

THE PLIGHT OF CHILDREN BORN OF CONFLICT-RELATED SEXUAL VIOLENCE AND THE NEED FOR THEIR HUMAN RIGHTS AWAKENING

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Behind all law is someone's story: someone whose blood, if you read closely, leaks through the lines... The question... is whose experience grounds what law?
Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*

ABSTRACT

Far beyond the commission of the act of violence itself, conflict-related sexual violence (CRSV) reverberates through generations – in the former Yugoslavia and Rwanda during the 1990s, tens of thousands of children were born of CRSV; and children continue to be born in Iraq, Nigeria, Colombia, DRC, Uganda... Dehumanising names for children conceived as a result of CRSV – ‘children of shame’, ‘monster babies’, ‘dust of life’ – are imperfectly perfect reflections of the plight of these children. This article argues that this vulnerable group urgently requires due consideration, specific measures, targeted reparations, and community initiatives. It is high time for the awakening of the rights of children born of CRSV.

Keywords: conflict-related sexual violence; children born of conflict-related sexual violence; international human rights law; children's rights; victimhood; stigmatisation; reparations; community engagement

INTRODUCTION

In times of armed conflicts, sexual violence becomes pervasive. This phenomenon is hardly new and dates back to Ancient Greek and Roman wars.¹ In the Democratic Republic of Congo (DRC), the prevalence of sexual violence has been estimated to be 12% among women, and the prevalence of sexual violence-related pregnancies to be between 6% and 17% among sexual violence survivors.² Against this backdrop, over the past decades, there has been increased international attention to conflict-related sexual violence (CRSV). Current international documents reflect this development; however, this article argues that the plight of children conceived as a result of CRSV requires further urgent attention. They number in the thousands after protracted conflicts, such as in Bosnia and Herzegovina, Rwanda, Colombia, the Republic of Iraq, Nigeria, and the Syrian Arab Republic. Marginalisation and an uncertain legal status leave many children stateless, in legal limbo, and susceptible to recruitment, and exploitation.³

¹ Jeanne Ward and Mendy Marsh, *Sexual Violence Against Women and Girls in War and its Aftermath: Realities, Responses and Required Resources* (UNFPA, 2006), 3.

² See Elisa Van Ee and Jorin Blokland. “Bad Blood or My Blood: A Qualitative Study into the Dimensions of Interventions for Mothers with Children Born of Sexual Violence,” *International Journal of Environmental Research and Public Health*, 16(23):4810 (2019), doi:10.3390/ijerph16234810.

³ See “Current Trends and Emerging Concerns,” United Nations Office of the Special Representative of the Secretary General on Sexual Violence in Conflict <https://www.un.org/sexualviolenceinconflict/current-trends-and-emerging-concerns/> [accessed April 29 2020].

In the first chapter, CRSV and its fundamental intergenerational implications are explored. It is argued that an approach, combining the needs of children born of CRSV and those of their mothers, is necessary for the healing process. The second and third chapters articulate this argument in more detail, and the plight of these children in both practical and legal terms is explored. The subsequent chapter demonstrates that States should provide redress for the plight of children born of CRSV and explores modalities of appropriate reparations. It is argued that while reparation is about seeking justice for these children and accountability, such processes should involve more than the outcomes of judicially based proceedings;⁴ and finally that any measures of targeted reparations should be complemented by locally generated reparative actions. Without this holistic support, mothers and their children born of CRSV are set on a trajectory of poverty, discrimination, violence, and many obstacles to living a life of dignity where their rights are respected.⁵

1. FRAMING CONFLICT-RELATED SEXUAL VIOLENCE (CRSV) AND ITS LINKAGE WITH CHILDREN BORN OF CRSV

CRSV is omnipresent; it is particularly rampant in the Democratic Republic of Congo (DRC), the Sudan, the Central African Republic, the Syrian Arab Republic, Libya, and Nigeria.⁶ This happens unabated and with impunity, although sexual violence is absolutely prohibited under international law.

In the *Akayesu case*, the International Criminal Tribunal for Rwanda (ICTR) Trial Chamber famously held that sexual violence is “*any act of a sexual nature which is committed on a person under circumstances which are coercive*”.⁷ “As for the CRSV, it refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict.”⁸ The widespread occurrence of CRSV can be explained by several reasons – climate of impunity, absence of clear instructions prohibiting CRSV, the proliferation of small arms and light weapons, increased vulnerabilities (IDPs, migrants, widows, etc.), destruction of community ties and the lack of individual coping mechanisms. Framing CRSV further requires paying attention to the drivers of this phenomenon which often have no relation to sexual desire, but are instead linked to spreading terror, dominance, power, warfare

⁴ Dyan Mazurana, and Christopher Carlson, Children and Reparation: Past Lessons and New Directions, (Innocenti Working Paper, UNICEF, 2010). https://www.unicef-irc.org/publications/pdf/iwp_2010_o8.pdf, 1.

⁵ See “Opening Remarks of Special Representative on Sexual Violence Pramila Patten, Commemoration of the International Day for the Elimination of Sexual Violence in Conflict,” United Nations (19 June 2018) <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/> [accessed 29 April 2020].

⁶ See United Nations, Security Council, Report of the Secretary-General on Conflict-Related Sexual Violence, S/2019/280 (March 29 2019).

⁷ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4, Judgment (September 2 1999), para. 688.

⁸ See United Nations, Security Council, Report of the Secretary-General on Conflict-Related Sexual Violence, para. 4.

strategy, and reprisals.⁹

Given the alarming extent of devastation incurred by this crime, contemporary International Humanitarian Law (IHL) treaties prohibit sexual violence in both international and non-international armed conflicts.¹⁰ This is done in several ways: rape is either expressly prohibited¹¹ or prohibition is implicit in other provisions, *inter alia*, the prohibitions of outrages upon personal dignity, indecent assault¹², and in those intended to ensure respect for persons and honour¹³. On the other hand, human rights law (HRL) applies at all times.¹⁴ While a limited number of HRL documents¹⁵ refer specifically to sexual violence, the *jus cogens* prohibition of torture or cruel, inhuman or degrading treatment or punishment provides a firm basis to prohibit virtually all forms of sexual violence at all times.¹⁶ Taking this framework into account, it comes as no surprise that sexual violence can give rise to international crimes; depending on the circumstances, it may constitute a war crime¹⁷, crime against humanity¹⁸, or genocide¹⁹. In view of the above, there is no doubt that the provisions regarding prohibition and criminalisation of sexual violence in international law are robust.

Regardless of this framework, sexual violence in armed conflicts is pervasive and one significant 'result' of CRSV is invisible to the international community and national

⁹ Dara Kay Cohen, Amelia Hoover Green and Elisabeth Jean Wood, *Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward* (Special Report of the United States Institute of Peace No.323, 2013), <https://www.usip.org/publications/2013/02/wartime-sexual-violence-misconceptions-implications-and-ways-forward>, 6 [accessed 21.04.2020].

¹⁰ Prohibition is likewise established in customary IHL; see Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. 1: Rules, (ICRC, Cambridge University Press, 2005), rule 93.

¹¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12 1949, 75 UNTS 85 [GC II], art 27; Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8 1977, 1125 UNTS 3 [P I], art 76(1).

¹² P I, arts 75(2)(b), 77(1); Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 [P II], art 4(2)(e).

¹³ Geneva Convention Relative to the Treatment of the Prisoners of War, August 12 1949, 75 UNTS 135, art 14 [GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, August 12 1949, 75 UNTS 287, art 3 [GV IV].

¹⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 1996, para. 25.

¹⁵ Convention on the Rights of the Child, November 20 1989, 1577 UNTS 3 [CRC], arts 19, 34; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, June 9 1994, art 3; United Nations General Assembly, Declaration on the Elimination of Violence against Women, (December 20 1993), A/RES/48/104; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (2014). See also United Nations, Security Council, Resolution 1325, S/RES/1325 (2000); United Nations, Security Council, Resolution 1820, S/RES/1820 (2008); United Nations, Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19, A/47/38 (1992); United Nations, Committee on the Elimination of Discrimination Against Women, General Recommendation No. 35, CEDAW/C/GC/35 (2017).

¹⁶ See Gloria Gaggioli, "Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law," *International Review of the Red Cross* 96 (2014): 521-524; *Aydin v. Turkey*, No. 57/1996/676/866, Judgment (September 25 1997).

¹⁷ Rome Statute of the International Criminal Court, July 17 1998, 2187 UNTS 3 [Rome Statute], arts 8(2)(b)(xxii), 8(2)(d)(vi).

¹⁸ Rome Statute, art 7(g).

¹⁹ Rome Statute, art 6(d).

action. In several conflicts, pregnancy is an unintended consequence of rape, while in others, like Darfur and former Yugoslavia,²⁰ it is employed as a tool to use women's bodies as 'biological weapons' to alter the demography of a region and to unravel existing kinship ties²¹. Regardless of the context, sexual violence can have a profound impact on the survivor, the community, and even the next generation. Research has shown that there is a negative impact of the experience of sexual violence of mothers on the well-being of their children.²² Despite these well-proven facts, children born of CRSV fall "outside the agenda", which is indeed problematic. Far beyond the immediate commission of the act of violence, CRSV reverberates through generations and failure to identify the needs of children born of CRSV neglects their victim mothers' needs too.²³ Power relations drive CRSV and the same driver fuels stigmatisation of the victim children. A more rigorous rights enforcement for children would likewise contribute towards *jus post bellum* in which the basic needs of victim women are met too. Accordingly, the author believes that there is a linkage between the failure to protect women's rights on the one hand and children born of CRSV on the other.

2. RISKS AND HARMS FACED BY CHILDREN BORN OF CRSV

There is no comprehensive data on the number of children born as a result of CRSV. According to estimates, tens of thousands of children were born in the midst of conflicts in the 1990s alone. Children have been and continue to be born as a result of CRSV in Colombia, Sierra Leone, DRC, Uganda, Peru, Iraq, Nigeria, etc.²⁴

Even though the status of children born of CRSV is informed by local contexts, stigmatisation through "naming" is a prevalent and universal phenomenon. Such names include 'genocidal children' (Rwanda), 'children of shame' (Kosovo), 'monster babies' (Nicaragua),²⁵ 'dust of life' (Vietnam), and 'rebel children' (Uganda).²⁶ "Naming" is invariably followed by "doing" - stigmatisation compromises the human rights of these children in several ways. It is unfortunately true that *"the children...become the symbol of the trauma the nation as*

²⁰ BBC News. "Darfur war breeds "dirty babies"" (December 15 2004) <http://news.bbc.co.uk/1/hi/world/africa/4099601.stm> [accessed April 29 2020].

²¹ See United Nations, Security Council, Report of the Secretary-General on Conflict-Related Sexual Violence, S/2016/361 (April 20 2016), para. 14.

²² See Elisa Van Ee and Jorin Blokland. "Bad Blood or My Blood: A Qualitative Study into the Dimensions of Interventions for Mothers with Children Born of Sexual Violence"; United Nations, Security Council, Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, S/1994/674 (1994).

²³ Charli R. Carpenter, Forgetting Children Born of War, Setting the Human Rights Agenda in Bosnia and Beyond, (Columbia University Press, 2010), 99-126.

²⁴ Kimberly Theidon, "Hidden in Plain Sight: Children Born of Wartime Sexual Violence," *Current Anthropology* 56(12) (2015):191.

²⁵ Patricia Weitsman, "The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda," *Human Rights Quarterly* 30(3) (2008):561-578.

²⁶ Kimberly Theidon, "Hidden in Plain Sight: Children Born of Wartime Sexual Violence":191-200.

*a whole went through, and society prefers not to acknowledge their needs*²⁷. Children born of CRSV are generally deprived of the fundamental human rights guaranteed to children, such as the right to survival, the right to be protected from discrimination, the right to a nationality, and identity.²⁸ Hence, these children face harm concerning their physical security and health, shaped by psychological, social, economic, legal, and cultural dimensions. One of the most alarming abuses that such children may face is infanticide - a violation of infants' survival rights under Article 6(2) of the CRC. Some babies born of systematic rape campaigns in the former Yugoslavia were even killed;²⁹ the same is true for Rwandan children.³⁰ In some instances, children born of CRSV may become stateless, as has been the case in Croatia - a phenomenon that impacts on the availability of social benefits within a State, such as education and health services.³¹

This brief analysis and numerous cases indicate that the failure to take concrete measures to protect the rights of children under such horrendous circumstances might condemn children and their mothers to lifelong misery. Two recent examples of the dire needs of children born of CRSV are presented below.

2.1. Children born of CRSV associated with Boko Haram in Northeast Nigeria

Sexual violence is a characteristic of the ongoing insurgency in northeast Nigeria, during which hundreds of women and girls have been raped by fighters belonging to Jama'atul ahl al-sunnah li da'awati wal jihad (JAS), known globally as Boko Haram.³² JAS construes women as the bearers of its future despite its brutality toward them. The consequence is a strategic plan for procreation of a new generation of children raised through the cyclical constellation of mass rape of women.³³ Subsequently, many of the women and girls became pregnant as a result of rape.³⁴

²⁷ Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building* (UNIFEM, 2002), <https://www.unfpa.org/sites/default/files/pub-pdf/3F71081FF391653DC1256C69003170E9-unicef-WomenWarPeace.pdf>, 15 [accessed 23.04.2020].

²⁸ See Charli Carpenter et al. *Protecting Children Born of Sexual Violence and Exploitation in Conflict Zones: Existing Practice and Knowledge Gaps* (University of Pittsburgh, Ford Institute of Human Security, 2005), <https://gsdrc.org/document-library/protecting-children-born-of-sexual-violence-and-exploitation-in-conflict-zones-existing-practice-and-knowledge-gaps/.4.ff> [accessed 23.04.2020].

²⁹ See Catherine N. Niarchos, "Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia," *Human Rights Quarterly* 17(4) (1995):649-690.

³⁰ Bianfer Nowrojee, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, (Human Rights Watch, 1996), https://www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf [accessed 23.04.2020].

³¹ Charli Carpenter et al. *Protecting Children Born of Sexual Violence and Exploitation in Conflict Zones*, 7.

³² See "Nigeria," United Nations Office of the Special Representative of the Secretary General on Sexual Violence in Conflict <https://www.un.org/sexualviolenceinconflict/countries/nigeria/> [accessed 30.04.2020].

³³ Oriola B.Temitope, "Unwilling Cocoons": Boko Haram's War Against Women," *Studies in Conflict & Terrorism* 40(2) (2017): 99.

³⁴ UNICEF, *Bad blood: perceptions of children born of conflict-related sexual violence and women and girls associated with Boko Haram in northeast Nigeria* (2016), https://www.international-alert.org/sites/default/files/Nigeria_BadBlood_EN_2016.pdf, 6 [accessed 30.04.2020].

Many local people believe that the children conceived as a result of sexual violence by JAS members will become the next generation of fighters, as they carry the violent characteristics of their biological fathers. Many perceive them as being partly responsible for the violence and losses suffered by entire communities during the insurgency. They are deemed “hyenas among dogs”, as one community leader described them. As a result, children and newborns as well as their mothers are being increasingly ostracised and are at risk of further violence. It is unlikely that such fears and suspicion will decrease. These perceptions place the children at risk of rejection, abandonment, discrimination, and potential violence.³⁵

2.2. Children of Yazidi Women Fathered by ISIL Fighters

The Islamic State of Iraq and the Levant (ISIL) raped women pursuant to a plan of self-perpetuation aimed at transmitting their ideology to a new generation who can be raised in their own image.³⁶

The hundreds of Yazidi women who were captured, raped, and gave birth to children of ISIL members have been subsequently faced with a choice between Yazidi society on one hand and their children on the other. The mothers who chose to stay with their children bear the burden of the trauma of enslavement and rape, along with the stigma and shame of wishing to care for their ‘Daesh’ children.³⁷

Moreover, the Yazidi Spiritual Council, the supreme body emitting binding religious decisions for Yazidis, stated in 2019 that children born to Yazidi mothers from the rape of ISIL members, “*would not be welcomed as part of the Yazidi community*”.³⁸ The situation is complicated by the fact that both mother and father must be Yazidi for a child to be considered Yazidi, and under Iraqi law, a child born from a Muslim father will be considered Muslim regardless of the mother’s identity, with no exceptions for rape.³⁹

It can be said that current Iraqi policies do not address the needs of women and their children born as a result of ISIL rape; this situation has devastating effects on the basic rights of the children such as the right to life, right to health, right to a nationality, etc.⁴⁰

3. THE HUMAN RIGHTS DIMENSION OF THE DEBATE

The patterns illustrated in the preceding chapter are highly problematic and run counter to children’s rights laid down in international and regional instruments.

³⁵ Ibid., 9-15.

³⁶ United Nations, Security Council, Report of the Secretary-General on Conflict-Related Sexual Violence, S/2016/361 (April 20 2016), para. 14.

³⁷ Free Yazidi Foundation, Yazidi Children Born from Rape, Rights of Yazidi Women (2019), <https://www.freeyazidi.org/wp-content/uploads/FYFstatement-Yazidi-children-and-Yazidi-womens-rights.pdf>.

³⁸ “Yazidis Divided Over Children Born of IS Rape,” VOA News (April 2019) <https://www.voanews.com/united-states/extremism-watch/yazidis-divided-over-children-bornrape>. [accessed 30.04.2020].

³⁹ Ibid.

⁴⁰ See “Children of the Caliphate, What to Do About Kids Born Under ISIS”, Human Rights Watch (November 2016) <https://www.hrw.org/news/2016/11/23/children-caliphate> [accessed April 30 2020].

The Convention on the Rights of the Child (CRC) articulates a wide variety of children's rights, including rights linked to their civil status such as the right to a name, the right to acquire a nationality and the right to preserve one's identity⁴¹. The Convention also contains a panoply of economic, social, and cultural rights. These include the right to education⁴², the right to enjoy the highest attainable standard of health⁴³, the right to benefit from social security⁴⁴, and the right to a standard of living adequate for a child's physical, mental, spiritual, moral, and social development⁴⁵. As the above discussion demonstrates, such rights are likely to be inapplicable or impeded for children born of CRSV. This protection gap exists, even though the treaty-based obligations to protect children require States Parties to take all appropriate legislative, policy, administrative, and other measures for the implementation of the rights contained therein⁴⁶.

In its General Comment No.5, the Committee on the Rights of the Child clarified that the CRC's non-discrimination obligation⁴⁷ requires States actively to identify individual children and groups of children the recognition and realisation of whose rights may demand special measures⁴⁸. Children born of CRSV clearly fit into the category of a marginalised group of children. For this reason, a note should be added to the measures articulated by the Committee regarding: the collection of data to enable discrimination or potential discrimination to be identified; changes in legislation, administration, and resource allocation; educational measures to change attitudes. In its General Comment No.18, the Human Rights Committee has also underlined the importance of taking special measures to diminish or eliminate conditions that cause discrimination.⁴⁹

Generally, there are four main pillars of a State's duty to ensure human rights including the rights of the child: The State has a duty to prevent violations of and to respect, protect, and promote human rights.⁵⁰ It should be noted here, that the CRC reflects a realistic acceptance of a State's lack of adequate resources. In particular, its Article 4 stipulates that *"with regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources."* Hence, the drafters of the CRC introduced the concept of 'progressive realisation' of such rights⁵¹, which could potentially be employed as an argument by the conflict-affected States. Article 4 of the CRC is similar to the wording used in the International Covenant on Economic, Social and Cultural Rights⁵². However, the Committee on Economic, Social and Cultural Rights in its General Comment No.3 interpreted the meaning of that phrase to the effect that *"even where the available resources are demonstrably inadequate, the obligation remains*

⁴¹ CRC, arts 7-8.

⁴² CRC, art 28.

⁴³ CRC, art 24.

⁴⁴ CRC, art 26.

⁴⁵ CRC, art 27.

⁴⁶ CRC, art 4.

⁴⁷ CRC, art 2.

⁴⁸ United Nations, Committee on the Rights of Child, General Comment No. 5, CRC/GRC/2003/5 (2003), para. 12.

⁴⁹ United Nations, Human Rights Committee, General Comment No. 18, HRI/GEN/1/Rev.9 (Vol. I) (1989), para. 5.

⁵⁰ See United Nations, Human Rights Committee, General Comment No. 31, CCPR/C/74/CRP.4/Rev.6 (2004).

⁵¹ United Nations, Committee on the Rights of Child, General Comment No. 5, paras. 7-8.

⁵² International Covenant on Economic, Social and Cultural Rights, December 16 1966, 993 UNTS 3 [ICESCR], art 2.

for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances ...”⁵³. Here, consideration should also be given to the statement of the Inter-American Court and Commission: to comply fully with its duty to give effect to human rights, the State has to ensure human rights through its entire “*legal, political and institutional system*,”⁵⁴ and to organize “*the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of legally ensuring the free and full enjoyment of human rights*.”⁵⁵ For all these reasons, the realisation of the rights of children born of CRSV is not in any way eliminated as a result of resource constraints, and States are required to undertake all possible measures towards the realisation of these children’s rights guaranteed from birth.

The duty of States to ensure the realisation of human rights has several consequences that can be relevant for children born of CRSV, who are left behind: State responsibility derives directly from a breach of international law, which may be a breach of an obligation under international human rights law. This is the general principle of law codified in Article 1 of the ILC Principles of State Responsibility for Internationally Wrongful Acts, which reads: “*Every internationally wrongful act of a State entails the international responsibility of that State*”⁵⁶

Under international human rights law, infringements of human rights of children born of CRSV may entail State responsibility when: (i) the human rights violation is committed by a State organ;⁵⁷ (ii) the human rights violation is committed by a non-State actor, but under the control or with the authorisation, acquiescence, complicity or acknowledgment of State agents, or where the non-State actor is empowered by the State to exercise elements of governmental authority;⁵⁸ and (iii) a private party commits an act that may impair the enjoyment of human rights, which, in and of itself is not attributable to the State, but where State responsibility may nonetheless be engaged in certain circumstances.⁵⁹ In the first two cases, State responsibility always arises. In the third situation, the State has a duty of due diligence to protect all persons from acts of private parties that impair the enjoyment of human rights.⁶⁰ To these ends, the 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 (Basic Principles)⁶¹ constitutes an important document. The document addresses the human rights violations

⁵³ United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 3, E/1991/23 (1990), para. 11.

⁵⁴ *Chumbivilcas v. Perú*, Case 10.559, Report No. 1/96, (1996), para. 5(3).

⁵⁵ *Velásquez-Rodríguez v Honduras*, Judgment, Series C No. 4 (1988), para. 166; See also United Nations, Human Rights Committee, General Comment No. 31, para. 4.

⁵⁶ United Nations, General Assembly, Responsibility of States for Internationally Wrongful Acts, A/RES/62/61 (2008) [ASP].

⁵⁷ *Ibid.*, art 4.

⁵⁸ *Ibid.*, arts 5,8, 11.

⁵⁹ See, *Ibid.*, art 2.

⁶⁰ United Nations, Human Rights Committee, General Comment No. 31; *Velásquez-Rodríguez v Honduras*, para. 172.

⁶¹ United Nations, 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, A/RES/60/147 (2006).

perpetrated by non-State actors and, in this context, Principle 3(c) provides for equal and effective access to justice, “irrespective of who may ultimately be the bearer of responsibility for the violation”.

The State has the primary obligation to ensure that children born of sexual violence enjoy the same rights as other children and, consequently, when States fail in that respect they must assume responsibility for redress. For these children, as a consequence of their human rights violations, reparations should be available – the duty to provide reparation is a legal consequence for every wrongful act of the State in international law.⁶² Under international human rights law, the normative basis for the right to a remedy and reparation is well established, as attested by several international human rights instruments.⁶³ Echoing these developments, the above referred Basic Principles were adopted.⁶⁴

Principle 8 of the Basic Principles refers to human rights law to define the notion of victim and it reads: “For purposes of the present document, 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...”. Establishing the victim status of children born of CRSV would not be difficult given the harms and risks they face. For example, in Sierra Leone, Peru, and Chile, children born as a result of wartime rape qualify to benefit from reparation programmes and they are recognised as primary victims by national legislation.⁶⁵

It is important to note that the Basic Principles addresses reparation not only in connection with gross human rights violations, they also clarify the general principles relating to reparation for all international human rights law violations.⁶⁶ This is understandable - the obligation of reparation arising out of the breach of an international obligation flows from the mere perpetration of the violation, independently of its consequences.⁶⁷

4. MODALITIES OF APPROPRIATE REPARATIONS PROVIDED BY STATES FOR CHILDREN BORN OF CRSV

Reparation is an umbrella designation for many different forms of redress, and their main value for children born of CRSV lies in its comprehensiveness.⁶⁸ The Human Rights

⁶² ASP, art 28.

⁶³ United Nations, General Assembly, Universal Declaration of Human Rights, 217 A (III) (1948) [UDHR], art 8; International Covenant on Civil and Political Rights, December 16 1966, 999 UNTS 171 [ICCPR], art 2; CRC, art 39; P I, art 91; Rome Statute, arts 68, 75.

⁶⁴ International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations A Practitioners' Guide* (2018), 19-45.

⁶⁵ Dyan Mazurana, and Christopher Carlson, *Children and Reparation: Past Lessons and New Directions*, 11.

⁶⁶ International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, 41.

⁶⁷ See, ASP, art 1.

⁶⁸ Diane Orentlicher, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity*, (E/CN.4/2004/88) 2004, para. 60.

Committee understands reparation as encompassing “*restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations*”.⁶⁹ For children born of CRSV several categories of reparations are appropriate.

To start with restitution, an advisable measure is recognition of citizenship. The Basic Principles lists this measure as one of the modalities of reparation.⁷⁰

Another measure should be guaranteeing safe return of these children to their places of residence and further facilitating their security. The Inter-American Court in one of its judgements requested the State to take all necessary measures both to permit the return of the applicants and to guarantee their future safety, which includes the obligation to investigate and punish those responsible for threats to their safety, whether they are State organs or non-State actors.⁷¹ This approach echoes the right to return to one’s country enshrined in international law.⁷²

One of the viable modalities of reparation for children born of CRSV is compensation. The Basic Principles considers that compensation must cover “*lost opportunities, including employment, education and social benefits*”⁷³. This loss is omnipresent for the children born of CRSV. In this regard, *the Aloeboetoe et al Case* - where the Inter-American Court addressed the loss of educational opportunities – is quintessential. Here, the Court ordered that the heirs of the victims must receive compensation to be able to study. It also considered that it was not sufficient only to grant compensation, but that also schooling had to be available for the children.⁷⁴ On the other hand, while compensation is awarded for economically assessable damage, this does not mean that it only concerns damage to material goods or other economic assets. Quite to the contrary, one of the main functions of compensation is to provide redress for harm to the physical and mental well-being of a person, given that there is no possibility of *restitutio in integrum* for such damage. This is particularly true in case of human rights violations of children born of CRSV, as they often cause considerable physical harm, psychological damage, and trauma. Such damage is easily economically assessable when it leads to costs for medical or psychological treatment.⁷⁵ This was equally true with regard to the case of *B.J. v Denmark*, where the Committee on the Elimination of Racial Discrimination recommended that “*the State party take the measures necessary to ensure that the victims of racial discrimination seeking just and adequate reparation or satisfaction in accordance with article 6 of the Convention, including economic compensation, will have their claims considered with due respect for situations where the discrimination has not resulted in any physical damage but*

⁶⁹ United Nations, Human Rights Committee, General Comment No. 31, para. 16.

⁷⁰ Basic Principles, Principle 19.

⁷¹ *Moiwana Community*, Judgment, Series C No. 124, (2005), para. 212.

⁷² UDHR, art 13(2); ICCPR, art 12(4).

⁷³ Basic Principles, Principle 20(b).

⁷⁴ *Aloeboetoe et al. v Suriname*, Judgment, Series C No. 15 (1993), para. 96.

⁷⁵ See International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations A Practitioners’ Guide*, 189.

*humiliation or similar suffering*⁷⁶“.

Consideration should also be given to Article 39 of the CRC – “*States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim...*” Hence, rehabilitation is one of the most appropriate modalities of reparation. In its *case on the Plan de Sánchez Massacre*, the Inter-American Court of Human Rights ordered the State to award free medical aid and medicine to the victims and to establish a programme of psychological and psychiatric treatment free of cost.⁷⁷ Analogous measures can be successful for the protection of the children born of CRSV. It should be stressed that rehabilitation for these children can be of a social nature – in its General Comment No.3, the Committee against Torture stated that *rehabilitation for victims should aim to restore, as far as possible, their independent physical, mental, social and vocational ability and full inclusion and participation in society*.⁷⁸

Finally, one of the most important forms of reparation is satisfaction. The Basic Principles lists as measures of satisfaction the “*verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations*”⁷⁹, “*public apology, including acknowledgement of the facts and acceptance of responsibility*,”⁸⁰ “*an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim*.”⁸¹ These measures constitute indeed the appropriate reparation for children born of CRSV.

In view of the forgoing, the implementation of the right to reparation for these children is critical in helping to rectify the position of disadvantage into which such children are born.⁸²

5. PROSPECTS OF LOCALLY GENERATED REPARATION PROCESSES FOR CHILDREN BORN OF CRSV

A State-level response to rectify the human rights situation of children born of CRSV could be illusory without a broader framework addressing their needs. In shaping and determining the options for these child victims, multi-sectoral responses are required. For a successful integration, culture must be taken into consideration, and efforts are required to understand the dynamics of social relations and traditions of the given community. Locally generated efforts should involve religious and community leaders; furthermore, national and international efforts should obtain the trust of local actors in the affected community,

⁷⁶ B.J. v Denmark, Communication 17/1999, CERD/C/56/D/17/1999 (2000), para. 6.2.

⁷⁷ Plan de Sánchez Massacre, Judgment, Series C No. 116 (2004), paras. 106-108, 117.

⁷⁸ United Nations, Committee against Torture, General Comment No. 3, CAT/C/GC/3 (2012), paras. 11-15.

⁷⁹ Basic Principles, Principle 22(b).

⁸⁰ Basic Principles, Principle 22(e).

⁸¹ Basic Principles, Principle 22(d).

⁸² Joanne Neenan, *Closing the Protection Gap for Children Born of War: Addressing Stigmatisation and the Intergenerational Impact of Sexual Violence in Conflict*, (London School of Economics, 2017), 31.

and consideration should be given to the enhancement of the life of the primary caregiver of the child in question.

A successful transition to the full development of the child victims will require support to the mothers of the children; they are themselves victims, and their experiences are reflected in the lives of their children. Improving their economic, psychosocial and health situation would greatly benefit their children too.⁸³

The right to the truth is essential for children born of CRSV. Not knowing one's own identity can have devastating consequences on the well-being of children; however, disclosure can be painful for the mothers. In this context, an important lesson learned is Rwanda, where community networks were set up, giving mothers a space to talk about mutual experiences. Consequently, it gave mothers the psychological support to disclose information regarding their history to the children.⁸⁴

Additionally, community involvement in stigma reduction efforts could be of considerable importance. The United Nations Secretary-General, in his report on Conflict-Related Sexual Violence, recommended the *“engagement of religious and traditional leaders, in particular to mitigate the stigma suffered by survivors of conflict-related sexual violence and to facilitate their reintegration and that of their children.”*⁸⁵ These efforts should include children born of CRSV and other children, rather than singling them out.

These efforts will provide the entire community with an understanding of what happened, and most importantly will bring the children born of CRSV closer to their roots – to quote Eleanor Roosevelt in this context: *“...after all, universal human rights begin in small places, close to home...”*

CONCLUSION

Regardless of the current comprehensive international framework on CRSV, a significant ‘consequence’ of CRSV is practically invisible to the international community, and to national actions. Research indicates that children born of CRSV constitute a particularly vulnerable category warranting greater care and attention.

According to estimates, tens of thousands of children were born in the midst of conflict in the 1990s alone, particularly in the Former Yugoslavia and Rwanda. Additionally, children have been and continue to be born as a result of CRSV in Colombia, Sierra Leone, DRC, Uganda, Peru, Iraq, Nigeria, etc.⁸⁶ These children are deprived of their fundamental human rights such as the right to survival, the right to be protected from discrimination, the right

⁸³ Joanne Neenan, *Closing the Protection Gap for Children Born of War*, 9.

⁸⁴ See Jemma Hogwood, Christine Mushashi, Stuart Jones, “‘I Learned Who I Am’: Young People Born From Genocide Rape in Rwanda and Their Experiences of Disclosure,” *Journal of Adolescent Research* 33(5) (2017): 549–570.

⁸⁵ United Nations, Security Council. Report of the Secretary-General on Conflict-Related Sexual Violence, para. 129.

⁸⁶ Kimberly Theidon, “Hidden in Plain Sight: Children Born of Wartime Sexual Violence”:191.

to a nationality, and identity.⁸⁷ Such patterns are highly problematic measured against ideals for children's rights. Hence, the existence and plight of thousands of children born of CRSV, who often face a lifetime of marginalisation and vulnerability, require States' due consideration.

States must identify them as a group of children the realisation of whose rights requires special measures⁸⁸; measures that shall include changes in legislation, administration, and resource allocation to support the survivors of sexual violence and their children. Furthermore, these children have an undeniable right to reparations of a material, symbolic, individual, and collective nature. It is important to look beyond traditional schemes and think more holistically about initiatives.⁸⁹ In this regard, locally generated reparations can play an important role in strengthening communities' abilities to uphold the rights of their children.

These initiatives, accompanied by State action, might effectively heal the wounds of children and their mothers, and help them to rebuild their lives under new terms and relations.⁹⁰

⁸⁷ See Charli Carpenter et al. *Protecting Children Born of Sexual Violence and Exploitation in Conflict Zones: Existing Practice and Knowledge Gaps*, 4,ff..

⁸⁸ United Nations, Committee on the Rights of Child, General Comment No. 5, para. 12.

⁸⁹ Dyan Mazurana, and Christopher Carlson, *Children and Reparation: Past Lessons and New Directions*, 25.

⁹⁰ See *Ibid.*, 27.