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The Convention on the Rights of the Child and Children Born of War Rape in Bosnia-Herzegovina

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Introduction

This chapter examines the societal response to children born of war rape in Bosnia-Herzegovina, during and after the mass rape campaigns of the early 1990s. After the disintegration of Yugoslavia in the early 1990s, many children, conceived in mass rape campaigns, were born to mothers who did not want them (Williams, 1993; Horvath, 1993).¹ Like thousands of other children of forced pregnancy worldwide, orphans of war rape in the Balkans are often viewed as children 'of the enemy.'² Local and international actors contest their ethnic identities and citizenship rights: consequently, their rights to education, family, identity and in some cases physical security have been severely curtailed.

Although Priyanthi de Silva has accurately termed these children "secondary rape victims," (Silva, 2004) most treatments of mass rape in the former Yugoslavia have focused on the plight of women and their victimization and social exclusion in situations of rape in armed conflict. Only in recent years, research on the situation of children born as a consequence of war rape has attracted the interest of academia, but still too little is known about their fate, their social integration or to what extent their human rights are being threatened. This chapter considers how local populations perceive these children, how this impacts their human rights, and what protections, if any, are available for these children and their mothers within the civil society sector in Bosnia-Herzegovina (BiH).

The findings presented here are based on exploratory research conducted for the author's MA thesis between 2002 and 2003 (Daniel, 2003). A review of the available literature from a number of sources was undertaken. These included country reports from international organizations, literature in academic journals, and press reports in magazines and newspapers. In May 2003, a fieldtrip to Sarajevo, Tuzla, Zenica and Gračanica was made to collecting testimonies about the issue from representatives of civil society in BiH. This trip included visits to women's organisations and orphanages to conduct semi-structured in-depth interviews with staff (primarily social workers and psychologists) of these institutions.³ In addition, this chapter

¹ Estimates of the numbers vary. They range as high as 4000 (see the War and Identity Project, http://www.warandchildren.org/Index_Intern.htm); relief workers and doctors involved in deliveries during the war were consistently quoted as estimating between 400 and 600. See Williams, "Bosnia's Orphans of Rape, Innocent Legacy of Hatred" *L.A. Times* (July 24, 1993), p. 1; Horvath, "The Children of the Rapes: Young Victims of Ethnic Cleansing," *World Press Review* (June 1993), p. 11.

² According to the Rome Statute for the International Criminal Court, forced pregnancy "means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law." On children of forced pregnancy in Rwanda, see Bianfer Nowrojee, *Shattered Lives* (NY: Human Rights Watch 1996); on Bangladesh see Rozario, "Disasters and Bangladeshi Women" in Lentin ed., *Gender and Catastrophe* (London: Zed Books 1997).

³ Visits were made to the following places: Sarajevo: "Hopes and Homes for Children", Save the Children UK, UNICEF, ICI- International Children's Institute, Žena za Žena, OSCE; UNHCR and UNPD. Tuzla: Home for Children without Parental Care, Familja, Vive Žena. Zenica: Medica Zenica. Gračanica: SOS-Children's Village.

draws on further insights developed the following year during participation in a separate exploratory fact finding study on children born of rape in BiH sponsored by UNICEF-Sarajevo in summer 2004.

The extreme sensitivity of the topic, the unresponsiveness of affected communities and the lack of reliable data on this issue, represent only a few of the impediments for a better understanding of the problem. In particular, interviews with rape victims and war rape orphans themselves were not part of the project, since they require a different approach and specialised personnel to conduct them. At this point, the main goal was to investigate and evaluate how the children born as a consequence of rape during war were perceived in their home country and if and how their needs and human rights were addressed. The majority of those contacted reported unawareness about the subject but, in certain cases, some unwillingness to provide information about such a taboo theme was also evident. This reluctance was in part motivated by previous bad experiences with journalists and researchers. Due to these factors, the findings here should be considered preliminary and tentative pending more systematic study. Only an in depth understanding of all aspects of the subject will allow local and international actors to devise policies in support of these children and their mothers and most importantly contribute to the improvement of their situation.

In this chapter, the situation of ‘war babies’ in BiH will be evaluated against the rights applicable to all children as enumerated in international law, particularly the 1989 Convention on the Rights of the Child (CRC). In the first section below, a description of the particular circumstances of rape and forced impregnation in BiH is given, followed by an account of what is known about the response of various entities within BiH to these children. Particular attention is given to government policies, orphanages and institutions for children without parental care, women's organisations and the various religious communities. The international standards for the protection of all children's human rights as enumerated in the 1989 Convention on the Rights of the Child are considered, as well as the extent to which these standards have been adequately applied – or indeed, are adequate – to address the particular harms to which Bosnia's war babies are subject.

Reactions to Children Born of War Rape and Forced Impregnation in BiH

Although the mass rape campaigns carried out during the war in Bosnia and Herzegovina (1991-1995) were treated as unprecedented at the time, it is now understood that these were part of a much broader global pattern of war-related violence against women. In conflicts all around the world women and girls, irrespective of their age, ethnicity or political affiliation, have been singled out for sexual violence, imprisonment, torture, execution, sexual mutilation, forced pregnancy, rape and sexual slavery. Acts such as rape, sexual assault, sexual slavery, forced prostitution, forced sterilisation, forced abortion, and forced pregnancy may all qualify as crimes under national and international law (Human Rights Watch, 1999): Sexual violence was considered to be a war crime,⁴ torture,⁵ genocide⁶ and a crime against humanity⁷; and forced

⁴The Convention Relative to the Protection of Civilians in Time of War (The Fourth Geneva Convention) of August 12, 1949, explicitly requires the protection of women against "rape, enforced prostitution, or any form of indecent assault" (Art. 27). Common Article 3 of the Geneva Conventions prohibits "violence to life and person", "cruel treatment", "torture" (Art.3 (1) (a)) or "other outrages upon personal dignity" (Art.3. (1)(c)). Protocol II to the Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts, explicitly outlaws "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" (Art. 4 (2)(e)).

pregnancy (or forced impregnation) was already recognised as a military strategy used in several conflicts and has been codified under international law as a war crime and a crime against humanity (Carpenter, 2000).

The numbers of raped women in former Yugoslavia vary depending on the sources, with numbers ranging from 20,000 to 50,000⁸. While all sides in the Bosnian conflict have committed rapes, Serbian forces appear to have used rape on the largest scale, principally against Muslim women. (Laber, 1993) According to the UN Final Report of the Commission of Experts, the majority of the cases, perpetrated by soldiers, paramilitary groups, local police as well as civilians, occurred between fall of 1991 and the end of 1993.⁹

Among several factors that substantiate the allegation of a Serbian rape policy are the five patterns of sexual violence that were established by the UN Final Report. One of those patterns occurred in the so-called "rape camps". There is unquestionable evidence that rape and other forms of sexual violence were not just "by-products" of the armed conflict or a form of revenge for a victorious army, but a well-planned and systematic policy in the context of ethnic cleansing. (Nowak, 2000)

On January 5, 1994, the UN General Assembly adopted a special resolution stating that "systematic practice of rape was used as a weapon of war and an instrument of ethnic cleansing against women and children in the areas of armed conflicts in former Yugoslavia, and especially against the Bosniac women and children in BiH". (Nowak, 2000:402) Frequently, the Serbian captors told the women that they were trying to impregnate them. In doing so they would create "Chetnik babies" who would kill Muslims when growing up. Furthermore, they repeatedly said that they were following their president's orders. Gynaecologists examined the women and those found pregnant were segregated, given special privileges, and held until their seventh month when it was too late to obtain an abortion; at that time they were released. (Niarchos, 1995)

A photograph of a letter sent to the secret police chief in Belgrade from the commander of the 3rd Battalion of the Serb army reads: "680 Muslim women of ages ranging from 12 to 60 years are now gathered in the centres for displaced persons in our territory. A large number of these are pregnant, especially those ranging in age from 15 to 30 years. In the estimation of Bosko Kelevic and Smiljan Geri, the psychological effect is strong, and therefore we must continue [the rape and forced impregnation]." (Chauval, 1995)

The Bosnian government estimated that some 35,000 women, primarily Muslim but also Croat, became pregnant from rape. (Salzman, 1998) According to Nikolic-Ristanovik, Serb women were also raped and impregnated, having testified that their Muslim or Croat attackers

⁵ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984, states that rape and other forms of sexual violence constitute torture when they are "intentionally inflicted" on a person by "a public official or other person acting in official capacity", or at the official "instigation", "consent", or "acquiescence" for purposes such as intimidation, coercion, punishment, or eliciting information or confessions or "for any reason based on discrimination of any kind" (Art.1 (1)).

⁶ As defined in the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, genocide constitutes certain acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" (Art. 2).

⁷ Although under the Nuremberg Charter, the Military Tribunal did not prosecute rape, the Military Tribunal for the Far East (the Tokyo Tribunal) did convict Japanese officers of rape.

⁸ In December 1992, the EU Fact Finding Mission determined that the Bosnian Serb Army "as a prolonged form of terror" had raped 20,000 women, while the Bosnian Government estimated the number of raped women around 50,000. (Nowak, 2000)

⁹ United Nations, Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Annex 241 n.65, U.N. Doc. S/ 1994/674 (1994).

made similar comments about wanting to impregnate them for ethnic reasons. According to the report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights,¹⁰ the majority of these women had abortions. Although abortions are not approved by the Catholic or by the Orthodox Church, they are allowed among Muslim women until the 120th day of pregnancy. On the other hand, it is also stated that a large number of women were kept in detention until they could not make abortions any more.

Ahmed Zin, director of the Egyptian Aid Agency designated by the Sarajevo leadership to operate group homes for these orphans, estimated that 500 to 600 children have been born as a consequence of war rape, and he speculated that many more were trapped with their mothers in the 70% of Bosnian territory controlled by Serbs. (Williams, 1993) This interview was given in 1993 when many of the pregnant women had not yet given birth and the raping was still going on. Some women gave birth in Bosnia, numerous in Croatia and several in the countries where they were evacuated and accepted as refugees. A number of them were also taken in advanced stages of pregnancy to Serbia (Salzman, 1998) where nobody knows their destinies. Fadila Memisevic of the Association for threatened Peoples of Bosnia revealed that raped women who kept their babies were a tiny minority. "Many more may have wanted to do so, but the pressures on them were intolerable." (Becirbasic, 2002)

Several refugee women, taken in advanced stages of their pregnancies to Croatia, delivered at the Petrovo Maternity Hospital in Zagreb. From there, according to the Centre for Women Victims of War, CWVW, and the Zagreb Caritas office, unwanted babies were taken to the Vladimir Nazor Orphanage or the Goljak Centre for children with special needs. (Becirbasic, 2002) Zagreb Caritas received around one hundred and fifty raped women. Around 60% of these women were pregnant. The director Jelena Brajsa remembers the first fifteen pregnant women who arrived in 1993. All had been repeatedly raped. After delivery, two babies were kept by their mothers, one Christian and one Muslim, nine were collected by the Bosnian Embassy and Red Cross and later returned to Bosnia. There, two were taken by their families, two were adopted and five placed in institutions.¹¹ The remaining four babies, which were handicapped stayed behind and are in Zagreb until today. The reasons for this selection remain unclear.

In sum, although the exact number is not known, the anecdotal evidence suggests that many children conceived as a result of war rape were carried to term during the war. Although many of these left Bosnia with their mothers, some percentage is likely to have been raised within Bosnia after the war: of these, some were raised by their mothers, others were adopted by Bosnian families, and some have remained in institutions.

Although the Convention on the Rights of the Child, to which Bosnia is a signatory, enumerates a range of rights to which all children are entitled, regardless of 'birth or other status,' children born as a result of war rape may be particularly at risk of deprivations of these rights, and it is not clear based on the data gathered so far whether the reaction of relevant entities in Bosnia-Herzegovina has been adequate to mitigate such harms.

In 1993 the Bosnian Government, while claiming that 200,000 people had been killed in 15 months of nationalistic aggression, refused to relinquish any more of its endangered citizens. (Williams, 1993) One of the implemented measures was the ban of international adoption of war orphans, and among those, the children of forced maternity. This attitude, in accordance with

¹⁰ See Report on The Situation of Human Rights in The Territory of Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Commission Resolution 1992/S-1/1 of 14 August, 1992, UN ESCOR, Commission on Human Rights, 49th Session, Agenda item 27.

¹¹ Author's interview with Belma Becirbasic. Sarajevo, May 2003.

religious principles laid down by the Muslim Community, was motivated not only by the hope that relatives of these children would take care of them, but also as a means of repopulating the country.¹²

But it is less clear what kind of government response, if any, was available for the children born as a consequence of rape and for their mothers; how those in institutes for children without parental care are being integrated; and if adopted, what follow-up measures were taken to evaluate their integration and present situation. Such information is particularly difficult to assess by outside researchers or human rights monitors because the government does not appear to have monitored this specific group of children after the war. Rather, the conventional wisdom in Bosnia appears to be that the question is a non-issue. It is reported by some that no concrete measures were taken to evaluate the situation of this population and address their needs, therefore no information is available. However, the same government officials argue that because they aren't aware of cases to the contrary, the children must be doing fine.

Institutions for Children Without Parental Care.

Since there are no private adoption agencies in BiH, and the concept of foster families is not well developed, the Centres for Social Work are responsible for the placement of the children in local orphanages or institutions for children without parental care or for organizing adoption.¹³ Children born as a consequence of rape who were abandoned by their mothers would have been dealt with through these mechanisms.

Centres for Social Work, state orphanages and institutions for children without parental care are not willing to share information in order to protect these children. Several institutions are not aware of the family history of the children because this is considered by the Centres for Social Work as "confidential information". On several occasions, staff revealed that they could have children born as a result of rape but they wouldn't know since they are not aware of the children's full background.

The orphanages visited in May 2003, were very reluctant to address the question of the children born as a consequence of rape. Most of the time, staff denied awareness about this particular subject, many adding that keeping records of the children during the war period was extremely difficult. The psychologist of the Tuzla orphanage revealed that some children born as a consequence of rape during war were sheltered in that institution. She stated that sometimes she tried to explain to these children their origins but they "didn't understand".¹⁴ Nothing has been revealed regarding the relationship between these children and the other war orphans. One of the reasons, according to the orphanage workers, is that these children are not aware of their origins.

According to Advija Hercegovac of the Vojo Peric orphanage in Tuzla, in 1993 around 700 children were admitted while the capacity of the orphanage was only 110, "it is possible that many of those were babies of raped women, but there was a chaos at the time and we had more

¹² Weitsman notes that, "while children conceived by rape in wartime are frequently considered to assume the identity of their father by the perpetrators, the victim's states do not necessarily adopt that view". (Weitsman, 2003:19)

¹³ Author's interview with Angela Pudar, National Director of Save the Children UK, Sarajevo, May, 2003. Pudar added that there was a poor capacity of the government to respond to children that were sent abroad. Unlike a group of children, from the Children's Home Bjelave, Sarajevo, that was evacuated to Germany and returned after the war without any complications, another group of around 40 children from this same home was evacuated, at the end of 1992, to Italy where they remain until today.

¹⁴ Case interview. Sarajevo, May 2003.

important tasks than keeping detailed records. Children later adopted were subject to the usual rules protecting their identities and those of their adoptive parents.” (Becirbacic, 2002)

Although not different from ordinary adoption procedures, the systematic lack of monitoring and assistance to adoptive children might expose children born to women raped during war and their adoptive parents to specific problems. The confidentiality rule can turn against the child it is suppose to protect. Social assistance and counselling become unavailable to children and parents due to the fact that no monitoring is foreseen after adoption.

Women's Organisations.

The main goal of the majority of women's organisations established in BiH during and immediately after the war is the well-being of women, helping them to cope with the physical and psychological traumas caused by rape and forced pregnancy. They have special training and experience working with women's problems, not only rape but also domestic violence, a problem that has been escalating since the end of the war. Through their work with rape victims these organisations are fully aware of the circumstances of conception. Given their focus on the situation of women they are not always in a position to provide the answers related to the destinies of the children and their integration, but some organisations shared their experiences concerning the different types of relationships between mother and child in cases where a client has chosen to raise her baby.

Medica Zenica is one of the few organizations that provide gynaecologic, therapeutic and psychological support not only to women victims of sexual abuse and forced pregnancy but also to their families.¹⁵ Regardless of the final decision for either aborting or keeping the child, this organization provides the necessary assistance. According to Medica Zenica, out of 150 raped women that arrived at the centre, fifteen women were pregnant and thirteen had babies. From those thirteen, three women kept the babies with psycho-social support from Medica; one mother wished to keep the baby but she didn't have enough money so the child was taken by the government and one mother killed the baby six months after delivery, in a moment of “insanity”, but the majority of women opted for giving the children up to adoption. According to the same organisation, the majority of girls, when realising it was too late for an abortion, wanted to have an abortion using paraprofessional methods or even injuring themselves. All women were extremely reluctant to accept their pregnancy. They neglected their body because it was a constant reminder of rape.¹⁶ A woman that approached Medica after being raped in Brcko was accompanied by her mother, who kept insisting that the pregnancy was her daughter's own fault. (Becirbacic, 2002)

In Tuzla there is a women's centre that provides counselling for rape victims called Vive Zena. Among its staff, helping several other women traumatised by war, there is a woman that was forcibly impregnated. She was six months pregnant by the time she arrived in Tuzla. Unable to have an abortion, she had to wait until the baby was born. After a first rejection of the baby that was sent to the local orphanage, she later reconsidered and decided to keep the baby with her. The price of this decision was high. Rejected by family and local community, enduring the whispers and finger pointing of other women in Zivince, the place where she started her life as a refugee, she had to go through a long fight until she could live with her son. The taboo around rape even extended to her family. Her mother, sister and brother-in-law were supportive, but not

¹⁵ Helped by Monica Hauser, this centre is equipped with a gynaecological out-patient department and a therapeutic in-centre department. Case interview, Sarajevo, May 2003.

¹⁶ Case interview, Sarajevo, May 2003. Information updated during Summer 2004.

her father or younger brother. She remained in Bosnia throughout her pregnancy, but many women who had been raped in prison camps in Northwest Bosnia were evacuated to third countries via Croatia¹⁷. Tory Araldesn, the psychologist who in 1993 was overseeing the women's counselling centre in Tuzla run by the Norwegian People's Aid, stated that “rape here is much more taboo than it is in the West. It is so taboo that even the local therapists are hesitant to bring it up”. (Williams, 1993)

Religious Leadership

Religious institutions became more politically relevant during and after the war in all three communities, therefore pronouncements of religious leaders on the issue of children born as a consequence of war rape acquire particular importance. While in Republic Srpska the majority of population of Serb origin is Orthodox, in the Federation, besides the Muslim community, those from Croat ancestry are Catholics. Although no information was obtained from the Orthodox religious authorities and their position in relation to this issue, the position of the Catholic Church and specially of the Muslim leaders demonstrate the attempt of religious institutions to live up to their responsibilities.

The Muslim authorities both internationally and within Bosnia considered the status and rights of the orphans of war rape early on in the war. According to Mr. Muharem Omerdić, the Counsellor for Religious Issues in BiH, the analysis of the problem and the study of the status of women in the Sharia Law¹⁸ was conducted with the intention of making sure that these women were protected. Furthermore, it was intended to prepare Muslims to accept the children and to alleviate their pain. Omerdić stated that “it was particularly painful when some of the raped women were left by their husbands, even their fathers. Cruel gossips about some women spread through their neighbourhoods, especially when they were left pregnant.” (Omerdić, 2002:428)

In order to deal with this situation, scholars from several countries issued special fatwas,¹⁹ legal statements issued by a mufti or a religious lawyer on a specific issue. According to Omerdić, several problems had to be addressed:

“What is debauchery? What are the sanctions against debauchery? Are raped women unchaste? Are raped women subject of the provisions against debauchery? Are babies born by a raped mother the babies born by an unchaste woman? Whose family name will the baby carry? Who will it inherit and what will be its right in general? Who will take care of such a baby? Whom does an unwanted baby belong to by God's, natural and civil law? Are raped mothers entitled to perform abortion, and when are they allowed to do so?”
(Omerdić, 2002:429)

Ali D'adulhakk, the sheikh of Al-Azhar, Cairo, considered to be the greatest recognised living Islamic authority, wrote and published a fatwa entitled “Fatwa on Children Born by Raped Women in BiH”²⁰. This fatwa, translated and published in BiH, provides important guidelines for

¹⁷ Becirbacic, 2002. Same story was confirmed in Vive Zena, author's interview, Tuzla, May 2003.

¹⁸ Sharia is the law system inspired by the Koran, the Sunna, older Arabic law systems, parallel traditions, and work of Muslim scholars over the two first centuries of Islam. Being "based upon the Koran", it is considered the "will of God".

¹⁹ Fatwas are asked for by judges or individuals and are needed in cases where an issue is undecided or uncertain. Lawsuits can be settled on the basis of a fatwa.

²⁰ Āl-Šajh D'allulakk, Ali D'allulakk, al Ima al akbar, Hukmu at fali n-nisa I al-mugtesibati fi l-Busneti wa l-Harsaki (“Regulations related to the children of raped women in BiH”), Buhnus wa fatawa islamiyya fi qadaya al-mu asira,

the conduct of both women and local communities in the acceptance and integration of these women and their children as valid members of society. Emphasizing the fact that abortions after 4 months of pregnancy are not allowed, even for women that were impregnated through rape, the fatwa designates the future mother as the main responsible for the upbringing of the child, “She is to carry, give birth to, raise and take care of that baby” (Omerdić, 2002:430). Although these women shouldn’t be considered as “unchaste” or in any other way responsible for their rape and impregnation, they will be sinners if they neglect and abandon the babies. In such case, the responsibility to take care of the child falls into the community. The society is then reminded of its duties with respect to the protection of all children, avoiding external threats like adoption in third countries, “(...) this attitude arises from the fact that Islam obliges both society and individual to protect children, even the illegitimate ones, in order to make them useful (to mankind); their identity should not be emphasised in order to secure their social adaptation and in order not to remind them ever of their origins.” (Omerdić, 2002:430).

In short, the Islamic leadership urged women and communities to accept and raise war rape orphans, to integrate them as much as possible in the communities and, in order to “secure their social adaptation”, keep their real identities secret. It is also worthy to note that, to protect the babies of any “threat” (like being sold, enslaved, trafficked or abused) they should not be given to adoption, specially not to other countries. This matter is even more evident in another fatwa, issued by the Muslim scholar, Sheikh Ibn Baz, the former Mufti of Saudi Arabia. “With regard to the children (of women who were raped in Bosnia and Kosovo), the Muslims are obliged to take care of them and bring them up in Islam. They must not leave them to the Christians or others.”²¹

The fact that Muslims should “not leave [the babies] to the Christians or others” is a clear expression of the conviction of the Muslim religious leaders that the interests of the child are best safeguarded within the Muslim community. It furthermore suggests that the identity of the child is Muslim regardless of the religious convictions of the biological father. This principle is however frequently ignored in Muslim communities.

The Islamic Community in BiH also took some concrete steps, aimed to protect raped women and their children. Attention should be given to the fact that the Islamic Community was not only opposing adoptions by foreigners, but also the creation of special shelters and registers or records, in an attempt to avoid future stigmatisation. (Omerdić, 2002)

The approach of the Catholic authorities with respect to Croatian victims of wartime rape and forced pregnancy exhibited parallels but distinctions from that of the Islamic community. In 1993, Pope John Paul II addressed a letter to Archbishop Vinko Pulijik of Sarajevo with a message to Bosnian women who had been raped in the conflict. The aim of this letter was to appeal for these women to “transform an act of violence into an act of love and welcome” by “accepting”²² the enemy inside them and making him “flesh of their flesh” by carrying their pregnancies to term. This statement raised several criticisms. One of them was from an author, Frances Kissling, who in her writings considered the Roman Catholic Church “among the

Cairo 1994, III, 175-186. Other Islamic theoreticians, experts in Sharia Law and commissions for scientific research issued their fatwas relating to this issue: Prof. Dr. Omer Nakičević, *Fetva o djeci silovanih žena u Bosni i Hercegovini* ("Fatwa on Children Born by raped women in BiH"), Glasnik Rijaseta IZ u BiH, sarajevo, LVIII/1996, 1-3, 41-4, Prof. Dr. Sheikh Jusuf Qaradawi, Egyptian professor at the Islamic University in Qatar, Prof. Dr. Muhammed Rewawas Kaládji, Syrian, professor at the University Melik Saud, Ryad, Saudi Arabia; Shaikh Muhammed Gazali, Egyptian ; the Commission of Scholars for issuing Fatwas from Algeria, *et alia*.

²¹ Author’s correspondence with Fatwa Editor: W. Shihab, Vienna, 2003.

²² *Pope Urges Bosnian Rape Victims Not to Have Abortions*, «Los Angeles Times», February 28, 1993.

harshest and most punishing of religions when it comes to understanding and respecting women's rights and needs". (Kissling, 1999)

The Pope's letter "*Change Violence into Acceptance*" further states that "as the image of God, these new creatures should be respected and loved no differently than any other member of the human family, (...) since the unborn child is in no way responsible for the disgraceful acts accomplished, he or she is innocent and therefore cannot be treated as the aggressor" (Ioannes Paulus II, 1993). The terms "rape" and "abortion" are noticeably absent from this document. It should be noted that, regarding "orphans and abandoned children", the Pope only expresses "a word of appreciation to all those who are working to promote adoption procedures: when little ones lack the support of those who have given them life, it is an act of great human and Christian value to offer them the warmth of a new home." (Ioannes Paulus II, 1993).

Although there are several common points between the Catholic Church's position and Islam, including an appeal for the mothers to accept their children, a clear difference exists regarding abortion and adoption policies. Muslim muftis allow abortion during the first 120 days and issue fatwas against adoption, especially by non-Muslims. The Catholic Church, on the contrary, opposes abortion and welcomes the efforts of providing a home to every child, regardless of their religious background inter alia through adoption. The different constructions of the children's needs and rights relative to their mothers and broader communities by the involved religious authorities, demonstrates the controversies in applying the concept of children's rights to this category of war-affected child, and the way in which the relevant actors have struggled with various interpretations of these standards in an effort to determine the best interests of the children.

Applying Children's Rights to Bosnia's War Babies

During the last fifty years, several documents providing rights for protection and well-being of children have been developed in several international legal instruments. Spelling out in an unequivocal manner the rights to which every child is entitled, regardless of where or to whom he/she is born, regardless of sex, religion, or social origin, the Convention of the Rights of the Child²³ (CRC), is the most complete instrument on children's rights ever made and the first to give these rights the force of international law (Krech, 1996). The CRC includes the whole spectrum of civil and political, as well as economic, social and cultural rights, adapted to the specific needs of children (UNICEF, 2002). The body of rights enumerated in the Convention are the rights of *all* children *everywhere*. The indivisibility of rights is the key to interpret the Convention. It is not enough to guarantee the right to education if children are not enrolled or cannot go to school regardless of gender or economic class. (UNICEF, 2002) In the same way, it is not enough to promote family rights to children born of forced maternity if adoption is not allowed for political or religious reasons.

Focusing on children born as a consequence of rape, it is alarming to realise how most of their rights could be endangered, not only their Survival Rights, (the right to life and to an adequate standard of living (Article 6) but also their Membership Rights. According to Donnelly and Howard, "the protection of the survival rights alone guarantees only the crudest anomic existence, a life unfit for a human being; to exist as a human being, one must exist as a part of a community" (Donnelly and Howard, 1988:223). LeBlanc focuses on three particular groups of "membership" rights that are affirmed in the CRC. First, the state has an obligation to respect

²³ Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, (Resolution 44/25); entry into force: September 2, 1990.

and ensure that children are not discriminated against (Article 2); second, the rights to have a name and a nationality (Article 7); third, the family rights and the rights of the child within the context of the family (Articles 9, 19, and 21).

Non-Discrimination (Article 2)

This principle is of particular importance in the case of war rape orphans, but to the extent that measures to address discrimination entail silence or denial about the child's origins, this may conflict with a child's assertion of his or her rights to identity later on. Some of the case studies in this volume suggest that stigma and discrimination can be a specific harm that such children face. The children born as consequence of rape in East Timor are known as "sons of the enemy", in BiH as "little Chetniks", carrying only the father's genes²⁴. Meanwhile, both the Muslim Community and the BiH government strongly oppose the adoption of these children by "outsiders". For the Muslim religious community, the children are Muslims and should be raised as such; for the government they are a way of repopulating the country. But what are they for the community where they are being raised? If caretakers manage to keep the identity of the children secret, there would be no grounds for discrimination; on the other hand, the children would be deprived of the right to know their identity. Should there be a prioritisation of their rights? What would be the best interests of the child? The CRC states frequently that states parties need to identify the most vulnerable and disadvantaged children within their borders and take affirmative action to ensure that the rights of these children are realised and protected. This could lead to new discrimination if it is not done with the due discretion. It should be noted that this fact was considered in BiH, by the government and also by the Muslim religious community.

The Right to a Name and Nationality.

According to Article 7 of the CRC, the child must be "registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents". The question of nationality is one of the most sensitive and complex aspects associated with birth registration and can compromise the registration of the child. Birth registration establishes the child's identity and is generally a prerequisite for the issuing of a birth certificate.(UNICEF, 2002) In the case of war rape children, birth registration was not always done. Too ashamed to reveal the identity of the father, or because this identity is not known, (it could be one of several rapists), women frequently did not register their babies. Some of the orphanages visited in BiH reported that children were found simply abandoned; in these cases, children were registered as "NN"- no name. Although some might argue that these were war rape children, there is no proof in favour or against this argument. Most states confer nationality according to the principles of *jus soli* or *jus sanguinis*,²⁵ or a combination of both. The different rules mean that children could possess

²⁴ For an elaboration in this point see Carpenter, *Forced Maternity, Children's rights and The Genocide Convention: a Theoretical Analysis*, in «Journal of Genocide Research», vol.2 (2), 2000, pp. 213-244; *Surfacing Children: Limitations of Genocidal Rape Discourse*, in «Human Rights Quarterly», John Hopkins University Press, vol. 22, 2000 pp. 428-477 (especially pp. 453-457) and Weitsman, *The Discourse of Rape in Wartime: Sexual Violence, War Babies and Identity*,

²⁵ *Jus solis*, which translates literally as the law of the soil, is the principle whereby those born within the country's territory are nationals, even if one or both parents came originally from another country. In this case birth registration gives the child automatic right to citizenship of the country in which he or she was born. In the case of *jus sanguinis*, the law of the blood, the child does not have an automatic right to citizenship of the country of birth if

dual nationality or no nationality at all. (LeBlanc, 1995) There is no ground to say that war rape babies in BiH are denied this right, but those born and abandoned in other countries remained stateless if the country follows the *jus sanguinis* rule. Both Bosnia²⁶ and Croatia follow the *jus sanguinis* concept, which means denial of citizenship to children of Bosnian women that were born in Croatia. This situation was only changed when in September 1996, the Bosnian Government made an amendment to Article 4 of the citizenship law regulating *jus sanguinis*. The new paragraph states that if one parent is citizen of BiH, the other is a citizen of a former republic of the Federal Republic of Yugoslavia and a child was born abroad, the child should be given the BiH citizenship.²⁷ The inclusion of this article seems to avoid the stateless status of refugee children, especially those whose mothers were victims of rape and have no intention of keeping the babies, leaving the children to the care of local institutions.

Family Rights.

The family is often regarded as the basic unit of society. (LeBlanc, 1995) Its importance to the rights of the child is evident in the large number of articles included in the CRC. Article 5 provides the basic framework. (LeBlanc, 1995) The right to know the biological parents is provided by Articles 7, 8, and 9, and under Article 22 states parties shall provide “as they consider appropriate” co-operation to protect, assist and “trace the parents or other members of the family of any refugee child”. The UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally,²⁸ provides that “the need of a foster or adopted child to know about his or her background should be recognised by persons responsible for the child's care unless this is contrary to the child's best interests” (Article 9). (UNICEF, 2002:117) According to the holistic nature of the Convention, a child who could be harmed by the discovery of his or her parent's identity should be prevented from having this information. (UNICEF, 2002) The war rape orphans case could be seen as one of the “most extreme and unambiguous circumstances” where the right to know their parentage could be refused. But do the parents have the right not to be found? Does a raped woman that simply abandoned or gave up her child to adoption have the right not to be confronted with her painful past? The children's rights to know their origins and the mother's rights to confidentiality and protection to avoid social condemnation such as ostracism, injury or death could be competing. Article 30 of the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, 1993, allows the state of origin of the child to deny information about the parents' identity while supporting the mother's rights. Those countries that maintain adoption secrecy in order to protect the mother should, according to the UNICEF Implementation Handbook for the CRC, be able to release information to the child with the mother's permission or when she will not be affected.

The Right to Alternative Means of Care

neither parent is a national of that state. This system applies in most of Asia and the majority of countries following Islamic law.

²⁶The only exception is the one expressed in Art. 7 in which a child born in BiH, of unknown parents, would be awarded citizenship that would end if until the 14th birthday, it is found out that both parents have a foreign citizenship.

²⁷ Author's interview with Judge Majer, Ministry of Justice, Vienna 2003.

²⁸ Doc adopted by resolution 41/85 by the General Assembly in December 1986.

The Convention emphasises the primary responsibility of the family for the care of the child, while recognising that under some circumstances children might become, or have to be, separated from their families either temporarily or permanently. (LeBlanc, 1995) The CRC contains two articles on alternative means of child care. Under Article 20, the state should provide “special protection and assistance” to children deprived of their family environment. These children should be given alternative means of child care like adoption or foster placement, always regarding the “best interests” of the child.

Besides the special protection, Article 20 (3) is particularly important for the present case since it presents the concept of *kafalah* of Islamic law, the placement of children with relatives. Article 21 is related to the adoption of children within countries and intercountry adoptions, only applicable to states “that recognise and/or permit the system of adoption”. If they do, they must ensure that “the best interests of the child” are the “paramount consideration” (LeBlanc, 1995:120). Measures to facilitate the adoption are, therefore, not imposed on states parties. LeBlanc further states that “Delegates from some Islamic states made statements regarding the terms of both Articles 20 and 21, claiming that the articles are not binding on them because, consistent with Islamic law, they do not recognise or approve the system of adoption”. (LeBlanc, 1995:120).

In BiH, adoptions are the responsibility of the two entities, the Federation and the Republika Srpska. Their laws and practices are basically the same. The application for adoption must be submitted to the custodial body in the municipality where the child resides. In most cases, the responsible body is the Centre for Social Work. The Centre prepares an adoption case for submission to the ultimate authority to approve adoptions by foreigners- the Ministry of Social Policy of the entity in question, which is not the case for adoptions by local Bosnian citizens.²⁹

An American circular, relating to the legal requirements for adoption in foreign countries, provides information about the adoption system in Bosnia revealing that “the law stresses that there has to be overwhelming justification and exceptionally compelling reasons for a foreigner to be permitted to adopt a Bosnian child. Just what an “overwhelming justification” might be is judged on a case-by-case basis.”³⁰ The same circular further informs those interested in adopting children from BiH that “neither the government of the Federation nor that of Republika Srpska considers it beneficial for native-born children to be uprooted, to lose contact with other relatives, or to lose their identity through losing their citizenship. Furthermore, in a country that is still recovering from a long and brutal conflict, it can be extremely difficult to determine if the whereabouts of a parent are simply unknown or if the child is truly an orphan.”³¹

²⁹ *Bosnia and Herzegovina International Adoption*, in http://travel.state.gov/adoption_bosnia.html.

³⁰ *Idem, ibidem*

³¹ *Idem, ibidem*

Protection Rights

Several articles of the Convention deal with the need to protect children from various forms of abuse and mistreatment, those are the Protection Rights included in Articles 19, 21, 32-38, and 40. In addition, Article 39 establishes the obligation of the states parties to take measures to promote the physical and psychological recovery and social reintegration of a child that becomes victim of abusive treatment.

During armed conflicts when attention is given to other kinds of problems, families willing to adopt children not always go through all the legal proceedings, especially if facing a country willing to “get rid of” these children. The fact that children born as a consequence of war rape could face the risks of being sold for trafficking and abuse is one of the reasons why international adoption is not always seen as the best alternative. On the other hand, as mentioned above, having the possibility of being adopted by a loving caring family, and this right being denied for political or religious reasons, could be seen as a violation of the right to a family, not taking into account the best interests of the child. The Islamic concept of Kafalah, and their refusal to accept adoption as set in Articles 20 and 21, should be seen in this perspective, in a way of protecting children, giving the responsibilities of their upbringing to their families and local communities.

Empowerment Rights

While the majority of rights are mainly passive rights that constitute protection of the children, Empowerment Rights allow the children to be active members of society. LeBlanc includes in this category freedom of thought, conscience, and religion (Article 14), the right to participation (Article 12), freedom of expression (Article 13) and the right to education (Article 28), a crucial right to the development and integration of this particular group of children.

Implementing the CRC in Bosnia

Existing international law aims to protect all children regardless of birth or other status, and enumerates specific rights relevant to the particular harms to which children born of rape are likely to be subject. However it is less clear to what extent these standards have been effectively implemented with respect to this population in Bosnia, or whether indeed children born of rape are ‘falling through the cracks’ in existing human rights law.

The Ombudsman Institute of the Federation of BiH, sponsored by Save the Children Norway, created in 1997 a Children’s Rights Department. As reasons for creating this department it cites: “a commitment of the state to respect the Convention of the Rights of the Child; wide range of the problems encountered by children, which requires special attention and concrete protection activities; failure to submit the Initial Report on the Situation of the Rights of the Child to the UN Committee; non-existence of a plan or program for the protection of the child at the level of the state, most serious violations of the rights of the child committed during the war resulting in physical and mental health disorders of the children...” (Silva, 2004:12).

During the summer of 2004, representatives of the Ombudsman for children rights were contacted regarding the children born out of rape by UNICEF’s regional office in Sarajevo. The research team was unable to establish record of initiatives designed to monitor, follow up on, or protect these specific children from stigma, statelessness, or mistreatment. Spokespersons for the Bosnian government either argued that there were no available data, or refused to recognize the existence of a group of children born as a consequence of rape. As the Ombudsman is allowed to

act based upon specific complaints, the Ombudsman's lack of awareness indicates that no such complaints were received by this institution. One can only speculate as to why this is so. But anecdotal evidence suggests that the fear of stigmatisation and social exclusion might prevent women or relatives from availing themselves of this legal avenue.

Concluding Remarks

Like rape, forced impregnation is considered a war crime, a grave breach of the Geneva Conventions, torture, genocide and a crime against humanity. But although recognised in international law, forced pregnancy has so far been treated mainly as a women's issue. Yet children conceived in this way are 'secondary victims' – they suffer from varying degrees of discrimination, stigmatisation and social exclusion depending on the cultural and social context and the precise historic circumstances of their conception. Measured against international standards for the protection of all children's human rights, this poses specific problems in post-war contexts.

In the particular case of BiH, rape and forced impregnation were perpetrated by all parties to the conflict. However, only the Serbian forces seem to have used rape and enforced pregnancies in a systematic fashion as a tool of war and with the clear intent to change the ethnic composition of the population of BiH. The result has been an indeterminate number of children living in adopted families, institutions or with economically impoverished and traumatized single mothers within Bosnia.

This chapter has provided an exploratory analysis of some of the sequelae to mass rape in Bosnia by considering the human rights of the children brought to term as a result. Evidence gathered in the literature and through fieldwork within Bosnia suggests that different sectors of civil society have very different responses to the needs of these children, and that it is not clear whether the Convention on the Rights of the Child is fully applied or provides consistent guidance in securing their particular needs.

In my research it became apparent that the affected communities are reluctant to confront the issue openly. This might be due to the sincere concern for the well being of the children in their care. Special attention to their situation might lead to stigmatisation and traumatising, particularly for those children who are unaware of the conditions of their conception. In some ways, therefore, this might be interpreted as a best practice under the CRC. However, the latent resistance to open dialogue with outside actors might also be rooted in the awareness that local authorities are not free from the same prejudices that form the basis for discrimination of these children. The question is whether effective efforts are being made to address societal stigma without sensationalizing or marking the children, or whether the sensitive nature of the subject has become an excuse for turning a blind eye. More careful and systematic analysis of this particular case should be undertaken to build upon the results of this chapter.

The case of BiH is of particular interest also in respect to the diverse religious responses to the issue. The fact that three religious groups closely identified with the three ethnic parties to the conflict are obliged to face the issue of children resulting from war rape offers the opportunity for further comparative studies. Religious communities can play an important role in helping affected communities to deal with the issue by de-stigmatising the victims and by providing spiritual guidance. The Muslim and Catholic positions on war babies provide a good basis for such action. However, the lack of sustained involvement of religious authorities diminishes the positive impact of their pronouncements.

The key to better understanding of the situation of children born as a consequence of war rape, and ultimately to devising policies to improve it, lies in the capacity of the affected community to accept ownership of the issue. Instances of denial of the problem, as documented in this paper, make outside intervention difficult and sometimes counter-productive. Ultimately, only the communities in which these children live can create the social and emotional environment that provides for a stable and fulfilling existence.

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