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“Forgotten victims of war”

Invisible, though stigmatised: the case of Children Born of Wartime Rape and Conflict-Related Sexual Violence

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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 be prevented.

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List of abbreviations

CBOW	Children Born of Wartime Rape
CRC	United Nations Convention of the Rights of the Child
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CRSV	Conflict-Related Sexual Violence
FARC	Fuerzas Armadas Revolucionarias de Colombia
FARDC	Forces Armées de la République Démocratique du Congo
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICC	International Criminal Court
LRA	Lord's Resistance Army
UPDF	Uganda People's Defence Force

INTRODUCTION

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

– Nelson Mandela

§1. Topic statement

1. 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.¹ 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 80’s, 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 1993.² The silence of the international community was, nevertheless, deafening for a long time.
2. The widespread occurrence of sexual atrocities committed in the nineties, in former Yugoslavia and Rwanda, were necessary to awaken the dozing international community and to increase international attention.³ 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 1994.⁴ 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.⁵

¹ A.M. Watson, “Children Born of Wartime Rape: Rights and Representations”, *International Feminist Journal of Politics* 2007, 21.

² R. Copelon, “International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking”, *American University Journal of Gender, Social Policy and Law* 2003, 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*, Cambridge, Cambridge University Press, 2006, 344.

³ United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), *Women2000: Sexual Violence and Armed Conflict: United Nations Response*, 1998, 9.

⁴ 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*, Virginia, Kumarian Press, 2012, 54.

⁵ K. Theidon, “Hidden in Plain Sight: Children Born of Wartime Sexual Violence”, *Current Anthropology* 2015, 1.

3. In addition to the former *ad hoc* tribunals, the United Nations Security Council adopted several resolutions⁶ 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.⁷ Fortunately, the culture of impunity regarding sexual violence is slowly transforming into a culture of accountability, though many steps still need to be taken.
4. 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 of CRSV, the often “*forgotten victims of war*”.⁸ 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 2000 children were born as a result.⁹ 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 25,000.¹⁰ 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 8,000.¹¹ 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.¹² 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.¹³ CBOW live in all parts of the world — DRC, Nigeria, Kenya, Libya, Colombia, Sierra Leone, Iraq and so on. Their presence is not a

⁶ UN Security Council, *Security Council resolution 1325 (2000)*, 31 October 2000; Followed by subsequent resolutions number 1820, 1888, 1889, 1960, 2106, 2122, 2242, 2467 and 2493.

⁷ K. Theidon, “Hidden in Plain Sight: Children Born of Wartime Sexual Violence”, *Current Anthropology* 2015, 1.

⁸ UN News, “*UN mobilizes in Rohingya camps to support babies born of rape; young mothers face stigma*”, 19 June 2018, available at: <https://news.un.org/en/story/2018/06/1012372>

⁹ C. Ingvill Mochmann and S. Lee, “The human rights of children born of war: case analyses of past and present conflicts”, *Historical Social Research* 2010, 269.

¹⁰ 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, *Violence Against Women* 2019, 707; Human Rights Watch (HRW), *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, 1996.

¹¹ Opening Remarks of SRSg Pramila Patten, *Commemoration of the International Day for the Elimination of Sexual Violence in Conflict*, 19 June 2018, available at: <https://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/>

¹² C. Carpenter, *Protecting Children born of sexual violence and exploitation in conflict zones: existing practice and knowledge gaps*, University of Pittsburgh, 2005, 6.

¹³ UNICEF, Press Release, “*More than 60 Rohingya babies born in Bangladesh refugee camps every day*”, 17th of May 2018, available at: <https://www.unicef.org/press-releases/more-60-rohingya-babies-born-bangladesh-refugee-camps-every-day-unicef>

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.¹⁴

5. The fate of CBOW is undeniably linked to the fate of their mothers.¹⁵ 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.¹⁶ Their lives are a painful reminder of the memories of the past which survivors are so desperately trying to forget.
6. 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.¹⁷ 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 right to education and healthcare, among others.¹⁸
7. 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 1989.¹⁹ 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.²⁰ The CRC entails four key provisions: the principle of non-discrimination (art.2), the right to life, survival and development (art. 6), the right to a nationality (art. 7) and the right to education (art. 28 – 29).²¹

¹⁴ C. Ingvill Mochmann and S. Lee, “The human rights of children born of war: case analyses of past and present conflicts”, *Historical Social Research* 2010, 269; C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 3.

¹⁵ Opening Remarks of SRSR Pramila Patten, *Commemoration of the International Day for the Elimination of Sexual Violence in Conflict*, 19 June 2018.

¹⁶ K. Theidon, “Hidden in Plain Sight: Children Born of Wartime Sexual Violence”, *Current Anthropology* 2015, 3.

¹⁷ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 8.

¹⁸ *Ibid*, 31.

¹⁹ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 18.

²⁰ A.M. Watson, “Children Born of Wartime Rape: Rights and Representations”, *International Feminist Journal of Politics* 2007, 26.

²¹ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017, 161.

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.

8. The wellbeing of CBOW is an urgent matter because the lives of an entire emerging generation are at stake.²² 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

9. 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 Children Born of Wartime Rape on the basis of the United Nations Convention on the Rights of the Child?*”.
10. 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 Elisabeth Jean 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.
11. 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 (art.2), the right to life, survival and development (art. 6), the right to a nationality (art.7) and the right to education (art.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 & 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

²² Opening Remarks of SRSR Pramila Patten, *Commemoration of the International Day for the Elimination of Sexual Violence in Conflict*, 19 June 2018, available at: <https://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/>

different timeframe and continent, giving the reader an insight in the global treatment of CBOW across time and space.

12. 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

13. 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 immersed in the dominant discourse of CRSV, in which female victims were the primary focus or, to a lesser extent, the male perpetrators.²³ The study of CBOW as primary subjects, has been an ignored reality and has only received minor systematic attention, with some notable exceptions.
14. Charli Carpenter has pursued 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*” (2007), was the first ground-breaking analysis that placed the emphasis on the protection of CBOW, rather than focusing on the women who survived it.²⁴ 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 Born of War: Setting the Human Rights Agenda in Bosnia and Beyond*” (2010), Carpenter focuses on the silence regarding CBOW, of transnational organisations dealing with children and armed conflict and children’s rights more generally.²⁵ Carpenter has shed a light on the neglected category of CBOW and sharpened the understanding of these otherwise silenced issues.
15. 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*” (2017). Lee puts the focus on

²³ T. Sanchez Parra and S. Lo Iacono, “(Re)Productive Discourses: Media Coverage of Children Born of War in Colombia”, *Bulletin of Latin American Research* 2019, 24.

²⁴ C. Carpenter (ed.), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, Kumarian Press, 2007.

²⁵ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010.

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.²⁶

16. 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.²⁷
17. 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 has 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 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.²⁸
18. Although the research on CBOW is still quite recent, the studies that have been conducted have placed emphasis on similar issues. Besides 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 made, however, on how to safeguard the rights enshrined in the CRC for CBOW in an effective manner, which this research aims to do.²⁹

§4. Methodology and Outline

19. 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.

²⁶ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017.

²⁷ H. Glaesmer, M. Kaiser, HJ. Freyberger, E. Brähler and P. Kuwert, “Die Kinder des Zweiten Weltkrieges in Deutschland – Ein Rahmenmodell für die psychosoziale Forschung”, *Trauma & Gewalt* 2012, 319-328; S.T. Yahyavi, M. Zarghami, U. Marwah, “A review on the evidence of transgenerational transmission of posttraumatic stress disorder vulnerability”, *Revista Brasileira de Psiquiatria* 2013, 89-94.

²⁸ Opening Remarks of SRSR Pramila Patten, *Commemoration of the International Day for the Elimination of Sexual Violence in Conflict*, 19 June 2018, available at: <https://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/>

²⁹ “The question of safeguarding children’s rights as enshrined in the CRC in the difficult situations of CBOW remains a largely uncharted territory” in S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017, 160.

20. 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 in following order, 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.
21. 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) will also be taken into account.
22. 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 NGOs, 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 is offering 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 T. 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.
23. 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 & 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 children born of wartime rape can effectively be secured.

§5. Theoretical framework

24. 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.
25. 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 principle throughout this research. Every State ratifying a treaty, is namely 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.
26. 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 is underlining 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.

27. **CONFLICT-RELATED SEXUAL VIOLENCE (CRSV)**– 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.³⁰
28. **SEXUAL VIOLENCE** – Sexual violence refers to any act of a sexual nature against one or more individuals. 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.³¹ 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*”.³²
29. **CHILDREN BORN OF WAR (CBOW)**– 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.³³ For the purpose of this study, children born of war will however exclusively refer to “*persons of any age conceived as a result of violent, coercive, or exploitative sexual relations in conflict zones*”.³⁴
30. **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*

³⁰ UN Security Council, *Report of the Secretary-General on conflict-related sexual violence*, 15 April 2017.

³¹ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 6.

³² Arts. 7g, 8 (xxii) *Rome Statute of the International Criminal Court* [hereinafter: Rome Statute], 17 July 1998.

³³ C. Ingwill Mochmann and S. Lee, “The human rights of children born of war: case analyses of past and present conflicts”, *Historical Social Research* 2010, 271.

³⁴ C. Carpenter (ed.), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, Kumarian Press, 2007, 3.

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".³⁵

PART I: CONFLICT-RELATED SEXUAL VIOLENCE

31. **OVERVIEW** – 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 first 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.

CHAPTER I: GENDER AND ARMED CONFLICT

§1. Sex and Gender

32. To assess the dimensions of war in relation to gender, one must first make a distinction between the categorizations “*sex*” and “*gender*.” The difference between the two categorizations is often described as a distinction of biology for the former and socialization or culture for the latter.³⁶ 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.³⁷ The gendered social roles are dependent on “*cultural, social, economic and political conditions, expectations, and obligations within the family, community and nation*.”³⁸ Because gender is not a natural or biological concept, rather a socially constructed one, it differs over time and across cultures.³⁹
33. 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

³⁵ Article 1, *Convention on the Elimination of All Forms of Discrimination Against Women* [hereinafter CEDAW], 18 December 1979, United Nations, Treaty Series, vol. 1249.

³⁶ M. Stern and M. Nystrand, *Gender and Armed Conflict*, Swedish International Development Cooperation Agency, SIDA 2006, 34.

³⁷ R.W. Connell, *Masculinities*, Berkeley, University of California Press, 2005, 71.

³⁸ D. Mazurana, A. Raven-Roberts, J. Parpart (eds.), *Gender, Conflict and Peacekeeping*, Lanham, Rowman & Littlefield, 2005, 13.

³⁹ Ibid.

understood as separate from “*feminine*” (as stereotypically associated with the “female” sex) and is frequently defined as being the direct opposite of it.⁴⁰ 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.⁴¹ 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*”.⁴²

34. Idealized 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 utilized as residual categories, giving a superior status to the former.⁴³ 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, marginalized or subordinate, masculinities, but to the gender order as a whole.⁴⁴ 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.⁴⁵
35. 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.⁴⁶ Political systems are based on the divide 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

⁴⁰ C. Hooper, *Manly States: Masculinities, International Relations, and Gender Politics*, New York, Columbia University Press, 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.

⁴¹ Ibid.

⁴² 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*, London, Zed Books, 2001, 15.

⁴³ M. Stern and M. Nystrand, *Gender and Armed Conflict*, Swedish International Development Cooperation Agency, SIDA 2006, 36.

⁴⁴ R. Connell, “Gender, Men and Masculinities” in E. Barbieri-Masini (ed.), *Quality of Human Resources: Gender and Indigenous Peoples*, Oxford, Eolss Publishers, 2009, 144.

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

⁴⁶ Ibid, 44.

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.⁴⁷

§2 Gender dimensions of war

A. Militarism and patriarchy

36. 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.⁴⁸ 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.⁴⁹ 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*”.⁵⁰ In armed conflict, the dichotomy between the two gender roles is exacerbated and is becoming more polarized, reinforcing the patriarchal familial ideology and increasing pre-existing inequalities between men and women further.⁵¹ 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 privilege and female subordination are kept in place.⁵² 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”.*⁵³

37. 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.

⁴⁷ N. Yuval Davis, *Gender and Nation*, London, Sage Publications, 1997, chapter 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.

⁴⁸ S. Peterson, “Gendered Nationalism: reproducing “Us” versus “Them” in L.A. Lorentzen and J. Turpin, *The Women and War Reader*, New York, New York University Press, 1998, 41.

⁴⁹ D. Mazurana, A. Raven-Roberts, J. Parpart (eds.), *Gender, Conflict and Peacekeeping*, Lanham, Rowman & Littlefield, 2005, 13.

⁵⁰ J. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa*, Cambridge, Cambridge University Press, 2001, 10.

⁵¹ C. Cockburn, *Gender, Armed Conflict and Political Violence*, Background paper for Gender, Armed Conflict and Political Violence, World Bank Conference, Washington, 1999, 8.

⁵² J. Turpin, “Many Faces: Women Confronting War” in L.A. Lorentzen and J. Turpin, *The Women and War Reader*, New York, New York University Press, 1998, 15-16.

⁵³ Ibid.

B. Economic and social impact

38. 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*”.⁵⁴ 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.⁵⁵ The distinction between the public and private spheres in society, (*supra* nr. 35) 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.⁵⁶ 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.⁵⁷ 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.⁵⁸ 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.⁵⁹ 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.⁶⁰ The collapse of primary health services disproportionately affects women as well, due to the steep rise in child – and maternal mortality.⁶¹ 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.⁶² Armed conflict permeates all spheres of the lives of

⁵⁴ C. Cockburn, *Gender, Armed Conflict and Political Violence*, Background paper for Gender, Armed Conflict and Political Violence, World Bank Conference, Washington, 1999, 8.

⁵⁵ “*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*” in *Ibid*, 10.

⁵⁶ United Nations, *Handbook on UN Multidimensional Peacekeeping Operations*, Peacekeeping Best Practices Unit, United Nations, New York, 2003, 114; C. Steinkogler, *Conflict-related Sexual Violence and International Peace Operations*, Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013, 20.

⁵⁷ *Ibid*; United Nations Security Council, *Report of the Secretary-General on Women, Peace and Security*, 16 October 2002, 2.

⁵⁸ *Ibid*.

⁵⁹ D. Bloomfield, T. Barnes and L. Huyse, *Reconciliation After Violent Conflict*, International Institute for Democracy and Electoral Assistance 2003, 55.

⁶⁰ United Nations Security Council, *Report of the Secretary-General on Women, Peace and Security*, 16 October 2002, 2.

⁶¹ C. Cockburn, *Gender, Armed Conflict and Political Violence*, Background paper for Gender, Armed Conflict and Political Violence, World Bank Conference, Washington, 1999, 11.

⁶² United Nations Security Council, *Report of the Secretary-General on Women, Peace and Security*, 16 October 2002, 2; United Nations, *Handbook on UN Multidimensional Peacekeeping Operations*, Peacekeeping Best Practices Unit, United Nations, New York, 2003, 114; D. Mazurana, A. Raven-Roberts, 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.

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.⁶³

C. *Physical impact*

39. 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 gender roles in wartime and the differences in societal perception of the male and female bodies in various cultures.⁶⁴ 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 militarization, sexual violence carried out as part of strategic military actions or via participation in forced marriages.⁶⁵
40. The gendered stereotype roles and societal expectations do not, however, always correlate with reality on the ground. By taking part in armed combat as combatants⁶⁶, supporting war or perpetrating acts of violence, including sexual violence;⁶⁷ women have proven to be active agents, and not mere victims, throughout wartime as well.⁶⁸ 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.⁶⁹ The significant gendered distinction between

⁶³ J.P. Kaufman and K.P. Williams, *Women and War: Gender Identity and Activism in Times of Conflict*, Sterling, Kumarian Press, 2010, 16.

⁶⁴ 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.

⁶⁵ 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; J.P. Kaufman and K.P. Williams, *Women and War: Gender Identity and Activism in Times of Conflict*, Sterling, Kumarian Press, 2010, 36; C. Steinkogler, *Conflict-related Sexual Violence and International Peace Operations*, Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013, 21.

⁶⁶ J. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa*, Cambridge, Cambridge University Press, 2001, 59.

⁶⁷ Y. Leggat-Smith, *Rwanda: Not so Innocent: When Women Become Killers*, African Rights, 1995.

⁶⁸ United Nations Security Council, *Report of the Secretary-General on Women, Peace and Security*, 16 October 2002, 2; C. Carpenter, *Forgetting Children Born of War: Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 69.

⁶⁹ C. Cockburn, "The Gendered Dynamics of Armed Conflict and Political Violence" in C. Moser, F. Clark (eds.), *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence*, London, Zed Books, 2001, 20; United Nations, *Handbook on UN Multidimensional Peacekeeping Operations*, Peacekeeping Best Practices Unit, United Nations, New York, 2003, 115; C. Steinkogler, *Conflict-related Sexual Violence and International Peace Operations*, Global Campus Awarded Theses 2010/2011, EIUC, Venice 2013, 21.

“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.⁷⁰

CHAPTER II: WARTIME SEXUAL VIOLENCE

41. **REMARK** – 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.

§1. History of slow recognition

42. 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.⁷¹ According to the ancient perspective, women were seen as spoils of war, consistent with their legal status as virtual property.⁷² Brownmillar explains the following in this regard:

*“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”.*⁷³

43. 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.⁷⁴ Prior to the 19th century, the laws governing wartime existed solely in custom, religious instruction or domestic military codes.⁷⁵ 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.⁷⁶ It

⁷⁰ M. Stern and M. Nystrand, *Gender and Armed Conflict*, Swedish International Development Cooperation Agency, SIDA 2006, 55.

⁷¹ K.D. Askin, “Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles”, *Berkeley Journal of International Law* 2003, 295.

⁷² C.N. Niarchos, “Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia.” *Human Rights Quarterly* 1995, 660.

⁷³ S. Brownmillar, *Against Our Will: Men, Women, and Rape*, New York, Fawcett Columbine, 1993, 38.

⁷⁴ *Ibid*, 18.

⁷⁵ K.D. Askin, “Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles”, *Berkeley Journal of International Law* 2003, 299.

⁷⁶ *Ibid*, 296.

could even be encouraged as a reward after, resulting in the toleration or silencing of such crimes by commanders.⁷⁷ 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.⁷⁸ The Lieber Code has proven to be the cornerstone for many military codes that followed.⁷⁹ 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 honor with the honor of women, which was understood as including sexual assault.⁸⁰

44. After the atrocities committed during WWII, the core of International Humanitarian Law⁸¹ was amended and codified in the four Geneva Conventions.⁸² 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*”.⁸³ 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*”⁸⁴; 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*”.⁸⁵

⁷⁷ Ibid., 296; “*The license to rape was considered a major incentive for the soldier involved in siege warfare*” in T. Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages*, Oxford, Oxford University Press, 1993, 111.

⁷⁸ C.N. Niarchos, “Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia.” *Human Rights Quarterly* 1995, 662.

⁷⁹ K.D. Askin, “Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles”, *Berkeley Journal of International Law* 2003, 299.

⁸⁰ 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, (The Hague, 18 October 1907), entered into force 26 January 1910, Art. 46; Ibid, 300.

⁸¹ “*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*”, see Advisory Service on International Humanitarian Law, ICRC, available at: <https://www.icrc.org/en/document/what-international-humanitarian-law>

⁸² 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 if they are parties to the treaties and additional protocols.

⁸³ The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949) [hereinafter Geneva Convention IV], Art.27(2).

⁸⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 76 (1).

⁸⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977), Art. 4 (2) (e).

45. Even though the Fourth Geneva Convention and the Additional Protocols include rape and enforced prostitution, the crimes are demarcated as crimes of “honor” or “dignity”, resulting in the reinforcement of shame and stigma experienced by the victimized women.⁸⁶ The term “honor” 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 “honor.”⁸⁷ Not categorizing rape crimes as crimes of violence, rather as crimes of honor, is ignoring the sexual and violent nature of the attack; it also reinforces detrimental stereotypes, where the shame of rape is placed on the victim, rather than on the perpetrator.⁸⁸ 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 giving 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 categorization of “torture or inhumane treatment” or “willfully causing great suffering or serious injury to body or health.”⁸⁹ 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.⁹⁰
46. 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.⁹¹ This patriarchal view on 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.⁹² 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

⁸⁶ S. Eaton, “Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime”, *Georgetown Journal of International Law* 2003-04, 885.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*; K.D. Askin, “Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles”, *Berkeley Journal of International Law* 2003, 304.

⁸⁹ Art. 147 Geneva Convention IV; art. 11 and art. 85 Protocol I.

⁹⁰ UN Women, *Women2000: Sexual Violence and Armed Conflict: United Nations Response*, 1998; S. Eaton, “Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime”, *Georgetown Journal of International Law* 2003-04, 885.

⁹¹ K.D. Askin, “Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles”, *Berkeley Journal of International Law* 2003, 297.

⁹² *Ibid.*, 298.

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 (see *supra* nr. 35), resulting in the inability or unwillingness of the judicial system to prosecute these crimes in a rightful way.

§2. International recognition

47. Despite the widespread evidence of the occurrence of sexual violence during WWII, the Charters of the international *ad hoc* tribunals of Nuremberg⁹³ and Tokyo⁹⁴, established for the prosecution of the committed war crimes and other atrocities, did not expressly criminalize sexual violence crimes.⁹⁵ It was not until the 1990s that the prosecution of CRSV at the international level developed comprehensively.
48. 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.⁹⁶ Rape was not an isolated act, committed by individuals, rather a strategy of war.⁹⁷ 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.⁹⁸ CRSV appeared on the international agenda, leading to the establishment by the United Nations of the International Criminal Tribunal for the former Yugoslavia (ICTY)⁹⁹ in 1993 and the International Criminal Tribunal for Rwanda (ICTR)¹⁰⁰ in 1994.¹⁰¹ The extent of the harm caused by sexual violence was being recognised and the focus shifted from a crime out of pure

⁹³ The International Military Tribunal in Nuremberg (IMT) did not prosecute any sexual violence crimes, even though extensive evidence was present.

⁹⁴ The International Military Tribunal for the Far East (IMTFE, Tokyo) did prosecute sexual violence crimes, but in a limited extent and as secondary – in conjunction with other – crimes.

⁹⁵ Organization for Security and Co-operation in Europe (OSCE), *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges*, February 2014, 25.

⁹⁶ R. A. Sitkin, B. X. Lee and G. Lee, “To destroy a people: Sexual violence as a form of genocide in the conflicts of Bosnia, Rwanda, and Chile”, *Aggression and Violent Behavior* 2019, 221.

⁹⁷ Detention camps (“*rape camps*”) were utilized by Serbian forces, with the specific purpose of sexually assaulting Muslim women.

⁹⁸ R. A. Sitkin, B. X. Lee and G. Lee, “To destroy a people: Sexual violence as a form of genocide in the conflicts of Bosnia, Rwanda, and Chile”, *Aggression and Violent Behavior* 2019, 221.

⁹⁹ UN Security Council, *Security Council resolution 808*, 22 February 1993; UN Security Council, *Security Council resolution 827*, 25 May 1993.

¹⁰⁰ UN Security Council, *Security Council resolution 955*, 8 November 1994.

¹⁰¹ 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*, Virginia, Kumarian Press, 2012, 54.

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 solely portrayed as belonging to the private sphere to a crime of public nature requiring global response.¹⁰²

49. The ICTY Statute was the first legal instrument explicitly listing rape as a crime against humanity¹⁰³, followed by the ICTR Statute¹⁰⁴, 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.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷
50. 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.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ The deep feminist engagement that was necessary to transform the human rights discourse of the tribunals, was part of the global women's movement in the late 80's that put the emphasis on “*woman's rights are human rights*” and identified violence against women as a priority issue within human

¹⁰² Ibid.

¹⁰³ Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, [hereinafter Statute of the ICTY], Art. 5.

¹⁰⁴ Statute of the International Tribunal for Rwanda, 8 November 1994, [hereinafter Statute of the ICTR], Art. 3(g).

¹⁰⁵ Statute of the ICTR, Art. 4(e).

¹⁰⁶ OSCE, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges*, February 2014, 25.

¹⁰⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (2 September 1998), para. 731.

¹⁰⁸ H. M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals*, Oxford, Oxford University Press, 2014, 115.

¹⁰⁹ Ibid.

¹¹⁰ Several appeals were submitted to amend the initial judgement, with the most important being the report “*Shattered Lives*” from HRW: “*there is a widespread perception among the Tribunal investigators that rape is somehow a ‘lesser’ or ‘incidental’ crime not worth investigating*”, 1996, p. 55; R. Copelon, “Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law”, *McGill Law Journal* 2000, 225.

rights, which gained universal acceptance at the Vienna Conference of 1993.¹¹¹ 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.¹¹² If it was not for the external pressure from human rights activist and feminist legal scholars, wartime rape would have largely remained invisible.

51. 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.¹¹³ Due to their activism, sexual violence crimes are recognised as no less important than other violent crimes such as of torture, genocide, enslavement or inhumane treatment.¹¹⁴ The Rome Statute offers today the broadest classification of CRSV crimes.¹¹⁵ Besides stipulating rape as a crime against humanity and a war crime, it also includes sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity within these two categories.¹¹⁶ According to the "Elements of Crimes" of the ICC, sexual violence is described as follows:

"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".¹¹⁷

¹¹¹ R. Copelon, "International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking", *American University Journal of Gender, Social Policy and Law* 2003, 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*, Cambridge, Cambridge University Press, 2006, 344.

¹¹² H. M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals*, Oxford, Oxford University Press, 2014, 115.

¹¹³ 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*, New York, Nova Science Publishers, 2011, 46.

¹¹⁴ Ibid.

¹¹⁵ OSCE, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges*, February 2014, 25.

¹¹⁶ Arts. 7g, 8 (xxii) Rome Statute.

¹¹⁷ International Criminal Court, *Elements of Crimes*, art.7 (1) (g)-6

§3. “Rape is not done by mistake”

A. Terminology

52. In this part of “*Rape is not done by mistake*”¹¹⁸, the term “*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.¹¹⁹ The definition of “*sexual violence*”, given by the Rome Statute will be used (*supra* nr. 51) and will include: “*rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity*”.¹²⁰

B. Misconceptions

1. Variation in conflict-related sexual violence

53. 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.¹²¹ Within the same armed conflict, some armed groups engage in sexual violence, others do not. Some armed organisations are targeting 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.¹²²

54. 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.¹²³ This shows that the majority of armed actors did not use sexual violence as part of their repertoire of violence, however excluding 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

¹¹⁸ N. Mitchell, *Agents of Atrocity: Leaders, Followers, and the Violation of Human Rights During Civil War*, New York, Palgrave MacMillan, 2004, 50.

¹¹⁹ E.J. Wood, “Conflict-related sexual violence and the policy implications of recent research”, *International Review of the Red Cross* 2014, 458.

¹²⁰ Arts. 7g, 8 (xxii) Rome Statute.

¹²¹ E.J. Wood, “Conflict-related sexual violence and the policy implications of recent research”, *International Review of the Red Cross* 2014, 458.

¹²² *Ibid.*

¹²³ R. Nordås, *Sexual Violence in African Conflicts*, Peace Research Institute Oslo, Policy Brief No. 1, 2011, 2.

armed actors; being State¹²⁴, rebel groups¹²⁵ and militias¹²⁶, did not perpetrate acts of sexual violence.¹²⁷ 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. Classical theories

55. According to Wood, Hoover Green and Cohen (2013), 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.¹²⁸ 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.¹²⁹ The substitute argument 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.¹³⁰ 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.¹³¹
56. 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.¹³² CRSV can vary greatly among armed conflicts - and even within a single

¹²⁴ 42% of State actors (56 of 132) were reported as perpetrating acts of sexual violence.

¹²⁵ 24% of rebel groups (65 of 275) were reported as perpetrating acts of sexual violence.

¹²⁶ 17% of militias (38 of 218) were reported as perpetrating acts of sexual violence.

¹²⁷ D.K. Cohen and R. Nordås, “Sexual Violence in Armed Conflict: Introducing the SVAC Dataset, 1989–2009”, *Journal of Peace Research* 2014, 425.

¹²⁸ D. K. Cohen, A. Hoover Green and E. J. Wood, “Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward”, *United States Institute of Peace Special Report 323*, February 2013, 5.

¹²⁹ *Ibid*, 6.

¹³⁰ E.J. Wood, “Conflict-related sexual violence and the policy implications of recent research”, *International Review of the Red Cross* 2014, 462.

¹³¹ D. K. Cohen, A. Hoover Green and E. J. Wood, “Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward”, *United States Institute of Peace Special Report 323*, February 2013, 5.

¹³² E.J. Wood, “Conflict-related sexual violence and the policy implications of recent research”, *International Review of the Red Cross* 2014, 463.

conflict - between armed actors, resulting in the lack of concrete evidence for existing claims regarding global trends in wartime rape.¹³³ 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.¹³⁴

3. *Shifting the focus*

57. 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.
58. 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.¹³⁵ 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.¹³⁶ 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.¹³⁷ Wood refers in this regard to the "*principal-agent problem*".¹³⁸ 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.¹³⁹ The preferences of the commander regarding the pattern of violence can be internalised by combatants due to strong indoctrination and training by such institutions.¹⁴⁰ Combatants tend to then only engage in the

¹³³ D. K. Cohen, A. Hoover Green and E. J. Wood, "Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward", *United States Institute of Peace Special Report 323*, February 2013, 11.

¹³⁴ *Ibid.*, 12.

¹³⁵ E.J. Wood, "Conflict-related sexual violence and the policy implications of recent research", *International Review of the Red Cross* 2014, 466.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ C.K. Butler, G. Tali, and M.J. Neil, "Security Forces and Sexual Violence: A Cross-National Analysis of a Principal-Agent Argument." *Journal of Peace Research* 2007, 670; J. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence*, Cambridge University Press, Cambridge, 2007, 130; E.J. Wood, "Conflict-related sexual violence and the policy implications of recent research", *International Review of the Red Cross* 2014, 466.

¹³⁹ 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", *Journal of Peace Research* 2016, 624; D. K. Cohen, A. Hoover Green and E. J. Wood, "Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward", *United States Institute of Peace Special Report 323*, February 2013, 12.

¹⁴⁰ J. Weinstein, *Inside Rebellion: The Politics of Insurgent Violence*, Cambridge University Press, Cambridge, 2007, 136; E.J. Wood, "Conflict-related sexual violence and the policy implications of recent research", *International Review of the Red Cross* 2014, 468.

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.¹⁴¹ 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 thirty-year civil war with the Sri Lankan government. However, they seemed to have rarely, or not at all, engaged in rape or other acts of sexual violence.¹⁴² 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.¹⁴³

59. 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.¹⁴⁴ Alternatively, many lack the will to build strong institutions to effectively implement and enforce these regulations concerning sexual violence.¹⁴⁵ 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 terrorizing, 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.¹⁴⁶ 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

¹⁴¹ E.J. Wood, "Conflict-related sexual violence and the policy implications of recent research", *International Review of the Red Cross* 2014, 468.

¹⁴² Ibid, ftnt. 65

¹⁴³ Ibid, 469.

¹⁴⁴ Ibid,

¹⁴⁵ Ibid.

¹⁴⁶ Ibid, 470; X. Agirre Aranburu, "Beyond Dogma and Taboo: Criteria for the Effective Investigation of Sexual Violence", in M. Bergsmo, A. Butenschon Skre and E.J. Wood (eds), *Understanding and Proving International Sex Crimes*, Torkel Opsahl Academic Epublisher, Oslo, 2012, 279; D. K. Cohen, A. Hoover Green and E. J. Wood, "Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward", *United States Institute of Peace Special Report* 323, February 2013, 10.

carried out for social rather than individual reasons, such as the pressure to conform with the behaviour of other soldiers in the unit.¹⁴⁷

60. 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.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ 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”.¹⁵¹ Eriksson Baaz and Stern analysed the motives of the FARDC 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*”.¹⁵² 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.¹⁵³ Soldiers 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.¹⁵⁴

¹⁴⁷ E.J. Wood, “Conflict-related sexual violence and the policy implications of recent research”, *International Review of the Red Cross* 2014, 471; D. K. Cohen, A. Hoover Green and E. J. Wood, “Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward”, *United States Institute of Peace Special Report 323*, February 2013, 10.

¹⁴⁸ D. K. Cohen, A. Hoover Green and E. J. Wood, “Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward”, *United States Institute of Peace Special Report 323*, February 2013, 1.

¹⁴⁹ E.J. Wood, “Conflict-related sexual violence and the policy implications of recent research”, *International Review of the Red Cross* 2014, 471.

¹⁵⁰ Ibid, 473; D. K. Cohen, A. Hoover Green and E. J. Wood, “Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward”, *United States Institute of Peace Special Report 323*, February 2013, 10.

¹⁵¹ CNN, “Why eastern DR Congo is ‘rape capital of the world’”, 25 November 2011, available at: <https://edition.cnn.com/2011/11/24/world/africa/democratic-congo-rape/index.html>

¹⁵² M. Eriksson Baaz and M. Stern, “Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)”, *International Studies Quarterly* 2009, 501.

¹⁵³ Ibid, 501.

¹⁵⁴ Ibid, 497.

61. 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.¹⁵⁵ 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.¹⁵⁶ Although this extensive body of law is formally prohibiting 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.¹⁵⁷

§4. Alteration of International Criminal Law

62. 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 repress*” foreseeable crimes, which can include rape crimes, by their subordinates.¹⁵⁸ 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.¹⁵⁹ 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 about to be – committed.¹⁶⁰ 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.¹⁶¹ Applying this current legal framework

¹⁵⁵ D. K. Cohen, A. Hoover Green and E. J. Wood, “Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward”, *United States Institute of Peace Special Report 323*, February 2013, 11.

¹⁵⁶ *Ibid*, 13.

¹⁵⁷ 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*, Leiden, Martinus Nijhoff Publishers, 2012, 97.

¹⁵⁸ Art. 28 Rome Statute.

¹⁵⁹ 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*, Leiden, Martinus Nijhoff Publishers, 2012, 99.

¹⁶⁰ Art. 28 (a) (i) Rome Statute.

¹⁶¹ Art. 28 (b) (i) Rome Statute.

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.¹⁶² 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 for the crime is committed. The failure of International Criminal Law on this point is currently being highlighted by Eboe-Osuji, who is suggesting a legal duty of due diligence on the commander, requiring 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.¹⁶³

§5. Conclusion

63. 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 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 this type of crimes.
64. 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.

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*, Leiden, Martinus Nijhoff Publishers, 2012, 100.

¹⁶³ *Ibid*, 98.

PART II: CHILDREN BORN OF WARTIME RAPE

65. **OVERVIEW** – Part two of this research examines the case of CBOW in the conflict-settings of the four case studies of Bosnia & 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 children born of wartime rape can effectively be secured.

CHAPTER I: WHO ARE THE CHILDREN BORN OF WARTIME RAPE?

§1. General

66. 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.¹⁶⁴ On the contrary, their existence in the international children's human rights regime has been widely disregarded for decades.
67. Stigmatisation, discrimination, abuse, neglect and infanticide; the human rights of CBOW are strongly impeded in many ways.¹⁶⁵ 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 her children, family and the wider community.¹⁶⁶ 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.¹⁶⁷ The transgenerational transmission of trauma results in reduced paternal ability to give physical and emotional care, due to suffered traumatic

¹⁶⁴ 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*, Philadelphia, University of Pennsylvania Press, 2009, 26.

¹⁶⁵ J. Neenan, "Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict", *Report Women, Peace and Security*, London School of Economics, 2018, 11.

¹⁶⁶ V. Ladisch, "From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda", *ICTJ* 2015, 7.

¹⁶⁷ *Ibid*, 6.

experiences.¹⁶⁸ To stop the re-victimization 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.¹⁶⁹

68. 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.

§2. Bosnia and Herzegovina

69. The end of Soviet dominance in early 1990's 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 women and girls.¹⁷⁰ 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.¹⁷¹ Used to humiliate the victim, her ethnic community and shatter her identity; rape was employed in a widespread and systematic way.¹⁷² Rape camps were being set up, to implement the Serbian policies of mass rape, forced impregnation and forced maternity.¹⁷³ Repeated gang rape, until women were impregnated so they would give birth to "little Chetnik babies"¹⁷⁴, appeared to be the aim of Serbian forces.¹⁷⁵ 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.¹⁷⁶

¹⁶⁸ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017, 155.

¹⁶⁹ V. Ladisch, "From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda", *ICTJ* 2015, 7.

¹⁷⁰ P. A. Weitsman, "The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda." *Human Rights Quarterly* 2008, 569.

¹⁷¹ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017, 152.

¹⁷² *Ibid.*

¹⁷³ P. A. Weitsman, "The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda." *Human Rights Quarterly* 2008, 569.

¹⁷⁴ Women continually were 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" in *Ibid.*

¹⁷⁵ *Ibid.*; 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.*

¹⁷⁶ C. Ingvill Mochmann and S. Lee, "The human rights of children born of war: case analyses of past and present conflicts", *Historical Social Research* 2010, 269.

70. 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 (see *supra* nr. 51). In addition, the United Nations Security Council adopted several resolutions¹⁷⁷ 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).¹⁷⁸ 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.

§3. Northern Uganda

71. 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.¹⁷⁹ The Lord’s Resistance Army (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.¹⁸⁰ To produce a new clan and a new generation of LRA fighters, the LRA abducted thousands of women and girls between 1986-2007.¹⁸¹ A forced wife system was carried out and formed a crucial part of Kony’s military and ideological operations.¹⁸² The abducted girls, usually around the age of 12 or 13, were forcibly married to commander “husbands” and became their exclusive property.¹⁸³ 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.¹⁸⁴

¹⁷⁷ UN Security Council, *Security Council resolution 1325 (2000)*, 31 October 2000; Followed by subsequent resolutions number 1820, 1888, 1889, 1960, 2106, 2122, 2242, 2467 and 2493.

¹⁷⁸ UN Security Council, *Security Council resolution 1325 (2000)*, 31 October 2000; S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017, 153.

¹⁷⁹ V. Ladisch, “From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda”, *ICTJ* 2015, 4.

¹⁸⁰ A. Green and M. Denov, “Mask-Making and Drawing as Method: Arts-Based Approaches to Data Collection With War-Affected Children”, *International Journal of Qualitative Methods* 2019, 2.

¹⁸¹ B. Rohwerder, “Reintegration of Children Born of Wartime Rape”, *Institute of Development Studies* 2019, 7.

¹⁸² A. Green and M. Denov, “Mask-Making and Drawing as Method: Arts-Based Approaches to Data Collection With War-Affected Children”, *International Journal of Qualitative Methods* 2019, 2.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*; V. Ladisch, “From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda”, *ICTJ* 2015, 4.

72. 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.¹⁸⁵ 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 1986.¹⁸⁶ A study on the findings from the Survey on War-Affected Youth (SWAY) in Northern Uganda, funded by UNICEF, 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.¹⁸⁷ According to Akello, an estimated 10,000 abducted girls became forced mothers under LRA captivity, giving birth to two or more children.¹⁸⁸
73. 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.¹⁸⁹

§4. Colombia

74. 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.¹⁹⁰ 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 territory, including drug-trafficking routes.¹⁹¹ In 2008, the Colombian Constitutional Court stressed in a landmark ruling the systematic and

¹⁸⁵ Ibid.

¹⁸⁶ P. Pham, E. Stover and P. Vinck, “Returning Home: Forced Conscription, Reintegration, and Mental Health Status of Former Abductees of the Lord’s Resistance Army in Northern Uganda”, *BMC Psychiatry* 2009, 2.

¹⁸⁷ J. Annan, C. Blattman, K. Carlson and D. Mazurana, “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.

¹⁸⁸ G. Akello, “Experiences of forced mothers in northern Uganda: The legacy of war”, *Intervention* 2013, 149.

¹⁸⁹ Uganda Human Rights Commission and OHCHR, “ ‘The Dust Has Not Yet Settled’ Victims’ Views on The Right to Remedy and Reparation: A Report from the Greater North of Uganda”, 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”, *Report Women, Peace and Security*, London School of Economics, 2018, 33.

¹⁹⁰ D. Kravetz, Promoting Domestic Accountability For Conflict-Related Sexual Violence: The Cases Of Guatemala, Peru, And Colombia, *American University of International Law Review* 2017, 722.

¹⁹¹ Ibid.

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.¹⁹²

75. A survey supported by Oxfam, regarding the prevalence of sexual violence, conducted between 2001-2009 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.¹⁹³ However, this consists only one estimate during a nine-year lapse. The high prevalence of CRSV stands in hard contrast with the complete lack on 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 only recent ending of the five decades long - key conflict between the state and the FARC, by the 2016 peace agreement.¹⁹⁴ No systematic collection of data exists around the number of children born of sexual violence, their identity and their plight.¹⁹⁵ 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*”.¹⁹⁶

§5. Rohingya – Myanmar

76. The Rohingya – a predominately Muslim ethnic group in Rakhine State, Myanmar – are one of the most persecuted minority groups in the world and have faced systematic discrimination throughout history.¹⁹⁷ After Myanmar’s (formerly Burma) independence in 1948 the situation worsened and persecution has multiplied, denying Rohingya people statehood, public services

¹⁹² Ibid; J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 33; Corte Constitucional [C.C.], Auto 092, abril 14 2008, *Protección de los derechos fundamentales de las mujeres víctimas del desplazamiento forzado por causa del conflicto armado* [hereinafter Auto 092/2008].

¹⁹³ Oxfam, “*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, 2011, 19.

¹⁹⁴ BBC, “Colombia signs new peace deal with Farc”, 24th November 2016, available at: <https://www.bbc.com/news/world-latin-america-38096179>

¹⁹⁵ T. Sanchez Parra, “The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia”, *International Journal of Transitional Justice* 2017, 4.

¹⁹⁶ UN News, “*Eradicating sexual violence in Colombia requires investment in communities – UN envoy*”, 4 March 2015, available at: <https://news.un.org/en/story/2015/03/492642>

¹⁹⁷ M.A. Bari. *The Rohingya Crisis : A People Facing Extinction*, La Vergne, Kube Publishing Ltd, 2018; European Network on Statelessness, *Statelessness in Myanmar – Country Position Paper*, May 2019, 10.

and civil rights; subjecting them to arbitrary arrest, discrimination and violence.¹⁹⁸ The violent attacks in 1978, 1991-92, 2012 and 2016 were followed up by the most extreme wave of genocidal violence in August 2017.¹⁹⁹ A series of “clearance operations”, particularly by the Tatmadaw, Myanmar’s armed forces, that then 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.²⁰⁰ 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.²⁰¹

77. 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*”.²⁰² Official data on rape-related pregnancies do not 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.²⁰³ 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.²⁰⁴

CHAPTER II: THE APPLICABILITY OF THE CONVENTION ON THE RIGHTS OF THE CHILD

§1. General

78. 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 1989 United Nations Convention

¹⁹⁸ Ibid.

¹⁹⁹ Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts* (A/HRC/42/CRP.4), 22th August 2019.

²⁰⁰ UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, 12 September 2018, 8; OCHA, Rohingya Refugee Crisis, available at: <https://www.unocha.org/rohingya-refugee-crisis>

²⁰¹ UN Press release, “One year into the Rohingya crisis, Special Representative Patten calls for accountability for sexual violence crimes”, 24th August 2018, available at: <https://www.un.org/sexualviolenceinconflict/press-release/one-year-into-the-rohingya-crisis-special-representative-patten-calls-for-accountability-for-sexual-violence-crimes/>

²⁰² Ibid.

²⁰³ OHCHR, A. Gilmour, “*Bangladesh and the international community must ensure support to victims of sexual violence*”, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23012&LangID=E>

²⁰⁴ UNICEF, Press release: “*More than 60 Rohingya babies born in Bangladesh refugee camps every day*”, 17th May 2018, available at: <https://www.unicef.org/press-releases/more-60-rohingya-babies-born-bangladesh-refugee-camps-every-day-unicef>

on the Rights of the Child (CRC) is the most widely ratified human rights instrument in history.²⁰⁵ The CRC 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.²⁰⁶

79. The Convention entails 42 provisions, covering a wide set of rights, each relating to one of the three “P’s” – Provision, Protection and Participation.²⁰⁷ Provision rights relate to the provision of children’s basic needs and entail *i.a.* the right to education (art. 28), right to attain the highest level of health and healthcare (art. 24) and the right to a standard of living adequate for the child’s development (art. 27). Protection rights are there to ensure children are shielded from all acts of harm and exploitation and entail *i.a.* the right to be protected from discrimination (art. 2), the right to be protected from all forms abuse, violence and exploitation (art. 19) and the right to be protected from economic and sexual exploitation (art. 32, 34). Participation rights are included to make sure children can express their views and participate in the decisions regarding themselves; and entail *i.a.* the right to express their views and to be heard in legal proceedings (art. 12), freedom of expression and the right to information (art. 13).²⁰⁸
80. 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”.²⁰⁹ 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.²¹⁰ 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.²¹¹ Including experiences in the international legal framework of children who belong to a somewhat more “dangerous” category – whose experiences do not

²⁰⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989; C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Columbia University Press, 2010, 18.

²⁰⁶ A.M. Watson, “Children Born of Wartime Rape: Rights and Representations”, *International Feminist Journal of Politics* 2007, 26.

²⁰⁷ A. Quennerstedt, “Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the “3 p’s”, *International Journal of Children’s Rights* 2010, 619.

²⁰⁸ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017, 162.

²⁰⁹ A.M. Watson, “Children Born of Wartime Rape: Rights and Representations”, *International Feminist Journal of Politics* 2007, 26.

²¹⁰ *Ibid.*

²¹¹ 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 A.M. Watson, “Children Born of Wartime Rape: Rights and Representations”, *International Feminist Journal of Politics* 2007, 26.

align with the idealised perception of “childhood” – can be presumed as being a threat to the existing societal order.²¹²

81. Human rights are said to be inalienable and universal, belonging to each individual irrespective of race, sex, culture, religion, age, birth or other status.²¹³ 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.²¹⁴ 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.²¹⁵ The representation, or lack thereof, of CBOW within the existing 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. Right to non-discrimination (art. 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”.*²¹⁶

82. **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.²¹⁷ Since many societies are still constructed in a firm patriarchal manner, patriarchal norms are resulting in the perception of the child taking on the paternal

²¹² Ibid.

²¹³ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 129.

²¹⁴ Ibid.

²¹⁵ Ibid, 131.

²¹⁶ Art. 2 Convention of the Rights of the Child.

²¹⁷ C. Ingvill Mochmann and S. Lee, “The human rights of children born of war: case analyses of past and present conflicts”, *Historical Social Research* 2010, 270; K. Theidon, “Hidden in Plain Sight: Children Born of Wartime Sexual Violence”, *Current Anthropology* 2015, 2

characteristics or the identity of the father.²¹⁸ 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.²¹⁹ This perceived association with the enemy can result in the rejection of the child by their mothers, which consists as the most fundamental level of discrimination.²²⁰ 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.²²¹

83. **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.²²² 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.²²³ Bosnian Muslim women impregnated by a Serb would therefore bear a Serb baby, carrying the ethnicity of their perpetrator.²²⁴ In 2004, the UNICEF field office in Bosnia and Herzegovina assembled confidential case histories on CBOW within society, in which it appeared that 39 percent of the case data showed an initial rejection by one or more family members of the rape survivor or her new-born child.²²⁵ 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.²²⁶ 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*".²²⁷ Nowadays, more than twenty years after the conflict erupted, 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

²¹⁸ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 165.

²¹⁹ Ibid; J. Neenan, "Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict", *Report Women, Peace and Security*, London School of Economics, 2018, 31.

²²⁰ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 165.

²²¹ Ibid.

²²² K. Theidon, "Hidden in Plain Sight: Children Born of Wartime Sexual Violence", *Current Anthropology* 2015, 3.

²²³ T. Salzman, "Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia", *Human Rights Quarterly* 1998, 359/364.

²²⁴ S. Fisher, "Occupation of the Womb: Forced Impregnation as Genocide". *Duke Law Journal* 1996, 114.

²²⁵ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 27.

²²⁶ Ibid.

²²⁷ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 27.

“live on the margins of society”.²²⁸ 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”.²²⁹

84. **NORTHERN UGANDA** – Children born under LRA captivity in Northern Uganda are regarded as symbols of misfortune.²³⁰ 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).²³¹ 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 are trying to build up their lives after returning home from LRA captivity, by marrying new partners.²³² 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.²³³ 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.²³⁴ Evidence suggests, for instance, that in many homes CBOW are obliged to sleep on the ground, whereas non-CBOW are provided with mattresses.²³⁵ The same applies for the amount of food children get at home, resulting in CBOW receiving less food.²³⁶ The segregation within families and their maternal, and sibling, alienation is, in addition, combined with a deplorable economic situation (*infra* nr. 93).²³⁷
85. **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

²²⁸ 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”, 11 May 2018, available at: <https://news.un.org/en/story/2018/05/1009372>

²²⁹ 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, 4.

²³⁰ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 34.

²³¹ 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.

²³² 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.

²³³ T. Atim, D. Mazurana and A. Marshak, “Women survivors and their children born of wartime in northern Uganda”, *Disasters* 2018, s68.

²³⁴ 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.

²³⁵ *Ibid.*

²³⁶ *Ibid.*, 6.

²³⁷ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 35.

paramilitaries) or “*children of the green people*”, referring to the colour of the soldier’s uniform.²³⁸ 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.²³⁹ 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”.²⁴⁰

86. 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.²⁴¹ Anecdotal evidence suggests that CBOW born to young indigenous mothers within an indigenous group can face possible rejection by their clan.²⁴² The suffered rejection stems from not being considered as “true” members of the clan by looking visibly different due to their mixed racial biological background.²⁴³ 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.²⁴⁴ 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.²⁴⁵ 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.²⁴⁶

²³⁸ Ibid, 34.

²³⁹ Ibid.

²⁴⁰ T. Sanchez Parra, “The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia”, *International Journal of Transitional Justice* 2017, 13.

²⁴¹ Ibid, ftnt.29.

²⁴² J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 36.

²⁴³ Ibid.

²⁴⁴ Children Change Colombia, “*Sexual and gender-based violence, including conflict-related sexual violence*”, available at: <https://www.childrenchange colombia.org/en/what-we-do/sexual-violence>

²⁴⁵ Ibid.

²⁴⁶ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined fourth and fifth periodic reports of Colombia*, 6 March 2015, 5.

87. Although the widespread institutional invisibility of CBOW in Colombia, the “*Victim’s and Land Restitution Law*”²⁴⁷ (the Victims Law 1448), adopted in 2011, is the first legal document that recognizes children born of war in the definition of its victims, next to forced disappearances, orphans or child combatants.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰ As of 2018, no reparations were yet granted to CBOW under the Victims Law 1448.²⁵¹ 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.²⁵²
88. **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 nationality (see *infra* nr. 101) or no right to education (see *infra* 111); the Rohingya are a people without rights.²⁵³ 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*

²⁴⁷ 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*”, 2012, available at: <https://www.refworld.org/pdfid/4f99029f2.pdf>

²⁴⁸ T. Sanchez Parra, “The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia”, *International Journal of Transitional Justice* 2017, 7.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ MADRE, “Charo Mina-Rojas Speaks at UN Security Council on Children Born of Rape”, *MADRE*, 2 November 2018, available at: <https://www.madre.org/press-publications/blog-post/charo-mina-rojas-speaks-un-security-council-children-born-rape>

²⁵² J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 36.

²⁵³ Amnesty International UK, *Myanmar’s apartheid campaign against the Rohingya*, 18 May 2020, available at: <https://www.amnesty.org.uk/myanmar-apartheid-campaign-against-rohingya-burma>

Rohingya children)” and urges Myanmar to implement necessary legislative changes to end discrimination on the basis of ethnicity.²⁵⁴ In the recent report of the UN Human Rights 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.²⁵⁵ A mother described her newborn child, born out of rape, as “*not our child – a lost child*”.²⁵⁶

89. **CONCLUSION** – The empirical evidence from the four case studies suggests one clear fact: CBOW suffer systematic discrimination solely based on their identity, regardless in 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.

§3. Right to life, survival and development (art. 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”.*²⁵⁷

90. **GENERAL** – The child’s right to life, survival and development is guaranteed by article 6 of the CRC. Although the most fundamental human right, the right to life is often affected in the case of CBOW.²⁵⁸ Women who were the victim 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, which can lead to botched abortions.²⁵⁹ Little to no information exists, however, on the possible health impact of botched abortions on children carried to term.²⁶⁰ In addition, reproductive health such as adequate assistance during childbirth is in many times lacking,

²⁵⁴ 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, 7.

²⁵⁵ Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts* (A/HRC/42/CRP.4), 22th August 2019, 49.

²⁵⁶ Ibid.

²⁵⁷ Art. 6 Convention of the Rights of the Child

²⁵⁸ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 163.

²⁵⁹ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 24.

²⁶⁰ Ibid.

because women are giving birth in captivity or they wish to keep the pregnancy a secret out of fear of shame and stigmatisation.²⁶¹ CBOW are at a particular risk of infanticide, which poses a significant threat to the lives of these children.²⁶² Even though no verifiable statistics are being kept on the prevalence of these incidents, it appears from anecdotal evidence²⁶³ and certain reports on gender-based violence in conflict²⁶⁴ that infanticide can occur as a consequence of wartime rape-related pregnancy.²⁶⁵ 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.²⁶⁶ 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 in the following:

*“Mothers kill for reasons that are rooted in their victimhood in war itself, mostly in the traumatising as a result of war rape, exacerbated by the stigmatisation and marginalisation following rape, pregnancy and motherhood of a child born of war rape.”*²⁶⁷

91. Art. 6 CRC protects more than solely the child’s life; it guarantees the child’s survival and development. Article 6 §2 CRC should be interpreted in a positive and proactive way, affecting all areas of the child’s life.²⁶⁸ States are namely obliged to *“create an environment that respects human dignity and ensures the holistic development of every child”*.²⁶⁹ The severe economic marginalisation and hardship that CBOW tend to suffer²⁷⁰, could for these reasons be seen as a violation of article 6 §2 CRC. The child’s fate is inextricably linked to that of their mother²⁷¹, whose status as a raped woman – who deliberately made the choice to raise the “enemy’s” child

²⁶¹ Ibid.

²⁶² S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 163.

²⁶³ Story of a Kosovar woman, who was raped by Serb armed forces, snapping the neck of her new-born 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*, 16th April 2000, available at: <https://www.theguardian.com/world/2000/apr/16/balkans>

²⁶⁴ World Health Organization, *Reproductive health during conflict and displacement*, WHO/RHR/00.13, 4th April 2000, 42, 113, 114, 130.

²⁶⁵ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 25.

²⁶⁶ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 164.

²⁶⁷ Ibid.

²⁶⁸ E. Sutherland, “The Child’s Right to Life, Survival and Development: Evolution and Progress”, *Stellenbosch Law Review* 2015, 282.

²⁶⁹ 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, 3.

²⁷⁰ B. Rohwerder, “Reintegration of Children Born of Wartime Rape”, *Institute of Development Studies* 2019, 5.

²⁷¹ V. Ladisch, “From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda”, *ICTJ* 2015, 17.

– in a war-torn society is one of shame, humiliation and stigma.²⁷² 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.²⁷³ Single woman households can, in addition, face difficulties in generating sufficient income to support themselves.²⁷⁴ Without adequate resources and lack of social support, including the lack of childcare, women can be impeded in their chances to find adequate skill – or job training, resorting them to other, more dangerous ways of survival.²⁷⁵ 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”.*²⁷⁶

92. **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 thereof died by infanticide, abuse or neglect.²⁷⁷ However, in the aftermath of the Bosnian war, it appeared, based on anecdotal evidence that the incidents of infanticide occurred to a disproportionately high level.²⁷⁸ The few case studies collected by UNICEF in 2004 regarding CBOW within Bosnian society (see *supra* nr. 83) included two cases of attempted infanticide, where one mother threw her new-born baby into the Sava river and the other mother tried to poison the baby and herself.²⁷⁹ In three other cases, infanticide was contemplated by the mothers as a “solution”.²⁸⁰ In comparison, a study conducted on infanticide in Croatia between 1989-2002 found the rate of neonaticide²⁸¹ to be estimated at eight in 100,000 or 0.008 percent.²⁸² In Bosnia and Herzegovina,

²⁷² C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 28.

²⁷³ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 157.

²⁷⁴ United Nations Security Council, *Report of the Secretary-General on Women, Peace and Security*, 16 October 2002, 2.

²⁷⁵ *Ibid.*

²⁷⁶ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 27.

²⁷⁷ *Ibid.*, 25.

²⁷⁸ B. Rohwerder, “Reintegration of Children Born of Wartime Rape”, *Institute of Development Studies* 2019, 5.

²⁷⁹ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, fn. 86; S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 157.

²⁸⁰ *Ibid.*

²⁸¹ The deliberate act of murdering one’s own child within the first 24 hours after birth.

²⁸² C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 25; S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 157.

however, it appeared out of the collected case histories that the percentage of attempted infanticide amounts to 8 percent (two out of 23 cases); and with regard to consideration of infanticide 22 percent (five out of 23 cases).²⁸³ 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.²⁸⁴

93. **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.²⁸⁵ Additionally, being born and growing up in the presence of a rebel group is resulting in daily exposure and subjection to violence, combat and a constant threat of death.²⁸⁶ Surviving life “in the bush” does not necessarily result, however, in a better post-war living situation due to the extreme socioeconomic marginalisation CBOW suffer within society afterwards.²⁸⁷ In Uganda’s patrilineal identity system, where the father is regarded as “everything”, children born out of wedlock are being placed in a severely disadvantaged situation and are perceived as an economic burden.²⁸⁸ Despite the absence of the fathers, they nevertheless still pass on their identity as LRA soldiers.²⁸⁹ 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.²⁹⁰ This situation is placing CBOW in an extremely precarious economic situation, since family land poses a crucial source of future livelihood.²⁹¹ 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.²⁹²
94. **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.²⁹³ Access to basic health services,

²⁸³ Ibid.

²⁸⁴ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 157.

²⁸⁵ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 27.

²⁸⁶ Ibid.

²⁸⁷ B. Rohwerder, “Reintegration of Children Born of Wartime Rape”, *Institute of Development Studies* 2019, 8.

²⁸⁸ V. Ladisch, “From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda”, *ICTJ* 2015, 17.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ 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.

²⁹² V. Ladisch, “From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda”, *ICTJ* 2015, 17.

²⁹³ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 28.

including reproductive health, are due to the context of armed conflict very limited which can result in health issues for the mother and her new-born baby.²⁹⁴ In addition, the presence of armed conflict is putting the lives of all children at risk every day.²⁹⁵

95. **ROHINGYA** – The conditions in which Rohingya mothers need to give birth to their new-born 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.²⁹⁶ It is estimated that 75 percent of Rohingya babies are born in unsafe conditions.²⁹⁷ Anecdotal evidence suggests that Rohingya families are afraid to seek reproductive healthcare, even in situations where pregnancy complications arise, due to the fear of sterilization or infanticide, based on the horror they experienced back in Myanmar.²⁹⁸ 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*”.²⁹⁹ 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.³⁰⁰ 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.³⁰¹ The lack of health facilities within the camps, are putting children at great risk of malnutrition and malaria, which in turn, is aggravated by floods in the monsoon season.³⁰²
96. **CONCLUSION** – From the evidence from the four above-mentioned case studies one conclusion can be made: the right to life, survival and development, protected by art. 6 of the CRC, is not protected in regard to CBOW. The particular risk of infanticide poses a serious threat to the lives

²⁹⁴ T. Sanchez Parra, “The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia”, *International Journal of Transitional Justice* 2017, 17.

²⁹⁵ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined fourth and fifth periodic reports of Colombia*, 6 March 2015, 6.

²⁹⁶ Save the Children, “*3 in 4 Rohingya Refugee Babies are Born in Unsanitary Bamboo Shelters*”, 3 June 2019, available at: <https://www.savethechildren.org/us/about-us/media-and-news/2019-press-releases/rohingya-refugee-babies-born-unsanitary-shelters>

²⁹⁷ Ibid.

²⁹⁸ Ibid.

²⁹⁹ Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts* (A/HRC/42/CRP.4), 22th August 2019, 16.

³⁰⁰ UN News, “*UN mobilizes in Rohingya camps to support babies born of rape; young mothers face stigma*”, 19 June 2018, available at: <https://news.un.org/en/story/2018/06/1012372>

³⁰¹ Save the Children, “*3 in 4 Rohingya Refugee Babies are Born in Unsanitary Bamboo Shelters*”, 3 June 2019, available at: <https://www.savethechildren.org/us/about-us/media-and-news/2019-press-releases/rohingya-refugee-babies-born-unsanitary-shelters>

³⁰² The Stateless Rohingya, “*Rohingyas face healthcare crisis in Myanmar*”, 2 July 2018, available at: <https://www.thestateless.com/2018/07/rohingyas-face-healthcare-crisis-in-myanmar.html>

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

§4. Right to a nationality (art. 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”.*³⁰³

97. **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.³⁰⁴ 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.³⁰⁵ 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.³⁰⁶ In the words of Grieg “*without citizenship the children are doomed to be a pariah in their birth country*”.³⁰⁷ In many situations, CBOW are not registered at birth due to a multitude of reasons.³⁰⁸ The collapse of the structures of 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.³⁰⁹ 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

³⁰³ Art. 7 Convention of the Rights of the Child.

³⁰⁴ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 32; S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 166.

³⁰⁵ Institute on Statelessness and Inclusion, *Addressing the right to a nationality through the Convention on the Rights of the Child*, June 2016, 2.

³⁰⁶ Ibid; S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 166.

³⁰⁷ K. Grieg, “The War Children of the World”, *War and Children Identity Project*, Bergen, 2001, 11.

³⁰⁸ 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.

³⁰⁹ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 166.

stigmatised and discriminated against.³¹⁰ An additional issue, which can increase the risk of CBOW becoming stateless, are the rules and practices in a State to confer nationality.³¹¹ 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.³¹² 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.³¹³

98. **BOSNIA AND HERZEGOVINA** – Both Bosnia and Croatia employed the practice of conferring nationality based upon the *jus sanguinis* principle.³¹⁴ This meant that children from Bosnian women, born in Croatia, were denied Croatian citizenship, remained stateless and were being denied the right to go to school.³¹⁵ It was only in September 1996 that this situation changed when the Bosnian government carried through the amendment to Article 4 of the citizenship law, altering the *jus sanguinis* principle.³¹⁶ This amendment made it possible to confer citizenship of Bosnia and 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.³¹⁷ 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.³¹⁸

³¹⁰ 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.

³¹¹ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 166.

³¹² UNHCR, *Good Practices Paper - Action 2: Ensuring that no child is born stateless*, 20 March 2017, 5.

³¹³ *Ibid*, 16.

³¹⁴ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 166.

³¹⁵ *Ibid*; C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 33.

³¹⁶ 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.

³¹⁷ C. Ingvill Mochmann and S. Lee, “The human rights of children born of war: case analyses of past and present conflicts”, *Historical Social Research* 2010, 284.

³¹⁸ 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.

99. **NORTHERN UGANDA**³¹⁹ – Birth registration is not a secured right for many children born in LRA captivity who do not know their father’s identity.³²⁰ 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 new-born child.³²¹ 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.³²² 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*”.³²³ 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 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.³²⁴ Having no birth certificate will make these children unable to enrol for and attend school, utilize their voting rights or have access to healthcare.³²⁵ 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.³²⁶ In addition, children born in LRA captivity are not always born on the territory of Uganda, yet can also 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.³²⁷
100. **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*

³¹⁹ 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, available at: <http://refugee-rights.org/quest-for-citizenship-the-story-of-the-maragoli/>

³²⁰ V. Ladisch, “From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda”, *ICTJ* 2015, 17.

³²¹ *Ibid.*

³²² *Ibid.*; Section 7, Births and Deaths Registration Act, Chapter 309 Laws of Uganda, October 1, 1973.

³²³ Section 11, Births and Deaths Registration Act, Chapter 309 Laws of Uganda, October 1, 1973.

³²⁴ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 35.

³²⁵ *Ibid.*

³²⁶ V. Ladisch, “From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda”, *ICTJ* 2015, 17.

³²⁷ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 35.

sanguinis principle.³²⁸ 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.³²⁹ 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.

101. **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 2017.³³⁰ Eligibility for citizenship in Myanmar is primarily based on ethnicity and race, a discriminatory restrictive form of the *jus sanguinis* principle.³³¹ The 1982 Citizenship Law is severely discriminatory since those who do not belong to the 135 listed national ethnic groups, cannot acquire citizenship.³³² A system of hierarchy is put in place, with different rights and rules relating to different categories of people.³³³ Rohingya people are not listed as one of the 135 national ethnic groups, which resulted in the arbitrary deprivation of their nationality, after the adoption of the 1982 Citizenship Law.³³⁴ 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.³³⁵ Children born of stateless parents – such as the Rohingya – will be automatically stateless and are therefore deprived at birth from accessing their human rights.³³⁶ 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.³³⁷ 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*

³²⁸ C. Escobar, “Report on Citizenship Law: Colombia”, *EUDO Citizenship Observatory* 2015, 10.

³²⁹ Dual Citizenship Colombia, available at: <https://www.dualcitizenship.com/countries/colombia.html>

³³⁰ Norwegian Refugee Council, *A Gender Analysis of the Right to a Nationality in Myanmar*, March 2018, 2.

³³¹ *Ibid*, 5.

³³² European Network on Statelessness, *Statelessness in Myanmar – Country Position Paper*, May 2019, 6.

³³³ *Ibid*, 5.

³³⁴ *Ibid*, 7.

³³⁵ Section 5, *Burma Citizenship Law*, 15 October 1982; *Ibid*.

³³⁶ Burmese Rohingya Organisation UK, *Myanmar’s 1982 Citizenship Law and Rohingya*, December 2014, 1, available at: <https://burmacampaign.org.uk/media/Myanmar%E2%80%99s-1982-Citizenship-Law-and-Rohingya.pdf>

³³⁷ Norwegian Refugee Council, *A Gender Analysis of the Right to a Nationality in Myanmar*, March 2018, iv.

stateless”, including “the large number of children, including Rohingya children, that remains unregistered”.³³⁸

102. 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.³³⁹ Bangladesh is registering Rohingya refugees as “*Forcibly Displaced Myanmar Nationals*”, denying their official refugee status and all the rights attached to it, placing Rohingya people in yet another legal limbo.³⁴⁰ Birth registration for newborn Rohingya babies in Cox’s Bazar, Bangladesh, is not taking place under the *de facto* refusal of Bangladesh.³⁴¹ 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.³⁴² 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.³⁴³ 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 twelve.³⁴⁴
103. 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.³⁴⁵ With no means to prove their identity, they are being stripped from their rights and are susceptible for further abuse and exploitation.
104. **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

³³⁸ 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.

³³⁹ Human Rights Watch, “*Bangladesh Is Not My Country*” - *The Plight of Rohingya Refugees from Myanmar*, 6th August 2018.

³⁴⁰ *Ibid.*

³⁴¹ A. de Chickera, “*Statelessness and identity in the Rohingya refugee crisis*”, October 2018, available at: <https://odihpn.org/magazine/statelessness-identity-rohingya-refugee-crisis/>

³⁴² N. Arnpriester, “*Saving Newborn Rohingya from a Legal Abyss*”, 10th August 2018, available at: <https://www.justiceinitiative.org/voices/saving-newborn-rohingya-legal-abyss>

³⁴³ *Ibid.*

³⁴⁴ UNHCR, “*Registration gives many Rohingya refugees identification for the first time*”, May 2019, available at: <https://www.unhcr.org/news/latest/2019/5/5cde66b84/registration-gives-rohingya-refugees-identification-first-time.html>

³⁴⁵ N. Arnpriester, “*Saving Newborn Rohingya from a Legal Abyss*”, 10th August 2018, available at: <https://www.justiceinitiative.org/voices/saving-newborn-rohingya-legal-abyss>

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.

§5. Right to education (art. 28 – 29)

Art. 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. [...]*³⁴⁶

Art. 29 – “States Parties agree that the education of the child shall be directed to:

*(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; [...]*³⁴⁷

105. **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.³⁴⁸ 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 on its turn is the key to lift oneself out of the generational cycles of poverty.³⁴⁹ Education is an empowerment right, enabling

³⁴⁶ Art. 28 Convention of the Rights of the Child.

³⁴⁷ Art. 29 Convention of the Rights of the Child.

³⁴⁸ 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, 1.

³⁴⁹ Human Rights Watch, *The Education Deficit*, 9th June 2016, available at: <https://www.hrw.org/report/2016/06/09/education-deficit/failures-protect-and-fulfill-right-education-through-global>

individuals to actively participate in society and exercise their civil and political rights.³⁵⁰ Article 29§1 CRC is adding a qualitative dimension to the right to education stipulated in article 28 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.³⁵¹

106. 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.³⁵² 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.³⁵³ 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.³⁵⁴ 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.³⁵⁵ Besides the necessity of being able to afford school fees, it is important that the school environment is one that feels safe and comfortable in order to fully enjoy their right to education.³⁵⁶ 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.³⁵⁷ 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.³⁵⁸

³⁵⁰ Ibid.

³⁵¹ UN Committee on the Rights of the Child (CRC), *General comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, 2.

³⁵² J. Hogwood, C. Mushashi, S. Jones and C. Auerbach, “I Learned Who I Am”: Young People Born From Genocide Rape in Rwanda and Their Experiences of Disclosure”, *Journal of Adolescent Research* 2018, 565; B. Rohwerder, “Reintegration of Children Born of Wartime Rape”, *Institute of Development Studies* 2019, 13.

³⁵³ Ibid.

³⁵⁴ S. Kahn and M. Denov, “We are children like others”: Pathways to mental health and healing for children born of genocidal rape in Rwanda”, *Transcultural Psychiatry* 2019, 517.

³⁵⁵ Ibid.

³⁵⁶ B. Rohwerder, “Reintegration of Children Born of Wartime Rape”, *Institute of Development Studies* 2019, 13.

³⁵⁷ S. Kahn and M. Denov, “We are children like others”: Pathways to mental health and healing for children born of genocidal rape in Rwanda”, *Transcultural Psychiatry* 2019, 517.

³⁵⁸ Ibid.

107. **BOSNIA AND HERZEGOVINA** – Due to the inattention to Bosnia’s children of war since the conflict has ceased³⁵⁹, there exist 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 (see *supra* nr. 98).³⁶⁰ 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.³⁶¹ 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.³⁶² 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.³⁶³
108. **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.³⁶⁴ 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*”.³⁶⁵ 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.³⁶⁶ 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*”.³⁶⁷ As a result, many CBOW cannot attend school properly and are in lower grades

³⁵⁹ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 128.

³⁶⁰ C. Carpenter, *Forgetting Children Born of War : Setting the Human Rights Agenda in Bosnia and Beyond*, Colombia University Press, 2010, 33.

³⁶¹ S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 169.

³⁶² *Ibid.*

³⁶³ 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, 10.

³⁶⁴ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 41.

³⁶⁵ V. Ladisch, “From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda”, *ICTJ* 2015, 19.

³⁶⁶ *Ibid.*

³⁶⁷ 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.

than their age since their fees are not paid regularly.³⁶⁸ 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.³⁶⁹ 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.³⁷⁰ 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.³⁷¹ School sponsorship is regarded by the mothers as what would be the most helpful in breaking the cycle of obstacles facing CBOW.³⁷² 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.³⁷³

109. **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.³⁷⁴ The discrimination and stigmatisation CBOW suffer in Colombia (see *supra* nr. 85), can lead us to believe their right to education is thence 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.

³⁶⁸ Ibid, 6.

³⁶⁹ V. Ladisch, “From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda”, *ICTJ* 2015, 19.

³⁷⁰ Ibid.

³⁷¹ 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.

³⁷² 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.

³⁷³ Ibid.

³⁷⁴ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined fourth and fifth periodic reports of Colombia*, 6 March 2015, 5/11.

110. 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.³⁷⁵ 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.³⁷⁶ It appears from the survey regarding the prevalence of sexual violence between 2001-2009 in Colombia, that the majority of the victims of forced pregnancies are adolescent girls.³⁷⁷ It is estimated that of the total victims of forced pregnancies, 39,15 percent of the women are between the ages of 15-24.³⁷⁸ 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.
111. **ROHINGYA** – Almost 400,000 Rohingya children live in the refugee settlements in Bangladesh, after they were forced to flee in August 2017.³⁷⁹ 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 (see *supra* 88). 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.³⁸⁰ 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.³⁸¹ Simultaneously, Myanmar is refusing to recognize their school curriculum when utilised in the refugee camps, resulting in a destructive education crisis for a new and “lost” generation of Rohingya children.³⁸² To provide some sort of education, humanitarian actors

³⁷⁵ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 37.

³⁷⁶ Ibid; See United Nations Population Fund, “Adolescent pregnancy”, available at: <https://www.unfpa.org/adolescent-pregnancy>

³⁷⁷ Oxfam, “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, 2011, 18.

³⁷⁸ 39,15 percent are 15-24 of age / 27,43 percent are 25-34 of age / 33,41 percent are 35-44 of age, see Ibid.

³⁷⁹ Human Rights Watch, *A Step Forward for 10,000 Rohingya Refugee Children*, 29th January 2020, available at: <https://www.hrw.org/news/2020/01/29/step-forward-10000-rohingya-refugee-children>

³⁸⁰ Human Rights Watch, “*Are We Not Human?*” *Denial of Education for Rohingya Refugee Children in Bangladesh*, 3th December 2019, available at <https://www.hrw.org/report/2019/12/04/are-we-not-human/denial-education-rohingya-refugee-children-bangladesh>

³⁸¹ Ibid.

³⁸² Ibid; Amnesty International, *A 'lost generation' of Rohingya children will have nowhere to go*, 24th January 2020, available at: <https://www.amnesty.org/en/latest/news/2020/01/a-lost-generation-of-rohingya-children-will-have-nowhere-to-go/>

established “learning centres” within the camps.³⁸³ Without electricity, desk or chairs, these centres are, however, not suitable in providing quality education. In 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.³⁸⁴

112. 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.³⁸⁵ The education crisis would, however, not be over in case 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.³⁸⁶ 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*”.³⁸⁷
113. **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 article 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.

³⁸³ Human Rights Watch, *A Step Forward for 10,000 Rohingya Refugee Children*, 29th January 2020, available at: <https://www.hrw.org/news/2020/01/29/step-forward-10000-rohingya-refugee-children>

³⁸⁴ UNICEF, *Expanding education for Rohingya refugee children in Bangladesh*, 10 February 2020, available at: <https://www.unicef.org/bangladesh/en/stories/expanding-education-rohingya-refugee-children-bangladesh>

³⁸⁵ Human Rights Watch, *A Step Forward for 10,000 Rohingya Refugee Children*, 29th January 2020, available at: <https://www.hrw.org/news/2020/01/29/step-forward-10000-rohingya-refugee-children>

³⁸⁶ Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts* (A/HRC/42/CRP.4), 22th August 2019, 15.

³⁸⁷ Human Rights Watch, “*Are We Not Human?*” *Denial of Education for Rohingya Refugee Children in Bangladesh*, 3rd December 2019, available at <https://www.hrw.org/report/2019/12/04/are-we-not-human/denial-education-rohingya-refugee-children-bangladesh>

CHAPTER III: CLOSING THE GAP WITHIN THE HUMAN RIGHTS PROTECTION FRAMEWORK

§1. General

114. 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.

§2. Adoption as special category of concern

115. 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.³⁸⁸ 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.
116. 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.³⁸⁹ 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.³⁹⁰ 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 the following:

³⁸⁸ 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*, Philadelphia, University of Pennsylvania Press, 2009, 26.

³⁸⁹ T. Sanchez Parra, “The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia”, *International Journal of Transitional Justice* 2017, 6.

³⁹⁰ 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*, Philadelphia, University of Pennsylvania Press, 2009, 26.

“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”.³⁹¹

117. 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.³⁹² 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.³⁹³

§3. Adoption of special protection measures by the State

118. The failure of the State to respect and protect the human rights for CBOW in an adequate way, constitutes a significant part of the protection gap that needs to be remedied.³⁹⁴ Even though the State is, in most cases, not the primary abuser, it is still responsible as secondary actor since 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.³⁹⁵
119. In the described global picture, significant rights enshrined in the CRC are compromised or not realised at all for CBOW. The stigmatisation and discrimination is affecting every aspect of their lives, strongly impeding the enjoyment of their human rights.³⁹⁶ 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”*.³⁹⁷ 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

³⁹¹ Ibid, 28.

³⁹² T. Sanchez Parra, “The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia”, *International Journal of Transitional Justice* 2017, 6.

³⁹³ Ibid.

³⁹⁴ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 30.

³⁹⁵ Ibid; 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, 14.

³⁹⁶ Ibid.

³⁹⁷ 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, 4

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.³⁹⁸

§4. Right to reparation

120. Victims³⁹⁹ 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.⁴⁰⁰ The right to reparation, codified in international human rights law⁴⁰¹ and humanitarian law⁴⁰² in various legal instruments, is essential in amending the disadvantaged position that CBOW can find themselves in.⁴⁰³ 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.⁴⁰⁴
121. The reparation offered must be in proportion to the gravity of the harm suffered and can constitute in a multitude of forms such as restitutions⁴⁰⁵, compensation⁴⁰⁶, satisfaction⁴⁰⁷, rehabilitation⁴⁰⁸

³⁹⁸ Ibid.

³⁹⁹ “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” in 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.

⁴⁰⁰ UN, “Reparations for Conflict-Related Sexual Violence”, *Guidance Note of the Secretary-General*, June 2014, 3.

⁴⁰¹ Article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 39 of the Convention on the Rights of the Child, article 24 of the International Convention for the Protection of All Persons from Enforced Disappearances.

⁴⁰² Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 and articles 68 and 75 of the Rome Statute of the International Criminal Court.

⁴⁰³ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 31.

⁴⁰⁴ UN, “Reparations for Conflict-Related Sexual Violence”, *Guidance Note of the Secretary-General*, June 2014, 5.

⁴⁰⁵ Restitution can redress the following harms suffered by conflict-related sexual violence survivors: loss of housing, loss of schooling, education or employment.

⁴⁰⁶ Compensation can redress moral and material damage that was suffered.

⁴⁰⁷ Satisfaction can consist of apologies, building of monuments and commemorations.

⁴⁰⁸ 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.

and guarantees of non-repetition⁴⁰⁹.⁴¹⁰ In addition, it is of extreme importance that the restitution offered ascends the gender hierarchy, patterns of female subordination and pre-existing gender inequalities (*supra* nr. 36), all of which are contributing to the perpetuation of sexual violence, and in most cases, already predate the conflict.⁴¹¹ 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 effect.⁴¹² 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.⁴¹³

§5. Eradication of gender discrimination

122. The stigmatisation of CBOW in every part of the globe can only be reduced when gender discrimination is being tackled and eradicated. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979 and with currently 189 Parties, was the first international agreement praising women's rights as human rights.⁴¹⁴ The aim of CEDAW is stipulated in article 2 and states the following:

*“...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 [...]”*⁴¹⁵

123. The failure of the State to respect and protect women's rights stands in direct correlation with the stigma CBOW suffer in their everyday lives.⁴¹⁶ First of all – as stated above (*supra* nr.45) – a raped woman will be seen in many societies as “damaged goods”, erasing her identity through the act of rape.⁴¹⁷ Her child born as a result from it, will go on to always be directly identified with their perpetrator father as a result of gender-discriminatory, patriarchal and patrilineal traditions

⁴⁰⁹ Guarantees of non-repetition should be focussed on the causes of the sexual violence perpetrated, in order to prevent it in the future.

⁴¹⁰ See UN, “Reparations for Conflict-Related Sexual Violence”, *Guidance Note of the Secretary-General*, June 2014, 15-19.

⁴¹¹ *Ibid*, 8.

⁴¹² UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, (A/HRC/14/22), 23 April 2010, 11.

⁴¹³ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 31.

⁴¹⁴ L.B. Mullins, “CEDAW: The Challenges of Enshrining Women's Equality in International Law”, *Public Integrity* 2018, 257.

⁴¹⁵ Article 2 CEDAW.

⁴¹⁶ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 31.

⁴¹⁷ *Ibid*; S. Eaton, “Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime”, *Georgetown Journal of International Law* 2003-04, 885.

of understanding a child's identity through their father's lineage.⁴¹⁸ A clear result of these 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 (*supra* nr. 97).⁴¹⁹ However, not only discriminatory laws are barriers to eradicating gender discrimination, but also particular social and cultural patterns of conduct are posing a threat to achieving gender equality.⁴²⁰ 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 [...]”*⁴²¹

124. 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.

⁴¹⁸ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 31; S. Lee, *Children Born of War in the Twentieth Century*, Manchester University Press, 2017. 165.

⁴¹⁹ *Ibid.*

⁴²⁰ J. Neenan, “Closing the protection gap for children born of war – Addressing stigmatisation and the intergenerational impact of sexual violence in conflict”, *Report Women, Peace and Security*, London School of Economics, 2018, 31.

⁴²¹ Article 5(a) CEDAW.

CONCLUSION

125. “What are the main violations of the human rights of Children Born of Wartime Rape on the basis of the United Nations Convention on the Rights of the Child?” In order to fully explore this question, this research began with tackling the root cause of the issue: conflict-related sexual violence.
126. 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 are 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 is stepping away from the classical explanations of patriarchy, opportunity or sexual desire as a cause of CRSV, and is focusing 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.
127. 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 United Nations Convention on the Rights of the Child (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.

128. 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 CRC – 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 build, 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 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 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 article 28-29 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.

129. 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.

130. This study has shown that the rights of children born of wartime rape 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 children born of wartime rape, a topic that deserves a worthy place on the international agenda.

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