the civilians. However, with the growth of IHL, it has become obligatory for the parties to armed conflict to act in conformity with the principles of humanity, distinction, proportionality and military necessity. In the early days of its growth, IHL did not give much importance

to GBV or sexual violence. However, it was after the devastating experiences of the armed conflict which took place in Former Yugoslavia and Rwanda that IHL started to cover the field of GBV and sexual violence against civilians. These wars brought into light a systematic use of sexual violence as a tactic of war.

The United Nations Security Council (UNSC), has also acknowledged in the Resolution 1820 that sexual violence against women and girls are resorted to by the parties to the war, in the following words “*women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group....*”¹⁷. Sexual violence was used as a method of war. Women were not only targeted as an individual as the ‘spoils of war’, but were also used for the purpose of ethnic cleansing. Some of the instances where rape was used as a weapon of war are as follows:

i. **The Rape of Nanking (1937):**

During the Japanese occupation of Nanking city of China, hundreds and thousands of civilian women were raped by the Japanese. Assumptions were drawn that it was also an instance of rape being used as a weapon of war by the Japanese.

ii. **World War II (1939-1945):**

During World War II, Jewish and Russian women were raped by Germans and German women were raped by the Russian soldiers. To retaliate the Nazis for their actions against Russia, Russian military raped 2000,000 German women. Nuremberg Tribunal was established to prosecute the war crimes committed during the Second World War. In the trial, although evidences were presented pertaining to mass rape of

120000 to 900000 in Greater Berlin. Even Japanese women were placed in camps and were repeatedly raped. They were referred to as ‘comfort women’ whose duty was to boost morale of the Japanese soldiers.¹⁸

iii. **Pakistan-Bangladesh War (1971):**

Bangladesh liberation war of 1971 also presented a horrific picture of the grave violation of human rights especially sexual violence against Bengali women. Approximately 200,000 to 400,000 Bengali women were raped in Bangladesh by the Pakistani soldiers. The survivors of this horrendous violence reveal that how the Pakistani military carried out mass rape campaigns against Bengali women and girls.¹⁹ The goal was to impregnate more and more women, in order to create a ‘pure Pakistan’. In both Muslim and Bengali communities, women’s chastity is associated with honor of the family as well as the community. Joseph Fried of the New York Daily News reported from Dhaka that, “a stream of victims and eyewitnesses,” relayed to him that, “truckloads of Pakistani soldiers...swooped down on villages in the night, rounding up women by force. Some were raped on the spot. Others were carried to military compounds.”²⁰ An Indian novelist wrote after being convinced that it was pre mediated and a deliberate crime that “the rapes were so systematic and pervasive that they had to be conscious Army policy.” Artillery used to open attacks on hospitals and schools and used to separate women and those children who were sexually matures. Then they were kept in a compound and were made available to troops for service.²¹

In the post conflict period, women were rescued from rape camps and shelters across the country. Some of them were in the complete state of shock and still those who survived are facing challenges in overcoming the heart wrenching experiences they had to go through. It indicates that how rape continues to be used a tool to instill fear and a deliberate policy to terrorize the communities and destroy the dignity of the communities.

iv. **Genocide of Former Yugoslavia (1945-1992):**

Media played an instrumental role here to highlight the incidents of sexual violence during the conflict period. Rape emerged as a strategy to wipe out the groups of people. Serbian military officials used 'rape' as weapon of war to dishonor women belonging to a particular community. It was calculated by a European Community team of investigators that 20,000 Muslim women and girls were raped by Serbs.²² However, the calculation made by the Bosnian women says that 50,000 Muslim women were raped.

Serbs were well aware of the traditional thought of the Bosnian Muslim and Croatian Roman Catholic societies that women were considered as property of men (father and husband). Defiling the honor and dignity of women would mean contaminating the honor and dignity of the men. Therefore, it shows that how women were used as the tool of men's war, where men were harmed by harming their women. It was believed that when men raped the property of their enemy, it becomes soiled, tainted and devalued. Women were physically

and emotionally harmed to break the social and cultural cohesion.

Rape was used not only to pollute the soil of the Bosnians and Croats, but also their bloodlines.²³ It was used as a planned strategy to intimidate and spread terror in the communities and also as a means of ethnic cleansing. Entire village of the Croats and Bosnian was evacuated and refugees were compelled to flee the national boundaries. Women and their families, fearing the devastating consequences fled and never return. 'Rape camps' were established where men and women were separately kept and repeatedly raped.

Rape was also a technique of revenge. Another purpose of committing such sexual abuse was to defile the ethnic bloodline. Forced pregnancy and maternity was another means used by Serb armies for that purpose. Women were repeatedly raped by Serb men to impregnate them. Women report being subjected to taunts that they will have to bear 'Chetnik' children (a word for Serbian extremists).²⁴

The real war, at which the women survivors of such assaults were thrown at, actually starts after the end of war. They were treated as a damaged and a devalued property by their families. The psychological effects were similar to that of post traumatic stress disorder. Other traumatizing effect which they had to bear physically was personal injuries, pain, sleep abnormalities, appetite disturbances, infection and pregnancy. Short term psychological effects include anger, anxiety, depression, fear, suicidal inclinations, and fixation on the rape.²⁵

v. **Rwanda Genocide (1994):**

The ethnic strife between Tutsis and Hutus, took form of a brutal genocide by the Hutus on 6th April 1994. Here also, the story was similar to that of Former Yugoslavia. Tutsi Women and girls were raped as a tool to humiliate and cleanse the ethnic Tutsi population. On that fateful day, an estimated 150,000 to 250,000 women were raped²⁶. Rape during Rwandan genocide was also a deliberate and organized tactic of war. As opined by Christopher W. Mullins, “*systematic assaults were carried out across the country. Some were spontaneous but most were planned—part of the official battlefield tactics of the genocide*”²⁷. Sadly, even if these kind of horrendous acts incidents were taking place, no official data actually existed because women knew it that reporting such acts may lead them into the mouth of death or will make their life more miserable. Therefore, they were reluctant and feared in reporting such acts because anyways the soldiers were not going to be made accountable for their acts.²⁸ Hutus used rape as a method of warfare to dishonor and humiliate Tutsis. The saddest part of the story is that not only Hutu men were involved in committing such acts against Tutsi women, but Hutu women were also aiding Hutu men to do so. Rwandan society was no different from other societies where women are considered as a chattel belonging to men and therefore, taken as plunder of war. Therefore, women were raped to humiliate their men and to create a group mixed ethnic children to continue their dominance and power. Tutsi women were raped or sexually tortured before being killed. And, sometimes perpetrators

mutilated women during rapes or before killing them by cutting their breasts, or puncturing the vagina with sharp objects, or disfiguring body parts that looked ‘Tutsi’ such as long fingers or thin noses (Alison, 1999)²⁹. In other cases, Tutsi women were gang-raped, sexually enslaved, or ‘married’ by Interahamwe militiamen to save their lives. Rape was used as a tool to dehumanize Tutsis. Both common Hutu men and the Hutu militia were involved in raping Tutsi women.³⁰

Rape has been used as a method of warfare, even earlier than Rwandan genocide, however, not in so systemic manner. The United Nations Special Rapporteur on Rwanda, Rene Degni-Segui (1996) found that: “*rape was the rule and its absence the exception . . .*”³¹

‘Genocidal rape’ is defined as “a systemically organized military tactic of terror and genocide. It is used to generate fear in a subdued population, humiliate the population (both men and women), derogate women (through spoilage of identity), and create a cohort of mixed-ethnic children to maintain the humiliation/spoilage/domination. Such use of sexual assault is an orchestrated tactic of warfare”³².

As a result of this genocide, International Criminal Tribunal for Rwanda (ICTR) became the first Tribunal to recognize rape as a means to perpetrate genocide.³³

Gender Based Violence and ongoing International Armed Conflicts:

There are two major ongoing international armed conflicts around the world: Israel-Palestinian armed conflict and Ukraine-Russia armed conflict. In both of these conflicts,

commission of GBV has been reported. Military men of the warring parties have been involved in grave violations of IHL and also the human rights of civilians, especially women:

i. **Israel-Palestinian Armed Conflict:**

The ongoing Israel-Palestinian conflict involving the non state actor Hamas operating from Gaza Strip is a conflict which is sometimes categorized as an international armed conflict, or a conflict having elements of both international and non-international armed conflict. On 7 October 2023, Hamas operating from Gaza Strip launched attacks on Israel. In response to this attack, Israel started retaliating and countering the further attacks.

United Nations Human Rights Council (UNHRC) set up an independent fact finding mission to inquire into the possible war crimes and human rights violations in Israel and occupied Palestinian territory since 2023. As a consequence, an independent body called 'Independent International Commission of Inquiry on occupied Palestinian territory, including East Jerusalem and Israel' was established.³⁴ The evidence collected by the Commission indicates towards escalation in the sexual violence and GBV. Israel has been employing these as a tool against Palestinian people in order to undermine their right to self determination.³⁵ SGBV such as forced public stripping, sexual harassment, threats of rape and sexual assault form part of Israeli forces Standard Operating Procedure and are being used as a means to intimidate and terrorize Palestinians.³⁶ Unfortunately, such acts are being encouraged by Israel's top civilians

and military leadership by issuing special orders for the same. Human rights of women have been severely undermined by Israel as it destroyed healthcare facilities especially reproductive healthcare facilities in Gaza, thus affecting the reproductive rights of women. It has also affected the fertility prospects of Palestinians as a group. Due to such violations, increase in the fatalities of women in Gaza could be witnessed.³⁷ Various patterns of GBV have been observed in different regions of Israel.³⁸

Gender based crimes (such as outraging personal dignity, humiliating and degrading treatment, including any form of indecent assault and coerced intimacy against women while captured in Southern Israel and brought to Gaza) has been acknowledged and confirmed by the Commission.³⁹ The Commission further found that war crime of taking hostages coupled with other kinds of GBV was also committed.⁴⁰ War crimes were committed against unarmed female soldiers in Mahal Oz Outpost.⁴¹

Grave violation of International Humanitarian Law as well as international human rights was witnessed here. Hamas and other Palestinian armed forces were involved in violating the principle of distinction.⁴² Hamas Military wing and other Palestinian group violated special provisions related to women under IHL.⁴³ Women in Mefalsim and Alumin were assaulted and killed deliberately. Israeli women were subjected to GBV (physical, sexual, psychological violence including threats of such violence).⁴⁴ Serious violations of the human rights of

women and girl have been committed by undermining their right to life, free from cruel, inhuman and degrading treatment, right to liberty and security of persons, etc.⁴⁵ The Commission further reiterates that violence against women and girls according to General Recommendation 30⁴⁶ of Committee on Elimination of discrimination is a form of discrimination prohibited by Convention and violation of Human Rights.⁴⁷ Therefore, as a consequence of these severe violations, South Africa alleged Israel of genocide being committed against Palestinian people and knocked the door of International Court of Justice (ICJ) for provisional measures. ICJ ordered Israel to prevent genocide occurring against the Palestinian people.⁴⁸

ii. **Russo-Ukrainian Armed Conflict:**

Amidst the ongoing Russo-Ukrainian conflict, recent reports from Ukraine suggest that Ukrainians in occupied territories as well as those who are taken as prisoners of war are facing various conflict related sexual violence (CRSV). Russian military has been involved in committing such violence against the Ukrainian citizens.

The conflict between Russia and Ukraine commenced with full invasion of Russia on February 22. The issue of GBV exacerbated due to outbreak of war between the two Nations as is indicated by the report 'voices of Ukraine', published by United Nations Population Fund (hereinafter referred to as UNFPA) in 2024.⁴⁹ The key findings of the report brings into light heightened risk of domestic violence, impact of soldiers who are returning from war, mobility restrictions being imposed on women, economic vulnerability,

displacement related risk, increased risk of blackouts, and increased risk of sexual violence.⁵⁰ Ukrainian women are facing various kinds of violence such as intimate partner violence, psychological violence, physical violence, sexual violence, economic violence, denial of rights, resources, forced marriage, child marriage, exploitation, gender discrimination, reproductive coercion and abuse, and so on. Movements of adolescent girls are being restricted due to the ongoing lack of safety and sexual violence at schools. Other women who are more susceptible to GBV are internally displaced, returnee, older women, women and girls with disabilities and Roma people.⁵¹ As per Ukraine Humanitarian Need and response Plan of 2025⁵², approximately 2.4 million people in Ukraine, especially girls and women who are experiencing or are at risk of GBV and are in need of humanitarian support services. The Plan also provides for measures which can be taken to mitigate the sufferings of the victims.

Ukraine is making endeavors to prevent GBV and providing assistance to the survivors by formulating Legislative policies. Ukrainian government formulated a National Action Plan to give effect to United Nations Security Council Resolution (UNSC) 1325⁵³ for the period until 2025. Ukraine also ratified the Istanbul Convention. Other important measures are being taken by the State Government in this direction.⁵⁴

Gender Based Violence and International Humanitarian Law

International Humanitarian law or the law of war or the law of armed conflict evolved as a savior, the object of which was to mitigate the

devastating effects of war. The need of such law was felt by Henry Dunant after he experienced the heart wrenching aftermath of the Battle of Sulferino in 1859. He recounted his experience in the Book 'Memory of Sulferino' and played a vital role in shaping and growth of IHL. IHL is the body of International law that deals with means and methods of war. It limits means and methods of war.

IHL contains some general as well as specific provisions addressing the needs of women. General provisions include the principle of non-discrimination as well as some customary international humanitarian law. Certain IHL provisions also provides for the provisions related to rape and sexual abuse, implied prohibitions of rape and sexual violence, rules related to abuses that disproportionately affects women, principle of discrimination, provisions related to grave breaches.

i. Principle of non-discrimination:

Principle of non-discrimination or principle of equality means that no one should be subject to 'adverse distinction'. Article 12 of the First and Second Geneva Convention (hereinafter referred to as GCI⁵⁵ and GC II⁵⁶) reflects this principle. The Article provides that no adverse distinction shall be made while providing protection and care to such protected persons as is mentioned in GCI and GCII, on the basis of sex, race, nationality, religion, political opinion, and such other grounds.⁵⁷ This provision under GCI applies to wounded and sick and under GCII applies to wounded, sick and shipwrecked members of armed forces at sea. Therefore, the IHL bans adverse distinction. However, it does not prohibit favorable distinction addressing special needs of vulnerable groups. Also, if unequally placed people are treated equally, it will

lead to injustice and therefore such unequal circumstances such as sex of the protected persons must be taken into consideration.⁵⁸ Article 12 of the Conventions also provide that only in case of urgent medical needs, priority in the order of treatment can be justified and women should be treated with all consideration due to their sex.⁵⁹ Therefore, Geneva Conventions of 1949 and the additional protocols establish the principle of equality. These provisions although do not provide explicit protection from GBV, however, implicitly addresses the concern of SGBV against women during the armed conflict. It provides that there should be no distinction on the basis of sex when it comes to the treatment of sick, wounded, or shipwrecked and they should be treated humanely that is they should not be subjected to any kind of violence including GBV. Therefore, GBV against women fall well within the ambit of Article 12.

Article 14 of GC III is another such provision, which prohibits harm to the persons and honor of those who are taken as Prisoners of war (PoWs). It provides that "*Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men*".⁶⁰ However, this provision has been the object of consistent objection, especially by feminists. While interpreting such provisions, women are assumed as weak and violence against them is associated with their 'honor' and 'dignity'. These kinds of provisions and their interpretations perpetuate patriarchy in the society and discrimination against women.

Article 46 of the Hague Convention IV provides that military authorities must respect the 'family honor'.⁶¹

This provision although prohibits sexual violence against women, but in very ambiguous term. However, the meaning of term 'family honor' has not been clarified and subjected to objection by feminists.

ii. **Special Provision:**

There are very few special provisions under IHL which specifically prohibits sexual violence against women. For instance, Article 27 of the GC IV prohibits any attack on the honor of women and particularly rape, enforced prostitution or any form of indecent assault.⁶² This provision is further backed by Article 76 (1) of Part IV of the Protocol I⁶³ which applies on all international armed conflicts. It specifically prohibits rape, forced prostitution and indecent assault.

Certain special categories of women such as women in detainment and internment and mothers and pregnant women are provided with special treatment. For instance, Article 25 of the GC III provides that separate men and women dormitories should be provided where both men and women PoWs are kept in the same camp.⁶⁴ Article 29 provides for separate conveniences for women.⁶⁵ Women PoW undergoing disciplinary punishment⁶⁶ or sentence⁶⁷ granted after conviction shall be confined in separate quarters and be kept under immediate supervision of women. Article 88 of the GC III provides that a women PoW shall not be awarded more severe punishment or treated more severely while undergoing the punishment than a female member and in no case, than a male member of armed forces of the detaining power for the similar offence.⁶⁸ Further, Annexure I read with Article 110 of

GC III provides that all women who are pregnant or are mothers with infant or small children shall be eligible for accommodation in neutral country.⁶⁹

GC IV deals with the protection of civilians. Women are primarily protected as civilians. It contains some special provisions for protection of women. Article 38(5) provides that mothers of children under seven years of age shall benefit from any preferential treatment to the same extent as the nationals of the state concerned (for non repatriated protected persons).⁷⁰ Provisions related to treatment of detainees⁷¹, separate sleeping quarters and sanitary conveniences for women internees have been provided⁷². Women internee should not be searched by anyone except women.⁷³

Along with these express provisions, there are certain implied prohibitions of rape and other sexual violence in the conflict. These prohibitions are result of progressive interpretations of the existing provisions, especially Geneva Conventions and its additional protocols. Rape is considered as 'torture', as confirmed by both Amnesty International⁷⁴ and the UN Special Rapporteurs. The Geneva Conventions and Protocol I contain the provisions of grave breaches. However, 'rape' or other forms of 'GBV' are not included in the list of grave breaches. Conferment of progressive interpretations to the existing provisions implies that 'rape' can be considered as grave breach of the Convention, as it is considered as 'torture'. Such provisions of IHL have been criticized by the feminists as it fails to consider the gravity of GBV against women and not includes such gender-based crimes in the list of the grave breaches.⁷⁵

Rome Statute of the International Criminal Court lists Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as ‘crime against humanity’⁷⁶. Therefore, International Criminal Court has jurisdiction over GBV committed during war times. Even ICC has prosecuted several cases related to forced marriage and forced pregnancy. In the case of *The Prosecutor v. Dominic Ongwen*⁷⁷, a Ugandan militia leader was prosecuted for several crimes against humanity including rape, forced marriage, forced pregnancy, etc. committed between 1 July 2002 and 31 December 2005.

International Courts such as ICTR and ICTY played a vital role in providing such interpretations. ICTR was established by UNSC to prosecute those who were involved in grave violations of IHL during Rwandan genocide 1994. In the case of *The Prosecutor v. Jean-Paul Akayesu*⁷⁸ (Trial Judgment), ICTR for the first time defined ‘sexual violence’ and ‘rape’. The Court defined sexual violence, which includes rape as “*any act of a sexual nature which is committed on a person under circumstances which are coercive.*”⁷⁹ Rape was defined as “*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.*”⁸⁰ It was further held that during conflict period, in sexual violence, consent does not matter. It was recognized in this case that rape and sexual violence were committed as a form of genocide. ICTY which was established by UNSC Resolution 827⁸¹ also followed the similar trend. The case of *Tadic*⁸² decided by ICTY was the first case which included charges of sexual nature. In the case of *Prosecutor v. Furundzija*⁸³, highlighted the objective

elements of ‘rape’ as follows:

The Court outlined the objective elements of rape as⁸⁴:

- (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 the victim or a third person.

However, in the case of *Kunarac*⁸⁵, broader definition was provided. ‘Rape’ was defined to include following⁸⁶:

- (i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
- (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- (iii) the sexual activity occurs without the consent of the victim

Regional Court such as European Court of Human Rights (ECHR) has also decided various cases related to sexual abuses at the time of war. In case of *Aydin v Turkey*⁸⁷, stated that: “*Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim*”⁸⁸.

The contribution of these interpretations is commendable where sexual violence and rape was actually recognized as a torture and the gravity of the act was taken into consideration. GBV not always, but are most of the times manifested in form of Sexual violence and rape against women. Therefore, through

these cases, the International Tribunals and Courts tried to recognize the fact that acts of sexual violence and abuses are actually being committed during the war times. Even they prosecuted the offenders for committing such acts. At least they are not denying the fact of SGBV during war times. Therefore, ICTR and ICTY played a vital role in shedding light on the darkest part of the war, which was for the long time was never brought into light.

What is the Problem: The Law itself or its Implementation?

IHL is not a flawless law! The credibility and effectiveness of IHL has been questioned time and again, whenever there is an outbreak of armed conflict. The two questions which has always been asked in this context is that whether IHL is sufficient to address the issues which arise during the armed conflict? Or the problem is in the implementation of IHL? Contemporary feminists argue that the problem lies within the law itself as it has become obsolete and reiterates discrimination against women. The rules of IHL emphasize on the 'honor' and consequently it makes a women survivor of rape or sexual violence dishonored. Accordingly the rules of IHL are inadequate. Moreover, rape has not been recognized in the IHL explicitly. This characteristic of IHL is also criticized by the feminists.⁸⁹

On the other hand, ICRC and some major Human Rights NGOs is of the view that problem lies in failure of States to implement IHL. Frangoise Krill wrote in the International Review of the Red Cross in 1985: "*If women in real life are not always protected as they should be, it is not due to the lack of a legal basis... The international community will not succeed in remedying this situation merely by adopting new rules. Most of all, it must see that the rules already in force are respected.*"⁹⁰ Therefore, focus should be on the rigorous implementation of IHL.

It can be admitted that there are lack of explicit rules under IHL which protection of women

from GBV during armed conflicts, however, by providing progressive interpretations to these rules, GBV is now covered by IHL. However, there are certain challenges in implementation of such provisions such as lack of reporting of such acts by women due to the fear of consequences including stigmatization, failure of states to deal with reported violence, weakness of implementation mechanism under IHL, and inability on the part of victims to prove such violence. These challenges must be overcome to ensure proper implementation of the laws relating women and GBV under IHL.

Sexual Violence Against Women Prisoners of War

Sexual violence against prisoners of war is not new. Due to their affiliation with the opposite military, they are prone to various kinds of violence and abuse, including sexual violence. In recent ongoing Russia Ukraine war, reports bring out the violence being committed by Russia against Ukrainian Prisoners of war (PoWs). In a Report prepared by Amnesty International, it has been highlighted that war crimes are being committed against the Ukrainian PoWs.⁹¹ They are being isolated from the world and are subjected to various forms of torture including sexual violence. PoWs are often subjected to such kinds of torture.⁹² It has been corroborated in various other reports including the Report of Independent International Commission of Inquiry on Ukraine (IICIU) that such violence are being committed against those held in captivity in Russia⁹³. Agnes Callamard, Secretary General of Amnesty International remarked about the Ukrainian detainees of Russia that "*Russia's systemic incommunicado detention of Ukrainian POWs and civilians reflects a deliberate policy designed to dehumanize and silence them, leaving their families in agony as they wait for news about their loved ones*".

Similar conditions have been reported in the case of Israel-Palestine conflict. Detainees are

being subjected to severe violence and abuse and were kept in a very inhumane condition. The Israeli security forces have been reported to have committed sexual violence including rape against Palestinian women detainees. Sexual violence against women detainees and PoWs are used as a tool to punish the State they are affiliated to.

Third Geneva Convention does provide for the PoW, especially women. According to Section 11 of the Convention, women shall be treated due to their sex and shall in all cases benefit by treatment as favorable as that granted to men. Section 25 further provides that women shall be provided with separate dormitories. Article 97 of the Convention ensures that Women PoWs undergoing disciplinary punishment shall be confined in separate quarters from male PoWs and shall be under the immediate supervision of women. Also, Article 108 of the Convention further provides that women PoWs on whom a sentence has been pronounced must be kept under the supervision of the women and should be kept in a separate quarter. All these provisions of the Convention are to ensure humane and dignified treatment of PoWs.

However, the States continue to violate this Convention during international armed conflicts. However, such kind of violence does occur during the times of Non-International Armed Conflict (NIAC), but the concept of PoW does not exist in NIAC. Therefore, the gap exists here and must be addressed as during the NIAC, detainees are subjected to severe violence.

Sexual Violence Against Women Combatants

In the Gaza Palestinian conflict, there were instances of violence against female soldiers. Commission reports that they were killed and abducted.⁹⁴ The Commission investigated an incident involving the shooting and killing of unarmed Israeli female soldiers who were in civilian clothing at the time of the attack on

7 October 2023, in the Nahal Oz outpost.⁹⁵

However, there is less reporting about the sufferings of women combatants as there are generally not at the front foot during the wartime.

Gender Based Violence Against Men

In the earlier sections it has already been brought into light that GBV is something to which women are prime victims, however, it must not be forgotten that GBV is a gender neutral act. Although, the GBV against men is a topic which is less talked about and receives least evidentiary support from the existing literature. However, it must not be assumed that, men are not subjected to GBV and sexual violence.

The forms of sexual violence which the men (civilian, prisoners of war as well as combatants) are subjected to include but not limited to various forms of rape, genital beating, genital mutilation, forced masturbation.⁹⁶ During wartimes, men suffer both directly as well as indirectly. Directly, they may suffer as the victims of sexual violence and indirectly they may suffer if compelled to witness the sexual violence being perpetrated against the female members of their families or if they are compelled to rape the female members of their own family. One of the instances, as collected by Carlsen since 2013 indicates towards the sufferings of men during wars. While researching, he found a respondent who told him how the rebel soldiers raped him and his companions and forced them to rape each other amongst themselves.⁹⁷

In the case of *Prosecutor v Ranko Cesic*⁹⁸, the perpetrator was convicted of rape as a crime against humanity and humiliating and degrading treatment as a war crime. Two brothers were compelled to perform fellatio on each other. Although there have been instances where men have been raped during war, but even if such actions are punished, they are not punished as such. Such acts are

punished as 'torture' even if it consists of components of sexual violence.

There are various aspects related to sexual violence against men. Sexual violence against men is generally seen from the lens of masculinity. Sexual violence against men is underreported due to the fact that it is seen as maligning the masculinity of the male survivors. Men are considered as losing their masculinity as they have suffered sexual violence.

Therefore, it can be said, there is a scarce reporting and literature pertaining to sexual violence against men. Moreover, most of the programs which are intended to relief survivors of sexual violence exclude men survivors. However, this gap in the existing literature must be filled and is something to ponder upon.

Way Forward

Women have been the prime sufferer of war. Their bodies have been used as a battleground, where the victors could stand and claim their victory. IHL being the law applicable during the time of war have always been questioned for its loopholes when it comes to women protection during the time of war and implementation of the rules pertaining to women. It will not be wrong to say that IHL fails as a law to protect women from GBV during war time. The evidence of this failure can be found in the reports related to GBV in Ukraine, Russia, Israel and Gaza. There are two prime reasons for the failure of IHL to address the issue of GBV during the time of armed conflict. Firstly, there is a lack of explicit provisions which prohibits SGBV against women. Even if some provisions can be construed to imply prohibition of SGBV against women, those provisions are written in such a language that associates women with 'weakness', 'dignity' and 'honor'. These provisions again perpetuate the patriarchal thoughts of the society, thus leading to continue the agony of women.

Secondly, the implementation mechanism of IHL is weak. Therefore, States rarely care about its violation during wartime. There is a need to address these deficiencies of IHL in order to make it capable of protecting people (including women and girls) from GBV during war time.

When it comes to the insufficiency of the provision, there is a pressing need to add to and modify IHL. There is a need that States must agree on explicit provisions dealing with GBV, especially prohibiting it to be used as a tactic of war and a form of genocide and providing an efficient redressal mechanism for the survivors of GBV. Also, there is a need to modify the language of the existing provisions related to women because such language perpetuates discriminatory treatment of women in the society. For instance, use of terms such as 'consideration due to their sex' and 'family honor' points towards the thought that women are 'honor of the community and family'. Law must be a vehicle of change, and therefore, such provisions must encourage the society towards 'equality' and 'modernization' in the society. It must not show a sense of pity towards women.

When it comes to implementation part, there is a pressing need to incorporate a well built implementation mechanism under IHL. The Courts that deal with matters related to IHL such as International Court of Justice, International Criminal Court and International Criminal Tribunals lacks their own implementation mechanism. For instance, ICJ does not have its own implementation mechanism and Security Council has the power to take actions related to compliance of ICJ decisions. However, if a permanent member of SC is involved, the implementation gets difficult. ICC too suffers from the lack of proper implementation mechanism. Its decisions are implemented on the basis of cooperation between the States. Unless and until a State cannot be compelled to obey the decisions of these Courts, it is really difficult to ensure implementation of IHL

as well. It is because a law cannot be obeyed unless its violation brings consequences. Courts have the competence to interpret the provisions of IHL and fix the liabilities of States in cases of violation of IHL. So, by strengthening the implementation mechanism of these institutions, implementation of IHL can be ensured in more efficient manner.

Another issue which needs to be addressed is the 'lack of the reporting' by the survivors. It is generally observed that the survivors of the SGBV fears reporting of the incident. The problem is twofold. Firstly, they have a fear of excommunication from the community, desertion by their families and fear of being killed by the perpetrators and secondly, they know that there is a high probability of perpetrator going unpunished. These two issues need to be addressed. There is a need to change the thought of the society and such change

must be initiated by the law itself, for instance, by omitting provisions which are reflection of orthodox society. Also, the survivors must be provided timely humanitarian aid and protection so that they can talk openly without fear. The international Courts must take stern actions against the perpetrators of such crimes which can bring a sense of security for the survivors that the perpetrators will not go unpunished. The rate of prosecution must be increased in such cases.

Therefore, it can be concluded that women must not be made to pay the price of war and there is a need to strengthen IHL in order to protect women from GBV. This is the right time to break the 'history's greatest silence' and speak up for those who fail to do so due to various reasons.

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