



Nina Hermus

‘Forgotten Victims of War’

Invisible though Stigmatised: The Case of Children Born of Wartime Rape and Conflict-Related Sexual Violence

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FOREWORD

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- Sibanda, Opal Masocha, *Protection of Children's Rights to Privacy and Freedom from Online Exploitation and Abuse in Southern Africa. A Case Study of South Africa and Zimbabwe*, Supervisors: Zahara Nampewo, Makerere University (Uganda) and Marystella Simiyu, University of Pretoria. Master's Programme in Human Rights and Democratisation in Africa (HRDA), coordinated by Centre for Human Rights, University of Pretoria.

- Van Der Werf, Charlotte Vera, *Lebanon's October Uprising: A Clean Slate for Syrian Refugees?* Supervisor: Zeina El-Hélou, Saint Joseph University (Lebanon). Arab Master's Programme in Democracy and Human Rights (ARMA), coordinated by Saint Joseph University (Lebanon).

- Yutthaworakool, Saittawut, *Understanding the Right to Change Legal Gender: A Case Study of Trans Women in Sri Lanka*, Supervisor: Kokila Lankathilake Konasinghe, University of Colombo (Sri Lanka) and Mike Hayes, Mahidol University. Master's Programme in Human Rights and Democratisation in Asia Pacific (APMA), coordinated by Mahidol University (Thailand).

This publication includes the thesis *“Forgotten Victims of War”. Invisible, though Stigmatised: the Case of Children Born of Wartime Rape and Conflict-Related Sexual Violence*, written by Nina Hermus and supervised by Kalliope Agapiou-Josephides, University of Cyprus.

BIOGRAPHY

Born and raised in Brussels, Belgium, Nina obtained a Master of Laws Degree (LL.M) from the KU Leuven in 2018 and a master’s degree in Human Rights and Democratisation in 2020. Particularly interested in women’s rights and children’s rights; strong activist for a gender-equal society.

ABSTRACT

Conflict-related sexual violence has many disastrous consequences, yet one consequence that is systematically ignored is the children being born as a result from such violence. This research focuses on children born of wartime rape, the often ‘forgotten victims of war’. The aim of this study is to explore how the human rights of these children, enshrined in the United Nations Convention on the Rights of the Child, are compromised, while, additionally, identifying ways to rectify these violations and safeguard the child’s rights in an adequate way. This research adopts an innovative approach that sheds a light on four different cases: Bosnia and Herzegovina, Northern Uganda, Colombia and Myanmar. It examines in a comparative way key issues that affect the lives of these children. Stigmatisation, discrimination, statelessness, abuse, economic hardship and, at worst, infanticide; the findings reveal that the human rights of these children are systematically violated, irrespective of time and space. However, before analysing the multitude of violations on the human rights of children born of wartime rape, this research will begin with tackling the root cause of the issue: conflict-related sexual violence, too often falsely perceived as a mere by-product of war. This research will analyse this complex phenomenon by stepping away from the classical explanations of patriarchal culture, sexual desire or opportunity and will demonstrate on the basis of feminist discourse that conflict-related sexual violence not only has, but can be effectively prevented.

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TABLE OF ABBREVIATIONS

CBOW	Children born of wartime rape
CRC	United Nations Convention on the Rights of the Child
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CRSV	Conflict-related sexual violence
DRC	Democratic Republic of the Congo
FARC	Fuerzas Armadas Revolucionarias de Colombia
GBV	Gender-based violence
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICC	International Criminal Court
LRA	Lord's Resistance Army
UNICEF	The United Nations Children's Fund
UNHCR	The United Nations Refugee Agency
UPDF	Uganda People's Defence Force

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INTRODUCTION

‘There can be no keener revelation of a society’s soul
than the way in which it treats its children’

– Nelson Mandela¹

1. TOPIC STATEMENT

Throughout history, women and children have been deliberate targets during times of war and armed conflict. Sexual violence in wartime has existed as long as war itself.² Although it can be directed towards all genders, females tend to be the primary victims and are disproportionately affected, further increasing pre-existing gender inequalities. Conflict-related sexual violence (CRSV) may have been present for millennia, though the political willingness to adopt the measures to address this phenomenon has not. Deep feminist engagement was necessary to transform the human rights discourse. By the late 1980s, the global women’s movement put the emphasis on ‘woman’s rights are human rights’ and identified violence against women as a priority issue of human rights, which gained universal acceptance at the Vienna Conference of 1993.³ The silence of the international community was, nevertheless, deafening for a long time.

¹ Address by President Nelson Mandela at the launch of the Nelson Mandela Children’s Fund, Pretoria, 8 May 1995.

² AM Watson, ‘Children Born of Wartime Rape: Rights and Representations’ (2007) 9 *International Feminist Journal of Politics* 20, 21.

³ R Copelon, ‘International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking’ (2003) 11 *American University Journal of Gender, Social Policy and Law* 865, 866; D Otto, ‘Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law’ in A Orford (ed), *International Law and its Others* (CUP 2006) 344.

The widespread occurrence of sexual atrocities committed in the 1990s, in former Yugoslavia and Rwanda, were necessary to awaken the dozing international community and to increase international attention.⁴ CRSV appeared on the international agenda, leading to the establishment by the United Nations of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994.⁵ The codification of sexual and reproductive violence took a great leap forward with the formation of the respective tribunals, given that systematic rape and other sexual crimes could now be prosecuted as war crimes, crimes against humanity or forms of genocide, not merely – falsely – perceived as a by-product of wartime.⁶

In addition to the former *ad hoc* tribunals, the United Nations Security Council adopted several resolutions⁷ on ‘Women, Peace and Security’ regarding the role of women as key players in conflict prevention, peacekeeping, conflict resolution and peace-building efforts, while simultaneously stressing that rape and other forms of sexual violence committed against women in conflict must be ceased.⁸ Fortunately, the culture of impunity regarding sexual violence is slowly transforming into a culture of accountability, though many steps still need to be taken.

The discourse surrounding CRSV has clearly put the focus on women as victims of the sexual violence suffered in armed conflicts. Little emphasis is given on the aftermath of such attacks. What is relatively absent in international discourse is the topic of children born as a result

⁴ United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), ‘Women2000: Sexual Violence and Armed Conflict: United Nations Response’ (UN 1998) 9.

⁵ A Faucette, ‘Improvements in the Legal Treatment of Systematic Mass Rape in Wartime: Where Do We Go From Here?’ in S Dewey and T St Germain, *Conflict-related Sexual Violence: International Law, Local Responses* (Kumarian Press 2012) 54.

⁶ K Theidon, ‘Hidden in Plain Sight: Children Born of Wartime Sexual Violence’ (2015) 56 *Current Anthropology* 1.

⁷ UN Security Council, ‘Security Council Resolution 1325’ S/RES/1325 2000 (31 October 2000). Followed by subsequent resolutions UN Security Council, ‘Security Council Resolution 1820’ S/RES/1820 2008 (19 June 2008); UN Security Council, ‘Security Council Resolution 1888’ S/RES/1888 2009 (30 September 2009); UN Security Council, ‘Security Council Resolution 1889’ S/RES/1889 2009 (5 October 2009); UN Security Council, ‘Security Council Resolution 1960’ S/RES/1960 2010 (16 December 2010); UN Security Council, ‘Security Council Resolution 2106’ S/RES/2106 2013 (24 June 2013); UN Security Council, ‘Security Council Resolution 2122’ S/RES/2122 2013 (18 October 2013); UN Security Council, ‘Security Council Resolution 2242’ S/RES/2242 2015 (13 October 2015); UN Security Council, ‘Security Council Resolution 2467’ S/RES/2467 2015 (10 November 2015); and UN Security Council, ‘Security Council Resolution 2493’ S/RES/2493 2019 (29 October 2019).

⁸ K Theidon, ‘Hidden in Plain Sight: Children Born of Wartime Sexual Violence’ (2015) 56 *Current Anthropology* 1.

of CRSV, the often ‘forgotten victims of war’.⁹ Their existence has been recognised only to a marginal degree, despite a notably more significant reality. Although the exact number cannot be known, it is estimated that of the 20,000 to 50,000 women who endured sexual violence during the Balkan wars, around 2,000 children were born as a result.¹⁰ The numbers of the Rwandan genocide range from 2,000 to 5,000 children born as a result of genocidal rape, with some estimates reaching 25,000.¹¹ In Northern Uganda, the number of children born of wartime rape (CBOW), as a result of the violence by the Lord’s Resistance Army (LRA), is an estimated 8,000.¹² The conflict that erupted in East Timor in 1999 is believed to have led to approximately 1,000 children born to sexual violence, with the actual figure probably much higher.¹³ In 2018 alone, more than 16,000 children were born in Bangladesh’s largest refugee camp, Cox’s Bazar, as a result of the new waves of violence that spread throughout the state of Rakhine in Myanmar, forcibly displacing thousands of Rohingya refugees.¹⁴ CBOW live in all parts of the world – Democratic Republic of the Congo (DRC), Nigeria, Kenya, Libya, Colombia, Sierra Leone, Iraq and so on. Their presence is not a marginal one, nonetheless they remain under-researched as war-affected children and receive little attention from international institutions dealing with the protection and promotion of the human rights of children in conflict situations.¹⁵

⁹ UN News, ‘UN mobilizes in Rohingya camps to support babies born of rape; young mothers face stigma’ (UN News, 19 June 2018 <<https://news.un.org/en/story/2018/06/1012372>> accessed 5 March 2020).

¹⁰ C Ingvill Mochmann and S Lee, ‘The human rights of children born of war: case analyses of past and present conflicts’ (2010) 35 Historical Social Research 268, 269.

¹¹ Human Rights Watch (HRW), *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (HRW 1996); L Woolner, M Denov and S Kahn, ‘“I Asked Myself If I Would Ever Love My Baby”: Mothering Children Born of Genocidal Rape in Rwanda’ (2019) 25 Violence Against Women 703, 707.

¹² Special Representative of the Secretary General (SRSG) Pramila Patten, ‘Opening Remarks’ (Commemoration of the International Day for the Elimination of Sexual Violence in Conflict, 19 June 2018) <www.un.org/sexualviolenceinconflict/statement/opening-remarks-of-srsg-pramila-patten-commemoration-of-the-international-day-for-the-elimination-of-sexual-violence-in-conflict-19-june-2018/> accessed 5 March 2020.

¹³ C Carpenter, *Protecting Children born of sexual violence and exploitation in conflict zones: existing practice and knowledge gaps* (University of Pittsburgh 2005) 6.

¹⁴ The United Nations Children’s Fund (UNICEF), ‘More than 60 Rohingya babies born in Bangladesh refugee camps every day’ (UNICEF, 17 May 2018) <www.unicef.org/press-releases/more-60-rohingya-babies-born-bangladesh-refugee-camps-every-day-unicef> accessed 6 March 2020.

¹⁵ C Ingvill Mochmann and S Lee, ‘The human rights of children born of war: case analyses of past and present conflicts’ (2010) 35 Historical Social Research 268, 269; C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 3.

The fate of CBOW is undeniably linked to the fate of their mothers.¹⁶ After enduring brutal attacks and traumatic experiences, survivors of sexual violence often face the risk of being stigmatised by, discriminated against and ostracised from their own community. ‘Children of bad memories’, ‘children of shame’, ‘children of the enemy’; children born of the sexual violence endured by their mothers are subject to injurious naming practices by their own communities worldwide.¹⁷ Their lives are a painful reminder of the memories of the past which survivors are so desperately trying to forget.

Although conflict and post-conflict situations differ culturally and geographically, CBOW often share the same tragic fate. They suffer discrimination, stigmatisation, abuse, neglect and, at worst, infanticide.¹⁸ Many of these children also face the risk of becoming stateless, since many patriarchal societies still make it impossible for single mothers to transfer citizenship to their children, impeding their human rights to education and healthcare, among others.¹⁹

Children’s rights are human rights. The instrument promoting and protecting the human rights of children is the United Nations Convention on the Rights of the Child (CRC), the most widely ratified human rights instrument in history, adopted in 1989.²⁰ With the adoption of the CRC, it is universally recognised that children are an autonomous group, their own actors within the international framework, to be considered independent from their parents.²¹ The CRC entails four key provisions: the principle of non-discrimination (article 2), the right to life, survival and development (article 6), the right to a nationality (article 7) and the

¹⁶ SRSG Pramila Patten, ‘Opening Remarks’ (Commemoration of the International Day for the Elimination of Sexual Violence in Conflict, 19 June 2018) <www.un.org/sexualviolenceinconflict/statement/opening-remarks-of-srsg-pramila-patten-commemoration-of-the-international-day-for-the-elimination-of-sexual-violence-in-conflict-19-june-2018/> accessed 5 March 2020.

¹⁷ K Theidon, ‘Hidden in Plain Sight: Children Born of Wartime Sexual Violence’ (2015) 56 *Current Anthropology* 1, 3.

¹⁸ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 8.

¹⁹ *ibid* 31.

²⁰ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS. 3 (CRC); C Carpenter, *Forgetting Children Born of War: Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 3.

²¹ AM Watson, ‘Children Born of Wartime Rape: Rights and Representations’ (2007) 9 *International Feminist Journal of Politics* 20, 26.

right to education (articles 28-29).²² Although the convention is based on the principle of universality, meaning that all included rights are applicable to all children, this is often not the case for CBOW.

The wellbeing of CBOW is an urgent matter because the lives of an entire emerging generation are at stake.²³ All children, from babies born to Rohingya mothers in Bangladesh and Yazedi mothers in Iraq, must have their human rights protected. The aim of this research is to shed light on the different human rights of CBOW that are being compromised solely due to the circumstances of their birth whilst simultaneously providing guidance on how to secure their human rights effectively.

2. RESEARCH AIM

The case of CBOW will be analysed in this research, more specifically it will aim to provide an answer to the following research question: ‘What are the main violations of the human rights of CBOW on the basis of the United Nations CRC?’.

Before analysing the human rights of CBOW, this study will begin with tackling the root cause of the issue: CRSV. By utilising the theory of Wood, this study will introduce a new perspective to this complex phenomenon by stepping away from the patriarchal understanding of perceiving CRSV as a mere by-product of war. The patriarchal myth will be deconstructed and factors will be revealed that can prevent the perpetration of these type of crimes. CRSV is not just inherent collateral damage tied to armed conflict and effective prevention is the first step towards the adequate protection of CBOW, the primary focus of this research.

This research will analyse the lack of the universal applicability of the rights enshrined in the CRC when considering CBOW. Four key provisions of the CRC, namely the principle of non-discrimination (article 2), the right to life, survival and development (article 6), the

²² S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 161.

²³ SRSG Pramila Patten, ‘Opening Remarks’ (Commemoration of the International Day for the Elimination of Sexual Violence in Conflict, 19 June 2018) <www.un.org/sexualviolenceinconflict/statement/opening-remarks-of-srsg-pramila-patten-commemoration-of-the-international-day-for-the-elimination-of-sexual-violence-in-conflict-19-june-2018/> accessed 5 March 2020.

right to a nationality (article 7) and the right to education (articles 28-29), will be the focus of this research with regard to CBOW. These particular rights will be researched in the setting of four different case studies: Bosnia and Herzegovina, Northern Uganda, Colombia and Myanmar. The innovative approach of this research lies within the choice of the above-mentioned conflict settings, each representing a different timeframe and continent, giving the reader an insight in the global treatment of CBOW across time and space.

This research will additionally address not only the inconsistencies in the current legal framework but will also focus on what needs to be done to remedy these gaps and secure their human rights effectively. The latter will be of extreme importance for children born in current conflict situations whose future is still unwritten and whose lives can still be influenced by the prompt implementation of their human rights.

3. LITERATURE REVIEW

The increased attention to CRSV as a political and humanitarian issue over the last decades has disregarded one group of victims: children born as a result from it. The study of their presence only emerged in the dominant discourse of CRSV, in which female victims were the primary focus or, to a lesser extent, the male perpetrators.²⁴ The study of CBOW as primary subjects has been an ignored reality and has only received minor systematic attention, with some notable exceptions.

Charli Carpenter has pursued an in-depth academic engagement with the topic over the last decade. The essay collection *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* was the first ground-breaking analysis that placed the emphasis on the protection of CBOW, rather than focusing on the women who survived it.²⁵ The work recognises CBOW as rightful subjects of human rights law, examining the problems and challenges particular to them as well as whereabouts and status in different case studies, showing the geographic extent of the problem. In her book *Forgetting Children*

²⁴ T Sanchez Parra and S Lo Iacono, '(Re)Productive Discourses: Media Coverage of Children Born of War in Colombia' (2019) 39 *Bulletin of Latin American Research* 22, 24.

²⁵ C. Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press 2007).

Born of War: Setting the Human Rights Agenda in Bosnia and Beyond, Carpenter focuses on the silence regarding CBOW, of transnational organisations dealing with children and armed conflict and children’s rights more generally.²⁶ Carpenter has shed a light on the neglected category of CBOW and sharpened the understanding of these otherwise silenced issues.

The needs and challenges of CBOW are also the primary research focus in Sabine Lee’s recent academic work *Children Born of War in the Twentieth Century*. Lee puts the focus on the life courses of children born of coercive relationships as well as of children born out of consensual relationships in conflict zones. The attitudes of the local communities, in addition to government policies towards mothers and their children, are both analysed.²⁷

Recently, CBOW appear to be of interest to some psychological studies, in which the emphasis is placed on the interrelatedness of identity, stigma and trauma, and the intergenerational issues that could have an impact on the wellbeing of these children, including their mental health.²⁸

Special reference should be made to the work of the current United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict, Pramila Patten, who put the focus on the plight as well as the rights of CBOW at the International Day for the Elimination of Sexual Violence in Conflict in 2018. Patten focuses on countering the culture of impunity of sexual violence into a culture of accountability, one in which there is no longer space or acceptance for stigmatisation and discrimination towards women and their children.²⁹

Although the research on CBOW is still quite recent, the studies that have been conducted have placed emphasis on similar issues. Besides

²⁶ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010).

²⁷ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017).

²⁸ H Glaesmer and others, ‘Die Kinder des Zweiten Weltkrieges in Deutschland – Ein Rahmenmodell für die psychosoziale Forschung’ [2012] *Trauma & Gewalt* 319, 319-328; ST Yahyavi, M Zarghami and U Marwah, ‘A review on the evidence of transgenerational transmission of posttraumatic stress disorder vulnerability’ (2013) 36 *Revista Brasileira de Psiquiatria* 89, 89-94.

²⁹ SRSG Pramila Patten, ‘Opening Remarks’ (Commemoration of the International Day for the Elimination of Sexual Violence in Conflict, 19 June 2018) <www.un.org/sexualviolenceinconflict/statement/opening-remarks-of-srsg-pramila-patten-commemoration-of-the-international-day-for-the-elimination-of-sexual-violence-in-conflict-19-june-2018/> accessed 5 March 2020.

focusing on the reasons for the silence of the multitude of international actors when it comes to CBOW, most research has considered the psychosocial consequences and the particular difficulties facing these children. Little research has been undertaken, however, on how to safeguard the rights enshrined in the CRC for CBOW in an effective manner, which this research aims to do.³⁰

4. METHODOLOGY AND OUTLINE

This study will begin by analysing the complex phenomenon of CRSV focused on international criminal law. From the perspective of feminist discourse, references to the studies of Wood, among others, will be employed to examine factors leading to CRSV, while simultaneously presenting possibilities to reduce and prevent its occurrence.

The main focus of this research and analysis emphasises, however, the situation after the sexual violence is committed: CBOW. The aim of this study is to evaluate the difficulties these children are facing by analysing the impediments on their human rights, as well as assessing how their human rights can be secured effectively. The innovative character of this research lies within the study of the four key provisions of the CRC mentioned above, across the four cases of Bosnia and Herzegovina, Northern Uganda, Colombia and Myanmar; all of which are selected based on a different time frame and different location, to give the reader global perspectives of CBOW.

For this study, an interdisciplinary approach is necessary. The methodologies employed will be a combination of jurisprudential and empirical legal research, combined with social scientific research methods, including policy analysis. For the legal research, an analysis will be made of international human rights law, more specifically of the CRC, with special attention to the reports by the UN Committee on the Rights of the Child. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³¹ will also be taken into account.

³⁰ 'The question of safeguarding children's rights as enshrined in the CRC in the difficult situations of CBOW remains a largely uncharted territory.' S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 160.

³¹ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979 and entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

Since the study of CBOW is fairly new, finding sufficient reliable empirical data is still a challenging endeavour. To gain more empirical information, reports of certain non-governmental organisations, researchers and institutions will therefore be of extra importance. Regarding Bosnia and Herzegovina, a thorough analysis will be made of the findings of Carpenter in her numerous missions to the country. The work of the International Justice Center for Transitional Justice in Northern Uganda offers valuable insights in their work on redress for victims of CRSV, with a special focus on affected children. The almost complete lack of data with regard to CBOW in Colombia will be counteracted by establishing contact with Sanchez Parra. Her PhD work ‘Born of War in Colombia: Narratives of unintelligibility, contested identities, and the memories of absence’ can provide more empirical information on the ground. The findings of the Independent International Fact-Finding Mission on Myanmar by the United Nations Human Rights Council, combined with reports in the media covering the situation in Cox’s Bazar refugee camp, will be utilised to sculpt the treatment of CBOW in Myanmar.

This research will be constructed in two main parts, with part one focusing on CRSV and part two dedicated to CBOW. Part one will be divided into two chapters. In chapter one, this research will start with examining the link between gender and armed conflict, including the gender dimensions of war, focussing on the economic and social impact, as well as the physical impact of war. Chapter two will revolve around wartime sexual violence, describing the history of slow recognition as a punishable crime to its prosecution before the International Criminal Court (ICC), followed by assessing the factors that can lead to the prevention of its occurrence. Part two’s first chapter will commence by providing an introduction to CBOW in the conflict-settings of Bosnia and Herzegovina, Northern Uganda, Colombia and Myanmar: ‘Who are these children?’. The second chapter will then analyse in which way the four key provisions of the CRC are compromised in regard to CBOW in each conflict setting. Finally, chapter three will provide four ways in which the human rights of CBOW can effectively be secured.

5. THEORETICAL FRAMEWORK

The case of CBOW will be analysed in this research by tackling the root cause: CRSV. This research is stepping away from the classical explanations for CRSV, based on patriarchal understandings of mere opportunity or sexual desire. The theory of Wood will be utilised in deconstructing the myth of perceiving CRSV as an inevitable by-product of war. Wood argues that sexual violence in conflict zones can effectively be prevented by highlighting the major variation of these type of crimes within and across armed conflicts and across armed actors. The enduring toleration of these crimes, in the first place by military commanders and *de facto* by the international community, needs to be ceased by building strong institutions to hold perpetrators accountable.

The foundation of this research falls back on the feminist discourse of Wood, underlining that rape is not inherent collateral damage tied to armed conflict. It is only when CRSV is effectively prevented that the issue of CBOW and their plight will automatically cease to exist. However, nowadays CBOW live in all parts of the globe. To analyse how their human rights are compromised, this research is adopting a human rights-based approach, based on international human rights standards with the aim of promoting and protecting the human rights of these children. More specifically the standards within the CRC and the obligations from the state therewith will form the guiding principles throughout this research. Every state ratifying a treaty is obliged to implement the treaty provisions into domestic legislation. The systematic violations of the human rights of CBOW consists therefore as a constant violation of the CRC.

This study will aim to underline that CRSV is not an inevitable by-product of war and can be effectively prevented, which is the first step towards the protection of CBOW. The human rights based approach throughout this research underlines the importance of states taking up their obligations under ratified human rights treaties, towards the promotion and the protection of the human rights of CBOW.

6. TERMINOLOGY

Throughout the study, the following key terms will be frequently utilised.

Conflict-related sexual violence – CRSV refers to any form of sexual violence that is perpetrated against people of all ages, bodies and gender identities and is linked to a conflict or post-conflict setting. The perpetrator can be affiliated with an armed group, whether associated to the state or not, or civilian. CRSV can exist in several forms such as rape, forced impregnation, forced abortion, forced prostitution, sexual enslavement, forced marriage, forced nudity or any other form of sexual violence.³²

Sexual violence – Sexual violence refers to any act of a sexual nature against one or more individual(s). This refers to the participation in any sexual action by coercion, or by threat of coercion and can be executed via an abuse of power, a fear of violence, intimidation or taking advantage of the incapacity to give genuine consent.³³ Forms of sexual violence can consist of ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’.³⁴

Children born of war – Children born of war refers to any child that is born to a parent who is part of foreign armed or peace-keeping forces and another parent who is a regular citizen, independent from geographical, timely or cultural context and independent from type of conflict or the manner of conception.³⁵ For the purpose of this study, children born of wartime rape will however exclusively refer to ‘persons of any age conceived as a result of violent, coercive, or exploitative sexual relations in conflict zones’.³⁶

³² UNSC Report of the Secretary-General on conflict-related sexual violence (15 April 2017) UN Doc S/2017/249.

³³ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 6.

³⁴ Rome Statute of the International Criminal Court (adopted 17th July 1998 and entered into force 1st July 2002) 2187 UNTS 90 (Rome Statute) arts 7(g) and 8(xxii).

³⁵ C Ingvill Mochmann and S Lee, ‘The human rights of children born of war: case analyses of past and present conflicts’ (2010) 35 Historical Social Research 268, 271.

³⁶ C Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press 2007) 3.

Discrimination against women – Discrimination against women can be defined as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.³⁷

³⁷ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979 and entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 1.

PART I

CONFLICT-RELATED SEXUAL VIOLENCE

Before analysing the rights of CBOW, this research starts with a thorough assessment of CRSV. Securing the rights of CBOW effectively starts with preventing sexual violence in armed conflicts. Chapter one will focus on gender and armed conflict; more precisely the way in which gender is a structural mark leading our social realities and influencing the experiences of both men and women during war. An assessment will be made of the economic, social and physical impact of war on women. Chapter two will firstly focus on wartime sexual violence and the process of recognition by the international community. Secondly, this chapter will argue that CRSV is not merely collateral damage of wartime, but can effectively be avoided.

1.

GENDER AND ARMED CONFLICT

1.1 SEX AND GENDER

To assess the dimensions of war in relation to gender, one must first make a distinction between the categorisations ‘sex’ and ‘gender’. The difference between the two categorisations is often described as a distinction of biology for the former and socialisation or culture for the latter.³⁸ While the term sex is used to refer to the biological differences between male- and female-born individuals, gender speaks rather to the social and cultural perceptions, differences and roles between men, women and non-binary people. The everyday conduct of life, such as social interactions, societal expectations and activities, is systematically and institutionally arranged through gender.³⁹ The gendered social roles are dependent on ‘cultural, social, economic and political conditions, expectations, and obligations within the family, community and nation’.⁴⁰ Because gender is not a natural or biological concept, rather a socially constructed one, it differs over time and across cultures.⁴¹

Gender is usually described as a relational concept, implying a relationship that revolves around power, whereby ‘masculine’ (as stereotypically associated with the ‘male’ sex) cannot be understood as separate from ‘feminine’ (as stereotypically associated with the ‘female’ sex) and is frequently defined as being the direct opposite of

³⁸ M Stern and M Nystrand, *Gender and Armed Conflict* (Swedish International Development Cooperation Agency, SIDA 2006) 34.

³⁹ RW Connell, *Masculinities* (University of California Press 2005) 71.

⁴⁰ D Mazurana, A Raven-Roberts and J Parpart (eds), *Gender, Conflict and Peacekeeping* (Lanham, Rowman & Littlefield 2005) 13.

⁴¹ *ibid.*

it.⁴² While masculinity is associated with notions such as aggressor, dominant, war, competitive, active, rational and agency; femininity is associated with opposing notions like victim, submissive, peace, caring, passive, irrational and surrender. The consequence of such discourses on gender, attaching certain identities, social roles and characteristics to the biological sex, enhances the dichotomy between 'masculine' and 'feminine', leading to the perception that the socially constructed differences between men and women are natural, immutable and 'given' in a society.⁴³ This gender dichotomous thinking generates a 'gender hierarchy', referring to the implication that what is perceived as 'masculine' is of higher order, dominating the 'feminine'.⁴⁴

Idealised perceptions of what it means 'to be a man' introduced by certain gender discourses only obtain their meaning when opposite notions of 'unmanliness' or 'womanliness' are utilised as residual categories, giving a superior status to the former.⁴⁵ In this regard, we can refer to Connell's 'hegemonic masculinity': the form of masculinity which is culturally dominant in a given setting, not only in regard to other marginalised or subordinate masculinities, but to the gender order as a whole.⁴⁶ An example illustrating this dynamic would be the labelling of newly recruited soldiers in the military as 'girls' or 'homosexuals', creating a culture of violent masculinity.⁴⁷

Even though men and women appear to be 'equal citizens' with 'equal rights' in most modern societies, the dominant normative ideal in the political system is heavily influenced by gender discourses which construct a different image.⁴⁸ Political systems are based on the divide

⁴² C Hooper, *Manly States: Masculinities, International Relations, and Gender Politics* (Columbia UP 2001) 43; M Stern and M Nystrand, *Gender and Armed Conflict* (Swedish International Development Cooperation Agency, SIDA 2006) 35; C Steinkogler, 'Conflict-related Sexual Violence and International Peace Operations' (Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013) 12.

⁴³ C Steinkogler, 'Conflict-related Sexual Violence and International Peace Operations' (Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013) 13.

⁴⁴ C Cockburn, 'The Gendered Dynamics of Armed Conflict and Political Violence' in C Moser and F Clark (eds), *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence* (Zed Books 2001) 15.

⁴⁵ M Stern and M Nystrand, *Gender and Armed Conflict* (Swedish International Development Cooperation Agency, SIDA 2006) 36.

⁴⁶ R Connell, 'Gender, Men and Masculinities' in E Barbieri-Masini (ed), *Quality of Human Resources: Gender and Indigenous Peoples* (Eolss Publishers 2009) 144.

⁴⁷ M Stern and M Nystrand, *Gender and Armed Conflict* (Swedish International Development Cooperation Agency, SIDA 2006) 36.

⁴⁸ *ibid* 44.

between the public and private spheres. The public sphere, in which the nation building processes take place, including national defence, political representation and economic productivity, is marked as masculine. The private sphere is then deemed feminine and affiliated with social reproduction such as caring for family and cultural tradition, as well as biological reproduction.⁴⁹

1.2 GENDER DIMENSIONS OF WAR

1.2.1 *Militarism and patriarchy*

A gender-sensitive lens allows us to see how gender hierarchy is influencing our way of thinking and acting. Gender is a structural mark that directs our social realities and shapes our experiences and concerns as women, men, boys and girls.⁵⁰ This also applies for the different experiences during and after armed conflict for both men and women, which are shaped by their respective gendered social roles.⁵¹ While in peacetime gender roles and identities can differ considerably across cultures and time, during wartime we can, however, observe a ‘cross-cultural consistency of gendered war roles’.⁵² In armed conflict, the dichotomy between the two gender roles is exacerbated and is becoming more polarised, reinforcing the patriarchal familial ideology and increasing pre-existing inequalities between men and women further.⁵³ Turpin and Enloe refer in this regard to the complementary relationship between militarism and patriarchy, where one requires the other to exist and vice versa. Militaries can only operate when male

⁴⁹ N Yuval Davis, *Gender and Nation* (Sage Publications 1997) ch 2; C Cockburn, ‘Gender, Armed Conflict and Political Violence’ (Background paper for Gender, Armed Conflict and Political Violence, World Bank Conference, Washington 1999) 26; M Stern and M Nystrand, *Gender and Armed Conflict* (Swedish International Development Cooperation Agency, SIDA 2006) 44-45.

⁵⁰ S Peterson, ‘Gendered Nationalism: reproducing “Us” versus “Them”’ in LA Lorentzen and J Turpin, *The Women and War Reader* (New York UP 1998) 41.

⁵¹ D Mazurana, A Raven-Roberts and J Parpart (eds), *Gender, Conflict and Peacekeeping* (Lanham, Rowman & Littlefield 2005) 13.

⁵² J Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (CUP 2001) 10.

⁵³ C Cockburn, ‘Gender, Armed Conflict and Political Violence’ (Background paper for Gender, Armed Conflict and Political Violence, World Bank Conference, Washington 1999) 8.

privilege and female subordination are kept in place.⁵⁴ Enloe points out the following:

Militaries need men and women to behave in gender-stereotyped ways. Women should behave in maternal fashion, they should need men to protect them. Men should feel that in order to prove their masculinity they should fight and generally support their nation going to war.⁵⁵

In order for a society to remain patriarchal, masculine values, which require the domination of militarism, must, in turn, prevail and be held above feminine values.

1.2.2 Economic and social impact

The gender discourse in times of armed conflict reminds women, via biology as well as tradition, that ‘they are the keepers of heart and home’, and men that ‘they need to protect women, children and the nation’.⁵⁶ This translates into overwhelmingly male national military forces and extra-governmental armed groups, assuming their roles as protectors and fighters, relating to the dominant version of masculinity in various cultures.⁵⁷ The distinction between the public and private spheres in society⁵⁸ has left women and girls to maintain the security and wellbeing of the family, increasing the number of female headed-households, often without the necessary resources.⁵⁹ Their abilities as caregivers and providers are becoming increasingly more constrained, as the destruction of economic and social systems impede access to public and household goods as well as the availability of natural resources.⁶⁰

⁵⁴ J Turpin, ‘Many Faces: Women Confronting War’ in LA Lorentzen and J Turpin, *The Women and War Reader* (New York UP 1998) 15-16.

⁵⁵ *ibid.*

⁵⁶ C Cockburn, ‘Gender, Armed Conflict and Political Violence’ (Background paper for Gender, Armed Conflict and Political Violence, World Bank Conference, Washington 1999) 8.

⁵⁷ ‘To be a real man is to be ready to fight, and ultimately to kill and to die. That for which men are often asked by their leaders to sacrifice themselves is the safety and honour of women and children’ *ibid* 10.

⁵⁸ N Yuval Davis, *Gender and Nation* (Sage Publications 1997) ch 2; C Cockburn, ‘Gender, Armed Conflict and Political Violence’ (Background paper for Gender, Armed Conflict and Political Violence, World Bank Conference, Washington 1999) 26.

⁵⁹ United Nations, ‘Handbook on UN Multidimensional Peacekeeping Operations’ (Peacekeeping Best Practices Unit, United Nations 2003) 114; C Steinkogler, *Conflict-related Sexual Violence and International Peace Operations* (Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013) 20.

⁶⁰ *ibid*; United Nations Security Council, ‘Report of the Secretary-General on Women, Peace and Security’ (United Nations 16 October 2002) 2.

Through their position as the sole income provider of the family, women can be pushed to take on additional occupational activities outside of regulated sectors, some of which may come at personal risk, to ensure food security and combat economic vulnerability.⁶¹ Furthermore, a difference in rights and entitlements have a significant impact on the influence of armed conflicts on the livelihood of men and of women.⁶² Hence, the lack of property and land rights, in combination with a lack of control over resources, poses a threat to the livelihoods of women.⁶³ The collapse of primary health services disproportionately affects women as well, due to the steep rise in child and maternal mortality.⁶⁴ Daily activities like selling and buying at local markets, collecting water or ploughing the land become more hazardous as women are at increased risks of being harmed from landmines, cross-fire or sexual violence.⁶⁵ Armed conflict permeates all spheres of the lives of women; however, due to the patriarchal construction of political systems, women rarely take part in decision-making processes leading to the engagement in conflict or peace agreements.⁶⁶

1.2.3 *Physical impact*

The path to violence during armed conflict is another phenomenon highly dependent on gender. Men and women are both subjected to torture, abuse and sexual violence, but the way in which these practices are carried out often differs between the genders, to a degree as a result of the physical differences between the sexes but primarily due to dominant

⁶¹ United Nations, 'Handbook on UN Multidimensional Peacekeeping Operations' (Peacekeeping Best Practices Unit, United Nations 2003) 114; C Steinkogler, *Conflict-related Sexual Violence and International Peace Operations* (Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013) 20.; United Nations Security Council, 'Report of the Secretary-General on Women, Peace and Security' (United Nations 16 October 2002) 2..

⁶² D Bloomfield, T Barnes and L Huyse, *Reconciliation After Violent Conflict* (International Institute for Democracy and Electoral Assistance 2003) 55.

⁶³ United Nations Security Council, 'Report of the Secretary-General on Women, Peace and Security' (United Nations 16 October 2002) 2.

⁶⁴ C Cockburn, 'Gender, Armed Conflict and Political Violence' (Background paper for Gender, Armed Conflict and Political Violence, World Bank Conference, Washington 1999) 11.

⁶⁵ United Nations Security Council, 'Report of the Secretary-General on Women, Peace and Security' (United Nations 16 October 2002) 2; United Nations, 'Handbook on UN Multidimensional Peacekeeping Operations' (Peacekeeping Best Practices Unit, United Nations 2003) 114; D Mazurana, A Raven-Roberts and J Parpart (eds), *Gender, Conflict and Peacekeeping* (Lanham, Rowman & Littlefield 2005) 5; C Steinkogler, *Conflict-related Sexual Violence and International Peace Operations* (Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013) 20.

⁶⁶ JP Kaufman and KP Williams, *Women and War: Gender Identity and Activism in Times of Conflict* (Kumarian Press 2010) 16.

gender roles in wartime and the differences in societal perception of the male and female bodies in various cultures.⁶⁷ Men appear to be more likely to fight and to be killed or injured in combat and are at increased risk of being the victim of extrajudicial killings, forced recruitment or forced disappearances. Women, on the other hand, are more likely to become victims of various forms of sexual assault during wartime, either at the hand of increased domestic violence due to the unravelling of moral and institutional safeguards in combination with the upsurge of militarisation, sexual violence carried out as part of strategic military actions or via participation in forced marriages.⁶⁸

The gendered stereotype roles and societal expectations do not, however, always correlate with reality on the ground. By taking part in armed combat as combatants,⁶⁹ supporting war or perpetrating acts of violence, including sexual violence,⁷⁰ women have proven to be active agents, and not mere victims, throughout wartime as well.⁷¹ An often ignored reality is the sexual abuse, torture and mutilation of men as well. They, too, participate in peace movements, fighting reluctantly or resisting entrance into combat.⁷² The significant gendered distinction between 'perpetrator' and 'victim' results in biased notions of victimhood and hinders the acknowledgement of the distinct groups of victims and perpetrators that do, in fact, exist.⁷³

⁶⁷ C Cockburn, 'Gender, Armed Conflict and Political Violence' (Background paper for Gender, Armed Conflict and Political Violence, World Bank Conference, Washington 1999) 11; C Steinkogler, *Conflict-related Sexual Violence and International Peace Operations* (Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013) 21.

⁶⁸ D Bloomfield, T Barnes and L Huyse, *Reconciliation After Violent Conflict* (International Institute for Democracy and Electoral Assistance 2003) 55; M Stern and M Nystrand, *Gender and Armed Conflict* (Swedish International Development Cooperation Agency, SIDA 2006) 56; JP Kaufman and KP Williams, *Women and War: Gender Identity and Activism in Times of Conflict* (Kumarian Press 2010) 36; C Steinkogler, *Conflict-related Sexual Violence and International Peace Operations* (Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013) 21.

⁶⁹ J Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (CUP 2001) 59.

⁷⁰ Y Leggat-Smith, *Rwanda: Not so Innocent: When Women Become Killers* (African Rights 1995).

⁷¹ United Nations Security Council, 'Report of the Secretary-General on Women, Peace and Security' (United Nations 16 October 2002) 2; C Carpenter, *Forgetting Children Born of War: Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 69.

⁷² C Cockburn, 'The Gendered Dynamics of Armed Conflict and Political Violence' in C Moser and F Clark (eds), *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence* (Zed Books 2001) 20; United Nations, 'Handbook on UN Multidimensional Peacekeeping Operations' (Peacekeeping Best Practices Unit, United Nations 2003) 115; C Steinkogler, *Conflict-related Sexual Violence and International Peace Operations* (Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013) 21.

⁷³ M Stern and M Nystrand, *Gender and Armed Conflict* (Swedish International Development Cooperation Agency, SIDA 2006) 55.

2.

WARTIME SEXUAL VIOLENCE

As previously detailed, armed conflict and times of war result in a range of harms that women and, to a lesser degree, men experience. Focusing solely on sexual violence, as a gendered aspect of war, would give too narrow a view of all the various gendered dimensions that armed conflicts entail. However, for the aim of this research, the focus must be placed on the sexual violence that is perpetrated during conflict. The focus on this aspect is not intended to disregard the many other disruptive consequences of war on women's lives.

2.1 HISTORY OF SLOW RECOGNITION

Rape and other forms of sexual violence have been perpetrated in wartime as long as war itself has existed. The body of law governing armed conflict has, however, only incorporated these crimes into legal codes to a minimal extent, with an inappropriate characterisation or even not at all.⁷⁴ According to the ancient perspective, women were seen as spoils of war, consistent with their legal status as virtual property.⁷⁵ Brownmillar explains that 'The body of a raped woman becomes a ceremonial battlefield, a parade ground for the victor's trooping of the colors. The act that is played out upon her is a message passed between men – vivid proof of victory for one and loss and defeat for the other'.⁷⁶

⁷⁴ KD Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288, 295.

⁷⁵ CN Niarcho, 'Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia' (1995) 17 *Human Rights Quarterly* 649, 660.

⁷⁶ S Brownmillar, *Against Our Will: Men, Women, and Rape* (Fawcett Columbine 1993) 38.

The rape of women has been perceived throughout history as a violation of a man’s estate, rather than a crime against the women themselves.⁷⁷ Prior to the 19th century, the laws governing wartime existed solely in custom, religious instruction or domestic military codes.⁷⁸ Although the customs of war prohibited rape crimes, the legal protection of women did not change dramatically. During the Middle Ages, although officially prohibited by custom, rape crimes were still sometimes viewed as a positive, which could increase a soldier’s aggression before battle.⁷⁹ It could even be encouraged as a reward after, resulting in the toleration or silencing of such crimes by commanders.⁸⁰ The 1863 Lieber Code, the war code of the Union Forces of the United States that, for the first time, codified the international customary law of war, changed things by making rape punishable by capital offence.⁸¹ The Lieber Code has proven to be the cornerstone for many military codes that followed.⁸² The 1907 Hague Convention, addressing the conduct of warfare in international law, contains a rather implicit prohibition of sexual violence by stipulating that ‘family honour and rights ... must be respected’, by equating family honour with the honour of women, which was understood as including sexual assault.⁸³

After the atrocities committed during World War Two (WWII), the core of international humanitarian law⁸⁴ was amended and codified in

⁷⁷ S Brownmiller, *Against Our Will: Men, Women, and Rape* (Fawcett Columbine 1993) 18.

⁷⁸ KD Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’ (2003) 21 *Berkeley Journal of International Law* 288, 299.

⁷⁹ *ibid* 296.

⁸⁰ *ibid* 296. See also T Meron, *Henry’s Wars and Shakespeare’s Laws: Perspectives on the Law of War in the Later Middle Ages* (OUP 1993) 111, ‘The license to rape was considered a major incentive for the soldier involved in siege warfare’.

⁸¹ CN Niarchos, ‘Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia’ (1995) 17 *Human Rights Quarterly* 649, 662.

⁸² KD Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’ (2003) 21 *Berkeley Journal of International Law* 288, 299.

⁸³ The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907 and entered into force 26 January 1910) art 46; *ibid* 300.

⁸⁴ ‘International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.’ International Committee of the Red Cross (ICRC), ‘What is international humanitarian law?’ <www.icrc.org/en/document/what-international-humanitarian-law> accessed 6 April 2020.

the four Geneva Conventions.⁸⁵ The Fourth Geneva Convention of 1949, concerned with the protection of civilians during armed conflict, contains an explicit provision prohibiting sexual violence and stipulates that 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.⁸⁶ Additional Protocol I of 1977, relating to the protection of victims in international armed conflicts, mentions that 'Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'.⁸⁷ Additional Protocol II of 1977, relating to the protection of victims in non-international armed conflicts, prohibits 'Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'.⁸⁸

Even though the Fourth Geneva Convention and the Additional Protocols include rape and enforced prostitution, the crimes are demarcated as crimes of 'honour or 'dignity', resulting in the reinforcement of shame and stigma experienced by the victimised women.⁸⁹ The term 'honour' does not adequately describe the violation of a women's physical and psychological integrity when she suffers sexual abuse. It is a term entrenched in traditional conceptions of femininity regarding women's virginity or strictly controlled sexuality; a sexually abused woman is regarded as 'damaged goods' and often led to believe that she should feel ashamed by this violation of her 'honour'.⁹⁰ Not categorising rape crimes as crimes of violence, rather as crimes of honour, ignores the sexual and violent nature of the attack; it also reinforces detrimental stereotypes, where the shame of rape is placed on

⁸⁵ The law stipulated in the four Geneva Conventions is, besides being part of regular international law, also part of customary international law, which entails that the provisions therein are universally binding upon states, regardless of if they are parties to the treaties and additional protocols.

⁸⁶ The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949 and entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV) art 27(2).

⁸⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977 and entered into force 7 December 1979) 1125 UNTS 3 (Protocol I) art 76(1).

⁸⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977 and entered into force 7 December 1978) 1125 UNTS 609 (Protocol II) art 4(2)(e).

⁸⁹ S Eaton, 'Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime' (2003-04) 35 *Georgetown Journal of International Law* 873, 885.

⁹⁰ *ibid.*

the victim, rather than on the perpetrator.⁹¹ Another problem regarding the Fourth Geneva Convention and Additional Protocol I revolves around the indication of certain crimes as 'grave breaches', indicating the most appalling breaches of the law of armed conflict give rise to universal jurisdiction, which means these crimes can be prosecuted at any time, by any state. Crimes of sexual violence are, however, not explicitly denoted as grave breaches, rather seen as falling under the categorisation of 'torture or inhumane treatment' or 'wilfully causing great suffering or serious injury to body or health'.⁹² The lack of explicit reference to sexual violence as a grave breach indicates the failure of the international community to adequately assess the seriousness of rape crimes during armed conflict.⁹³

The codification of the prohibition of sexual violence did not result in the cessation of the act, rape was still being considered as an inevitable by-product of war by most.⁹⁴ This patriarchal view of sexual violence remains in stark contrast with the reality behind it. Instead of being mere consequences of armed conflict, rape crimes can form a fundamental portion of the attack against the opposing party, perpetrating these acts systematically and strategically, as a weapon of war.⁹⁵ The act of rape does not only affect the victim but also has a destructive impact on the family and society as a whole. Wartime sexual violence was, however, long perceived as a private issue concerning individual soldiers, rather than a public matter, leading back to the division between the public sphere, which is deemed masculine, and the private sphere, which is marked as feminine,⁹⁶ resulting in the inability or unwillingness of the judicial system to prosecute these crimes in a rightful way.

⁹¹ *ibid*; KD Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 Berkeley Journal of International Law 288, 304.

⁹² Geneva Convention IV art 147; Protocol I art 11 and art 85.

⁹³ UN Women, 'Women2000: Sexual Violence and Armed Conflict: United Nations Response' (UN 1998); S Eaton, 'Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime' (2003-04) 35 Georgetown Journal of International Law 873, 885.

⁹⁴ KD Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 Berkeley Journal of International Law 288, 297.

⁹⁵ *ibid* 298.

⁹⁶ N Yuval Davis, *Gender and Nation* (Sage Publications 1997) ch 2; C Cockburn, 'Gender, Armed Conflict and Political Violence' (Background paper for Gender, Armed Conflict and Political Violence, World Bank Conference, Washington 1999) 26.

2.2 INTERNATIONAL RECOGNITION

Despite the widespread evidence of the occurrence of sexual violence during WWII, the charters of the international *ad hoc* tribunals of Nuremberg⁹⁷ and Tokyo,⁹⁸ established for the prosecution of the committed war crimes and other atrocities, did not expressly criminalise sexual violence crimes.⁹⁹ It was not until the 1990s that the prosecution of CRSV at the international level developed comprehensively.

The genocidal violence that erupted in the Balkans in 1992 shocked the world. The ethnic cleansing campaign employed by the Bosnian Serb armed forces was accompanied by an organised widespread policy of sexual crimes, at an unprecedented scale.¹⁰⁰ Rape was not an isolated act, committed by individuals, rather a strategy of war.¹⁰¹ Around the same time, sexual violence was committed on a massive scale on the African continent. During the Rwandan genocide of 1994, a conflict in which an estimated one million people were slaughtered, widespread and extreme acts of sexual violence were committed, stemming from organised policy.¹⁰² CRSV appeared on the international agenda, leading to the establishment by the United Nations of the ICTY¹⁰³ in 1993 and the ICTR¹⁰⁴ in 1994.¹⁰⁵ The extent of the harm caused by sexual violence was being recognised and the focus shifted from a crime out of pure sexual gratification to one of power, from a crime against a men's property and honour to a violent crime against women and from a crime

⁹⁷ The International Military Tribunal in Nuremberg (IMT) did not prosecute any sexual violence crimes, even though extensive evidence was present.

⁹⁸ The International Military Tribunal for the Far East (IMTFE, Tokyo) did prosecute sexual violence crimes, but in a limited extent and as secondary – in conjugation with other – crimes.

⁹⁹ Organization for Security and Co-operation in Europe (OSCE), *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges* (OSCE February 2014) 25.

¹⁰⁰ RA Sitkin, BX Lee and G Lee, 'To destroy a people: Sexual violence as a form of genocide in the conflicts of Bosnia, Rwanda, and Chile' (2019) 46 *Aggression and Violent Behavior* 219, 221.

¹⁰¹ Detention camps ('rape camps') were utilised by Serbian forces, with the specific purpose of sexually assaulting Muslim women.

¹⁰² RA Sitkin, BX Lee and G Lee, 'To destroy a people: Sexual violence as a form of genocide in the conflicts of Bosnia, Rwanda, and Chile' (2019) 46 *Aggression and Violent Behavior* 219, 221.

¹⁰³ UN Security Council, 'Security Council resolution 808' S/RES/808 (22 February 1993); UN Security Council, 'Security Council resolution 827' S/RES/827 (25 May 1993).

¹⁰⁴ UN Security Council, 'Security Council resolution 955' S/RES/955 (8 November 1994).

¹⁰⁵ A Faucette, 'Improvements in the Legal Treatment of Systematic Mass Rape in Wartime: Where Do We Go From Here?' in S Dewey and T St Germain, *Conflict-related Sexual Violence : International Law, Local Responses* (Kumarian Press 2012) 54.

solely portrayed as belonging to the private sphere to a crime of public nature requiring global response.¹⁰⁶

The ICTY Statute was the first legal instrument explicitly listing rape as a crime against humanity,¹⁰⁷ followed by the ICTR Statute,¹⁰⁸ which also additionally recognised 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' as a war crime.¹⁰⁹ Both tribunals have furthermore established that sexual violence can fall under other statutory provisions such as torture, persecution and other inhumane acts, to constitute as a crime against humanity; or torture, cruel treatment, inhumane treatment and outrages upon personal dignity, to constitute as a war crime.¹¹⁰ More importantly the ICTY and the ICTR decided that sexual violence can amount to the act of genocide when it is perpetrated with genocidal intent.¹¹¹

The prosecution of CRSV took a major leap forward with the establishment of the ICTY and ICTR, however a number of shortcomings were present that prevented a fully adequate response. First of all, despite the widespread occurrence of brutal sexual attacks, both tribunals failed to recognise and prosecute these crimes from the beginning of their mandate.¹¹² Enormous external pressure from women's human rights groups and other human rights activists was needed for the prosecutor to adequately start investigations into the massive and systematic rape and sexual violence crimes.¹¹³ The first indictment from the famous *Akayesu* judgment of the ICTR did, for example, not contain any rape charges despite the enormous amount of evidence.¹¹⁴ The deep feminist

¹⁰⁶ A Faucette, 'Improvements in the Legal Treatment of Systematic Mass Rape in Wartime: Where Do We Go From Here?' in S Dewey and T St Germain, *Conflict-related Sexual Violence: International Law, Local Responses* (Kumarian Press 2012) 54.

¹⁰⁷ UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993, as last amended on 7 July 2009) art 5.

¹⁰⁸ UN Security Council, Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994, as last amended on 16 December 2009) art 3(g).

¹⁰⁹ Statute of the ICTR art 4(e).

¹¹⁰ OSCE, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges* (OSCE February 2014) 25.

¹¹¹ *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (1998) para 731.

¹¹² HM Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (OUP 2014) 115.

¹¹³ *ibid.*

¹¹⁴ Several appeals were submitted to amend the initial judgment, with the most important being the report from HRW: 'there is a widespread perception among the Tribunal investigators that rape is somehow a "lesser" or "incidental" crime not worth investigating'. HRW, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (HRW 1996) 55. See also R Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 McGill Law Journal 217, 225.

engagement that was necessary to transform the human rights discourse of the tribunals, was part of the global women's movement in the late 1980s that put the emphasis on 'woman's rights are human rights' and identified violence against women as a priority issue within human rights, which gained universal acceptance at the Vienna Conference of 1993.¹¹⁵ Secondly, there was a lack of experience in rape and other gender-based crimes, combined with a lack of a gender-sensitive policy at the investigation and trial stage, leading to the treatment of rape survivors as secondary casualties.¹¹⁶ If it was not for the external pressure from human rights activists and feminist legal scholars, wartime rape would have largely remained invisible.

Women's rights advocates proved to be of extreme importance during the drafting of the Rome Statute of the ICC, established in 2002, as well. The Women's Caucus for Gender Justice, formed by the most prominent women's groups, radically improved the initial draft for the Rome Statute, which was initially built in accordance with existing international law, without making reference to gender-related issues and crimes.¹¹⁷ Due to their activism, sexual violence crimes are recognised as no less important than other violent crimes such as torture, genocide, enslavement or inhumane treatment.¹¹⁸ The Rome Statute offers the broadest classification of CRSV crimes.¹¹⁹ Besides stipulating rape as a crime against humanity and a war crime, it also includes sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity within these two categories.¹²⁰ According to the 'Elements of Crimes' of the ICC, sexual violence is described as follows:

¹¹⁵ R Copelon, 'International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking' (2003) 11 *American University Journal of Gender, Social Policy and Law* 865, 866; D Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in A Orford (ed), *International Law and its Others* (CUP 2006) 344.

¹¹⁶ HM Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (OUP 2014) 115.

¹¹⁷ C Çakmak, 'The Rome Statute of the International Criminal Court (2002): The Impact of the Coalition of Women's Groups' in D Wingeate Pike (ed), *Crimes Against Women* (Nova Science Publishers 2011) 46.

¹¹⁸ *ibid.*

¹¹⁹ OSCE, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges* (OSCE February 2014) 25.

¹²⁰ Rome Statute arts 7g and 8(xxii).

The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.¹²¹

2.3 ‘RAPE IS NOT DONE BY MISTAKE’

2.3.1 Terminology

In this part of ‘Rape is not done by mistake’,¹²² the terms ‘armed organisations’, ‘armed groups’ or ‘armed actors’ will refer to state actors, in the sense of military, policy or paramilitary organisations under the direct command of state actors, and non-state actors, in the sense of rebel groups, insurgents and other militia organisations.¹²³ The definition of ‘sexual violence’, given by the Rome Statute will be used¹²⁴ and will include ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’.¹²⁵

2.3.2 Misconceptions

2.3.2.1 Variation in conflict-related sexual violence

There exists a broad misconception that wartime rape and other forms of sexual violence are perpetrated in every armed conflict as inevitable consequences. However, research shows that sexual violence highly differs across armed conflicts and armed organisations.¹²⁶ Within the same armed conflict, some armed groups engage in sexual violence,

¹²¹ International Criminal Court, Elements of Crimes (2011) ISBN No. 92-9227-232-2 art 7(1)(g)-6.

¹²² N Mitchell, *Agents of Atrocity: Leaders, Followers, and the Violation of Human Rights During Civil War* (Palgrave MacMillan 2004) 50.

¹²³ EJ Wood, ‘Conflict-related sexual violence and the policy implications of recent research’ (2014) 96 International Review of the Red Cross 457, 458.

¹²⁴ International Criminal Court, Elements of Crimes (2011) ISBN No. 92-9227-232-2 art 7(1)(g)-6.

¹²⁵ Rome Statute arts 7g and 8(xxii).

¹²⁶ EJ Wood, ‘Conflict-related sexual violence and the policy implications of recent research’ (2014) 96 International Review of the Red Cross 457, 458.

others do not. Some armed organisations solely target solely women and girls from a specific ethnic group, others target women and girls more broadly or will rape boys and men as well. The form in which sexual violence is perpetrated also widely differs, from armed groups engaging in sexual slavery and forced marriage, to armed groups engaging in sexual torture and mutilation.¹²⁷

The most significant fact is, however, that in some armed conflicts, rape and other forms of sexual violence are not committed. A pilot study about CRSV in 20 African countries, encompassing 177 armed actors revealed, for example, that ‘only’ 42% of armed actors committed acts of sexual violence.¹²⁸ This shows that the majority of armed actors did not use sexual violence as part of their repertoire of violence, however this does exclude isolated sexual violence acts. Another report, presenting patterns from the new sexual violence in armed conflict (SVAC) dataset, covering 129 conflicts and 625 armed actors during 1989-2009, revealed that the majority of armed actors, being state,¹²⁹ rebel groups¹³⁰ and militias,¹³¹ did not perpetrate acts of sexual violence.¹³² Even though CRSV struggles with the issue of staying underreported, the exhibited differences stand in hard contrast with the patriarchal vision that sees CRSV as an inevitable collateral damage of war that nothing can be done against.

2.3.2.2 *Classical theories*

According to Wood, Hoover Green and Cohen, the classical theories that explain the presence of sexual violence in armed conflict generally focus on only one part of the observed variation and disregard the disparities in wartime rape.¹³³ The opportunity argument, referring to the increased opportunity for armed actors to engage in rape and the myth of ‘uncontrollable male sexual desire’, cannot explain the lack of sexual violence on part of some armed organisations.¹³⁴ The substitute argument

¹²⁷ EJ Wood, ‘Conflict-related sexual violence and the policy implications of recent research’ (2014) 96 *International Review of the Red Cross* 457, 458.

¹²⁸ R Nordås, ‘Sexual Violence in African Conflicts’ (Policy Brief No 1 Peace Research Institute Oslo 2011) 2.

¹²⁹ 42% of state actors (56 of 132) were reported as perpetrating acts of sexual violence.

¹³⁰ 24% of rebel groups (65 of 275) were reported as perpetrating acts of sexual violence.

¹³¹ 17% of militias (38 of 218) were reported as perpetrating acts of sexual violence.

¹³² DK Cohen and R Nordås, ‘Sexual Violence in Armed Conflict: Introducing the SVAC Dataset, 1989–2009’ (2014) 51 *Journal of Peace Research* 418, 425.

¹³³ DK Cohen, A Hoover Green and EJ Wood, ‘Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward’ [February 2013] United States Institute of Peace Special Report 323 5.

¹³⁴ *ibid* 6.

on the other hand, referring to rape as ‘substituting’ sex with consensual civilians, female combatants or prostitutes, cannot declare the brutality by which the acts are committed; the targeting of specific ethnic or political groups or the presence of sexual torture and mutilation.¹³⁵ The same reasoning stands for patriarchal norms, which are a necessary condition but not a sufficient one. A history of oppression and devaluation of women plays a decisive role in the occurrence of sexual violence, but a shared patriarchal culture alone cannot account for the substantial variation in the prevalence of wartime rape, especially within the same conflicts with an asymmetric pattern, where one party is engaging in frequent acts of sexual violence and the opponent does not.¹³⁶

The result offered by these classic explanations is often too narrowly focused on rape as such, disregarding other brutal forms of sexual violence, as well as over-predicting CRSV; not taking into account the many armed organisations that do not perpetrate sexual violence as part of their repertoire of violence.¹³⁷ CRSV can vary greatly among armed conflicts – and even within a single conflict – between armed actors, resulting in the lack of concrete evidence for existing claims regarding global trends in wartime rape.¹³⁸ New theories are shifting the focus from the above explained classical theories, and are connecting the variation in sexual violence by armed organisations to the variation in armed group institutions.¹³⁹

2.3.2.3 *Shifting the focus*

In trying to explain the variations in CRSV, scholars have been, in recent times, placing the emphasis on the armed organisation itself: its culture, ideology and institutions, rather than on the traditional explanations of patriarchal culture, opportunity, sexual desire or a combination thereof.

¹³⁵ EJ Wood, ‘Conflict-related sexual violence and the policy implications of recent research’ (2014) 96 *International Review of the Red Cross* 457, 462.

¹³⁶ DK Cohen, A Hoover Green and EJ Wood, ‘Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward’ [February 2013] *United States Institute of Peace Special Report* 323 5.

¹³⁷ EJ Wood, ‘Conflict-related sexual violence and the policy implications of recent research’ [2014] *International Review of the Red Cross* 457, 463.

¹³⁸ DK Cohen, A Hoover Green and EJ Wood, ‘Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward’ [February 2013] *United States Institute of Peace Special Report* 323 11.

¹³⁹ *ibid* 12.

Wood's theory analyses the institutions of an armed organisation, which are necessary to recruit and train combatants, amplify unity and control the pattern of violence perpetrated by combatants on the ground.¹⁴⁰ Regarding the latter, military leaders seek to regulate the forms of violence committed, the targeted groups, the timing and the frequency of attacks. This can also include regulations on rape and other forms of sexual violence, in which commanders can choose to prohibit, promote or tolerate these acts.¹⁴¹ Regulating the pattern of violence can, however, be hampered by difference in preferences, between leaders and combatants, of the violence being committed and, most importantly, by the lack of information to the situation on the ground.¹⁴² Wood refers in this regard to the 'principal-agent problem'.¹⁴³ To effectively control the pattern of violence, combatants' preferences need to align with those of the commander; in this regard Hoover Green underlines the importance of armed group institutions.¹⁴⁴ The preferences of the commander regarding the pattern of violence can be internalised by combatants due to strong indoctrination and training by such institutions.¹⁴⁵ Combatants tend to then only engage in the pattern of violence that is ordered, without further discipline needed. Another way to mitigate tensions is via powerful disciplinary institutions, resulting in combatants being punished if they do not respect orders and follow their own preferences.¹⁴⁶ As an example, the LTTE, the militant secessionist organisation in Sri Lanka, has been responsible for the deaths of many civilians over the course of the 30 year civil war with

¹⁴⁰ EJ Wood, 'Conflict-related sexual violence and the policy implications of recent research' [2014] *International Review of the Red Cross* 457, 466.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ CK Butler, G Tali, and MJ Neil, 'Security Forces and Sexual Violence: A Cross-National Analysis of a Principal-Agent Argument' (2007) 44 *Journal of Peace Research* 669, 670; J Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (CUP 2007) 130; EJ Wood, 'Conflict-related sexual violence and the policy implications of recent research' (2014) 96 *International Review of the Red Cross* 457, 466.

¹⁴⁴ Hoover Green refers to institutions such as recruitment, socialisation, discipline, military training and political education in A Hoover Green, 'The commander's dilemma: Creating and controlling armed group violence' (2016) 53 *Journal of Peace Research* 619, 624. See also DK Cohen, A Hoover Green and EJ Wood, 'Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward' [February 2013] *United States Institute of Peace Special Report* 323 12.

¹⁴⁵ J Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (CUP 2007) 136; EJ Wood, 'Conflict-related sexual violence and the policy implications of recent research' (2014) 96 *International Review of the Red Cross* 457, 468.

¹⁴⁶ EJ Wood, 'Conflict-related sexual violence and the policy implications of recent research' (2014) 96 *International Review of the Red Cross* 457, 468.

the Sri Lankan government. However, they seemed to have rarely, or not at all, engaged in rape or other acts of sexual violence.¹⁴⁷ Due to the operation of a strong internal intelligence institution, the organisation safeguarded a flow of information concerning the pattern of violence on the ground. One can conclude that if strong internal institutions are present within an armed organisation, and sexual violence is occurring in high frequency, it is ordered.¹⁴⁸

In many cases, however, the armed group institutions that are in place with the intention of controlling the combatants’ behaviour and steering the pattern of violence are not strong enough to be effective. The majority of armed groups will formally prohibit acts of sexual violence, but their institutions remain too weak.¹⁴⁹ Alternatively, many lack the will to build strong institutions to effectively implement and enforce these regulations concerning sexual violence.¹⁵⁰ If rape or other acts of sexual violence are then committed, it will not be the result of an order, but it will nonetheless be tolerated and left unpunished. The existing literature on CRSV makes distinct violence that is ordered from violence that is not ordered, identifying ‘strategic rape’ as acts which are ordered and carried out solely in organisational objectives such as terrorising, interrogating, punishing or subjugating the victimised group; while ‘opportunistic rape’ is categorised as unordered instances of rape carried out as a result of purely private motivations, without a comprehensive plan or strategy, rather for sexual gratification or personal revenge.¹⁵¹ To this distinction, Wood adds a third intermediate category, namely rape as a ‘practice’, referring to instances of rape that are not ordered but nevertheless tolerated and are carried out for social rather than individual reasons, such as the pressure to conform with the behaviour of other soldiers in the unit.¹⁵²

¹⁴⁷ EJ Wood, ‘Conflict-related sexual violence and the policy implications of recent research’ (2014) 96 *International Review of the Red Cross* 457, 468 fn 65.

¹⁴⁸ *ibid* 469.

¹⁴⁹ *ibid*.

¹⁵⁰ *ibid*.

¹⁵¹ X Agirre Aranburu, ‘Beyond Dogma and Taboo: Criteria for the Effective Investigation of Sexual Violence’ in M Bergsmo, A Butenschon Skre and EJ Wood (eds), *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic Epubisher 2012) 279; DK Cohen, A Hoover Green and EJ Wood, ‘Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward’ [February 2013] United States Institute of Peace Special Report 323 10; *ibid* 470.

¹⁵² DK Cohen, A Hoover Green and EJ Wood, ‘Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward’ [February 2013] United States Institute of Peace Special Report 323 10; EJ Wood, ‘Conflict-related sexual violence and the policy implications of recent research’ (2014) 96 *International Review of the Red Cross* 457, 471.

The three different categories into which acts of sexual violence can be divided, according to their distinctive purposes and motivations, do, however, not refer to the frequency with which these acts are committed. CRSV does not need to be ordered to happen on a massive scale.¹⁵³ Strategic rape does occur – and appeared to be one of the major weapons in particular conflicts such as Bosnia, Rwanda, or Guatemala – as part of an ethnic cleansing campaign or as sexual torture of prisoners, but it remains rather rare.¹⁵⁴ What happens most frequently, however, is the toleration of this type of violence, and this occurs for a variety of reasons. The cost of effective prohibition can be seen as ‘too high’ by the commanders, since it can require resources that would be ‘better’ spent on other affairs that are viewed as more important, require the drilling and educating of otherwise competent combatants or lessen the respect for the commander who can then be perceived as weak by the lower-ranked combatants.¹⁵⁵ A specific context where rape as a practice is being carried out is in the DRC, also known colloquially as the ‘rape capital of the world’.¹⁵⁶ Eriksson Baaz and Stern analysed the motives of the Forces Armées de la République Démocratique du Congo soldiers committing widespread rape of civilians, and concluded that, although officially prohibited, rape is committed on a massive scale due to frustration, dissatisfaction and anxiety caused, among others, by deterioration of conditions in the military such as the extended absence of pay-outs for soldiers and is therefore perceived as a sort of ‘compensation’.¹⁵⁷ A feeling of not living up to the heterosexual idea of manhood, by not being able to be the provider for their families is combined with a very low loyalty towards their commanders and superiors, who are seen as responsible for their situation.¹⁵⁸ Soldiers

¹⁵³ DK Cohen, A Hoover Green and EJ Wood, ‘Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward’ [February 2013] United States Institute of Peace Special Report 323 1.

¹⁵⁴ EJ Wood, ‘Conflict-related sexual violence and the policy implications of recent research’ (2014) 96 *International Review of the Red Cross* 457, 471.

¹⁵⁵ DK Cohen, A Hoover Green and EJ Wood, ‘Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward’ [February 2013] United States Institute of Peace Special Report 323 10; *ibid* 473.

¹⁵⁶ F Lloyd-Davies, ‘Why eastern DR Congo is “rape capital of the world”’ (*CNN*, 25 November 2011) <<https://edition.cnn.com/2011/11/24/world/africa/democratic-congo-rape/index.html>> accessed 1 May 2020.

¹⁵⁷ M Eriksson Baaz and M Stern, ‘Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)’ (2009) 53 *International Studies Quarterly* 495, 501.

¹⁵⁸ *ibid* 501.

make a distinction between ‘lust’ rapes that are essentially sexually driven, therefore ethically and socially ‘acceptable’; and ‘evil’ rapes that are an expression of their anger and rage, which are unacceptable but still ‘understandable’ in their eyes.¹⁵⁹

Seeing the high degree of variation in sexual violence committed by armed actors across armed conflicts indicates that CRSV is not merely a by-product of war but can effectively be avoided. The difference perceived at the level of the armed organisations, more specifically between their armed institutions, carries important implications for policy that is aimed at preventing and addressing CRSV.¹⁶⁰ The many armed actors that do not engage in acts of sexual violence, regardless of the brutality of other acts committed, implies that commanders have the power to effectively establish institutions that prohibit and prevent sexual violence, if they care to do so. It is in their power to effectively prohibit and punish sexual violence crimes and their omission can lead to their criminal responsibility under international criminal law.¹⁶¹ Although this extensive body of law formally prohibits sexual violence crimes, there continues to exist a gap between the practice, which is still vastly present, and the norms that are necessary to protect women in a stronger and better way against it.¹⁶²

2.4 ALTERATION OF INTERNATIONAL CRIMINAL LAW

Article 28 of the Rome Statute entails the criminal responsibility of the commander and other superiors for crimes committed by forces under their command. A distinction is being made between military-type ranks and non-military type ranks, where both military commander and any other superior can be held criminally responsible for the ‘failure to take all necessary measures within his or her power to prevent or

¹⁵⁹ M Eriksson Baaz and M Stern, ‘Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)’ (2009) 53 *International Studies Quarterly* 495, 497.

¹⁶⁰ DK Cohen, A Hoover Green and EJ Wood, ‘Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward’ [February 2013] United States Institute of Peace Special Report 323 11.

¹⁶¹ *ibid* 13.

¹⁶² C Eboe-Osuji, ‘Superior Responsibility for the Rape of Women during Armed Conflicts’ in C Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Martinus Nijhoff Publishers 2012) 97.

repress' foreseeable crimes, which can include rape crimes, by their subordinates.¹⁶³ The Rome Statute thus requires a test of foreseeability, entailing that only crimes that subordinates 'were committing or about to commit' can generate criminal responsibility of their commanders and other superiors.¹⁶⁴ The duty to prevent or repress only comes to light for the military commander when they 'knew or, owing to the circumstances at the time, should have known' that crimes were being – or were about to be – committed.¹⁶⁵ For a non-military superior this responsibility is even more constrained since the Rome Statute only requires that they 'either knew, or consciously disregarded information which clearly indicated' that crimes were being, or were about to be, committed.¹⁶⁶ Applying this current legal framework on the perpetration of sexual violence crimes by subordinates, means that leaders in charge only need to take special measures in times of immediacy of these crimes, rather than at **all** times.¹⁶⁷ The criminal responsibility for commanders and other superiors for sexual violence crimes is not based on the general risk of such crimes women and girls face during conflict, but can only arise at a time immediately when the crime is committed. The failure of international criminal law on this point is highlighted by Eboe-Osuji, who suggests a legal duty of due diligence on the commander, requiring them to take reasonable measures at all times, rather than solely before imminent danger occurs, in order to prevent rape crimes from happening and to combat impunity.¹⁶⁸

2.5 CONCLUSION

Part one of this research started with an analysis of the way in which gender is a structural mark leading our social realities and influencing the experiences of both men and women during war, followed by

¹⁶³ Rome Statute art 28.

¹⁶⁴ C Eboe-Osuji, 'Superior Responsibility for the Rape of Women during Armed Conflicts' in C Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Martinus Nijhoff Publishers 2012) 99.

¹⁶⁵ Rome Statute art 28(a)(i).

¹⁶⁶ Rome Statute art 28(b)(i).

¹⁶⁷ C Eboe-Osuji, 'Superior Responsibility for the Rape of Women during Armed Conflicts' in C Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Martinus Nijhoff Publishers 2012) 100.

¹⁶⁸ *ibid* 98.

highlighting the slow recognition of sexual violence as a crime by the international community. From only being categorised as a crime against men’s property, to being a crime of honour, the prosecution of CRSV developed comprehensively and can now be prosecuted before the ICC as war crimes or crimes against humanity, undoubtedly due to the large involvement of women’s rights advocates. Although the prosecution of CRSV took a considerable leap forward, still too little attention is being paid to the causes that can lead to these type of crimes.

The theory of Wood successfully shows that CRSV can be effectively prevented if one analyses the variation in the institutions of the armed groups to explain the perpetration of CRSV, rather than focussing on the classical explanations of patriarchy, opportunity or sexual desire. Sexual violence that is perpetrated is in some cases used as a strategy of war, for organisational purposes; however, in most cases it is not ordered, nor punished, but nevertheless tolerated. If military commanders refuse to build strong institutions to effectively prohibit rape, they should be held accountable under international criminal law, which on its turn should be altered as well. A general duty to take necessary and reasonable measures at **all** times to prevent sexual violence should be imposed, in order to protect women and girls in a stronger and better way, before the crimes are committed, not after. CRSV is not just inherent collateral damage tied to armed conflict and effective prevention is the first step towards the adequate protection of CBOW, who nowadays still live in all parts of the globe.

PART II

CHILDREN BORN OF WARTIME RAPE

Part two of this research examines the case of CBOW in the conflict-settings of the four case studies of Bosnia and Herzegovina, Northern Uganda, Colombia and Myanmar. Chapter two will then analyse in which way the four key provisions of the CRC are compromised in regard to CBOW in each conflict setting. Chapter three provides four ways in which the human rights of CBOW can effectively be secured.

1.

WHO ARE THE CHILDREN BORN OF WARTIME RAPE?

1.1 GENERAL

CBOW live in all parts of the globe, for as long as armed conflict and war has existed, from the Democratic Republic of Congo to Nigeria, Kenya, Libya, Colombia, Sierra Leone, Iraq and so on. Although there is no exact data available regarding numbers, we can claim with certainty that their existence is in the hundreds of thousands. The lack of data is a striking example of the silence and ignorance by the international community. CBOW are not recognised as a separate category of concern, which should require special protection mechanisms, advocacy initiatives or the collection of statistical data.¹⁶⁹ On the contrary, their existence in the international children’s human rights regime has been widely disregarded for decades.

Stigmatisation, discrimination, abuse, neglect and infanticide; the human rights of CBOW are strongly impeded in many ways.¹⁷⁰ It is important that a light is shed on their plight and rights, as enshrined in the CRC. Besides the moral responsibility to address these human rights violations, there is also a legal obligation for nation states to protect and implement the rights of the children and their mothers. In addition, it is extremely important to highlight that the impact of the initial violation does not only affect the mother alone, but continues to affect

¹⁶⁹ C Carpenter, ‘Orphaned Again? Children Born of Wartime Rape as a Non-Issue for the Human Rights Movement’ in C Bob (ed), *The International Struggle for New Human Rights* (University of Pennsylvania Press 2009) 26.

¹⁷⁰ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 11.

her children, family and the wider community.¹⁷¹ The magnitude of the problem is increasing over time and physical and psychological violence can transform into intergenerational problems, where the challenges are transmitted to the new generations.¹⁷² The transgenerational transmission of trauma results in reduced paternal ability to give physical and emotional care, due to suffered traumatic experiences.¹⁷³ To stop the re-victimisation of children born as a result of the sexual abuse, it is important that they are recognised as full right bearers, with their rights respected and that redress is offered for the mothers, the children and the communities.¹⁷⁴

To have a global approach, this research will focus on four different case studies to assess the rights of CBOW in each country. The situation regarding CBOW in Bosnia and Herzegovina, Northern Uganda, Colombia and Rohingya (Myanmar) will be assessed.

1.2 BOSNIA AND HERZEGOVINA

The end of Soviet dominance in early 1990s Eastern Europe was marked by the dissolution of Yugoslavia and the several independence wars that followed. The declaration of independence by Bosnia and Herzegovina in 1992 led to a brutal ethnic civil war between Serbians, Muslims and Croats. The Bosnian war resulted in the death of approximately 100,000 people, caused two million people to be displaced and led to the rape of tens of thousands of women and girls.¹⁷⁵ The ethnic cleansing campaign, enforced by the Serbian forces, was characterised by the use of rape and other sexual violence crimes, primarily targeting Bosnian Muslim women.¹⁷⁶ Used to humiliate the victim, her ethnic community and shatter her identity; rape was employed in a widespread and systematic way.¹⁷⁷ Rape camps were being set up, to implement the Serbian policies

¹⁷¹ V Ladisch, 'From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda' (ICTJ 2015) 7.

¹⁷² *ibid* 6.

¹⁷³ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 155.

¹⁷⁴ V Ladisch, 'From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda' (ICTJ 2015) 7.

¹⁷⁵ PA Weitsman, 'The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda' (2008) 30 *Human Rights Quarterly* 561, 569.

¹⁷⁶ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 152.

¹⁷⁷ *ibid*.

of mass rape, forced impregnation and forced maternity.¹⁷⁸ Repeated gang rape, until women were impregnated so they would give birth to 'little Chetnik babies',¹⁷⁹ appeared to be the aim of Serbian forces.¹⁸⁰ No exact figures exist around the number of rape-related pregnancies. However, it is estimated that 20,000 to 50,000 women had to endure sexual violence and that about 4,000 women became pregnant, with about half of them terminating the full pregnancy and approximately 2,000 children being born as a result.¹⁸¹

As discussed above, the atrocities committed during the Balkan wars led to the codification of sexual violence crimes, including rape and forced pregnancy, as crimes against humanity or war crimes.¹⁸² In addition, the United Nations Security Council adopted several resolutions¹⁸³ on 'Women, Peace and Security', addressing the impact of war and armed conflict on women and calling on all parties to take measures against gender-based violence (GBV).¹⁸⁴ Despite the increasing awareness around GBV in armed conflicts by the international community, no regard is paid to the aftermath of forced impregnation and forced maternity. Children born as a result of the sexual violence appeared to be an ignored reality.

¹⁷⁸ PA Weitsman, 'The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda' (2008) 30 Human Rights Quarterly 561, 569.

¹⁷⁹ Women were continually told by the rapists 'you are going to have our children – you are going to have our little Chetniks', 'to plant the seed of Serbs in Bosnia' *ibid*.

¹⁸⁰ UN Security Council, 'Final Report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780' (1992) Annex IV Rape and Sexual Assault S/1994/674/AnnexIX; *ibid*.

¹⁸¹ C Ingwill Mochmann and S Lee, 'The human rights of children born of war: case analyses of past and present conflicts' (2010) 35 Historical Social Research 268, 269.

¹⁸² International Criminal Court, *Elements of Crimes* (2011) ISBN No. 92-9227-232-2 art 7(1)(g)-6.

¹⁸³ UN Security Council, 'Security Council Resolution 1325' S/RES/1325 2000 (31 October 2000). Followed by subsequent resolutions UN Security Council, 'Security Council Resolution 1820' S/RES/1820 2008 (19 June 2008); UN Security Council, 'Security Council Resolution 1888' S/RES/1888 2009 (30 September 2009); UN Security Council, 'Security Council Resolution 1889' S/RES/1889 2009 (5 October 2009); UN Security Council, 'Security Council Resolution 1960' S/RES/1960 2010 (16 December 2010); UN Security Council, 'Security Council Resolution 2106' S/RES/2106 2013 (24 June 2013); UN Security Council, 'Security Council Resolution 2122' S/RES/2122 2013 (18 October 2013); UN Security Council, 'Security Council Resolution 2242' S/RES/2242 2015 (13 October 2015); UN Security Council, 'Security Council Resolution 2467' S/RES/2467 2015 (10 November 2015); and UN Security Council, 'Security Council Resolution 2493' S/RES/2493 2019 (29 October 2019).

¹⁸⁴ UN Security Council, 'Security Council Resolution 1325' S/RES/1325 2000 (31 October 2000); S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 153.

1.3 NORTHERN UGANDA

Since its independence from the United Kingdom in 1962, violence has tormented Uganda, with a military coup in 1971, followed by several insurgencies by armed groups. Even though not one part of the country was spared from armed conflict, northern Uganda was particularly affected.¹⁸⁵ The LRA, one of the insurgent groups formerly operating in Northern Uganda since 1986 under the leadership of Joseph Kony, was responsible for a more than two decade long violent conflict, resulting in a multitude of human rights violations.¹⁸⁶ To produce a new clan and a new generation of LRA fighters, the LRA abducted thousands of women and girls between 1986-2007.¹⁸⁷ A forced wife system was carried out and formed a crucial part of Kony's military and ideological operations.¹⁸⁸ The abducted girls, usually around the age of 12 or 13, were forcibly married to commander 'husbands' and became their exclusive property.¹⁸⁹ The systematic abduction of women and girls was thus followed by forced marriage, rape, forced impregnation, resulting in forced child bearing and appeared to be the *modus operandi* of the LRA.¹⁹⁰

Reliable data on the exact number of abductions in Uganda are largely unavailable, even more so with regard to children born to those abducted, under LRA captivity.¹⁹¹ A study in 2008, conducted by the University of California, Berkeley, estimated that approximately 52,000-75,000 people had been abducted by the LRA since 1986.¹⁹² A study on the findings from the Survey on War-Affected Youth (SWAY) in Northern Uganda, funded by the United Nations Children's Fund (UNICEF),

¹⁸⁵ V Ladisch, 'From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda' (ICTJ 2015) 4.

¹⁸⁶ A Green and M Denov, 'Mask-Making and Drawing as Method: Arts-Based Approaches to Data Collection With War-Affected Children' (2019) 18 International Journal of Qualitative Methods 1, 2.

¹⁸⁷ B Rohwerder, 'Reintegration of Children Born of Wartime Rape' (Institute of Development Studies 2019) 7.

¹⁸⁸ A Green and M Denov, 'Mask-Making and Drawing as Method: Arts-Based Approaches to Data Collection With War-Affected Children' (2019) 18 International Journal of Qualitative Methods 1, 2.

¹⁸⁹ *ibid.*

¹⁹⁰ V Ladisch, 'From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda' (ICTJ 2015) 4; *ibid.*

¹⁹¹ *ibid.*

¹⁹² P Pham, E Stover and P Vinck, 'Returning Home: Forced Conscripted, Reintegration, and Mental Health Status of Former Abductees of the Lord's Resistance Army in Northern Uganda' (2009) 9 BMC Psychiatry 2009 1, 2.

found that a quarter of the abducted females were forcibly married to LRA commanders and fighters; resulting in half of these ‘forced wives’ bearing children.¹⁹³ According to Akello, an estimated 10,000 abducted girls became forced mothers under LRA captivity, giving birth to two or more children.¹⁹⁴

An even more ignored reality is the sexual violence committed by state actors, namely the Uganda People’s Defence Force (UPDF). The UPDF is accused of sexual exploitation of females in displacement camps, in exchange for money or food. Other accusations regard the rape of women by UPDF forces in communities they ought to protect against LRA attacks. A culture of silence, taboo, impunity and fear of retaliation makes statistics on the perpetrated sexual violence, and the children born as a result from it, by state actors even more impossible. However, significant anecdotal proof suggests that the sexual violence was committed at an alarming rate.¹⁹⁵

1.4 COLOMBIA

Colombia’s 50-year armed conflict started in the 1960s between government forces and left-wing guerrilla groups – with the most significant being Fuerzas Armadas Revolucionarias de Colombia (FARC) – demanding social and land reforms.¹⁹⁶ As a response to the attacks by the different left-wing guerrilla groups, right-wing paramilitary groups took arms, resulting in a violent battle to gain control over resources and

¹⁹³ J Annan and others, ‘The State of Female Youth in Northern Uganda: Findings from the Survey of War Affected Youth: Survey for War Affected Youth (SWAY), Phase II’ (SWAY 2008) vii.

¹⁹⁴ G Akello, ‘Experiences of forced mothers in northern Uganda: The legacy of war’ (2013) 11 *Intervention* 149, 149.

¹⁹⁵ Uganda Human Rights Commission and Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘“The Dust Has Not Yet Settled” Victims’ Views on The Right to Remedy and Reparation: A Report from the Greater North of Uganda’ (Uganda Human Rights Commission and OHCHR 2011) 48-49; V Ladisch, ‘From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda’ (ICTJ 2015) 6; J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 33.

¹⁹⁶ D Kravetz, ‘Promoting Domestic Accountability For Conflict-Related Sexual Violence: The Cases Of Guatemala, Peru, And Colombia’ (2017) 32 *American University of International Law Review* 707, 722.

territory, including drug-trafficking routes.¹⁹⁷ In 2008, the Colombian Constitutional Court stressed in a landmark ruling the systematic and extensive nature of sexual violence perpetrated during the half-century conflict and underlines that sexual violence is ‘a habitual, extensive, systematic and invisible practice in the context of the Colombian armed conflict’, perpetrated by all armed actors – being state forces, guerrilla groups and paramilitaries.¹⁹⁸

A survey supported by Oxfam, regarding the prevalence of sexual violence, conducted between 2001-09 in 407 municipalities, established a 17.58% rate or 489,687 women that endured a form of sexual violence. It is estimated that 14,779 women were raped by armed forces and 5,402 women were victim of forced pregnancy by armed actors.¹⁹⁹ However, this consists of only one estimate during a nine-year lapse. The high prevalence of CRSV stands in hard contrast with the complete lack of official data, especially with regard to children born as a result of the sexual violence, during the whole conflict. One of the reasons for the data gaps is the recent ending of the five decades long key conflict between the state and the FARC by the 2016 peace agreement.²⁰⁰ No systematic collection of data exists around the number of children born of sexual violence, their identity and their plight.²⁰¹ In 2015, the former Special Representative of the Secretary-General on Sexual Violence in Conflict, Zainab Hawa Bangura, expressed concern about the sexual violence perpetrated in Colombia and the lack of accountability, while also stressing the ‘silent issue of children born out of rape, their unique challenges, needs and the support they require’.²⁰²

¹⁹⁷ D Kravetz, ‘Promoting Domestic Accountability For Conflict-Related Sexual Violence: The Cases Of Guatemala, Peru, And Colombia’ (2017) 32 American University of International Law Review 707, 722.

¹⁹⁸ *ibid*; J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 33; Corte Constitucional (CC) Auto 092 (14 April 2008) *Protección de los derechos fundamentales de las mujeres víctimas del desplazamiento forzado por causa del conflicto armado* (Auto 092/2008).

¹⁹⁹ O Amparo Sanchez and others, ‘Campaign Rape and Other Violence: Leave my Body out of the War First Survey of Prevalence, Sexual violence against women in the context of the Colombian armed conflict, Colombia 2001-2009’ (Oxfam, Development Cooperation Ministry of Foreign Affairs and Violaciones y Otras Violencias 2011) 19.

²⁰⁰ BBC, ‘Colombia signs new peace deal with Farc’ (BBC, 24 November 2016) <www.bbc.com/news/world-latin-america-38096179> accessed 13 May 2020.

²⁰¹ T Sanchez Parra, ‘The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia’ (2017) 12 International Journal of Transitional Justice 1, 4.

²⁰² UN News, ‘Eradicating sexual violence in Colombia requires investment in communities – UN envoy’ (UN News, 4 March 2015) <<https://news.un.org/en/story/2015/03/492642>> accessed 13 May 2020.

1.5 ROHINGYA – MYANMAR

The Rohingya – a predominately Muslim ethnic group in Rakhine State, Myanmar (formerly Burma) – are one of the most persecuted minority groups in the world and have faced systematic discrimination throughout history.²⁰³ After Myanmar’s independence in 1948 the situation worsened and persecution has multiplied, denying the Rohingya people statehood, public services and civil rights; subjecting them to arbitrary arrest, discrimination and violence.²⁰⁴ The violent attacks in 1978, 1991-92, 2012 and 2016 were followed up by the most extreme wave of genocidal violence in August 2017.²⁰⁵ A series of ‘clearance operations’, particularly by the Tatmadaw, Myanmar’s armed forces, led to approximately 890,000 Rohingya people fleeing the border, into Cox’s Bazar refugee camps, Bangladesh and the killing of more than 10,000 Rohingyas.²⁰⁶ The widespread pattern of human rights violations – murder, torture, looting and the burning of entire villages – is marked by the extreme use of sexual violence as part of Myanmar’s military strategy.²⁰⁷

The exact number of women who were the victim of rape crimes by the Myanmar armed forces is unknown. Pramila Patten – current Special Representative of the Secretary-General on Sexual Violence in Conflict – describes that during her visit to Cox Bazar ‘almost every woman and girl I spoke with described patterns of rape, gang-rape, forced nudity and abduction for the purpose of sexual slavery during military campaigns’.²⁰⁸ Official data on rape-related pregnancies do not

²⁰³ MA Bari, *The Rohingya Crisis : A People Facing Extinction* (Kube Publishing Ltd 2018); European Network on Statelessness, ‘Statelessness in Myanmar – Country Position Paper’ (May 2019) 10.

²⁰⁴ MA Bari, *The Rohingya Crisis : A People Facing Extinction* (Kube Publishing Ltd 2018).

²⁰⁵ Human Rights Council, ‘Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts’ (22 August 2019) A/HRC/42/CRP.4.

²⁰⁶ UN Human Rights Council, ‘Report of the independent international fact-finding mission on Myanmar’ (12 September 2018) 8; OCHA, ‘Rohingya Refugee Crisis’ (OCHA) <www.unocha.org/rohingya-refugee-crisis> accessed 15 May 2020.

²⁰⁷ United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, ‘One year into the Rohingya crisis, Special Representative Patten calls for accountability for sexual violence crimes’ (*United Nations*, 24 August 2018) <www.un.org/sexualviolenceinconflict/press-release/one-year-into-the-rohingya-crisis-special-representative-patten-calls-for-accountability-for-sexual-violence-crimes/> accessed 15 May 2020.

²⁰⁸ *ibid.*

exist, but it is estimated that there were approximately 40,000 women and girls pregnant among the Rohingya population in the refugee camps, many of them as a consequence of rape.²⁰⁹ Nine months after the spike of violence, more than 16,000 Rohingya babies have been born in the refugee camps of Cox Bazar, corresponding to 60 babies being born each day.²¹⁰

²⁰⁹ A Gilmour, 'Bangladesh and the international community must ensure support to victims of sexual violence' (OHCHR) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23012&LangID=E> accessed 16 May 2020.

²¹⁰ UNICEF, 'More than 60 Rohingya babies born in Bangladesh refugee camps every day' (UNICEF, 17 May 2018) www.unicef.org/press-releases/more-60-rohingya-babies-born-bangladesh-refugee-camps-every-day-unicef accessed 16 May 2020.

2.

THE APPLICABILITY OF THE CONVENTION ON THE
RIGHTS OF THE CHILD

2.1 GENERAL

Like all other human beings, children are protected by global human rights instruments. Examining the rights of CBOW starts with analysing the most important legal instrument for the promotion and protection of the human rights of children. The CRC is the most widely ratified human rights instrument in history.²¹¹ It is the first international treaty placing children as the central actors in the international legal framework, as an autonomous group, to be considered independent from their parents.²¹²

The CRC entails 42 provisions, covering a wide set of rights, each relating to one of the three ‘P’s’ – provision, protection and participation.²¹³ Provision rights relate to the provision of children’s basic needs and include the right to education (article 28), right to attain the highest level of health and healthcare (article 24) and the right to a standard of living adequate for the child’s development (article 27). Protection rights are there to ensure children are shielded from all acts of harm and exploitation and include the right to be protected from discrimination (article 2), the right to be protected from all forms abuse, violence and exploitation (article 19) and the right to be protected from economic and sexual exploitation (articles 32 and 34). Participation

²¹¹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 18.

²¹² AM Watson, ‘Children Born of Wartime Rape: Rights and Representations’ (2007) 9 International Feminist Journal of Politics 20, 26.

²¹³ A Quennerstedt, ‘Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the “3 p’s”’ (2010) 18 International Journal of Children’s Rights 619, 619.

rights are included to make sure children can express their views and participate in the decisions regarding themselves; and include the right to express their views and to be heard in legal proceedings (article 12) and freedom of expression and the right to information (article 13).²¹⁴

Even though the widespread ratification of the CRC resulted in the creation of children as autonomous actors with their own agency, within the international framework, there also exists criticism on the conceptualisation of the enshrined notion of 'childhood'.²¹⁵ According to Watson, the CRC does little to take into account the different realities and different categories of 'childhood', and is rather focused on a Western, idealised perception.²¹⁶ The notion of childhood that is portrayed is one that is rather peaceful and prosperous, not portraying the many different categories of children that do exist.²¹⁷ Including experiences in the international legal framework of children who belong to a somewhat more 'dangerous' category – whose experiences do not align with the idealised perception of 'childhood' – can be presumed as being a threat to the existing societal order.²¹⁸

Human rights are said to be inalienable and universal, belonging to each individual irrespective of race, sex, culture, religion, age, birth or other status.²¹⁹ Carpenter refers, however, to the difference between the **possession** and the **enjoyment** of these rights. International human rights standards are abstract moral statements that need to be transformed into enforceable legislation by each government.²²⁰ So even though all children **possess** the rights enshrined in the CRC, each government should also implement these provisions in such a way that CBOW can be as sure as other children to truly **enjoy** these rights.²²¹ The representation, or lack thereof, of CBOW within the existing

²¹⁴ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 162.

²¹⁵ AM Watson, 'Children Born of Wartime Rape: Rights and Representations' (2007) 9 International Feminist Journal of Politics 20, 26.

²¹⁶ *ibid.*

²¹⁷ Watson gives the example of the guideline age of 18 years for the transition into adulthood, that is not taking into account the many different experiences lived by children all over the world, in less peaceful and Western conditions: See AM Watson, 'Children Born of Wartime Rape: Rights and Representations' (2007) 9 International Feminist Journal of Politics 20, 26.

²¹⁸ *ibid.*

²¹⁹ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 129.

²²⁰ *ibid.*

²²¹ *ibid.* 131.

international legal framework will be discussed in the four above-mentioned case studies, particularly examining four key provisions in the CRC and their applicability to CBOW.

2.2 RIGHT TO NON-DISCRIMINATION (ARTICLE 2)

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.²²²

2.2.1 *General*

One of the fundamental principles enshrined in the CRC is the principle of non-discrimination, according to which no child should experience discrimination based on the child's parent's or legal guardian's status. However, empirical evidence suggests that CBOW suffer systematic discrimination and stigmatisation **precisely** because of the identity of their parents and their biological background.²²³ Since many societies are still constructed in a firm patriarchal manner, patriarchal norms result in the perception of the child taking on the paternal characteristics or the identity of the father.²²⁴ In this way, CBOW will always be directly linked with their perpetrator fathers and the horrors committed by the enemy, especially in post-conflict situations where rape was committed with genocidal intent.²²⁵ This perceived association with the enemy can result in the rejection of the

²²² CRC art 2.

²²³ C Ingwill Mochmann and S Lee, 'The human rights of children born of war: case analyses of past and present conflicts' (2010) 35 *Historical Social Research* 268, 270; K Theidon, 'Hidden in Plain Sight: Children Born of Wartime Sexual Violence' (2015) 56 *Current Anthropology* 1, 2.

²²⁴ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 165.

²²⁵ *ibid*; J Neenan, 'Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict' (Centre for Women, Peace and Security, London School of Economics 2018) 31.

child by their mothers, which consists as the most fundamental level of discrimination.²²⁶ The suffered discrimination is, however, not only caused by the father's identity but is as well a result of the expressed prejudices against the mothers in the community – portraying them according to stereotypes relating to the lack of moral standards and illegitimacy by having children out of wedlock.²²⁷

2.2.2 *Bosnia and Herzegovina*

CBOW are often subjected to injurious naming practices, a constant reminder of the painful memories of the past and their mother's plight.²²⁸ In Bosnia and Herzegovina, CBOW are collectively labelled 'Chetnik babies' or 'little Chetniks' since the child's ethnicity is based upon the ethnicity of the father.²²⁹ Bosnian Muslim women impregnated by a Serb would therefore bear a Serb baby, carrying the ethnicity of their perpetrator.²³⁰ In 2004, the UNICEF field office in Bosnia and Herzegovina assembled confidential case histories on CBOW within society, in which it appeared that 39% of the case data showed an initial rejection by one or more family members of the rape survivor or her newborn child.²³¹ In one case it appeared that the family had taught the child of their daughter to introduce himself to guests as 'I am the product of my mother's shame', explicitly stating his existence as a mistake.²³² The possible rejection by their mothers, and the extended family, is in many cases combined with the rejection by the community as a whole. After the war, CBOW are stigmatised along with their mothers. A rape-survivor in Bosnia and Herzegovina stated, in this regard, at the time, 'Where I come from, everyone would think of the kid as filth'.²³³ Nowadays, more than 20 years after the conflict erupted,

²²⁶ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 165.

²²⁷ *ibid.*

²²⁸ K Theidon, 'Hidden in Plain Sight: Children Born of Wartime Sexual Violence' (2015) 56 *Current Anthropology* 1, 3.

²²⁹ T Salzman, 'Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia' (1998) 20 *Human Rights Quarterly* 348, 359, 364.

²³⁰ S Fisher, 'Occupation of the Womb: Forced Impregnation as Genocide' (1996) 46 *Duke Law Journal* 91, 114.

²³¹ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 27.

²³² *ibid.*

²³³ *ibid.*

the intergenerational impact of sexual violence is still tangible. CBOW in Bosnia and Herzegovina still suffer from the stigma of their descent, resulting in some of them to ‘live on the margins of society’.²³⁴ The 2019 concluding remarks of the UN Committee on the Rights of the Child addresses the stigmatisation of children in disadvantaged situations and points out ‘the negative impact of stereotyping and discriminatory attitudes on children’s rights’.²³⁵

2.2.3 Northern Uganda

Children born under LRA captivity in Northern Uganda are regarded as symbols of misfortune.²³⁶ They are labelled as ‘Kony’s Children’ or are subjected to pejorative nicknames directly associated to the mother’s suffering: ‘Komakech’ (I am unfortunate), ‘Anenocan’ (I have suffered), ‘Odokorac’ (Things have gone bad) and ‘Lubanga Kene’ (Only God knows why this happened to me).²³⁷ The stigmatisation and rejection, by their own families, the wider community and potential in-laws, affects the daily lives of CBOW and their mothers. In many cases, the mothers try to rebuild their lives after returning home from LRA captivity by marrying new partners.²³⁸ These new relationships pose, however, a particular risk for further physical, emotional and sexual abuse for both the mothers and their children born in captivity.²³⁹ The continuation of ostracisation and isolation of these children within their own homes can be observed when comparing the treatment of CBOW versus non-CBOW.²⁴⁰ Evidence suggests, for instance, that in many homes CBOW

²³⁴ Stated by T Chikuhwa (Chief of Staff of P Patten) in UN News, ‘For Rohingya refugees, imminent surge in births is traumatic legacy of sexual violence - special report’ (UN News, 11 May 2018) <<https://news.un.org/en/story/2018/05/1009372>> accessed 18 May 2020.

²³⁵ UN Committee on the Rights of the Child (CRC) ‘Concluding observations on the combined fifth and sixth periodic reports of Bosnia and Herzegovina’ (5 December 2019) CRC/C/BIH/CO/5-6, 4.

²³⁶ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 34.

²³⁷ E Apio, ‘Uganda’s Forgotten Children of War’ in C Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press 2007) 101.

²³⁸ L McClain Opiyo, ‘Alone Like a Tree: Reintegration Challenges Facing Children Born of War and Their Mothers in Northern Uganda’ (Justice and Reconciliation Project 2015) 4.

²³⁹ T Atim, D Mazurana and A Marshak, ‘Women survivors and their children born of wartime in northern Uganda’ [2018] *Disasters* 61, 68.

²⁴⁰ L McClain Opiyo, ‘Alone Like a Tree: Reintegration Challenges Facing Children Born of War and Their Mothers in Northern Uganda’ (Justice and Reconciliation Project 2015) 4.

are obliged to sleep on the ground, whereas non-CBOW are provided with mattresses.²⁴¹ The same applies for the amount of food children get at home, resulting in CBOW receiving less food.²⁴² The segregation within families and their maternal, and sibling, alienation is, in addition, combined with a deplorable economic situation.²⁴³

2.2.4 *Colombia*

The identities of CBOW in Colombia are defined by stigmatisation which can be observed by the injurious naming practices, labelling these children as '*paraquitos*' (little paramilitaries) or 'children of the green people', referring to the colour of the soldier's uniform.²⁴⁴ Even though not much is currently known about the particular risks and harms CBOW encounter in Colombia, it is clear that such injurious labelling practices are usually only the starting point for creating stigma and a limited awareness of CBOW, and more importantly, for much deeper and broader human rights issues and obstacles to their integration.²⁴⁵ As Sanchez Parra states around the injurious labelling practices and the narrative around the identity of CBOW in Colombia, 'It assumes that children are defined only in relation to the violence that conceived them, and fails to understand the dynamism of their development as human beings within their cultural and socio-political contexts'.²⁴⁶

In small communities it is believed within local logics and values that CBOW are aggressive and violent members of the community due to the failure of their mothers to raise them properly.²⁴⁷ Anecdotal evidence suggests that CBOW born to young indigenous mothers within an indigenous group can face possible rejection by their clan.²⁴⁸ The suffered rejection stems from not being considered as 'true' members of

²⁴¹ L McClain Opiyo, 'Alone Like a Tree: Reintegration Challenges Facing Children Born of War and Their Mothers in Northern Uganda' (Justice and Reconciliation Project 2015) 4.

²⁴² *ibid* 6.

²⁴³ J Neenan, 'Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict' (Centre for Women, Peace and Security, London School of Economics 2018) 35.

²⁴⁴ *ibid* 34.

²⁴⁵ *ibid*.

²⁴⁶ T Sanchez Parra, 'The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia' (2017) 12 *International Journal of Transitional Justice* 1, 13.

²⁴⁷ *ibid* fn 29.

²⁴⁸ J Neenan, 'Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict' (Centre for Women, Peace and Security, London School of Economics 2018) 36.

the clan by looking visibly different due to their mixed racial biological background.²⁴⁹ CBOW’s rejection by their communities is often combined with rejection and alienation by their mothers, this is due to their severe psychological trauma, which remains unaddressed.²⁵⁰ This neglect within their own homes can increase the risk of these children joining armed groups, in search of a sense of belonging and protection.²⁵¹ The 2015 concluding observations of the UN Committee on the Rights of the Child pointed out in a more general manner the ‘persistent patriarchal attitudes and gender stereotypes that discriminate against girls and women’ which can further deteriorate the lives of CBOW in Colombia.²⁵²

Although there has been widespread institutional invisibility of CBOW in Colombia, the Victim’s and Land Restitution Law²⁵³ (the Victim’s Law 1448), adopted in 2011, is the first legal document that recognises children born of war in the definition of its victims, next to forced disappearances, orphans or child combatants.²⁵⁴ The recognition of their existence – as subjects who deserve a role in the current political community – is a significant landmark in the jurisprudence around the plight of CBOW globally.²⁵⁵ However, their inclusion was not the result of political discussions around acknowledging CBOW as war-affected children, the consequences of armed conflict on these individuals and how to address the latter; it was rather the result of the fight of women’s organisations to address sexual violence as a weapon of war and the widespread existence of gender-based violence and its consequences.²⁵⁶

²⁴⁹ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 36.

²⁵⁰ Children Change Colombia, ‘Sexual and Gender-Based Violence’ (Children Change Colombia) <www.childrenchange colombia.org/en/what-we-do/sexual-and-gender-based-violence> accessed 1 June 2020.

²⁵¹ *ibid.*

²⁵² UN Committee on the Rights of the Child (CRC) ‘Concluding observations on the combined fourth and fifth periodic reports of Colombia’ (6 March 2015) CRC/C/COL/CO/4-5, 5.

²⁵³ The Victim’s and Land Restitution Law acknowledges the existence of an armed conflict for the first time, it provides for reparations for survivors (including special provisions for women and children survivors) of human rights abuses and contains measures for the restitution of millions of hectares of stolen land, see Amnesty International, ‘Colombia: The Victims and Land Restitution Law’ (Amnesty International Publications 2012) <www.refworld.org/pdfid/4f99029f2.pdf> accessed 3 June 2020.

²⁵⁴ T Sanchez Parra, ‘The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia’ (2017) 12 International Journal of Transitional Justice 1, 7.

²⁵⁵ *ibid.*

²⁵⁶ *ibid.*

As of 2018, no reparations were yet granted to CBOW under the Victim's Law 1448.²⁵⁷ The formal legal recognition of CBOW stands in hard contrast with the practical implementation of the law and is still going hand in hand with the absence of institutional frameworks around their plight, their possibilities for redress and a worthy place on the political agenda.²⁵⁸

2.2.5 *Rohingya*

Although not much is known about the specific risks and harms CBOW from Rohingya mothers will face, it is almost certain they will be the victim of double discrimination – solely for being Rohingya and, in addition, for being born as a result of the perpetrated genocidal sexual violence. The discrimination of the Rohingya people by the Myanmar forces is carried out through many different discriminatory laws and policies, denying their human and legal rights. With no freedom of movement, no right to health, no right to nationality²⁵⁹ or no right to education,²⁶⁰ the Rohingya are a people without rights.²⁶¹ The 2012 concluding remarks of the UN Committee on the Rights of the Child specifically highlighted ‘the multiple forms of discrimination ... particularly those against girls and children in vulnerable and disadvantaged situations, such as children from ethnic and religious minority groups (including Rohingya children)’ and urged Myanmar to implement necessary legislative changes to end discrimination on the basis of ethnicity.²⁶² In the recent report of the UN Human Rights

²⁵⁷ MADRE, ‘Charo Mina-Rojas Speaks at UN Security Council on Children Born of Rape’ (MADRE, 2 November 2018) <www.madre.org/press-publications/blog-post/charo-mina-rojas-speaks-un-security-council-children-born-rape> accessed 3 June 2020.

²⁵⁸ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 36.

²⁵⁹ European Network on Statelessness, ‘Statelessness in Myanmar – Country Position Paper’ (May 2019) 7.

²⁶⁰ Human Rights Watch, ‘“Are We Not Human?” Denial of Education for Rohingya Refugee Children in Bangladesh’ (Human Rights Watch, 3 December 2019) <www.hrw.org/report/2019/12/04/are-we-not-human/denial-education-rohingya-refugee-children-bangladesh> accessed 28 June 2020.

²⁶¹ Amnesty International UK, ‘Myanmar’s apartheid campaign against the Rohingya’ (Amnesty International, 18 May 2020) <www.amnesty.org.uk/myanmar-apartheid-campaign-against-rohingya-burma> accessed 4 June 2020.

²⁶² UN Committee on the Rights of the Child (CRC) ‘Consideration of reports submitted by States parties under article 44 of the Convention – Myanmar’ (14 March 2012) CRC/C/MMR/CO/3-4, 7.

Council, regarding sexual and gender-based violence in Myanmar, it is indicated that recognition of Rohingya children who were conceived through rape is hard for some mothers, since they are a constant reminder of the rape they have endured.²⁶³ A mother described her newborn child, born out of rape, as ‘not our child – a lost child’.²⁶⁴

2.2.6 Conclusion

The empirical evidence from the four case studies suggests one clear fact: CBOW suffer systematic discrimination solely based on their identity, regardless of which conflict-setting they were born. Injurious naming practices are often only the starting point, compounded in many cases with social alienation, stigmatisation and ostracisation within their own homes and the wider community. The right to non-discrimination, protected by article 2 of the CRC, is continuously violated in the case of CBOW in all conflict-settings, hence the universal applicability is not realised.

2.3 RIGHT TO LIFE, SURVIVAL AND DEVELOPMENT (ARTICLE 6)

States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child.²⁶⁵

2.3.1 General

The child’s right to life, survival and development is guaranteed by article 6 of the CRC. The most fundamental human right, the right to life is often affected in the case of CBOW.²⁶⁶ Women who were the victims of rape and became pregnant as a result from it often try to abort such pregnancies for different reasons. However, access to safe abortions is limited due to the circumstances of armed conflict, or not present at all, resulting in the use of informal means to proceed,

²⁶³ Human Rights Council, ‘Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts’ (22 August 2019) A/HRC/42/CRP.4 49.

²⁶⁴ *ibid.*

²⁶⁵ CRC art 6.

²⁶⁶ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 163.

which can lead to botched abortions.²⁶⁷ Little to no information exists, however, on the possible health impact of botched abortions on children carried to term.²⁶⁸ In addition, reproductive health such as adequate assistance during childbirth is often lacking, because women are giving birth in captivity or they wish to keep the pregnancy a secret out of fear of shame and stigmatisation.²⁶⁹ CBOW are at a particular risk of infanticide, which poses a significant threat to the lives of these children.²⁷⁰ Even though no verifiable statistics are kept on the prevalence of these incidents, it appears from anecdotal evidence²⁷¹ and certain reports on gender-based violence in conflict²⁷² that infanticide can occur as a consequence of wartime rape-related pregnancy.²⁷³ The narrative around infanticide is, however, in most cases constructed around the rights of the mothers, rarely focussing on the rights of the victimised child and therefore implicitly denying their right to life in the current literature.²⁷⁴ Yet, it should be noted that the question around the legal and moral culpability in these cases is a complicated one, making prosecutions for infanticide implausible, as Lee claims ‘Mothers kill for reasons that are rooted in their victimhood in war itself, mostly in the traumatisation as a result of war rape, exacerbated by the stigmatisation and marginalisation following rape, pregnancy and motherhood of a child born of war rape’.²⁷⁵

Article 6 of the CRC protects more than solely the child’s life; it guarantees the child’s survival and development. Article 6(2) of the CRC should be interpreted in a positive and proactive way, affecting all areas of the child’s life.²⁷⁶ States are namely obliged to ‘create an environment

²⁶⁷ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 24.

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

²⁷⁰ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 163.

²⁷¹ There is a story of a Kosovar woman, who was raped by Serb armed forces, snapping the neck of her newborn baby in front of the nurses at Kosovo’s British-administered university hospital. See H Smith, ‘Rape victims’ babies pay the price of war’ (*The Guardian*, 16 April 2000) <www.theguardian.com/world/2000/apr/16/balkans> accessed 8 June 2020.

²⁷² World Health Organization, ‘Reproductive health during conflict and displacement’ (4 April 2000) WHO/RHR/00.13 42, 113, 114, 130.

²⁷³ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 25.

²⁷⁴ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 164.

²⁷⁵ *ibid.*

²⁷⁶ E Sutherland, ‘The Child’s Right to Life, Survival and Development: Evolution and Progress’ (2015) 26 Stellenbosch Law Review 272, 282.

that respects human dignity and ensures the holistic development of every child’.²⁷⁷ The severe economic marginalisation and hardship that CBOW tend to suffer²⁷⁸ could for these reasons be seen as a violation of article 6(2) of the CRC. The child’s fate is inextricably linked to that of their mother,²⁷⁹ whose status as a raped woman – who deliberately made the choice to raise the ‘enemy’s’ child – in a war-torn society is one of shame, humiliation and stigma.²⁸⁰ The child may be seen by the community as a constant reminder and proof of the violent past, therefore the mothers can face enormous social difficulties in raising their child born of rape within these communities.²⁸¹ Single woman households can, in addition, face difficulties in generating sufficient income to support themselves.²⁸² Without adequate resources and lack of social support, including the lack of childcare, women can be impeded in their chances to find adequate skills or job training, resorting them to other, more dangerous ways of survival.²⁸³ Due to these reasons CBOW can grow up in severe financial hardship, strongly impeding their chances for survival and adequate development. As Carpenter points out, ‘Rape survivors’ abilities to nurture their children are shaped by the resources and support available to them: financially, logistically, and most importantly, emotionally’.²⁸⁴

2.3.2 *Bosnia and Herzegovina*

The lack of specific data on the exact numbers of CBOW in Bosnia and Herzegovina also renders it impossible to determine with certainty how many children died by infanticide, abuse or neglect.²⁸⁵ However, in the

²⁷⁷ UN Committee on the Rights of the Child (CRC) ‘General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration’ (29 May 2013) CRC/C/GC/14, 3.

²⁷⁸ B Rohwerder, ‘Reintegration of Children Born of Wartime Rape’ (Institute of Development Studies 2019) 5.

²⁷⁹ V Ladisch, ‘From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda’ (ICTJ 2015) 17.

²⁸⁰ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 28.

²⁸¹ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 157.

²⁸² United Nations Security Council, ‘Report of the Secretary-General on Women, Peace and Security’ (16 October 2002) S/2002/1154, 2.

²⁸³ *ibid.*

²⁸⁴ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 27.

²⁸⁵ *ibid* 25.

aftermath of the Bosnian war, it appeared, based on anecdotal evidence that the incidents of infanticide occurred to a disproportionately high level.²⁸⁶ The few case studies collected by UNICEF in 2004 regarding CBOW within Bosnian society²⁸⁷ included two cases of attempted infanticide, where one mother threw her newborn baby into the Sava river and the other mother tried to poison the baby and herself.²⁸⁸ In three other cases, infanticide was contemplated by the mothers as a 'solution'.²⁸⁹ In comparison, a study conducted on infanticide in Croatia between 1989-2002 found the rate of neonaticide²⁹⁰ to be estimated at eight in 100,000 or 0.008%.²⁹¹ In Bosnia and Herzegovina, however, it appeared out of the collected case histories that the percentage of attempted infanticide amounts to 8% (two out of 23 cases); and with regard to consideration of infanticide 22% (five out of 23 cases).²⁹² So even though no official statistics are present on the actual rate of infanticide committed, the small sample sizes that are available do describe a grim picture nevertheless.²⁹³

2.3.3 Northern Uganda

Children born in LRA captivity are subjected to an immediate risk to their right to life due to starvation, lack of access to clean water and unsafe shelter in the bush.²⁹⁴ Additionally, being born and growing up in the presence of a rebel group results in daily exposure and subjection to violence, combat and a constant threat of death.²⁹⁵ Surviving life 'in the bush' does not necessarily result, however, in a better post-war living

²⁸⁶ B Rohwerder, 'Reintegration of Children Born of Wartime Rape' (Institute of Development Studies 2019) 5.

²⁸⁷ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 27.

²⁸⁸ *ibid* fn 86; S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 157.

²⁸⁹ *ibid*.

²⁹⁰ The deliberate act of murdering one's own child within the first 24 hours after birth.

²⁹¹ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 25; S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 157.

²⁹² *ibid*.

²⁹³ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 157.

²⁹⁴ J Neenan, 'Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict' (Centre for Women, Peace and Security, London School of Economics 2018) 27.

²⁹⁵ *ibid*.

situation due to the extreme socioeconomic marginalisation CBOW suffer within society afterwards.²⁹⁶ In Uganda’s patrilineal identity system, where the father is regarded as ‘everything’, children born out of wedlock are placed in a severely disadvantaged situation and are perceived as an economic burden.²⁹⁷ Despite the absence of the fathers, they nevertheless still pass on their identity as LRA soldiers.²⁹⁸ However, due to the contested identity of the father and lineage, the child does not get any benefit of belonging to a clan, nor will they get any land access.²⁹⁹ This situation places CBOW in an extremely precarious economic situation, since family land poses a crucial source of future livelihood.³⁰⁰ It will make them unable to earn any income, resulting in their inability to pay school or training fees, which will further impede their chances for the future and increase their chances of becoming homeless.³⁰¹

2.3.4 Colombia

No research has been carried out on the particular risks to the right to life of CBOW born in Colombia. However, the risk of infanticide, abandonment and physical abuse of CBOW by their mothers is, unfortunately, also present in this country.³⁰² Access to basic health services, including reproductive health, is very limited, due to the context of armed conflict, which can result in health issues for the mother and her newborn baby.³⁰³ In addition, the presence of armed conflict puts the lives of all children at risk every day.³⁰⁴

²⁹⁶ B Rohwerder, ‘Reintegration of Children Born of Wartime Rape’ (Institute of Development Studies 2019) 8.

²⁹⁷ V Ladisch, ‘From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda’ (ICTJ 2015) 17.

²⁹⁸ *ibid.*

²⁹⁹ *ibid.*

³⁰⁰ L McClain Opiyo, ‘Alone Like a Tree: Reintegration Challenges Facing Children Born of War and Their Mothers in Northern Uganda’ (Justice and Reconciliation Project 2015) 6.

³⁰¹ V Ladisch, ‘From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda’ (ICTJ 2015) 17.

³⁰² J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 28.

³⁰³ T Sanchez Parra, ‘The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia’ (2017) 12 International Journal of Transitional Justice 1, 17.

³⁰⁴ UN Committee on the Rights of the Child (CRC) ‘Concluding observations on the combined fourth and fifth periodic reports of Colombia’ (6 March 2015) CRC/C/COL/CO/4-5, 6.

2.3.5 Rohingya

The conditions in which Rohingya mothers need to give birth to their newborn babies in the refugee camps are extremely unsafe and unsanitary, resulting in possible severe infections for mothers and their child, putting both of their lives at risk.³⁰⁵ It is estimated that 75% of Rohingya babies are born in unsafe conditions.³⁰⁶ Anecdotal evidence suggests that Rohingya families are afraid to seek reproductive healthcare, even in situations where pregnancy complications arise, due to the fear of sterilisation or infanticide, based on the horror they experienced back in Myanmar.³⁰⁷ A refugee stated that ‘In our country, people usually don’t go to the hospital because of the high rate of killings of new born babies’.³⁰⁸ The fear of seeking medical care is even more enhanced by the stigma Rohingya mothers face of bearing a child out of rape, making these women hide their pregnancies.³⁰⁹ The lack of proper maternal care leads to a high maternal mortality rate in the camps, almost two and a half times higher than the worldwide ratio of maternal deaths.³¹⁰ The lack of health facilities within the camps is putting children at great risk of malnutrition and malaria, which in turn is aggravated by floods in the monsoon season.³¹¹

2.3.6 Conclusion

From the evidence from the four case studies one conclusion can be made: the right to life, survival and development, protected by article 6 of the CRC, is not protected in regard to CBOW. The particular risk of infanticide poses a serious threat to the lives of these children. Even

³⁰⁵ Save the Children, ‘3 in 4 Rohingya Refugee Babies are Born in Unsanitary Bamboo Shelters’ (*Save the Children*, 3 June 2019) <www.savethechildren.org/us/about-us/media-and-news/2019-press-releases/rohingya-refugee-babies-born-unsanitary-shelters> accessed 15 June 2020.

³⁰⁶ *ibid.*

³⁰⁷ *ibid.*

³⁰⁸ Human Rights Council, ‘Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts’ (22 August 2019) UN Doc A/HRC/42/CRP.4 16.

³⁰⁹ UN News, ‘UN mobilizes in Rohingya camps to support babies born of rape; young mothers face stigma’ (*UN News*, 19 June 2018 <<https://news.un.org/en/story/2018/06/1012372>> accessed 15 June 2020).

³¹⁰ Save the Children, ‘3 in 4 Rohingya Refugee Babies are Born in Unsanitary Bamboo Shelters’ (*Save the Children*, 3 June 2019) <www.savethechildren.org/us/about-us/media-and-news/2019-press-releases/rohingya-refugee-babies-born-unsanitary-shelters> accessed 15 June 2020.

³¹¹ The Stateless Rohingya, ‘Rohingyas face healthcare crisis in Myanmar’ (*The Stateless*, 2 July 2018) <www.thestateless.com/2018/07/rohingyas-face-healthcare-crisis-in-myanmar.html> accessed 15 June 2020.

when they do survive, a life of economic hardship, marginalisation and abuse awaits them, irrespective of the time and place they were born.

2.4 RIGHT TO A NATIONALITY (ARTICLE 7)

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.³¹²

2.4.1 *General*

The CRC stipulates that all children have the right to a nationality and must immediately be registered after birth. Discrimination – deliberate or as the outcome of indirect factors – however, does not only occur on individual or community level but also happens on national level when assigning or not assigning children’s nationality.³¹³ Birth registration is one of the most essential rights of the child: it establishes the child’s identity, it is of fundamental importance to their future well-being and it entails the potential to lead a dignified life.³¹⁴ The right to a nationality forms the entry point for the fulfilment of other civil rights such as education, healthcare, freedom of movement and family life; or other social benefits like financial or psychosocial support.³¹⁵ In the words of Grieg, ‘without citizenship the children are doomed to be a pariah in their birth country’.³¹⁶ In many situations, CBOW are not registered at birth due to a multitude of reasons.³¹⁷ The collapse of the structures of

³¹² CRC art 7.

³¹³ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 32; S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 166.

³¹⁴ Institute on Statelessness and Inclusion, ‘Addressing the right to a nationality through the Convention on the Rights of the Child’ (Institute on Statelessness and Inclusion June 2016) 2.

³¹⁵ *ibid*; S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 166.

³¹⁶ K Grieg, ‘The War Children of the World’ (War and Children Identity Project 2001) 11.

³¹⁷ J Daniel-Wrabetz, ‘Children Born of War Rape in Bosnia-Herzegovina and the Convention on the Rights of the Child’ in C Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press 2007) 32.

society in a conflict or post-conflict situation, combined with the fact that the women who survived sexual violence are often on the move – as refugees or displaced persons – makes smooth birth registration virtually impossible.³¹⁸ Revealing the identity of the father, and disclosing in this way the manner of conception, can pose an additional obstacle since some women can feel ashamed and can also fear that they will be stigmatised and discriminated against.³¹⁹ An additional issue, which can increase the risk of CBOW becoming stateless, are the rules and practices in a state to confer nationality.³²⁰ States who apply the *jus soli* approach have the strongest protection against statelessness: a child who is born in the territory of a state obtains the nationality of that state on the grounds of birth in the territory alone.³²¹ According to the *jus sanguinis* principle, the nationality of the parents is conferred to the child, irrespective of the place of birth. A pure *jus sanguinis* rule therefore entails that a child born in a country does not obtain citizenship unless one of the parents is a citizen at the time of birth.³²²

2.4.2 Bosnia and Herzegovina

Both Bosnia and Croatia employed the practice of conferring nationality based upon the *jus sanguinis* principle.³²³ This meant that children from Bosnian women, born in Croatia, were denied Croatian citizenship, remained stateless and were denied the right to go to school.³²⁴ It was only in September 1996 that this situation changed when the Bosnian government carried through an amendment to article 4 of the citizenship law, altering the *jus sanguinis* principle.³²⁵ This amendment made it possible to confer citizenship of Bosnia and

³¹⁸ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 166.

³¹⁹ J Daniel-Wrabetz, 'Children Born of War Rape in Bosnia-Herzegovina and the Convention on the Rights of the Child' in C Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press 2007) 32.

³²⁰ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 166.

³²¹ The UN Refugee Agency (UNHCR), 'Good Practices Paper - Action 2: Ensuring that no child is born stateless' (UNHCR 20 March 2017) 5.

³²² *ibid* 16.

³²³ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 166.

³²⁴ C Carpenter, *Forgetting Children Born of War: Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 33; *ibid*.

³²⁵ J Daniel-Wrabetz, 'Children Born of War Rape in Bosnia-Herzegovina and the Convention on the Rights of the Child' in C Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press 2007) 33.

Herzegovina to a child that is born abroad, from a parent who is a citizen of Bosnia and Herzegovina and the other parent a citizen of a former republic of the Federal Republic of Yugoslavia.³²⁶ Before the amendment, refugee children – especially those who were abandoned by their mothers and left for the local institutions – could not acquire any nationality and remained stateless, which only deteriorated their future well-being and development even more.³²⁷

2.4.3 Northern Uganda³²⁸

Birth registration is not a secured right for many children born in LRA captivity who do not know their father’s identity.³²⁹ In a country with such a strong patrilineal identity system, the questioned children’s nationality and the paternal lineage leads to a multitude of challenges that mothers need to overcome to obtain birth registration for their newborn child.³³⁰ Section 7 of the Births and Deaths Registration Act of Uganda stipulates that the birth of the child needs to be registered within three months by the father or the mother, which for many CBOW in captivity is impossible.³³¹ After the expiration of the maximum period of six months, the birth of the child cannot be registered anymore unless ‘the registrar is satisfied as to the truth of the particulars’ and ‘a prescribed fee has been paid’.³³² The specific circumstances of the child being born under captivity, fathered by an LRA combatant –who is seen as ‘the enemy’ – can place mothers in a very dreadful situation if

³²⁶ C Ingvill Mochmann and S Lee, ‘The human rights of children born of war: case analyses of past and present conflicts’ (2010) 35 *Historical Social Research* 268, 284.

³²⁷ J Daniel-Wrabetz, ‘Children Born of War Rape in Bosnia-Herzegovina and the Convention on the Rights of the Child’ in C Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press 2007) 33.

³²⁸ Uganda uses a mixture of the *jus soli* principle and *jus sanguinis* principle, however both restricted. The *jus soli* principle allows citizenship to those who were born on the territory, yet only if they are a member of one of the indigenous groups named in the 1995 Constitution. The *jus sanguinis* principle is limited in the sense that citizenship can only be conferred to children of parents who are citizens by birth, and not by naturalisation: see J Seidl, ‘Quest for citizenship – the story of the Maragoli’ (*International Refugee Rights Initiative*, 23 January 2019) <<http://refugee-rights.org/quest-for-citizenship-the-story-of-the-maragoli/>> accessed 16 June 2020.

³²⁹ V Ladisch, ‘From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda’ (ICTJ 2015) 17.

³³⁰ *ibid.*

³³¹ *ibid.*; Births and Deaths Registration Act, Chapter 309 Laws of Uganda (1 October 1973) s 7.

³³² Births and Deaths Registration Act, Chapter 309 Laws of Uganda (1 October 1973) s 11.

they are required to explain the particulars of birth to the registrar. Fear of being stigmatised by disclosing the biological father in mandatory paperwork can withhold mothers from registering their child.³³³ Having no birth certificate will make these children unable to enrol for and attend school, utilise their voting rights or have access to healthcare.³³⁴ Special birth registration policies and exceptions for children born in captivity should be implemented by the government of Uganda in order to protect these children from statelessness.³³⁵ In addition, children born in LRA captivity are not always born on the territory of Uganda, they might have been born in South Sudan, Central African Republic or DRC. In this case, they may not possess the same nationality as their mothers or the nationality of the country in which mother and child aspire to settle – after their release or escape from captivity.³³⁶

2.4.4 Colombia

For CBOW born in Colombia, their right to nationality should be secured. Colombian citizenship is primarily rooted in a combination of the *jus soli* principle and the *jus sanguinis* principle.³³⁷ A child born in Colombia will obtain citizenship if at least one parent is a Colombian citizen or a Colombian legal resident. A child born outside the territory of Colombia can still acquire citizenship if one parent is Colombian.³³⁸ These provisions entail that a Colombian mother can transfer her nationality onto her child, even when the identity of the father is contested, as well as when she would live outside the territory of Colombia thus protecting the child against statelessness.

³³³ J Neenan, 'Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict' (Centre for Women, Peace and Security, London School of Economics 2018) 35.

³³⁴ *ibid.*

³³⁵ V Ladisch, 'From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda' (ICTJ 2015) 17.

³³⁶ J Neenan, 'Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict' (Centre for Women, Peace and Security, London School of Economics 2018) 35.

³³⁷ C Escobar, 'Report on Citizenship Law: Colombia' (EURO Citizenship Observatory 2015) 10.

³³⁸ Dual Citizenship, 'Dual Citizenship Colombia' (*Dual Citizenship*) <www.dualcitizenship.com/countries/colombia.html> accessed 16 June 2020.

2.4.5 Rohingya

With the adoption of the 1982 Citizenship Law, Myanmar is one of the countries with the largest stateless populations in the world, estimated at 1.1 million until 2017.³³⁹ Eligibility for citizenship in Myanmar is primarily based on ethnicity and race, a discriminatory restrictive form of the *jus sanguinis* principle.³⁴⁰ The 1982 Citizenship Law is severely discriminatory since those who do not belong to the 135 listed national ethnic groups cannot acquire citizenship.³⁴¹ A system of hierarchy is put in place, with different rights and rules relating to different categories of people.³⁴² Rohingya people are not listed as one of the 135 national ethnic groups, which resulted in the arbitrary deprivation of their nationality.³⁴³ Childhood statelessness is increasing over time since in order to obtain Myanmar citizenship, both parents of the child must be members of the listed national ethnic groups and must be citizens themselves.³⁴⁴ Children born of stateless parents – such as the Rohingya – will be automatically stateless and are therefore deprived at birth from accessing their human rights.³⁴⁵ Children born out of wedlock will face the same barriers to citizenship, since citizenship documentation is required from **both** parents, impeding the ability of women to confer citizenship to their children alone.³⁴⁶ The UN Committee on the Rights of the Child highlights their concern about ‘the lack of legislation granting nationality to children born in the territory of the State party who would otherwise be stateless’ and ‘the very restricted requirement of having both parents as nationals of the country for citizenship, which will render some people stateless’, including ‘the large number of children, including Rohingya children, that remains unregistered’.³⁴⁷

³³⁹ Norwegian Refugee Council (NRC), ‘A Gender Analysis of the Right to a Nationality in Myanmar’ (NRC March 2018) 2.

³⁴⁰ *ibid* 5.

³⁴¹ European Network on Statelessness, ‘Statelessness in Myanmar – Country Position Paper’ (May 2019) 6.

³⁴² *ibid* 5.

³⁴³ *ibid* 7.

³⁴⁴ Burma Citizenship Law (15 October 1982) s 5; *ibid*.

³⁴⁵ Burmese Rohingya Organisation UK, ‘Myanmar’s 1982 Citizenship Law and Rohingya’ (Burmese Rohingya Organisation UK December 2014) 1 <<https://burmacampaign.org.uk/media/Myanmar%E2%80%99s-1982-Citizenship-Law-and-Rohingya.pdf>> accessed 17 June 2020.

³⁴⁶ Norwegian Refugee Council (NRC), ‘A Gender Analysis of the Right to a Nationality in Myanmar’ (NRC March 2018) iv.

³⁴⁷ UN Committee on the Rights of the Child (CRC), ‘Consideration of reports submitted by States parties under article 44 of the Convention – Myanmar’ (14 March 2012) 8.

After the mass expulsion into neighbouring country Bangladesh, the situation for the Rohingya people deteriorated even more. Even though Bangladesh opened its border for the Rohingya refugees, they are also subjected to a lack of recognised legal status there.³⁴⁸ Bangladesh is registering Rohingya refugees as ‘Forcibly Displaced Myanmar Nationals’, denying their official refugee status and all the rights attached to it, placing the Rohingya people in yet another legal limbo.³⁴⁹ Birth registration for newborn Rohingya babies in Cox’s Bazar, Bangladesh is not taking place under the *de facto* refusal of Bangladesh.³⁵⁰ In April 2018, a confidential agreement was closed between the Bangladeshi government and the UN Refugee Agency, which incorporated a clause on the registration of newborns within the Rohingya refugee population on their territory.³⁵¹ However, a few months after the agreement was closed, this provision was still not operationalised yet and birth registration of Rohingya babies has not been taken place.³⁵² The UN Refugee Agency is, however, pushing for registration for Rohingya refugees and are in the process of providing identity documentation to Rohingya refugees over the age of 12.³⁵³

CBOW of Rohingya mothers are born into legal oblivion, invisible to their home government in Myanmar and their host government in Bangladesh. No access to education or healthcare, as well as being at future risk of underage marriage, sex trafficking or child labour; unregistered children can become the victim of a multitude of abuses that can go by unnoticed.³⁵⁴ With no means to prove their identity, they are being stripped of their rights and are susceptible for further abuse and exploitation.

³⁴⁸ Human Rights Watch (HRW), “Bangladesh Is Not My Country” - The Plight of Rohingya Refugees from Myanmar’ (HRW 6 August 2018).

³⁴⁹ *ibid.*

³⁵⁰ A de Chickera, ‘Statelessness and identity in the Rohingya refugee crisis’ (Humanitarian Practice Network October 2018) <<https://odihpn.org/magazine/statelessness-identity-rohingya-refugee-crisis/>> accessed 20 June 2020.

³⁵¹ N Arnpriester, ‘Saving Newborn Rohingya from a Legal Abyss’ (*Open Society Justice Initiative*, 9 August 2018) <www.justiceinitiative.org/voices/saving-newborn-rohingya-legal-abyss> accessed 20 June 2020.

³⁵² *ibid.*

³⁵³ A St-Denis, ‘Registration gives many Rohingya refugees identification for the first time’ (UNHCR, 17 May 2019) <www.unhcr.org/news/latest/2019/5/5cde66b84/registration-gives-rohingya-refugees-identification-first-time.html> accessed 20 June 2020

³⁵⁴ N Arnpriester, ‘Saving Newborn Rohingya from a Legal Abyss’ (*Open Society Justice Initiative*, 9 August 2018) <www.justiceinitiative.org/voices/saving-newborn-rohingya-legal-abyss> accessed 20 June 2020.

2.4.6 Conclusion

A strong patrilineal identity system, giving birth in captivity, reluctance in revealing the father’s identity or discriminatory nationality laws; the empirical evidence from the four case studies present many obstacles that make smooth birth registration for CBOW almost impossible. With statelessness as one of the devastating consequences, CBOW are left with no protection for their other rights such as education, healthcare or freedom of movement. Even though the right to nationality, protected by article 7 of the CRC, is fundamental to lead a dignified life, it is for CBOW violated in many cases.

2.5 RIGHT TO EDUCATION (ARTICLES 28-29)

Article 28

States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; ...

States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention. ...³⁵⁵

Article 29

States Parties agree that the education of the child shall be directed to:
The development of the child’s personality, talents and mental and physical abilities to their fullest potential; ...³⁵⁶

³⁵⁵ CRC art 28.

³⁵⁶ CRC art 29.

2.5.1 General

The right to education is crucial for a child's development, well-being and empowerment; it is indispensable for the enjoyment of other human rights and proves to be a protective safeguard against exploitative labour, sexual exploitation or recruitment into armed forces.³⁵⁷ By receiving an adequate education, children will develop the ability to obtain life skills and knowledge to cope with the challenges of everyday life, which is the key to lift oneself out of the generational cycles of poverty.³⁵⁸ Education is an empowerment right, enabling individuals to actively participate in society and exercise their civil and political rights.³⁵⁹ Article 29(1) of the CRC adds a qualitative dimension to the right to education stipulated in article 28 of the CRC; it highlights the aims of education which are all directly connected to the fulfilment of the child's human dignity, while taking into account the child's special development needs.³⁶⁰

Securing the right to education and vocational training for CBOW is of extreme importance for their future; it increases their possibility to find a respected job and place within society.³⁶¹ Education is necessary to break the cycle of poverty and hardship – a situation where many CBOW find themselves in – and can make sure they feel a valued member within their own home and the wider community.³⁶² However, for CBOW, poverty is often greatly compounded with social challenges, stigmatisation and social alienation in the school environment, which will further compromise their academic achievements and in the end, their right to education.³⁶³ Having a lack of sufficient resources to pay school fees can have a deep impact on the self-esteem of CBOW, who are already in a very precarious and sensitive situation.³⁶⁴ Besides the necessity of being able to afford school fees, it is important that the

³⁵⁷ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No 13: The Right to Education (Art 13 of the Covenant)' (8 December 1999) E/C.12/1999/10, 1.

³⁵⁸ Human Rights Watch (HRW), *The Education Deficit* (HRW 9 June 2016) <www.hrw.org/report/2016/06/09/education-deficit/failures-protect-and-fulfill-right-education-through-global> accessed 18 June 2020.

³⁵⁹ *ibid.*

³⁶⁰ UN Committee on the Rights of the Child (CRC) 'General Comment No 1 (2001), Article 29 (1), The aims of education' (17 April 2001) CRC/GC/2001/1, 2.

³⁶¹ J Hogwood and others, "'I Learned Who I Am': Young People Born From Genocide Rape in Rwanda and Their Experiences of Disclosure' [2018] *Journal of Adolescent Research* 549, 565; B Rohwerder, 'Reintegration of Children Born of Wartime Rape' (Institute of Development Studies 2019) 13.

³⁶² *ibid.*

³⁶³ S Kahn and M Denov, "'We are children like others': Pathways to mental health and healing for children born of genocidal rape in Rwanda' (2019) 56 *Transcultural Psychiatry* 510, 517.

³⁶⁴ *ibid.*

school environment is one that feels safe and comfortable in order to fully enjoy the right to education.³⁶⁵ Unfortunately, stigma and shame can lead to the marginalisation of CBOW within the school environment, and in society as a whole. Certain coping mechanisms can then arise in order to deal with their outcast status. Based on anecdotal evidence, strategies of striving to be exemplary and worthy of belonging, so ‘that our mothers don’t regret why they gave birth to us’ can be one way in which the impact of their experienced shame and stigma is managed.³⁶⁶ Other coping mechanisms can, however, go in the opposite direction and can consist of more destructive ways to deal with the trauma, being dropping out of school, substance abuse or engaging into sex-work as a means of financial support.³⁶⁷

2.5.2 Bosnia and Herzegovina

Due to the inattention to Bosnia’s children of war since the conflict has ceased,³⁶⁸ there is a complete lack of data on the implementation of their right to education. What is known is that children born in Croatia from Bosnian women were – as a result of their stateless status – denied the right to go to school in Croatia before the amendment of the Bosnian citizenship law in 1996.³⁶⁹ Furthermore – in anecdotal evidence – some students indicated they suffered from hostility and continues hate attacks from their peers, which can negatively impact their academic achievements.³⁷⁰ Since Bosnian CBOW are seen as ‘Serbian blood’, they are perceived as socially acceptable victims for pestering behaviour and serve as a ‘legitimate’ valve to let go of inner frustrations about unrelated problems.³⁷¹ In the 2019 concluding remarks, the UN Committee of the Rights of the Child indicated the – still – discriminatory attitudes of teachers against students, as well as the high rates of school dropouts due to poverty and economic hardship, a situation where many CBOW possibly could find themselves in.³⁷²

³⁶⁵ B Rohwerder, ‘Reintegration of Children Born of Wartime Rape’ (Institute of Development Studies 2019) 13.

³⁶⁶ S Kahn and M Denov, ‘“We are children like others”: Pathways to mental health and healing for children born of genocidal rape in Rwanda’ (2019) 56 *Transcultural Psychiatry* 510, 517.

³⁶⁷ *ibid.*

³⁶⁸ C Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond* (Colombia UP 2010) 128.

³⁶⁹ *ibid.* 33.

³⁷⁰ S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 169.

³⁷¹ *ibid.*

³⁷² UN Committee on the Rights of the Child (CRC) ‘Concluding observations on the combined fifth and sixth periodic reports of Bosnia and Herzegovina’ (5 December 2019) CRC/C/BIH/CO/5-6, 10.

2.5.3 Northern Uganda

For the children born in LRA captivity, education is seen as the primary tool to regain self-esteem, reshape their identity and overcome the hardship and the multitude of challenges they face.³⁷³ Perceived as the key for a brighter future, as well as a means to obtain respect in the community and become self-sufficient, a mother explains, 'Let our children go to school and be educated. When they are educated they shall be independent. Education shall be their father and mother'.³⁷⁴ The right to education for CBOW in Northern Uganda becomes, however, impeded due to numerous obstacles. Even though primary education is free, many children are prevented from accessing education due to their inability to pay school fees for uniforms, materials or examination.³⁷⁵ Although some mothers remarried, their current partners refuse to contribute in paying the school fees since 'they are from the bush and do not have a bright future'.³⁷⁶ As a result, many CBOW cannot attend school properly and are in lower grades than their age since their fees are not paid regularly.³⁷⁷ In addition, the school environment is not conducive for the ability of CBOW to academically perform well. Since many children after captivity grow up in small communities – where everyone is aware of their biological background and the manner of their conception – the stigmatisation and rejection will haunt them to school.³⁷⁸ Discriminatory comments from teachers, describing them as 'totally brainwashed. There is nothing in their brain', can have a detrimental impact on the academic performances of children born in captivity.³⁷⁹ Keeping a low profile and trying to stay out of trouble is one way in which these children are trying to cope with the social exclusion, others are described by their mothers as wild, unruly and showing a lack of interest in school, or will turn to fighting as a reaction to the received insults.³⁸⁰ School sponsorship is

³⁷³ J Neenan, 'Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict' (Centre for Women, Peace and Security, London School of Economics 2018) 41.

³⁷⁴ V Ladisch, 'From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda' (ICTJ 2015) 19.

³⁷⁵ *ibid.*

³⁷⁶ L McClain Opiyo, 'Alone Like a Tree: Reintegration Challenges Facing Children Born of War and Their Mothers in Northern Uganda' (Justice and Reconciliation Project 2015) 5.

³⁷⁷ *ibid.* 6.

³⁷⁸ V Ladisch, 'From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda' (ICTJ 2015) 19.

³⁷⁹ *ibid.*

³⁸⁰ *ibid.*; L McClain Opiyo, 'Alone Like a Tree: Reintegration Challenges Facing Children Born of War and Their Mothers in Northern Uganda' (Justice and Reconciliation Project 2015) 5.

regarded by the mothers as what would be the most helpful in breaking the cycle of obstacles facing CBOW.³⁸¹ This can consist of traditional forms of education being provided to younger children, or vocational training to the older ones, while also including special training for teachers to counteract discriminatory attitudes.³⁸²

2.5.4 Colombia

There currently exists a complete lack of data on the specific needs of CBOW in Colombia, including how their right to education is implemented, however, some general assumptions can be made. In the 2015 concluding remarks, the UN Committee of the Rights of the Child highlighted its concern about the structural discrimination against ‘indigenous, Afro-Colombian and displaced children, children with disabilities, children living with HIV/AIDS, lesbian, gay, bisexual, transgender and intersex children, and children living in rural, remote and marginalized urban areas’ which is particularly affecting their right to education, while at the same time highlighting the lack of inclusive education.³⁸³ The discrimination and stigmatisation CBOW suffer in Colombia³⁸⁴ can lead us to believe their right to education is affected as well, just as the other formerly mentioned minority groups. However, it is necessary that CBOW should be adopted as a separate category of concern to assess how their right to education is actually affected by the suffered discrimination.

Another factor that needs to be taken into account, as stated by Neenan, are the intergenerational harms that are ‘passed on’ from mothers to children.³⁸⁵ Neenan points out that pregnant adolescent girls are at increased risk of ‘poverty, exclusion, health issues and reduced or nullified access to education’, as stated by the United Nations Population Fund.³⁸⁶ It appears from the survey regarding the prevalence of sexual violence between 2001-09 in Colombia that the majority of the victims

³⁸¹ L McClain Opiyo, ‘Alone Like a Tree: Reintegration Challenges Facing Children Born of War and Their Mothers in Northern Uganda’ (Justice and Reconciliation Project 2015) 8.

³⁸² *ibid.*

³⁸³ UN Committee on the Rights of the Child (CRC) ‘Concluding observations on the combined fourth and fifth periodic reports of Colombia’ (6 March 2015) CRC/C/COL/CO/4-5, 11.

³⁸⁴ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 34.

³⁸⁵ *ibid.* 37.

³⁸⁶ *ibid.*; United Nations Population Fund, ‘Adolescent pregnancy’ (*United Nations Population Fund*) <www.unfpa.org/adolescent-pregnancy> accessed 25 June 2020.

of forced pregnancies are adolescent girls.³⁸⁷ It is estimated that of the total victims of forced pregnancies, 39.15% of the women are between the ages of 15-24.³⁸⁸ One can broadly assume that CBOW of adolescent girls in Colombia will have less access to education due to the impeded chances of their mothers.

2.5.5 Rohingya

Almost 400,000 Rohingya children live in the refugee settlements in Bangladesh, after they were forced to flee in August 2017.³⁸⁹ Although Bangladesh opened its borders, it made clear that Rohingya people are not welcome to stay in the country, by denying them their official refugee status.³⁹⁰ This entails that Rohingya are prevented from integrating into society on all levels, including denying Rohingya children the right to enrol in local school outside the camps or participation into national school examinations.³⁹¹ Education within the refugee camps is, however, scarce. The Bangladeshi government is deliberately depriving Rohingya children from their right to education, by not providing any education and banning the use of the Bangladeshi curriculum, while in addition preventing any humanitarian actors in providing any form of accredited education, under the assumption Rohingya people will be repatriated back to Myanmar.³⁹² Simultaneously, Myanmar refuses to recognise their school curriculum when utilised in the refugee camps, resulting in a destructive education crisis for a new and 'lost' generation of Rohingya children.³⁹³ To provide some sort of education, humanitarian

³⁸⁷ O Amparo Sanchez and others, 'Campaign Rape and Other Violence: Leave my Body out of the War First Survey of Prevalence, Sexual violence against women in the context of the Colombian armed conflict, Colombia 2001-2009' (Oxfam, Development Cooperation Ministry of Foreign Affairs and Violaciones y Otras Violencias 2011) 18.

³⁸⁸ *ibid.* 39.15% are 15-24 years of age, 27.43% are 25-34 years of age, 33.41% are 35-44 years of age.

³⁸⁹ Human Rights Watch, 'A Step Forward for 10,000 Rohingya Refugee Children' (*Human Rights Watch*, 29 January 2020) <www.hrw.org/news/2020/01/29/step-forward-10000-rohingya-refugee-children> accessed 28 June 2020.

³⁹⁰ Human Rights Watch (HRW), "Bangladesh Is Not My Country" - The Plight of Rohingya Refugees from Myanmar' (HRW 6 August 2018).

³⁹¹ Human Rights Watch, "Are We Not Human?" Denial of Education for Rohingya Refugee Children in Bangladesh' (*Human Rights Watch*, 3 December 2019) <www.hrw.org/report/2019/12/04/are-we-not-human/denial-education-rohingya-refugee-children-bangladesh> accessed 28 June 2020.

³⁹² *ibid.*

³⁹³ *ibid.*; Amnesty International, 'A "lost generation" of Rohingya children will have nowhere to go' (*Amnesty International*, 24 January 2020) <www.amnesty.org/en/latest/news/2020/01/a-lost-generation-of-rohingya-children-will-have-nowhere-to-go/> accessed 28 June 2020.

actors established ‘learning centres’ within the camps.³⁹⁴ Without electricity, desk or chairs, these centres are, however, not suitable in providing quality education. At the beginning of 2020, the Bangladeshi government alleviated some of the restrictions and approved a pilot formal education programme, based on the Myanmar curriculum, targeting 10,000 Rohingya children.³⁹⁵

CBOW of Rohingya mothers, born in Cox’s Bazar in 2018, are – for the time being – being spared from the current education crisis. However, for their right to education to be respected in the future, it is necessary that education for Rohingya is dramatically improved. Even though the recently approved pilot education programme is an important step forward to provide quality education to Rohingya children, it still only reaches one out of 40 children in the Cox’s Bazar refugee camp.³⁹⁶ The education crisis would, however, not be over even if Rohingya refugees would voluntarily and safely return to Myanmar. Rohingya children are prevented from accessing the formal education system in Myanmar, due to a discriminatory policy resulting in a combination of lack of schools, lack of teachers and movement restrictions.³⁹⁷ Education is marked as one of the top priorities for Rohingya refugees, as one Rohingya teacher claims in Cox’s Bazar: ‘if you want to destroy a community you don’t have to kill the people, just prevent them from studying’.³⁹⁸

³⁹⁴ Human Rights Watch, ‘A Step Forward for 10,000 Rohingya Refugee Children’ (*Human Rights Watch*, 29 January 2020) <www.hrw.org/news/2020/01/29/step-forward-10000-rohingya-refugee-children> accessed 28 June 2020.

³⁹⁵ UNICEF, ‘Expanding education for Rohingya refugee children in Bangladesh’ (UNICEF, 10 February 2020) <www.unicef.org/bangladesh/en/stories/expanding-education-rohingya-refugee-children-bangladesh> accessed 28 June 2020.

³⁹⁶ Human Rights Watch, ‘A Step Forward for 10,000 Rohingya Refugee Children’ (*Human Rights Watch*, 29 January 2020) <www.hrw.org/news/2020/01/29/step-forward-10000-rohingya-refugee-children> accessed 28 June 2020.

³⁹⁷ Human Rights Council, ‘Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts’ (22 August 2019) A/HRC/42/CRP.4 15.

³⁹⁸ Human Rights Watch, ‘“Are We Not Human?” Denial of Education for Rohingya Refugee Children in Bangladesh’ (*Human Rights Watch*, 3 December 2019) <www.hrw.org/report/2019/12/04/are-we-not-human/denial-education-rohingya-refugee-children-bangladesh> accessed 28 June 2020.

2.5.6 Conclusion

The four above-mentioned case studies present many factors that are impeding the education of CBOW. Although a multitude of factors such as hate attacks from peers, discriminatory attitudes from teachers, inability to pay school fees out of poverty, or being born in a setting with no education facilities present; in each conflict-setting the right to education of CBOW, protected by articles 28 and 29 of the CRC, was compromised. Education is, however, fundamental to change the outcome of these children's lives and hence should be protected in an adequate way.

3.

CLOSING THE GAP WITHIN THE HUMAN RIGHTS
PROTECTION FRAMEWORK

3.1 GENERAL

The adoption of the CRC proved to be a milestone for the protection and promotion of children’s rights. However, for certain categories of children this protection is not safeguarded, making these children slip through the cracks of the framework. The four above-mentioned case studies – each covering a different timeframe and continent – gave an insight into the treatment and the protection, or lack thereof, of the rights of CBOW in a global manner. What is apparent out of the four case studies is that even though the legislation to protect the rights of children does exist, there exists a wide gap with their implementation in regard to CBOW that needs to be remedied. The rights of CBOW should be protected in an adequate way, through different protection mechanisms and measures.

3.2 ADOPTION AS SPECIAL CATEGORY OF CONCERN

For the rights of CBOW to be protected in an adequate way, it is first and foremost necessary that they are adopted as a separate category of concern, which should require special protection mechanisms, advocacy initiatives, funding and the collection of data.³⁹⁹ The four case studies have shown that although CBOW are big in numbers, still too little is known about their plight and the violation of their rights due to the lack of specific data.

³⁹⁹ C Carpenter, ‘Orphaned Again? Children Born of Wartime Rape as a Non-Issue for the Human Rights Movement’ in C Bob (ed), *The International Struggle for New Human Rights* (University of Pennsylvania Press 2009) 26.

For the transnational advocacy network, raising awareness around the plight of CBOW was, for a long period of time, seen as something that could put them further at risk, increasing their discrimination and stigmatisation.⁴⁰⁰ Advocacy networks working around child protection described the issue of CBOW as belonging to the area of sexual violence, hence paying little attention to it and forwarding the issue to the ‘women and armed conflict’ network, who on their turn placed the rape-survivor at the centre of the discourse rather than focussing on the child’s needs.⁴⁰¹ Carpenter – proven to be a strong advocate for the adoption of CBOW as a population of concern – undermines the arguments for the reluctance of the issue adoption and considers ‘whether strategic inattention to a specific population necessarily serves or undermines the protection of that population—or whether this is simply a convenient justification when the political economy of ideas mitigates against issue adoption’.⁴⁰²

Both Carpenter and Sanchez Parra argue that in order to accurately address these children’s needs through particular laws, policies and programmes, it is necessary that CBOW are clearly established and discussed as a specific category.⁴⁰³ In addition, the fear of increasing stigmatisation by raising awareness around their plight would also concern other special categories of children, who, nevertheless, did earn a specific place on the political agenda and within the human rights framework such as child soldiers, children with HIV/AIDS, or children with disabilities.⁴⁰⁴

3.3 ADOPTION OF SPECIAL PROTECTION MEASURES BY THE STATE

The failure of the state to respect and protect the human rights of CBOW in an adequate way constitutes a significant part of the protection gap that needs to be remedied.⁴⁰⁵ Even though the state is, in most cases, not the primary abuser, it is still responsible as a secondary actor since

⁴⁰⁰ T Sanchez Parra, ‘The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia’ [2017] *International Journal of Transitional Justice* 1, 6.

⁴⁰¹ C Carpenter, ‘Orphaned Again? Children Born of Wartime Rape as a Non-Issue for the Human Rights Movement’ in C Bob (ed), *The International Struggle for New Human Rights* (University of Pennsylvania Press 2009) 26.

⁴⁰² *ibid* 28.

⁴⁰³ T Sanchez Parra, ‘The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia’ [2017] *International Journal of Transitional Justice* 1, 6.

⁴⁰⁴ *ibid*.

⁴⁰⁵ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 30.

they are obliged to protect individuals from actions or omissions by third parties such as family – or community members, school teachers or local government officials.⁴⁰⁶

In the described global picture, significant rights enshrined in the CRC are compromised or not realised at all for CBOW. The stigmatisation and discrimination affects every aspect of their lives, strongly impeding the enjoyment of their human rights.⁴⁰⁷ General Comment No 5 of the UN Committee of the Rights of the Child stipulates, however, that the non-discrimination obligation upon states requires them to ‘actively identify individual children and groups of children the recognition and realization of whose rights may demand special measures’.⁴⁰⁸ The ‘special measures’ obligation can, therefore, be applied to the separate category of CBOW, in order to safeguard their rights. The UN Committee underlines in this regard the importance of the collection of national data, the adaptation of legislation and resource allocation, as well as the implementation of educational measures to alter discriminatory attitudes, which is of extreme importance in the case of CBOW.⁴⁰⁹

3.4 RIGHT TO REPARATION

Victims⁴¹⁰ of CRSV, which include not only the person who has suffered the violence but also family members, such as children born as a result from it, have a right to reparation.⁴¹¹ The right to reparation,

⁴⁰⁶ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 30.; UN Human Rights Council, ‘Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque: Stigma and the realization of the human rights to water and sanitation’ (2 July 2012) A/HRC/21/42, 14.

⁴⁰⁷ *ibid.*

⁴⁰⁸ UN Committee on the Rights of the Child (CRC) ‘General Comment No 5 (2003): General measures of implementation of the Convention on the Rights of the Child’ (27 November 2003) CRC/GC/2003/5, 4.

⁴⁰⁹ *ibid.*

⁴¹⁰ ‘Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.’ UN General Assembly, ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (21 March 2006) A/RES/60/147 5.

⁴¹¹ OHCHR ‘Reparations for Conflict-Related Sexual Violence’ Guidance Note of the Secretary-General (June 2014) ST/SG(02)/R425, 3.

codified in international human rights law⁴¹² and humanitarian law⁴¹³ in various legal instruments, is essential in amending the disadvantaged position that CBOW can find themselves in.⁴¹⁴ However, the severe psychological and physical consequences of the sexual violence suffered, exacerbated by the stigma attached to it, often results in survivors refraining from seeking redress.⁴¹⁵

The reparation offered must be in proportion to the gravity of the harm suffered and can exist in a multitude of forms such as restitutions,⁴¹⁶ compensation,⁴¹⁷ satisfaction,⁴¹⁸ rehabilitation⁴¹⁹ and guarantees of non-repetition.^{420 421} In addition, it is of extreme importance that the restitution offered ascends the gender hierarchy, patterns of female subordination and pre-existing gender inequalities,⁴²² all of which are contributing to the perpetuation of sexual violence, and in most cases, already predate the conflict.⁴²³ Adequate reparations should therefore not be about placing the victim in the situation as it was before the instance of violence, yet, instead should aspire to have a transformative

⁴¹² UN General Assembly, Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III), art 8; International Covenant on Civil and Political Rights (adopted 16 December 1966 and entered into force 23 March 1976) 999 UNTS 171, art 2; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 and entered into force 4 January 1969) 660 UNTS 195, art 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 and entered into force 26 June 1987) 1465 UNTS 85, art 14; CRC art 39.

⁴¹³ The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907 and entered into force 26 January 1910) art 3; Protocol I art 91; Rome Statute arts 68 and 75.

⁴¹⁴ J Neenan, 'Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict' (Centre for Women, Peace and Security, London School of Economics 2018) 31.

⁴¹⁵ OHCHR 'Reparations for Conflict-Related Sexual Violence' Guidance Note of the Secretary-General (June 2014) ST/SG(02)/R425, 5.

⁴¹⁶ Restitution can redress the following harms suffered by conflict-related sexual violence survivors: loss of housing, loss of schooling, education or employment.

⁴¹⁷ Compensation can redress moral and material damage that was suffered.

⁴¹⁸ Satisfaction can consist of apologies, building of monuments and commemorations.

⁴¹⁹ Rehabilitation can consist of providing essential services to survivors to overcome the harm suffered, in order to move on, for example mental and physical health or education services.

⁴²⁰ Guarantees of non-repetition should be focussed on the causes of the sexual violence perpetrated, in order to prevent it in the future.

⁴²¹ OHCHR 'Reparations for Conflict-Related Sexual Violence' Guidance Note of the Secretary-General (June 2014) ST/SG(02)/R425, 15-19.

⁴²² J Turpin, 'Many Faces: Women Confronting War' in LA Lorentzen and J Turpin, *The Women and War Reader* (New York UP 1998) 15-16.

⁴²³ OHCHR 'Reparations for Conflict-Related Sexual Violence' Guidance Note of the Secretary-General (June 2014) ST/SG(02)/R425, 8.

effect.⁴²⁴ For CBOW, it is important that reparations are put in place to reduce stigma, rather than aggravate their stigmatisation through particular laws, programmes or narratives.⁴²⁵

3.5 ERADICATION OF GENDER DISCRIMINATION

The stigmatisation of CBOW in every part of the globe can only be reduced when gender discrimination is being tackled and eradicated. CEDAW, adopted in 1979 and with currently 189 parties, was the first international agreement praising women’s rights as human rights.⁴²⁶ The aim of CEDAW is stipulated in article 2, ‘to condemn discrimination against women in all its forms, to pursue by all appropriate means and without delay a policy of elimination of discrimination against women ...’.⁴²⁷

The failure of states to respect and protect women’s rights stands in direct correlation with the stigma CBOW suffer in their everyday lives.⁴²⁸ First of all – as stated above⁴²⁹ – a raped women will be seen in many societies as ‘damaged goods’, erasing her identity through the act of rape.⁴³⁰ Her child born as a result will go on to always be directly identified with their perpetrator father as a result of gender-discriminatory, patriarchal and patrilineal traditions of understanding a child’s identity through their father’s lineage.⁴³¹ A clear result of these

⁴²⁴ UN Human Rights Council, ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo’ (23 April 2010) A/HRC/14/22 11.

⁴²⁵ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 31.

⁴²⁶ LB Mullins, ‘CEDAW: The Challenges of Enshrining Women’s Equality in International Law’ (2018) 20 Public Integrity 257, 257.

⁴²⁷ CEDAW art 2.

⁴²⁸ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 31.

⁴²⁹ S Eaton, ‘Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime’ (2003-04) 35 Georgetown Journal of International Law 873, 885.

⁴³⁰ *ibid*; J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 31.

⁴³¹ J Neenan, ‘Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict’ (Centre for Women, Peace and Security, London School of Economics 2018) 31; S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 165.

gender discriminatory patterns can be observed in laws prohibiting women from passing on their nationality to their children, breaching in this way article 2 of CEDAW and, furthermore, resulting in the life-threatening consequence of statelessness for CBOW.⁴³² However, not only are discriminatory laws barriers to eradicating gender discrimination, but particular social and cultural patterns of conduct are also posing a threat to achieving gender equality.⁴³³ Discriminatory attitudes, stereotypes and name-calling by family and community members are all practices that affect CBOW and their mothers. Article 5(a) of CEDAW is of particular importance in this regard and stipulates the following:

States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women ...⁴³⁴

In order to protect the human rights of CBOW, it is necessary that the laws that are already in place are better enforced, while at the same time focussing on transforming discriminatory practices and attitudes that are embedded in most societies, to achieve a safer and more gender equal post-conflict society.

⁴³² J Neenan, 'Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict' (Centre for Women, Peace and Security, London School of Economics 2018) 31; S Lee, *Children Born of War in the Twentieth Century* (Manchester UP 2017) 165; J Daniel-Wrabetz, 'Children Born of War Rape in Bosnia-Herzegovina and the Convention on the Rights of the Child' in C Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press 2007) 32.

⁴³³ J Neenan, 'Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict' (Centre for Women, Peace and Security, London School of Economics 2018) 31.

⁴³⁴ CEDAW art 5(a).

CONCLUSION

‘What are the main violations of the human rights of CBOW on the basis of the United Nations CRC?’ In order to fully explore this question, this research began with tackling the root cause of the issue: CRSV.

Although the prosecution of these types of crimes took a considerable leap forward, still too little attention is being paid to its causes. Based on patriarchal understandings, too often CRSV is wrongly perceived as an inevitable by-product of war, falsely justifying the unwillingness of the international community to tackle the problem at its roots. Wood argues that sexual violence is, however, not perpetrated in every armed conflict, which is demonstrated by the major variation within and across armed conflicts and across armed actors. Recent research steps away from the classical explanations of patriarchy, opportunity or sexual desire as a cause of CRSV, and focuses on the variation in the institutions of armed groups instead. Sexual violence that is perpetrated is in some cases used as a strategy of war, for organisational purposes; however, in most cases it is not ordered, nor punished, but nevertheless tolerated. If military commanders or any other superiors are not taking up their responsibility to build strong institutions that effectively prohibit rape and other sexual violence crimes, they should be held accountable under international criminal law for the crimes committed by their troops. Holding commanders accountable should, simultaneously, go hand in hand with an alternation of international criminal law itself. A general duty to take necessary and reasonable measures **at all times** to prevent sexual violence should be imposed. Women and girls should be protected in a stronger and better way, before the crimes are committed, not after.

Preventing CRSV will prevent children being born as a result from it, who nowadays still live in all parts of the globe. Although their existence is to be estimated in the hundreds of thousands, they are a

widely neglected category of concern for the international community. The cases of CBOW in Bosnia and Herzegovina, Northern Uganda, Colombia and Myanmar show that, even though these cases vary over time and space, the plight of these children stays nevertheless the same. This result allows us to draw general conclusions about the situations of CBOW on a global perspective. The analysis of the international agreement that should safeguard the rights of these individuals, the CRC, reveals that it is falling short on their protection. Rights that are already in place, in order to give children a dignified life, are for CBOW a non-self-evident situation, requiring a lot more than what has currently been done. CBOW are faced with a continuous deprivation of their human rights, even decades after the adoption of the CRC. The universal applicability of the rights enshrined in the CRC is hence not realised.

The empirical evidence from the four case studies of Bosnia and Herzegovina, Northern Uganda, Colombia and Myanmar suggest that the four key provisions of the CRC are severely compromised in regard to CBOW. Examples such as possible health complications due to botched abortions, severe economic hardship, and at worst, infanticide demonstrate that the most fundamental right enshrined within the CRC – the right to life, protected by article 6 – is for CBOW impeded in many cases. The life that does await them is, however, a life of profound systematic discrimination and stigmatisation. The patriarchal manner in which many societies are still built leads namely to a patrilineal understanding of a child's identity, which in the case of CBOW entails that they are automatically associated with their perpetrator fathers and 'the enemy'. The rejection, alienation and ostracisation that CBOW are experiencing within their own homes and the wider community can be witnessed in the four case studies and on a global scale. This results in a strong violation of their right to non-discrimination, stipulated in article 2 of the CRC; a right that every child – no matter their biological background – should be entitled to. The patriarchal construction of societies is, in addition, resulting in gender-discriminatory nationality laws, obstructing or prohibiting women in conferring their nationality to their children. The above-mentioned case studies reveal that smooth birth registration is for many CBOW impossible, increasing their risk of becoming stateless and compromising their right to nationality, protected by article 7 of the CRC. Without birth registration, the enjoyment of other human rights will be strongly impacted as well, drastically diminishing the chances of leading a dignified life. The empirical evidence suggests

that for many, education is seen as the key to lift oneself out of the cycle of poverty and hardship; a way to find a respected place within society. However, for CBOW, their economic marginalisation is compounded with the stigmatisation and social alienation, which will follow them to school. The marginalisation of CBOW within the school environment, can severely impact their academic achievements and in the end, their right to education, protected by articles 28-29 of the CRC. In all countries, CBOW are perceived as unwanted children. No matter in which conflict setting they were born, these children will face severe difficulties in their childhood and, due to their compromised education, less chances in life.

The four cases of Bosnia and Herzegovina, Northern Uganda, Colombia and Myanmar reveal that the human rights of CBOW are strongly compromised, irrespective of time or geography. In order to close the protection gap within the human rights framework, this research has shown it is first and foremost necessary to clearly establish CBOW as a separate category of concern. The lack of specific data is namely the first obstacle in adequately protecting their rights and in guaranteeing CBOW a dignified life. Secondly, the state needs to be held responsible in their failure to respect and protect the human rights of CBOW. They are namely obliged to take special protection measures under General Comment No 5 of the UN Committee of the Rights of the Child, in order to adequately safeguard the rights of vulnerable groups of children, including CBOW. Thirdly, CBOW have a right to reparation under international law, which – when applied in a transformative, non-stigmatising way – can be essential in amending their disadvantaged position in society. Lastly, in order to give CBOW the dignified life they deserve, it is essential that gender-discrimination is eradicated, both in existing laws as in discriminatory practices and attitudes. The stigma CBOW suffer in their everyday lives stands namely in direct correlation with the failure of the state to respect and protect women’s rights.

This study has shown that the rights of CBOW are systematically violated, irrespective of time and place, while at the same time providing ways to address and rectify these violations. Even though the analyses only revolved around four specific parameters within the CRC, one can assume that the protection regarding the other rights enshrined is on their turn lacking as well. The findings of this research can be viewed as a starting point for further research around the plight and rights of CBOW, a topic that deserves a worthy place on the international agenda.

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