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## PRACTICES OF (IN)JUSTICE FOR GENOCIDE'S VICTIMS

### ESPERIENZE DI (IN)GIUSTIZIA PER LE VITTIME DI GENOCIDIO

*Nicoletta Policek*

#### **Abstract**

In the context of genocide, international criminal law articulates the “truth” about a situation, asserting for example that victimization in genocide occurs mainly through rape. Consequently, international criminal law dictates which harms are “extraordinary” such as rape, for example, and who can speak about them. It follows that when international criminal law is dealing with genocide’s victims, there appear to be two interconnected, troubling effects. Firstly, we have the exclusion of harm suffered by some victims with the focus specifically on certain victims and thus in the process, we witness the construction of an ideal victim subject, and secondly, the manufacture of a hierarchy of victims takes shape. This contribution contends that by focusing exclusively on rape as a genocide crime other forms of victimization which occur during genocide are not taken in full consideration. Consequently, and for such reason, it is difficult to argue that international criminal law as we know it can fully provide justice to all victims of genocide.

**Key words:** rape, ideal victim, international criminal law, civil society.

#### **Riassunto**

Nel contesto del genocidio, la legge penale internazionale definisce la “verità” su una situazione, affermando ad esempio che la vittimizzazione nel genocidio avviene principalmente attraverso lo stupro. Ne consegue che quando il diritto penale internazionale si occupa delle vittime del genocidio, sembrano esserci due effetti interconnessi e preoccupanti. In primo luogo, l’esclusione del danno sofferto da alcune vittime con l’attenzione specifica su certe altre e, quindi, nel processo si assiste alla costruzione di un soggetto vittima ideale e, in secondo luogo, prende forma la determinazione di una gerarchia di vittime. Questo contributo sostiene che concentrandosi esclusivamente sullo stupro come crimine specifico del genocidio si trascurano altre forme di vittimizzazione che, pur verificandosi durante il genocidio, non sono prese in piena considerazione. Di conseguenza, e per tale ragione, è difficile sostenere che il diritto penale internazionale, così come lo conosciamo, possa garantire pienamente giustizia a tutte le vittime del genocidio.

**Parole chiave:** violenza sessuale, vittima ideale, diritto internazionale penale, società civile.

## Introduction

Consistently, international criminal law is enlisted to support arguments for the existence of unbiased mechanisms when seeking justice for genocide's victims (Brienen and Hoegen, 2000). Regarded as a system able of removing the local peculiarities of national criminal justice systems whilst putting in their place a unified system of transnational justice, international criminal law has nonetheless the power to define and legitimate some victims' narratives, while at the same time, silence and suppress other victims' meanings (Koskeniemi, 2002) or stories (Fein, 1979). More specifically, in the context of genocide, international criminal law articulates the "truth" about a situation, asserting for example that victimization in genocide occurs mainly through rape (de Alwis, 2010). International criminal law creates meaning and it is an authoritative, yet at times remains a selective and biased source of the "crime of all crimes" (Kuper, 1985). Consequently, international criminal law produces, legitimates and mediates harm suffered by victims according to its internal and external mechanisms of legal governmentality (Jamieson and McEvoy, 2005). It authoritatively dictates which harms are "extraordinary" such as rape, for example, and who can speak about them (Buss, 2009). It follows that when international criminal law is dealing with genocide's victims, there appear to be two interconnected, troubling effects. Firstly, we have the exclusion of harm suffered by some victims with the focus specifically on certain victims (Hall, 2012) and thus in the process, we witness the construction of an ideal victim subject, and secondly, the manufacture of a hierarchy of victims takes shape. Such outcomes give rise and support practices of (in)justice for genocide's victims as the ideal victim (Christie, 1986), the victim *par excellence* is the person who has been raped (de Brouwer, 2009) whilst other gender-based harms are often ignored or set aside (de Guzman, 2012). This contribution contends that by focusing exclusively on rape as a genocide crime other forms of victimization which occur during genocide are not taken in full consideration. Consequently, and for such reason, it is difficult to argue that international criminal law as we know it (Dixon et al., 2002) can fully provide justice to all victims of genocide. Being a victim is an extremely malleable concept, especially because there are different disciplines of reference in aid of a definition, which supports and expands the legal one, reflecting many of the nuances found in the definition of genocide (Policek, 2012). At the outset, three distinct sets of problems arise in the design, implementation and effects of criminal sanctions for victims of genocide, when this demarcation remains within a legalistic framework (De Waal, 2010). First, with regard to

the experience of the victims, international criminal law, it is argued here, is not able to develop languages and mechanisms affording a satisfactory response to the horrors of genocide, when it is pivotal to include all victims (Douglas, 2001; Drumbl, 2007). Furthermore, international criminal law is incapable of simultaneously teach history, as well as the evidence of all the victims, and at the same time do justice, whilst providing adequate recognition and compensation to all victims (Booth and du Plessis, 2005). The third point concerns the legitimacy of the experiences of all victims and how the stories produced by international criminal tribunals are largely intended to give authority to the institutions or states which are the object of accusations (Askin, 2003). Here the reference is specifically to the narratives of genocide's victims of rape in the former Yugoslavia (Calvetti and Scovazzi, 2004) and Rwanda (Dixon, 1997; Reyntjens, 2004).

Finally, this contribution claims that the answers of the international criminal law are totally inadequate unless the definition of victim of genocide is deconstructed to highlight the restrictions afforded by a purely legalistic response. Ultimately, the proposal here is for a criminology of genocide (Hagan and Raymond-Richmond, 2009) which must critically evaluate the limitations of legal responses to genocide and examine the politics and principles behind definitions of genocide's victims (Day and Vandiver, 2000).

## 1. Defying genocide's victims in international law

In law, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly on 29<sup>th</sup> November 1985, sets out to offer a concise definition of what it means to be a victim and subsequently recommends four avenues of redress for victims: access to justice and fair treatment, restitution, compensation, and assistance (Dixon et al., 2002). The Victims Declaration identifies victims of crime all individuals who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, comprising also those laws proscribing criminal abuse of power (Horowitz, 1997). The term victim similarly includes, where applicable, 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 (Marcus, 1992). Fundamental to this definition, is the four avenues of redress which are subscribed by the Victims Declaration (Gaynor and Harmon, 2004). Access to justice and fair treatment

means that victims should be treated with compassion and respect for their dignity and furthermore, that they be entitled to gain access to the mechanisms of justice and to prompt redress for the harm that they have undergone. Restitution is defined as the return of property or payment for the harm or loss suffered and it rests on the acknowledgment that those responsible for victimization should make fair restitution to their victims, including the victims' families and dependents. The concept of compensation essentially takes off where restitution fails and looks toward the potential, although often sporadic, altruism of States. The rationale would be that when compensation is not fully available from the offender or other sources, States are tasked to provide financial compensation to victims, their families and dependents, and even, if and when appropriate, to look at the possibility of setting up trust funds.

The theory of assistance embeds the notion that victims should receive the crucial material, medical, psychological and social assistance that can be offered through governmental, voluntary and community-based indigenous channels. Such assistance should be made readily available to all victims, with attention paid to individual needs. The Victims Declaration is by no means binding, nonetheless its ambition of promoting the victims' needs under international law has begun to be effective. Many steps, however limited, have been taken towards advancing victims' rights under international criminal law, all of which might never have occurred had the ground not first been broken by the Victims Declaration (Hall, 2012). Building from the Declaration, on 16<sup>th</sup> December 2005, the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, also known as the Van Boven/Bassiouni Principles. There are two major divergences between the Victims Declaration and the van Boven Principles. First, the van Boven Principles accentuated state, as opposed to individual, responsibility. This shift accounts for the realistic understanding that restitution as a general rule is easier to secure from states, as opposed to the limited resources of individuals. Second, the van Boven Principles introduced the term reparations into the vernacular of international criminal jurisprudence. Reparations, which as a term did not appear in the Victims Declaration, is used as a general term to describe all forms of redress, including but not limited to, restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition. The van Boven Principles then proceeded to examine each form of reparations. Significantly, van Boven clarified that restitution should be applied to reinstate the situation that existed prior to the violations of human rights and humanitarian law (Neier, 1998). Explicitly, restitution requires restoration of liberty, family life, and citizenship, among other examples. Curiously, van Boven encapsulates the meaning of restitution in the same tradition as previously defined in the Victims Declaration. Following such tradition, it is stated that compensation should be offered for any economic damage resulting from violations of human rights and humanitarian law. Van

Boven also argued that rehabilitation should be provided to victims and should include medical and psychological care as well as legal and social services. Lastly, to provide assurances of non-repetition, victims should be afforded with the cessation of continuing violations. In order to prevent the recurrence of victimization, a full and public disclosure of the truth together with an official declaration restoring the dignity, reputation and legal rights of the victim are very much needed. Importantly, when devising strategies of justice, it must be borne in mind that lack of reparation for victims and impunity of perpetrators should both be considered. Therefore, all efforts and strategies aimed at strengthening the normative framework in the pursuit for justice have to expose the clear nexus that occurs between impunity of perpetrators and the failure to provide just and adequate reparation for the victims. The reference to victims, however, remains embedded within discourses framed around the construction of the authentic victim. Conversely, while it is accurate to claim that a vast array of gender-based harms have either been habitually ignored in post-genocide justice mechanisms or not specifically framed as gendered harms, it is possible workable to contend that the very attention given to sex crimes against women within international jurisdictions has at least opened up possibilities for pursuing other forms of gendered violence (Buss, 2007). It should not be overlooked, for example, that at the first trial since the Nuremberg and Tokyo trials at the ICTY, the accused Tadic was convicted for aiding and abetting the sexual assault of male detainees, which included the sexual mutilation of prisoners (Mis-chkowski and Mlinarevic, 2009).

## 2. The authentic genocide's victim

Although rape has been recognised as a crime of genocide in contemporary international criminal jurisdictions (de Alwis, 2010), this acknowledgment, albeit favourably welcomed, has resulted in other gender-based harms ignored or shelved (Marcus, 1992). The concern relates to the impact that genocide rape prosecutions can have on suppressing or excluding other harms against women and the way in which the ideal or "authentic" victim subject (Mibenge, 2010) has come to dominate the field. This is to say that rape in genocide situations is at the exclusion of other forms of violence against women and, also, more worryingly, rape has questionably become synonymous with violence against women, omitting the experience of men (Jones, 1994). The focus on sexual violence seems to have blocked any consideration of other gender based violence that occurs in genocide, such as the lack of reproductive health assistance and broader socio-economic harms. Equally worrying is that the fact that the focus on sexual violence against women has the effect of diverting attention away from male victims of gender-based harms (Jones, 1994). The tendency to conflate gender with female has meant that sexual violence against males is often not contextualised specifically as a gender-based crime (Carthy, Bates and Policek, 2019). When thinking about raped geno-

cide victims, the reference is inevitably to a woman (Marcus, 1992): the focus on women has ignored rape and other forms of sexual humiliation and abuse against males, forcible conscription, massacre and torture. Carpenter (2006) highlights how there is a widespread assumption that women constitute the majority of wartime rape victims, which has the effect of obscuring the extent to which adult men and adolescent boys also face gender-based violence, including, but not exclusively encompassing, sexual violence. It is worth mentioning here that the discourse on forced impregnation of women during conflict has the effect of placing children born of rape on the periphery, not as rights-bearers or victims of genocide. Related to these perceived exclusions, along similar lines, Buss (2009) has contended that the rapes of Hutu women or men from both Tutsi and Hutu groups have not captured the attention of the ICTR (International Criminal Tribunal for Rwanda) because the authentic victim subject is predominantly the female Tutsi genocide victim. This, she maintains, reveals that some rapes are paradigmatic or overtly visible in international criminal law, which can have the effect of rendering other rapes invisible, or less important. She also notes that the fixation of rape as an instrument of genocide suppresses or obscures a wider narrative about wartime sexual violence, such as why the rapes happened in the first place, how women expressed resistance and negotiation and the ways in which sexual violence is connected to structural and systemic conditions existing prior to the outbreak of violence (Buss, 2009). Already, the construction of a rape hierarchy within national criminal justice systems has been fervently critiqued (Askin, 2003). The argument here is that stranger rape attracts significantly more public sympathy and attention than acquaintance rape and is prosecuted far more vigorously than other violent crimes (Estrich, 1987), with MacKinnon (2006) bluntly but powerfully stating that under law, rape is not regarded as a crime when it looks like sex. This judicial blindness is evident at the international level also, for example, in the failure of the Tokyo war crimes trial to prosecute the sexual enslavement of ‘comfort women’ (Henry, 2013); the heated debates surrounding the legitimacy of German women’s victimisation during the 1945 Soviet invasion of Berlin (Halley, 2008a); the hostile and suggestive cross-examination of Muslim women and girls who were detained in schools, apartments and sport centres during the conflict in the former Yugoslavia (Jones, 1994); and the silence of post-conflict justice mechanisms regarding forced marriage and other forms of coercive sexual encounters in conflict zones (Nikoli-Ristanovi, 1999). This historical trajectory reflects law’s fixation on consent (as opposed to sexual autonomy) as the determining factor in securing not only a guilty verdict but genuine public sympathy. Like domestic rape trials, the ‘authentic’ victim subject is not one who has been somehow made – by discourse – complicit in her subjugation. There are unintended consequences resulting from the international criminalisation of rape during genocide, in particular, that the prosecution of sexual violence at the international level can contribute to a one-dimensional narrative of suffering and perpetration, positioning some victims as the authentic victim subject, silencing other less conventional narratives and obscuring the role that

colonialism and sexism play in the perpetration of these crimes.

### 3. Genocide’s victims of rape

There has been much debate about the need to treat international crimes as separate, both procedurally and substantively, from ordinary domestic crimes (Quijano, 2012). International courts and international criminal law prioritise so called exceptional or extraordinary crimes in the elements of the crimes and the prosecution strategies (Drumbl, 2007). Under international law, these extraordinary crimes are shaped by the fundamental principle of *jus cogens* (i.e. compelling law) (Charlesworth, and Chinkin, 1993). This refers to a set of indeterminate peremptory norms accepted and recognised by the international community, such as the prohibition of genocide. These norms are non-derogable by international or local laws or customs and as such their violation should be prioritised due to their gravity. The peremptory norm aspect of the crime is its absolute prohibition based on its severity. When committed during genocide, breaches of obligations under these norms constitute grave breaches of international humanitarian law and as such give rise to universal jurisdiction under the Geneva Conventions and arguably underscore the rationale for international prosecution (Grewal, 2012). Because rape has been interpreted by international and regional courts to constitute genocide, this therefore would suggest uncontestedly that acts of sexual violence fit within the prism of peremptory norms. However, the prohibition of sexual violence can only reach the glory of *jus cogens* if associated with other crimes. In other words, it does not reach *jus cogens* status on its own volition, which it could be argued is a gendered legacy of patriarchal legal culture (Mardorossian, 2002). This issue remains unresolved and scholars and legal experts continue to debate whether rape should be a stand-alone crime subject to universal jurisdiction under customary international law (Mitchell, 2005). While systematic or genocidal forms of sexual violence at the highest level have been prosecuted, random, isolated or individual rapes as well as other forms of interpersonal violence are generally not dealt with by international courts (de Brouwer, 2009). The effect of exceptionalising some rapes and not others is concerning because it reinforces the notion of the authentic and ideal victim. In addition to trepidations about exceptionalising rape in genocide, some feminist scholars (de Guzman, 2012), have questioned the “over-criminalisation” of genocide rape on the basis that rape might not in fact be the worst thing that can happen to a woman during genocide. For instance, rape was not the worst of horrible experiences for German women at the end of the Second World War (Halley, 2008a). It could also be argued that prioritising the prosecution of rape may not have entirely good effects because the “badness” of rape can be used in alarming ways to advance certain political and nationalistic ideologies (Halley et al. 2006). Also, within this “reading” of rape, women’s consent to sex during conflict is negated due to

stringent rules on consent in some jurisdictions, with the problematic effect of eliding rape, sex work, forced marriage and “garden variety cohabitation” (Halley et al. 2006). Furthermore, rape may not be the worst thing that can happen to a woman during genocide (Hagan and Kaise, 2011). Unsurprisingly, international criminal law constructs a hierarchy of crimes due to the grave breaches’ regime, the linking of various crimes with the categories of crimes against humanity and genocide and the associated decision to prosecute some crimes over others. However, while this is to some extent unavoidable, the debate about whether or not rape is the worst crime that can happen to a woman or to a man; whether rape is worse for a man than it is for a woman and vice versa, or whether sexual violence inflicts greater harm than killing, or is a more serious crime (de Guzman, 2012; Sharratt, 2011), remains problematic. First of all, the questioning of the uniform gravity of sexual violence, in order to avoid universalism and embrace diversity, supports the question, conceived of as “worse” by whom, how and when, which in turn reinforces the creation of the authentic and ideal victim in genocide. It follows that a fixation on whether or not rape is the worst of crimes in genocide is a distraction to the more important questions surrounding the efficacy of international criminal law for providing recognition and justice for victims, meaning all victims of genocide. Finally, this fixation reifies and consolidates problematic rape hierarchies (that are all too familiar in domestic settings) and as such may serve to reinforce rape myths and marginalise victims further by calling them to account for their injury and victimisation (Schabas, 2003).

#### 4. Justice for victims

During the conferences that led to the creation of the International Crime Court (Schabas, 2000), much debate arose over the appropriate restitution that should be granted to victims mainly because similar provisions of the Statutes and Rules of the ICTY and the ICTR (International Criminal Tribunal for Rwanda) were deemed ineffective. The Statutes of the ICTs (International Criminal Tribunals) provide that the Trial Chambers could order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners (Dixon et al., 2002). Likewise, the Rules of Procedure and Evidence of the ICTs provide for the restitution of property and state that the judgment finding the accused guilty of a crime which has caused injury to a victim must be transmitted to the competent authorities of the states concerned so that the victims can bring an action in a national court or other competent body to endeavor to obtain economic compensation (Dixon et al., 2002). Regrettably, neither International Criminal Tribunal has addressed or ordered either form of reparation. “In any event, these rules fall well short of providing reparations or establishing a compensation scheme”, - in the event of rape, compensation is even more difficult to quantify. Furthermore, the rules provide an opening for future movement, but nothing more. Luckily, this slight opening

was sufficient to help create tremendous debate over such schemes during the ICC debates. The ICTR Registry has thus begun to explore the idea of establishing a trust fund “to provide financial support to programs, primarily operated by non-governmental organizations and other institutions, which would assist victims.” This concept was further explored during the creation of the ICC. The permanent ICC was created as a deterrent to impunity, as a means towards eliminating the world’s most horrendous crimes and as instrumentality to redress the victims of genocide. The ICC is expected to function as an independent, impartial, just and effective, permanent judicial institution and to stand as a monument to the struggles of the past. Admittedly, these are ambitious aims. Particularly since the wars in Rwanda (Dixon, 1997) and the Former Yugoslavia (Calvetti and Scovazzi, 2007) and the more recent events in Sierra Leone (Kenn, 2005) and Kosovo (Mischkowski and Mlinarevic, 2009) underscore that genocide has become a growth industry (De Waal, 2010). Yet in what surely is a testament to the fortitude of human nature, the world’s nations have banded together to embrace these goals.

Unlike the Statutes and Rules of the ICTs, the Rome Statute for an International Criminal Court consistently underscores the fact that one of the ICC’s primary purposes is to protect and vindicate the victims of genocide. For example, discussing the functions and powers of the Trial Chamber, the Rome Statute states that trials must be “conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” Furthermore, “[w]here the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, particularly in the interests of the victims, the Trial Chamber may ... request the Prosecutor present additional evidence ... [and may order] that the trial be continued” even after an admission of guilt by the accused. These procedures might offer the satisfaction and guarantees of non-repetition required by the van Boven Principles by providing a “public acknowledgment of the facts and acceptance of responsibility.” ‘References to victims’ interests can also be seen in less obvious contexts. Article 36 of the Rome Statute, which deals with the qualifications, nomination and election of judges, stresses that states “shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children.” This reference to women and children emphasizes the growing understanding of the various types of sensitivities that must be addressed when examining victimization (Grewal, 2012). Nonetheless, there is an implicit albeit not explicit acknowledgment that rape can be experienced by men and that rape might not be the only crime of violence committed during genocide. With regard to compensation, the Rome Statute handled the issue by incorporating theories from the Victims Declaration and the van Boven Principles. Building from the emerging idea of utilizing trust funds to assist victims, the Rome Statute also provides for a trust fund to be established “for the benefit of victims of crimes within the jurisdiction of the Court, and the families of

such victims.” Furthermore, under the Rome Statute, the ICC has the discretion to order money and other property collected by the ICC through fines or forfeiture to be transferred to that trust fund. The Rome Statute does not detail how the trust fund should be managed, but instead leaves that determination to the states that are parties to the Rome Statute. This shift of burden allows more research to be undertaken to determine the best manner to incorporate the needs of victims and the cooperation of states into such compensatory schemes. Clearly such endeavor could be successful only when there is a legal and intellectual departure from the notion of the authentic victim.

Besides a trust fund, the Rome Statute also authorizes the ICC to award reparations to, or in respect of, the victims of genocide. The ICC defines the term reparations in light of the Victims Declaration and the van Boven Principles, using the language of restitution, compensation and rehabilitation. The ICC however is not empowered to order states to award reparations to victims. The ICC may, however, make the order “directly against a convicted person” and states that are parties to the Rome Statute are required to cooperate in collecting such awards. Furthermore, when appropriate, the ICC can order that the reparations are made through the trust funds. It is regrettable that the ICC will not be empowered with the ability to order that the states themselves make reparations to victims, since states could be in a much better position than individuals to make such offers. It became evident during the U.N. Preparatory Committee Meetings, however, that this ICC was meant solely to prosecute individuals and, thus, any power to enforce awards of reparations against states would threaten not only the sovereignty of the concerned states, but also their support for the creation of the ICC. The fact, however, that reparations were accepted into the Rome Statute of the ICC at all and that language relating to victims was laced throughout the statute, was still a major advancement for the consideration of the plight of victims in the international arena. Such legal framework paves the way for the introduction of a model that takes into consideration collective victimization in genocide. The ultimate aim being the dismantlement of the hierarchy of victims. The claim here is for civil society as a whole to be considered as a victim of genocide (Policek, 2012).

## 5. Dismantling the hierarchical model: collective victimization in genocide

In addition to various forms of direct violence in genocide, with rape being the most recognised crime, collective victimization too can entail structural violence, meaning the unequal distribution of power and resources between groups thus preventing people from being able to meet basic needs (Mamdani, 2009). Thus, collective victimization resulting from either structural or direct violence can have severely detrimental effects on material and physical well-being as well as on psychological well-being and mental health of groups and populations affected by genocide (Pas-

coe and Smart Richman, 2009). Moreover, the detrimental effects on mental health, such as posttraumatic stress disorder, can even be transmitted through generations (Wohl and Van Bavel, 2011), hence the claim that collective victimization in genocide should be fully acknowledged. It is important to distinguish between objective instances of collective victimization, for example assessing exposure to violence, and how individuals subjectively perceive them. The subjective sense of collective victimization is referred to as collective victimhood, which may even be held by group members who are separated by generations from the historical victimization events (Vollhardt, 2012). Subjective perceptions of collective victimhood vary individually and shape the impact of collective victimization on psychological well-being. In recent years, there has been increased interest in the consequences of collective victimhood in genocide (Vollhardt, 2012). Most of this research has also focused on detrimental effects. More research has focused on collective victimhood in the context of genocide or in the aftermath of genocide, with the intent to dismantle the hierarchy of victimization in genocide. To this extent, victimized groups who thought that their group has suffered more than other groups in genocide (competitive victimhood) were also less likely to express willingness to forgive the other side. Genocide victims who endorsed a greater sense of collective victimhood were also less open to new information about their victimization during and after genocide and less willing to compromise (Halperin et al., 2008). Moreover, correlational studies (Schori-Eyal et al., 2014) and experimental studies (Wohl and Branscombe, 2008) show that awareness of historical genocide victimization can increase conflict-exacerbating attitudes (such as feeling less collective guilt for harmdoing against different groups or supporting military actions) in the presence, in a seemingly unrelated context. There can even be effects on the wider society relations more generally. Because of the potential severity of these problems, it is perhaps not surprising that this has been the focus of research and policy concerns related to collective victimhood (Oosterveld, 2012).

The most common mode of thinking about collective victimhood involve victims’ focus on how their group has suffered indistinct and unique ways, which can be referred to as exclusive victim consciousness. Within this category, there are several different kinds of victim beliefs further reinforced by the legitimization offered by the legal framework that, as already stated, supports a hierarchy of victims. While exclusive victim beliefs can refer to a specific conflict and comparisons with the other conflict party/ies - i.e., conflict-specific exclusive victim consciousness such as in the instance of women raped during genocide -, other exclusive victim beliefs compare their group’s victimization more generally to other victim groups - i.e., general exclusive victim consciousness (Bilali et al., 2016). A common form of genocide-specific exclusive victim consciousness is competitive victimhood: when group members claim to have suffered more than the other party (Noor et al., 2008). Other forms of genocide-specific exclusive victim con-

consciousness do not involve direct comparisons with other groups or competition over the victim status, but still focus exclusively on how a specific group has been victimized during genocide (Schori-Eyal et al., 2014). An important question is whether these two forms of genocide-specific exclusive victim consciousness – competitive versus non-competitive – are separate or whether they always go hand in hand. One example of general exclusive victim consciousness is siege mentality, the belief that for example, all women will be victims of rape during genocide. General exclusive victim consciousness can also be competitive in nature, for example, when group members claim that their group's victimization is unparalleled in world history.

In contrast to the exclusive understanding of victimization, there are perceived similarity between the suffering of one's own group and other groups, which could be described as inclusive victim consciousness (Bilali et al., 2016). Conceptually related to the idea of general inclusive victim consciousness are two other lessons stemming from the experience of the Holocaust, namely to "never be a perpetrator" and to "never be a passive bystander" (Cohen, 2001). The former involves the moral obligation not to harm other human beings, even if they are rivals or enemies. This can nevertheless be considered as general rather than genocide-specific because it links across different historical events and socio-political contexts, rather than focusing on the similarities of suffering between two parties. The lesson to never be a passive bystander is more general and links victimised group's past experiences to other atrocities and group-based violence throughout the world (such as refugees in present-day genocides). Again, here we could witness the opening for a claim that civil society, as a whole, is a victim of genocide and, consequently, the assertion that international criminal law does not account for all the victims of genocide acquires more depth. Here as well, the argumentation that the international criminal law creates and reinforces a hierarchy of victims is further supported.

## Conclusion

The promises of justice for all victims of genocide, as imbedded in the work of international criminal law, call out an enlightened, progressive moral force that has the power to vindicate victims, prosecute villains and end impunity for these egregious crimes. While the inclusion of rape and other forms of sexual violence could be certainly be seen as a victory for victim vindication, an end to impunity and an albeit extremely limited (and arguably impossible) way to ensure that these crimes do not happen again, this contribution has questioned the ascendancy of rape as a crime against humanity as the producer of a range of unintended consequences for both victim and perpetrator subjectivity and agency. The increasing criminalisation of genocide rape at the international level no doubt points to the inherent but intractable dilemma of hierarchy arguments and the incredible power of law to pronounce meaning, demarcate the gravity of crimes and silence alternative stories. A balance must be struck, however, between seeing law as a venerable arbiter of

atrocities on the one hand and seeing law as the ultimate expression of imperialism and violence on the other hand (Henry, 2013). Such an approach is about embracing a modest, as opposed to a cynical, approach to international criminal law (Booth and du Plessis, 2005), and appreciating both the limits and potential of this form of justice. To conclude, when considering the practices of justice for genocide victims is imperative to ensure that gendered harms are thoroughly investigated, prosecuted and recognised. Consequently, first and foremost is important to make sure that the fiction of the authentic victim subject is deconstructed, and that more nuanced and unconventional narratives are also heard and validated. The substantive problems associated with the prosecution of sexual violence crimes should be investigated and remedied as much as possible, whilst arguments about what constitutes the worst crime, including what kinds of rape are worse than others, are to be actively avoided (Policek, 2011). The definition of the victim of genocide should be revised so that victims are not simply reduced to a sexed, injured and incapacitated body but are instead recognised, represented and respected as complex and diverse agents with differing justice needs. These reminders are equally important for researchers of both domestic and genocide sexual violence.

Atrocities committed on a large scale as in the case of genocide, can be prevented through constant and rigorous involvement of civil society (Schabas, 2000). It is therefore important to highlight that, through education and information, the victims of genocide are not only women, men, and children who have experienced first-hand the trauma of physical and psychological violence, but civil society as a whole (Policek, 2012). It is therefore necessary to use a more holistic approach in broadening the definition of a victim of genocide. The call here is for a criminal justice that is able to transform itself into global justice (Kurasawa, 2007), not a kind of universal justice but a justice that takes into account how the moral imperative of our time must be directed towards the prevention of genocide. Civil society is always a victim of genocide for at least two distinct reasons. From a practical point of view, almost in the literal terms, civil society is a victim of genocide, and as such it should be in a position to see this status recognized, whenever the existence of entire groups of people is threatened. The possibility that civil society is identified as the victim, in proceedings against those who are guilty of genocide, involves the formal recognition that the whole society has in fact suffered physical and psychological injuries and harm. Economic damages are side effects of genocide, and practices of justice should consider the financial burden of setting up mediation, rehabilitation, education and prevention programs. There is also the economic damage that victimised groups, as witnesses and victims of the atrocities of genocide, suffer: the annihilation of groups that make up the workforce of a nation, for example, or the cost associated with rebuilding nation states affected by genocide. From a strategic point of view, it is only when civil society is given the status of victim, that human and economic resources are used for the purposes of prevention. Preventing



genocide is possible if the prerequisites are clearly identified: education for peace and non-violence are not to be considered simply a marginal topics curriculum, but pillars of any nation founded on the principles of legality. The responsibility of civil society once acquired the knowledge that the entire community is the victim of acts of genocide, it is to make sure that through the mass media, government bodies and local institutions, prevention programs can be implemented.

Criminology as an academic discipline should engage in testimonial labour in response to genocide (Moon, 2011). Too often, the tapestry which makes up criminology, is characterised by governmental evidence and policy led research used to legitimate the definition of certain key terms (Hillyard et al. 2004), thus not making space for mass atrocities, almost restraining criminology to sit at the edge of a mass grave. The task of criminology as bearing witness to genocide is constituted through its confrontations with a host of perils constantly threatening to submerge it: silence, incomprehension, indifference, forgetting and repetition (Cohen, 2001; Moon, 2011). By way of a publicly framed dialogical process that often crosses socio-cultural and territorial borders, the two parties engaged in testimonial labour – criminology as an academic discipline and its audience of scholars, politicians and civil society – are enacting a pattern of social action composed of the task of speaking out and listening, representing and interpreting, preventing and often, when remembering past and current mass atrocities, creating empathy.

## References

- Aoláin, F. N. (2006). Political violence and gender during times of transition. *Columbia Journal of Gender and Law* 15: 829–849.
- Askin, K. D. (2003). Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles. *Berkeley Journal of International Law* 21(1): 288–349.
- Bilali, R., Vollhardt, J. R. and Rarick, J. R. D. (2016). Assessing the impact of a media based intervention to prevent intergroup violence and promote positive intergroup relations in Burundi. *Journal of Community & Applied Social Psychology*, 26(3), 221–235.
- Boltanski, L. (1999). *Distant Suffering: Morality, Media and Politics*, Cambridge: Cambridge University Press.
- Booth, C. and du Plessis, M. (2005). The international criminal court and victims of sexual violence. *South African Journal of Criminal Justice* 18(3): 241–258.
- Brienen, M. E. I. and Hoegen, E. H. (2000). Victims of crime in 22 European Criminal Justice Systems, The Netherlands.
- Buss, D. E. (2007). The curious visibility of wartime rape: Gender and ethnicity in international criminal law. *Windsor Year Book of Access to Justice* 25(1): 3–22.
- Buss, D. E. (2009). Rethinking ‘rape as a weapon of war’. *Feminist Legal Studies* 17: 145–163.
- Calvetti, G. and Scovazzi, T. (2007). Il Tribunale per la ex Jugoslavia: l’attività svolta e il suo prossimo scioglimento, Milano, Giuffrè.
- Carpenter, R. C. (2006). Recognizing gender-based violence against civilian men and boys in conflict situations. *Security Dialogue* 37(1): 83–103.
- Carthy, N., Bates, E. and Policek, N. (2019). Promoting inclusivity in intimate partner abuse research: Exploring gender and age. *Partner Abuse*.
- Charlesworth, H. and Chinkin, C. (1993). The gender of jus cogens. *Human Rights Quarterly* 15(1): 63–76.
- Christie, N. (1986). “The ideal victim” in Fattah, E. (ed), *From Crime Policy to Victim Policy*, Basingstoke: Macmillan, 17–30.
- Cohen, S. (2001). *States of Denial: Knowing about Atrocities and Suffering*, Cambridge: Polity Press.
- Day, E. L. and Vandiver, M. (2000). Criminology and genocide studies: Notes on what might have been and what still could be, in *Crime, Law & Social Change* 34: 43–59.
- de Alwis, M. (2010). The ‘apparition of rape’ and the ‘sisterhood’ of international feminists. In: *Reimagining gender and politics: Transnational feminist interventions*, Frankfurt: Goethe University.
- de Brouwer, A. M. (2009). What the international criminal court has achieved and can achieve for victims/survivors of sexual violence. *International Review of Victimology* 16(2): 183–209.
- de Guzman, M. M. (2012). An expressive rationale for the thematic prosecution of sex crimes. In: Bergsmo M (ed) *Thematic Prosecution of International Sex Crimes*. Beijing, China: Torkel Opsahl Academic Epublisher, pp. 11–44.
- De Waal, A. (2010). The Humanitarians Tragedy: Escapable and Inescapable Cruelties, in *Disasters* 34(s2): 130–7.
- Dixon R., et al. (eds.) (2002). *Archbold: International Criminal Courts: Practice, Procedure and Evidence*, London, Sweet & Maxwell.
- Dixon, R. (1997). Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals, in *Transnat’l L. & Contemp. Probs*.
- Douglas, L. (2001). *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*. New Haven, CT: Yale University Press.
- Drumbl, M. A. (2007). *Atrocity, Punishment, and International Law*. Cambridge, UK; New York, NY: Cambridge University Press.
- Estrich, S. (1987). *Real Rape*. Cambridge, MA: Harvard University Press.
- Fein, H. (1979). Accounting for Genocide: National Responses and Jewish Victimization during the Holocaust, New York.
- Gaynor, F. and Harmon, M. (2004). Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings, in *JICJ*, p. 403 ss.
- Grewal, K. (2012). The protection of sexual autonomy under international criminal law: The International Criminal Court and the challenge of defining rape. *International Criminal Justice* 10(2): 373–396.
- Hagan, J. and Kaiser, J. (2011). The Displaced and Dispossessed of Darfur: Explaining the Sources of a Contin-

- uing State-led Genocide, in *British Journal of Sociology*, 62(1):1–25.
- Hagan, J. and Raymond-Richmond, W. (2009). Criminology confronts genocide: whose side are you on?, *Theoretical Criminology* 13(4):503–11.
- Hall, M. (2012). *Victims and policy-making: a comparative perspective*. Abingdon e New York: Willan Publishing.
- Halley, J. (2008a). Rape in Berlin: Reconsidering the criminalisation of rape in the international law of armed conflict. *Melbourne Journal of International Law* 9(1): 78–124.
- Halley, J. (2008b). Rape at Rome: Feminist interventions in the criminalization of sex-related violence in positive international criminal law. *Michigan Journal of International Law* 30(1): 1–123.
- Halley, J., Kotiswaran, P., Shamir, H. and Thomas, C. (2006). From the international to the local in feminist legal responses to rape, prostitution/sex work, and sex trafficking: Four studies in contemporary governance feminism. *Harvard Journal of Law and Gender* 29(2): 335–423.
- Halperin, E., Bar-Tal, D., Nets-Zehngut, R. and Drori, E. (2008). Emotions in conflict: Correlates of fear and hope in the Israeli-Jewish society. *Peace and Conflict: Journal of Peace Psychology*, 14, 233–258.
- Henry, N. (2013). Memory of an injustice: The ‘comfort women’ and the legacy of the Tokyo Trial. *Asian Studies Review*. 37(3):262–380.
- Hillyard, P., Sim, J., Tombs, S. and Whyte, D. (2004). Leaving a ‘Stain upon the silence’. *Contemporary criminology and the politics of dissent*, in *British Journal of Criminology*, (44), 369–390.
- Horowitz, I. L. (1997). *Taking Lives: Genocide and State Power*, New Brunswick, N. J.: Transaction Publishers.
- Jamieson, R. and McEvoy, K. (2005). State Crime by Proxy and Juridical Othering, in *British Journal of Criminology*, 45, 4:504–527.
- Jones, A. (1994). Gender and ethnic conflict in ex-Yugoslavia. *Ethnic and Racial Studies* 17(1): 115–134.
- Keen, D. (2005). *Conflict and collusion in Sierra Leone*. James Currey (imprint of Boydell & Brewer Ltd.).
- Koskeniemi M. (2002). “Between Impunity and Show Trials” *Max Planck UNYB*, 6:1–36.
- Kuper, L. (1985). *The Prevention of Genocide*, New Haven, Connecticut: Yale University Press.
- Kurasawa, F. (2007). *The Work of Global Justice. Human Rights as Practices*. Cambridge: Cambridge University Press.
- MacKinnon, C. A. (2006). Defining rape internationally: A comment on *Akayesu*. *Columbia Journal of Transnational Law* 44(3): 940–958.
- Mamdani, M. (2009). *Saviours and Survivors: Darfur, Politics and the War on Terror*, London: Verso.
- Marcus, S. (1992). Fighting bodies, fighting words: A theory and politics of rape prevention. In: Butler J and Scott J (eds) *Feminists Theorize the Political*. New York, NY: Routledge, pp. 385–403.
- Mardorossian, C. M. (2002). Toward a new feminist theory of rape. *Signs* 27(3): 743–775.
- Mibenge, C. (2010). Investigating outcomes of a limited gender analysis of enslavement in post-conflict justice processes. *Journal of Peacebuilding and Development* 5(3): 34–46.
- Mischkowski, G. and Mlinarevic, G. (2009) ‘... and that it does not happen to anyone anywhere in the world’: The trouble with rape trials – views of witnesses, prosecutors and judges on prosecuting sexualised violence during the war in the former Yugoslavia. Report for *Medica Mondiale*, December.
- Mitchell, D. S. (2005). The prohibition of rape in international humanitarian law as a norm of *jus cogens*: Clarifying the doctrine. *Duke Journal of Comparative and International Law* 15(2): 219–257.
- Moon, C. (2011). The crime of crimes and the crime of criminology: genocide, criminology and Darfur, in *The British Journal of Sociology*. 62, 1:49–55.
- Neier, A. (1998). *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*. New York, NY: Times Books.
- Nikolic-Ristanovic, V. (1999). Sexual violence. in: Nikolic-Ristanovic V (ed) *Women, Violence and War: Wartime Victimization of Refugees in the Balkans*. Budapest, Hungary: Central European University Press, pp. 41–77.
- Noor, M., Brown, R., Gonzalez, R., Manzi, J. and Lewis, C. A. (2008). On positive psychological outcomes: What helps groups with a history of conflict to forgive and reconcile with each other? *Personality and Social Psychology Bulletin*, 34, 819–832.
- Oosterveld, V. (2012). Contextualising sexual violence in the prosecution of international crimes. In: Bergsmo M (ed) *Thematic Prosecution of International Sex Crimes*. Beijing, China: Torkel Opsahl Academic Epublisher, pp. 189–232.
- Pascoe, E. A. and Smart Richman, L. (2009). Perceived discrimination and health: a meta-analytic review. *Psychological bulletin*, 135(4), 531.
- Policek, N. (2011). Editorial. The Occurrence of Rape. Trauma of Rape. *Edinburgh, Saraswati Project Newsletter*, pp. 1–3.
- Policek, N. (2012). Le vittime di genocidio e i dilemmi delle promesse di giustizia. *Rivista di Criminologia, Vittimologia e Sicurezza*, Vol. VI – N. 3.
- Quijano, A. A. (2012). Science and international thematic prosecution of sex crimes: A tale of re-essentialisation. In: Bergsmo M. (ed) *Thematic Prosecution of International Sex Crimes*. Beijing, China: Torkel Opsahl Academic Epublisher, pp. 251–290.
- Reyntjens, F. (2004). Rwanda, Ten Years On. From Genocide to Dictatorship, in *African Affairs*, pp. 177–210.
- Schabas, W. (2000). *Genocide in International Law. The Crime of Crimes*. Cambridge: Cambridge University Press.
- Schabas, W. (2003). National Courts Finally Begin to Prosecute the ‘Crime of Crimes’, *Journal of International Criminal Justice*, pp. 39–63.
- Schori Eyal, N., Halperin, E. and Bar Tal, D. (2014). Three layers of collective victimhood: effects of multileveled victimhood on intergroup conflicts in the Israeli–Arab context. *Journal of Applied Social Psychology*, 44(12), 778–

- 794.
- Sharratt, S. (2011). *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals*. Farnham, UK: Ashgate Publishing.
- Soh, C. S. (2008). *The Comfort Women: Sexual Violence and Postcolonial Memory in Korea and Japan*. Chicago, IL; London, UK: The University of Chicago Press.
- Tolbert, D. (2002). The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, in FletFWA, p. 13 e ss.
- Vollhardt, J. R. (2012). Collective victimization. *Oxford handbook of intergroup conflict*, 136-157.
- Wohl, M. J. and Branscombe, N. R. (2008). Remembering historical victimization: collective guilt for current in-group transgressions. *Journal of personality and social psychology*, 94(6), 988.
- Wohl, M. J. and Van Bavel, J. J. (2011). Is identifying with a historically victimized group good or bad for your health? Transgenerational post traumatic stress and collective victimization. *European Journal of Social Psychology*, 41(7), 818-824.
- Yacoubian, G. S. (2000). The (In)significance of Genocidal Behavior to the Discipline of Criminology, in *Crime, Law and Social Change*. 34,1: 7-19.