FROM VIOLENCE TO LIFE: CHILDREN BORN OF WAR AND CONSTRUCTIONS OF VICTIMHOOD

RENÉ PROVOST & MYRIAM DENOV*

I. INTRODUCTION ..... 1 R
II. FILLING THE GAPS IN RESEARCH ON CHILDREN BORN OF CONFLICT-RELATED SEXUAL VIOLENCE .. 2 R
III. CHILD AND YOUTH PERSPECTIVES IN RWANDA AND NORTHERN UGANDA: STIGMA, VIOLENCE, & PERCEPTIONS OF VICTIMHOOD ..... 7 R
IV. THE IDEA OF A WRONGFUL LIFE ..... 13 R
A. *A Life Worth Living* ..... 15 R
1. *Wrongful Conception* ..... 19 R
2. *Wrongful Birth* ..... 21 R
3. *Wrongful Life* ..... 23 R
B. *Social Roots of a Harmful Life* ..... 25 R
V. CBW AND VICTIMHOOD IN INTERNATIONAL CRIMINAL LAW ..... 30 R
A. *Legal Recognition of Victimhood* ..... 31 R
B. *The Idea of the Ideal Victim* ..... 38 R
C. *The Victim in International Criminal Law* ..... 44 R
D. *CBW as Victims of International Crimes* ..... 58 R
VI. CONCLUSION ..... 68 R

I. INTRODUCTION

"Why can't people understand that we are victims?" asked a young man born of his mother's rape during the 1994 genocide in Rwanda. This *cri de coeur* calls for unpacking, both in its underlying assumptions and in the framework used to answer it. The need to respond to this question is highlighted by previous research uncovering the reality of stigma, victimization, violence, and socio-economic marginalization of children

* René Provost, Faculty of Law and Centre for Human Rights and Legal Pluralism, McGill University; Myriam Denov, School of Social Work, McGill University. We gratefully acknowledge the financial support of the Canada Council for the Arts, the Social Sciences and Humanities Research Council of Canada, and the Pierre Elliot Trudeau Foundation (of which both authors are Fellows). Superb research assistance was provided by Leah Woolner, Bruno Savoie, Fiona Cooke, Katrina Bland, and Amy Preston-Samson.

born of war (CBW). Across a variety of post-conflict contexts, these children revealed in extensive interviews with the authors that their entire life trajectories have been shaped by their birth origins.

This article explores conceptions of victimhood in private law and international criminal law and argues that CBW should be recognized as victims in the transitional justice processes initiated in the wake of conflict. Part II reviews the gaps that exist in current research, while Part III presents some of the ways in which CBW in Uganda and Rwanda experience continued harm because of the circumstances of their conception. While CBW consider themselves victims, domestic and international actors have largely failed to include them in legal conceptions of victimhood. To consider whether a child born of harmful behaviour should be seen as a victim, Part IV gives a broad overview of wrongful life and wrongful birth jurisprudence, the only areas of law to significantly explore this question. The article finds that courts have generally been reluctant to accept claims of this nature because of a perceived tension between the idea of the gift of life and harm associated with circumstances of birth. The article further finds that the concept of the victim remains under-theorized in domestic criminal law systems, regimes that place the perpetrator's accountability at the centerpiece of the legal narrative. Part V highlights how international criminal law has diverged from this approach by examining the space for victims in international criminal proceedings. Notably, the Rome Statute of the International Criminal Court announced a shift to a victim-centered approach, which has led to a more nuanced legal understanding of who should be considered a victim. The international criminal law conception of victimhood supports the article's conclusion that CBW should indeed be considered victims. This important finding challenges the policies and practices of domestic and international actors who have failed to recognise CBW as victims in post-conflict transitions.

II. Filling the Gaps in Research on Children Born of Conflict-Related Sexual Violence

Incidents of sexual violence have been documented with increasing regularity in contemporary armed conflict, transcending countries and contexts. Sexual and gender-based vio-

lence serve as weapons of war to intimidate the enemy, terrorize local populations, impose a form of gendered power relations, and carry out ethnic cleansing and genocide.[1] Research has begun to highlight that while an individual rape survivor may suffer physical, psychological, social, and economic consequences from rape, the subsequent generation and the broader family and community can also be affected in multiple and complex ways.[2] As the U.N. Secretary-General has noted: "[s]ystematic sexual violence, without a doubt, can be every bit as destructive to communities as more conventional weapons."[3] Often, children are conceived as a result of this violence. In the last decade of the twentieth century alone, it is estimated that tens of thousands of children have been born from mass rape campaigns, sexual violence, and forced pregnancy in conflicts around the globe.[4] Yet despite the vast scope of the issue, the lived realities of children born of conflict-related sexual violence remain vastly under-studied.[5]

---

1. *See generally* Breann Fallon, *Violence of Mind, Body, and Spirit: Spiritual and Religious Responses Triggered by Sexual Violence During the Rwandan Genocide*, *in* RAPE CULTURE, GENDER VIOLENCE, AND RELIGION 71 (Caroline Blyth et al. eds., 2018) (summarizing quantitative research findings on the widespread use of sexual violence in conflicts around the world); SARA MEGER, RAPE, LOOT, PILLAGE?: THE POLITICAL ECONOMY OF SEXUAL VIOLENCE IN ARMED CONFLICT (2016) (providing an overview of the use of sexual violence as a weapon of war).

2. *E.g.*, Myriam Denov, *Children Born of Wartime Rape: The Intergenerational Realities of Sexual Violence and Abuse*, 1 ETHICS MED. & PUB. HEALTH 61 (2015); Myriam Denov et al., *The Intergenerational Legacy of Genocidal Rape: The Realities and Perspectives of Children Born of the Rwandan Genocide*, 35 J. INTERPERSONAL VIOLENCE 3286 (2017); Marie-Eve Hamel, *Ethnic Belonging of the Children Born Out of Rape in Postconflict Bosnia-Herzegovina and Rwanda*, 22 NATIONS & NATIONALISM 287 (2016).

3. U.N. Secretary-General, *Implementing the Responsibility to Protect* ¶ 34, U.N. Doc. A/63/677 (Jan. 12, 2009).

4. DONNA SETO, NO PLACE FOR A WAR BABY: THE GLOBAL POLITICS OF CHILDREN BORN OF WARTIME SEXUAL VIOLENCE 15 (2013).

5. Kimberly Theidon, *Hidden in Plain Sight: Children Born of Wartime Sexual Violence*, 56 CURRENT ANTHROPOLOGY S191 (2015) (discussing the absence of CBW in literature and U.N. Security Council Resolutions, particularly the Women, Peace and Security Agenda); SETO, *supra* note 4 (analyzing the lack of attention given to CBW). CBW are briefly mentioned as a victim group in a 2019 U.N. Security Council resolution: U.N. Security Council, Resolution 2467 ¶ 18, U.N. Doc. S/RES/2467 (Apr. 23, 2019); U.N. Secretary-General, *Conflict-Related Sexual Violence* ¶ 20, U.N. Doc. S/2019/280 (Mar. 29, 2019) ("Children born of wartime rape constitute another vulnera-

Existing scholarship reveals that children born of conflict-related sexual violence are deeply affected by their biological origins and their subsequent treatment by society.[6] Children born of wartime rape may live in structures in which unmitigated intergenerational trauma, maternal trauma and stress, and maternal ambivalence combine with social and economic marginalization to create an environment hostile to a child's healthy development.[7] The implications of these stressors upon children's development, mental health, and well-being in post-war societies are not yet well understood, but research in this area is emerging. Van Ee and Kleber considered both post-war and non-post-war contexts to identify mental health risk factors for children born of rape such as infanticide, the epigenetic transmission of maternal post-traumatic stress disorder, child abuse, neglect, poor parent-child relationships, discrimination, guilt, self-blame, and problems with positive identity development.[8] Akello noted that on a structural level, inequities exist regarding these children's access to health, education, and employment.[9] Hamel uncovered that, following ethnic conflict, families may impose the ethnic identity of the father/rapist on the child and refuse to accept the child within the mother's ethnic group.[10] Children may thus possess the ethnic attributes of two groups without fully belonging to either. Denov and Lakor found that children born of wartime rape in northern Uganda experienced social rejection and stigma, as well as ongoing violence, socioeconomic alienation,

---

ble group, who are often labelled by communities as the "bad blood" of political, ethnic or religious enemies").

6. *E.g.*, R. CHARLI CARPENTER, FORGETTING CHILDREN BORN OF WAR?: SETTING THE HUMAN RIGHTS AGENDA IN BOSNIA AND BEYOND (2010); Ingvill C. Mochmann, *Children Born of War—A Decade of International and Interdisciplinary Research*, 42 HIST. SOC. RES. 320 (2017).

7. Sarilee Kahn & Myriam Denov, *"We Are Children Like Others": Pathways to Mental Health and Healing for Children Born of Genocidal Rape in Rwanda*, 56 TRANSCULTURAL PSYCHIATRY 510, 512 (2019); Myriam Denov & Sara Kahn, *'They Should See Us as a Symbol of Reconciliation': Youth Born of Genocidal Rape in Rwanda and the Implications for Transitional Justice*, 11 J. HUM. RTS. PRAC. 151, 152 (2019).

8. Elisa van Ee & Rolf J. Kleber, *Growing Up Under a Shadow: Key Issues in Research on and Treatment of Children Born of Rape*, 22 CHILD ABUSE REV. 386, 389 (2013).

9. Grace Akello, *Experiences of Forced Mothers in Northern Uganda: The Legacy of War*, 11 INTERVENTION 149, 151–53 (2013).

10. Hamel, *supra* note 2, at 288.

and challenges to their sense of personal and social identities.[11] Finally, Denov, Woolner, Bahati, Nkusi and Shyaka documented how youth born of genocidal rape in Rwanda struggled with issues of identity and belonging, ambivalence in the mother-child relationship, family and community stigma, and a deep desire to learn of their biological origins and heritage.[12] These findings suggest that children born of conflict-related sexual violence face a distinct set of challenges and needs that have yet to be formally addressed in local, national, and international policy.

Until recently, much of the research on this topic has been based on the perspectives of human rights advocates,[13] mothers,[14] or historical and legal scholars.[15] With the exception of a few empirically-based studies,[16] the direct perspectives and voices of CBW are noticeably absent from the literature. Children's views on the parent-child relationship, experiences of community belonging and stigmatization, and the

11. Myriam Denov & Atim Angela Lakor, *When War is Better than Peace: The Post-Conflict Realities of Children Born of Wartime Rape in Northern Uganda*, 65 CHILD ABUSE & NEGLECT 255, 255 (2017); Myriam Denov & Atim Angela Lakor, *Post-War Stigma, Violence and "Kony Children": The Responsibility to Protect Children Born in Lord's Resistance Army Captivity in Northern Uganda*, 10 GLOBAL RESP. TO PROTECT 217, 227 (2018).

12. Denov et al., *supra* note 2, at 3292–99.

13. *E.g.*, Tatiana Sanchez Parra, *The Hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia*, 12 INT'L J. TRANSITIONAL JUST. 45 (2018); CARPENTER, *supra* note 6.

14. *E.g.*, Odeth Kantengwa, *How Motherhood Triumphs over Trauma Among Mothers with Children from Genocidal Rape in Rwanda*, 2 J. SOC. & POL. PSYCH. 417 (2014); Leah Woolner, Myriam Denov & Sarilee Kahn, *"I Asked Myself If I Would Ever Love My Baby": Mothering Children Born of Genocidal Rape in Rwanda*, 25 VIOLENCE AGAINST WOMEN 703 (2018).

15. *E.g.*, SABINE LEE, CHILDREN BORN OF WAR IN THE TWENTIETH CENTURY (2017); SETO, *supra* note 4; Cassie Powell, "*You Have No God": An Analysis of the Prosecution of Genocidal Rape in International Criminal Law*, 20 RICH. PUB. INT'L L. REV. 25 (2017).

16. *E.g.*, Jean d'Amour Banyanga et al., *The Trauma of Women Who Were Raped and Children Who Were Born as a Result of Rape During the Rwandan Genocide: Cases from the Rwandan Diaspora*, 3 PYREX J. AFRICAN STUD. & DEV. 31 (2017); Zala Volèiè & Karmen Erjavec, *"Target," "Cancer" and "Warrior": Exploring Painful Metaphors of Self-Presentation Used by Girls Born of War Rape*, 21 DISCOURSE & SOC'Y 524 (2010); Jemma Hogwood et al., *"I Learned Who I Am": Young People Born from Genocide Rape in Rwanda and Their Experiences of Disclosure*, 33 J. ADOLESCENT RES. 549 (2018); Denov & Lakor, *Post-War Stigma*, *supra* note 11; Kahn & Denov, *supra* note 7.

meaning and implications for social identity and well-being continue to be under-explored. Rather than allow adults to speak on children's behalf, contemporary work on the anthropology of childhood argues that, as active agents, children's perspectives must be documented, included, and promoted to ensure their participation in the social world.[17] Children born of wartime rape have expressed a need to speak on their own behalf: In the words of a youth born of genocidal rape in Rwanda, "[*w*]*e have to stand up and speak up for ourselves.*"[18]

In this vein, this article includes the direct voices and perspectives of 139 children born of conflict-related sexual violence in two countries: sixty in Rwanda and seventy-nine in northern Uganda.[19] In-depth interviews were conducted in Rwanda between June and August 2016 with twenty-nine females and thirty-one males born of genocidal rape. These same youth also participated in focus group discussions. A total of seven focus group discussions were held with eight youth participants in each group.[20] While the individual interview questions sought to elicit an understanding of each participant's unique life story, focus groups were used to identify and generate best practices and culturally appropriate directions for policy and practice innovation. In northern Uganda, data collection with children born in Lord's Resistance Army (LRA) captivity occurred between June 2015 and September 2017. Qualitative in-depth interviews were conducted with seventy-nine children born in captivity in three districts. Of the participants, forty-four were male and thirty-five were female. Participants remained in LRA captivity for varied amounts of time, ranging from a few months to eight years.

---

17. Jo Boyden & Joanna de Berry, Children and Youth on the Front Line: Ethnography, Armed Conflict and Displacement xi–xxvi (2004).

18. Laura Eramian & Myriam Denov, *Is It Always Good to Talk? The Paradoxes of Truth-Telling by Rwandan Youth Born of Rape Committed During the Genocide*, 20 J. Genocide Res. 372, 385 (2018).

19. These narratives derive from a larger project on children born of conflict-related sexual violence in three countries (northern Uganda, Rwanda, and Cambodia) and funded by the Pierre Elliot Trudeau Foundation, the Social Science and Humanities Research Council of Canada, and the Canada Council for the Arts.

20. Four participants in Rwanda were unable to attend focus groups due to competing obligations.

Denov and local researchers in each country conducted interviews with children and youth in the local language, with Denov receiving simultaneous English-Kinyarwanda/Acholi translation. At the time of the interviews in Rwanda, participants born of genocidal rape were either twenty or twenty-one years old, with the exception of one participant, who was nineteen.[21] In northern Uganda, child and youth participants were between the ages of twelve and twenty-two at the time of interviews. For participants in both countries, all interviews and focus groups were recorded with permission and subsequently transcribed into English.

The following section draws directly on the narratives and perspectives of participants in Rwanda and northern Uganda to illustrate their lived realities, particularly as they relate to perceptions and experiences of post-war/genocide stigma, violence, and victimhood.

III. Child and Youth Perspectives in Rwanda and Northern Uganda: Stigma, Violence, & Perceptions of Victimhood

The personal narratives shared by CBW uncover a fundamental contradiction that shapes their lives: While CBW see themselves as victims and can trace their experiences of discrimination back to birth, their families, communities, and countries do not view them as victims and instead often treat them as a cause of their families' pain. As will be illustrated in field work excerpts, the disconnect between how CBW perceive themselves and how society perceives them further aggravates their circumstances by denying them personal and institutional support. It is crucial to remember the real experiences of victimhood that institutions attempt to address when considering, as Part V of this article does, the qualities of victimhood reflected in legal standards.

---

21. The majority of participants in Rwanda were born in 1995. In a few cases, however, mothers were abducted and taken to the Democratic Republic of the Congo or Western Rwanda, where they were held captive and experienced repeated sexual violence. As such, a few youth participants were born in 1996. The mother of one youth participant was a victim of sexual violence when a group of *Interahamw*e returned to Rwanda in 1996. This participant was born in 1997 and thus 19 at the time of the interview.

At the time of the interviews, all participants knew they were born of rape during the Rwandan genocide or born in LRA captivity. However, some participants reported that as children they were uncertain as to why they were treated like pariahs or were targets for violence and marginalization within their families. Eventually, they grew to understand that their outcast status was associated with the circumstances of their conception and birth:

> Some people sympathize with me and they say my brother should have taken care of me until I am an adult, while those who hate me say that I am useless and that my brother should not have accepted me in that home in the first place. They have it in their mind that my father was among the people committing atrocities on them. They say that I should be made to suffer . . . They say it was the fathers of those children who were born in captivity who were causing havoc on the civilians during LRA insurgency. So that is why because we are connected to them, they have turned their hate against us. (Male, northern Uganda)

In both Rwanda and northern Uganda, as in many cultures, family and heritage are the building blocks of identity, belonging, protection, and place in society.[22] Cultural identity, key to kinship ties and land use, is acquired through the father's side, particularly connections to one's paternal clan. Yet for most children born of war or genocide, the identity of their paternal heritage is unknown or unwanted given the violence their mothers experienced. The absence of their biological fathers has important implications for children's senses of identity, kinship, and belonging:[23]

---

22. Denov & Lakor, *When War Is Better than Peace*, *supra* note 11, at 260–62.

23. Myriam Denov & Antonio Piolanti, "*Though My Father Was a Killer, I Need to Know Him*"*: Children Born of Genocidal Rape in Rwanda and Their Perspectives on Fatherhood*, 107 CHILD ABUSE & NEGLECT (forthcoming 2020), https://doi.org/10.1016/j.chiabu.2020.104560; Myriam Denov & Anais Cadieux Van Vliet, *Children Born of Wartime Rape on Fatherhood: Grappling with Violence, Accountability and Forgiveness in Post-War Northern Uganda*, PEACE & CONFLICT: J. PEACE PSYCH. (forthcoming 2020), https://doi.org/10.1037/pac0000470.

> I don't know how my future might be . . . some of us don't even know where we belong. (Male, northern Uganda)

> It is important for a child to know where you come from. A person always belongs to the name of their family. And in the future they may ask me: "Where is your family?" and I should be able to tell where I come from. (Male, northern Uganda)

Rwandan and northern Ugandan children revealed during interviews that their entire life trajectory has been intimately shaped by their birth origins. One participant shared the way in which his origins, heritage, and anonymous father figure was something he always "walked with":

> I'm not proud of any piece of [my life] because there is nothing good and charming about it. It's only filled with anger moments, hunger-stricken times and individual questions that I still have no answers for . . . As a child, I had no happiness at all because I was told that I was born of genocidal rape. The anonymous father figure I would grow up looking up to and be proud of, was a criminal, a perpetrator, a rapist during 1994 genocide against Tutsis. It's a shame, a pain that still lingers in my mind, I always walk with it and it's hard to shake it off my head. (Male, Rwanda)

The realities of stigma, marginalization, and social exclusion shaped participants' lives. Interviews uncovered the complex and often challenging relationships that participants had with their mothers, families, and community members. Participants reported that multiple forms of shame, internalized stigma, and social isolation haunted them. Messages of hate and marginalization were transmitted both explicitly and implicitly:

> They [siblings not born of wartime rape] keep segregating me. When it comes to the time of eating they don't want to eat with me because they say something will come to my mind and I can do anything to them. Even while playing, they don't want to play with me. When it comes to sleeping, they don't want to share a sleeping room with me because they say something

> may come to my mind and I can strangle them at night. (Female, northern Uganda)

> [My mother] told me that I was ugly when I was born. (Female, Rwanda)

One participant from Rwanda recalled the sting of being labeled by his mother and other relatives as a bastard or illegitimate child:

> Yes, like my aunt when she happened to use words like *ikinyendaro* [bastard]. Though I seem to be calm, inside I feel really sad, but, for me, life goes on. When I was younger I used to cry very often . . . I was four years old when my young brother was born. Then my mom was calling me a bastard. Then I was growing in that situation and was feeling not loved. (Male, Rwanda)

Indeed, participants reported confusion regarding their identity. Negative messages from family and community members were subsequently absorbed and internalized, resulting in a sense of shame:

> I don't know, I was confused. They were saying that my mother has children who are Tutsis and others who are Hutus, and I didn't know what that was . . . It was hard to accept myself. I had a complex. I started feeling ashamed. (Female, Rwanda)

> I was called *interahamwe* by a child who was my neighbor . . . I asked my mother: 'What does that mean?' and she cried and did not tell me anything and left. And until now she avoided telling me the truth, but she knows that I know how I was born through other people." (Female, Rwanda)

While participants in both countries reported stigma, they also recounted physical and sexual abuse by family members, often stepfathers, that was directly linked to the children's identities as being born of war or genocide:

> Life is hard here because people stigmatize us . . . they have turned their hate against us . . . In my family, they hate the three of us who were born in [Lord's Resistance Army] captivity . . . My uncle beats us and said he would kill us. He doesn't want rebel

> children, Kony children, at home. (Female, northern Uganda)
>
> When I was young [my mother] used to beat me so much, even our neighbors were wondering if she was really my mother. (Male, Rwanda)
>
> I find life hard. Sometimes my stepfather chases me away from home. Sometimes he grabs an axe and runs after me with it telling me to go away, saying I am Kony's child. That is what makes me bitter. I used to find life was easy at my mother's place, but now that my [biological] father is not here, I find life hard. (Male, northern Uganda)
>
> My stepfather was beating me, hurting me, and calling me a bastard as well. He was even telling me to go to see my [biological] dad. (Male, Rwanda)
>
> Some of us [born of rape] are harassed and raped by the husbands of our mothers. He is like a husband of two wives in the house. (Female, Rwanda)

Participants in both countries also reported neglect and differential treatment compared with siblings not born of war or genocide:

> My parents do not love me. They discriminate me against my siblings who were born from home. Right now they are not paying for my school fees. But they are paying for my siblings to go to school. (Female, northern Uganda)
>
> Yes, our mom treats us [children at home] differently. She is caring with them [my siblings] . . . My mother seems to be unhappy with me. (Male, Rwanda)
>
> Life is not good. I am not allowed to go to the hospital for treatment when I am sick, while the other children [in the home] are taken for treatment when they are sick. (Male, northern Uganda)
>
> I feel I don't have value [like other children]. But I have to be resilient. Since I was in the womb of my

> mother, I was miserable, I have never been happy. (Female, Rwanda)

Ultimately, these experiences of stigma, violence, discrimination, social marginalization, and identity issues were key in participants' understanding of themselves as victims. As these participants explained:

> Yes, we need to be accepted, but things start from down [on the ground], things start with neighbours. If your dad killed people during the genocide and your dad is not here, people are seeing you as if you are him. You may find the people you [meet] . . . your dad killed their families. So we need, first of all, the neighbor's and family's support. [How?] We can do like *gacaca*; people forgive each other. And you have to explain that it is not your fault. People in *gacaca* were asking for forgiveness and they were forgiven despite that they killed people. What about us, who didn't do anything? *Why can't people understand that we are victims*? (Male, Rwanda)[24]

> We have been victims of genocide. (Male, Rwanda)

Across interviews and focus groups in both countries, participants longed for formal recognition from society of their perceived status as victims. Participants in Rwanda noted that inclusion in the Fund for the Neediest Survivors of Genocide in Rwanda ("*Fonds de soutien et d'assistance aux rescapés les plus nécessiteux du génocide*," commonly referred to as "FARG"), which supports genocide survivors born prior to 1995,[25] would represent a significant indication of social acceptance and recognition:

> Like FARG does not recognize us, whereas it pays school fees for genocide survivors' children. So chil-

24. *Gacaca* courts were established by the Government of Rwanda in 2001 as a community-based justice mechanism to deal locally with the prosecution of some of the crimes connected to the 1994 genocide. See Kristin Doughty, *Grassroots Law in Context: Moving Beyond the Cultural Justification, in* CULTURE IN THE DOMAINS OF LAW 266, 270-271 (René Provost ed., 2017).

25. Law No 81 of 2013 (Law Establishing the Fund for Support and Assistance to the Neediest Survivors of the Genocide Against the Tutsi Committed Between 1 October 1990 and 31 December 1994 and Determining its Mission, Powers, Organisation and Functioning), *Official Gazette*, vol. 45, 11 Nov. 2013 (Rwanda).

> dren in my situation don't have equal opportunities as the ones provided to the beneficiaries of FARG, like being offered scholarships, etc. (Female, Rwanda)

Within the focus group discussions in Rwanda, there emerged a strong collective desire for recognition and justice. Specifically, participants expressed a need to advocate not only for their rights and their families, but also for the rights and well-being of other children born of genocidal rape:

> I want us to form a club and to have advocacy. We need to have all rights that other children have. We need to know each other, as we have the same problems. We need to be united, to understand each other. We also need to write our history. We need to make awareness of our story . . . (Male, Rwanda)

The children's words paint a grim picture of exclusion, deprivation, and discrimination rooted in the circumstances of their conception. The violence that marked their coming into the world continues to reverberate in their lives to this day. They are not seen as victims of wartime or genocidal rape but as somehow party to the violation itself; this not only denies their victim status, but actually constitutes a further harm. Indeed, the insults directed at them suggest that their very existence is harmful to their families and communities.

IV. The Idea of a Wrongful Life

The findings of the fieldwork in Rwanda and Uganda align with earlier research on the lives of children born of sexual violence in times of war or genocide and support the general conclusion that these children often have a very difficult life. Yet despite these findings, CBW are commonly overlooked in the process of transitional justice.[26] It is one thing to conclude that a life is full of hardship and that the behavior of identifiable individuals or groups is to blame; it is another to ask whether and how this reality ought to be recognized in a

26. For instance, the U.N. General Assembly adopted two resolutions titled "Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence," yet neither resolution mentions CBW. G.A. Res. 59/137 (Feb. 17, 2005); G.A. Res. 68/129 (Feb. 25, 2014).

more formal manner. It is possible to sympathize with a person's suffering and refuse to see that suffering as calling for collective recognition.[27]

The formal recognition of harmful behavior and its limits is often examined in legal discourse. Private law tort claims require determining what types of harm ought to be compensated. The jurisprudence analyzing the idea of a wrongful life comes closest to the concerns that animate the discussion of the difficulties facing CBW. This Part thus explores how courts in various jurisdictions have reacted to tortious claims for wrongful life to see whether they have provided an analytical framework applicable to the harm suffered by CBW.

Children conceived from sexual assault in the context of armed conflict or genocide embody a paradox: Their very existence is a benefit coming from an act of violence, but their lives may sustain and expand the initial harm caused by that act. The inextricable linking of benefit and harm in the lives of CBW poses a quandary that is typically answered by emphasizing one facet over the other, often focusing on the harm over the benefit. As evidenced by quotes from interviews in Rwanda and Uganda, the children themselves are caught in this paradox and often struggle to make sense of their own lives, fighting against a sense that their existence is wrongful in some respect.

In a very different setting, private law claims capture a similar mix of benefit and harm tied to a child's existence. In many jurisdictions around the world,[28] wrongful life claims seek redress for an act committed prior to a child's birth that subsequently caused hardship in the life of that child or her parents. There are many permutations to the claims that fall within the general category of wrongful life, but all raise diffi-

27. Unrequited love, for instance, may be the source of very real and significant suffering, often caused by a person that can readily be identified and whose behaviour may be viewed as wrongful. But we are not moved to regulate this harmful relationship through a regime of rights and responsibilities.

28. This section will discuss cases from Australia, Canada, France, Israel, The Netherlands, South Africa, Singapore, the United Kingdom, and the United States.

cult questions touching on the nature and limits of the concept of harm.[29]

There are two aspects of harm explored in wrongful life jurisprudence that intersect with the situation of CBW: First, the fact that the impugned act was the cause of both benefit and harm; and second, the uncertain causal chain between the wrongful act and the eventual injury to the child. Importantly, this analysis does not aim to offer a complete or coherent application of the law of extracontractual responsibility. There is no suggestion that private law remedies offer an avenue upon which CBW could rely in order to obtain redress. The reality of transitional societies like Rwanda suggest the futility of this type of recourse. Judicial institutions are lacking, and the perpetrators of the sexual violence are often unknown, unreachable, or dead. Furthermore, both victims and eventual defendants lack economic resources. Instead, this article uses wrongful life jurisprudence as a laboratory to examine how actors balance policy considerations written into legal standards with concerns for affected children, their parents, and third parties.

A. *A Life Worth Living*

As noted above, CBW embody the contradiction between the benefit and harm flowing from an act of sexual violence. Courts seized of wrongful life claims have been confronted with arguments suggesting that the child's life was made so difficult by medical or social conditions linked to her birth that her very existence was a form of harm. A child plaintiff advanced this line of argument in the 1986 Israeli Supreme Court decision of *Zeitsov v. Katz*.[30] In that case, a woman con-

---

29. The term "wrongful life" has come to indicate a specific type of claim within the spectrum of prenatal harm litigation. This paper uses it in a broader sense to refer to all such claims, as is commonly done in doctrinal writings on the subject.

30. CivA 512/81 Zeitsov v. Katz 40(2) PD 85 (1986) (Isr.). Translated excerpts of this decision were reproduced in a 2012 decision of the Israeli Supreme Court: CivA 1326/07 Hammer v. Amit, Nevo Legal Database (May 28, 2012) (Isr.) (available in English at https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Hammer%20v.%20Amit.pdf [https://perma.cc/7BZV-SLGR]). For a case comment on *Zeitsov* see David Heyd, *Are "Wrongful Life" Claims Philosophically Valid?: A Critical Analysis of a Recent Court Decision*, 21 Isr. L. Rev. 574 (1986).

sulted her doctor about the risks of transmitting a serious genetic disease prevalent in her family. The mother stated she did not want to conceive if there was a risk of transmitting the disease to the baby. The doctor negligently assured her that there was no such risk, and the woman later became pregnant and gave birth to a child afflicted with the genetic disease. The court allowed the child's wrongful life claim. The majority found that this was a rare situation "in which it can be held that it would have been better for a certain person not to have been born. At times, there will be a societal presumption, that it is a matter of consensus that it would have been better for a certain person not to have been born than to have been born with severe disability."[31] It concluded that "the very birth of the child is the damage that was caused to him."[32]

This radical position has been shunned by other courts, including the Israeli Supreme Court itself in a later case.[33] The position courts more commonly adopt is illustrated by the lengthy debate in France around what has been termed the *Affaire Perruche*. The *Perruche* case dealt with a child born severely handicapped after his mother was exposed to rubeola during pregnancy. The mother had indicated her desire to have an abortion if the fetus was infected, but was misadvised by her doctor. The Court of Cassation held that the child could present a claim for wrongful life.[34] In his report on the decision, the court's rapporteur, Pierre Sargos, noted:

---

31. *Zeitsov*, CivA 512/81 at 97, *quoted and translated* in *Hammer*, CivA 1326/07 at para. 3.

32. *Id.* The Supreme Court of California held in Turpin v. Sortini that "while our society and our legal system unquestionably place the highest value on all human life, we do not think that it is accurate to suggest that this state's public policy establishes—as a matter of law—that under all circumstances 'impaired life' is 'preferable' to 'nonlife.'" 643 P.2d 954, 962 (Cal. 1982). In situations of "extremely severe hereditary diseases," the court found that "[c]onsidering the short life span of many of these children and their frequently very limited ability to perceive or enjoy the benefits of life, we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all". *Id.* at 963.

33. *Hammer*, CivA 1326/07 at paras. 13–29; *Harriton v Stephens* (2006) 226 CLR 52, ¶¶ 102–109 (Austl.).

34. Cour de cassation [Cass.][supreme court for private law claims] ass plén., Nov. 17, 2000, Bull. Civ., No. 9 (Fr.).

> The argument that any compensation of harm to this child would amount to a recognition that there are some lives not worth living is grounded in appearance more than reason. How are life and human dignity truly respected—in an abstract refusal to offer any compensation, or on the opposite in admitting that it could allow a child to live, at least materially, in conditions more consonant with human dignity regardless of the availability of family, private, or public support?[35]

This was meant as a reference to the earlier *Quarez* decision by the *Conseil d'État*, a co-equal jurisdiction in France, where the Government had argued that children cannot bring wrongful conception claims, even when they suffer from a genetic defect or incurable disease, "if there was no available *in utero* medical treatment at the time. To claim the opposite view would be to deem some lives not worth living and to force the mother, when confronted with such a diagnosis, to terminate her pregnancy."[36] The mention of a life not worth living in both decisions was meant as an ominous reference to the idea of a "*lebensunwerten Lebens"* or "unworthy life" that drove the Nazi eugenics program, including the forced sterilization and euthanasia of handicapped individuals.[37] Like CBW, children implicated in wrongful life litigation may have severe challenges in their lives, but the clear thrust of the jurisprudence has been to insist that these lives can never be reduced to their negative aspects.

---

35. *Projet de loi relatif aux droits des malades et à la qualité du système de santé* [*Bill on Patients' Rights and the Quality of the Health System*], SÉNAT, http://www.senat.fr/rap/a01-175/a01-1758.html [https://perma.cc/7KV7-UFVP] (last visited Oct. 10, 2020) (reproducing the conclusions of Pierre Sargos in French, translation provided by author).

36. *Id.* (reproducing the conclusions of the Government Commissioner in French, translation provided by author).

37. The expression is taken from ALFRED HOCHE & KARL BINDING, DIE FREIGABE DER VERNICHTUNG LEBENSUNWERTEN LEBENS: IHR Maβ UND IHRE FORM (1920) [THE RELEASE OF THE DENIAL OF UNWORTHY LIFE: ITS MEASURE AND ITS FORM] (Berliner Wissenschafts-Verlag 2006); For a link to the *Perruche* and *Quarez* cases, see Jean-Paul Amann, *L'arrêt Perruche et nos contradictions face à la situation des personnes handicapées* [*The Perruche Decision and Contradictions with Regard to the Situation of Persons with Disabilities*], 2002/3 REVUE FRANÇAISE DES AFFAIRES SOCIALES 125, 131 (2002).

An opposite but equally radical argument also has been made in the context of wrongful life litigation, asserting that because every birth is a blessing and the bliss of life and parenting is incommensurable, compensation for such a happy event should never be granted. For example, the defendant in a recent case before the Singapore Court of Appeal argued that "there was something distasteful, if not morally offensive, in treating the birth of a normal, healthy child as a matter for compensation."[38] Courts often allude to the consensus that social policy—in addition to moral and religious teachings and cultural attitudes in many places—encourages human reproduction as a collective good. Nowhere has the validity of such policy been affirmed more clearly than in decisions relating to abortion. In these cases, a woman's right to privacy and dignity is balanced against a state's legitimate interest in fostering "the wonder of creation."[39] In this view, the anxieties, physical constraints, and pain of pregnancy are "sacrifices [that] have from the beginning of the human race been endured by women with a pride that ennobles her in the eyes of others."[40] That being said, as noted by Khiara Bridges, the construction of pregnancy in legal norms is not systematically positive; in particular, there are a number of American states in which the pregnancy of the victim is an aggravating factor to a crime of sexual assault.[41] In these statutes, pregnancy is analogized to "substantial bodily injury," running counter to the suggestion that any birth is a blessing that necessarily offsets the harm that might accompany it.[42] In the context of wrongful life litigation, this line of argument was considered by the Quebec Superior Court in *Cataford v. Moreau* in pondering whether the birth of a healthy child could be anything other than "a blessing corresponding to the natural order of things."[43] The court concluded that the birth of an eleventh

38. ACB v. Thomson Medical Pte Ltd, [2017] SGCA 20, para. 3 (Sing.).

39. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853 (1992).

40. *Id.* at 852.

41. Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 466–469 (2013).

42. The Supreme Court of Canada adopted this reading in *Hutchinson*, in which it found that an unwanted pregnancy can amount to harm under the Canadian Criminal Code. R v. Hutchinson, [2014] 1 S.C.R. 346, para. 70.

43. Cataford v. Moreau, [1978] C.S. 933, 114 D.L.R. 3d 585, para. 72 (Can. Que. Sup. Ct.) (original in French).

child to destitute parents following the defendant's negligent sterilization procedure was not an event so blissful and normal that compensation would offend public order.[44] Similarly, the Singapore Court of Appeal was not convinced by the defense's unidimensional vision of pregnancy in *ACB v. Thomson Medical*, eventually awarding damages for the birth of a healthy child.[45]

The story told by the full spectrum of cases within wrongful life jurisprudence is that children can be born into circumstances that combine the joys of being alive and the hardships that befall human existence. Mapping specific subcategories of wrongful life cases can be helpful to situate the reality of CBW. While wrongful life jurisprudence encompasses a range of prenatal harm cases, courts and academic commentators have differentiated a number of situations according to the identity of the claimant, the role of the wrongdoer, and the nature of the hardship. The three main subcategories identified in the law of various jurisdictions are wrongful conception, wrongful birth, and wrongful life (understood here in a narrower sense). These subcategories provide further insight into the social discourse surrounding the reality of the lives of children born under the shadow of harmful conduct.

1. *Wrongful Conception*

Wrongful conception cases are claims brought by the parents of a healthy child conceived and born due to a medical professional's negligent attempt at a sterilization procedure. In some cases, claimants sought sterilization because a pregnancy might jeopardize the mother's health, while in other cases it was a broader family planning measure. The harm claimed is the unwanted pregnancy itself, the birth, and the financial and emotional burden of raising a child to maturity. In a number of cases, such claims were rejected on the basis that "to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people."[46] In some cases, courts noted that the claiming parents were un-

44. *Id.* at para. 74 (original in French). The view that the birth of a healthy child can constitute a compensable harm was confirmed in Suite v. Cooke [1995] R.J.Q. 2765 (Can. Que. C.A.).

45. ACB v. Thomson Medical Pte Ltd, [2017] SGCA 20, para. 210 (Sing.).

46. Shaheen v. Knight, 11 Pa. D. & C. 2d 41, 45 (C.P. 1957).

willing to terminate the pregnancy by abortion, place the baby for adoption, or even sell the baby for the $50,000 being claimed as damages.[47] The courts thus suggest that if parents abstain from terminating the pregnancy or giving up the unexpected child for adoption when it was in their power to do so, any harm caused from having or keeping the child cannot be said to be caused by the negligence of the medical professional.

Other jurisdictions take an alternative approach. The Australian High Court in *Cattanach* ordered the payment of all of the unexpected child's upkeep costs, thereby legitimizing the claim for harm of raising the child.[48] However, while the majority of courts, like the Québec Superior Court in *Cataford v. Moreau*, show some willingness to provide a measure of compensation in such cases, they shy away from ordering the negligent medical practitioner to pay all the costs of raising the unwanted child.[49] The House of Lords in *McFarlane* surveyed a wide array of arguments presented in many jurisdictions to conclude, in Lord Millet's words:

> In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.[50]

---

47. Ball v. Mudge, 391 P.2d 201, 204 (Wash. 1964); *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, 84–85 (Austl.).

48. *Cattanach v Melchior*, (2003) 215 CLR 1 (Austl.).

49. Cataford v. Moreau, [1978] C.S. 933, 114 D.L.R. 3d 585 , paras. 88, 99 (Can. Que. Sup. Ct.).

50. McFarlane v. Tayside Health Board [2000] 2 AC (HL) 59, 113–14 (appeal taken from Scot.) (Lord Millet, dissenting in part, but not on this point).

In *White v. United States,* claims were presented not only by the parents of the unwanted child, but also by the child himself and his siblings.[51] The district court denied that siblings had any right to a specific share of their parents' wealth or affection.[52] As for the child himself, the court found that he could not recover for his own birth, as "it is impossible to measure the damages for his life against the utter void of nonexistence."[53]

In the context of CBW, wrongful conception cases signal that there are strong policy considerations limiting the extent to which the normal birth of a healthy child can be considered harmful, even if the parents or mother did not desire that birth. There must be other factors at play for a birth to amount to an injury, such as a permanent disability that increases the costs beyond those for a normal, healthy baby. As indicated above, some families of CBW see these children as a constant source of pain, resulting in an emotional cost that outweighs any benefits of having another child. Parents are indignant about having to bear the costs associated with a CBW, and indeed refuse to do so even if this means the child will go without schooling or parental affection. This attitude towards CBW signals that, despite their physical health, CBW are not seen by their society as "normal" or "healthy." As such, their situation is not identical to that of the children in wrongful conception cases.

2. *Wrongful Birth*

Wrongful birth cases involve claims brought by the parents of a child born with a significant disability. Claimants argue that a defendant medical professional negligently failed to detect the disability and thus prevented the mother from terminating the pregnancy. Many cases involve a hereditary condition or the pregnant mother's exposure to a contagious disease known to create significant risk of serious disability for the fetus, combined with a stated wish on the part of the mother to have an abortion if this risk is present.[54] These cases

---

51. White v. United States, 510 F. Supp. 146 (D. Kan. 1981).

52. *Id.* at 148.

53. *Id.*

54. The French *Perruche* case and the Dutch *Kelly* case are examples. *See Projet de loi relatif aux droits des malades et à la qualité du système de santé, supra*

tend to focus on the identification of the harm and assessment of damages, with claims ranging from the cost of raising the child to the specific supplemental burden resulting from the special care needed to address the severe handicap affecting the child.

In wrongful birth cases, courts consider whether the parents desired to have a baby and whether the negligent conduct of the medical professional caused the disability. The direct consequence of the harmful conduct in these cases is the mother's loss of an opportunity to obtain an abortion. At the moment of the wrongful act, there was no possibility that the child could be born without a serious disability. Many judges in these cases grapple with the arbitrariness of comparing a disabled life with the non-disabled life that this particular child could not possibly have had, regardless of the harmful conduct of the medical professional. Other courts compare the additional cost of raising a child affected by the particular disability with the cost of raising a non-disabled child, reasoning that the parents could have terminated the pregnancy and conceived another child had they been given accurate medical advice. However, this line of thinking requires a significant degree of speculation, as there is no assurance that the parents could or would have another child, or that a second child would remain unaffected by the condition at the basis of the claim.[55] Some courts, such as the Dutch Supreme Court in the *Kelly* case, do not even venture into the second child hypothetical. Instead, the court simply found that the parents were entitled to the extra costs necessary to ensure that their severely disabled daughter lives a reasonable life.[56]

The wrongful birth claims show a clear social acknowledgment that the birth of a child can constitute a recognizable injury if wrongful conduct affected the circumstances of the pregnancy and contributed to a more difficult life for the child and those around her. Similarly, for CBW, the sexual violence of their conception undeniably affects the circumstances of

---

note 41 (discussing the facts, arguments, and holdings of the *Perruche* case); HR 18 maart 2005, NJ 2006, 606 m.nt. JBMV (Kelly) (Neth.).

55. Albert Ruda, *'I Didn't Ask to Be Born': Wrongful Life from a Comparative Perspective*, 1 J. EUR. TORT L. 204, 212 (2010).

56. *Kelly* dealt with a severely disabled child born following negligent medical advice that failed to highlight a significant health risk. HR 18 maart 2005, NJ 2006, 606 m.nt. JBMV (Kelly), paras. 4.14–4.15.

their mothers' pregnancy and contributes to a more difficult life for them and those around them. Like mothers bringing tort claims for wrongful birth, the mothers of CBW often were deprived of the opportunity to avoid an unwanted birth. Moreover, the stain of their fathers' wrongful acts prevent CBW from being seen as "normal" and "healthy," and the potential success of a wrongful birth claim for CBW aligns with an understanding that women who suffered forced pregnancies are victims.

3. *Wrongful Life*

Wrongful life claims brought by a child parallel wrongful birth claims brought by parents. In wrongful life cases, a child brings a claim for being born with a significant disability that a defendant medical professional negligently failed to detect, thus preventing the mother from terminating the pregnancy. As in the previous category, the medical negligence is not the cause of the disability, but rather the condition that allowed the pregnancy to continue to term and the claimant to be born. All the contradictions that were latent in the wrongful birth cases are fully revealed in wrongful life cases, which are grounded in a negligent act but for which the claimant would not be alive. Whereas wrongful conception and wrongful birth cases focus on the harmful consequences of the birth of a child, here the harm is the birth itself. Both common and civil law liability regimes demand that courts inquire into what the situation would have been but for the defendant's harmful conduct, allowing for fair compensatory damages that will notionally erase the consequences of the wrong to make the claimant whole. In a wrongful life claim, this asks the court to go down an existential rabbit hole and assess the difference between the claimant's disabled life and the non-existence that would have resulted from diligent medical advice. An early and influential English case, *McKay v. Essex AHA*, grappled with this dilemma: "But how can a court begin to evaluate non-existence, 'the undiscovered country from whose bourn no traveller returns'? No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action."[57] The court found that even if it were justified in finding the medical

57. McKay v. Essex AHA [1982] QB 1166 (EWCA) at 1180 (Eng.).

professional had to afford the mother an opportunity to have an abortion,

> To impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving, and it would even mean that a doctor would be obliged to pay damages to a child infected with rubella before birth who was in fact born with some mercifully trivial abnormality. These are the consequences of the necessary basic assumption that a child has a right to be born whole or not at all, not to be born unless it can be born perfect or "normal," whatever that may mean.[58]

In *Hammer*, the Israeli Supreme Court rejected the possibility that a child might successfully present a wrongful life claim by underscoring that the interests of the child and the public in sanctioning the harmful conduct could be fulfilled by the parents' wrongful birth claim.[59] However, courts in several jurisdictions have embraced a diametrically opposite stance. For example, the Supreme Court of California in *Turpin* reasoned that it would be illogical to permit the parents' wrongful birth claim while refusing the child's wrongful life claim when the child suffers from the harmful conduct alleged. Furthermore, it would make the availability of compensation subject to the "wholly fortuitous circumstance of whether the parents are available to sue and recover such damages."[60] A similar stance was adopted by the French Court of Cassation in *Perruche* and the Dutch Supreme Court in *Kelly*.[61]

---

58. *Id.* at 1180–81. This passage is favorably quoted in *Harriton v Stephens* (2006) 226 CLR 52, para. 227 (Austl.).

59. CivA 1326/07 Hammer v. Amit, Nevo Legal Database, para. 12 (May 28, 2012) (Isr.) (available in English at https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/%20v.%20Amit.pdf [https://perma.cc/7BZV-SLGR]).

60. Turpin v. Sortini, 643 P.2d 954, 965 (Cal. 1982).

61. Cour de cassation [Cass.][supreme court for judicial matters] ass plén., Nov. 17, 2000, Bull. Civ., No. 9 (Fr.); HR 18 maart 2005, NJ 2006, 606 m.nt. JBMV (Kelly), paras. 4.11–4.16.

Like the children presenting wrongful life claims, CBW cannot really assert that they would prefer not to have been born. But the goal of this article is not to consider whether CBW could successfully bring a wrongful life claim—a vast question to which courts in different jurisdictions would likely offer contradictory answers. Rather, it is to highlight judicial conceptions of the conflicting interests at play and the nature of a life arising from harmful conduct and resulting in ongoing suffering. Wrongful life claims strain courts' ability to weigh the costs and benefits of a child's life. Still, the jurisprudence indicates the importance of sanctioning harmful behavior and offsetting a child's suffering as much as possible.

One of the few clear lessons from wrongful life jurisprudence is that harmful conduct in itself cannot overshadow the life that eventually ensues. The prevailing principle is that morality and public policy regard the existence of a child as inherently beneficial. This principle is far from absolute, however, as illustrated by courts' conflicting treatment of wrongful conception, wrongful birth, and wrongful life claims. Indeed, some courts are willing to derogate from the principle that a child is a blessing if the initial harmful conduct creates ongoing suffering during the life of the child. The physical harm claimant children suffer is thus integral to wrongful life claims, and it is also the most significant difference between them and CBW in places like Uganda and Rwanda.

B. *Social Roots of a Harmful Life*

As evidenced by the testimonies shared earlier in this paper, CBW are sometimes physically mistreated. However, to focus on this would distract from what defines CBW and sets them apart from other children in Uganda and Rwanda. Instead, what sets them apart—and what may cause some of the violence inflicted upon them—is the social reverberation of the circumstances of their conception.

There is a peripheral strand of wrongful life claims that better approximate the harm CBW suffer, though this small number of cases have attracted comparatively little doctrinal attention. One such older case, *Zepeda v. Zepeda*, is credited

with inventing the very label of "wrongful life."[62] *Zepeda* was a suit brought by an illegitimate child against his father, who had convinced the mother to have sexual relations by promising marriage, but who was in fact already married.[63] The child claimed damages "for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his father, to inherit from his paternal ancestors and for being stigmatized as a bastard."[64] The court noted that while the child could not present a legal claim for lack of affection from his father, the absence of a stable family life, or the lack of a happy home, "it would be pure fiction to say that the plaintiff suffers no injury."[65] The court found that despite the progressive disappearance of legal discrimination against illegitimate children, the social ignominy they suffer amounted to a "patent injustice": "Children born illegitimate have suffered an injury. If legitimation does not take place, the injury is continuous. If legitimation cannot take place, the injury is irreparable. The injury is not as tangible as a physical defect, but it is as real."[66] The nature of this injury, and the link to the main body of wrongful life jurisprudence, was made explicit when the court concluded that the child's "adulterine birth has placed him under a permanent disability."[67] However, despite the court's acknowledgment of the wrong and ensuing injustice suffered by the claimant, it found that the claim fell outside the established common law categories of torts and that it was the role of the legislature, not the courts, to recognize such new claims.[68]

---

62. Zepeda v. Zepeda, 190 N.E.2d 849, 858 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964).

63. *Id.* at 851.

64. *Id.*

65. *Id.* at 856.

66. *Id.* at 857.

67. *Id.*

68. *See also* Williams v. State, 223 N.E.2d 343 (N.Y. 1966) ("Impossibility of entertaining this suit comes not so much from difficulty in measuring the alleged 'damages' as from the absence from our legal concepts of any such idea as a 'wrong' to a later-born child caused by permitting a woman to be violated and to bear an out-of-wedlock infant."); Slawek v. Stroh, 215 N.W.2d 9 (Wis. 1974) ("While this court is probably not powerless to recognize this tort as a valid cause of action by virtue of art. I, sec. 9 of the Wisconsin constitution (set forth above), we believe, as the Illinois court did, that the creation and recognition of a cause of action for wrongful birth

The idea that the circumstances of a child's birth may result in social opprobrium similar to a disability, as the *Zepeda* court found, is echoed in a small number of more recent cases dealing with mistakes in assisted reproduction procedures. In *A (a minor) and B (a minor) v. A Health and Social Services Trust*, twins born in Northern Ireland from in vitro fertilization claimed that despite their white parents' request for a white donor, the fertility clinic mistakenly used sperm from a mixed-race donor.[69] The children's resulting dark skin made them the subject of derogatory comments at school and caused distress in their relationship with their parents.[70] A similar claim, in which a mother was negligently inseminated with sperm from a black donor against the stated wish of her and her same-sex partner, both white, was filed in Illinois.[71] The asserted damages included the cost of relocating from an all-white to a racially mixed environment and emotional and financial harm associated with stigmatization of people of color in the United States.[72] While the Illinois case floundered on procedural grounds, the Irish case did proceed to judgment, with the Queen's Bench denying that the children had any legally cognizable harm: "In a modern civilised society the colour of their skin—no more than the colour of their eyes or their hair or their intelligence or their height—cannot and should not count as connoting some damage to them."[73] The court refused to conclude that "the genes they carry somehow

---

would have vast social ramifications and the creation of such a cause of action is the type of public policy decision that should be made by the people of this state or their elected legislative representatives."); Vance v. T.R.C., 494 S.E.2d 714 (Ga. Ct. App. 1997) ("An action brought by a child against the . . . physician on the theory that because of his illegitimacy . . . he would have been better not born has found almost no support in the law."). For an argument in favor of such a tort, see Guido Tedeschi, *On Tort Liability For "Wrongful Life"*, 1 ISR. L. REV. 513, 519–20 (1966).

69. A (a minor) and B (a minor) v. A Health and Soc. Servs. Tr. [2010] NIQB 108, [1], *appeal dismissed*, [2011] NICA (Civ) 28.

70. *Id.*

71. Cramblett v. Midwest Sperm Bank, 230 F. Supp. 3d 865 (N.D. Ill. 2017); Matthew McKnight, *The Ohio Sperm-Bank Controversy: A New Case for Reparations?*, NEW YORKER (Oct. 14, 2014), http://www.newyorker.com/news/news-desk/ohio-sperm-bank-controversy-new-case-reparations [https://perma.cc/SX3N-RCAH].

72. McKnight, *supra* note 71.

73. A (a minor), [2010] NIQB 108, [18].

render them 'a victim' at the hand of the defendant."[74] The same argument was embraced on appeal, where the court declared that "[i]t would be perverse and objectionable to suggest that a child so born was in some way damaged, disabled or injured,"[75] even though "there will inevitably be some who will make unpleasant comments in relations to matters of differences in others whether it be in respect of skin colour, religion, the colour of an individual's hair, the clothes they wear and their family background."[76]

The Northern Ireland Court of Appeals was scornfully dismissive of the case, reducing racism against visible minorities in a society that is 99 percent white to "unpleasant comments"[77] and failing to satisfactorily address the claim that the resulting fracture within the family was a significant harm.[78] The Irish courts' dismissal of a causal relationship between the behavior and harm stands in stark contrast to human rights standards protecting family life and prohibiting racial discrimination. However, although the concept of disability was invoked uncritically by the Northern Irish courts, the law on disability reflects a social model of disability. According to that model, disability cannot be reduced to an individual physical impairment because it corresponds to a set of social practices and expectations of normality that a disabled individual is deemed not to meet. In other words, disability is a form of

74. *Id.* at [23].

75. A (a minor) and B (a minor) v. A Health and Soc. Servs. Tr. [2011] NICA (Civ) 28 [9] ("Having a different skin colour from the majority of the surrounding population and their parents' cannot sensibly be regarded as damage or disability").

76. *Id.* at [10].

77. *See* Sally Sheldon, *Only Skin Deep? The Harm of Being Born a Different Colour to One's Parents*, 19 MED. L. REV. 657, 663 (2011) (commenting that the decision in *A (a minor)* reduced the plaintiff children's alleged harm to "irrelevant physical variation," failing to adequately capture the children's experiences).

78. *Id.* at 666. A long interview with the parents in a British newspaper leaves little doubt that there is substance to their feeling that their "lives ha[d] been ruined by this mistake." Helen Weathers, *Why Am I Dark, Daddy? The White Couple Who Had Mixed Race Children After IVF Blunder*, DAILYMAIL (June 13, 2009), http://www.dailymail.co.uk/news/article-1192717/Why-I-dark-daddy-The-white-couple-mixed-race-children-IVF-blunder.html [https://perma.cc/UD96-6EUE].

social oppression.[79] When disability is understood in this light, it is clear that social exclusion on the basis of other invidious factors such as race or illegitimacy can be analogized to disability.[80] The Singapore Court of Appeal was recently confronted with this dilemma in yet another negligent in vitro fertilization case. In that case, a Chinese woman and her Caucasian husband sought artificial insemination using their respective genetic materials, but sperm from an Indian donor was mistakenly used instead. The plaintiffs alleged that the curious looks and comments about the differences in appearance created tensions within the family.[81] The Singapore court carefully considered *A Health and Social Services Trust*, but diverged in its understanding that race "as a social concept can lie at the root of real and significant harms."[82] Because Singapore, like many places, cannot be considered a post-racial society, race does have an impact and can be a determinant of harm. The court accordingly held that the wrongful denial of genetic affinity could be a cognizable injury leading to damages.[83]

The broad lesson of wrongful life jurisprudence is that harmful conduct may simultaneously create life and contribute to the eventual suffering of the child thus conceived. While judges in many jurisdictions have grappled with the paradox that life and harm are conjoined to an extent that resists the normal application of private law principles, they have also been unwilling to declare that the value of life and the protection of human dignity render any harm associated with the wrong inconsequential. On the whole, courts have been inclined to find avenues to compensate children whose lives

79. Tom Shakespeare, *The Social Model of Disability*, *in* THE DISABILITY STUDIES READER 195, 195–203 (Lennard Davis ed., 5th ed., 2017).

80. For a commentary on the Cramblett case, see Kimani Paul-Emile, *When a Wrongful Birth Claim May Not Be Wrong: Race, Inequality, and the Cost of Blackness*, 86 FORDHAM L. REV. 2811, 2815–17 (2017).

81. ACB v. Thomson Medical Pte Ltd, [2017] SGCA 20, para. 3 (Sing.).

82. *Id.* at para. 133 (referring to Sheldon, *supra* note 77, at 664).

83. *Id.* at paras. 134–35. *See also* Leeds Teaching Hosps. NHS Tr. v. A [2003] EWHC (QB) 259 (Eng.) (discussing the legal arguments for awarding damages to white parents who have borne children of mixed race because the wrong donor's sperm was used); Andrews v. Keltz, 838 N.Y.S.2d 363 (Sup. Ct. 2007) (noting prior case law recognizing the possibility of awarding damages for the emotional harm resulting from having a child who is not the biologically related to both parents and is a different race than the parents).

have been made harder because of another's wrongful deed. Claims of wrongful birth, wrongful life and those touching on legitimacy or identity all relate to situations in which the wrongdoer is not the direct and immediate cause of the harm, but still an undeniable factor that gave rise to suffering. Courts may thus link a child's condition to the wrongful act and hold the wrongdoer accountable. All of this amounts to a social practice across many communities, cultures, and legal traditions that supports an understanding of CBW as victims suffering ongoing harm from the original act of sexual violence at their conception. In this view, CBW today still suffer harm originating in the civil war in Uganda and the genocide in Rwanda. Whether this conclusion can be reflected in the concept of victimhood that emanates from the construction of sexual violence as a crime under international law is the purview of the next part of this article.

V. CBW AND VICTIMHOOD IN INTERNATIONAL CRIMINAL LAW

International criminal law emerged as a reaction to mass atrocities, initially at Nuremberg and Tokyo to sanction crimes committed by the Axis powers during World War II. This is a legal regime focused on genocide, crimes against humanity, and war crimes, acts often associated with the phenomenon of CBW.[84] As such, international criminal law seems an especially promising laboratory in which to explore the legal construction of CBW as victims.

Although victims have been central in the rhetoric of international criminal justice since its inception, they have generally been marginalized in the process of administering justice until very recently. Justice may have been presented as being done in their names, but victims were at most tolerated within the international court system as witnesses for the prosecution.[85] The adoption of the Rome Statute of the Interna-

84. Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 90 (setting out the jurisdiction of the International Criminal Court over genocide, crimes against humanity, war crimes, and other crimes of aggression).

85. *See* Fiona McKay, *Victim Participation in Proceedings Before the International Criminal Court*, 15 HUM. RTS. BRIEF 1, 1 (2008) (noting that many victims felt alienated by being left out of the criminal proceedings of international criminal tribunals).

tional Criminal Court (ICC) in 1998 proved to be a turning point, aiming to realign international criminal law as a victim-centered regime. Autonomous legal standing was recognized for victims and they were granted significant procedural and substantive rights, triggering the need to define victimhood in international criminal law.[86] Whereas the previous section started from the harm CBW suffered to identify remedies in private law regimes, this section begins with the broad legal concept of the victim and asks whether it should be understood to include CBW. After situating the conception of the victim in international criminal law within a broader notion of victimhood, this section argues that the meaning of victim being developed under the Rome Statute should be understood to include CBW.

A. *Legal Recognition of Victimhood*

It may come as a surprise to many that the victim was a latecomer to the administration of criminal justice, which was long centered squarely on the accused and the determination of his criminal liability. Once the victim emerged from the shadow of the perpetrator, however, it became necessary to articulate the defining features of this actor. As evidenced by the budding sub-discipline of victimology, this became contested terrain in which an array of claims vie for attention.

The multifaceted question of who is a victim can be approached from many different angles and evades simple answers. The question is always asked in a context imbued with assumptions and certain analytical boundaries; "[t]he meaning of objects, including victims, . . . is something that is conferred upon them as they are interpreted."[87] There are many ways to specify the question—would a news headline refer to this person as a victim? Does the person consider himself a victim? Would the average person of the same culture consider him a victim? What about the average person of a different

86. Preparatory Comm'n for the Int'l Crim. Ct., Report of the Preparatory Commision for the International Criminal Court, Addendum Part 1: Finalized Draft Text of the Rules of Procedure and Evidence, r. 85, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000) [hereinafter ICC RPE].

87. JO-ANNE M. WEMMERS, VICTIMOLOGY: A CANADIAN PERSPECTIVE 3 (2017); *See* Tessa Lacerda, *'Victim': What Is Hidden Behind This Word?*, 10 INT'L J. TRANSITIONAL JUST. 179, 181 (2015) ("There is a certain degree of ambiguity in the word 'victim.'").

culture? Is this person a victim according to his domestic criminal justice system? According to international criminal law? Human rights law? Has he been morally wronged? Is calling this person a victim an accurate reflection of his contribution to the situation? Many more questions could be asked.

Historically, the word victim referred to a living animal offered in sacrifice to a god, and was not used to connote someone who is killed or severely harmed until the seventeenth century.[88] By the late eighteenth century, the term was defined as "one who suffers some injury, hardship or loss, is treated badly or taken advantage of."[89] Before these uses became common, the victims of crime were not thought of as such. Early justice systems left dealing with crime to the victims or their family, who took on the role of prosecutor and had to retaliate or seek retribution.[90] This became less tenable with the development of larger, more settled societies—blood feuds tended to be destabilizing.[91] Slowly, with the evolution of the state apparatus and the wish to solidify the political power of the government, crime management was taken over by the state prosecutor and the role of the victim became progressively less important.[92] Eventually victims were reduced to mere witnesses to a crime against the state.[93] In some jurisdictions, victims retain a limited procedural capacity to initiate private prosecutions, but the state usually has discretion to terminate such actions. In the continental European tradition, jurisdictions such as France, Germany, and Belgium allow for the addition of the victim as a civil party to a criminal trial, but the victim is considered ancillary and the trial otherwise remains managed by the state.[94]

---

88. WEMMERS, *supra* note 87, at 1.

89. *Id.*

90. TYRONE KIRCHENGAST, VICTIMS AND THE CRIMINAL TRIAL PROCESS 12 (2016).

91. WEMMERS, *supra* note 87, at 6.

92. This evolution was not necessarily decried by victims, as private prosecutions could be expensive and dangerous. KIRCHENGAST, *supra* note 90, at 12.

93. WEMMERS, *supra* note 87, at 8.

94. For a comparative study of victim participation in Belgium, France, and Germany, see ERNESTINE HOEGEN & MARION BRIENEN, VICTIMS OF CRIME IN 22 EUROPEAN CRIMINAL JUSTICE SYSTEMS: THE IMPLEMENTATION OF RECOMMENDATION (85) 11 OF THE COUNCIL OF EUROPE ON THE POSITION OF THE

The sidelining of the victim was the impetus for the birth and development of the victims' rights movement, which advocated for returning victims to the center of the criminal process.[95] In general, there has been a progressive movement to formalize the demand for a more significant victim's role as a basic requirement of the administration of criminal justice. Perhaps the clearest indication of this evolution is the 2012 European Union Directive on minimal standards for the rights, support, and protection of crime victims.[96]

Victims' historical relegation to the periphery of the criminal legal system has relieved it from the need to provide a clear general definition of victimhood. Instead, the concept has either been left undefined or given a specific definition tailored to a particular institution or practice. For instance, Canada's Criminal Code defines a victim as "an individual who has suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence."[97] Obviously, this is much narrower than the common usage of the word, and reflects the purpose and context of the act. For comparison, under Canada's Corrections and Conditional Release Act, a person is a victim if "they have been harmed as a result of a criminal offence, they have experienced property damage or economic loss as a result of a criminal offense, [or] they are a spouse, conjugal partner, relative of, or person legally responsible for, a victim who has died or is not able to act for themselves . . . ."[98] This defini-

---

VICTIM IN THE FRAMEWORK OF CRIMINAL LAW AND PROCEDURE 134, 318, 363 (2003).

95. KIRCHENGAST, *supra* note 90, at 13–14; Marie Manikis, *Conceptualizing the Victim Within Criminal Justice Processes in Common Law Tradition*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 247, 250–51 (Darryl Brown et al. eds., 2019).

96. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, 2012 O.J. (L315) 57, 57. *See* Johanna Göhler, *Victim Rights in Civil Law Tradition*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 267 (Darryl Brown et al. eds., 2019) (discussing the content and implications of Directive 2012/29/EU).

97. Criminal Code, R.S.C. 1985, c C–46 (Can.).

98. Corrections and Conditional Release Act, S.C. 1992, c 20 (Can.).

tion is slightly broader than that of the Canadian criminal code, but it is still rather narrow.[99]

In political contexts, the contested nature of victimhood leads to definitions that are very narrow or very broad. For example, in Ireland, the Social Democratic and Labour Party defined victims as "any individual whose life has altered its course as a result of the bitterness and division in our society and who believes that the alteration was negative," even including "individuals who might be perceived by some to have brought suffering upon themselves."[100] In transitional justice situations where questions of resources or reparations are explicitly involved, the definition tends to become even more controversial. As Trudy Govier explains, disagreement over the definition of "victim" is really about "the rightness or wrongness of political causes and actions within a political struggle—and the responsibilities of individual agents for their actions and affiliations . . . Differences about who counts as victims will involve differences about justice, responsibility, and innocence."[101] Take, for example, the Belfast Agreement of Northern Ireland, which entirely avoids defining who is a victim. According to Neil Ferguson, this lack of clarity has allowed competing groups to define the term as best suits their needs, and the "debate over defining who the 'real' victims are is part of a wider competitive intercommunity dynamic where victims and victimhood are used to garner support to one side at a cost to the other while strengthening ingroup solidarity and feelings of moral superiority over the outgroup."[102] In 2009, the Report of the Consultative Group on the Past in Northern Ireland recommended that the families of all victims to the con-

---

99. Among other things, the Corrections and Conditional Release Act allows victims to access certain information about sentenced individuals' parole conditions. *Id.* As this is part of a bureaucratic regulatory framework, providing this information draws on scarce resources, which could help explain the definition's limited scope.

100. Sara McDowell, *Who Are the Victims? Debates, Concepts and Contestations in 'Post-Conflict' Northern Ireland*, CONFLICT ARCHIVE (2007), http://cain.ulst.ac.uk/victims/introduction/smcd07whoarethevictims.html [https://perma.cc/Y5YF-L3HE].

101. TRUDY GOVIER, VICTIMS AND VICTIMHOOD 46 (2015).

102. Neil Ferguson, *I'm the Victim Here: Intrastate Conflict and the Legacy of Political Violence*, *in* THE PALGRAVE HANDBOOK OF CRIMINOLOGY AND WAR 151, 155 (Ross McGarry & Sandra Walklate eds., 2016).

flict receive a one-time payment of £12,000, but the furor this provoked foiled implementation.[103]

Overall, the definition of victimhood is variable and controversial because there is power in the ability to self-identify, identify others, or institutionally identify others as victims. Self-identifying and being recognized as a victim can give a person a sort of immunity from criticism and secure public respect and deference.[104] Thus Alyson Cole suggests that, in American culture, victimhood has also been heavily politicized through "anti-victimism": a rhetorical campaign that distinguishes "true victims," who refuse to so identify and endure their suffering with dignity, from "victimists," usually the traditionally marginalized, who are seen as playing the victim in order to game the system.[105] In many contexts, the status of victim may give people moral clout they can use for particular purposes; this high level of deference has even been considered in some situations to be an obstacle to reconciliation and peace processes in the aftermath of conflict.[106] Individuals, groups, and even states may claim victim status as a way to legitimize acts of violence or harm done ostensibly in self-defense or self-preservation—for example, a corporation that discriminates against LGBTQ people under the guise of preserving family values, or the Nazi Germany narrative of Aryan Germans as the victims of Jewish control over the economy.[107]

While being labeled a victim may grant social legitimacy, there has also been backlash against the use the term because of its associations with powerlessness, vulnerability, and lack of agency. For example, after World War I, many disabled and suffering veterans rejected the victim label because they did

---

103. *Id.* at 156.

104. GOVIER, *supra* note 101, at 10.

105. *See generally* ALYSON M. COLE, THE CULT OF TRUE VICTIMHOOD: FROM THE WAR ON WELFARE TO THE WAR ON TERROR (2007) (building to this conclusion by exploring the political effects of victim-anti-victim dynamics).

106. *See* Ruth Jamieson, *Framing Blame and Victimhood in Post-conflict Northern Ireland*, *in* THE PALGRAVE HANDBOOK OF CRIMINOLOGY AND WAR, *supra* note 102, at 171 ("Significantly, those who perceive themselves as victims are more likely than any other group to adopt a partisan, non–compromising stance in attributing responsibility for the conflict.").

107. *See* Saira Mohamed, *Of Monsters and Men: Perpetrator Trauma and Mass Atrocity*, COLUM. L. REV. 1157, 1181–1182 (2015) (describing how the former Serbian President Slobodan Milošević structured his defense in the ICTY around his being a victim of Western Governments).

not want to be viewed as "soldier boys," unable to work and reduced to child-like dependence on their families.[108] Hannah Arendt warned of the danger of slipping from the characterization of an individual or group as victim to scapegoat.[109] Tessa Lacerda, invoking Arendt's work, explains:

> [T]o affirm the absolute innocence of victims is also to reduce them to mere objects, taking away their responsibility for their own actions, even though no individuals can or should be held responsible for the external conditions in which they find themselves . . . It is this denial of a person's ability to act, to be the subject of an action rather than a mere object, that is present in the word "victim." . . .
>
> To summarize, to define oneself as a victim is to risk giving up one's dimension as a subject; it is to be paralyzed in the position of an object of the actions of others. How can one demand one's rights when one sees oneself as a mere object—when entire groups see themselves as mere objects—of the actions perpetrated by others?[110]

This explains why, for instance, targets of state-sanctioned human rights abuses in Brazil systematically rejected the label of "victims."[111] Likewise, many women suffering abuse at the hand of their spouse have resisted being called victims, preferring the image of the "survivor."[112] To avoid the pacification of those who would be victims, they must be allowed to determine if and when they ought to be considered victims of a crime.[113] This reflection of the agency of victims in the concept of victimhood can in turn increase the political agency of victims, both individually and collectively, and the group can

---

108. Zoe Alker & Barry Godfrey, *Soldiers and Victims: Conceptions of Military Service and Victimhood, 1914–45*, *in* THE PALGRAVE HANDBOOK OF CRIMINOLOGY AND WAR, *supra* note 102, at 138.

109. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 5–6 (1973).

110. Lacerda, *supra* note 87, at 183–85.

111. *Id.*

112. Jennifer L. Dunn, *"Victims" and "Survivors": Emerging Vocabularies of Motive for "Battered Women Who Stay"*, 75 SOCIO. INQUIRY 1, 2–6 (2005).

113. Lacerda, *supra* note 87, at 187.

be made visible through converging acknowledgements of victim status.[114]

With regard to CBW, legitimizing their victim status would be more likely to increase than decrease their power. The difficulty for these children is that the blameworthy acts of their fathers are attributed to them through a long-standing, deeply ingrained cultural conception of identity and individuality. The ultimate goal is to see them as victims of their fathers' acts instead of as a continuation of the identity of the father. Victim status for CBW would highlight their innocence, which will help affect society's perspectives on their responsibility and agency and conceptually distance them from the identities of their fathers. Athanasios Chouliaras writes, "the acknowledgement of the status of victim equates to the ascription of a positive social role that legitimizes expectations on the part of the victim, i.e. establishes moral rights awaiting to be converted into legal rights, which will involve concrete responsibilities on the side of the state and civil society."[115] A victimhood-based discourse will help to nurture agency on the part of CBW, giving them the power required to begin to change deeply ingrained, deeply harmful societal assumptions about their identities.

The agency that can develop from the creation of a victims' collective is evidenced by some Rwandan CBW's reactions to meeting in groups with other CBW: "For me, having met people with the same problems is a solution to my life. To meet and share our problems related to our story, gives me strength to work hard for my future."[116] Another said, "The society should consider us as symbol of reconciliation because we have been victims of genocide. . . . Society should learn from us how a person can accept himself, whatever the problem they passed through. We must find solutions and together

114. Sissel Rosland, *Victimhood, Identity, and Agency in the Early Phase of the Troubles in Northern Ireland*, 16 IDENTITIES: GLOB. STUD. CULTURE & POWER 294, 298 (2009).

115. Athanasios Chouliaras, *The Victimological Concern as the Driving Force in the Quest for Justice for State-Sponsored International Crimes*, *in* VICTIMOLOGICAL APPROACHES TO INTERNATIONAL CRIMES: AFRICA 35, 39 (Rianne Letschert et al. eds., 2011).

116. Sarilee Kahn and Myriam Denov *"We Are Children Like Others": Pathways to Mental Health and Healing for Children Born of Genocidal Rape in Rwanda*, 56 TRANSCULTURAL PSYCHIATRY 1, 11 (2019).

with all Rwandans we can build our future and our country as well."[117] Through a sense of group belonging and compassion from their communities, this position of innocence and victimhood can give CBW leverage for better treatment and recognition by their home states and fuller acceptance by their home communities.

B. *The Idea of the Ideal Victim*

The sustained engagement with the idea of victimhood spurred by vigorous advocacy for victim's rights, combined with the absence of a broad-based general definition of the victim in criminal law, has started a conversation about the foundational characteristics of victimhood. In particular, scholars have theorized as to what conditions would make for the ideal victim. While the figure of the ideal victim is derived from social discourse rather than legal rules, social practices are related to the presentation of facts to which legal rules are applied.[118] In an idiosyncratic but influential essay, Nils Christie suggested that an ideal victim, according to the sociological discourse around crime, would be a "little old lady on her way home in the middle of the day after having cared for her sick sister" who is physically attacked by a big stranger who steals her bag to pay for drugs or alcohol.[119] The idea of an ideal victim echoes some of the elements of the victimhood discourse already highlighted, but it also suggests the possibility of a more systematic mapping of the victim concept, corresponding to a number of attributes. Four attributes are especially relevant to CBW and victim status under international criminal law: self-identification, harm, innocence, and resilience.

First, whether someone considers themselves to be a victim is not only a psychological matter but also an important factor in whether others associate that person with victimhood. There is generally much greater hesitation to label anyone a

117. *Id.* at 13.

118. CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, *in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 170 (1983).

119. Nils Christie, *The Ideal Victim*, *in* FROM CRIME POLICY TO VICTIM POLICY 17, 18 (Ezzat Fattah ed., 1986); For a discussion of the significance of this piece, see Marian Duggan, *Introduction*, *in* REVISITING THE "IDEAL VICTIM": DEVELOPMENTS IN CRITICAL VICTIMOLOGY 1, 1–10 (Marian Duggan ed., 2018).

victim if that person resists the status. Whether or not someone self-identifies as a victim of a particular act or situation might be a reflection of their psychological state, their assumptions about victimhood, or their political views. The long-standing political crisis in Northern Ireland, for example, generated many conflicts and controversies over who is a victim. Studies on the Northern Irish show that there is not always a correlation between considering oneself a victim and having suffered "direct or indirect experiences of political violence."[120] Often, people considered themselves victims despite not having such experiences, while those who had experienced violence linked to the conflict did not consider themselves victims. Myriad factors can influence whether or not an individual will self-identify as a victim, including "geographical and temporal proximity to the violent incident, amount of exposure, memory displacement, denial, habituation to the conflict, [and] the stigma of victimhood."[121] Conversely, victimhood is not a purely internal status, such that a person's claim to be a victim is not in itself sufficient to justify that label. There are many examples of situations in which some have sought to instrumentalize a spurious victimhood claims in order to justify their own positions or power abuses. Self-identification is important, but it is not sufficient.

Second, a person must have suffered some kind of harm in order to be properly described as a victim of crime. This is also the central element in the definitions adopted by the Canadian statutes mentioned earlier in this section.[122] In Christie's image, the "little old lady" suffers both physical harm from the attack and economic loss from the theft of her handbag, though what counts as harm need not be narrowly defined to include only the physical, psychological, or financial. The previous discussion of wrongful life cases showed that some forms of harm, such as the loss of genetic affinity in *ACB v. Thomson Medical Pte Ltd*, do not fit squarely into any of these categories.[123] Govier goes so far as to claim that the only re-

120. Ferguson, *supra* note 102, at 156.

121. *Id.* at 157.

122. Criminal Code c C–46, *supra* note 97; Corrections and Conditional Release Act, c 20, *supra* note 98.

123. See ACB v. Thomson Medical Pte Ltd, [2017] SGCA 20, para. 135 (Sing.) (identifying harm in the appellant's loss of ability to "maintain an intergenerational genetic link and to preserve 'affinity.'" The court noted

quirement for harm is that "one's interests must be in some way adversely affected,"[124] an extremely broad understanding of the requirement of harm as a constituent element of victimhood.

The harm that defines a victim can be directly caused to that person by the criminal act, as when someone is killed or injured by the wrongdoer, but it can also extend to harm caused indirectly, like when a close relationship between the immediate victim and secondary victims occasions a reverberation of the harm beyond its immediate scope. For example, in a 2019 decision, the government of Québec decided to extend the application of the Crime Victims Compensation Act to the spouse and two children of a man killed in a terrorist attack against a mosque in Québec City in 2017, even though the spouse and children were not present at the moment of the murder. Despite the fact that the definition of victim could be read to require direct physical or psychological harm, the Québec government concluded that the post-traumatic shock the decedent's immediate family members suffered amounted to harm warranting recognition under that statute.[125] Closer to the situation of CBW, the Delhi High Court in a 2016 appeal decided that the infant born of the rape of a teenage girl should be considered a victim pursuant to the Protection of Children from Sexual Offences Act:

> We find that there is a complete vacuum in the consideration of compensation so far as the sexual offence resulting in the birth of a child. Such a child is clearly a victim of the act of the offender and entitled

---

that this harm was the "result of a complex amalgam of biological, social, ethical, and historical factors.").

124. GOVIER, *supra* note 101, at 26.

125. *See* Céline Fabriès, *Les proches d'une victime de la Grande Mosquée de Québec indemnisés* [*Relatives of a Victim of the Great Mosque of Québec Compensated*], LE SOLEIL (Jan. 27, 2019), http://www.lesoleil.com/actualite/la-capitale/les-proches-dune-victime-de-la-grande-mosquee-de-quebec-indemnises-2dfa9f45eae9c5b59e7beb86a2e401c3 [https://perma.cc/EZA5-XHWN] (last visited Nov. 13, 2020). The statute is the Crime Victims Compensation Act, C.Q.L.R., c I-6, art. 3. For a directory of the statutes and regulations that the Québec Government relies on when processing victims' applications for compensation, see Crime Victims' Compensation, *Direction générale de l'IVAC Statutes, Regulations, and Policies*, IVAC, http://www.ivac.qc.ca/en/about/Pages/statutes-regulations-policies.aspx [https://perma.cc/3JY7-N8K5] (last visited Nov. 13, 2020).

> to compensation independent of the amount of compensation paid to his/her mother.[126]

The court accordingly ordered payment for maintenance and support of the infant from a public compensation scheme. Finally, returning to the issue of genetic affinity, Indiana in 2019 enacted a statute that creates a cause of action for parents and children born from a fertility treatment in which the medical professional fraudulently used his own genetic material. In such a case, the claimant is entitled to compensatory and punitive damages, or liquidated damages set at $10,000.[127]

Harm, whether direct or indirect, should not be equated with suffering, which is not a constituent element of victimhood. For example, "a victim of financial fraud who loses his money and whose interests are adversely affected, but who does not suffer because he did not really care about that money in the first place" is still a victim.[128] The important distinction between harm and suffering can help make sense of situations in which a person is unaware of having been victimized. For example, many children born of Argentinians who were disappeared during the military dictatorship between 1976 and 1983 were adopted by middle class families close to the regime and raised in stable homes. As long as they did not suspect their situation, they did not suffer; but arguably they were harmed by being deprived of the right to know their identity and genetic heritage.[129] Many of these children then did experience psychological suffering and identity crises once they learned what had happened to their birth parents.[130] The degree of suffering is dependent on the type and intensity of

---

126. Gaya Prasad Pal Mukesh v. State, Cr.A. 538 of 2016, H.C. Del., 9 Dec. 2016, at para. 114 (India).

127. Senate Enrolled Act 174, 2019 Ind. Acts 2680 (codified as amended at IND. CODE § 34-24-5 (2019)).

128. GOVIER, *supra* note 101, at 27.

129. The U.N. Convention on the Rights of the Child does not include the right to know one's genetic heritage, but Alice Diver argues for the "need for such a right to be more fully articulated and more consistently implemented by domestic legal systems," highlighting the harms that can attach to "kinlessness," such as mental health difficulties, experiencing "fractured" identities, etc. ALICE DIVER, A LAW OF BLOOD-TIES: THE "RIGHT" TO ACCESS GENETIC ANCESTRY 78, 299 (2014).

130. Ari Gandsman, *"Do You Know Who You Are?" Radical Existential Doubt and Scientific Certainty in the Search for the Kidnapped Children of the Disappeared in Argentina*, 37 ETHOS 441, 447 (2009).

harm, the personality of the victim, and their particular situation.[131] Therefore, typical definitions of victimhood refer to some sort of harm or damage instead of subjective experiences of suffering.

A third attribute of the "ideal victim," one that has proven much more controversial, is innocence. The fact that reference is so often made to an innocent victim underscores the morality claim that seems to be inherent in victimhood. Innocence can refer to two distinct dimensions: specific and general. A person with specific innocence has not contributed to the chain of events that resulted in their victimhood.[132] For example, an individual who has been arrested may be harmed, in that he is deprived of his liberty, but he is not specifically innocent if his criminal behavior triggered his arrest. Govier is careful to point out that the innocence required to qualify a person as a victim is innocence with regard to the particular harm that happened to them: "One must not deserve the harm imposed by the damaging act itself, even though one might have acted so as to create the context in which the act occurred," such as walking through a dark alley at night.[133] Whether a person was responsible for, or merely a contributor to, her own misfortune is often a controversial question. The more a person contributed to her own harm, the less likely it is that she will be considered a victim. For example, the person who insists on white water rafting after being warned of particularly dangerous conditions, and then perishes due to this recklessness, will be less likely to be deemed a victim. This can be linked to a power disparity between the victim and perpetrator, whereby the comparative weakness of the former prevents her from stopping the harm. Thus, in Christie's original story, the little old lady attacked by a big man while walking home at midday after having cared for her sick sister was otherwise carrying out a respectable project and was unable to stop the harm.[134]

---

131. GOVIER, *supra* note 101, at 27.

132. The specific innocence inquiry is limited to the specific harm at issue. It is a separate question entirely whether or not the person has been a perpetrator with regards to other situations in their lives; having committed crimes or causing other people harm does not mean that someone is not the victim of a harm he suffered through no fault of his own.

133. GOVIER, *supra* note 101, at 23.

134. Christie, *supra* note 119, at 18.

However, on a broader level the public often requires a person to also have general innocence before he may be considered a legitimate victim deserving of sympathy and assistance. A person may be entirely specifically innocent in the context of the particular harm that befalls him, but society may refuse to call him a victim because of a previous criminal history or a particularly unsavory life trajectory.[135] The controversy surrounding Dominic Ongwen, a former child soldier tried before the ICC for committing the same crimes of which he was once the victim, exemplifies this cognitive dissonance. The unease caused by the blurring of the imagined bright line between victim and perpetrator is also evident in the prosecution of Kapos, Jewish concentration camp inmates that assisted in disciplining other inmates in exchange for better conditions that could offer a chance of survival.[136] As Mark Drumbl explains, such cases disrupt the black-and-white dichotomy of criminal law, whereby "victims are to be pure and ideal; perpetrators are to be unadulterated and ugly."[137] The problem for unideal victims is that the morally underserved nature of their harm may be more questionable, undermining any claim to victimhood.

A fourth and final relevant attribute of ideal victims is resilience. In Christie's original telling, the little old lady goes to the police to file a complaint and start a process that can eventually lead to holding the perpetrator accountable. It is, he suggests, another essential condition that as a victim "you are powerful enough to make your case known and successfully claim the status of an ideal victim."[138] He provides the example of spousal abuse, which for decades went underreported (and likely still does) because women were unwilling or unable to make their situation known to outsiders. It is somewhat paradoxical to demand that a victim be powerless enough to be unable to resist the infliction of harm yet also strong enough to speak truth to power. These are, of course, different realms

135. *Id.* at 21.

136. Orna Ben-Naftali & Yogev Tuval, *Punishing International Crimes Committed by the Persecuted: The Kapo Trials in Israel (1950s–1960s)*, 4 J. INT'L CRIM. JUST. 128, 129–30 (2006); DAN PORAT, BITTER RECKONING: ISRAEL TRIES HOLOCAUST SURVIVORS AS NAZI COLLABORATORS 173–74 (2019).

137. Mark A. Drumbl, *Victims Who Victimise*, 4 LONDON REV. INT'L L. 217, 218–19 (2016).

138. Christie, *supra* note 119, at 21.

of power, but there is more to the distinction. The idea of resilience really refers not only to the individual's ability to articulate and defend a claim, but also to the existence of a social and cultural context that makes such claims possible.[139] This final attribute of the ideal victim thus reflects the institutional dynamics of the criminal justice system, in which the victim is at once essential to the accountability process and marginalized in its operation.

C. *The Victim in International Criminal Law*

International criminal law is an area in which the victim has been given greater prominence and a sharper definition. This section will map out the constitutive elements of the victim under the Rome Statute of the ICC and relate them to the attributes of the ideal victim, which will in turn permit the assessment of whether CBW can be considered victims under the international criminal law regime.

In the process leading to the adoption of the Rome Statute in 1998, there was a strong push to make the ICC a victim-centered regime. This was in part a reaction against the perceived marginalization of victims in proceedings before the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). As a result, the Rome Statute grants victims significant rights and delineates the status of victim with considerably greater precision than previous definitions under public international law and most domestic legal systems.[140] Furthermore, victims' role at the ICC is not strictly curtailed by the definition linked to their various rights under

---

139. *See* Michael Ungar, *Resilience Across Cultures* 38 BRITISH J. SOC. WORK 218, 255 (2008) ("[R]esilience is both the capacity of individuals to navigate their way to health-sustaining resources, including opportunities to experience feelings of well-being, and a condition of the individual's family, community and culture to provide these health resources and experiences in culturally meaningful ways."); Bree Akesson & Myriam Denov, *Introduction, in* CHILDREN AFFECTED BY ARMED CONFLICT: THEORY, METHOD, AND PRACTICE 3 (Bree Akesson & Myriam Denov eds., 2017) (quoting Ungar); René Provost, *L'attaque directe d'enfants-soldats en droit international humanitaire* [*The Direct Targeting of Child Soldiers in International Humanitarian Law*], 55 CAN. Y.B. INT'L L. 33, 42 (2018) (quoting Ungar).

140. *See* Rome Statute of the International Criminal Court, *supra* note 84, arts 68, 75, (allowing, for instance, for victims to "advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance.") .

the Rome Statute. Even within the ICC regime, the concept of the victim is multifaceted. At one level, the ICC has a clearly defined, functional, purposive definition of victims that all organs of the court use to determine which individuals can participate at various stages of proceedings and claim other rights recognized by the Statute.[141] However, the ICC's discourse on victims is much broader and more variable than this functional definition. Various organs deploy the concept of victimhood in their rhetoric in different ways in order to continually justify the existence and actions of the ICC. The court thus describes victims differently when speaking outwardly.[142]

The ICC occasionally references victims in a way that implies that it does not exclusively mean those who formally qualify to participate in proceedings as victims. Reference is thus often made to larger, more vaguely defined groups of victims of the crimes under the court's jurisdiction. For example, the Office of the Prosecutor noted in its 2010 Policy Paper on Victim Participation that

> [T]here are a number of provisions that are distinguished from victim participation under Article 68(3) of the Statute. Chambers have held that the category "victims having communicated with the Court," which appears in a number of provisions in the Rules, relates to a separate and additional group of victims besides those who have been allowed to participate in the proceedings.[143]

The Prosecutor's Office noted that it "consistently seeks to address the interests of a wider community of victims

---

141. This definition is found in Rule 85 of the ICC Rules of Procedure and Evidence (RPE). ICC RPE, *supra* note 86.

142. The language of Rule 85 can be compared with, for example, press releases from the ICC involving victims. Press Release, International Criminal Court, The Trust Fund For Victims Launches Ten New Assistance Projects in the Democratic Republic of the Congo (July 27, 2020), http://www.icc-cpi.int/Pages/.aspx?name=200727-tfv-press-release-drc [https://perma.cc/LH4E-YULU]; Press Release, International Criminal Court, ICC Marks Day of International Criminal Justice, Launching #resilience campaign (July 17, 2020), http://www.icc-cpi.int/Pages/item.aspx?name=pr1533 [https://perma.cc/A8DX-6CCR].

143. Off. of the Prosecutor of the Int'l Crim. Ct., *Policy Paper on Victims' Participation*, ICC-OTP 1, 6 (April 2010), http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/281751/.pdf [https://perma.cc/KX9Y-BN5C].

through its submissions on the gravity of crimes, including in terms of their impact."[144] In its Policy Paper on Children, the Office of the Prosecutor once more evidenced its understanding of victimhood as far-reaching: "The Office will request a sentence which adequately reflects the seriousness of crimes against children, including the immediate and long-term harms caused to them, their families and communities."[145] The 2009 Report of the Court on the Strategy in Relation to Victims included an explanation of the various people the court may refer to as victims:

> For the purpose of this strategy, a victim is a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court . . . the term "victim" may refer to different persons at different times, as specific victims interact in distinct ways with different parts of the Court at different phases of the proceedings. For instance, the term is used to describe persons having sent communications/information of crimes to the Office of the Prosecutor, or allowed by the relevant Chamber to participate in the proceedings or having applied to do so, persons who receive reparations as a result of an order of a Trial Chamber following a conviction, or persons who require specific measures of protection or psycho–social support related directly to their appearance before the Court. Some victims are likely to also be witnesses in the proceedings. A possibility may also equally [sic] for victims to appear in person before the Court. *The term is also used in a broader sense to describe those who benefit from assistance provided by a project supported by the [Trust Fund for Victims], or members of a community affected by crimes in the context of a particular situation or case who as a result is targeted by outreach activities of the Court.*[146]

144. *Id.* at 9.

145. Off. of the Prosecutor of the Int'l Crim. Ct., *Policy on Children*, ICC-OTP 1, 4 (Nov. 2016), http://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF [https://perma.cc/QF3H-UG6T].

146. Int'l Crim. Ct. Assembly of State Parties, *Report of the Court on the Strategy in Relation to Victims*, ¶ 8, ICC–ASP/8/45 (Nov. 10 2009) (emphasis added).

In general, ICC organs frequently refer to victims in their rhetoric with a view to legitimizing the court's project.[147] The extent to which victims' rights are respected has become an important measure of the legitimacy and success of such institutions in the eyes of the public and human rights advocates.[148] Prosecutor Fatou Bensouda's public statements and press reports almost always make explicit reference to providing justice for victims. For example, after the chamber dropped charges against William Ruto and Joshua Sang, the Prosecutor's public statement argued it was "troubling . . . that the onslaught against this case has—for now—denied the victims of the 2007–2008 election violence in Kenya the justice they so rightly deserve," and that "our one, consistent objective has always been to secure independence and impartial justice for the many victims of that violence."[149] The first ICC Prosecutor, Luis Moreno Ocampo, stated in 2008 that "[m]y mandate is justice; justice for the victims."[150] This constant evocation of the victim is undoubtedly intended as a rhetorical shield against criticism of the ICC, and the broader and vaguer the abstraction, the more useful it is as a shield.

It could be argued that this abstract notion of victimhood, by containing everyone, dilutes the concept of the victim to a point of meaninglessness. Sara Kendall and Sarah Nouwen criticize this abstract victimhood for turning victims into a rhetorical construct that "entails an appropriation or 'usurpation'

147. Indeed, most transitional justice institutions "almost always seek to underline their bona fides by demonstrating their 'victim-centeredness,'" and that "justice or support for victims are often *the* reasons advanced by lawyers, judges, psychologists, human rights activists, and others for their involvement in transitional justice." Kieran McEvoy & Kirsten McConnachie, *Victims and Transitional Justice: Voice, Agency and Blame*, 22 SOC. & LEG. STUD. 489, 490 (2013).

148. Mark Findlay, *Activating a Victim Constituency in International Criminal Justice*, 3 INT'L J. TRANSITIONAL JUST. 183, 185 (2009).

149. Off. of the Prosecutor of the Int'l. Crim. Ct, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding Trial Chamber's Decision to Vacate Charges Against Messrs William Samoei Ruto and Joshua Arap Sang Without Prejudice to their Prosecution in the Future*, ICC-OTP (Apr. 6, 2016),), http://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406 [https://perma.cc/L5W8-HYMX].

150. *Ten Years of the International Criminal Court*, BRITISH INST. INT'L & COMP. L., http://www.biicl.org/event/332 [https://perma.cc/TM89-ABF3] (last visited Nov. 13, 2020).

of the voices (and indeed authority) of the represented."[151] When the ICC claims to give voice to victims, it does so in a way that distorts reality, where the victims become something different than the sum of the constituent individuals. For Kendall and Nouwen, "[t]his abstraction in fact effaces individuality and transforms victims into a homogenous unity, like 'the masses', 'the general will', or 'the people,'" and more generally "does not correspond to a concrete, material referent, [but] stands for collective suffering produced through international crimes without containing the particular suffering of wronged individuals."[152]

The ICC's broader notion of victims is large enough, one would think, to accommodate CBW. However, even at that level of abstraction, no ICC organs make any explicit reference to CBW, not even in the Prosecutor's Policy Papers on Children or Sexual and Gender Based Crimes.[153] CBW do not appear to be on anyone's minds when victims are referenced. This mirrors the general erasure of CBW from the international legal discussion of the protection of children from the impact of war. The Optional Protocol on Children in Armed Conflict to the Convention on the Rights of the Child, for example, does not include any reference to CBW.[154] This is so despite the fact that an unofficial precursor document to the Optional Protocol, the 1994 Amsterdam Declaration on the Rights of Children in Armed Conflict, had in fact briefly alluded to CBW to recommend that "every effort shall be made to prevent the danger of stigmatization of children born as a result of rape."[155]

---

151. Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood*, 76 L. & CONTEMP. PROBS. 235, 236 (2013).

152. *Id.* at 254.

153. Off. of the Prosecutor of the Int'l Crim. Ct., *Policy on Children*, *supra* note 155; Off. of the Prosecutor of the Int'l. Crim. Ct., *Policy on Sexual and Gender-Based Crimes*, ICC-OTP 1, 4 (June 2014), http://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes—june-2014.pdf [https://perma.cc/69UX-WM2K].

154. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222.

155. *Declaration and Recommendations on the Rights of Children in Armed Conflict (Declaration of Amsterdam)*, 2 INT'L J. CHILD. RTS. 413, 419 (1994); Soledad Torrecuadrada García-Lozano, *Los hijos del enemigo: las víctimas silenciosas de*

The broader conception of victims deployed in ICC rhetoric is largely undefined, so arguments that CBW should be included are more moral, social, or political than legal. This stands in contrast to the formal status of victim under the Rome Statute, a more tightly defined concept associated with various substantive and procedural rights. Under the Rome Statute, described as a "milestone in victimology," victims are granted unprecedented standing to participate in the court's proceedings that is unmatched in any other international forum.[156] In addition to procedural rights, victims may be eligible for protective measures and entitled to compensation. In order to benefit from these rights, victims must present an application to the ICC, which will confer victim status upon them if they meet the definition in Rule 85 of the ICC Rules of Procedural Evidence (RPE):

> (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.[157]

The development of the ICC's definition of victims and the extent of their participatory rights was a subject of intense controversy at the Rome Conferences in 1998, and the final form of the relevant provisions in the Rome Statute and RPE are the result of influence from multiple sources.[158] The grow-

---

los crímenes sexuales [*The Children of the Enemy: The Silent Victims of Sexual Crimes*], 33 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL 127, 130–31 (2017) .

156. Rianne Letschert & Marc Groenhuijsen, *Global Governance and Global Crime—Do Victims Fall in Between?*, *in* THE NEW FACES OF VICTIMHOOD: GLOBALIZATION, TRANSNATIONAL CRIMES AND VICTIM RIGHTS 15, 30 (Rianne Letschert & Jan Van Dijk eds., 2011); *See* Rome Statute of the International Criminal Court, *supra* note 84, arts. 68, 75 (listing victims' rights to participation and reparations).

157. For a description of the victim registration procedure at the ICC, see MARKUS FUNK, VICTIMS' RIGHTS AND ADVOCACY AT THE INTERNATIONAL CRIMINAL COURT 98–103 (2d ed. 2015).

158. *See* Charles P. Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777, 788–90 (2008) (arguing

ing presence of victims' advocacy in the field of human rights had a particular impact on the definition of victim under the Rome Statute. These groups advocated for the recognition of a more central role for victims in the criminal justice process and for the recognition of victims' rights as human rights.[159] The United Nations had responded to similar calls a decade earlier with the 1985 U.N. Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power, and then again in 2006 with the Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law.[160] Both instruments call for the recognition of victims' rights to participation, assistance, and reparations. These soft-law instruments have significantly impacted various states' legal frameworks regarding victims.[161] In particular, their inclusion of the concept of collective victims and collective victimization made them innovative and influential, as they recognized that modern crimes are often targeted towards groups as well as individuals.[162] The two instruments define victims in nearly identical terms as

> [P]ersons 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

---

against victims' participation and noting that three factors, including "a desire to avoid the criticisms levied against the ICTY and the ICTR," shaped the victim participation scheme under the Rome Statute).

159. *See* WEMMERS, *supra* note 87, at 16 (discussing the rationale for recognizing victims' rights as human rights).

160. GA Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985); GA Res. 60/147, 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 (Mar. 21, 2006); Rianne Letschert & Jan Van Dijk, *New Faces of Victimhood: Reflections on the Unjust Sides of Globalization*, *in* THE NEW FACES OF VICTIMHOOD: GLOBALIZATION, TRANSNATIONAL CRIMES AND VICTIM RIGHTS, *supra* note 156, at 4.

161. This is particularly true of more affluent countries. Letschert & Groenhuijsen, *supra* note 156, at 15, 18.

162. *Id.* at 29.

> accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[163]

The 1985 Declaration, along with developments in regional human rights regimes, partially inspired the ICC's far-reaching victims' rights provisions, and the ICC Chambers use both soft-law documents as guidance in making decisions regarding victims.[164] However, at the Rome Conferences, the inclusion of a collective aspect to the definition of victims was not agreed upon.[165] This is despite the fact that the ICC was established to address collective violence, focusing on crimes that inherently create collective victimization. Indeed, a core feature of international crimes is that they are "collective, systemic, structural, institutional, organizational and political," and thus "compos[e] at the end a unique pattern of victimization . . . the collective element [of which] . . . can be traced on the part of the victim as well."[166] While the ICC's RPE do allow for collective assessment and awards of reparations, the victim participation framework is entirely based on individual applications, assessments, and participation.[167]

---

163. G.A. Res. 40/34, *supra* note 160, art. 1; G.A. Res. 60/147, *supra* note 160, art. 5.

164. *See* Prosecutor v. Lubanga, ICC-01/04-01/06 OA 9 OA 10, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶ 33 (July 11, 2008) ("The Appeals Chamber finds no error in the Trial Chamber's reference to the Basic Principles of 2005 for purpose of guidance.") [hereinafter *Lubanga*, Judgement on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation]. Article 21(3) of the Rome Statute states that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights . . . ." Rome Statute of the International Criminal Court, *supra* note 84, art. 21(3). See also LUKE MOFFETT, JUSTICE FOR VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT 89 (2014) (discussing the influence that articles within international conventions had on the drafting process of the Rome Statute).

165. Brianne McGonigle Leyh, *Understanding Limitations: Victim Participation and the International Criminal Court*, *in* VICTIMOLOGICAL APPROACHES TO INTERNATIONAL CRIMES: AFRICA, *supra* note 115, at 500.

166. Chouliaras, *supra* note 115, at 47, 49.

167. ICC RPE, *supra* note 86, Rule 89.

The ICC's definition of victims was also significantly influenced by criticisms regarding how victims had been accommodated in previous international tribunals. The ICTY and ICTR only allowed for extremely limited victim participation in reparations proceedings and provided only limited protection of victims who were also witnesses.[168] The ad hoc tribunals were extensively criticized for their "range of failures concerning their treatment of victims during the conduct of their trials."[169] In addition, the ICTY and ICTR Statutes narrowly defined victim as a "person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed."[170] This definition has been criticized for being singular, reflecting an individualized rather than collective construction of victimhood; for not including family members or institutions; and for linking "the status of victim with the specific actions of an accused," meaning that victim status depends upon proving the charges against the accused.[171] This definition, along with the tribunals' scant incorporation of victims' rights, did not reflect the UN Declaration or Guidelines on Victims' Rights.[172]

The ICC's definition of victimhood and the incorporation of victims' rights in the Rome Statute and RPE were the result of the collaboration of 160 states and hundreds of NGOs, many of which campaigned for the inclusion of extensive victim provisions that reflected changes in human rights law.[173] As a result, the ICC's conception of the victim is the product of various international sources and perspectives originating in a wide array of jurisdictions, which lends legitimacy to its current framework.[174] It reflects a less particular, more generally

168. McGonigle Leyh, *supra* note 165, at 494.

169. McEvoy & McConnachie, *supra* note 147, at 494.

170. Int'l. Crim. Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev.50, r. 2A (July 8, 2015); Int'l. Crim. Tribunal for Rwanda, *Rules of Procedure and Evidence*, U.N. Doc. ITR/3/Rev.1, r. 2A (June 29, 1995).

171. McGonigle Leyh, *supra* note 165, at 499–500.

172. Jo-Anne Wemmers, *Victim Reparation and the International Criminal Court*, 16 INT'L. REV. VICTIMOLOGY 123, 124 (2009).

173. MOFFETT, *supra* note 164, at 87–88.

174. However, there is much criticism of the actual practice of victim participation at the ICC. HUM. RTS. CTR., THE VICTIMS' COURT? A STUDY OF 622 VICTIM PARTICIPANTS AT THE INTERNATIONAL CRIMINAL COURT 1–2 (2015),

accepted conception of victimhood and the role of victims in criminal trials.

The ICC's chambers have interpreted the Rome Statute and RPE Rule 85 to create a functional definition of a victim that allows the court to determine who may participate in various stages of the proceedings. In order to have legal standing as victims before the ICC, individuals must submit an application to the chambers that establishes prima facie that they meet the court's four criteria: "the applicant must be a natural or legal person; the applicant must have suffered harm; the crime which caused the harm must fall within the jurisdiction of the court; and there must be a causal nexus between the harm suffered and the crime."[175] The appeals chamber confirmed in 2008 that individuals may be considered victims for the purpose of participation if they have experienced either direct or indirect harm.[176] The chamber defined "indirect victims" as "those who suffer harm as a result of the harm suffered by direct victim."[177] A later appeals chamber decision clarified that indirect victims must prove that because of their relationship with the direct victim, "the loss, injury or damage suffered by the latter gives rise to harm to them. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged."[178] Furthermore, the appeals chamber determined that close personal relationships, such as those between parents and children, are an effective means to prove both the existence of the harm and that the harm re-

---

http://www.law.berkeley.edu/wp-content/uploads/2015/04/_report_2015_final_full2.[https://perma.cc/4AKT-ULA2].

175. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment on the Appeals Against the Order of Trial Chamber II of 24 March 2017 Entitled "Order for Reparations Pursuant to Article 75 of the Statute," ¶ 94 (Mar. 8, 2018) [hereinafter *Katanga Appeals Judgment on Orders for Reparations*]; Prosecutor v. Al Mahdi, ICC-01/12-01/15, Public redacted version of "Decision on Victim Participation at Trial and on Common Legal Representation of Victims," ¶ 17 (June 8, 2016) [hereinafter *Al Mahdi*].

176. *Lubanga*, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation, ICC-01/04-01/06 OA 9 OA 10, ¶ 1.

177. *Id.* ¶ 44.

178. Prosecutor v. Lubanga, ICC-01/04-01/06, Redacted Version of "Decision on Indirect Victims," ¶ 49 (Apr. 8, 2009).

sulted from the crime committed.[179] The nature of those relationships, including the notion of the family, are elements that must be assessed in light of the particular social and cultural context in which the crimes took place.[180]

The concept of indirect or secondary victimhood is widely accepted by victimologists and appears to also be accepted in some national jurisdictions. While not explicitly included in Canada's Criminal Code, Canadian courts have found that the term "victims" in the criminal code encompasses "those directly affected by the commission of the offense, that is, those who are so closely connected with the direct victim . . . that the effect of the harm done causes them physical or emotional loss also . . . ."[181] Victimology textbooks typically identify victims as either direct victims; indirect or secondary victims who are "injured by the fact of a criminal injury to a primary victim"; and even tertiary victims, "individuals affected by the harm due to cultural proximity to, or shared national, ethnic or religious identity with primary and secondary victims."[182] Edna Erez and

---

179. *Katanga Appeals Judgment on Orders for Reparations*, *supra* note 175, ¶ 116. Chambers have determined that the crimes "do not have to be the only cause of harm" to satisfy the causal link requirement, so long as they "objectively contributed" to the harm. *Al Mahdi,* ICC-01/12-01/15, ¶ 21–22. The victim must only identify perpetrators "to the extent possible"—an inability to identify the perpetrator does not disqualify someone from victim status. Prosecutor v. Ruto, ICC-01/09-01/11, Decision on Victims' Participation at the Confirmation Charges Hearing and in Related Hearings, ¶ 22 (Aug. 5, 2011).

180. Prosecutor v. Bemba, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2, Expert Report on Reparations, ¶ 21 (Nov. 30, 2017).

181. R. v. Duffus, [2000] O.J. No. 4850, para. 9 (Can. Ont. Sup. Ct. J.) (QL). *See also* Cook c. R., 2009 QCCA 2423 (CanLII) (Can. Que. C.A.) (daughter of the murdered woman is a victim under the Criminal Code); R. v. Bourque (2014), 427 N.B.R. 2d 259 (Can. N.B.Q.B.) (victims include spouse, parents, siblings, comrades of murdered police officers); R. v. George, 2016 BCSC 2291 (CanLII) (Can. B.C.S.C.) (victims include parents, siblings, daughter, aunts, and cousin of murdered woman); R. v. MacRoberts, 2018 PESC 7 (CanLII) (Can. P.E.S.C.) (mother of abused child is a victim); Julian V. Roberts & Marie Manikis, *Victim Impact Statements at Sentencing: The Relevance of Ancillary Harm*, 15 CANADIAN CRIM. L. REV. 1 (2010) (discussing how the Québec Court of Appeal's decision in Cook gives "an unambiguous affirmation of the importance of victim impact evidence as a source of aggravation at sentencing.").

182. Edna Erez & Tikva Meroz-Aharoni, *Primary and Secondary Victimization during Protracted Conflict*, *in* VICTIMOLOGICAL APPROACHES TO INTERNATIONAL CRIMES: AFRICA, *supra* note 115, at 120–21.

Tikva Meroz-Aharoni explain that secondary victims "experience harm by observing, listening, living with, taking care of, or responding to the needs of primary victims," elaborating that the extent of the harm secondary victims suffer is determined by the nature of their relationship with the primary victim and the character of the community and society.[183]

The ICC's acceptance that indirect victims are victims within the meaning of RPE Rule 85 and the Rome Statute begs the question of where the outer boundary of this ill-defined category lies. Of particular relevance to the victimhood of CBW is the question of transgenerational harm. Victimological studies have devoted considerable attention to the phenomena of intergenerational trauma and transgenerational victimhood. Cyril Adonis, writing on the children and grandchildren of apartheid-era survivors, explains how the physical and psychological trauma suffered by direct victims can negatively affect their children and subsequent generations "through possible impairment of the parenting capacity of primary victims as well as through the collective memory of the population, and first-hand experiences of discrimination, injustice, poverty, and inequality . . . psychological disorders of primary victims can be genetically transmitted to subsequent generations."[184]

This phenomenon has been observed among multiple groups of young people at various times and in various places: children and grandchildren of Holocaust survivors; American veterans of the Vietnam War; Japanese atomic bomb survivors; First Nations peoples; African-American victims of colonialism, slavery, and exploitation; incarcerated Japanese-Americans; and many more.[185] Adonis' research shows that children and grandchildren of apartheid-era abuse victims not only experience economic deprivation as a result of the oppression of their parents and grandparents, but also suffer mental health problems as a result of "the cumulative impact of both the

183. *Id.* at 120.

184. Cyril Kenneth Adonis, *Exploring the Salience of Intergenerational Trauma Among Children and Grandchildren of Victims of Apartheid-Era Gross Human Rights Violations*, 16 INDO-PAC. J. PHENOMENOLOGY 1, 2 (2016) (citations omitted); Adonis refers to Anthony J. McMichael, *Prisoners of the Proximate: Loosening the Constraints on Epidemiology in an Age of Change*, 149 AM. J. EPIDEMIOLOGY 887 (1999).

185. Adonis, *supra* note 184, at 3.

trauma suffered by the parents and grandparents and then transmitted to subsequent generations, as well as distressing factors associated with abuse or neglect."[186] One girl, whose grandfather's experience of apartheid-era violence profoundly affected her grandmother and mother, said: "I was exposed to the sadness because we all stayed together and were close. I could not escape it. I was traumatized because they were traumatized."[187] The situation of the Hibakusha, survivors of the atomic bomb blasts in Japan and their children, shows a similar pattern. Children born to survivors of the atomic bombs had multiple types of birth and health defects, and the stigma attached to these children has caused significant harm to the next generation: "Fears of genetic and chromosomal effects also exist among people surrounding the Hibakusha, creating a stigma for the Hibakusha and their families. . . . [They] may be socially rejected out of the fear that their genes will taint marriages and families."[188] This rejection has psychological consequences, resulting in isolation, secrecy, and lower socioeconomic status for the Hibakusha.[189]

The question of whether indirect victims suffering transgenerational harm fall within the Rome Statute definition of victims became a contentious issue in the *Katanga* trial, when a number of children born after the date of the commission of the crime sought to be registered as victims before the ICC. The accused in that case challenged the inclusion of these children as reflecting an overbroad definition of "victim" under the Rome Statute. After the trial chamber initially accepted that there was no nexus between the harm suffered by the children and crimes in the indictment, the appeals chamber overturned that decision and found that if the children of direct victims could demonstrate that they suffered transgenerational personal harm, then they should be considered indirect victims.[190] Relying on many decisions of the Inter-Ameri-

186. *Id.* at 5.

187. *Id.* at 7.

188. Mikihachiro Tatara, *The Second Generation of Hibakusha, Atomic Bomb Survivors*, *in* INTERNATIONAL HANDBOOK OF MULTIGENERATIONAL LEGACIES OF TRAUMA 141, 144 (Yael Danieli ed., 1998).

189. *Id.* at 143–45.

190. *Katanga Appeals Judgment on Orders for Reparations*, *supra* note 175, ¶ 238; Prosecutor v. Katanga, ICC-01/04-01/07, Order for Reparations Pursuant to Article 75 of the Statute, ¶¶ 132–34 (Mar. 24, 2017).

can Court of Human Rights, the appeals chamber concluded that transgenerational harm could reflect the closeness of the family relationship between direct and indirect victims.[191] When the matter was sent back to the trial chamber for an evaluation of the children's individual claims to victim status, the trial chamber analyzed the nexus between the crime and the harm. It expounded on a short statement it had made in the impugned decision in the *Lubanga* trial, which clarified that the standard of causation is "a 'but/for' relationship between the crime and the harm and, moreover the crimes . . . [must be] the 'proximate cause' of the harm for which reparations are sought."[192] The *Katanga* trial chamber noted that while this terminology refers to torts in common law, there are corresponding civil law notions that limit liability to harms that are tightly causally connected to the impugned act.[193] This is especially important when multiple causes may have contributed to a harm, as there is no causation if harm results from a subsequent and independent event that the initial wrongdoer could not foresee.[194] Applying this standard, the *Katanga* trial chamber concluded that the prosecution had failed to show that the harm suffered by the children was more likely than not caused by the accused's crimes.[195]

The concept of the victim in international criminal law and, more specifically, under the Rome Statute is, of course, a

---

191. *Katanga Appeals Judgment on Orders for Reparations*, *supra* note 175, ¶ 118.

192. Prosecutor v. Lubanga, ICC-01/04-01/06-3129, Judgment on the Appeals Against the "Decision Establishing the Principles and Procedures to be Applied to Reparations" of 7 August 2012 With Amended Order for Reparations (Annex A) and Public Annexes 1 and 2, ¶ 250 (Mar. 3 2015).

193. Prosecutor v. Katanga, ICC-01/04-01/07, Trial Chamber, Décision relative à la question renvoyée par la Chambre d'appel concernant le préjudice intergénérationnel [Judgment on Question Sent by the Court of Appeal Concerning Intergenerational Harms], ¶ 16 (July 19, 2018) ("La responsabilité de l'auteur d'un acte est limitée aux causes qui sont étroitement liées au résultat de cet acte et d'une importance justifiant la reconnaissance de la responsabilité." ["The actor's responsibility is limited to causes which are tightly linked to the result of the act and of an importance justifying the recognition of responsibility."]).

194. *Id.* ¶ 17.

195. The trial chamber's decision is heavily redacted with regard to the factual circumstances of the children seeking victim status on the basis of intergenerational harm, but the dates suggest a tighter timeline than would be the case for CBW.

narrower version of victimhood. Victim status here is the reflection of normative, institutional, and political concerns that are specific to the operation of an international criminal tribunal, as opposed to a wider vision of victimhood that could encompass the entire population of a country affected by war.[196] The selectivity inherent in the identification of victims under the Rome Statute is nevertheless helpful in mapping a certain topography of harm flowing from international crimes to identify concentric circles of victimhood that will underpin any policy designed to provide justice or assistance to victims. The notion of the ideal victim can also be raised in this context to ask who is the "little old lady" of international criminal law.[197] Although introduced in a domestic context, Christie's elements remain largely relevant in international criminal law; the ideal victim of an international crime will be self-identified, harmed, innocent, and resilient.[198] Do CBW have these attributes?

D. *CBW as Victims of International Crimes*

The formal legal concept of the victim under the Rome Statute separates those whose harm is causally connected to the charged crime from others whose suffering, while undoubtedly real and significant, owes more to the general occurrence of war or massive human rights violations in a given time and place. The narrowly defined legal category of victims is then further divided into primary and secondary victims. This section will argue that CBW are secondary victims of the crimes initially committed against their mothers, meeting the requirement of ICC RPE Rule 85. At the same time, the characterization of CBW as secondary victims demonstrates how the unjustifiably reductive construction of their victimhood

196. *See* Kendall and Nouwen, *supra* note 151, at 241–52 ("The legal process narrows the category of legally 'recognized' victims."); Rachel Killean, *Constructing Victimhood at the Khmer Rouge Tribunal: Visibility, Selectivity, and Participation*, 24 INT'L REV. VICTIMOLOGY 273, 275 (2018) ("Legal professionals, victor governments, other states, international organizations and donors all take part in the negotiating of law and fact, thus shaping which victims are legitimised within justice processes.").

197. Joris van Wijk, *Who is the "Little Old Lady" of International Crimes? Nils Christie's Concept of the Ideal Victim Reinterpreted*, 19 INT'L REV. VICTIMOLOGY 159, 162–67 (2013).

198. *Id.*

fails to account for the unique dynamics of the harm afflicting these children.

While there is not yet an ICC decision holding that CBW can be considered victims under the Rome Statute, such a conclusion would be consistent with the legal concept of the victim as developed by the court up to this point. The ICC determined in a series of cases that in order to be considered a legal victim, a person must (1) be a natural or legal person that (2) has suffered personal harm (3) caused by a crime which (4) falls within the jurisdiction of the ICC.[199] For indirect victims, the physical or emotional harm must be linked to the harm suffered by a direct victim. In the case of CBW, the mothers' rapes and forced pregnancies at the hands of the accused inevitably lead to the conclusion that they are primary victims. The fact that the harm suffered by CBW arises out of their mothers' harm can be established, according to several ICC decisions, by the nature of the relationship between the direct and indirect victims.[200] As noted by the court, in every culture, there is no closer personal relationship than that between a mother and her child, which leads to the conclusion that CBW are indirect victims of the crimes committed against their mothers.

In fact, there is a deeper connection between CBWs' harm and that of their mothers, because the mother-child relationship is intrinsically connected to the crime itself. It is not rare that the circumstances of the child's birth remain a permanent defining feature of that relationship. Indeed, for the crime of forced pregnancy, which the Rome Statute defines as "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population,"[201] the child is himself an element of the crime. The fact that the suffering of CBW often owes significantly to negative attitudes or mistreatment by other members of their family or the broader community does not negate the conclusion that they can be considered indirect victims. In *Al Mahdi*, the ICC determined that the complex origins of harm and the existence of multiple contributing sources did not in-

199. *See supra* note 175 and accompanying text.

200. *See supra* notes 176–80 and accompanying text.

201. Rome Statute of the International Criminal Court, *supra* note 84, art. 7(2)(f).

terfere with the legal status of victims inasmuch as the crime had "objectively contributed" to the harm.[202] It can hardly be disputed that the rape or forced pregnancy that led to a CBW objectively contributed to the harm later suffered by the child in such circumstances. Therefore, CBW meet all four necessary elements of indirect victims: they are natural persons, the harm they experienced is integrally tied to the harm caused to their mothers, and the causal crime of forced pregnancy is well-established as being within the jurisdiction of the ICC. CBW should thus be considered indirect victims of the crimes committed against their mother under existing ICC jurisprudence.

While the conclusion that CBW can have the legal status of indirect victims before the ICC is significant, there is something deeply unsettling about this characterization. The ICC has no formal hierarchy among individuals who have been granted victim status, but there is no denying that the categories of direct and indirect victims establish a preferential order of victimhood in the court's narrative. The very concept of a victim is not one that is easily circumscribed. There are concentric circles of suffering, starting with immediate victims and extending to secondary victims and ultimately to tertiary victims. Wars and genocides leave few people untouched, such that the entire population of a country could reasonably be said to suffer as a result. However, the ICC is an institution with a relatively limited jurisdiction and finite resources that it must deploy strategically. It is therefore necessary and justifiable to exclude from legal victimhood many, if not most, of those who have suffered.[203]

The ICC's mapping of victimhood reflects a certain ranking of victims, and within that scheme indirect victims are a somewhat devalued actor in the transitional justice process. They hover near the outer boundary of the concept of the le-

202. *Al Mahdi,* ICC-01/12-01/15, ¶¶ 21–22.

203. Kendall and Nouwen, *supra* note 151, at 243–44. For example, as part of its obligations to balance the rights of victims and the accused and satisfy the requirements of a fair trial, the Appeals Chamber of the ICC has held the only victims who may participate at trial are those whose suffering is linked to the charges against the accused. Prosecutor v. Lubanga, ICC-01/04-01/06 OA 9 OA 10, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶ 58 (July 11, 2008).

gal victim and risk being excluded altogether, like the children in the *Katanga* case who did not sufficiently show that the crimes of the accused were the proximate cause of their suffering.[204] But this hardly matches the reality of CBW, even when compared to other categories of victims. Thus, the experts appointed by the ICC in the *Bemba* trial to assist with reparations issues took special care to underline the particularly egregious situation of victims of rape and CBW when noting that a great number of individuals, families, and communities, present and future, can suffer as a result of international crimes.[205] Indeed, these experts found a striking dissonance between "the appalling harms suffered by children born of rape" and their relegation to the category of indirect victims.[206]

A second concern connected to the characterization of CBW as indirect victims is that it perpetuates the idea that their victimhood is derivative of their mothers' trauma. They therefore risk being overshadowed by their mothers' victimization. Conceiving of CBW as indirect victims means that their stories, discourses, and experiences of victimhood are inextricably linked to those of their mothers, whose narratives will continue to dominate. Charli Carpenter noted that any mentions of CBW in online documents published by human rights advocacy groups were only in relation to the needs of their mothers: "rape survivors . . . remain the advocacy focal point for the few in the child rights network who have taken notice of the issue at all . . . ."[207] Within the field of international criminal law, the feminist critique of prosecutorial inattention to sexual and gender-based violence in indictments before the ICTY and ICTR led to a sea change in both the law and practice of international tribunals. Much clearer norms were adopted in the Rome Statute and articulated in the case law, and every new case is scrutinized to verify that any sexual and

204. Prosecutor v. Katanga, ICC-01/04-01/07, Décision relative à la question renvoyée par la Chambre d'appel concernant le préjudice intergénérationnel [Judgment on Question Sent by the Appeals Chamber Concerning Intergenerational Harms], ¶ 145 (July 19, 2018).

205. Prosecutor v. Bemba, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2, Expert Report on Reparation, ¶¶ 35–41 (Nov. 30, 2017).

206. *Id.* ¶ 40.

207. CARPENTER, *supra* note 6, at 42.

gender-based crimes are duly prosecuted.[208] The push to end the legal silence on wartime sexual violence against women has been one of the engines of modern international criminal law, but it has also—perhaps inadvertently—cast a shadow on other forms of violence, including the non-sexual abuse of women, sexual violence against men and boys, and CBW.[209] Mothers of CBW have easy-to-understand, emotionally evocative, and powerful victimhood narratives, which has contributed to why CBW have not received the focus and attention they deserve. In fact, emphasizing the indirect victim-status of CBW may weaken the mothers' victimhood claims, as the harm suffered by CBW is often channeled through the mother in the form of abuse or neglect. Their stories may create a narrative dissonance with the moral blamelessness of the mothers and discourage squarely addressing the suffering of CBW.[210] Furthermore, linking the victim status of mothers and CBW may also lead to the "othering" of these children as "carriers of harm" against their mothers.[211] Emphasizing the indirect victimhood of CBW thus risks perpetuating the silence surrounding their situations, as it does not conceptually separate their harm from the harm caused by proximity to their mothers. If their needs are not highlighted as independent, CBW will remain mere appendages to their mothers and their suffering will be left unaddressed.[212]

A third and final concern with characterizing CBW as indirect victims is that it corresponds to an incomplete or inac-

---

208. Margaret M. deGuzman, *An Expressive Rationale for the Thematic Prosecution of Sex Crimes*, *in* THEMATIC PROSECUTION OF INTERNATIONAL SEX CRIMES, 16, 39 (Morten Bergsmo ed., 2012).

209. *See* Nicola Henry, *The Fixation on Wartime Rape: Feminist Critique and International Criminal Law*, 23 SOC. & LEGAL STUD. 93, 97 (2014) (introducing the contemporary feminist critique against "fixating on sexual violence as the universal source of women's oppression."); Fionnuala Ní Aoláin, *Political Violence and Gender During Times of Transition*, 15 COLUM. J. GENDER & L. 829, 840–44 (2006) (discussing the capacity of the political process "to create and enforce silences that exist in relation to other harms.").

210. CARPENTER, *supra* note 6, at 43.

211. Joanne Neenan, *The Role of the ICC in Protecting the Rights of Children Born of Rape in War*, EJIL TALK (Feb. 12, 2018), http://www.ejiltalk.org/the-role-of-the-icc-in-protecting-the-rights-of-children-born-of-rape-in-war/#more-15879 [https://perma.cc/6CLN-BGJC].

212. Michael Goodhart, *Sins of the Fathers: War Rape, Wrongful Procreation, and Children's Human Rights*, 6 J. HUM. RTS. 307, 310 (2007).

curate picture of their reality. Although many CBW experienced secondary trauma through proximity to their mothers, this is only one of many ways harm reaches them. For CBW whose mothers did not survive childbirth or who were abandoned—far from an exceptional fate—their harm would be reduced to deprivation of maternal care. This is by no means an insignificant harm, but it fails to capture the complex layers of suffering experienced by most CBW. For example, many CBW in Rwanda and northern Uganda experienced rejection and harassment primarily by step-parents, who did not recognize them as their children and treated them differently than their own children.[213] The stepfather's behavior may ultimately harm the child because the mother was raped, but this seems an unnecessarily tenuous and delicate chain of causation upon which to base an argument of victimhood. It may also be more challenging to meet the legal requirement of proximity establishing the causal link between the crime of the accused and the harm suffered by CBW. It is conceptually clearer and factually more accurate to understand CBW as being harmed directly by the crime of their biological fathers, who brought them into life in a societal context extremely likely to harm them. The mistreatment of CBW at the hands of relatives, communities, and society at large, far from being unforeseeable, is the entirely predictable outcome of the rape of their mothers.

There is little need to restrict this claim of foreseeability to the crime of forced pregnancy, in which the child appears more clearly as an element of the crime, and even less to suggest the recognition of a new crime of birth by "forced impregnation."[214] The earlier examination of wrongful life litigation demonstrates that, for the child, life itself cannot be consid-

---

213. *See generally* Myriam Denov & Atim Angela Lakor, *Post-War Stigma, Violence, and "Kony Children": The Responsibility to Protect Children Born in Lord's Resistance Army Captivity in Northern Uganda*, 10 GLOBAL RESP. TO PROTECT 217 (2019); Myriam Denov et al., *"You Feel Like You Belong Nowhere": Conflict-Related Sexual Violence and Social Identity in Post-Genocide Rwanda*, 14 J. GENOCIDE STUD. & PREVENTION 40 (2020); Myriam Denov et al., *The Intergenerational Legacy of Genocidal Rape: The Realities & Perspectives of Children Born of the Rwandan Genocide,* 35 J. INTERPERS. VIOLENCE 22 (2017).

214. *See* R. Charli Carpenter, *Surfacing Children: Limitations of Genocidal Rape Discourse*, 22 HUM. RTS. Q. 428, 468–77 (2000) (arguing for the recognition of birth by "forced impregnation" as a crime against children born of rape).

ered harm, although the blessing of life does not erase all other circumstances of the life that ensues. This understanding does not create a proximate causal link between the act of rape and any and all ills that may occur during the lifetime of a child born as a result. But it does allow for the conclusion that the act of rape can be proximately connected with mistreatment suffered by CBW specifically because of their identity. Although the crime against the child depends on the initial crime against the mother, this is conceptually different from indirect victimhood, where the child is a victim through proximity to the mother's trauma. For CBW, rape was at once the source of life and the direct cause of very significant, foreseeable harm. Indeed, rapists often intend the social and familial rejection of CBW, seeking to disrupt the fabric of the community by forcing the birth of children whose identities would be linked to their biological fathers.[215] Even in situations lacking such obvious intent, the harm eventually befalling CBW at the hands of relatives and communities was entirely foreseeable because of their origins in an act of violence against their mothers. This clarifies why CBW are unlikely to ever have their victimhood narratives completely separated from that of their mothers, as the former would not exist without the latter. To even explain who these children are, it is necessary to talk about what happened to their mothers. However, conceiving of CBW as direct victims opens up space to speak about the victimhood of these young people without getting lost in the focus on the mothers. Additionally, it helps avoid tension with the mothers' victimhood narratives, as it emphasizes that the harm is caused directly by the rapist, as opposed to focusing on the mother as a channel of that harm.

The characterization of CBW as direct victims of the crimes that resulted in their birth also appears more consistent with international human rights law. The notion of victimhood in human rights law is connected to the state's viola-

215. This strategy was evident in Darfur, where the Janjaweed militants famously proclaimed their desire to make a light baby, Emily Wax, *"We Want to Make a Light Baby,"* WASH. POST, June 30, 2004, at A1, and in Bosnia, where Serbian captors told women they were trying to impregnate them to create "Chetnik babies" who would kill Muslims when they grew up. Joana Daniel-Wrabetz, *Children Born of War Rape in Bosnia-Herzegovina and the Convention on the Rights of the Child*, *in* BORN OF WAR: PROTECTING CHILDREN OF SEXUAL VIOLENCE SURVIVORS IN CONFLICT ZONES 21, 23 (Charli Carpenter ed., 2007).

tion of protected rights and freedoms, whereas in the international criminal law context the focus is on the guilt or innocence of an accused individual.[216] The approach adopted by the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights accordingly draws attention away from the behavior and intent of the accused rapist to highlight instead the impact on the child. This approach aligns with the definition of a victim under the Rome Statute and could thus link the discourse around CBW to the powerful rhetoric of human rights, combatting the pervasive tendency to overlook these children in the transitional justice context.[217] In fact, the ECHR considered a case analogous to the situation of CBW in *Thiermann v. Norway*, dealing with children born of German fathers and Norwegian mothers during the five-year German occupation of Norway during World War II.[218] These were not children born of rape but rather as part of the Nazi *Lebensborn* program aiming to encourage the birth of "racially pure" children. After the war, the 10–12,000 children conceived in this fashion were referred to in Norway as *krigsbarn*—literally "born of war"—and considered "mentally retarded and carriers of poor genes."[219] Many were arbitrarily interned in psychiatric institutions or, more generally, "subjected to discrimination, harassment and ill-treatment in children's homes, educational establishments, adoptive homes and fosters homes and to derogatory treatment in their close social environment."[220] Because of the decades that elapsed between the mistreatment and the petition to the ECHR, and the fact that at least some of the mistreatment predated Norway's ratification of the European Convention on Human Rights, the case did not proceed to the merits. However, the court left no doubt that it considered these children victims of very serious human rights violations, including the right to

---

216. Prosecutor v. Guek Eav, Case No. 001/18-07-2007/ECCC/SC, Appeals Judgment, ¶ 431 (Feb. 3, 2012).

217. Goodhart, *supra* note 212, at 307–09.

218. Thiermann v. Norway, App. No. 18712/03, 45 Eur. H.R. Rep. 199 (2007) (Decision on Admissibility).

219. *Id.* at 200–01.

220. *Id.* at 201. Mistreatment included being locked in a pigsty or outhouse, chained like a dog, marked with a swastika on the forehead, sexually abused, constantly beaten, excluded from school, etc. *Id.* at 201–03.

family life and protection against discrimination.[221] If the mistreatment of children born of presumably consensual unions of enemies during war can be considered a serious violation of human rights, then the mistreatment of CBW resulting from sexual assault should also be so viewed.[222] The protection of a child's inherent right to dignity, a foundational concept of human rights, warrants clear recognition of the harm suffered by CBW.[223] The ICC's acknowledgment of CBWs' suffering by way of granting them direct victim status would shift the public rhetoric about, and even perhaps the self-conception of these children from objects of harm to subjects of rights.

In her opening statement in the trial of Dominic Ongwen in 2016, ICC Prosecutor Fatou Bensouda included a brief mention of "a whole category of other victims: the children born in captivity resulting from these forced marriages, who sometimes face hostility and taunts as a result of their parentage."[224] This was the first time an ICC organ mentioned CBW as a category of victims worthy of particular attention. A much more engaged discussion of the situation of CBW occurs in the 2017 report of independent experts on reparations in the *Bemba* case.[225] The experts noted the "appalling harm" suffered by CBW in the Central African Republic, who are often abandoned, abused in private and public settings, and de-

221. *Id.* at 221.

222. *See generally* Torrecuadrada García-Lozano, *supra* note 155, at 137–38 (arguing that the needs of children born of war are systematically neglected compared to children generally); Ingvill C. Mochmann & Sabine Lee, *The Human Rights of Children Born of War: Case Analyses of Past and Present Conflicts*, 35 HIST. SOC. RES. 268 (2010) (using case studies to demonstrate that the rights allocated to chidlren generally are often withheld from children born of war).

223. See generally Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008) (discussing of the meaning and use of "dignity" as an essential component of human rights documents).

224. Off. of the Prosecutor of the Int'l. Crim. Ct., *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of Trial in the Case Against Dominic Ongwen*, ICC-OTP (Dec. 6, 2016), http://www.icc-cpi.int/Pages/.aspx?name=2016-12-06-otp-stat-ongwen [https://perma.cc/CUT6-EMBC]. *See also* Neenan, *supra* note 211 (discussing CBW in the context of the *Ongwen* case).

225. Prosecutor v. Bemba, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2, Expert Report on Reparation, ¶ 21 (Nov. 30, 2017).

prived of education or health services.[226] The experts found that "[c]hildren born of rape are in a highly vulnerable situation: many with HIV/AIDS, they are stigmatised, alone, poor, uneducable and unmarriageable."[227] Despite this harsh reality, "opaque silence remains the rule when it comes to them."[228] The accused in that case, Jean-Pierre Bemba Gombo, was acquitted of all charges by the Appeals Chamber in 2018, meaning that the court never had an opportunity to address the recommendations of the independent experts dealing with CBW. Nevertheless, these explicit references to CBW in ICC proceedings suggest an openness to formally accepting CBW as victims of the crimes of rape and forced pregnancy.

The logic of victimhood in international criminal law reflects the particular dynamics of a process designed to fairly determine the guilt or innocence of the accused. This process defines and restricts who can be considered the victim of a crime. Even within the narrow definition of victimhood under the Rome Statute, CBW ought to be considered indirect and, more properly, direct victims of international crimes. This recognition has the potential to dispel the silence surrounding CBW by giving them a voice in an international forum devoted to post-conflict justice. At the same time, the inclusion of CBW in the class of recognized victims may not fully address their situation.[229] In many places, it is well known that there are CBW, even if local authorities fail to acknowledge their plight. Part of the challenge is to not only know but also to make sense of their existence. There is a constitutive dimension to the legal narrative, such that victims are in many ways created by their recognition in legal institutions like the ICC. This constitutive process is far from the objective representation of an existing set of facts.[230] Rather, through selection and exclusion

226. *Id.* ¶ 40.

227. *Id.* ¶ 92.

228. *Id.* ¶ 40.

229. *See* Sanchez Parra, *supra* note 13, at 46 (arguing that although CBW are recognized as victims under Colombian legislation, these children "are not part of the reality of war that is subjectively meaningful for those public and political actors.").

230. *See generally* GEERTZ, *supra* note 118 ("Between the skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them (to my mind, the defining feature of legal process) and the schematization of social action so that its meaning can be construed in cultural terms (the defining feature, also to my mind, of ethnographic

of relevant elements, law creates the object it seeks to regulate. The version of CBW as victims produced by international criminal law will thus be one that corresponds to the regulation of that status under the Rome Statute. The narrative of CBW created through that process will be intelligible within that context, but not necessarily beyond it. Some caution is thus warranted to refrain from equating the identity and reality of CBW with their definition in the ICC.

VI. Conclusion

The resistance to the label of victim for CBW is a complex issue that cannot be reduced to politics or willful ignorance. The young Rwandan participant's *cri de coeur* to be recognized as a victim is representative of a yearning to inscribe his life in a broader experience that is shared with other children like him. However, there is currently no existing legal narrative that embodies their reality and experience. These children are, wittingly or unwittingly, surrounded by silence, generally erased in law and society.

A central function of the law is to provide social and individual narratives that give meaning to events and practices in a given community. The analysis of wrongful life jurisprudence and the development of victim status under the Rome Statute of the ICC provide concrete illustrations of how legal standards can support such narratives in relation to CBW.[231] While it is unlikely that either private law civil liability or victim status before the ICC could meaningfully respond to the needs of CBW at large, these legal narratives can still be a first step in addressing the tensions that define who these children are and how their interests can be fairly represented.

Law, rather than a mere toolkit of measures designed to provide concrete solutions to identified problems, is a repository of individual and collective narratives that give meaning

---

analysis) there is a more than passing family resemblance."); Boaventura de Sousa Santos, *Law: A Map of Misreading: Toward a Postmodern Conception of Law*, 14 J. L . & Soc. 279 (1987) (discussing the "non-normative" dimension of law and the relationship between law and the society.).

231. *See* Eithne Dowds, *Children Born of Sexual and Gender-Based Violence in Conflict: The International Criminal Court, Ecological Environments and Human Development* 33 Child. & Soc. 226, 227 (2019). (arguing that ICC proceedings can influence perceptions of CBW and "reduce the narratives that fuel stigmatisation and prevent human flourishing.").

to experiences and aspirations. In order for law to become real, it must trigger what Robert Cover calls interpretive commitments to a particular narrative on the part of all legal agents in the community.[232] Within these interpretive commitments, the individual and the collective, the public and the private converge to provide support for a particular narrative. The answer to the plea for recognition by CBW cannot take shape through the adoption of a single legal measure. Legal recognition is not enough. Rather, a meaningful response must correspond to a multi-faceted engagement with legal norms evincing a commitment by all involved to live by these norms.

There is violence inherent in the creation of legal narratives; the state is in a constant struggle to impose one legal narrative over others. The multitude of actors involved—children, mothers, family, community, government—all hold competing narratives and responses to the issue, each one vying for dominance. For example, the genocide narrative propagated by the government of Rwanda is one that does not include the reality and experiences of CBW. As we have found in our study of mothers who bore children as a result of rape during the genocide, these women actively seek to leave behind the trauma and brutality of the sexual violence they experienced. Within the context of families, evidence shows that narratives of deliberate exclusion, marginalization, and violence are frequent. What legal recognition seeks to achieve is the stifling of competing narrative in favor of a chosen one: The law thus seeks to violently "kill" alternative narratives though the force of norms and the operation of legal institutions.[233] Official law can never altogether eliminate narratives originating in other segments of society, but the state does wield sufficient power through its courts, officials, and agencies such that it will have a pervasive influence. We can observe in contexts such as Rwanda, Uganda, and Colombia,[234] fragmented and incomplete recognition of CBW in law, rather than the engaged and comprehensive approach that is needed.

---

232. Robert Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983).

233. As expounded in Cover's landmark article. *Id.*

234. See Sanchez Parra, *supra* note 13.

That being said, law always and necessarily remains a particular way of imagining the real. Law operates through a process of factual construction driven by a normative order that partly predetermines which facts are recognized as relevant and which are discarded as not. As such, law can never adequately capture the full realities of CBW and their experiences. While the young Rwandan man may desire legal recognition, the law, in its reflection of the state, will perhaps never be more than a partial response to his *cri de coeur*.