
THE RIGHT TO REPARATION FOR WAR-AFFECTED CHILDREN SPECIAL FOCUS ON BIH

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ABSTRACT

As it has been pointed out M.Cherif Bassiouni from the mid 20th century to the present, wars, insurgencies, ethnic unrest and the repressive actions of authoritarian regimes have produced enormous human suffering and the deaths of tens of millions, the majority of whom have been civilians.²⁶⁰ A consistent part of those civilians, killed or injured, are children. What happen to the children in the aftermath of these heinous crimes? International law provides a range of remedies for victims of gross human rights violations and serious violations of international humanitarian law. According to article 39 of the Convention on the Rights of the Child, child-victims should also benefit from those remedies, in particular from reparations programs and efforts set up by the State. The aim of the present contribution is twofold: it is meant to provide first the readers with a general overview of the right to reparation for child-victims and then it will focus on the implementation of the right to education in the Bosnian context as a form of rehabilitation for the children directly or indirectly involved in the war which occurred in BiH.

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²⁶⁰ M.Cherif Bassiouni, Facing atrocity: the importance of guiding principles on post-conflict justice, introduction to the Chicago Principles on post-conflict justice, International Human Rights Institute, Chicago, 2007.

Introduction

According to many authoritative scholars and to the new victim-oriented trend adopted by both international tribunals and regional human rights bodies²⁶¹, reparations have primarily strive to give victims a sense of recognition in order to help them to face their trauma and overcome it. The children affected by human rights violations also have to be recognized as individuals who are entitled to demand and obtain specific reparations, but they are often included in a broader group of vulnerable people and they don't gain a relevant and uniform identity; the need for a uniform identity become even more essential when we talk about post-conflict states tear to pieces by ethnical divisions, like BiH. While the main goal of this article is to provide an overview of the most salient issues to be considered with respect to the right to reparation in general and how it applies to child-victims, it doesn't claim to provide a comprehensive evaluation of either the legal or the social actions undertaken or neglected with regard to this specific group of victims. In the Bosnian context the role played by public institutions in granting any kind of reparation to victims has so far been irrelevant. In none of the judicial mechanisms triggered both at the international and at the local level is it possible to detect redress mechanisms and the State itself never launched a victim-friendly reparation program. When it comes to child-victims in BiH the lack of reparations and remedies becomes even

more obvious: many monuments have been unveiled after the conflict, most of them dedicated to the youngest victims, but whilst the symbolic forms of reparation have been granted all the other remedies identified by the international law have been ignored: the range of those remedies includes access to justice, reparation *stricto sensu* and access to relevant information concerning violations and reparation mechanisms. According to the Secretary-General *where transitional justice is required strategies must be holistic*: reparation programs are part of a transitional justice process and therefore they need to be implemented taking into account other contingent circumstances and factors. Bearing in mind the entirety of the process, is it undeniable that the potential impact of a reparation program in a post-conflict society can affect efficaciously the whole population and, particularly, the victims; especially when many of them are calling for reparations and it's impossible to redress their claims only through individual cases brought before international or local courts.

When we talk about child-victims we must consider that they are vulnerable above all in regard to their age and immaturity, moreover their mental attitude is influenced by their inability to speak for themselves and act independently from adults. Therefore the best way to ensure their rehabilitation²⁶² and reintegration into the society should be the implementation of the education system and all the other activities related to their physical and psychological care. The present work will start introducing

²⁶¹ *Decisions of regional human rights bodies play an important role in setting expectations. In Latin America, for example, decisions of the Inter-American Court of Human Rights have been crucial not only for providing redress to individual victims, but also for motivating States parties to establish reparations programmes for other victims. The incentive effect of these decisions is, however, a result of the level of compensation that they provide. This level is seldom met by broader programmes, but this decisions do raise expectations among the victims. See Rule of Law Tools for Post-Conflict States: Reparations Programmes, Office of the United Nations High Commissioner for Human Rights, New York 2008.*

²⁶² Please see Redress Report on "Rehabilitation as a form of reparation under international law", December 2009, available at <http://www.redress.org/smartweb/reports/reports>: *There is a lot of discussion about rehabilitation as a form or reparation but so far, no one has been able to define it properly. This lack of agreement about its meaning could be partly explained by the fact that in its nature, rehabilitation requires multidisciplinary and interdisciplinary work to secure a holistic treatment of victims. Doctors, social workers, educators, psychologists, lawyers, the survivors themselves and other stakeholders are all vital to such a dialogue.*

the normative framework of the right to reparation, both its developments and shortcomings, consequently, it will define who are the child-victims. As it has been pointed out by the work of several TRCs, especially the one set up in Sierra Leone until 2004, the reparation programs²⁶³ promoted so far to help and support the reintegration of the child-victims have been mainly focused on their right to education, assuming that this fundamental right, when fully satisfied, enables the child-victims to become active members of the societies they live in. In BiH no reparation program has been designed so far and no actions have been taken to promote and spread a child-sensitive approach: on the contrary the education reforms implemented in the past years have been upgrading fragmentation and internal divisions. The last part of this contribution will be dedicated to a brief analysis of the current education system in BiH, followed up by some conclusive remarks.

The right to a remedy and reparation and its normative framework

Traditionally in international law the States are identified as the main subjects. As the Permanent Court of International Justice pointed out in the *Chorzow Factory* case: *It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.*²⁶⁴ This oft-quoted passage of the sentence clarified, once for all, that every violation of an international obligation creates a duty to make reparation and that an international tribunal with jurisdiction over a dispute, once it has been proven

that a breach of international law has occurred, has jurisdiction to award reparations. Only in the aftermath of the second world war, with the adoption of the Universal Declaration of Human Rights and the International Covenants on Human Rights, the international community recognized that the wrongs committed by a State against its nationals were more than just a matter of domestic law and, hence, that the violations committed by a State against the nationals of another State could give rise to claims not only by the State, but by individuals and groups themselves. The legal basis of the right to reparation are, thus, rooted in the customary international law and in the jurisprudence of the ICJ, moreover, as Pablo de Greiff has recently underlined, the right to reparation has a dual dimension under the international law: *a substantive dimension to be translated into the duty to provide redress for harm suffered in the form of restitution, compensation, rehabilitation, satisfaction and, in case it may be, guarantees of non-repetition; and a procedural dimension as instrumental to securing this substantive redress.*²⁶⁵ Its procedural dimension in particular shows that the right to reparation is playing a crucial role in the transition out of conflicts or toward democracies, because, while criminal justice *per se* is a struggle against perpetrators, reparation is an effort on behalf of the victims and represents a tangible and concrete manifestation of the liability of the offenders, states or individuals, to repair the harms caused. The best example of how the implementation of the right to reparation can have a strong impact on transitional justice process can be found in the jurisprudence of the Inter-American Court of Human Rights. The Court's decision in

²⁶³ Ibidem, p.3: *Reparations programmes are designed from the outset as a systematically interlinked set of reparations measures.*

²⁶⁴ *Factory at Chorzow*, Merits, Permanent Court of International Justice, Ser. A, No. 17 (1928).

²⁶⁵ On this point see *Rule of Law Tools for Post-Conflict States, Reparation Programmes*. Office of the United Nations High Commissioner for Human Rights, author: Pablo de Greiff, New York, 2008.

*Velázquez-Rodríguez*²⁶⁶ marked a sea change in human rights jurisprudence. The innovative reparation framework crafted by the Court over the last two decades can be traced to that decision²⁶⁷; the Court imposed to the State of Honduras the adoption of measures which express its emphatic condemnation of the facts that gave rise to the Court's judgment: in particular, it should be established that the Government has an obligation to carry out an exhaustive investigation of the circumstances of the disappearance of Manfredo Velásquez and bring charges against anyone responsible for the disappearance". The Court went even further granting to the victim's wife and children of other financial benefits, such as pension and scholarship, and the payment to Velásquez 's family of a cash amount corresponding to the resultant damages, loss of earnings, and emotional harm suffered. Today the Court, through its mandate to grant reparations contained in article 63²⁶⁸ of the American Convention, has creatively developed the law of reparations within the Americas and its work reflects the undeniable need to improve worldwide a solid victim-oriented approach.

²⁶⁶ Velásquez Rodríguez Case, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989).

²⁶⁷ C. Grossman, Reparations in the Inter-American System: A Comparative Approach, 56:6 AM. U. L. REV. 1375, 1376 (2007).

²⁶⁸ "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

Recent developments

On the purpose to provide the international and the local actors with an exhaustive tool entirely focused on the right to reparation, the UN General Assembly in December 2005²⁶⁹ adopted and proclaimed the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; notwithstanding their *soft law status*, the Basic Principles represent a huge step forward in the struggle for the implementation of the human rights worldwide: they highlight which are the victims' needs and in the same time they strengthen the rule of law and deter the culture of impunity. The access to justice for those who suffered abuses through acts or omissions that constitute violations of international human rights law is strictly related to their identification as victims; according to the Rome Statute and its RPE once an applicant has been recognized as a victim, in the sense that all the criteria indicated in Rule 85²⁷⁰ are met, the participation in the proceedings is still uncertain because it has been left to the discretion of the judges. Although the ICC, compared to the ICTY and the ICTR, has concretely promoted the participation of victims in the trials, so far only 89 people have been granted with the status of victim and only one has claimed for reparations. Furthermore, according to Article 79(1) of the Rome Statute, on 9 September 2002 a Trust Fund for Victims has been established under a Resolution of the Assembly of States Parties. The goal of the

²⁶⁹ Resolution 60/147 of 16 December 2005.

²⁷⁰Rule 85: For the purposes of the Statute and the Rules of Procedure and Evidence: (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

TFV is: *to support programs which addresses the harm resulting from the crimes under the jurisdiction of the ICC by assisting the victims to return to a dignified and contributory life within their communities.* In agreement with the data diffused by the ICC itself, in 2007/8 there were 42 proposals submitted to the TFV for consideration and 34 of this were diverted to the Chambers of the ICC for approval. These projects should involve in the immediate future at least 380,000 direct and indirect victims. As it stated in the ICC website: *The current TVF reparations Reserve is 1,000,000 euro, depending on how the ICC defines reparations (individual or collective) it would be possible to reach 200,000 beneficiaries with the current reserve if the same modalities for delivering the TFV assistance are applied*²⁷¹. The concrete limits that such a fund face are connected to the purely monetary nature which marks the reparation granted. As it has been already pointed out, the kind of remedies recognized by the international law which fall within the definition of reparation are far from being reducible to payments of lump sums. According to the Van Boven-Bassiouni Principles and Guidelines reparations include, besides compensation, restitution, satisfaction, guarantees of non-repetition and rehabilitation. The latter in particular is the target of this contribution, since I am personally convinced that the implementation of the right to education is an infeasible aspect of the rehabilitation of war-affected children.

Who are the child-victims?

The notion of reparation is intrinsically coupled with the idea of victim. According to the article 1 of the Convention on the Rights of the Child entered into force in September 1990: *child is every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.* The

²⁷¹ For further information and data please visit the ICC website: www.icc-cpi.int

general definition of victim referred to in this contribution is the one contained in the above mentioned Basic Principles and Guidelines on the Right to Remedy and Reparation: *victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.* The formulation of the latter sentence clearly highlights that there must be a direct causal link between victims and harms suffered: only whether this link exists and it is provable before the courts the right to reparation arises, when, instead, the connection requirement is not fully accomplished the acquisition of the status of victim will entirely depend on variable factors, such as the domestic laws of the different countries. It is, indeed, a matter of fact that many reparations programs aim to prioritize women's redress, especially in post-conflict countries where the female population usually constitutes the only resource left to the nation.²⁷² There is a widely recognized need to conceptualize in a proper way in the reparation debates the many forms of violence that target or affect women's reproductive function or capacity, because these kinds of wrongful acts commonly fall within the broader idea of rape or sexual abuses. Across the world currently a lot of non-judicial bodies such as truth and reconciliation commissions (TRC) are facing the

²⁷² For instance in Rwanda after the 1994 genocide there were twice as many women as men and while the gap has since narrowed, more than a third of households are still headed by women. According to the Rwandan Commerce Minister Monique Nsanabaganwa, actually women make up 55% of the workforce and own about 40% of businesses.

challenge to let the voices of the women affected speak for themselves, but the same thing, for too many reasons doesn't happen when we talk about child-victims of gross human right violations²⁷³.

The long path towards a child-sensitive approach

The right to a remedy is clearly a part of international law and therefore it is contained in global and regional human rights treaties. Article 8 of the Universal Declaration of Human Rights (hereinafter UDHR) provides that: *..everyone has the right to an effective remedy by the competent national tribunals for acted violating the fundamental rights granted him by the constitution or the laws..* The International Covenant on Civil and Political Rights (ICCPR) copes with the necessity to regulate and guarantee the right to reparation in a more comprehensive way. It evidences three different articles on remedies, addressing in article 2(3) the right to access to an authority competent to afford remedies and the right to an effective and enforceable remedy, whilst providing in article 9(5) and 14(6) that everyone unlawfully arrested, detained or convicted shall have an enforceable right to compensation or to be compensated according to law. Provisions on the right to a remedy are present also in the article 6 of the Convention on the Elimination of Racial Discrimination and in article 2(c) on the Convention on the Elimination of All Forms of Discrimination against Women. The UN Convention against Torture establishes in its article 14 that *each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation*

including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

There are many provisions which embody the right to a remedy and reparation in general, but there is only one that deals specifically with child-victims. According to Article 39 of the Convention on the Rights of the Child: *States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.* Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child. This provision represents a key legal tool and also the first step for the implementation of the right to reparation for children, taking into account the fact that almost all the countries of the world are States Parties of the Convention. There are of course also other instruments which provide a certain support in order to guarantee a crescent number of positive results in this sensitive field, e.g. The Guidelines on Justice for Child Victims and Witnesses of Crimes adopted by the ECOSOC resolution 2005/20, that establish a set of principles which underlines the urgency to adopt a child-sensitive approach in the proceedings. These guidelines are mostly directed at professionals and others responsible for the well-being of the children and their main goal is to ensure justice for child-victims and witnesses through implementing *ad hoc* procedures and adequate training in both formal and informal justice systems. As it has been clearly stressed, the efforts made to promote the growth of knowledge and practice on the purpose to assist properly the child victims before, during and after the trials need to achieve further

²⁷³ A remarkable enhancement has been achieved in this sense by the Sierra Leonean TRC which presented in December 2004 the child-friendly version of its final report.

developments. The children who experienced human rights violations and war crimes represent the most sensitive part of a deeply affected society, in a context characterized by *weak institutional capacity, fractured social relations, very low levels of trust and a scarcity of financial resources*²⁷⁴ the only way to redress the highest number of victims is to design a reparation program which can address not only material needs, such as restitution of properties and compensation, but also the need for health and education.

Child-victims in BiH

The awful civil war that occurred in BiH has caused more than 100.000 deaths and 2 millions of displaced persons, in alone Sarajevo 5410 children lost one of their parents and almost 400 lost both of them. In an ideal world these children should be able to claim their right to a remedy and reparation before both the ICTY and the domestic courts, in particular the Court established early in 2005.²⁷⁵ Instead child-victims are mostly left behind when it comes to legitimately promote their active participation and intervention in issues related to their wellbeing. An example of this sad condition is the absence of a complaints mechanism to the Convention on the Rights of the Child. The CRC, in fact, is the only international human rights treaty with a mandatory reporting procedure which doesn't include a complaints or communication mechanism on the purpose to allow individuals or groups to

bring a formal complaint before the Committee when the rights protected in the convention are violated by the State Parties. This *lacuna* can be seen as a serious act of discrimination against children and it is often justified through claiming that children are not able to act according to their best interest. The intervention of adult representatives is also rejected since it might entail a manipulation of the children's will. Taking part in this complex debate goes far beyond the goal of this contribution, although the issue of children participation is highly connected to the concrete impossibility for child-victims to independently ask and obtain remedy and reparation in the aftermath of a heinous conflict.

Unfortunately sensitive developments in ensuring the access to justice to child-victims are still far from being achieved, nonetheless the range of remedies provided by the international law is not limited to the possibility to take part in the criminal proceedings, but it goes much further enabling the victims to benefit from different types of reparation²⁷⁶. Although the main actors

²⁷⁴ See *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, Office of the United Nations High Commissioner for Human Rights, New York 2008.

²⁷⁵ The NGO Women Victims of War campaigns for the rights of women victims of rape and other crimes committed during the Bosnian war, the association took over from the government the responsibility to collect evidences from the women injured by the conflict and provides key testimonies in the proceedings before the Court of Bosnia & Herzegovina, for further info please check <http://www.zena-zrtva-rata.ba/news.php>

²⁷⁶ According to the Basic Principles and Guidelines: *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services. *Rehabilitation* should include medical and psychological care as well as legal and social services. *Satisfaction* should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and

involved in this process should be the local and national institutions providing to the children all the support and the help that they need, in the reality the most effective efforts are made by different stakeholders, such as NGOs and private foundations. This situation is clearly in contrast with the already quoted article 39 of the CRC, which indicates the State as being responsible for promoting the

full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention: (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

reintegration of child-victims adopting appropriate measures and setting all the premises for the creation of a peaceful environment suitable for their recovery. Since the States are required to ensure that their domestic law is consistent with their international legal obligations and since the basic principles and guidelines on the right to a remedy and reparation *identify mechanisms, modalities procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law*, one of the main goals of a post-conflict State should be to *foster the health, self-respect and dignity of the child*; outcome which can be reached only through an implementation of the education system. According to article 29 of the CRC amongst the aims of education there is *the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, equality of sexes and friendship among all people, ethnic, national and religious groups and persons of indigenous origin*. In the aftermath of a cruel civil war grasp the proper meaning of this provision becomes even more important: the commitment to teach children how to be tolerant must be one of the top-priorities of a society which is struggling for a new national identity and wants to overcome the adversities.

The right to education

In BiH there are 14 "Ministries of the Education"²⁷⁷, one in charge of the entire

²⁷⁷ The term Ministries of education is not precise, but emphasizes the fragmentation of the education system, according to the 2009 Report by UNICEF Divided Schools in BiH: *At the state level the Ministry of Civil Affairs of BiH (MoCA) is the only administrative authority with competency over education. In accordance with its legally specified competencies within the field of education the MoCA is responsible for the coordination of activities within education.. In addition, there are ministries of education at the level of both BiH entities: Republika Srpska (RS) and the Federation of BiH (FBiH). In accordance with constitutional responsibilities in the field of education, the Ministry of Education and Culture of Republika*

BiH, one for each of the two entities established by the Dayton agreement, the Republic of Srpska and the Federation of Bosnia and Herzegovina, ten ministries for the ten cantons which compose the latter entity and one for the District of Brčko. The complexity of this situation affects beyond any reasonable doubt the linearity and the efficiency of the education system, fomenting the ethnic divisions and hindering the dialogue amongst different cultures. According to the article 13²⁷⁸ of the International

Srpska is responsible for education policy, legislation and assurance in RS. The same constitutional responsibilities in the field of education rests with the ten cantons in the Federation of Bosnia and Herzegovina, while the role of the Ministry of Education and Science of the Federation of BiH is similar to that of the MoCA at the state level.

²⁷⁸Article 13:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:(a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity

Covenant on Economic, Social and Cultural Rights, hereinafter the ICESCR, ratified by BiH in 1993, the right to education shall *promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups*, in other words it is the most effective tool that the mankind has to ensure the acceptance and the reintegration of different people, especially in post-conflict societies. The Committee on Economic, Social and Cultural Rights in its General Comment No13 pinpoints that *education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.* Moreover it stresses that the education must be characterized by four main features: availability, accessibility, acceptability and adaptability; in particular when we talk about acceptability we have to consider three interrelated dimensions. The first one in the non-discrimination in the sense that *education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.* The second and the third dimensions are physical accessibility and economic accessibility, the latest establishes that education must be accessible to all and that secondary and higher education need to become progressively “free to all”, while primary education should be already available and costless for all the citizens of the state parties. According to the Report submitted to the General Assembly by the Special Rapporteur on the right to

with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

education in May 2008 as the outcome of his mission in BiH, there are two main issues affecting the enjoyment of the right to education: *the excessive fragmentation and politicization of the education system and the segregation between ethnic groups*. This statement underlines the defects of the system and especially its lack of accessibility, considered in all of its three overlapping levels. In particular when it comes to the non-discrimination it's self-evident that the existence of many different curricula²⁷⁹ it's an obstacle to the mobility of the pupils and the dialogue amongst cultures. *Subjects such as math and sciences are almost entirely covered by the common curriculum, while language, literature, history, geography, nature and society and religious instruction are almost completely different, depending on the area of the country where they are taught and the ethnic majority*²⁸⁰, the gravity of this setting is even more detectable if we consider the importance of the education in a post-conflict context. The child-victims should be first enroll in a good school program and introduced in a finally safe and protected environment, where the possibility to gain a collective memory about the war occurred should be far from being a utopia²⁸¹. A report

developed by OSCE²⁸² in 2007 underlines that in each of the ten cantons of the Federation the dominant majority determines the contents of the education program²⁸³ and the same thing applies to the Republic of Srpska where the Serbs are the foremost ethnic group. This leads to *the negation of the ethnic and linguistic peculiarity of the weaker culture and its silent assimilation*²⁸⁴ and feeds in particular the discrimination²⁸⁵ and the marginalization of the children of the most vulnerable ethnic groups, like the Roma.

On 30 June 2003 the State Parliament adopted the Framework Law on Primary and Secondary Education, the adoption of such a law was an outcome of the pressure exerted by the international community on BiH, which had to make some commitments on its accession to the Council of Europe. The Law aims to regulate the principles of preschool, elementary and secondary education; according to its text the goal of education

²⁸² OSCE Mission to BiH, Background report: Education in BiH: A neglected security issue, Vienna, 28 June 2007, p. 4.

²⁸³ Ibidem: *five cantons are said to be Bosniak majority cantons, three are Croat majority cantons, and two are mixed and effectively divided among Bosniaks and Croats.*

²⁸⁴ Please see the 2009 report by UNICEF: Divided schools in BiH, available at <http://www.unicef.org/bih>

²⁸⁵ On this point see the Report of the Special Rapporteur, Vernor Muñoz (A/HRC/8/10/Add.4 27 May 2008) p.22: *Non-discrimination is a fundamental human rights principle, enshrined in article 26 of the Universal Declaration of Human Rights and reaffirmed in many other treaties, including the International Covenant on Economic, Social and Cultural Rights, in which it is stated that the rights enunciated in the Covenant are to be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. With regard to the right to education, the specific issue of equal rights in education is addressed in different human rights instruments, such as the Convention against Discrimination in Education, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. The right to education is also noted and protected by the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, equally binding on Bosnia and Herzegovina.*

²⁷⁹ On this point see the Report of the Special Rapporteur, Vernor Muñoz (A/HRC/8/10/Add.4 27 May 2008): *There is a variety of curricula in Bosnia and Herzegovina. Each ministry of education decides which curriculum should be taught in the schools under its jurisdiction. The Framework Law on Primary and Secondary Education attempted to address this situation, with the provisions of a common core curriculum (arts. 42 and 43). The objective was to ensure that students across the country learn a minimum of common elements and to facilitate the mobility of pupils. Nevertheless it has not been implemented in all schools of Bosnia and Herzegovina, in spite of its adoption in 2003.*

²⁸⁰ Ibidem p.18

²⁸¹ Ibidem note 55: *there is another project of the canton of Mostar, jointly with the OSCE, aimed to issue **history textbooks**, which reflects different views on BiH's history, including representatives of constituent nationalities. However, due to a lack of consensus these textbooks skip the war period.*

is to contribute to the creation of a society based on the rule of law and respect of human rights through the optimum intellectual, physical and social development of the individual, according to each one's potential and abilities. Another peculiarity of the education system in BiH is the sad phenomenon of "two schools under one roof": before the war BiH was famous for its multi-ethnic character and multiculturalism and therefore the education system was a mirror of this society, after the 1992-1995 war, political, nationalist and ideological pressures made segregation the main feature of the new trend. According to this practice children belonging to different ethnicities are attending the same school, but they are taught different curricula and they go to class at separate times. The Minister of Education of the Central Bosnian canton in 2007 gave a shocking statement during an interview about "two schools under one roof", according to her "the project won't be suspended because you cannot mix apples and pears. Apples with apples and pears with pears."²⁸⁶ Such a way of thinking and dealing with ethnic discrimination is even more dangerous when located in a post-conflict society where the risk of fomenting old hatreds is already extremely high, not mentioning the issue of re-victimizing children already affected by the war and eager to start a normal life and overcome the trauma suffered. In other words: not only the access to primary and secondary school should be "available", or costless for all the children as it is stated in the international conventions ratified by BiH, but in order to satisfy, at least, the very basic principles on the right to reparation the education should be encouraged and supported by the government²⁸⁷ as the

core of a wider and comprehensive reparation program on the purpose to help the reintegration of the youngest and weakest victims of the conflict. On the contrary the policies adopted by the BiH governments, referring to both the national and the locals, seem to discourage the process of reconciliation and, instead, embitter the hostilities making the children even more vulnerable.

Conclusion

*Authorities should not disregard their obligation to repair victims by only providing them basic socioeconomic rights that every citizen is entitled to, and specific efforts should be made to improve the conditions of victims, individuals and communities... After the exclusion suffered by victims, expressed through violence and denial of their basic rights, societies have to make concrete efforts to make them feel included.*²⁸⁸ As Mr. Correa pointed out, enabling the citizen of a post-conflict state to fully enjoy their fundamental rights doesn't automatically fulfill their right to a remedy and reparation under international law. The BiH case is even more challenging since the war, which occurred almost 15 years ago, has left deep scars in the country: the present children are indirect victims of what happened and their families got devastated by the war, many places have been ethnically cleansed and when people started coming back to their homes they found a new hostile majority there ready to impose on the minorities their culture. The only option left to the parents or the foster families is to passively expect the lack of any integration process and the segregation deriving from phenomena like "two schools under one roof". The different books of history that circulate

²⁸⁶ This sadly famous statement has been given by Mrs Greta Kuna, Minister of education of Central Bosnian canton and member of the Croatian Democratic Union party.

²⁸⁷ *State should endeavour to establish national programmes for reparation and other assistance to the victims in the vents that the parties liable for the harm suffered are unable or unwilling to meet their obligations.*

²⁸⁸ Mr Cristian Correa, Senior Associate with the Reparation Unit of the International Centre of Transitional Justice, New York, interview available at <http://www.ictj.org/en/news/coverage/article/1966.html>, UNDP Development Times, No 17.Year IV-Sarajevo-Bosnia and Herzegovina-September 2008.

nowadays in BiH are nothing more than the proof of how far the country is from reaching a sustainable development. More than to the international covenants ratified, the country is internally bound to the necessity to wipe out all the discrimination factors and boost the rehabilitation of the war-affected children. In order to achieve these goals, significant changes need to be made both at the national and at the local levels. The struggle to eliminate the discrimination which affects children in BiH nowadays is inmost coupled with the need to effectively ensure them the enjoyment of the right to education not only through the fulfillment of the four criteria pinpointed by the international treaties, but also recognizing them as the most vulnerable victims of a cruel conflict, entitled to be fully rehabilitate and re-integrated into the Bosnian society. In such a case the aim of the institutions and the other actors involved must be to overcome the minimum standard drawn by the international law and go beyond providing the child-victims with *ad hoc* measures able to concretely bias the quality of their lives, placing a special emphasis on the restoration of their human dignity. *While under international law, gross violations of human rights and serious violations of international humanitarian law give rise to a right to reparations for victims implying a duty on the State to make reparations, implementing this right and corresponding duty is in essence a matter of domestic law and policy. In this respect, national Governments possess a good deal of discretion and flexibility.*²⁸⁹ Albeit the discretion is intrinsically coupled with the principle of state sovereignty and therefore is not going to be spoiled by the imposition of a pre-packaged model, the Governments should follow the Van Boven and Bassiouni principles and

guidelines on the right to a remedy and reparation and refer to them as a tool to implement victim-oriented policies. Regarding the child-victims, in particular it's important to support their participation in the reconciliation process, promoting their involvement in every related discussion and, most importantly, considering the education reform as a substantive part of a highly desirable national reparation program.

²⁸⁹ See *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, Office of the United Nations High Commissioner for Human Rights, New York 2008, p.7.