
CHILDREN BORN OF WAR: AN ENCUMBRANCE OF POST-CONFLICT SOCIETY OR AN IMPASSE OF HUMAN RIGHTS

Snegapriya V S, LL.M, School of Legal Studies, Cochin University of Science and Technology, Kochi

Dr. P.R.L. Rajavenkatesan, Professor of Law, VIT School of Law, Vellore Institute of Technology, Chennai

ABSTRACT

The history of war reveals that violence against women had not been viewed seriously. Most of the time, the perpetrators of such crimes either go unnoticed or are not convicted due to several reasons. With the International Humanitarian Law (IHL) governing the situations of wartime seeks to minimize human rights violations during armed conflict and conflict-driven genocide and terrorism which wreak havoc on civilians, a critical question arises: how far does the protection extend to distil the experiences of children born of war (CBOW) in post-conflict situations. There were always children born as a result of war crimes from time immemorial, yet their socio-legal rights are rarely discussed and addressed at the international stage. The Fourth Geneva Convention extends protection to civilians during wartime, yet, this particular category of children remains outside the scope of humanitarian laws and lacks the proper care and assistance they require. It is the status of social neglect and ostracism which is keeping these children distant from the state's protection. This paper infers the CBOW's state of neglect and its inextricable link with their scant treatment by outlining the legal lacuna in recognizing the socio-legal status of CBOW. The focus centers on to analyze the existing grey area between international legal instruments and their application.

Keywords: Conflict-related sexual violence, Genocide, International Law, Symbols of Misfortune, War Children.

1. Introduction

The term sexual violence refers not only to rape and forced prostitution, but it is wide enough to encompass all acts of sexual nature committed without consent and any other related violence is of similar gravity. The practice of perpetrating sexual violence in situations of armed conflict has been reported throughout history. The Geneva Convention of 1949 addresses and recognizes conflict related sexual violence of all kinds as a war crime. The condemning rise in such cases accentuates that the persistent prevalence of wartime sexual violence despite strict legal prohibition is the reflection of its strategic use in warfare as a deliberate war tactic to advance the interest of the warring parties. The multidimensional and multifaceted nature of the violence and the glaring impacts on the individuals and the communities to which the survivor belongs is what underpins its widespread use as an instrument of war. The conflict leading to a chaotic environment is fueling its occurrence and normalization of all kinds of conflict related sexual violence by perceiving it as an inevitable consequence of conflict is facilitating its reoccurrence. The taboo associated with such violence is most common across cultures and is the central factor silencing the victim and motivating the perpetrator to commit complex crimes in total impunity and makes the victim an object of abuse even after the conflict.¹

The deterrence of wartime sexual violence and strengthening of perpetrator accountability has always been a daunting task as the variation in its commission was either misconceived or disregarded until was recognized as a crime against humanity by The International Tribunal for Former Yugoslavia (ICTY), followed by the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). The mounting violence of these kinds in ever growing cycles of conflict has gained international political attention and propelled the international community towards fortifying the rights of women through policies and operations. Though it entrenched the victim's position in society, it collapsed at establishing an effective mechanism to integrate children born as the result of wartime sexual violence into the post-conflict society. This category of children and their state of neglect is one of the grave repercussions of armed conflicts, where the children and their mothers suffer for no fault of theirs while perpetrators are distant from accountability. Most of the International Policy Framework focuses on eliminating the violence against women, and granting reparation to

¹Innocent A. Daudu & Lukong S. Shulika, *Armed Conflict in Africa: Examining Sexual Violence as an Instrument of War*, 8 JoAUS. 51, 53 (2019). <https://doi.org/10.31920/2050-4306/2019/v8n1a3>

victims, but remains silent on addressing the needs of CBOW.

2. Conceptualizing Children Born of War and Their Categorization

Children born of war are those born to local women fathered by foreign soldiers, the existence of these children is known to mankind from time immemorial, whenever there was a war there were always children born out of such conflict. As their origin is associated with trauma, irrespective of their relationship with their mothers, either good or bad, the consequence has always been devastating for them. These children parented by single mothers themselves victims of wartime sexual violence, are preyed on by social harassment and debarred from receiving any benefits available to other children of single parents.² The social stigmatization and communal alienation coupled with negative relations with their mothers is the consequence of them being constant reminders of the sexual violence and identity linked to their rapist fathers. Throughout history these children were called by different names, one similarity is all these terminologies carry stigma. For instance, children born of the Vietnam War, fathered by American soldiers were called 'Bui Doi' translates to 'Dust of Life,' similarly the children born as a result of the military strategy to impregnate local women and girls aimed ethnic cleansing (genocide rapes) were called 'Monster Babies' in Nicaragua and 'Devil's Children' in Rwanda. Due to which, these children from their young age exposed to discrimination that has always had a strong negative impact on their lives, although variations exist, it forced them to believe that addressing their marginalization is a topic of taboo to be discussed. As posited by Charli Carpenter,³ It underscores the importance of using the catchall term 'Children Born of War' to address all subgroups of children born as a result of conflict related sexual violence irrespective of geographical variations and conflict typologies.

As most of the post conflict reparation and reconciliation programmes focus more on the needs of direct victims of war situations, the vulnerabilities of these children are outpaced by their mothers and leave no room for their reintegration. The risk of statelessness, marginalization, abuse, less access to resources, education and so on reflects the stark reality of victimhood that these children endure. The development of literature in this regard during the early 2000s brings it to the notice of the international community as to how the paucity of information along with international law offering limited space for policy development on the upliftment of these

² Lindsay McClain Opiyo & Virginie Ladisch, *For Children Born of War, what future*, OPENDEMOCRACY, (Jun. 12, 2015), <https://www.opendemocracy.net/en/opensecurity/for-children-born-of-war-what-future/>.

³ Author, FORGETTING CHILDREN BORN OF WAR: SETTING HUMAN RIGHTS AGENDA IN BOSNIA AND BEYOND (2010)

children vindicate their state of neglect and questions the veracity of their experiences of post conflict social discrimination. The gained global traction post publication of several research works, documentaries and scholarships led to the categorization of these children into four⁴ to demystify their degree of vulnerability and analyze different legal rights guaranteed by law. However, the majority of those still remain a hidden population as groups of CBOW other than those born of WWII are not known on a systematic level with a dearth of data, which impinge on their recognition as serious then as now at the international stage.⁵

Although CBOWs were recognized as victim-survivors of conflict related sexual violence by the United Nations in 2014⁶ such recognition has failed to obliterate the socio-economic and psychological impacts on their lives and issues surrounding identity that are closely knitted to realization of their legal rights. For instance, in Northern Uganda, 6,000 children were roughly estimated to have been born during the Lord's Resistance Army Insurgency as a result of the waged war of attrition.⁷ These children bearing the brunt of imposition of ethnic identity of their rapist fathers are debarred from securing national identification cards and acquiring lands as in Uganda it is traditionally based on patrilineal descent, absence of or rejection by their biological fathers has significant implications for these children's place in the society, and their belonging and protection.⁸ Their endurance of fraught life events accentuates the fact that not all reintegration programs at the global level have been successful as these children have always been perceived as living reminders of war crimes. In Rwanda, despite being bestowed with Rwandese citizenship,⁹ when the government extended its hand to support the victims of genocide, it refused to consider this category of children as victims of genocide and disqualified them from receiving aid from the *Funds for Support to Genocide Survivors* (FARG). The same situation persists in Iraq and Syria, where legislation to support victims of sexual violence leaves out this particular category of children. This conveys that the rationale behind ensuring

⁴ Mochmann, Ingvill C. *Children Born of War - A Decade of International and Interdisciplinary Research*. HISTORICAL SOCIAL RESEARCH, 159 (2017): 320–46. <http://www.jstor.org/stable/44176035>. The categorization of children born of war goes as: children of enemy soldier, children of peacekeeping force, children of child soldiers and children of soldiers from occupational forces.

⁵ Mitreuter, S., Kaiser, M., Roupetz, S. *et al. Questions of Identity in Children Born of War—Embarking on a Search for the Unknown Soldier Father*. 28J CHILD FAM STUD, 3220–3229 (2019). <https://doi.org/10.1007/s10826-019-01501-w>

⁶ United Nations, *Guidance Note of the Secretary General: Reparation for Conflict Related Sexual Violence* (2014) <https://www.ohchr.org/sites/default/files/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>

⁷ The Justice, Law and Order Sector, Study at Acholi Sub region of Uganda, 2018

⁸ Rene' Provost & Myriam Denov, *From Violence to Life: Children Born Of War And Constructions Of Victimhood*, (2020) <https://www.nyujilp.org/wp-content/uploads/2021/01/NYI101.pdf>.

⁹ Relating to Rights and Protection of the Child Against Violence, Rwanda: Law No. 27/2001 of 2001, Art. 6, <https://www.refworld.org/legal/legislation/natlegbod/2001/en/37354>.

their basic legal rights and its potentiality has not been fully comprehended and hence was not brought to full fruition.

3. Dynamics of International Human Rights Law

The dominant discourse invites the distinction between human rights law and humanitarian law only on the basis of its period of operation. The former is wider enough to encompass and protect the rights of all individuals, devoid of them being identified as combatants, civilians, victims or perpetrators, subject to the jurisdiction of any state.¹⁰ It makes states liable to human rights indictments backed by their geopolitical choices and conduct.¹¹ Any failure in the realisation of these inherent rights is an encapsulation of the state's deviance in establishing legal obligation through state legislation or international agreement.¹² As all three generations of human rights are universal, interconnected and interdependent, they are the established international standards which are not granted by states but recognized and implemented by states. The recognition of human rights gained momentum at the International level in the 1920s,¹³ which culminated in the adoption of the Universal Declaration on Human Rights (UDHR), the first instrument to set a human rights agenda for every individual belonging to the human family.¹⁴ The Bill of Rights comprising UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) is another milestone marked in human rights development and international cooperation in encouraging human rights initiatives.¹⁵ Keeping with it, the applicability of human rights during conflict and post conflict situations are not barred by any human rights instruments rather upheld and espoused.

Looking at the magnitude and the continued occurrence of sexual violence in the ongoing conflicts of Russia-Ukraine and Israeli-Gaza international armed conflicts, the devastating usage of sexual violence as a deliberate means of warfare has been reported in a larger volume than ever before, which makes the possible childbirth resulting from such war crime unavoidable. The United Nations Commission of Inquiry of Ukraine documented the prevalence and gravity of the sexual violence perpetrated against civilians 'at gunpoint, with

¹⁰ Vienna Declaration and Programme of Action (1993), <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>

¹¹ UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (3ed 2012)

¹² HANS KELSEN, THE LAW OF THE UNITED NATIONS, 1950.

¹³ Slavery Convention, 1926; International Convention for the Suppression of Traffic in Women and Children, 1921.

¹⁴ Preamble, Universal Declaration of Human Rights (UDHR), 1948.

¹⁵ V K AHUJA, PUBLIC INTERNATIONAL LAW, 390 (2d ed. 2021).

extreme brutality.¹⁶ The testimonies of Palestinians, notably recorded by Euro-Med Human Rights Monitor add to the ubiquitousness of conflict related sexual violence despite legal prohibitions. It urges the global community to stop ignoring the realization of the rights of CBOW while guaranteeing justice for victims in the post conflict society. The United Nations Convention on the Rights of the Child (UNCRC) is the central instrument that sets the human rights agenda for this ignored population who grows up in a hostile environment. The convention confers a catalogue of rights encompassing social, economic, cultural, civil, health, political and legal protection required to effectuate the principle of the *Best Interest of the Child* and makes state parties duty bound to apply and implement such mandate. The other three underlying principles guiding UNCRC are: the right to life, survival and development, the right against discrimination and the right to be heard. The convention has 54 Articles, which collectively aim at providing a conducive atmosphere for children by eliminating all possible threats to the cause, but the lack of evidence and paperwork relating to birth registration resulted in the non-legal existence of the children born of war in Uganda is a bleak scenario, both for these children to claim their birthright as a matter of right and the state in maintaining the normative mandate of UNCRC.¹⁷ While this persists, the lassitude of states in decrying human rights abuses is affecting the lives of hundreds and thousands of CBOW, where they are subjected to child labour, illegal inter country adoption turning into human trafficking, sexual exploitation, military recruitment, unnecessary detention, and communal rejection. As these children are considered as a bitter legacy left behind by the Lord's Resistance Army Rebellion in Northern Uganda, their fight for an identity is lingering even 16 years after the cessation of hostilities agreement which ended the decades-long war.¹⁸

4. Existing Legal Protection to CBOW

The IHL limiting the means and methods of military operation prohibits and penalizes the usage of sexual offences of any form as a means of combat. Such prohibition has been in progression since the codification era, right from the Lieber Code of 1893 and Hague

¹⁶ United Nations Human Rights Office of the High Commissioner, *Ukraine: UN Commission Concerned Continuing Patterns Violations of Human Rights* (2024) <https://ohchr.org/en/press-releases/2024/03/ukraine-un-commission-concerned-continuing-patterns-violations-human-rights#:~:text=Background%3A%20The%20Independent%20International%20Commission,of%20the%20Russian%20Federation's%20aggression>

¹⁷ Mochmann, Ingvill C, *supra* note 4.

¹⁸ Denov, Myriam & Lakor, Atim, *When war is better than peace: The post-conflict realities of children born of wartime rape in northern Uganda. Child Abuse & Neglect* (2017) https://www.researchgate.net/publication/313743492_When_war_is_better_than_peace_The_post-conflict_realities_of_children_born_of_wartime_rape_in_northern_Uganda

Convention of 1899 to the Geneva Convention of 1949. The *Aide-memoire* issued by the red cross in 1992 post ratification of additional protocols to the Geneva Convention reiterated the express prohibition of ‘indecent assault’ manifested in forms of rapes, forced prostitution, etc.¹⁹ The Additional Protocol I (AP I) to the 1949 Convention makes the warring parties duty bound to protect children from any form of indecent assault.²⁰ The distinction principle codified in AP I provides that civilians cannot be targeted until they directly participate in hostilities, and the presence of combatants in the population does not deprive the civilian status of the population.²¹ Nevertheless, the status quo in Gaza, the situation of Palestinian children²² and the available plethora of evidence attest to the flagrant disregard of IHL’s special protection for children, women and distinction principles. The abject non-compliance with the ruling of the International Court of Justice (ICJ) dated January 26, 2024, ordered the cessation of Israel’s military operation to prevent genocide in the Gaza Strip is highlighting the existing accountability vacuum.²³ Such blatant violations of principles governing the conduct of hostilities and dwindling accountability is questioning the efficiency of the IHL. Per contra, the conviction of Dominic Ongwen,²⁴ a former commander of LRA by the International Criminal Court (ICC) for perpetrating war crimes including abduction, rape, forced pregnancy, murder, and use of child soldiers committed in Northern Uganda is the prominent milestone in international criminal jurisprudence on accountability.

The ambit of special protection for children principle under Article 77 of API and Article 3 of AP II is limited to children in combat zones and children taking direct part in hostilities. In the context of recognizing CBOW as a victim of war crimes, it raises the issue of “whether the scope and operation of IHL be extended to post conflict situations or it might be expedient to avail Human Rights instruments when IHL and other bodies of law are highly flouted and thwarted by their own percept.”²⁵ The CBOW being an extremely vulnerable population and

¹⁹ Art.76(1), Protocol Additional to the Geneva Convention 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.

²⁰ Id. at Art.77

²¹ Id. at Art. 50 (3)

²² As of 29 April, 2024, 14,500 Palestinian children have been killed; Onslaught of violence against women and children in Gaza unacceptable: UN experts (May. 2024) <https://www.ohchr.org/en/press-releases/2024/05/onslaught-violence-against-women-and-children-gaza-unacceptable-un-experts>.

²³ Nishant Sirohi, *Gaza's healthcare collapse: A global failure to uphold the International Humanitarian Law* (May. 2024) <https://www.orfonline.org/expert-speak/gaza-s-healthcare-collapse-a-global-failure-to-uphold-the-international-humanitarian-law#:~:text=Despite%20clear%20violations%20of%20IHL,violations%2C%20creating%20a%20dangerous%20precedent.>

²⁴ *Prosecutor v. Ongwen*, ICC-02/04-01/15-422-Re

²⁵ Patricia Viseur Sellers, *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation*,

susceptible to social victimization, their rights have been recognized through exclusive legislations in Bosnia-Herzegovina, Norway, and Colombia. All these legislations sprung from and rooted in the international human rights commitment of the respective states and the ruling of ICC in the Bosco Ntaganda case²⁶ which established CBOW as a direct victim of war crimes. The judgment involves prosecution of Bosco Ntaganda for committing war crimes during the Ituri conflict in the Democratic Republic of the Congo.²⁷ The recognition of CBOW contributes to establishing institutional support to improve their socio-economic conditions. The reparation initiatives have been launched by war torn countries namely Libya, East Timor and Bangladesh, yet, those are not manifested in law rather implemented through policies and ministerial decrees. This conveys that the CBOW are no longer an invisible population and their rights are not overlooked instead protected by the jus cogens nature of UNCRC.

5. Conclusion

As the foregoing analysis, legal protection for victims of sexual violence omitted CBOW despite their plight being known to mankind from time immemorial. In the context of the applicability of IHL principles, it does not outlaw conflict but limits the means and methods of military operation and lays down war crime investigation procedures. Its operation is limited to effects and situations of armed conflict. The proper compliance of those principles avoids the occurrence of conflict related sexual violence, which is the root cause of CBOW. The recent developments in international criminal jurisprudence on upholding criminal justice standards and accountability mandates are promising and contributing to rendering justice to the principal victims of war crimes. On the question as to whether reparation and reintegration measures for the victims and survivors of war crimes at the international level extend to CBOW? Unless these children are considered a special category of victims, the recognition of their rights will remain at a complete standstill. Given that hitherto domestic laws pertaining to the protection of CBOW are not prevalent in all countries, universal recognition of their rights and providing an improved standard of living is the need of the hour. However mere recognition without any additional benefit is a ticklish problem, and barely an initiative to comply with the proviso of UNCRC. The effective implementation of international human rights instruments and documentation related to childbirth at the domestic level is imperative to expedite the progress.

https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf.

²⁶ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06

²⁷ International Criminal Court Project, *The Prosecutor v. Ntaganda*, <https://www.aba-icc.org/cases/case/the-prosecutor-v-ntaganda/>