

THE POLITICS AND POSSIBILITIES OF VICTIM-MAKING IN INTERNATIONAL LAW

AS POLÍTICAS E POSSIBILIDADES DA “CONSTRUÇÃO DE VÍTIMAS” NO DIREITO INTERNACIONAL

*Kristin Bergtora Sandvik**

ABSTRACT

The need to deal with the human consequences of conflict and violence remains a key challenge in global governance. As a result human experiences of suffering have become core concerns for international law in the aftermath of the Second World War. Imageries of human suffering have also become central to the idea of universalized justice which finds its particular expression in the areas of human rights, humanitarianism and international criminal law. Since the early 1990s, a proliferating number of international and national tribunals, commissions and administrative entities have been created to deal with the need for legal protection for displaced individuals, transitional justice, and restoration and allocation of criminal responsibility in the aftermath of internal and international conflict. Through a conceptual inquiry of how victim statuses are produced and allocated in international law, this paper aims to contribute to a richer socio-legal understanding of the role of law in victim-making in global governance.

Keywords: Global legal liberalism; Victims; Transitional justice; Human rights; International humanitarian law; International criminal law; Narratives of suffering; Testimony.

RESUMO

A necessidade de se enfrentar as consequências humanas de conflitos e violência segue sendo um desafio à governança global. Como resultado, as experiências humanas de sofrimento se tornaram preocupações centrais do Direito Internacional na sequência da Segunda Guerra Mundial. Imaginários de sofrimento humano também se tornaram centrais à ideia de justiça universal que encontra particular expressão nas áreas de direitos humanos, humanitarismo e Direito Internacional Penal. Desde o início dos anos de 1990, foi criado um número que cresce constantemente de

* Senior Researcher em Peace Research Institute Oslo. Doutora por Harvard. Vínculo: Peace Research Institute Oslo. Correspondência para/Correspondence to: PRIO PO Box 9229 Grønland, NO-0134 Oslo Norway. E-mail: bergtora@prio.no.

tribunais, comissões e órgãos administrativos nacionais para tratar da necessidade de proteção legal para pessoas deslocadas, justiça transicional, e restauração e imputação de responsabilidade criminal na sequência de conflitos internos e internacionais. A partir de um questionamento conceitual sobre como o status de vítimas é produzido e imputado pelo Direito Internacional, este artigo busca contribuir para uma compreensão sociolegal mais rica do papel do Direito na “construção” de vítimas na governança global.

Palavras-Chave: Liberalismo legal global; Vítimas; Justiça transicional; Direitos humanos; Direito Internacional Humanitário; Direito Internacional Penal; Narrativas de sofrimento; Testemunhos.

INTRODUCTION

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Through a conceptual inquiry of how victim statuses are produced and allocated in international law, this paper aims to contribute to a richer socio-legal understanding of the role of law in victim-making in global governance. Premised on the liberal aspiration towards universal justice, the need to deal with the human consequences of conflict and violence remains a key challenge in global governance. As a result human experiences of suffering have become core concerns for international law in the aftermath of the Second World War. Imageries of human suffering have also become central to the idea of universalized justice which finds its particular expression in the areas of human rights, humanitarianism and international criminal law. Since the early 1990s, a proliferating number of international and national tribunals, commissions and administrative entities have been created to deal with the need for legal protection for displaced individuals, transitional justice, and restoration and allocation of criminal responsibility in the aftermath of internal and international conflict.

The victim is a driving engine in international human rights scholarship. While subfields in this scholarship deal with the sociality of integrity violations and suffering, and some attention has been given to the processes of othering underpinning the legal framing of the victim and the politics of appropriating these tragic stories, a better conceptual grasp of cross-cutting issues is required. In this paper, I suggest that following the explosion of human rights as an academic field in the early 1990s, mainstream human rights scholarship has been characterized by a propensity to focus on *gaps* between formal law and operational effectiveness, at the expense of a more critical approach to the efficacy of the human rights/humanitarian infrastructure. Instead of investigating how this structure produces and legitimates truth-claims, scholars focus on norm refinement (Evans 2005). In recent years, these methodological concerns –and the insufficient attention given to them– have become relevant challenges for the burgeoning scholarship on international humanitarian law (Modirzadeh 2010) and international criminal law.

The previous decade saw the emergence of a rich and evolving body of socio-legal scholarship on how international law is produced, received and mediated on the ground. Emphasizing the importance of approaching international law from “below” (Rajagopal 2003), this scholarship was often highly critical of the workings of power in global governance. However, while applying such labels as “global legal liberalism”, “global legal reformism” or “global moralism” (Merry 2006), critically minded commentators also recognized the rise of the victim in international law development as a good thing: it helped making marginal identities visible and universally recognized, uncovered biases and identified silences produced by a state-oriented, Eurocentric international legal system. In this paper I argue that to push these insights further, more attention needs to be paid to the *processes* through which international law produces victim-categories, and about how these processes link with the larger idea of universal justice.

Taking these insights as the starting point, the ambition of this paper is to map out a critical taxonomy of the ways in which victims and experiences of suffering are presently being constituted by international law. I hope to provide a starting point for the discussing questions such as: Through which identities is recognition of suffering allocated across the various institutions and instruments of international law? How do such categories emerge and how do they travel? What is the extent to which these developments are driven by *shared* assumptions about victimhood and human misery? How can we think critically about the notion of liberal progress that surrounds the expansion of victim identities: for example, is there an on-going displacement of “the legal” in the making of international norms and what are their implications for the legitimacy of a “universal justice” project?

The first part of the paper lays out a background context, describing three broader developments in international law that underpins the notion of “universal justice”. This includes the so-called “humanization of international law”, the idea of a convergence between international human rights law and humanitarian law and the rise of transitional justice. The second part, consisting of eight subsections, explores developments and critical debates in victim making. This part considers the growth of victim categories in international law, the professionalization of “victim-makers”, the professionalization of “victim-makers”, the changing sites of victim claiming, and how norm production in international law has shifted towards international organizations and soft legalization. The paper then discusses the rise of universal identities of suffering, and the ascendancy of the personal testimony premised on globalized imageries of suffering. The paper then attempts to bring these discussions together in an innovative conceptual critique of how victim making may also produce “costs” to universal justice.

THE BACKGROUND CONTEXT OF INTERNATIONAL LAW

This section sketches out the humanization of international law, the convergence between international human rights law and humanitarian law and the rise of transitional justice. Together, these legal developments shape the idea of universal justice, as envisioned in the global legal liberalism which rests on the belief in the transformatory potential of judicial mechanisms and of law reforms.

In an influential article from 2000, Theodor Meron suggests that the influence of human rights and humanitarian law on general international law has resulted in the humanization of international law. This process has meant a fostering of accountability; and innovations in the formation, formulation, and interpretation of rules. Meron argues that human rights and humanitarian law have had a “radiation” effect, a “reforming effect” on other fields of public international law (Meron 2000; 2006). A similar perspective is expressed in the writings of Ruti Teitel, who proposes that humanitarian law through its merger with international human rights law has created an emergent *humanity’s law*. Teitel sees humanity’s law as interpretive practice, capable of revealing common and entwined elements in debates about the law (Teitel 2002; 2008).

A second important development is the notion the ongoing doctrinal convergence between human rights and humanitarian law. At the outset (around 1945), human rights and humanitarian law were systematically treated as two separate branches of public international law that should be interpreted in isolation from each other. Over the past decade, debate on the relationship between these two bodies of law has assumed a central position in discussions of international law as lawmaking, case law, and legal policy, accompanied by a burgeoning legal literature, have brought about a gradual doctrinal support for the convergence between human rights and humanitarian law. Meron explains the move towards convergence was a direct response to growing social consensus on the need to “humanize” war, which had emerged as a result of the “calamitous events and atrocities” of the 1990s, coupled with “the media’s rapid sensitization of public opinion, which reduced the time between commission of the tragedies and responses by the international community” (Meron 2000, 243). Shared among most commentators in this debate, is a vision of convergence as a unique narrative of progress which is desirable for human rights and humanitarian law, or both, capable of making armed conflict and occupation more human. However, the implications of this rapprochement remain unclear (Modirzadeh 2010). In a parallel development, there is an ongoing (but much less developed) process of tripartite co-application between human rights, humanitarian law and international criminal law. As noted by Cryer (2009), this interrelationship is not simple, and claims of unity should be treated with some skepticism.

The third pillar of the universal justice-model is transitional justice. According to Ruti Teitel’s definition, transitional justice is a conception of justice

associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes (Teitel 2006). As such, transitional justice is not a coherent, cosmopolitan project, but rather a bundle of approaches to the social, political and cultural challenge of making the transition between war and peace, where the academic definitions and statement of objectives vary between authors. McEvoy and McGregor identify two phases in the development of transitional justice since WWII. The first phase involved familiar quasi-legal institutions such as war crime trials and sanctions. The focus was on targeting individuals and holding them accountable for their actions by legal means, with the Nuremberg trials as the paradigm example. The second phase was marked by truth commissions such as those utilized in Latin America and South Africa in the late 1980s and early 1990s. These commissions were concerned less with individual accountability and more with healing, social cohesion, and reconciliation, often involving traditional legal dispute resolution and the granting of blanket amnesties for individual wrongdoers. These two phases produced two meta-models of transitional justice: the trial court model and the truth and reconciliation commission model (McEvoy and McGregor 2008).

In the 1990s and early 2000s, much of the writing on transitional justice fell within the second model. In her seminal work on the role of vengeance and forgiveness in transitional justice, Martha Minow argued that in addition to truth and justice, reconciliation must be seen as a key component of transitional justice. Teitel suggests that geared towards the theoretical re-constitution of the state and practical re-integration of disenfranchised or unruly groups, transitional justice is one way of giving at least symbolic citizenship to muted groups through a broadly negotiated settlement of the past and present of social arrangements (Teitel 2002/3:70). In response to these influential normative approaches, a body of critical scholarship has emerged, which explores the expansion of victim categories over time (García-Godos & Lid 2010), and the consequences of the proliferation of “transitional justice entrepreneurs” (Madlingozi 2010). Finally, since the late 1990s, a “new international regime of individual criminal accountability” (Subotic 2011) has reinvigorated the trial court mode of transitional justice described above.

THE GROWTH OF INDIVIDUAL AND COLLECTIVE CATEGORIES OF VICTIMS

The past decades have witnessed the emergence and consolidation of a host of individual and collective “victim” identities, through treaty-based lawmaking, soft law arrangements, adjudicative practices and judicial proceedings. Significant to this development are two outcomes of the humanization of international law described in the previous section: the notion of a convergence between international human rights law and international humanitarian law, and the emergent idea of interpretive and normative unity between human rights, humanitarian

law and international criminal law. In the following, the paper outlines six categories of victims articulated around this tripartite interface.

First, the UN has made extensive efforts to provide soft law codifications of “victims”, targeting domestic criminal laws and later based on international human rights and humanitarian law violations. The *1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* defined as a victim individuals and collectivities who *have suffered* harm, including physical and 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, including those laws proscribing criminal abuse of power. Included in the definition is the immediate family and dependents, in addition to those who have suffered as a result of their attempt to assist the victim or prevent victimization. Adopted twenty years later, the *2005 UN 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* protects victims harmed through acts or omissions that reaches the threshold of gross violations of human rights law, or serious violations of humanitarian law (for a discussion, see Zwanenburg 2006).

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Second, emphasis has been put on formalizing individual agency as intrinsic to the legitimacy of global legal liberalism. As explained above, building on the lessons from Nuremberg, a broad reactivation of international criminal law began to take place in the early-mid 1990s. To allocate individual responsibility for atrocities, the international community summons victims to testify in front of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda, the Special court for Sierra Leone, and the International Criminal Court. As the tribunals for Rwanda and Yugoslavia attempted to put proper emphasis on witness accounts in their proceedings in the 1990s, the outcome was often feelings of disempowerment and factual increases in the security problems faced by individual victims (Nowrojee 2005). Attempting to remedy formal and practical shortcomings, espousing a broad definition of victims, the *1998 Rome Statute of the International Criminal Court*, and the *2002 ICC Rules of Procedure and Evidence* enshrined groundbreaking provisions with respect to victims’ rights to participation, protection and reparation (Gioia 2007). In the Rome statute, for the first time, victims have been granted the right to representation. Article 68(3) gives victims the right to participate in all stages of the proceedings determined to be appropriate by the Court. Pursuant to Procedural Rule 16(b), victims are also to be assisted in obtaining legal advice by the Registrar.

Third, there has been a forging of a connection between individual and collective victim identities, and access to resources, both in transitional justice (García-Godos 2008) and in international criminal law (Megret 2009). Article 75 of the Rome statute provides reparations upon the conviction of an individual before the Court. Article 79 (2) of the Rome statute establishes a Trust Fund for

making financial reparations to victims and their families. The Rules of Procedure 98 state that these will be in the form of physical or psychological reparations, or material support. According to the 2005 *Regulations of the Trust Fund for Victims*, the Trust Fund is mandated to focus on two aspects of situations where the prosecutor has opened investigations. The Trust Fund will support the court in the implementation of reparations awards, but will also assist victims in areas under the jurisdiction of the Court *without* any link to the alleged crimes or suspects/perpetrators and at *any* stage of the proceedings. While advocates suggest that the Trust Fund should “take full advantage of its legal freedom by engaging in reparative projects” to benefit victims not reached by the provisions of article 75” (Dannenbaum 2010), this extremely wide mandate raises important questions about which ideas of victimization and insecurity that will form the basis for the distribution of resources.

Fourth, there is an evolving recognition of “indirect victims” in international human rights law and in international criminal law. In the Thomas Lubanga case, the ICC Trial Chamber decided that “people” eligible for participation can “be the direct or indirect victims of a crime within the jurisdiction of the Court”.¹ Indirect victims are those who suffer harm as a result of the harm suffered by direct victims, and they must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them. However, as decided by the Appeals chamber, the harm must be “personal”: Close personal relationships, such as those between parents and children, are a precondition for participation by indirect victims.²

Fifth, spearheaded by NGO’s and international lawyers, there is an evolving legal understanding of *intermediaries* as individuals in need of protection under international criminal law, due to their role as go-betweens for the ICC, victims and witnesses. This role frequently puts intermediaries in danger and strains their finances and resources. Yet, there is no definition of ‘intermediary’ in the Rome Statute or in the Rules of Procedure and Evidence; hence intermediaries receive no protection or financial assistance from the court. The expert coalition VRWG (Victims Rights Working Group) understands the term ‘intermediary’ to include local NGOs or grassroots associations, individuals or any other associations or groupings which in some way link the ICC (including the Trust Fund for Victims) to its constituents (victims, witnesses or others) in countries of concern to the ICC, or link the ICC’s constituents to the ICC (including the Trust Fund for Victims). An ‘intermediary’ may also be a local NGO or grassroots association, an individual or any other association or grouping which in some

¹ <http://www.icc-cpi.int/iccdocs/doc/doc409168.PDF> Decision of January 18, 2008. cited in *ICC Victims’ Rights Legal Update December 2008 – April 2009*.

² *ICC Victims’ Rights Legal Update December 2008 – April 2009*.

way links a legal representative (typically a legal representative of victims) with its clients in remote locations and vice versa. In certain circumstances it may also be an international organisation or agency operating in the situation country or a local or international organisation operating in any other country to which victims have fled.³

Finally, the globalization of “risk society” has generated the idea that we are all potential victims of mass suffering (Ewald 2002), with the consequence that there has been an institutional production of contexts of “large scale victimization” as fields of intervention (Ewald 2006). One example is the process currently underway in the European council, aiming to develop a convention for combating violence against women, including domestic violence.⁴ Another example is the gradual cementation of a soft law norm concerning the plight of internally displaced people (IDPs) (Orchard 2010). As of 2008, twenty-six million people were internally displaced in their own countries (IDMC 2009). The dire predicament of the world’s IDPs raises sensitive questions regarding sovereignty and intervention. While international refugee movements are regulated by the *1951 Convention relating to the Status of Refugees*, no international treaty applies specifically to IDPs, and achieving international consensus about their legal status has been difficult. Today, the most authoritative statement by the international community remains the non-binding *1998 Guiding Principles on Internal Displacement*, which restates the responsibilities of states before, during and after displacement according to the human rights and humanitarian law relevant to internally displaced persons. However, there are signs of a hardening of this framework: in October 2009, the African Union approved *The Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, to be known as the Kampala Convention.

The emergence of these forms of victim-making has been discussed by a critical legal literature drawing on post-colonial scholarship, critical feminist approaches, the U.S school of critical legal studies and third world approaches to international law (TWAIL). For example, Makau Mutua describes the human rights project as organized around a set of hierarchical roles, where saviors subjectively determine the level of deserved human rights protection, based on the quality of suffering offered up by a differentiated category of victims (Mutua 2001). The scholarship of Sherene Razack (1995) and Ratna Kapur (2002) unpacks how international law constructs the “third world” gendered victim, suggesting that while the global violence against women campaign has been overwhelmingly successful in translating very specific violations experienced by individual

³ VICTIMS RIGHTS WORKING GROUP Comments on the Role and Relationship of ‘Intermediaries’ with the International Criminal Court 6 February 2009.

⁴ http://www.coe.int/t/dghl/standardsetting/violence/general_en.asp [last visited December 21, 2009].

women into a more general human rights discourse, the articulation of the victim subject is based on gender essentialism and cultural essentialism, and that it justifies state restrictions on women's rights for the protection of women. While important, these critiques are often general and broad-based. Contributions targeting subsets of international law's humanization project have only recently been emerging: writing within the discourse of transitional justice, Jemima García-Godos has criticized the focus on empowerment, where "those formerly categorized as victims, perpetrators, bystanders and the like all become survivors" (García-Godos 2008).

THE PROFESSIONALIZATION OF "VICTIM-MAKING"

Victim making involves such different professional groups as judges, lawyers, human rights activists, journalists, therapists and politicians. The "norm-entrepreneurs" (Finnemore and Sikkink 1998) focus on the creation and promotion of new legal norms for the identification and protection of victims. The practitioners attempt to implement these norms to protect victims. Both groups continuously try to put the spotlight of "muted groups", victims of forgotten violence or victims of hitherto unrecognized forms of violations. Professionals may be members of both groups, or alternate between them.

Critique of norm-entrepreneurship in human rights and international criminal law has in part been based on a continuation of the cultural relativism debate of the 1980s and early 1990s, and like the literature on victim-making, the scholarship on victim-makers has also incorporated arguments from postcolonial theory, feminist legal thought, critical legal studies and TWAIL.

Focus has also been given to the circulation of the global legal elite among the top U.S law schools, transnational law firms, international organizations and domestic and international courts and tribunals. As argued by David Kennedy, rather than lying in the background of global politics, the everyday decisions made by the professionals who manage norms and institutions now appear as instrumental to the distribution of material resources and the making of policy agendas (Kennedy 2005).

With respect to the practitioners, the critique of the humanitarian industry is now a well-established genre: In her work, Jennifer Hyndman argues that the international refugee regime is premised on a division between sub-citizens and supra-citizens. As sub-citizens, refugees and migrants must occupy certain subject positions in order to be heard or to gain legal status. Hyndman's "supracitizens", the employee of the international refugee bureaucracy, move effortlessly across countries and continents with their blue UN *Laissez Faire* passports (Hyndman, 2000). These supra-citizens belong to the larger group Alex De Waal labels "the humanitarian international", consisting of the staff of international relief agencies, academics, consultants, specialist journalists, lobbyists, "conflict

resolution” specialists and human rights workers. In De Waal’s symbolic “famine story”, the plot focus on the interaction between a victim (usually a black child), a villain (the weather, a frightening warlord, a complacent bureaucrat) and a savior (a white aid-worker equipped with Western technology and traditional Judaeo-Christian compassion.)” (De Waal 1997). At the same time, the humanitarian industry is also an outcome of professionalization, resulting from humanitarian reform: As Michael Barnett (2005) notes with respect to the institutionalization of humanitarianism: “It became professionalized, developing doctrines, specialized areas of training, and career paths”. A parallel socio-legal and criminological critique of international criminal law is emerging.

SHIFTING SITES OF VICTIMS CLAIMING

An important precondition for contemporary victim-making is the transformation of the relationship between citizens and the state. I suggest that important collective political struggles to establish agreements on social, civil and political justice have been shifted from adjudication in national jurisdictions towards juridical and individualized formats in the international sphere. First, there is the emergence of regional human rights courts mandated to adjudicate on a range of civil, political, social, cultural and economic rights.⁵ A second important factor is the rapid institutionalization of individual petition rights. Currently, five of the UN human rights treaty bodies have quasi-judicial mechanisms composed of committees of independent experts which may consider individual complaints alleging treaty violations, although their views and recommendations on remedies are not legally binding on the state concerned.⁶

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⁵ This includes the European Court of Human Rights established under the European Convention on Human Rights of 1950, the Inter-American Court of Human Rights established in 1979 under the American Convention on Human Rights and the African Court on Human and Peoples’ Rights established under the 2004 African Charter on Human and Peoples Rights (not yet operational).

⁶ They include the Human Rights Committee, which consider petitions relating to the First Optional Protocol to the International Covenant on Civil and Political Rights (1966, 1976); the Committee on the Elimination of Discrimination against Women which considers petitions relating to the Optional Protocol to the Convention on the Elimination of Discrimination Against women (1999, 2000); the Committee against Torture which considers individual petitions under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (1984, 1987); the Committee of the Elimination of Racial Discrimination which considers petitions under article 14 of the Convention on the Elimination of Racial Discrimination (1965); and the Committee on the Rights of People with Disabilities which consider petitions under the Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006, 2008). The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly on 10 December 2008, and will enter into force when ratified by 10 state parties.

These developments constitute a significant shift in *how* and *through which sites* justice and victim identities are to be allocated: individuals and communities are increasingly asked to pursue protection against government interference as well as their active intervention against third parties through the language of law and rights in forums *outside* the structures of the nation state. Both the courts and the complaint mechanisms have significantly influenced the evolution of international human rights law. At the same time, the benefits of resorting to international legal institutions are uncertain and often at best symbolic. Moreover, there is a high threshold for succeeding in this type of claims-making: access is disproportionately available to individuals with sufficient legal literacy, adequate material resources and available social connections (Sandvik 2010).

SHIFTING NORM PRODUCTION TOWARDS IOS AND SOFT LEGALIZATION

Two further developments are of note with respect to the form and formats of production of victim categories. The first is the increasing importance of non-state actors, international organizations in particular, as producers of norms in international law. Traditionally, public international law was deployed as a means to regulate relations between states, and to protect sovereignty. States were bound by obligations incurred through the international agreements they entered, but also by the evolving norms of international customary law. The period after the Second World War has seen a gradual turn to *non-state actors* in international law. Today, the world is faced with a rapidly expanding range of new regulatory subjects such as international organizations (IOs), transnational corporations (TNCs) and Non-Governmental Organizations (NGOs). These non-state subjects are producing novel institutional frameworks and have adopted new ways of producing and organizing normative approaches and administrative processes. As pointed out by Karns and Mingst, in the particular case of IOs, as they have become ever more powerful actors in global governance, international law plays an increasingly prominent role in their activities. The institutional structures and practices of IOs have also gradually become more legalized, both as a framework for governance, and as a strategy to address questions of accountability and democratic participation (Karns & Mingst 2004).

However, the most remarkable development is the way IOs have turned into important producers of soft law, so-called “secondary international law” (Peters et al. 2009). These proliferating soft law regimes, which are non-binding in their form, include recommendations, guidelines, codes of practice and standards (Alvarez 2005). IOs have three important soft law-making functions: as standard-setting mechanisms, as adjudicative mechanisms and as makers of instruments subjecting individuals to strong indirect legal repercussions. While soft law has long been a topic of controversy in international law (Klabbers 1998), scholars have also begun to pay attention to the element of public authority

embedded in the forms of “internal soft law” (Srnkollj 2008) or “internal administrative law” (Goldmann 2008) generated by international organizations to regulate their own *internal* activities. These consist of administrative handbooks, bureaucratic guidelines, codes of conduct and standards of procedure that are formally non-binding but which in practice affects the legal situations of individuals directly or indirectly, such as the refugee status determination process undertaken by UNHCR (Goldmann 2008).

Today, there is a growing unease among commentators about how these transnational expert-run bureaucracies of international law, including the regulatory schemes devised to generate greater degrees of accountability and transparency, impact not only the nature and content of international law in itself, but also conditions on the ground. As part of a resurgent scholarly interest in the normative and social legitimacy of international law, the “thin legitimacy” of this form of IO-governance, and the need to address questions of accountability and democratic participation has emerged as important topics in international law scholarship (Peters et al. 2009). As observed by Jose Alvarez, although the formal status of proliferating IO soft law regimes remains unsolved, these developments cannot be ignored (Alvarez 2006:344-5). The factual impact of the resort to soft law may be as significant as the effect of formal and legally binding instruments, but makes the control of bureaucracies as they engage in “interpretive change” or “mission creep” more difficult (Venzke 2008).

THE RISE OF GLOBAL IDENTITIES OF SUFFERING

Construed through legal language centering on human dignity and integrity, and the conceptualization of standards of transgressions and violations as universally applicable, we have seen the emergence of what I will call “global identities of suffering” as a key element of the regulatory project of global legal liberalism. These generic categories include a range of experiences pertaining to acute social vulnerability, infliction of physical pain and conditions of emotional and psychological trauma. In the following, I will describe the properties of one such identity-category, that of victims of sexual violence and gender-based crimes. I suggest that we can identify three overlapping phases in the establishment of sexual violence and other gender-based crimes as violations of international law.

Towards the end of the 1970s, activists and NGOs started to focus on naming and documenting violation of women’s rights as a global phenomenon. The 1975 World Conference on the international women’s year in Mexico City put discrimination against women firmly on the international agenda. The Convention for the Elimination of All Forms of Discrimination of Women (CEDAW) was established in 1979. CEDAW Article 6 committed state parties to “suppress all forms of traffic in women and exploitation of prostitution of women”, but the wording was silent on the issue of violence. In fact, the report from the 1980

Copenhagen conference on the United Nations Decade for Women was the first UN document to mention the issue of domestic violence against women. At the 1985 review conference in Nairobi, it became clear that the issue of violence against woman had been given inadequate attention.

I have anchored the beginning of the second phase in the 1993 World Conference on Human Rights in Vienna. This phase was directed towards developing legal norms in new issue areas relevant for the protection of women's human rights. The 1993 Vienna conference declared that "Women's rights are human rights". The same year, the UN General Assembly approved the Declaration for the Elimination of Violence against Women (DEDAW).⁷ In 1994, the UN Commission on Human Rights appointed a special rapporteur on violence against women. So far, the rapporteur has focused on domestic violence, trafficking and migration, armed conflict and reproductive rights, HIV/AIDS and violence against women.⁸

The focus on the extent and gravity of gender-based violence in situations of unrest and displacement, gradually led to the recognition of refugee women as a particularly vulnerable group. "Women-at-Risk" has evolved gradually from the 1980s, when, as a result of political lobbying, the protection of women refugees became a topic for UNHCR. Particularly significant were *the 1991 Guidelines on the Protection of Refugee Women*, which recognized the link between refugee protection and human rights. In 1995 this connection was specified and reinforced by the Executive Committee Conclusion no. 73, *Refugee Protection and Sexual Violence* (Kneebone 2005).

The UN Security Council established the Yugoslavia tribunal in 1993 and the Rwanda tribunal in 1994. The statutes of both courts contained ground-breaking provisions for the prosecution of war crimes against women. While it has been a challenge to get indictments on the basis of gender-based crimes, both tribunals have produced ground-breaking case law on issues such as mass rape, forced impregnation and sexual slavery. The statutes and rule of procedure of the ICC incorporates the experiences and challenges encountered by these tribunals. In addition to extensive prohibitions on gender-based crimes, there are detailed mechanisms dealing with investigation, witness protection, participation rights and reparations/restitution in conjunction with these crimes.

In the current decade, the attention has shifted towards problems of implementation of the evolving catalogue of vulnerable individuals. We have also seen a shift from a focus on "women" to a focus on "gender". In tandem with the

⁷ A/RES/48/104 85th plenary meeting 20 December 1993.

⁸ <http://www2.ohchr.org/english/issues/women/rapporteur/docs/15YearReviewofVAWMandate.pdf>.

discursive shift, it is now increasingly recognized that men and boys are also subjected to sexual violence during armed conflict (Carpenter 2006; Sivakumaran 2007; Russell 2008) Yet, as illustrated by the intense disagreement over the role of gender in the definition of trafficking victims during the negotiations of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* to the 2000 *United Nations Convention against Transnational Organized Crime*, the universalization of the connection between sex, migration and suffering is also controversial (Warren 2007; Dauvergne 2003).

NARRATIVES OF SUFFERING: GLOBAL TEMPLATES, PERSONAL TESTIMONIES

This section looks at the testimonial practices and narrative that have emerged together with the rise of global identities of suffering. Above, I contended that the same underlying ideas of suffering and vulnerability are at work across a broad range of victim categories. Here, I propose that these ideas are mirrored in the infrastructure of international law, where a range of different institutional settings may share the same set of actors, revolve around the same political, social and historical events and espouse similarly structured narratives of justice. Importantly, variations between legal norm sets and institutional infrastructures mean that the legal transactions themselves serve a range of different ends.

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The discursive properties of “mass-suffering” are produced through particular globalized templates that detail not only the range of available imageries, but also circumscribe permitted formats. In this context, storytelling and personal narrative have become important in the establishment of legal facts about suffering. Such testimonies about abuse, exploitation and violence are intrinsic to the inclusion of an increasingly broad range of individual and collective attributes of victimhood in international legal discourse and practice. Successful transnational “circuits of suffering” (McLagan 2005) have come into being by way of the specialized communication structures of the human rights community. Today, international law conscripts testimonials as progress narratives across a number of fields. Fulfilling the contemporary legal liberal preference for personal narrative, as well as the interdisciplinary academic emphasis on qualitative data, testimonies about abuse, exploitation and violence have come to constitute a particular liberal practice that reproduces global imageries of suffering in a plethora of settings, and which take place on a proliferation of international and transnational stages (Segall 2002; Colvin 2004).

The testimonies of Holocaust survivors, Korean comfort women, Bosnian rape victims and internally displaced Kosovars have served a range of different political, social and cultural purposes, as part of local struggles, nation building projects, or as arsenal in a larger regional conflict. Testimonies of suffering are deployed in order to bring forth repentance, to legitimize interventions or to

avoid future conflict, to establish legal or emotional responsibility for human violations or to further particular political reform agendas. The first International Tribunal on Crimes against Women in Brussels, Belgium 1976 was an early example of organization of testimonies for *therapeutic purposes* (Russell 1977). From the late 1980s and onwards, victims in such varied locations as Argentina, South Africa and Morocco have given testimonies to truth commissions and participated in truth and reconciliation hearings. Some of these processes of reconciliation have involved formalized apologies or monetary compensation (Slyomovics 2008). Other processes, such as the South African Truth and Reconciliation Commission, aimed to achieve a more abstract form of restorative justice (Wilson 2001). Perhaps the most prevalent and popularized source of narratives of suffering are the highly mediated eyewitness-accounts produced by advocacy groups such as Human Rights Watch and Amnesty International (Dudai 2008).

At the same time, the reliance on testimonial practices and narrative has been criticized for overselling the transformative potential of its product. It is argued that law, with its binary combinations is reductive. As noted by Byrnes (2006), subtle distinctions are made between the testimonies produced by “justice seekers” in international criminal law or “protection seekers” in international refugee law, subjects of underdevelopment in international development discourse, rights holders petitioning the international human rights bodies, and the citizen subject testifying in front of national truth and reconciliation tribunals and committee. While the notion of a universalized justice may be shared, humanitarianism, human rights law, refugee law, international criminal law, transitional justice and development discourse are set up to produce very different forms of fairness: achieved through formal legal vindication or financial torts, through protection or material provisions, through the allocation of new legal identities, procedural participation or through punishment. Furthermore, that it reflects Western and American views of what constitutes wrongdoing; that it overestimates the moral vindication and empowerment to be had by storytelling; and that it underplays social costs, stigma and regeneration of trauma.

FORGING A CROSSCUTTING CRITIQUE: FROM HARD TO SOFT LEGALIZATION, COSTS TO DUE PROCESS

In this section, I will draw on various critiques of victim-making processes outlined above, to show how we may develop conceptual critiques of victim-making further. While non-binding, soft law frequently functions as a stepping stone towards hard law codification. In this section, I think about the reverse development. As described above, the legal protection of victims increasingly moves from hard to soft frameworks, as a result of the growth of victim categories and the emphasis on testimony. I ask whether the shift from “hard” legal frameworks towards *internal* soft law frameworks incurs costs to due process.

The argument is that this shift represents a reconfiguration of the underpinning principles of procedural justice into a controversial concept of administrative justice. This proposition is explored by looking at the soft law framework through which UNHCR organizes the process of selecting vulnerable individuals and victims of human rights violations for third-country resettlement. The testimonies and narratives of suffering produced during the encounter between UNHCR legal officers and refugees exemplify a type of administrative human rights practice whose ethos appear to be molded on adjudicative settings, but whose structure places individuals in the role of clients, not rights holders or legal petitioners.

When an individual has been granted refugee status, the next step is the search for a durable solution, which in the terminology of UNHCR means repatriation, local integration or third-country resettlement. Resettlement under the auspices of UNHCR involves the selection and transfer of refugees from a state in which they have initially sought protection to a third state that has agreed to admit them with permanent residence status. Whereas the individual has a right to seek asylum under international human rights law, resettlement is discretionary response on the part of nation states and UNHCR. The bureaucratic typology promulgated in the 2004 *UNHCR Resettlement Handbook* communicates that resettlement is a rule-governed formal process where the selection of resettlement-candidates takes place through sequential, administrative steps. This includes a detailed bureaucratic vetting process, which maps the claimants' social and economic profile, and considers the evidence of previous torture or sexual abuse and the credibility of alleged security threats, as well as the larger political context out of which claims emerge (including country of origin information, the nature of human rights violations commonly occurring in particular conflicts). Currently, UNHCR uses eight criteria for determining resettlement as the appropriate solution, and human rights protection is a core concern in the delineation of these categories. These include Legal and Physical Protection Needs; Survivors of Violence and Torture, Medical Needs, Women-at-Risk, Family Reunification, Children and Adolescents; Older Refugees; and Refugees without Local Integration Prospects (such as those in mixed marriages, gays and lesbians, people with particular disabilities and refugees accused of witchcraft).

For refugees, the absence of a right to access *any* form of permanent solution is a core concern. The relationship between the procedural guarantees we know from refugee law, and the resettlement procedure is disjointed. While cast in the mould of the due process rights that informs UNHCR's guidelines on refugee status determination, the 2005 *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, in actuality the handbook introduces a formalization approach whose *lack of* relevant guarantees cements an asymmetrical relationship between the legal protection officer and the resettlement applicant. Refugees can officially not "apply" for resettlement: the individual UNHCR Legal protection officer makes the determination of whether resettlement is the

appropriate solution during a face-to-face encounter, or through a facilitator. Depending on the outcome on the case assessment and verification, the refugee will then start the procedure, which may take anywhere from weeks to years. The relative few who make it to a screening interview have no right to representation, no right to review the documents collected by the legal protection officers, was no right of appeal, and no right to a reasoned explanation for rejection. The absence of substantive explanations effectively removed the possibility of tracing any inappropriate steps or subjective considerations made during the process.

CONCLUSION

My ambition in this paper has been to lay out some almost impressionistic sketches of international law, in order to pin down what I see as key contemporary developments in the struggle to translate ideas of universalized justice into global practice. I have attempted to describe what I think of as a move towards defining, identifying and institutionalizing ever greater groups of victims and types of injuries as concerns for international law. I discussed the growth of individual and collective categories of victims, the internationalization and institutionalization of victim-making and the shift in the normative underpinnings of these categories towards international organizations and soft law formats.

The idea of victimhood holds a prominent position in the idea of universalized justice: the intention of much of the IO-based soft law making is to remedy omissions of the past, when international law ignored the plight of women, children, indigenous groups and so forth. As discussed in the paper, soft law has played a crucial role in the struggle to prevent and punish violence against women, and sexual violence more generally. Attempting to use these critiques for a crosscutting discussion, the paper has asked whether the thin legitimacy affecting the standard-setting activities of IOs and the contours of a broad move from hard to soft legalization are developments which may impose costs on due process, thus resulting in negative consequences for victims.

In conclusion I think that some concern is also warranted with respect to how the formal and apolitical universalism characterizing soft law instruments works to qualify individuals for particular categories, in ways that can only be achieved by eschewing agency (Sandvik 2008). On the other hand, as noted by Baxi (1998), recourse to law might represent a form of voice of suffering, whose alternative is not other forms of voice, but exit-options. Moreover, I propose that an important but intangible legal development ensuing from the rise of global identities of suffering and the attendant templates of testimonial practices and personal narratives of suffering is the migration of victim motifs. This involves the travelling of theories of victimhood and templates for moral suffering, heroism and loss between international legal structures and levels, as well as an emergent linkage between victim performances and access to resources. As noted above,

the interrelationship between human rights, humanitarian law and international criminal law is complicated, and the proponents of convergence-models – often the victim makers in international law- need to be cognizant of this. Tracing the migration of victim motifs could be a promising way of unpacking slippages. Hence, the place of the victim in international law is thus both dangerous and dynamic. Keen attention is needed to how justice-discourses appropriate ideas of suffering and victimhood, but also to the ways in which international law seeks to translate and apply the schemas of universal justice.

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