

BORN OF WAR

**Protecting Children of
Sexual Violence Survivors
in Conflict Zones**

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Children Born of War
and Human Rights*Philosophical Reflections*

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Systematic mass rape, forced impregnation, enforced pregnancy, and forced maternity shockingly demonstrate that we human beings possess a seemingly limitless capacity to devise ever more terrible forms of cruelty and misery for our fellows. To heap woe upon injustice, the children born of wartime rape and other forms of sexual exploitation are tragically often neglected, rejected, or simply ignored; we possess a prodigious capacity for cruelty toward unfortunates as well. When I agreed to contribute some philosophical reflections on the human rights of these children to this important volume, I envisioned something much like the essay that follows: a series of interconnected ruminations on various puzzles that arise concerning the identity and human rights of these children and on the normative and political implications of those puzzles. I failed to anticipate the profound sadness that would envelop me as I read and reflected on the chapters; academics are, after all, supposed to remain neutral and objective as we pursue our research.

Yet the urgency of the questions posed in this volume cannot be grasped without a deep appreciation of the injustice underlying them. Fortunately, we also possess tremendous capacities to hope, to empathize, and to effect social change, capacities displayed by the many mothers and communities who embrace their "children born of war" as they work to rebuild their societies and create better futures. One role of socially engaged research is to marshal empirical evidence in providing analytic and normative guidance that can inform such efforts; the chapters in this volume, and the reflections offered here, should be read in this spirit.

This chapter works through some issues raised in the foregoing chapters or in the interstices among them. For the most part, rather than engage directly with the individual chapters I step back from them to consider broad questions concerning identity, justice, and human rights, and the normative and political challenges they present. At times I discuss children born of war in the broad sense; at others I focus specifically on children born of wartime rape.

Children Born of War and the Politics of Identity

As several contributors to this volume make clear, questions about identity figure importantly in the discourse surrounding children born of war. Among the rights of the child recognized by the UN's Convention on the Rights of the Child (CRC) are the rights to a name and a nationality and to know and be cared for, so far as is possible, by one's parents (Article 7). Children also have the right to the preservation of their identities (Article 8), a right originating in the Argentine experience of "enforced or involuntary" disappearances of children during the Dirty War (Freeman 1997, 66). While name, family, and nationality are obviously important dimensions of identity, these important rights must not be mistaken for a right to a specific identity, in the sense of membership of a particular social, cultural, or religious group. There is no right recognized in international law that guarantees an individual membership of any particular group. Insisting on this distinction clarifies what is at stake in the politics of identity in which children born of war become embroiled.

It does so by differentiating what we might call a *civic* identity, to which all children and indeed all human beings have a right, from a fuller sense of identity as membership of and belonging in a community that shapes one's values, outlook, and opportunities and provides a cultural frame of reference and way of being in the world. We might, as a shorthand, call this *deep identity*; it is the type of identity frequently associated with communitarian thinking, multiculturalism, and the politics of recognition (e.g., Sandel 1998; Kymlicka 1995; Taylor 1994). Deep identity is a characteristic of groups as well as of individuals; any group member's identity is in a sense negotiated within the framework of meaning that defines (and is defined by) the group. Group membership and identity are neither fully affective nor fully ascriptive; one cannot join just any community because one wants to, and one is never part of any community solely because one possesses (some of) its requisite traits or characteristics—values, language, religion, physiognomy, and so forth. Group identity is maintained in part through control over membership; groups define the criteria of membership and decide who qualifies as a member.

Transmission of membership to children usually has a biological or genetic component: the child of two group members typically qualifies as a group member, though even this generalization might not hold in cases where the circumstances of the child's conception are held to be "illegitimate" on the dominant understanding of group identity or where holding certain values or beliefs is crucial to membership (as in a religious community). None of this is to suggest that membership is uncontested or uncontested within groups. Questions surrounding the definition and negotiation of identity and membership are, however, suffused with power; they are inherently political.

This distinction between a right to a civic identity—a right binding upon states and entailing nondiscriminatory application of standards for citizenship¹—and a right to what I am calling a deep identity seems frequently to get lost in the discussion of the identities of children born of war. Several contributors to this volume write about these children's deep identities as if the children had a *right* to them and as if the facts of their parentage *proved* something about their claim to membership in their mothers' communities (I shall call this a claim of matrilineal membership). Such arguments are common in condemnations of patriarchal conceptions of identity that construct these children as children of the enemy, children of hate—in short, as inheritors exclusively of their fathers' identities. Claims of matrilineal membership make a category mistake, however; they confuse genetics with identity and membership.

This confusion is apparent in Weitsman's generally excellent discussion of identity politics (chap. 7 herein), in which she rejects the myth of genetic determination apparent in the patriarchal logic of rapists and communities who view children solely as inheriting the father's identity. This rejection follows from her (in my view correct) background assumption that identity is socially constructed. The tension arises because Weitsman appeals to the fact that children of war rape are "half the mother's genetic heritage" in countering claims about identity and membership that follow from this patriarchal logic. But as her own claim about the social construction of identity shows, genetic heritage and identity and membership are very different things. To suggest that biologically children "belong" to both parents' groups merely replicates the myth of genetic determination in a different form. No one disputes that the children are (biologically) their mothers' children, but a child's "genetic heritage" does not translate directly into group membership: it is one marker of identity whose significance must be apprehended within the broader cultural context and politics of group membership. The Nazis, whose view Weitsman discusses in comparing various constructions of identity, did not share the Serb view that paternity determines identity. Genetically the Nazi view is more correct, though the resulting view of group membership and its social and political implications were no less

odious. Some sources cite matrilineal descent within Judaism as having proved useful and humane in the context of rapes attending the frequent pogroms suffered by European Jews;² this norm, while less correct biologically, helped to mitigate the trauma surrounding the identities of children born from the rapes. As these examples show, the point about social construction is that it is not the genetic or biological link but rather the *socially constructed significance of that link* that matters for the politics of identity.

The tough ethical and political questions concern whether groups whose constructions of identity exclude children born of war should be forced to accept them as members because of their mothers' identities. It might seem cruel or unreasonable to exclude these blameless children from matrilineal membership. Precisely because identity is socially constructed, however, conceptions of identity and membership cannot be easily criticized from the outside—or rather, the ethical status of such criticisms is uncertain. Because control over membership and definitions of identity are crucial to group survival (Wälzer 1983, 32ff.), insisting on a strict biological "50 percent" rule for membership for a group that understands its identity differently is ethically problematic, especially if we take group identity and survival as *prima facie* goods to be preserved.

The underlying tension here is between groups' rights to define and control membership and individuals' need for the social and psychological goods that group membership and deep identity convey. To the extent that we treat group survival as a valuable and desirable end—as discussions framed by considerations of genocide and "ethnic cleansing" encourage us to do—we must recognize that a right to a deep identity of an individual's own choosing (or an obligation on the part of groups to recognize as members individuals who meet certain externally set criteria) could have profoundly negative effects on the groups to which it might be applied. Forcibly altering a community's membership through the imposition of requirements to admit individuals who the group would otherwise exclude would be tantamount to taking away the group's self-determination. It could even plausibly be constructed as genocidal under Sections (b) and (c) of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which prohibits "causing serious . . . mental harm to members of the group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction," respectively. Counter-intuitively, from the group's point of view a requirement to admit "nonmembers" could be both psychologically traumatic and reasonably construed as an infliction of conditions of life that would result in the group's (eventual) physical destruction.³ Such a position seems to me both extreme and unwarranted, but it nonetheless highlights the very real tension we are considering here.

Whether discrimination by groups against putative or would-be members constitutes a human rights violation, or for that matter should even be considered discrimination, is a vexing question, one to which I shall return later on in a slightly more advantageous context. Here I want to emphasize that for groups, unlike states, formal membership requirements are not really the main issue. Belonging is primarily a social and psychological phenomenon; mandating acceptance of a member the group would otherwise not recognize seems unlikely to work. My point is not to prejudice the case in favor of group rights—about which I have certain reservations⁴—but rather to emphasize that concern with designing policies to help children born of war find places within the shattered societies that produce them does not obviate concern with the implications of those policies on the victimized communities.

These considerations raise an important question about the participatory method of research advocated by Mertus (chap. 10 herein). Participatory research, at least as imagined by Freire (1993), presumes a model in which clear, objective distinctions exist between members of the oppressing and oppressed groups (for Freire, these are class distinctions). Two aspects of this conceptualization seem inapposite to cases involving children born of war. First, the consciousness-raising aspect of participatory methodology seems explicitly designed to make members of the oppressed group aware of the oppressor, to help them liberate themselves from the internalization of oppression that characterizes the downtrodden as a group or class (see Freire 1993, 27ff.). In cases involving children born of war, the community in which research is conducted is frequently the oppressor (even though the oppression originates, as it were, in the violence perpetrated by outsiders). In this case it is not clear what exactly empowerment and ownership of the research process might mean for the children. Ending the oppression of children born of war requires a reevaluation of the community's values, not the unmasking of an external ideology or the realization of an objective class situation. In such cases there is at least the real possibility that participatory research designs, instead of leading to liberation, might reinforce the community's rationale for rejecting the children and their mothers. In other words, empowering the community through research might reinforce rather than combat the oppression of children born of war.

A second and closely related challenge for participatory research in coming to grips with the social plight of these children concerns the complexities of the power hierarchies involved. The awkwardly interventionist nature of participatory research, combined with this complexity, raises extraordinary ethical quandaries that deserve further attention. Where the lines between oppressor and oppressed are clear and relatively stable, it is easy enough for researchers to align themselves with the oppressed in such a way that the humanitarian values informing their

work support the liberationist objectives of the participatory paradigm. Moreover, there is no obvious or necessary conflict in such cases between the researchers' values and agenda and those of the community. In cases involving children born of war, where oppression of children and mothers stems from oppression of the wider group to which the mothers belong, this felicitous alignment of values and interests can break down. There is potential tension between allowing the community to shape and direct the research and conducting research that gives voice to the oppressed children and mothers, a tension amplified in the case of mothers who internalize the community's attitudes and become oppressors of their own children. The problem is not just that researchers must be extra cautious in such cases, but rather that the easy harmony between their principled commitment to a certain research paradigm and their personal and humanitarian value commitments might slip into discord. In such cases, intervention risks slipping into advocacy with implications not just for the researchers but also for the purported advantages and credibility of participatory research. Put bluntly, participatory research works best when the roles of victim and oppressor are clear; when those roles are blurred, ethical and methodological puzzles arise. In raising these concerns my point is not to criticize Mertus, with whose position on these questions I largely agree, but instead to point to an area of predictable tension where further normative and methodological reflection is warranted.

Are Children Born of War Victims? Of What? By Whom?

Determining whether children born of war are victims of human rights violations is more complicated than the obvious wrongs committed in their conception and the disadvantages they often endure throughout their lives might suggest. The difficulties lie in determining what exactly they are victims of and who their victimizers are (see chap. 4 herein). In thinking about these issues it is essential to be clear about the nature of harm. In what follows I shall be concerned with what I shall call *wrongful harming*. Wrongful harming has two components: "it must lead to some kind of adverse effect, or create the danger of such an effect, on its victim's interests; and . . . it must be inflicted wrongfully in violation of the victim's rights" (Feinberg 1986, 145-46). One can be harmed without being wronged—by an accident, for example. Conceivably one can also be wronged without being harmed; Feinberg gives the example of a broken promise that, by some fluke, redounds to the advantage of the promisee (1986, 146). Wrongful harming, then, can be defined as "adversely affecting another party's interest in a way that wrongs him or, alternatively,

wronging him in a way that adversely affects his interest" (ibid.). I shall define *interest* here as comprising those rights guaranteed to all children in the CRC and in other international human rights instruments. In the following discussion, when I write that a child has been wronged or harmed, I mean that the child's interest has been adversely affected, either as a result of the wrong action of another or in a way that wrongs the child.

Various scholars have identified four possible ways in which children born of war might be considered harmed in this sense: as victims of genocide, of war crimes, of infanticide, and of discrimination and stigmatization. In the first two instances the violator appears to be the rapist/father; in the third, usually the mother; in the fourth, the state and/or the child's maternal community. In three of these cases, however, things are much more complicated than they initially appear. Only in infanticide are the wrong, the victim, and the perpetrator all obvious; in such cases the child's status is clearly linked to the wrongful harm of murder. While this crime might be comprehensible to us in light of the circumstances preceding it (see chap. 9 herein), these circumstances do not obviate or excuse the crime (though they might reasonably serve as mitigating factors in deliberations about appropriate responses to it). These issues, while tragic, do not seem controversial to me, and I shall say nothing further about infanticide here, focusing instead on the other, more puzzling cases.

Let us consider first whether children born of war might be victims of genocide. This possibility must be distinguished from the claim that systematic rape and forced impregnation constitute genocide. This latter claim is obviously correct: systematic rape and forced impregnation (repeated rape carried out for the explicit purpose of initiating a pregnancy in the victim) qualify as genocide under Section (b) of Article II of the Genocide Convention, which prohibits "causing serious bodily or mental harm to members" of the target group. Some scholars and jurists have also argued that forced impregnation violates Sections (d) and (e) of the convention, which prohibit measures intended to prevent birth within the group and the forcible transfer of children out of the group to another group, respectively;⁵ these claims are more problematic.

Carpenter (2000a, 224–27) argues that whether children born of wartime rape are victims of genocide depends upon how we understand their identity. It seems, however, that on any interpretation of the child's identity, the child cannot be a victim of genocide, at least not by virtue of his or her status as a child of genocidal rape. Consider first the patriarchal view of identity that seems to have informed the Serb campaign of forced impregnation of Bosnian Muslim women (see chap. 2 herein): the child's identity is the father's; the mother is merely a vessel for the nurture of the fetus. (This same view seems to inform the rejection by the children's maternal communities, in Bosnia and elsewhere, as "children of hate" or

"children of the enemy.") In this view the child might be a tool of genocide but cannot be its victim because by stipulation the child belongs to the father's group; it cannot be a victim of genocidal acts either directly or indirectly (as a member of the target group). There is no transfer of the child out of the target group because, again by stipulation, the child never was a member of that group (cf. Carpenter 2000b, 464, 474).

Now suppose we take the opposite view, that the child's identity is its mother's (perhaps because it is typically born into the maternal community). The child's birth now represents an increase in the population of the maternal community; there is no transfer of the child out of the group. The child might plausibly be considered a victim of genocide qua member of the target group, but here it is crucial to note that *the child's status as a child of rape has no bearing whatsoever on this determination*; it is no more a victim of genocide by virtue of its status than any other child or adult in the group. We can see this by considering the nature of the harm such children suffer: they are wronged in a way that harms their interests as individual members of a target group; the wrongful acts in question consist in the genocidal acts committed against the group generally. Note that I am not claiming that rape and forced impregnation fail to qualify as genocide; as stated above, they clearly do. I am concerned here only with whether children born of war are victims of genocide in any way that depends upon their peculiar circumstances of birth. I do not believe that they are.

Two types of confusion blur this point. One concerns identity; there is a temptation, as we have seen above, to consider the child as biologically "half" a member of its mother's group (and half a member of the rapist/father's group). As I argued above, it is doubtful that such biological definitions have much traction against cultural understandings of identity and uncertain how much traction they should have. Besides, I know of no international law that defines group identity and highly doubt whether biological "facts" could provide an uncontroversial basis for such a law. Second, arguments that interpret children born of war as victims of genocide because they involve the forcible transfer of children are incoherent because they assume *simultaneity* that the children bear exclusively their fathers' and their mothers' identities. The child can only be "transferred out" of the target group (the maternal community) if it is "in" that group, that is, if it carries its mother's identity. The purported transfer consists, however, in the birth of an "enemy" baby into the maternal community. But according to this view the child possesses the rapist/father's identity, nullifying the claim of membership in the target group that is a legal and logical requisite of any "transfer."⁶ If we regard the child as a "half" member of each group, it appears to be either a "half" victim of genocide or simultaneously a victim and a victimizer—absurdities we would do well to avoid. Only on interpretations that

construct the child's identity as its mother's is the child a victim of genocide, and only then in the same sense that any member of the target group is also a victim.

Another argument views children born of war as victims of war crimes. War crimes are typically defined as violations of the laws of war as set forth in the Geneva and Hague conventions and the UN Charter. The Fourth Geneva Convention defines "grave breaches" of those conventions as

involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.⁷

This list is representative rather than exhaustive of war crimes, but it conveys a clear idea of what is imagined in international law.⁸ Again, it is eminently clear that women who suffer from rape, sexual exploitation, and forced impregnation are victims of war crimes, including torture, inhumane treatment, infliction of great suffering, and serious injury to body and health.

Complex issues arise in assessing whether children born of war are victims of war crimes. It is helpful to begin by specifying in what the relevant harm consists. The most obvious candidate that would fall within the definition of war crimes seems to be the willful "causing great suffering or serious injury to body or health." It is not completely clear, however, that such a crime exists in the case of children born of war rape. Certainly they suffer higher than average rates of discrimination and stigmatization in their maternal communities, and sometimes in their states as well. Importantly, however, in neither of these cases is the rapist/father the perpetrator of the direct wrong the child suffers. I shall return to questions regarding how we should conceive ill treatment of war-rape children by their maternal communities later on; here it suffices to note that, however we conceive that treatment, it is not likely to be as a war crime.

It is also unclear how far we can consider the rapist/father an indirect agent of wrongful harm to his child(ren). The difficulty here lies in whether it makes sense to talk about wronging someone through bringing him or

her into existence. In the case of children born of war rape, the act that links the rapist/father to the wrongful harms suffered by the child in his or her state or maternal community is the very same act that brings the child into existence (see Hartman 2004).⁹ Similarly, Carpenter maintains that "birth of a child can never be a crime against the child, for this is the event that brings about her status as . . . a rights-bearer" (2000b, 463). I am not certain this is correct, but I shall postpone that question for a moment to consider a logical problem with her proposed alternative, birth-by-forced-maternity. Unlike the conceptually muddled notions of "forced impregnation," "forced maternity," and "forced birthing," all of which conceptualize the wrong from the woman's perspective rather than the child's, birth-by-forced-maternity

encompasses both forced impregnation and enforced pregnancy together (but not forced impregnation that results in an abortion). It is through forced maternity, not forced impregnation directly, that the child comes into being as a rights-bearer and has claims to make on the community. Yet it is the aspect of force in relation to the *conception* that matters. (Carpenter 2000b, 463)

The flaw in this conceptualization becomes evident when we consider the parenthetical note regarding forced impregnation that results in abortion. On this construction it is the combination of forced impregnation plus enforced pregnancy (no access to an abortion) and forced maternity that together constitute the crime of birth-by-forced-maternity. But imagine a case in which an abortion is available to a pregnant victim of forced impregnation who elects not to abort. The availability of an unutilized abortion eliminates the element of enforced pregnancy and thus of forced maternity, meaning that the resulting birth cannot, by definition, constitute birth-by-forced-maternity. Not only does this conclusion seem counter-intuitive, but, since abortion can in effect preempt or nullify this crime, it would seem to be morally obligatory when available, on this view. Now imagine two babies born on the same day, into the same community (their mothers are neighbors). Both women were raped and impregnated in the same camp; for reasons that need not concern us, one woman had the option of an abortion, which she declined, and the other was forced to bring her pregnancy to term. Both babies would be "children of the enemy," conceived in rape, and both would presumably be victims of the same discrimination and stigmatization in their maternal community. Yet, according to birth-by-forced-maternity, one would be a victim of a war crime and the other not; moreover, the reason the potentially aborted child would not be a victim has to do with the actions of its mother, not those of its rapist/father. This result seems to contradict Carpenter's assertion that it is

"the aspect of force in relation to the *conception*" of the child in which the crime originates.

I think Carpenter's account moves us a good way toward a correct and revealing understanding of children born of war as victims of wrongful harms (human rights violations) perpetrated by their rapist/fathers. Specifically, I think she is right to focus on wrongs committed in the conception of these children; rape and forced impregnation by themselves are crimes against humanity, as recognized explicitly in the Rome Statute of the International Court (Part II, Article 7). Presumably these are crimes against the woman. The crime against the prospective child lies less in the force involved in conception than in the *calculation* regarding the wrongs the prospective child is likely to suffer. I would label this *wrongful procreation*: intentionally causing conception or pregnancy calculated to result in the birth of a child likely to suffer human rights violations.¹⁰ Wrongful procreation violates what I call the right to have rights—the guarantee in Article 2 of the Universal Declaration of Human Rights that everyone has the right to enjoy all of the human rights. (Wrongful procreation is similar to what I take DeLaet to mean in arguing that rapist/fathers deny their children access to human rights.)

Wrongful procreation has distinct conceptual advantages as a way of thinking about the wrongs often endured by children of war rape. First, by locating the wrong in the intention of the rapist, it dissolves the philosophical confusion relating to acts that bring persons into existence by clarifying the sadistic and malicious nature of the act (cf. Feinberg 1986). While such motives might seem hard to establish, in many cases—like the camps described in these pages where systematic rape aimed to result in pregnancy occurred—there seems to be little difficulty. In addition, wrongful procreation clearly distinguishes the wrongs done to the children from the wrongs done to the mothers, opening space for the recognition and discussion of the former on their own terms. Moreover, because wrongful procreation does not suggest that the life of the child is inherently damaged or unworthy (the wrong lies in the act of the rapist/father, not in any fact about the life of the child), it does not further stigmatize the child. Finally, wrongful procreation lets us contemplate the maternal community's role and complicity in harming children born of war rape directly.¹¹

This brings us to the fourth type of human rights violation frequently mentioned by scholars in connection with children born of war: discrimination and stigmatization within the children's maternal or birth communities. Even in this apparently clear-cut case, puzzles arise. There is no disputing that infanticide or other direct harms committed against children violate their rights. Less clear, however, is how far communities—as opposed to states—have affirmative obligations in connection

with the human rights of children born of war. Part I, Article 2, Section 1 of the CRC clearly makes state discrimination on the basis of birth or status illegal. On the widest reading, discrimination in the extension or protection of any of the rights outlined in the convention would be included here, making any discrimination against or prejudicial treatment of children born of war a clear human rights violation by the state. The most common forms of discriminatory or prejudicial state action include the denial of citizenship or nationality; of health, education, or other social benefits; or of the necessary social minimum to the children.

Typically, many maternal communities take similar actions and make similar omissions, denying recognition, social benefits, and social support to the children and their mothers. Such social ostracism can at times have fatal consequences, as it is linked to women's and children's socioeconomic prospects (a point to which I return in the final section); cases exist of economically induced suicide and poverty-related morbidity resulting from such ostracism.¹² Whether stigmatization and discrimination in maternal communities constitute human rights violations, however, is unclear.

The CRC, like nearly all human rights law, is binding on states, and human rights violations have traditionally been understood as wrongs states commit against their citizens (see Donnelly 2003, 33–37). It is perfectly consistent, according to this state-centered view, for a state to fulfill all of its obligations with respect to human rights and for children and their mothers nonetheless to experience discrimination in their communities. To see this, consider the denial of deep identity to children born of war rape by their maternal communities. Let M be the maternal community of a "war baby," WB, born in state S. M might define itself on racial, ethnic, religious, or "cultural" grounds. Assume that M's definition of membership includes that for a child to be a member of M, both of its parents must be members. By stipulation, WB cannot be an M because its father is not an M. M therefore denies WB membership, excluding the child from religious and cultural rites and isolating WB socially. But M resides in S, a state which grants full citizenship to WB and guarantees WB the same social benefits as all other children. On traditional statist understandings of human rights, there is no obvious violation here. But suppose that S is poor and ravaged by internal warfare; it treats all its citizens equally, but that treatment still falls short of human rights standards. Suppose further that in S, communities like M traditionally see to the social and economic needs of their members as best they can. As a practical matter WB is denied enjoyment of its human rights by being excluded from M, yet on the traditional statist view the only violations occur in S's inability fully to meet its obligations

under the CRC. While M's actions and inactions clearly affect WB's human rights, M insists that it is duty-bound to provide these benefits only to Ms.

WB's dilemma points to the shortcomings of existing human rights law and theory, which remain predominantly statist. While it might seem that a simple solution would be to hold groups and other non-state actors to the same human rights standards as states, lumping groups like M and other non-state actors into the statist framework misses that the point that it is not just whom to hold responsible for securing human rights but also how those rights themselves are conceived. Feminist critiques of human rights show that it is inadequate simply to "add women and stir," and the same intuition applies here (chap. 8 herein; Goodhart 2006). A thorough reconsideration of what rights mean and how they are constructed is necessary.

Applying the statist framework to groups would be detrimental and, in some cases, simply incoherent. Part I, Article 2 of the CRC, for instance, forbids discrimination on the basis of religion; application of such a requirement to all social groups would effectively destroy religion. The right to a nationality, discussed above, makes no sense if applied to groups, and there are good reasons to resist the apparent analogy between citizenship and group membership that application of this principle to groups would imply. Part I, Article 19 describes the appropriate legal, social, educational, and administrative measures and the social welfare programs states should utilize in guaranteeing rights to citizens. Should all groups be subjected to similar requirements? The point is neither that groups should be permitted to discriminate as they please nor that groups should be exempt from all human rights requirements in all instances. The point is rather that precisely how these various requirements should apply to which groups in what specific circumstances cannot be answered without a good deal of careful consideration.

Another puzzle that arises in cases like WB's concerns identity. Earlier I agreed with Weitsman concerning the social construction of identity and showed how such a view problematizes putative biological claims to membership. When we move from those abstract considerations to more realistic cases, like WB's, where stigmatization and discrimination have a dire and immediate impact on WB's welfare, things look somewhat different. To see this, consider a similar case in which K is an ethnic and linguistic minority within state T. K has for years suffered human rights violations from T (and committed some of its own against Ts). In particular, K has been subjected to a political and military campaign to stamp out its language and culture. Suppose that K provides benefits to its Ks that T cannot or will not provide to Ks. Suppose further that there are Ts living within the territory where K predominates, and that K does

not provide these Ts with the same benefits it provides to Ks. We would be hesitant to call K's action or inaction a violation of the human rights of the Ts, I think, even if T is unwilling or unable to provide those Ts with comparable guarantees.¹³

The salient difference in our assessment of whether K is justified in withholding benefits to Ts and whether M is justified in withholding benefits to WB seems to be WB's claim to special consideration in virtue of a biological connection to M, a justification we rejected earlier along with the myth of genetic determination. Still, M's actions seem morally objectionable in a way that K's do not because of this claim and the special moral obligation it seems to create for M, raising anew the question of how much deference the human rights framework should grant to socially constructed norms of identity and membership. There are no easy answers here. Even if we think that groups deserve little latitude in denying benefits in such cases (a big if), we must recognize that coercing M to provide benefits to WB would likely have other negative effects on WB. Even if the tangible benefits can be mandated, the social and psychological benefits typically associated with membership would be unlikely to follow; indeed, resentment could well create new problems for WB and others like him or her. There is also the problem of encouraging states to make coercive interventions into the affairs of ethnic, religious, and cultural groups; the costs of such interventions must be weighed carefully against the anticipated benefits.

I cannot consider these complex issues further here; three provisional conclusions seem warranted, however, in light of this brief discussion. First, children born of war unquestionably suffer human rights violations whose sources are overdetermined; their rapist/fathers, the broad social and economic conditions in states like S, and the attitudes of groups like M all contribute to their plight. Second, the children's situation underscores the importance of *public* guarantees of all human rights, especially social and economic ones. Provision of such guarantees is especially important to the most vulnerable and marginalized members of society. Where states are incapable of providing such benefits, other generalized mechanisms of provision might be preferable to group-based provision. Obviously, state capacity-building should also be a high priority in such cases—a point to which I return below. Finally, whether or not groups like M are responsible for human rights violations in cases like that of WB, it seems clear they fall short of the high standards of human decency and compassion toward which human rights as a moral framework gestures. The only remedy for such deficiencies is a deeper social transformation and transvaluation of values—the creation of what McEvoy-Leyva calls a human rights culture (chap. 9 herein). I shall return to this subject in the final section.

Adequacy of Human Rights Discourse

This critique of the statist character of the traditional human rights framework raises the question posed by several contributors: whether the human rights discourse is adequate for addressing the myriad issues surrounding children born of war. Obviously I share these concerns. A focus on children born of war clarifies that one of the key failures of the CRC and many other human rights instruments is their tacit incorporation of assumptions about the "normal" situation of children. The CRC largely presumes that children live in stable families and grow up in the care of their parents; such presumptions limit the convention's relevance for children born of war and children in conflict zones. The situation of these children is doubly problematic in the context of failed states and war-torn states; not only are such states more likely to engender and sustain the kinds of conflicts in which systematic rape and forced impregnation occur, but they are also less capable of coping with the social needs arising from such conflicts. The CRC, with its optimistic assumptions about states parties' ability to provide a range of human rights guarantees ranging from security to health care, education, and social welfare support, clearly neither envisions the incapacity of failed and war-torn states nor the impact such incapacity might have on children.

These shortcomings reflect wider problems with the state-centered human rights framework, which makes it hard to conceive the role of non-state actors in violating as well as in protecting and promoting human rights, as we saw in the case of groups' discriminatory practices, and which provides little guidance about how human rights might be protected where states are unable or unwilling to do the job. Failed and war-torn states are in this respect just the tip of a much larger iceberg; repressive and recalcitrant states also fall outside what human rights law and institutions presently envision. It is this failure that entities like the permanent International Criminal Court are beginning to address—though we seem a long way from any kind of international agency that could guarantee, even in the last instance, social and economic security where states cannot do so. What an effective global human rights regime might look like and how we might get there are questions beyond my scope here (see Goodhart 2005, esp. chaps. 8 and 9); I raise them mainly to illustrate that the existing limits of human rights framework with respect to children born of war in failed and war-torn states are part of a wider problem involving the state-centric nature of the human rights regime and its optimism regarding the functioning of those states.

Sadly, however, in this respect the inattention to issues facing children born of war is hardly unique; consideration of the rights and needs

of other vulnerable and marginalized classes of persons is similarly lacking. Just as taking women's rights seriously as human rights forced a complete reconceptualization of the human rights framework, so consideration of children born of war (of homosexuals, of stateless persons, . . .) requires us again to rethink what human rights mean and how they can be realized.

I strongly disagree, however, that these failures of the human rights *framework*—the existing treaties and institutions through which human rights are protected and promoted—represent a failure of the human rights *discourse*. It seems to me rather a strength that human rights are both appealing enough and pliable enough to be adapted to the needs of real people across an amazing diversity of situations, some of which we can barely imagine today.¹⁴ The theoretical resources exist within human rights discourse to reinvent human rights indefinitely, and such reinvention should be embraced as a requirement of the universality to which human rights aspire and a key to building the kind of human rights culture that McEvoy–Levy advocates.

Justice for Children Born of War: Toward a Human Rights Culture?

Children born of war are so extraordinarily vulnerable in part for the obvious and easily overlooked reason that so many of them live in failed or war-torn states struggling to achieve peace or to consolidate fragile transitional regimes. This context means that they are also significantly affected by the measures taken (or not taken) in efforts to rebuild such states and to create a human rights culture. Each of these issues—the heightened incidence of human rights violations experienced by children born of war, failed states, and institution-building and reconciliation in conflict-ravaged societies—presents serious normative and political challenges for their human rights.

That children born of war and their mothers face a higher incidence of human rights violations reminds us of two central claims advanced by various authors in this volume: the plight of these children and their mothers cannot be separated, and it is primarily socioeconomic in nature. This inseparability stems from numerous factors, including the children's economic dependence on their mothers throughout infancy and childhood and the mother's corresponding responsibilities; the children's status as living evidence of rapes committed against their mothers, crimes for which the women, although victims, are frequently vilified and rejected; and, the grim fact that mothers are sometimes perpetrators of wrongs against their own children, whether through

neglect, abuse, or, in extreme cases, reckless abandonment or infanticide.¹⁵

As several of the contributors argue, the socioeconomic challenges faced by children born of war and their mothers are paramount. To see why, consider that one of the most damaging effects of the discrimination and stigmatization directed toward the children and their mothers is their rejection by families and communities that would otherwise provide their primary social support networks. In failed, impoverished, and war-torn states, national social security systems are often wanting; more traditional arrangements for social support are likely to be primary in such cases. Given the limited economic opportunities for women working in the paid sector in many cultural contexts, discrimination and stigmatization can translate directly into poverty, which compounds the likelihood and severity of other violations the women and children suffer. The situation is only worsened by the failure of most peace accords, in their provisions for institution-building and political reconciliation, to attend to social and economic needs in general, and to the needs—indeed the existence—of the children in particular (see chaps. 4, 8, and 9 herein).

These observations indicate two broad challenges that must be overcome if efforts to ameliorate the situation of children born of war and their mothers are to succeed. The first concerns pervasive structural issues of patriarchy and sex and gender inequality. That many women depend for their (and their children's) well-being upon cultural institutions that construct and constrict their identities quite narrowly and in highly sexualized terms exacerbates the economic difficulties they face; such attitudes can exclude women from communal support and constrain their ability to support themselves outside of their communities. This observation underscores the need for long-term strategies to elevate the status of women.¹⁶

The second and closely related challenge concerns the immediate need for policies that provide economic security for women and their children. Calls and strategies for economic empowerment recur throughout the chapters, cited both as one of the clearly voiced needs of "war mothers" and as one of the possible tools for mitigating human rights violations experienced by these women and their children (see chaps. 5, 6, and 8 herein). In the long run, economic empowerment is complementary, indeed integral, to improving the status of women generally; feminists since Mary Wollstonecraft and Elizabeth Cady Stanton have clearly recognized the links among economic independence, political freedom, and moral development for women.

More immediately, schemes for economic empowerment of women must be supplemented with social welfare schemes to support them and

their children. Such programs should include adequate funding for state institutions caring for orphans or children turned over by their mothers, measures to facilitate adoption of such children, and a guaranteed source of income for war mothers and other victims of wartime rape and sexual exploitation.¹⁷ IN this volume Susan Harris Rimmer suggests treating women and children as veterans eligible for pensions and other social benefits, while Debra Delaet suggests reparations as a mechanism for providing social support while recognizing the structural nature of the crimes and wrongs involved. Both of these measures and others should be seriously considered. What might work in one context might not work in another, depending on the nature of the past conflict and a variety of social and cultural factors. One of these factors is a state's (and the international community's) *willingness* to undertake measures to alleviate the wrongs experienced by the children and their mothers. Their performance with regard to the measures required to provide economic security is one indicator of such willingness. As noted earlier, most peace accords and transitional political arrangements avoid any mention of the problem, and most ignore the concerns of women and the society's economic, educational, and human welfare needs more generally. What Siobhán McEvoy-Levy has referred to as "patriarchal pragmatism" suffuses peace accords and transitional justice more generally.

Achieving justice for children born of war remains an elusive goal, in part because exactly what justice means and requires for these children is uncertain. In this volume Debra Delaet analyzes the pros and cons of punitive and restorative approaches in achieving justice for them, and Siobhán McEvoy-Levy emphasizes the creation of a human rights culture, stressing reconciliation and understanding achieved in part through education as well as a more general restructuring of key social institutions. These are laudable and sensible aims. In making their arguments, however, both authors articulate what I view as a highly problematic notion of *agency* for children born of war. Both describe the potential role of the children as symbols of hope, reconciliation, and agents of social renewal.

Ascribing agency to individuals—by assumption, children—in this way strikes me as ethically problematic. To assert that a person, a child, has a particular social role to play or special social obligations and responsibilities owing to the circumstances of its conception strikes me as patronizing. It in effect *denies* agency to the person involved by suggesting that there is a role the person can and ought to play. Of course, many children born of war will, as adults, choose to play an active role in demanding rights and justice for themselves and similarly situated persons, and that role should be encouraged and supported. To suggest that certain persons have social duties by virtue of their birth or status,

however, evokes a sort of feudal fatalism inconsistent with a human rights culture.

Creating a human rights culture that will achieve justice for children born of war requires, as I see it, two key changes. The first involves creating effective social institutions to guarantee economic rights and provide economic opportunities for women. I have already discussed the need and justification for these guarantees and will not rehash them here. The second change needed is a transformation of the social discourse surrounding children born of war. Such a change is integral to any effort to effect social reconstruction and reconciliation.

This effort is sometimes conceived as a need to break the silence surrounding these children. This view must be heavily qualified. First, as McEvoy-Lewis rightly notes, there are two different kinds of silence concerning the children: strategic silences, which protect them and their mothers, and imposed silences, through which societies ignore or avoid the problem. I shall return to the former in just a moment; with respect to the latter, I am not sure that *silence* is the appropriate word. Recalling that actions sometimes speak louder than words, I submit that there exists in many of the societies examined in these pages a deafening roar of callous contempt toward children born of war, one that constructs them and their mothers as objects of shame and humiliation, that facilitates their social exclusion, and that is often promoted by the media and by state agencies, as Weitsman argues (chap. 7 herein). This roar must be dulled, while at the same time a vocabulary and voice in which children and their mothers can express their legitimate claims must be developed.

It is true that international agencies have not succeeded in shaping the debate on this subject as they have on other issues. Again, however, this hardly seems due to silence. A scan of the references in this volume reveals reports and studies bearing the names of the IRC, UNICEF, Amnesty International, Physicians for Human Rights, and many other well-known human rights agencies and NGOs. Whatever the problem, finding a way to generate a discourse around children born of war that can help to overcome the neglect and indifference that frequently attend the issue is a significant priority.

With respect to strategic silences, it remains clear that a tension exists between creating a broader, more balanced discussion of these vulnerable children and protecting their safety, dignity, and privacy (see chap. 10 herein). In principle it should be possible to initiate and sustain a discourse that protects victims while also addressing their human rights constructively and effectively. One way to achieve this might be by building a discussion around the experience of communities elsewhere that have grappled with the problem and the myriad issues they raise within and among communities as a way of partially defusing the issue. Another might be to provide forums for anonymous testimony that could help to

vivify the problem within a community while protecting individual victims—a variation on witness-protection programs. Institutionally, the current emphasis on police, military, and political institutions in post-conflict reconstruction should be supplemented by the creation of permanent institutions, like human rights ombudsmen's offices and democratic forums for deliberation and discussion of basic rights and freedoms that can address social wrongs in a sustained, political fashion.¹⁸

The challenge of creating a new human rights discourse reminds us that human rights play a dual role in contemporary politics. On the one hand, they provide urgent protection—or at least hold out the promise of such protection—in the face of monstrous evils and quotidian suffering alike; on the other, they point toward a world in which everyone might enjoy a free and dignified life. As we struggle to comprehend the injustices underlying the problems faced by children born of war and their mothers, we must keep both of these roles in mind. We must maintain unwavering faith in the possibility of a better world, one in which children born of war are rare and in which their human rights are secure. We must at the same time recognize that the violence from which they are born, which manages to shock even the twenty-first century moral conscience, can be overcome only through careful study, deep reflection, and effective, tireless action.

Notes

¹ In practice, states have wide latitude in determining who qualifies for citizenship, so that nondiscriminatory application of the standards often turns out to be less important than the nature of the standards themselves; its actual terms are often prejudicial to immigrants and members of ethnic and religious minorities. What might constitute legitimate standards for citizenship is beyond my scope here.

² Of course, I do not mean to suggest that this fact in any way lessens the horror of these crimes.

³ For a similar argument connecting the Convention on the Elimination of All Forms of Discrimination against Women to genocide, see Smolin 1995–96.

⁴ For an excellent general discussion of group rights, see Jones 1999 (cf. Jones 1994).

⁵ For a critical review of the literature, see Carpenter 2000b.

⁶ On the patriarchal construction of identity one could argue (disingenuously, to be sure) that the birth of “Cheruk babies” to be raised in the Bosnian Muslim community represents a forcible transfer of Serbian children out of their group and constitutes genocide against Serbs! This interpretation, while clearly specious, would be consistent with the maternal community’s rejection of the children as enemies.

⁷ GC4, Article 147; this is the most comprehensive statement, comprising definitions in the previous conventions. For the full text, see the icrc.org website.

⁸ Other war crimes concerning the *conduct of battle* (use of truce flags, for example) are omitted here.

⁹ There is a great deal of philosophical debate about whether future persons have rights and whether it is possible to violate future persons' rights (see, e.g., Archard 2004; Feinberg 1986; Parfit 1984; Warren 1978). I have addressed these issues, insofar as they apply to children born of war rape, in Goodhart 2007.

¹⁰ I borrow and adapt this term from Matthew Hanser (1990).

¹¹ For a more comprehensive treatment of wrongful procreation and related issues, see Goodhart 2007.

¹² I am grateful to Charli Carpenter for making this point clear to me and for helping me to grasp its implications for my argument in this and the following section.

¹³ The case would be different if K were somehow preventing or interfering with provision of these benefits to Ts.

¹⁴ I would wager that some readers of this volume will read an essay on the human rights of clones in their lifetimes.

¹⁵ Women might responsibly give up their children to state agencies for care or ultimate adoption or entrust them to the care of willing relatives; unfortunately the term *abandonment* is sometimes used in describing such actions as well as actions like leaving children on the steps of hospitals and orphanages (or worse). The former set of actions seems qualitatively different from the latter; however, and I include the qualifier "reckless" in the text to indicate that I am referring the latter.

¹⁶ Unfortunately I cannot discuss such strategies here. For an introduction and overview, see the United Nations Development Program's Human Development Report 1995, *Gender and Human Development*, available on the hdr.undp.org website.

¹⁷ I cannot join the debate addressed by some of the authors regarding the merits and drawbacks of international adoption except to note that, like so much else connected with children born of war, much in that debate will turn on how the relevant actors construct the identity of these children.

¹⁸ I have in mind here something like the *Espace d'interpollation démocratique* in Mali (see Wing 2002).

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