



**QUEEN'S
UNIVERSITY
BELFAST**

Children Born of Sexual and Gender-Based Violence in Conflict: Exploring the Boundaries of International Criminal Law

Dowds, E. (2018). Children Born of Sexual and Gender-Based Violence in Conflict: Exploring the Boundaries of International Criminal Law. In W. Aschauer, J. Buckley, H. Embacher, . A. Lichtblau, D. Steinert, & G. Prontera (Eds.), Children and War Past and Present III Helion.

Published in:

Children and War Past and Present III

Document Version:

Peer reviewed version

Queen's University Belfast - Research Portal:

[Link to publication record in Queen's University Belfast Research Portal](#)

Publisher rights

Copyright 2018 Helion. This work is made available online in accordance with the publisher's policies. Please refer to any applicable terms of use of the publisher

General rights

Copyright for the publications made accessible via the Queen's University Belfast Research Portal is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The Research Portal is Queen's institutional repository that provides access to Queen's research output. Every effort has been made to ensure that content in the Research Portal does not infringe any person's rights, or applicable UK laws. If you discover content in the Research Portal that you believe breaches copyright or violates any law, please contact openaccess@qub.ac.uk.

Children and War Past and Present III

Name: Dr Eithne Dowds

Job Title: Lecturer

University: Queen's University Belfast, School of Law, Belfast, BT7 1NN

Email: e.dowds@qub.ac.uk

Biography:

Eithne's research intersects the areas of international criminal law, feminist legal theory, sexual offences and children born of sexual violence in conflict. Her PhD thesis examines the role of consent in an international criminal definition of rape. Eithne is particularly interested in feminist strategies in international criminal law and the extent to which developments at the international criminal level might bear relevance to domestic law on sexual offences. To date she has published book reviews in *Feminist Legal Studies* and the *Journal of International Criminal Justice*. Eithne has presented her work widely participating in conferences in Hannover and Salzburg.

Children Born of Sexual and Gender-Based Violence in Conflict: Exploring the Boundaries of International Criminal Law

Abstract

Thousands of children have been born as a result of sexual and gender-based violence perpetrated in recent conflicts, often discriminated against in their own societies. Despite the fact that these children are born out of crimes international criminal law has been designed to punish and redress, these children have received limited attention in the international criminal arena. This paper addresses this gap by arguing that international criminal law has the symbolic and reparative potential to respond to the plight of these children and that peace agreements should be used to complement any criminal justice response; thus, ensuring that such children are integrated into their post-conflict societies.

INTRODUCTION

The nature of armed conflict has changed dramatically since the turn of the century. Today's conflicts, conceptualised by Kaldor as 'new wars' are less a matter of confrontation between professional militaries in different states than one of grinding struggles between military and civilians in the same country, or between hostile groups of armed civilians often fought along ethnic, religious or tribal lines.¹ Consequently, civilians account for an estimated 90% of casualties, with 75% of these casualties being women and children.² Women suffer a plurality of harms during conflict: they may be maimed; murdered; displaced; subjected to sexual and gender-based violence including rape or be taken as 'wives' by armed soldiers and suffer unwanted pregnancies as a result.³ Where women are not the specific target of violence they may nonetheless suffer irreparable harm. For instance, women may suffer socially and economically where a male family member is killed or they may suffer mental trauma and anguish as a result of the disappearance of a loved one.⁴ Thus, women are affected by armed conflict in a way that requires us to look beyond explicit physical violence. Similarly, children have been subjected to horrendous abuses during armed conflict, including being

¹ M. Kaldor, *New and Old Wars: Organised Violence in a Global Era*.

² C. Hawkins, 'Women's human rights: The global intersection of gender equality, sexual and reproductive justice, and healthcare' *Journal of Research on Women and Gender*, p. 163.

³ M.U. Walker, 'Gender and Violence in Focus: A Background for Gender Justice in Reparations' in R. Rubio-Marin (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing*, p. 20.

⁴ F. Ni Aolain, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' *Queen's Law Journal*, p. 235.

maimed; murdered; subjected to sexual and gender-based violence; abducted from their families and forced to fight in conflicts as child soldiers; they may suffer from malnourishment and in some cases starvation, as well as disruption to their education and personal development.⁵

International criminal justice has become a ‘ubiquitous feature of societies recovering from mass conflict’,⁶ with the creation of numerous international criminal judicial bodies, such as the international criminal tribunals of Rwanda (ICTR) and the former Yugoslavia (ICTY), and the International Criminal Court (ICC).⁷ These international judicial bodies provide the means through which individuals can be held to account for *some* of the harms outlined above when perpetrated as war crimes, crimes against humanity or genocide.⁸ In particular, sexual and gender-based violence perpetrated against women and the use of child soldiers have received increasing attention at the international criminal level.⁹ Despite, burgeoning interest in, and international criminal recognition of, crimes against women and children, one category of individuals who intersect both groups have been left to the margins: children born as a result of sexual and gender-based violence during conflict.¹⁰ These children represent a unique category of war-affected children: in contrast to child soldiers, who are directly affected by the conflict, the suffering and indeed the existence of children born of sexual and gender-based violence is brought about by the original crime perpetrated against their mother. Thus, it would seem that there is no direct crime for which international criminal law could hold an individual to account in respect of these children.

While children born of sexual and gender-based violence test the boundaries of international criminal law, they are born out of violence that international criminal law was designed to punish and redress. As such, this paper seeks to move these children from the margins into

⁵ United Nations Secretary General, Report by Graça Machel on ‘The Impact of Armed Conflict on Children’, 26 August 1996, A/51/306.

⁶ P. Clark, ‘The Challenges of International Criminal Law in Addressing Mass Atrocity’ in B.A. Arrigo and H.Y. Bersot (eds) *The Routledge Handbook of International Crime and Justice Studies*, p. 147.

⁷ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia adopted by Security Council on 25 May 1993, U.N. Doc S/RES/827 (1993) (ICTY Statute); Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994) (ICTR Statute); UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 (ICC Statute).

⁸ Clark, *op. cit.*, p. 147.

⁹ R. Coomaraswamy ‘Women and Children: The Cutting Edge of International Law’ *American University International Law Review*, pp. 10-20.

¹⁰ C. Carpenter, *Forgetting Children Born of War: Setting the Human Rights Agenda in Bosnia and Beyond*; C. Carpenter (ed) *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*; D. Seto, *No Place for a War Baby: The Global Politics of Children Born of Wartime Sexual Violence*.

the mainstream by arguing that there is room within the international criminal legal framework to provide recognition of these children. The paper will proceed as follows. First, it will explore the international criminal response to sexual and gender-based crimes perpetrated in times of conflict, from the historical silence to the explicit recognition of these crimes in contemporary international criminal tribunals. Second, it will highlight the plight of children born of sexual and gender-based crimes and note the current failure of international criminal law to specifically recognise these children. Thirdly, it will identify the ways in which the international criminal legal framework developed in response to sexual and gender-based crimes may be used to provide some accountability to children born of these crimes. Finally, it will explore how peace agreements could be used to complement any criminal justice response and ensure that children born of sexual and gender-based violence are integrated into society post-conflict.

‘SURFACING’ SEXUAL AND GENDER-BASED CRIMES IN INTERNATIONAL CRIMINAL LAW¹¹

Sexual and gender-based violence is an all too common feature of conflict zones across the globe. It has been, and continues to be, perpetrated in places such as Afghanistan, Central African Republic, Colombia, Côte d’Ivoire Democratic Republic of the Congo, Iraq, Liberia, Libya, Mali, Myanmar, Nepal, Nigeria, Sri Lanka, Rwanda, Somalia, South Sudan, Sudan (Darfur), Syrian Arab Republic, the former Yugoslavia and Yemen.¹² Yet, historically these crimes have been viewed as an inevitable consequence of war, with little, if any repercussions.¹³ Such crimes were absent from the statutes of early international criminal tribunals such as Nuremberg and Tokyo, despite the fact that sexual and gender-based violence was perpetrated on a large scale during World War II.¹⁴ While there is evidence that these crimes did feature during trial proceedings they were subsumed within other crimes; thus effacing the specific nature of sexual and gender based crimes. For instance, the Tokyo

¹¹ R. Copelon, ‘Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law’, *Hastings Women’s Law Journal*.

¹² United Nations Security Council, *Conflict-related sexual violence Report of the Secretary-General*, 23 March 2015 S/2015/203.

¹³ United Nations Division for the Advancement of Women Department of Economic and Social Affairs, *Sexual Violence and Armed Conflict: United Nations Response*, April 1998.

¹⁴ K.D. Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’, *Berkeley Journal of International Law*, p. 302.

Tribunal prosecuted rape under the headings of ‘inhumane treatment’, ‘mistreatment’, ‘ill-treatment’ and ‘failure to respect family honour and rights’.¹⁵

The treatment of sexual and gender-based violence as trivial, incidental and inevitable in international law may, in part, be explained with reference to the impoverished and patriarchal understanding of these crimes in international humanitarian law: the law regulating conduct during conflict. While rape was explicitly prohibited under the United States Lieber Code of 1863, the 1907 Hague Convention, which had its origins in the Lieber Code, did not mention rape but instead provided that: ‘Family honour and rights [...] must be respected’.¹⁶ Article 27 of the Fourth Geneva Convention, provides that: ‘Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault’.¹⁷ Article 76 of the 1977 Additional Protocol I to the Geneva Conventions states 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’,¹⁸ and Article 4(2)(e) of the 1977 Protocol II prohibits ‘Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’.¹⁹

Interestingly, these early frameworks portray violations against women as violations of honour as opposed to autonomy and are protective rather than prohibitive in nature. The use of a value-laden term such as honour ‘fails to recognise the brutality of sexual violence’ and links it to notions of virginity and chastity.²⁰ These notions not only create a pre-condition for the violation, but invoke perceptions of the victim as ‘dirty’ or ‘spoiled’ after the violation.²¹ According to Gardam, the idea that rape is wrong because it will dishonour the victim

¹⁵ R. Pritchard and S. Zaide (eds) *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal of the Far East*, volume 2 transcript at 2568-73, 2584, 3593-95, 3904-44, 4463-79, 4496-98, 4501-36, 4544, 4559, 4572-73, 4594, 4602, 4615, 4638, 4642, 4647; volume 6, transcript at 12521-48, 12995, 13117, 13189, 13641-42, 13652.

¹⁶ 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 Convention, 18 October 1907.

¹⁷ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

¹⁸ International Committee of the Red Cross (ICRC), 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, 1125 UNTS 3.

¹⁹ International Committee of the Red Cross (ICRC), 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, 1125 UNTS 609.

²⁰ M. Eriksson, *Defining Rape Emerging Obligations for States under International Law?*, p. 397.

²¹ United Nations Commission on Human Rights, Fifty-fourth Session, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, paragraph 11.

represents an antiquated male view of women and rape.²² It focuses on male interests, not the victims; it is her chastity and honour that are valuable and the act of rape, according to the above conceptualisation, violates these values. Therefore, the legal treatment of sexual and gender-based crimes, historically, has reflected an understanding of rape as ‘the worst offence that can happen to a man connected to a woman in armed conflict’.²³

Crucial legal advances have been made in the last three decades, turning this legal history on its head. The recognition and condemnation of rape and sexual violence committed against women during the conflicts in the former Yugoslavia and Rwanda is particularly noteworthy in this regard. Reports of ‘the massive, organised and systematic detention and rape, in particular of Muslim women in Bosnia and Herzegovina’ left the Security Council ‘appalled’.²⁴ Indeed, in a 1993 report to the Committee on the Elimination of Discrimination against Women, Yugoslavia apologised for an earlier statement in which it had suggested that rape was considered normal behaviour in times of war.²⁵ Similarly in Rwanda, non-governmental organisations estimated between 250,000 and 500,000 cases of rape with many women being forced into sexual slavery.²⁶ Rape was recognised as an ‘egregious’ breach of international humanitarian law and a crime against humanity perpetrated during the Rwandan conflict.²⁷

Consequently, the crime of rape became firmly entrenched in applicable international criminal law. Rape was recognised as a crime against humanity in the Statute of the ICTY, and as both a war crime and a crime against humanity in the Statute of the ICTR.²⁸ The Rome Statute for the ICC recognises the crime of rape as well as a wide range of other sexual and gender-based crimes: ‘sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’ which can be

²² J. Gardam, ‘Women and the Law of Armed Conflict: Why the Silence?’, *International and Comparative Quarterly*, p. 73.

²³ C. O’Rourke, ‘International Law and Domestic Gender Justice, or Why Case Studies Matter’ in M.A. Fineman and E. Zinsstag (eds), *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice*, citing F. Ní Aoláin, Comments, Transitional Justice Institute Annual Summer School, Derry, June 9, 2010.

²⁴ UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) Resolution 820 (1993) Adopted by the Security Council at its 3200th meeting, on 17 April 1993, 17 April 1993, UN Doc S/RES/820 (17 April 1993).

²⁵ J. Henckaerts and L. Doswald-Beck, *Customary International Law, Volume I: Rules*, p. 325.

²⁶ African Rights, *Rwanda: Death, Despair and Defiance*, p. 750.

²⁷ Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) UN Doc S/1994/1405 (9 Dec 1994) paragraph 137-145.

²⁸ ICTY Statute, op. cit., Article 5(g) Rape as a Crime Against Humanity; ICTR Statute, op. cit., Article 2(g) Rape as a Crime Against Humanity and Article 4(e) Rape as a War Crime.

prosecuted as crimes against humanity and war crimes.²⁹ Subsequently, this statutory recognition has translated into concrete action with rape being prosecuted as a tool of genocide; as an act of torture and as persecution; jurisprudence to support the prosecution of sexual slavery and forced marriage as international crimes; and a case of forced pregnancy being prosecuted at the ICC.³⁰

The recognition and prosecution of these crimes in international criminal law is to be welcomed. However, concern has been raised that the focus on sexual and gender-based violence has resulted in a ‘fixation on war-time rape’ and the depiction of women as passive victims of sexual violence.³¹ Thus, strategies aimed at protecting women may result in an odd paradox, ultimately reinforcing the view that women are primarily sexual objects, reduced to their sexual experience and sexual vulnerability.³² While there are dangers in engaging with crimes of sexual and gender-based violence, it is not the recognition of these crimes *per se* that is problematic, on the contrary, this recognition has had ‘expressive and substantive gains’ in an area that maintained a long silence on violence against women.³³ It may even open up space to expose other gendered harms.³⁴ The separate and dissenting judgment of Judge Odio Benito in the 2012 case against *Thomas Lubanga Dyilo*, before the ICC, is significant in this regard as it drew attention to not only the *existence* of sexual violence but also the *gendered consequence* of such violence.³⁵ While crimes of sexual and gender based violence were not charged in this case and the majority failed to give due regard to the sexual violence committed against female child soldiers,³⁶ Judge Odio Benito highlighted these crimes and noted the ‘gender-specific potential consequence of *unwanted pregnancies* for girls that often lead to maternal or infant’s deaths, disease, HIV, psychological traumatisation

²⁹ ICC Statute, op. cit., Article 7(1)(g), Article 8(b)(xxii), Article 8(e)(vi).

³⁰ See for instance, *The Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgement (Sept 2. 1998), *Prosecutor v Mucić et al.* (IT-96-21) 9 October 2001; *The Prosecutor v Kvočka et al.* (IT-98-30/1) 2 November 2001; *Prosecutor v Kunarac, Kovac, Vukovic* No. IT-96-23&23/1, Judgement (Feb 22 2001); *Prosecutor v. Alex Tamba Brima, Ibrahim Bazy Kamara and Santigie Borbor Kanu* [2008] SCSL-2004-16-A (Special Court for Sierra Leone, Appeals Chamber) 22 February 2008; *The Prosecutor v Dominic Ongwen* (ICC-02/04-01/15) 6 December 2016.

³¹ N. Henry, ‘The Fixation on Wartime Rape: Feminist Critique and International Criminal Law’, *Social & Legal Studies*.

³² F. Ní Aoláin and C. Turner ‘Gender, Truth and Transition’, *UCLA Women’s Law Journal*, p. 262.

³³ F. Ní Aoláin ‘Gendered Harms and their Interface with International Criminal Law: Norms, Challenges and Domestication’, *International Feminist Journal of Politics*, p. 628.

³⁴ Henry, op. cit., p. 95.

³⁵ *The Prosecutor v. Thomas Lubanga Dyilo* (14 March 2012) ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito.

³⁶ For a critique of this case see L. Chappell, ‘Conflicting Institutions and the Search for Gender Justice at the International Criminal Court’, *Political Research Quarterly*.

and social isolation'.³⁷ Indeed, it is unwanted pregnancies and, in particular, children who are born as a result of sexual and gender-based violence that is the subject of this paper.

The move from a sole focus on the existence of sexual and gender-based violence against women to a focus on children born as a result of such violence can be problematic: such a move may confirm the criticism above that when women are recognised in international law they are reduced to their sexual bodies and, in this case, their reproductive capacities.³⁸ Moreover, it may also fuel protectionist rhetoric within which the male is viewed as the primary protector of women and children, with violations against them being strategically elevated not out of genuine concern but to justify military intervention or the waging of war.³⁹ These responses are ultimately disempowering as they put women and children in a position of obedience and dependence,⁴⁰ contributing to a discourse of victimhood within which women and children are depicted 'as bystanders, beings not fully conscious of the world around them – not actors, but rather objects, in the tableau of the battlefield'.⁴¹ Nonetheless, children born of sexual and gender-based violence in conflict exist in vast numbers, as will be demonstrated below, and they have been left in the shadows. While the dangers associated with responding to these children should be borne in mind, they must not deter the quest for justice.

'SURFACING' CHILDREN BORN OF SEXUAL AND GENDER-BASED VIOLENCE IN CONFLICT⁴²

Children born of sexual and gender-based violence in conflict can be situated within a growing literature on 'children born of war'.⁴³ According to Mochmann and Lee 'children born of war' are 'children who have one parent who is part of a foreign army or peace keeping force and the other parent a local citizen independent of time and geographical context, type of conflict and circumstances of conception'.⁴⁴ Mochmann further identifies

³⁷ Separate and Dissenting Opinion of Judge Odio Benito, op. cit., paragraph 20 [Emphasis added].

³⁸ Ní Aoláin and Turner, op. cit.

³⁹ K. Engle, "'Calling in the Troops": The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention', *Harvard Human Rights Law Journal*.

⁴⁰ I.M. Young, 'The Logic of Masculinist Protection: Reflections on the Current Security State', *Signs: Journal of Women in Culture and Society*, p. 2.

⁴¹ D.M. Amann, 'The Post-Postcolonial Woman or Child', *American University International Law Review*, p. 48.

⁴² C. Carpenter, 'Surfacing Children: Limitations of Genocidal Rape Discourse', *Human Rights Quarterly*.

⁴³ For an overview of this literature see I.C. Mochmann, 'Children Born of War - A Decade of International and Interdisciplinary Research', *Historical Social Research*. See also International Network for Interdisciplinary Research on Children Born of War (INIRC-CBOW).

⁴⁴ I.C. Mochmann and S. Lee, 'The Human Rights of Children Born of War: Case analyses of Past and Present Conflicts', *Historical Social Research*, p. 271.

four categories of children born of war: 1) children of enemy soldiers; 2) children of soldiers from occupation forces; 3) children of child soldiers; and 4) children of peacekeeping forces.⁴⁵ Often children born of war scholars do not distinguish between children born of consensual relationships and those born of sexual and gender-based violence, instead focusing on the rights of these children irrespective of the circumstances and relationship of the parents that brought about their conception.⁴⁶ As noted by Ingvill and Lee, ‘children born of war grow up in a more hostile environment simply due to their biological background...exposed to stigmatisation and discrimination which have an impact on their development and even their right to life’.⁴⁷

This paper, however, narrows its focus to children born of sexual and gender-based violence in the context of international criminal law. As such, these children must be born out of sexual and gender-based violence as recognised by the international criminal tribunals when committed as a war crime, crime against humanity or genocide. The ICC recognises the most expansive list of these crimes including: rape, sexual slavery, enforced prostitution, forced pregnancy and forced marriage.⁴⁸ All of these crimes require the presence of force or coercion which ultimately negates any consent.⁴⁹ Thus, unlike the approach taken by Mochman and Lee, it is necessary to distinguish between the consensual and non-consensual activity which brought about the child. Moreover, it is suggested that the four categories set out by Mochmann, above, are limited in nature and built on a dichotomy of the ‘other’, which may lead to the popularisation of harmful notions such as ‘children of the enemy’.⁵⁰ Sexual and gender-based violence committed in conflict is not only perpetrated by and against the

⁴⁵ I.C. Mochmann, Children Born of War In Revista OBETS, *Juventud Embotellada. Los ritmos del cambio social*. Revista de Ciencias Sociales. N. 2 (dic. 2008),. 53-61. Alicante: Universidad de Alicante. Instituto Universitario de Desarrollo Social y Paz; I.C. Mochmann, and S.U. Larsen, ‘The forgotten consequences of war: The life course of children fathered by German soldiers in Norway and Denmark during WWII – some empirical results’, *Historical Social Research*.

⁴⁶ Mochmann and Lee, op. cit., p. 272.

⁴⁷ Ibid, p. 270.

⁴⁸ ICC Statute op. cit; Forced marriage is not included in the ICC Statute but has been charged in the case of *Ongwen*, op. cit..

⁴⁹ Elements of Crimes for the International Criminal Court (2002). For instance, Articles 7 (1) (g)-1; 8 (2) (b) (xxii)-1; 8 (2) (e) (vi)-1 provide that the crime of rape requires the ‘penetration of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body’ and that such penetration occurred ‘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 another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent’.

⁵⁰ C. Carpenter, Protecting Children Born of Sexual Violence and Exploitation in Conflict Zones Existing Practice and Knowledge Gaps, Findings from Consultations with Humanitarian Consultations with Humanitarian Practitioners December 2004 – March 2005, 12. See also, A. Orford, (ed.) *International Law and its Others*.

‘enemy’. As noted in an article on the conflict in Uganda: ‘Thousands of...children exist on the margins, fathered through sexual violence by not only the LRA, but also government forces and a multitude of other state and non-state armed actors’.⁵¹ While the visibility of, and legal accountability for, such violence may lag behind that of sexual and gender-based violence perpetrated against those perceived as ‘enemies’,⁵² care should be taken not to reinforce narrow understandings of sexual and gender-based violence in conflict which may contribute to the stigmatisation of some children who have been born as a result, as well as the invisibility of others.

It is estimated that tens of thousands of children have been born as a result of sexual and gender-based violence in recent conflicts. For instance, Grieg reports that around 1000 children were born during the conflict in East Timor; between 2000-5000 during the conflict in Rwanda; 4000 in the former Yugoslavia; and around 25000 in Liberia.⁵³ Born into ‘a culture of war, crime, death and deprivation’,⁵⁴ these children may suffer from a number of health-related or physical vulnerabilities due to a lack of medical facilities in conflict-affected areas.⁵⁵ Negative labels are often attached to these children by their communities; such as, ‘children of bad memories’ or ‘children of hate’ in Rwanda, ‘children of shame’ in Kosovo, and ‘children of the enemy’ in East Timor.⁵⁶ The stigma attached to the conception of these children can have life-long effects and constitute a significant obstacle to the realisation of their basic human rights.⁵⁷ As noted by the World Health Organisation (WHO), these children ‘may be neglected, stigmatized, ostracized or abandoned. Infanticide may occur’.⁵⁸ Furthermore, these children may suffer from conflicting identities, neither feeling like they belong to the mother’s community due to discrimination or to the father’s community due to the violence that brought about their birth.⁵⁹ Where the child is unaware of the origins of their birth or the identity of their father, the child may suffer from a lack of identity and consequently a lack of citizenship. For example, research carried out by Grieg found that

⁵¹ V. Ladisch, Children Born of War, What Future?, *The International Centre for Transitional Justice*.

⁵² D. Buss ‘Performing Legal Order: Some Feminist Thoughts on International Criminal Law’, *International Criminal Law Review*, p. 419.

⁵³ K. Grieg, *The War Children of the World*, p. 7.

⁵⁴ E. Apio, ‘Uganda’s Forgotten Children of War’ in Carpenter, op. cit., 108.

⁵⁵ D. Seto, op. cit., 17-19.

⁵⁶ K. Theidon, ‘Hidden in Plain Sight: Children Born of Wartime Sexual Violence’, *Current Anthropology*, p. 193.

⁵⁷ C. Carpenter, ‘Gender, Ethnicity, and Children’s Human Rights: Theorizing Babies Born of Wartime Rape and Sexual Exploitation’ in Carpenter, op. cit., p. 3.

⁵⁸ Department of Reproductive Health and Research, World Health Organisation, *Reproductive Health during Conflict and Displacement: A Guide for Programme Managers*, p. 113.

⁵⁹ Seto, op. cit., p. 17.

children fathered by American soldiers in Vietnam were denied welfare, education and medical care because it was ‘customary for fathers to claim legal paternity and to register births...Without citizenship the children are doomed to be a pariah in their birth country’.⁶⁰ The identities of these children are thus politically charged and have severe implications for their overall development and well-being.

Carpenter has led the way in ‘surfacing’ children born of sexual and gender-based violence in conflict and mounted a strong critique of the international communities’ failure to address the needs of these children.⁶¹ Yet, in 2013, over a decade after Carpenter first shone the spotlight on children born of sexual and gender-based violence, the Secretary-General on Sexual Violence in Conflict referred to an ‘accountability gap’ in relation to these children.⁶² Indeed, in March 2014, the Office of the Prosecutor (OTP) for the ICC published a historic ‘Policy Paper on Sexual and Gender-Based Crimes’; however, children born as a result of such crimes are not mentioned anywhere in the document.⁶³ While regrettable, the lack of attention given to these children is unsurprising given international laws poor track record in even recognising the existence, let alone the consequences, of sexual and gender-based violence perpetrated against women in conflict situations. Moreover, in November 2016, the OTP launched its ‘Policy Paper on Children’ with children born of sexual and gender-based crimes featuring only marginally: as a footnote in relation to the multi-generational impact of crimes against children i.e., rape of female child soldiers resulting in pregnancy and later in the document in relation to the impact on the education of those children who become pregnant from rape.⁶⁴ The lack of specific attention given to children who are born as a result of sexual and gender-based violence within this Policy Paper is problematic in light of Chief Prosecutor Ms. Fatou Bensouda’ statement at its launch: ‘We must strengthen our resolve to end impunity for atrocity crimes against *and affecting* children’ at the launch of the policy.⁶⁵ While this statement suggests that the OTP is willing to look beyond crimes committed directly against children, an important opportunity to explicitly state that this encompasses children born of sexual and gender-based crimes was missed.

⁶⁰ Grieg, *op. cit.*, p. 11. See also, Theidon, *op. cit.*, p. 196-198.

⁶¹ C. Carpenter, *op. cit.*

⁶² United Nations, *Report of the Secretary-General on Sexual Violence in Conflict*, A/67/792–S/2013/149, 14 March 2013, paragraph 12.

⁶³ Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*.

⁶⁴ Office of the Prosecutor, *Policy Paper on Children*, footnote 6 and paragraph 87.

⁶⁵ ICC Press Release, ‘ICC Prosecutor, Fatou Bensouda, launches Policy on Children: “We must strengthen our resolve to end impunity for atrocity crimes against and affecting children”’ [Emphasis added].

It is evident from the foregoing discussion that the international community has failed to adequately respond to the plight of children born of sexual and gender-based violence. The following section argues that while there is currently a lack of visibility in relation to these children, there is room within the international criminal legal framework to provide recognition of these children and that there is evidence of such an approach already being taken.

EXPLORING THE BOUNDARIES OF INTERNATIONAL CRIMINAL LAW: THE SYMBOLIC AND REPARATIVE POTENTIAL

As noted earlier, international criminal law administered through international criminal judicial bodies such as the ICTR, ICTY and ICC has become a common response to atrocities committed during mass conflict. The prosecution and punishment of *individuals* in this way is premised on the idea that prosecuting grave human rights or humanitarian law violations ‘can substantially enhance the chances for establishing the rule of law in the post conflict society by signalling that no individuals are outside the reach of the law.’⁶⁶ The goals of international criminal justice can be divided into two broad categories: retributive and utilitarian.⁶⁷ The former is concerned with punishment or ‘just-deserts’ and denunciation, whereas the latter is concerned with deterrence, social redistribution and the creation of a historical record.⁶⁸ International criminal law’s key feature – individual accountability – however represents a problematic paradox: it responds to widespread violence through methods of individual accountability. The desire to find a ‘legal solution’ through the criminal trial model may lead to the erasure of complex social and cultural issues due to the focus on the ‘simplistic binaries of innocence/guilt; good/bad’.⁶⁹ This is compounded by the limited reach of international criminal law which focuses on ‘those who bear the greatest responsibility’; translated into the most ‘senior leaders suspected of being most responsible for crime’, ‘political military leadership’ or ‘others in command authority’ down a chain of command, and military, governmental, civilian leaders and authority figures.⁷⁰ Thus, international criminal

⁶⁶ D. Buss and A. Manji, *International Law Modern Feminist Approaches*, p. 274.

⁶⁷ L. Moffett, *Justice for victims before the International Criminal Court*, p. 12-16

⁶⁸ D. Guilfoyle, *International Criminal Law*, p. 88.

⁶⁹ C. O’Rourke, ‘Remarks’ in ‘Feminism v Feminism: What is a Feminist Approach to Transnational Criminal Law’ *American Society of International Law Proceedings of 102nd Annual Meeting*, p. 275; Buss, *op. cit.*, 412.

⁷⁰ C. Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, *op. cit.*, p. 258; United Nations Security Council Resolution 1534 (2004) of 28 August 2004, Doc No. S/RES/1534 (2004); United Nations

tribunals are only able to prosecute a handful of cases and such prosecutions are often painstakingly slow.⁷¹

The inherent limitations of international criminal law should not, however, lead to the conclusion that international criminal law is a lost cause. On the contrary, international criminal law has a symbolic and communicative function beyond prosecutions.⁷² This function is particularly important when it comes to sexual and gender-based violence. As noted by Phelps, sexual violence has always operated in a communicative and symbolic way: as a symbol of power, possession, to humiliate the enemy.⁷³ Trials involving the prosecution of these crimes operate in a similar way:

[T]he pronouncements of the tribunals...symbolise and communicate other powerful messages about women and about sexual violence...the way that the police, the prosecutor, or the judge handles rape says something, and what is communicated helps to define how a culture sees women, how women behave and how women see themselves.⁷⁴

Thus, international criminal tribunals do not deal with sexual and gender-based violence in a ‘vacuum: they respond to and in turn affect culture.’⁷⁵

Moreover, international criminal tribunals are developing a complicated jurisprudence on sexual violence, detailing not only the substantive law but the stories of women who suffered this violence. Indeed, when women in Rwanda were asked what they expected from the ICTR they said they wanted ‘the record to show that they were subjected to horrific sexual violence’.⁷⁶ While the extent to which survivors of sexual violence can frame their stories is stunted by the adversarial nature of international criminal trials, their narratives nonetheless play a role in representing history.⁷⁷ It is argued here that children born of sexual and gender-

Security Council Report of the Secretary-General on the establishment of a Special Court for Sierra Leone 4 October 2000 S/2000/915, paragraphs 29-31.

⁷¹ J. Galbraith, ‘The Pace of International Criminal Justice’, *Michigan Journal of International Law*.

⁷² T.G. Phelps, ‘The Symbolic and Communicative Function of International Criminal Tribunals’ in Fineman and Zinsstag, op. cit., p. 171. For a broader discussion of the symbolic and communicative function of criminal law in general see J. Feinberg, ‘The Expressive Function of Punishment’, *The Monist*, p. 397 and R.A. Duff, ‘Punishment, Retribution and Communication’ in G. Bruinsma, H. Elffers, & J. W. de Keijser (eds.), *Punishment, Places and Perpetrators: Developments in Criminology and Criminal Justice*, pp. 78-96.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid, p. 174.

⁷⁶ B. Nowrojee, ‘Your Justice is Too Slow’: *Will the ICTR Fail Rwanda’s Rape Victims?*, Occasional Paper, United States research Institute for Social Development, p. 4.

⁷⁷ N. Henry, ‘Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence’, *International Journal of Transitional Justice*, pp. 114-134; J. Mertus, ‘Shouting

based violence are part of this history and that the recognition of these children through the narratives of their mothers, other participants, or themselves, where appropriate, in international trials would go some way to removing the cloaks of silence that currently shrouds these children.

The potential of such an approach can be seen in the cases against *Jean Pierre Bemba* and *Dominic Ongwen* before the ICC. In the case of *Bemba*, who was found guilty on 21 March 2016 of rape, amongst other crimes, as crimes against humanity and war crimes, expert testimony during trial proceedings identified four women as having suffered unwanted pregnancies as a result of rape.⁷⁸ In the on-going case against *Ongwen*, who was charged with forced pregnancy, amongst other crimes in March 2016, Ms Bensouda drew attention to ‘a whole category of other victims: the children born in captivity resulting from these forced marriages, who sometimes face hostility and taunts as a result of their parentage’.⁷⁹ The language used by Ms Bensouda is significant, as it moves beyond a focus on the mother in the form of unwanted pregnancies to a focus on the difficulties faced by children born of sexual and gender-based violence. Such a change in focus may also provide a forum in which the stigma experienced by these children can be redirected to the perpetrator.

While all international criminal tribunals have the capacity to provide visibility to children born of sexual and gender-based crimes through the narratives which result from the trial transcripts, the framework of the ICC allows us to go a step further. The ICC, unlike the ICTR and ICTY, integrates retributive and reparative justice mechanisms through Article 75 of its Statute which provides that: ‘The Court shall establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation’.⁸⁰ Reparations are measures which are designed to repair or alleviate the harm caused to the injured party.⁸¹ Reparations can be individual and/or collective in nature: individual reparations focus on the specific harm to the individual and may involve restitution and compensation; whereas collective reparations focus on the collective harms of communities as a whole and may take the form of public apologies, the construction of memorials, schools

from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women's Agency’, *International Feminist Journal of Politics*, pp. 110-128.

⁷⁸ Testimony of Dr Tabo, *The Prosecutor v Bemba Gombo* (ICC-01/05-01/08-T-100-ENG), p. 27

⁷⁹ Trial Hearing Preliminary Matters, *The Prosecutor v Dominic Ongwen* (ICC-02/04-01/15-T-26-ENG), p. 35.

⁸⁰ ICC Statute, op. cit., Article 75.

⁸¹ International Court of Justice, Declaration of Judge Cançado Trindade, *Armed Activities on the Territory of the Congo*, p. 2.

or hospitals or truth commissions.⁸² At the ICC, victims are able to claim reparations when an alleged perpetrator is found guilty before the Court.⁸³ Thus, accountability at the ICC involves ‘not only doing something against the perpetrators, but also doing something specifically for victims’.⁸⁴ Furthermore, the OTP has committed to a ‘gender-inclusive approach to reparations taking into account the gender-specific impact on, as well as the harm caused to, and suffering of, the victims affected by the crimes for which an individual has been convicted’.⁸⁵

It is argued here that where an individual is convicted for sexual and gender-based violence before the ICC and it is found that children have resulted from these crimes, such children should be eligible for reparations as they, like their mothers, have clearly been ‘affected by the crimes’.⁸⁶ This is an argument that has been advanced in relation to reparations in the *Bemba* case⁸⁷ and while it is still unclear how the ICC will respond, recognising children born of this violence as eligible for reparations should, in theory, be relatively uncontroversial. Authorities exist in Timor Leste, Chile, Peru and Sierra Leone where children born of rape have been recognised as primary victims eligible for reparations as a result of truth commissions or national legislation.⁸⁸ Awarding reparations to these children may provide the opportunity to address the structural context and economic inequalities faced by these children. In Peru, for example, such children are entitled to economic compensation up to the age of 18 and should be eligible for preferential access to education services.⁸⁹

International criminal law thus has symbolic and reparative potential when it comes to addressing the needs of children born of sexual and gender-based violence. However, international criminal law has inherent limitations due to its individualised nature and ability to only prosecute a small number of cases. Further, while there is the potential to provide

⁸² F. Rosenfeld ‘Collective reparation for victims of armed conflict’, *International Review of the Red Cross*, p. 733.

⁸³ ICC Statute, op. cit., Article 75.

⁸⁴ Rubio-Marin, op. cit., p. 2.

⁸⁵ OTP, *Policy Paper on Sexual and Gender-Based Crimes*, op. cit., p. 7.

⁸⁶ Ibid.

⁸⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Annex, 28 November 2017, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2”. See also, E. Dowds, ‘Children Born of Rape in Bemba: Can the ICC Close the Accountability Gap?’, *INTLAWGRRRLS: Voices on International Law, Policy and Practice* and L. Moffett, R. Killean, Y. Brunger, E. Dowds, L. Dempster, K. Schwarz, & S. Gilmore, ‘Submission by QUB Human Rights Centre on reparations issues pursuant to Article 75 of the Statute’, *QUB Human Rights Centre*.

⁸⁸ D. Mazurana and K. Carlson, ‘Reparations as a Means for Recognising and Addressing Crimes and Grave Rights Violations against Girls and Boys during Situations of Armed Conflict and under Authoritarian and Dictatorial Regimes’ in Rubio-Marin op. cit., p. 182.

⁸⁹ United Nations, *Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence*, June 2014, 15.

broader justice through reparations at the ICC, reparations are only available where a conviction has been obtained and the process is extremely slow due to procedural and administrative requirements which the ICC has yet to fully clarify.⁹⁰ Indeed, the timeline for the *Lubanga* case, which represents the first ICC case to reach the reparations stage, demonstrates some of these challenges with Lubanga having been convicted in March 2012 and the final part of the reparations judgment only being delivered in December 2017.⁹¹ In light of this, any international criminal justice response should be complemented by other mechanisms developed to help a society transition from conflict to post-conflict. This will be explored further below.

COMPLEMENTING INTERNATIONAL CRIMINAL RESPONSES WITH PEACE AGREEMENTS

International criminal justice as a response to mass atrocity is situated within the wider field of transitional justice which encompasses a number of mechanisms to help societies come to terms with mass atrocities.⁹² As such, trials are just one ‘tool’ among many others, such as truth commissions; political reform through elections; economic development through free market principles; and peace agreements.⁹³ It is the latter tool which forms the focus of this section. Peace agreements are ‘documented agreements between parties to a violent internal conflict to establish a cease-fire together with new political and legal structures’.⁹⁴ In this regard, they attempt to reconstruct societies and redistribute power. While research carried out by McEvoy-Levy on forty peace agreements found that provisions relating to children born of sexual and gender-based violence during the conflict were not contained within any,⁹⁵ it is argued here that there is scope to include these children in the construction of future peace agreements by building on the recommendations that have been made in relation to

⁹⁰ M. Brodneý, ‘Implementing International Criminal Court-Ordered Collective Reparations: Unpacking Present Debates’, *Journal of the Oxford Centre for Socio-Legal Studies*, p. 1-35. M. Brodneý, ‘Formal, Functional, and Intermediate Approaches to Reparations Liability: Situating the ICC’s 15 December 2017 Lubanga Reparations Decision’, *Blog of the European Journal of International Law*.

⁹¹ Case Information Sheet, Situation in the Democratic Republic of the Congo: The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06: charges confirmed 2007, trial began 2009, convicted 2012, original reparations judgment delivered in August 2012 and amended in March 2015, the plan for symbolic reparations was only approved in October 2016 and the judgement on Lubanga’s monetary liability for reparations only delivered in December 2017.

⁹² N. Roht-Arriaza, ‘Editorial Note Special Issue: The Role of International Criminal Justice in Transitional Justice’ *The International Journal of Transitional Justice*, p. 389.

⁹³ M. Rees and C. Chinkin, ‘Exposing the gendered myth of post conflict transition: the transformative power of economic and social rights’, *New York University Journal of International Law and Politics*, p. 1211-1226.

⁹⁴ C. Bell, ‘Peace Agreements: Their Nature and Legal Status’, *The American Journal of International Law*, p. 374.

⁹⁵ S. McEvoy-Levy ‘Human Rights Culture and Children Born of Wartime Rape’ in Carpenter, op. cit., p. 157.

child soldiers and other vulnerable children within the United Nations international peace and security agenda.

Following a 1996 report entitled the *'Impact of Armed Conflict on Children'*, which called for a 'halt' on the 'modern-day brutality towards children',⁹⁶ the mandate of the Special Representative of the Secretary-General for Children and Armed Conflict was created by the United Nations General Assembly.⁹⁷ Over the years the Special Representative has attempted to enhance the protection of children affected by armed conflict, raise awareness on the use child soldiers in conflict and foster cooperation between international and civil society organisations working on child protection, rehabilitation and reintegration.⁹⁸ One initiative advanced by the Special Representative has been 'leveraging peace processes to engage with parties to conflict on children affected by violations'.⁹⁹ The 2013 *Report of the Special Representative* is particularly noteworthy in this regard as it expressed a need to mainstream child protection in peace agreements stating that such agreements should 'explicitly recognise that children's lives have been affected by the armed conflict, in particular through forced recruitment, displacement and sexual and gender-based violence', and that a commitment to the Convention on the Rights of the Child should be included in agreements.¹⁰⁰ While children born of sexual and gender-based violence are not directly referenced in the 2013 Report, it is noted that 'specific consideration should also be given to concerns regarding the protection of vulnerable children, such as refugee and internally displaced children, children separated from their families, unaccompanied minors and children orphaned by war'.¹⁰¹ Arguably this statement includes children born of sexual and gender-based violence as a vulnerable group.

⁹⁶ Report by Graça Machel, op. cit., paragraph 5.

⁹⁷ United Nations General Assembly, Resolution 51/77 (2017) Adopted by the General Assembly at its 51st session on 20th February 1997 A/RES/51/77.

⁹⁸ United Nations General Assembly, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 2017 A/72/276.

⁹⁹ *Ibid.*, paragraph 5.

¹⁰⁰ United Nations General Assembly, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, 2013 A/68/150, at paragraph 83 and 84.

¹⁰¹ *Ibid.*, paragraph 86.

Similarly, the United Nations has produced a number of Security Council Resolutions, *Resolution 2225* and *Resolution 2143*, which recognise the role of Governments in ‘providing protection and relief to *all* children affected by armed conflict’,¹⁰² urging:

Member States, United Nations entities, regional and sub-regional organizations and other parties concerned to ensure that child protection provisions, including those relating to the release and reintegration of children formerly associated with armed forces or armed groups, are integrated into all peace negotiations, ceasefire and peace agreements, and in provisions for ceasefire monitoring.¹⁰³

It might be thought that this provision is only applicable to child soldiers due to the wording ‘formerly associated with armed forces’; however, children born of sexual and gender-based violence have a paternal association with the armed forces, as evidenced above in relation to the negative labels often attached to these children. Therefore, it is argued that *Resolution 2225* and *Resolution 2143* require that the reintegration of children born of sexual and gender-based violence is integrated into peace agreements. Such agreements could provide the vehicle through which the plight of these children is recognised, moving beyond prosecution to social inclusion.

CONCLUSION

Following years of advocacy, international criminal law has recognised a wide range of sexual and gender-based crimes against women and it has increasingly responded to crimes against children; in particular, the forced recruitment of children as child soldiers. Yet, children born of sexual and gender-based violence have received limited attention in comparison. These children exist in their thousands and are often discriminated against in their own societies. This paper set out to explore the boundaries of international criminal law in relation to these children.

International criminal law possesses a symbolic and communicative function which has the power to make visible the plight of children born of sexual and gender-based violence through the prosecution of crimes against their mother. While there are legitimate concerns with this approach; such as the reinforcement of victimhood narratives and the reduction of

¹⁰² United Nations Security Council, *Resolution 2225 (2015) Adopted by the Security Council at its 7466th meeting, on 18 June 2015*, S/RES/2225 (2015) Preamble; United Nations Security Council, *Resolution 2143 (2014) Adopted by the Security Council at its 7129th meeting on 7 March 2014*, S/RES/2134, Preamble.

¹⁰³ *Resolution 2225 (2015)* para 9; *Resolution 2143 (2014)* para 9.

women to their reproductive capacities, these concerns should not result in the silencing of these children. The potential of the ICC to provide reparative justice has also been highlighted. However, the extent to which children would have access to reparations would be dependent upon successful prosecutions and a multitude of procedural and administrative requirements. As such, it has been argued that peace agreements should be used to complement any criminal justice response and ensure that children born of sexual and gender-based violence are integrated into society post-conflict.

Bibliography

International Statutes

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 Convention, 18 October 1907.

Elements of Crimes for the International Criminal Court (2002).

International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

International Committee of the Red Cross (ICRC), 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, 1125 UNTS 3.

International Committee of the Red Cross (ICRC), 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, 1125 UNTS 609.

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia adopted by Security Council on 25 May 1993, U.N. Doc S/RES/827 (1993) (ICTY Statute)

Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994) (ICTR Statute)

United Nations General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 (ICC Statute).

United Nations Reports and Resolutions

United Nations Commission on Human Rights, Fifty-fourth session, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission resolution 1997/44, UN Doc. E/CN.4/1998/54, 26 January 1998.

United Nations Division for the Advancement of Women Department of Economic and Social Affairs, Sexual Violence and Armed Conflict: United Nations Response, April 1998.

United Nations General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, 2017 A/72/276.

United Nations General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, 2013 A/68/150.

United Nations General Assembly, Resolution 51/77 (2017) Adopted by the General Assembly at its 51st session on 20th February 1997 A/RES/51/77.

United Nations, Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence, June 2014.

United Nations Security Council Report of the Secretary-General on the establishment of a Special Court for Sierra Leone 4 October 2000 S/2000/915.

United Nations Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) Resolution 820 (1993) Adopted by the Security Council at its 3200th meeting, on 17 April 1993, 17 April 1993, UN Doc S/RES/820 (17 April 1993).

United Nations Security Council Resolution 1534 (2004) of 28 August 2004, Doc No. S/RES/1534 (2004)

United Nations Security Council, Resolution 2143 (2014) Adopted by the Security Council at its 7129th meeting on 7 March 2014, S/RES/2134.

United Nations Security Council, Resolution 2225 (2015) Adopted by the Security Council at its 7466th meeting, on 18 June 2015, S/RES/2225 (2015)

United Nations Secretary General, Report Graça Machel on The Impact of Armed Conflict on Children, A/51/306, 26 August 1996.

United Nations, Report of the Secretary-General on Sexual Violence in Conflict, A/67/792–S/2013/149, 14 March 2013.

International Case Law and Trial Material

International Court of Justice, Declaration of Judge Cançado Trindade, *Armed Activities on the Territory of the Congo*.

Testimony of Dr Tabo, *The Prosecutor v Bemba Gombo* (ICC-01/05-01/08-T-100-ENG)

The Prosecutor v. Alex Tamba Brima, Ibrahim Bazy Kamara and Santigie Borbor Kanu [2008] SCSL-2004-16-A (Special Court for Sierra Leone, Appeals Chamber) 22 February 2008

The Prosecutor v Akayesu, Case No. ICTR-96-4-T, Judgement (Sept 2. 1998)

The Prosecutor v Dominic Ongwen (ICC-02/04-01/15) 6 December 2016.

The Prosecutor v Kunarac, Kovac, Vukovic No. IT-96-23&23/1, Judgement (Feb 22 2001)

The Prosecutor v Kvočka et al. (IT-98-30/1) 2 November 2001

The Prosecutor v Mucić et al. (IT-96-21) 9 October 2001

The Prosecutor v. Thomas Lubanga Dyilo (14 March 2012) ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito.

The Prosecutor v. Jean-Pierre Bemba Gombo, Public Redacted Version of “Annex, 28 November 2017, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2”.

Trial Hearing Preliminary Matters, *The Prosecutor v Dominic Ongwen* (ICC-02/04-01/15-T-26-ENG)

International Reports and Policy Documents

African Rights, *Rwanda: Death, Despair and Defiance*, rev ed, 1995..

B. Nowrojee, ‘Your Justice is Too Slow’: Will the ICTR Fail Rwanda’s Rape Victims?, Occasional Paper, United States research Institute for Social Development, November 2005.

C. Carpenter, ‘Protecting Children Born of Sexual Violence and Exploitation in Conflict Zones Existing Practice and Knowledge Gaps’ Findings from Consultations with Humanitarian Consultations with Humanitarian Practitioners December 2004 – March 2005.

Department of Reproductive Health and Research, World Health Organisation, Reproductive Health during Conflict and Displacement: A Guide for Programme Managers, 2000.

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) UN Doc S/1994/1405 (9 Dec 1994)

International Criminal Court, Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, March 2014.

International Criminal Court, Office of the Prosecutor, *Policy Paper on Children*, November 2016.

K. Grieg, *The War Children of the World*, Bergen, Norway: War and Children Identity Project 2001.

L. Moffett, R. Killean, Y. Brunger, E. Dowds, L. Dempster, K. Schwarz, & S. Gilmore, 'Submission by QUB Human Rights Centre on reparations issues pursuant to Article 75 of the Statute', *Queen's University Belfast Human Rights Centre*, 2016.

Books

A. Orford, (ed.) *International Law and its Others*, Cambridge, Cambridge University Press, 2009.

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

C. Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, Leiden, Boston, Martinus Nijhoff Publishers, 2012

D. Buss, and A. Manji, A. *International Law Modern Feminist Approaches*, Oxford, Hart Publishing 2005.

D. Guilfoyle, *International Criminal Law*, Oxford, Oxford University Press, 2016.

D. Seto, *No Place for a War Baby: The Global Politics of Children Born of Wartime Sexual Violence*, England, Ashgate Publishing Company 2013.

I.C. Mochmann, Children Born of War In Revista OBETS, Juventud Embotellada. Los ritmos del cambio social. Revista de Ciencias Sociales. N. 2 (dic. 2008) 53-61. Alicante: Universidad de Alicante. Instituto Universitario de Desarrollo Social y Paz. (first published 2007) Online. Available HTTPS: http://rua.ua.es/dspace/bitstream/10045/9030/1/OBETS_02_04.pdf (accessed 19 February 2018).

J. Henckaerts, and L. Doswald-Beck, *Customary International Law, Volume I: Rules*, New York, Cambridge University Press, 2005.

L. Moffett, *Justice for victims before the International Criminal Court*, Abingdon, Oxon, Routledge 2014.

M. Eriksson, *Defining Rape Emerging Obligations for States under International Law?* Kållerød, Örebro University, 2010.

M. Kaldor, *New and Old Wars: Organised Violence in a Global Era*, Cambridge, Polity Press, 2012.

R. Pritchard, and S. Zaide, (eds) *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal of the Far East* (1981) volume 2 and 6.

R. Rubio-Marin, (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, Cambridge, Cambridge University Press, 2009.

Book Chapters

C. Carpenter, 'Gender, Ethnicity, and Children's Human Rights: Theorizing Babies Born of Wartime Rape and Sexual Exploitation' in Carpenter, C. (ed) *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, United States of America, Kumarian Press, 2007.

C. O'Rourke, 'International Law and Domestic Gender Justice, or Why Case Studies Matter' in M.A. Fineman, and E. Zinsstag, (eds), *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice*, Antwerp, Intersentia, 2013.

D. Mazurana, and K. Carlson, 'Reparations as a Means for Recognising and Addressing Crimes and Grave Rights Violations against Girls and Boys during Situations of Armed Conflict and under Authoritarian and Dictatorial Regimes' in R. Rubio-Marin, (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing*, Cambridge, Cambridge University Press, 2009.

E. Apio, 'Uganda's Forgotten Children of War' in Carpenter, C. (ed) *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, United States of America, Kumarian Press, 2007.

M.U. Walker, 'Gender and Violence in Focus: A Background for Gender Justice in Reparations' in R. Rubio-Marin, (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing*, Cambridge, Cambridge University Press, 2009.

P. Clark, 'The Challenges of International Criminal Law in Addressing Mass Atrocity' in B.A. Arrigo, and H.Y. Bersot, (eds) *The Routledge Handbook of International Crime and Justice Studies*, United Kingdom, Routledge 2014).

R.A. Duff, 'Punishment, Retribution and Communication' in G. Bruinsma, H. Elffers, & J. W. de Keijser (eds.), *Punishment, Places and Perpetrators: Developments in Criminology and Criminal Justice*, United Kingdom, Willan Publishing, 2004.

S. McEvoy-Levy, 'Human Rights Culture and Children Born of Wartime Rape' in C. Carpenter, (ed) *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, United States of America, Kumarian Press, 2007.

T.G. Phelps, 'The Symbolic and Communicative Function of International Criminal Tribunals' in M.A. Fineman and E. Zinsstag, (eds), *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice* Antwerp, Intersentia, 2013.

Articles

C. Bell, 'Peace Agreements: Their Nature and Legal Status', *The American Journal of International Law*, 2006, vol. 100(1).

C. Carpenter, 'Surfacing Children: Limitations of Genocidal Rape Discourse', *Human Rights Quarterly*, 2000, vol. 22.

C. Hawkins, 'Women's human rights: The global intersection of gender equality, sexual and reproductive justice, and healthcare', *Journal of Research on Women and Gender*, 2012, vol. 4.

C. O'Rourke, 'Remarks' in 'Feminism v Feminism: What is a Feminist Approach to Transnational Criminal Law' *American Society of International Law Proceedings of 102nd Annual Meeting*, 2008.

D. Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law', *International Criminal Law Review*, 2011, vol. 11.

D.M. Amann, 'The Post-Postcolonial Woman or Child' *American University International Law Review*, 2015, vol. 30(41).

- F. Ní Aoláin, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' *Queen's Law Journal*, 2009, vol. 1.
- F. Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law: Norms, Challenges and Domestication' *International Feminist Journal of Politics*, 2014, vol. 16(4).
- F. Ní Aoláin and C. Turner, 'Gender, Truth and Transition' *UCLA Women's Law Journal*, 2007.
- F. Rosenfeld, 'Collective reparation for victims of armed conflict' *International Review of the Red Cross*, 2010, vol. 92(879).
- K. Theidon, 'Hidden in Plain Sight: Children Born of Wartime Sexual Violence', *Current Anthropology*, 2015, vol. 56(12).
- I.C. Mochmann, 'Children Born of War - A Decade of International and Interdisciplinary Research', *Historical Social Research*, 2017, vol. 42(1).
- I.C. Mochmann, and S. Lee, 'The Human Rights of Children Born of War: Case analyses of Past and Present Conflicts', *Historical Social Research*, 2010, vol. 35.
- I.C. Mochmann, and S.U. Larsen, 'The forgotten consequences of war: The life course of children fathered by German soldiers in Norway and Denmark during WWII – some empirical results' *Historical Social Research*, 2008, vol. 33(1).
- I.M. Young, 'The Logic of Masculinist Protection: Reflections on the Current Security State' *Signs: Journal of Women in Culture and Society*, 2003, vol. 29(1).
- J. Feinberg, 'The Expressive Function of Punishment', *The Monist*, 1965, vol. 49.
- J. Galbraith, 'The Pace of International Criminal Justice' *Michigan Journal of International Law*, 2009, vol. 31
- J. Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' *International and Comparative Quarterly*, 1997, vol. 46
- J. Green, R. Copelon, P. Cotter, and B. Stephens, 'Affecting the Rules for the Prosecution of Rape and Other Gender Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique', *Hastings Women's Law Journal*, 1994, vol. 5.

J. Mertus, 'Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women's Agency' *International Feminist Journal of Politics*, 2004, vol. 6(1)

K. Engle, "'Calling in the Troops": The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention', *Harvard Human Rights Law Journal*, 2007, vol. 20.

K.D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkeley Journal of International Law*, 2003, vol. 21(2).

L. Chappell, 'Conflicting Institutions and the Search for Gender Justice at the International Criminal Court', *Political Research Quarterly*, 2014, vol. 67(1)

M. Brodney, 'Implementing International Criminal Court-Ordered Collective Reparations: Unpacking Present Debates', *Journal of the Oxford Centre for Socio-Legal Studies*, 2016.

M. Rees, and C. Chinkin, 'Exposing the gendered myth of post conflict transition: the transformative power of economic and social rights', *New York University Journal of International Law and Politics*, 2016, vol. 48(4).

N. Henry, 'The Fixation on Wartime Rape: Feminist Critique and International Criminal Law', *Social & Legal Studies*, 2014, vol. 23(1).

N. Henry, 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence', *International Journal of Transitional Justice*, 2009, vol. 3(1).

N. Roht-Arriaza, 'Editorial Note Special Issue: The Role of International Criminal Justice in Transitional Justice' *The International Journal of Transitional Justice*, 2013, vol. 7(3).

R. Coomaraswamy, 'Women and Children: The Cutting Edge of International Law', *American University International Law Review*, 2015, vol. 30(1)

R. Copelon, 'Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law', *Hastings Women's Law Journal*, 1994, vol. 5.

Electronic Sources

Case Information Sheet, Situation in the Democratic Republic of the Congo: The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06, Updated: November 2017. Online. Available HTTPS: <https://www.icc-cpi.int/drc/lubanga/Documents/lubangaEng.pdf> (accessed 19 February 2018).

ICC Press Release, ‘ICC Prosecutor, Fatou Bensouda, launches Policy on Children: “We must strengthen our resolve to end impunity for atrocity crimes against and affecting children”’ 18 November 2016. Online. Available HTTPS: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1257> (accessed 10 February 2018).

International Network for Interdisciplinary Research on Children Born of War (INIRC-CBOW). Online. Available HTTPS: <http://www.childrenbornofwar.org/> (accessed 10 February 2018).

E. Dowds, ‘Children Born of Rape in Bemba: Can the ICC Close the Accountability Gap?’, INTLAWGRRLS: Voices on International Law, Policy and Practice, 16 January 2018. Online. Available HTTPS: <https://ilg2.org/2018/01/16/children-born-of-rape-in-bemba-can-the-icc-close-the-accountability-gap/> (accessed 19 February 2018).

Ladisch, V. Children Born of War, What Future?, (2015) The International Centre for Transitional Justice. Online. Available HTTPS: <https://www.ictj.org/news/uganda-children-born-war-future> (accessed 19 February 2018).

M. Brodny, Formal, Functional, and Intermediate Approaches to Reparations Liability: Situating the ICC’s 15 December 2017 Lubanga Reparations Decision, 4 January 2018, Blog of the European Journal of International Law. Online. Available HTTPS: <https://www.ejiltalk.org/formal-functional-and-intermediate-approaches-to-reparations-liability-situating-the-iccs-15-december-2017-lubanga-reparations-decision/> (accessed 19 February 2018).