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Foreword From Academic Sponsor

It is my pleasure to introduce the fourth volume of the *Contemporary Challenges* journal and I want to use the opportunity to congratulate the Board of Editors for another excellent and thought-provoking issue. Having arisen as a project led by students on the MSc in Global Crime, Justice and Security program at the University of Edinburgh, the journal has – owing to the intellectual efforts of the previous and current editors – become a consistent and inspiring source of knowledge and ideas in this domain. Articles that appear in the current volume are a good example of the variety of topics and approaches that present contemporary global challenges but are also a good reminder of the constantly changing and evolving forms of crime and insecurity. This is what is both exciting and unsettling in the study of global crime: as soon as we start researching a topic or problem, it begins to change, by assuming new forms and creating new problems. Articles in this volume all exemplify these challenges, and develop fresh perspectives to deal with them. These include: (1) providing a new intellectual lens through which to observe a global problem (for example, using zemiology to understand the harms inflicted on Uyghur community; understanding domestic violence as a human rights concern; using game theory to interpret motivations behind a specific nuclear policy), (2) developing new theoretical tools to better grasp the dimensions of the problem (for example, developing a new definition of femicide; expanding judicial ability to acknowledge non-traditional narratives of victimhood); (3) acknowledging the role of new or previously unidentified (f)actors of global crime (for example, the role of social media in propagating atrocity crimes; the role of nurses in perpetrating atrocities; the role of supranational actors in ending an armed conflict). Most of the articles, however, straddle across and contribute to more than one of these perspectives which adds to their value and inquisitiveness. The current volume of *Contemporary Challenges* is a thoroughly rewarding read – I hope the readers will enjoy it as much as I did.

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Acknowledgment And Remarks From The Editor-In-Chief And Deputy Editor-In-Chief

Upon publication of the fourth volume of *Contemporary Challenges: The Global Crime, Justice and Security Journal* it is worth reflecting on the role of the journal within the academic space in which it exists. Since its inception in 2020, the journal has set out to provide a platform for a range of perspectives on the challenging and entangled issues of global crime, justice, and security. The fourth volume of the journal has very much stayed true to this intention and has brought together scholarship from a range of disciplines and regions to provide novel perspectives of these vast topics. Through our author's wide-ranging contributions, we can see new ways of understanding these global challenges and, as a result, potential pathways forward.

Indeed, this volume provides fresh lenses and tools to understand a number of different global crime, justice, and security problems with stark contemporary application, such as femicide, victimhood, armed conflict, and atrocity crime. By exploring these diverse perspectives with reference to a number of globe-spanning events, our authors have undoubtedly greatly contributed to the ongoing conversation on these contemporary challenges. The fourth volume therefore provides a further step in solidifying the *Contemporary Challenges* journal as a consistent and valuable presence in the academic debate on global crime, justice, and security.

Of course, the publication of the fourth volume would not have been possible without the generous support of many people. We extend our deepest thanks to all who have worked hard to see this volume of the journal come to fruition. Our academic supervisors – Dr Andy Aydin-Aitchison, Dr Milena Tripkovic, and Dr Andrea Birdsall – have continued to provide a source wisdom and guidance. Rebecca Wojturska has been vital in ensuring we had the tools we needed to publish the journal and providing consistent support throughout. Finally, our editorial team has worked tirelessly throughout the year, impressively balancing multiple rounds of editing with demanding postgraduate study commitments. Our Head Copy Editor, Amelia Retter, has been particularly invaluable in ensuring the completion of the journal to the highest standard. You have all been a great team to work with and journal would not have been possible without you.

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Moving Towards More Inclusive Definitions of Femicide: Intersectionality and Marginalised Identities

Martina Caterini*

Abstract

Femicide violence has long been invisible. Drawing on feminist scholarship, this article will discuss existing definitions of femicide that have been key to its recognition as a distinct phenomenon. However, the notion of patriarchy these definitions build upon is not enough to explain the occurrence of such crime causing these definitions to fall into the trap of essentialism. Femicide is the result of multiple intersecting systems of oppression, including race, class, sexuality, disability, and so forth which shape women's' experiences in a wide variety of ways. Considering this, the theoretical framework of intersectionality is fundamental to expand definitions of femicide as it recognises that women's experiences cannot be categorised under the same umbrella, as there exist differences between them. Moreover, because there is a need to move towards more inclusive definitions, such an approach may successfully go beyond the traditional biological sex-based man/woman heteronormative binary. This binary contributes to the marginalisation of identities that are less visible, such as those of transgender women.

Introduction

Femicide, as a distinct phenomenon, has gained attention in relatively recent times and has emerged from being labelled as a crime of homicide. Several academics and activists advocated for its recognition not only as a feminist political issue but as a universal problem.[1] This has helped to make it significantly more visible and aided the

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1 Chaime Marcuello-Servós et al., "Femicide: A Social Challenge", *Current Sociology* 64, no. 7 (November 2016): 967–74, https://doi.org/10.1177/0011392116639358; Marylène Lapalus and Mariana R. Mora, 'Fémicide/féminicide. Les enjeux politiques d'une catégorie juridique et

identification of potential solutions. Drawing on feminist theory, this article will suggest that although important contributions have been made to shaping femicide as a distinct crime, the notion of patriarchy it builds upon is not enough to explain it as a phenomenon. Patriarchy, which refers to a male-dominated system which oppresses women by controlling governmental, social, economic, religious, and cultural institutions,[2] is problematic as it views masculine power and privilege as the sole root cause of all social relations, including femicide. It places other social structures, such as class and race, in a secondary position and interprets them simply as male-female relations derivatives.[3] Relying solely on patriarchal oppression as a driving factor of femicide fails to recognise that there exist differences in how women experience violence. This therefore universalises their experiences under the same umbrella. This article will adopt an intersectional approach and will thus argue that femicide is not only a product of patriarchy but results from a wider set of power relations, such as race, class, disability, sexuality, age, and religion.

Coined by Kimberlé Crenshaw,[4] intersectionality was initially designed to highlight that Black women's experiences could not be assumed to be shaped only by gender as this interacts with other structural inequalities, such as race, class and so forth.[5] Such a framework called attention to so-called intersectional identities. As concerns femicide, this framework would help overcome the limitations of prior patriarchy-based research, such as false universalism, the simplification of power relations, and the failure to consider women as also agents of patriarchy.[6] Using patriarchy as a fixed and static factor obscures its multiple patterns and how gender interacts with other

militante', *Travail, genre et sociétés* 43, no. 1 (2020): 155–60, https://doi.org/10.3917/tgs.043.0155.

2 Suhad Daher-Nashif, "Intersectionality and Femicide: Palestinian Women's Experiences With the Murders of Their Beloved Female Relatives", *Violence Against Women* (25 June 2021): 1079, https://doi.org/10.1177/10778012211014561; Carol Cohn, *Women and Wars: Contested Histories, Uncertain Futures*, 1st ed. (Cambridge: Polity Press; Blackwell Pub, 2013).

3 James W. Messerschmidt, "Masculinities and Femicide", *Qualitative Sociology Review* 13, no. 3 (31 July 2017): 71.

4 Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour", *Stanford Law Review* 43, no. 6 (1991): 1241–1300.

5 Daher-Nashif, "Intersectionality and Femicide", 3; Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour', 1242; Sumi Cho, Kimberlé Williams Crenshaw, and Leslie McCall, "Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis", *Signs: Journal of Women in Culture and Society* 38, no. 4 (1 June 2013): 785–810, https://doi.org/10.1086/669608.

6 Gwen Hunnicutt, "Varieties of Patriarchy and Violence Against Women: Resurrecting "Patriarchy" as a Theoretical Tool", *Violence Against Women* 15, no. 5 (May 2009): 554. https://doi/10.1177/1077801208331246.

social structures.[7] This means that even if existing conceptualisations of femicide made the phenomenon visible, there is a need to go further and develop more inclusive definitions to account for other power dynamics.

First, I will discuss the issue of invisibility, namely the fact that some crimes or harms are more hidden than others, as in the case of femicide. Here, I will also address the practice of naming as a way to draw attention to a given phenomenon. Defining a problem and constructing a legal framework is key to raising public awareness and provoking collective reactions.[8] Secondly, the definitions of femicide which have been provided so far will be analysed to illustrate how this term has evolved. More precisely, I will begin with Diana Russell's initial definition of such phenomenon, namely "the murder of women by men motivated by hatred, contempt, pleasure, or a sense of ownership of women",[9] and I will analyse how it has evolved, by looking at its strengths and limitations. Then, I will explore the concept of intersectionality to highlight that women's experiences of femicide are determined by multiple structures of power, and therefore the importance of shaping definitions which include them all. In particular, this will be discussed with reference to transgender women's invisibility as victims of femicide. This will also serve to emphasise the need to go beyond the usual heteronormative binary which solely considers biological men and women. Lastly, evidence of transgender women's experiences will be presented and discussed.

The Issue of Invisibility

To date, there exists thousands of articles and papers which address and question femicide as a distinct phenomenon. See, for example, Russell's, Kelly's, and Radford's

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7 Hunnicutt, "Varieties of Patriarchy and Violence Against Women", 559.

8 Anna Costanza Baldry and Magalhães José, "Prevention of Femicide", in *Femicide across Europe: Theory, Research and Prevention*, ed. Shalva Weil, Consuelo Corradi, and Marceline Naudi, Policy Press Shorts Policy & Practice (Bristol: Policy Press, 2018): 81.

9 Myrna Dawson and Michelle Carrigan, "Identifying Femicide Locally and Globally: Understanding the Utility and Accessibility of Sex/Gender-Related Motives and Indicators", *Current Sociology* 69, no. 5 (September 2021): 686, https://doi.org/10.1177/0011392120946359; Jill Radford and Diana E. H. Russell, eds., *Femicide: The Politics of Woman Killing*, 1. publ (Buckingham: Open Univ. Press, 1992), xi; Jane Caputi and Diana Russell, "Femicide: Speaking the Unspeakable", *Ms.: The World of Women* 1, no. 2 (1990): 34.

works in the following footnote.[10] However, this has not always been the case, as women's voices have long been underrepresented, silenced, and under-studied. According to muted group theory, the marginalisation of women's perspectives results from an asymmetry in power relations, which impacts communication between those with power and marginalised, muted groups.[11] Such linguistic practices were shaped by men who used these categories as a means to voice their own experiences.[12] To be more precise, society is dominated by men's power over women. Consequently, men exert increasing dominance over language, which, therefore, is extremely male-biased. Men shape culture using their own words, while women are left out of this process. As a consequence of this, women are turned into a muted group.[13] This implies that individuals from disempowered groups, such as women, may want to express their voices and make their experiences visible but do not have enough agency to do so. Their stories tend to be undervalued and are not considered to be sufficiently important to change or enact policies.[14] This system has contributed to silencing female victims of violence for centuries and treating femicide as an invisible crime.

According to Pamela Davies, Peter Francis and Tanya Wyatt's writing on social harm and invisible crime, certain crimes or harms may remain invisible as a consequence of several different factors. These include their absence from the political agenda, which prevent them from being tackled publicly,[15] the failure to place such phenomena at the centre of social research and develop theories which might explain them and their regulation[16], the lack of adequate or efficient systems of control aimed to regulate such crime[17], and lastly, the depiction of such crimes as non-real threats.[18] Regarding

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10 Radford and Russell, 5; Liz Kelly and Jill Radford, "Rethinking Violence Against Women", (Thousand Oaks: SAGE Publications, Inc., 2023): 53–76, https://doi.org/10.4135/9781452243306.

11 Cheris Kramarae, "Muted Group Theory and Communication: Asking Dangerous Questions: WL", *Women and Language* 28, no. 2 (Fall 2005): 55-61,72; Shalva Weil, "Making Femicide Visible", *Current Sociology* 64, no. 7 (November 2016): 1125, https://doi.org/10.1177/0011392115623602.

12 Kramarae, "Muted Group Communication: Asking Dangerous Questions: WL", 55.

13 aspire2beublog, "Theory Logs: Muted Groups Theory", *WordPress* (blog), n.d.

14 Kramarae,"'Muted Group Communication: Asking Dangerous Questions", 55.

15 Pamela Davies, Peter Francis, and Tanya Wyatt, "Taking Invisible Crimes and Social Harms Seriously", in *Invisible Crimes and Social Harms*, ed. Pamela Davies, Peter Francis, and Tanya Wyatt (London: Palgrave Macmillan UK, 2014), 4, https://doi.org/10.1057/9781137347824_1.

16 Davies, Francis, and Wyatt, "Taking Invisible Crimes and Social Harms Seriously", 4.

17 Davies, Francis, and Wyatt, "Taking Invisible Crimes and Social Harms Seriously", 4.

18 Davies, Francis, and Wyatt, "Taking Insivible Crimes and Social Harms Seriously", 4.

femicide, the lack of criminological research and theorising on the relationship between women and crime may have contributed to its invisibility. In fact, the discipline of criminology has long disregarded women's experiences, and its studies have been considerably androcentric.[19] Such a framework has hidden gender-based cultural and structural inequalities and has failed to provide an accurate understanding of women's experiences.[20]

Nevertheless, radical feminist scholarship of the 1960s set the stage for the recognition of femicide as a distinct phenomenon and called attention to the realities that had thus far been ignored, such as men's wider violence against women and domestic abuse. The radical feminist wave brought to the fore how men's violence against women, including femicide, "is both a cause and consequence of sex inequality in patriarchal societies, serving to control women as a sex class".[21] In so doing, this wave of feminism shed light on gendered patterns of victimisation and potential ways to address problems.[22]

Making Femicide Visible: The Evolution of Definitions

Language represents a powerful tool for people to make sense of the world and give voice to their perceptions and beliefs.[23] When a phenomenon is named, the extent to which it becomes notable might contribute to moving it from the margins to the centre of research and motivating action to tackle it. Definitions are necessary as they help explain the nature of the environment in which individuals live, the difficulties they face, the role of the state and identify potential solutions.[24] As concerns femicide, definitions have evolved over time and have been vital to its recognition as a real issue. However,

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19 Allison Morris and Loraine Gelsthorpe, "Feminist Perspectives in Criminology: Transforming and Transgressing", *Women & Criminal Justice* 2, no. 2 (7 May 1991): 6, https://doi.org/10.1300/J012v02n02_02.

20 Rae Taylor and Jana L. Jasinski, "Femicide and the Feminist Perspective", *Homicide Studies* 15, no. 4 (1 November 2011): 342-343, https://doi.org/10.1177/1088767911424541.

21 Ingala Karen Smith, "Femicide", in *The Routledge Handbook of Gender and Violence*, ed. Nancy Lombard, 1st ed. (London: Routledge, 2018).

22 Davies, Francis, and Wyatt, "Taking Invisible Crimes and Social Harms Seriously", 2.

23 Magdalena Grzyb, Marceline Naudi, and Chaime Marcuello-Servós, "Femicide Definitions", in *Femicide across Europe: Theory, Research and Prevention*, ed. Shalva Weil, Consuelo Corradi, and Marceline Naudi, Policy Press Shorts Policy & Practice (Bristol: Policy Press, 2018):17.

24 Michael V. Bhatia, "Fighting Words: Naming Terrorists, Bandits, Rebels and Other Violent Actors", *Third World Quarterly* 26, no. 1 (2005): 9.

a universally accepted definition of this concept does not exist.[25] The shared goal of all femicide definitions is to emphasise the need to distinguish femicide from the crime of "'homicide", behind which it had been hidden.[26] Homicide, in its original sense (derived from Latin) literally means man (*homo*) slaying (*caedere*).[27] In this context, men represent the standard against which violence is measured. However, its meaning is different in English where it is a gender-neutral expression aimed at indicating the intentional killing of an individual by another person.[28] Therefore, the initial main objective of defining the concept of femicide was to highlight the gender-based dimension of femicide and demonstrate that it should be considered separately to the killing of men.[29]

In light of this, it is worth analysing how definitions of femicide have evolved. Diana Russell, an American radical feminist scholar, first coined the term "femicide" in 1976, and defined it as "the murder of women by men motivated by hatred, contempt, pleasure, or a sense of ownership of women".[30] This definition began to shed light on the relationship between patriarchy, women's subordination, and violence, and aimed to bring misogynistic killings to the fore. This idea was taken further when a new edited definition was propounded, that is femicide as "the killing of females by males because they are females".[31] By including sexism-, patriarchy-, and misogyny-based killings, this definition made a ground-breaking contribution to both femicide scholarship and the wider field of criminology itself. In fact, it made visible the gendered structures of power shaping women's experiences within society and set the scene for fighting

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25 Myrna Dawson and Michelle Carrigan, "Identifying Femicide Locally and Globally: Understanding the Utility and Accessibility of Sex/Gender-Related Motives and Indicators", *Current Sociology* 69, no. 5 (September 2021): 684, https://doi.org/10.1177/0011392120946359.

26 Consuelo Corradi et al., "Theories of Femicide and Their Significance for Social Research", *Current Sociology* 64, no. 7 (November 2016): 976, https://doi.org/10.1177/0011392115622256.

27 Corradi et al., "Theories of Femicide and Their Significance for Social Research", 977.

28 Corradi et al, "Theories of Femicide and Their Significance for Social Research", 977.

29 Diana Russell, "My Years Campaigning for the Term "Femicide"" 6, no. 5 (2021), 1.

30 Daher-Nashif, "Intersectionality and Femicide", 686; Jill Radford and Diana E. H. Russell, eds., *Femicide: The Politics of Woman Killing*, 1. publ (Buckingham: Open Univ. Press, 1992), xi; Jane Caputi and Diana Russell, "Femicide: Speaking the Unspeakable", *Ms.: The World of Women* 1, no. 2 (1990): 34.

31 Grzyb, Naudi, and Marcuello-Servós, "Femicide Definitions", 20; Russell, "My Years Campaigning for the Term "Femicide"", 1.

violence and crimes against them. Moreover, it contributed to raising public awareness.[32]

However, despite its contributions, this definition is not without criticism. In fact, it fell into the trap of essentialism, as it failed to recognise that there exist multiple intersecting inequalities and systems of oppression which shape people's lives, such as race or sexuality.[33] This implies that women's experiences, including of violence, cannot be categorised under the same umbrella. Furthermore, this definition excludes instances in which femicide is committed by other women, who "act as agents of patriarchy or simply on their own behalf".[34]

There have been attempts to include systems of power in femicide studies, such as race, class, sexuality and so forth. For instance, Jill Radford and Diana Russell introduce and differentiate between distinct forms of femicide violence. These include racist femicide (the killing of a woman of colour by a white man), homophobic femicide (deaths of non-heterosexual women at the hands of straight men), marital femicide (when women's partners commit the abuse), and lastly, femicide carried out by strangers.[35] At first glance, this definition seems more inclusive than Russell's initial definition as it takes power relations into account. However, it does not define how such structures intersect with gender, but rather it views them as additional layers which can just be added to women's gender-based subjugation. In so doing, it does not explicate how intersecting inequalities generate harm.[36]

Moving forward, Marcela Lagarde and Julia Monárrez shaped a new definition and coined the term '*feminicidio'*, or feminicide, which was intended to provide a framework to address the increase of violence against and deaths of women in Mexico and

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32 Grzyb, Naudi, and Marcuello-Servós, "Femicide Definitions", 20.

33 Hunnicutt, "Varieties of Patriarchy and Violence Against Women", 1983

34 Paulina García-Del Moral, "The Murders of Indigenous Women in Canada as Feminicides: Toward a Decolonial Intersectional Reconceptualization of Femicide", *Signs: Journal of Women in Culture and Society* 43, no. 4 (June 2018): 934, https://doi.org/10.1086/696692.

35 Jill Radford and Diana E. H. Russell, eds., *Femicide: The Politics of Woman Killing*, 7; Corradi et al., "Theories of Femicide and Their Significance for Social Research", 978; García-Del Moral, "The Murders of Indigenous Women in Canada as Feminicides", 935.

36 García-Del Moral, "The Murders of Indigenous Women in Canada as Feminicides", 935.

Ciudad Juarez.[37] This term refers to any form of violence against women and the killings of women which constitute a breach of their human rights.[38] Following this definition, “feminicide is genocide against women, and it occurs when the historical conditions generate social practices that allow for violent attempts against the integrity, health, liberties, and lives of girls and women”.[39]

This conceptualisation of feminicide violence differs from existing others, such as Russell’s and Radford’s, in one substantial way. It touches upon the notion of impunity,[40] namely the negligent role played by the state in perpetuating patriarchy and violence, as it covertly accepts the commission of such crime and fails to condemn it.[41] As a result of this, feminicide is viewed as a state crime.[42] In this context, feminicide is assumed to be the product of the patriarchal social organisation of gender which produces inequities between men and women, and the marginalisation of the latter from structures of power, which contributes to their oppression.[43] One criticism of this definition is that it portrays the state in terms of male power without taking into consideration how the standards of masculinity and femininity have been constructed in parallel with other structures of power.[44] In so doing, it does not draw enough attention to the intersectional perspective on violence or a conceptualisation of the state as bourgeois, conservative, and masculinised.[45] Despite this, it has made significant contributions as it led to the criminalisation of femicide in Mexico.[46] In fact, through Lagarde and Monárrez’s definition of *feminicidio* and an efficient naming and

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37 Marcela Lagarde Y De Los Ríos and Charlie Roberts, "Preface: Feminist Keys for Understanding Feminicide: Theoretical, Political, and Legal Construction", in *Terrorizing Women: Feminicide in the Americas*, ed. Rosa-Linda Fregoso and Cynthia Bejarano (Duke University Press, 2010), xv; Grzyb, Naudi, and Marcuello-Servós, "Femicide Definitions", 20.

38 De Los Ríos and Roberts, "Preface: Feminist Keys for Understanding Feminicide: Theoretical, Political, and Legal Construction", XV.

39 De Los Ríos and Roberts, "Preface: Feminist Keys for Understanding Feminicide: Theoretical, Political, and Legal Construction", xv-xvi.

40 Grzyb, Naudi, and Marcuello-Servós, "Femicide Definitions", 20.

41 De Los Ríos and Roberts, "Preface: Feminist Keys for Understanding Feminicide: Theoretical, Political, and Legal Construction", xxi; Paulina García-Del Moral and Pamela Neumann, "The Making and Unmaking of *Feminicidio/Femicidio* Laws in Mexico and Nicaragua", *Law & Society Review* 53, no. 2 (June 2019): 456, https://doi.org/10.1111/lasr.12380.

42 García-Del Moral, "The Murders of Indigenous Women in Canada as Feminicides", 936.

43 De Los Ríos and Roberts, "Preface: Feminist Keys for Understanding Feminicide: Theoretical, Political, and Legal Construction", xxi.

44 García-Del Moral, "The Murders of Indigenous Women in Canada as Feminicides", 938.

45 García-Del Moral, "The Murders of Indigenous Women in Canada as Feminicides", 938.

46 García-Del Moral and Neumann, "The Making and Unmaking of *Feminicidio/Femicidio* Laws in Mexico and Nicaragua", 453, 467.

shaping campaign conducted by regional feminist activists and feminist federal lawmakers, such crime has been brought to the fore and has been codified into law in all 32 Mexican states.[47] For clarification, naming and shaping refers to the process of defining and constructing femicide as a distinctive crime.

Lastly, it is worth drawing attention to another conceptualisation of femicide which has been helpful for its recognition of colonial power, and has been developed following a feminist anti-colonial approach. More precisely, it presents femicide as the result of historical colonial practices and the cultural dynamics colonialism produced.[48] Nadera Shalhoub-Kervorkian and Suhad Daher-Nashif employ this concept of femicide to explore the murders of women in Palestinian society at the hands of their relatives and challenge common romanticised understandings of honour killings,[49] which occur when girls' and women's behaviour is perceived to be immoral and to dishonour their family's values and reputation.[50]

Using the term femicide, Nadera Shalhoub-Kervorkian and Suhad Daher-Nashif refused to view the murders of women as honourable when carried out by a member of the family.[51] In this context, femicide is defined as "all violent acts that instil a perpetual fear in women or girls of being killed under the justification of 'honour'".[52] By looking at the interrelationship between Israeli colonial "politics of exclusion", and "localised culture of control",[53] the anti-colonial framework sheds light on the material and structural processes perpetuated by such colonial mechanisms.[54] As a consequence, such an approach generates the conditions for maintaining a cultural system which legitimises femicide violence.[55] In light of this, an intersectional

47 García-Del Moral and Neumann, "The Making and Unmaking of *Feminicidio/Femicidio* Laws in Mexico and Nicaragua", 453, 467.
48 García-Del Moral, "The Murders of Indigenous Women in Canada as Feminicides", 941.
49 Nadera Shalhoub-Kevorkian, "Femicide and the Palestinian Criminal Justice System: Seeds of Change in the Context of State Building?", *Law & Society Review* 36, no. 3 (2002): 577, https://doi.org/10.2307/1512163; García-Del Moral, "The Murders of Indigenous Women in Canada as Feminicides", 940.
50 Shalhoub-Kevorkian, "Femicide and the Palestinian Criminal Justice System", 578.
51 Nadera Shalhoub-Kervorkian and Suhad Daher-Nashif, "Femicide and Colonization: Between the Politics of Exclusion and the Culture of Control", *Violence Against Women* 19, no. 3 (March 2013): 297, https://doi.org/10.1177/1077801213485548.
52 Shalhoub-Kervorkian and Daher-Nashif, "Femicide and Colonization", 296.
53 Shalhoub-Kervorkian and Daher-Nashif, "Femicide and Colonization", 296.
54 García-Del Moral, "The Murders of Indigenous Women in Canada as Feminicides", 941.
55 Shalhoub-Kervorkian and Daher-Nashif, "Femicide and Colonization", 298.

approach is necessary to define femicide in a way that takes into account the interaction between distinct social inequalities, systems of power, and different forms of discrimination. It analyses the disempowerment of subordinated people and tries to capture the consequences of the interrelatedness of different forms of marginalisation.[56]

An Intersectional Framework

The definitions discussed so far all made ground-breaking contributions to the recognition of femicide as a unique crime and moved it from the margins to the centre of academic research.[57] However, there is still a need to develop more inclusive definitions which consider the impact of multiple intersecting inequities that result from systems of domination on people's experiences, in order to avoid falling into the trap of essentialism. Moreover, it is necessary to go beyond the binary sex-based men/women framework as it marginalises identities who remain hidden, such as those of transgender women.[58] To clarify, sex refers to a person's biological characteristics which define their maleness and femaleness.[59] As noted above, this article advocates for the adoption of an intersectional approach as it provides an accurate framework for overcoming such shortcomings.

An intersectional approach sheds light on how structures such as gender, race, class, or sexuality function as structuring agents which influence individual or group choices and actions, how their behaviour is perceived, the opportunities they have, and the treatment they receive.[60] Patriarchy exists at both the macro-level (meaning that it is embedded within institutions), and micro-level (meaning that it is perpetuated through

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56 Janice Joseph, "Transphobic Femicide: An Intersectional Perspective", in *An International Perspective on Contemporary Developments in Victimology*, ed. Janice Joseph and Stacie Jergenson (Cham: Springer International Publishing, 2020): 105–19, https://doi.org/10.1007/978-3-030-41622-5_8.

57 Caputi and Russell, "Femicide: Speaking the Unspeakable"; Russel, "My Years Campaigning for the Term "Femicide""; Diana Russel and Jill Radford, *The Politics of Woman Killing*, 3; Daher-Nashif, "Intersectionality and Femicide", 1080; Grzyb, Naudi, and Marcuello-Servós, "Femicide Definitions", 20-21; De Los Ríos and Roberts, "Preface: Feminist Keys for Understanding Feminicide: Theoretical, Political, and Legal Construction", XV; Shalhoub-Kevorkian, "Femicide and the Palestinian Criminal Justice System",578.

58 Joseph, "Transphobic Femicide", 107.

59 H.M. Lips, *Sex and Gender: An Introduction, Seventh Edition* (Waveland Press, 2020): 8.

60 Amanda Burgess-Proctor, "Intersections of Race, Class, Gender, and Crime: Future Directions for Feminist Criminology", *Feminist Criminology* 1, no. 1 (2006): 39.

interpersonal relationships). Although gender is the main organising feature of patriarchal structures, power and identity markers such as race, age, class, religion, nationality, and sexuality converge with it and determine the amount of privilege or power individuals hold.[61]

There are several ways in which an intersectional approach could help us understand other factors which contribute to femicide. For instance, the intersectional framework could help us comprehend the experiences of women of colour as victims of abuse and violence, who are very likely to suffer from a social structure which is organised around race.[62] In other instances, further socioeconomic factors may impact women's killings. Some studies have found that when women have a lower social or educational status than their abusers, abusers are more likely to be violent towards them.[63] This may also apply to women acting as perpetrators. Women who hold privilege have more power than disadvantaged women,[64] which could make them feel more empowered to exert control and resort to violence. Therefore, there exist several systems of oppression, other than gender, which determine the "worthiness" of a woman and affects how she is treated by both men and women.[65] This provides a framework to understand femicide within same-sex relationships, which remain under-researched.

Going Beyond the Binary: The Experiences of Transgender Women

In addition to the above factors, the theoretical lens of intersectionality would allow for going beyond the usual binary and heteronormative framework to include invisible identities, such as transgender women. Following muted-group theory, it can be stated that even if more voice has been given to women as regards their experiences of violence, silencing still exists. However, it has shifted to other individuals affected by femicide rather than women as a biological category, as it is the case for transgender women. By focusing on the experiences of transgender women as a muted group, this

61 Hunnicutt, "Varieties of Patriarchy and Violence Against Women", 558.
62 Hunnicutt, "Varieties of Patriarchy and Violence Against Women", 564.
63 Taylor and Jasinski, "Femicide and the Feminist Perspective", 347.
64 Hunnicutt, "Varieties of Patriarchy and Violence Against Women", 565.
65 Hunnicutt, "Varieties of Patriarchy and Violence Against Women", 565.

article aims to fill a gap in the literature and raise the voices of those categories which remain hidden in the closet.

It is also worth bring up the experiences of gender non-conforming people, as it is often the case that they remain viewed as “feminine” or “masculine” by society, despite their transition and fluidity. Transgender identities are often stereotyped as deserving of suffering, even when violence against them has been particularly ferocious.[66] Several studies focusing on the United States demonstrated that the convergence of gender and race places transgender women of colour at increased risk, as they are victims of racist, sexist, and transphobic attacks.[67]

The term ‘trans’ is an umbrella term which refers to a “collective community of individuals whose gender identities, expression and/or lived experiences differ from what is typically associated with the sex they were assigned at birth”.[68] Therefore, transgender women are “individuals who were assigned male at birth but do not identify as men, and identify as women, transgender, or other gender identity”.[69] On the contrary, the term cisgender refers to individuals whose gender conform with the sex they were assigned at birth.[70] Transgender women, like cis-women, suffer from heteronormative and patriarchal systems which expose them to violence and abusive behaviours, such as social marginalisation, discrimination and stigmatisation.[71] However, their experiences are not assumed to be the same. Violence against transgender women is viewed as a different form of abuse which results from a culture which conceives gender in a static and binary sense.[72]

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66 Daniela Jauk, "Gender Violence Revisited: Lessons from Violent Victimization of Transgender Identified Individuals", *Sexualities* 16, no. 7 (October 2013): 809, https://doi.org/10.1177/1363460713497215.

67 Joseph, "Transphobic Femicide"; Seely, "Reporting on Transgender Victims of Homicide", 76.

68 Joseph, "Transphobic Femicide: An Intersectional Perspective",106.

69 Jae M. Sevelius, "Gender Affirmation: A Framework for Conceptualizing Risk Behavior Among Transgender Women of Colour", *Sex Roles* 68, no. 11–12 (June 2013): 675, https://doi.org/10.1007/s11199-012-0216-5.

70 Cynthia Lee and Peter Kwan, "The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women", *Hastings Law Journal* 66, no. 1 (2014): 90.

71 Aslı Zengin, "Mortal Life of Trans/Feminism: Notes on “Gender Killings” in Turkey", *TSQ: Transgender Studies Quarterly* 3, no. 1–2 (May 2016): 270, https://doi.org/10.1215/23289252-3334487.

72 Michaela Rogers, "Transphobic ‘Honour’-Based Abuse", *Sociology* 51, no. 2 (2017): 226.

Transgender women's experiences are shaped by cissexism or transphobia (hatred towards trans people), as well as misogyny (hostile, negative attitudes towards women).[73] Compared to cisgender women who present more masculine traits, mainstream society tends to be harsher towards transgender women with the same characteristics, as these can be used against them to "prove" that they are not "real women".[74] This leads to discrimination and alienation from the social realm.[75] More precisely, transphobia is key to understanding transgender women's experiences of violence and murder, as it refers to the hatred they are subjected to because they do not conform to traditional gender norms, as well as "norms regarding cisgender, heterosexual male sexual behaviour, and so on".[76] Therefore, transphobic violence, sometimes also known as 'gendercide' or 'trans-cide', refers to violence towards transgender people as a punishment for their deviance from the cisgender standard.[77]

Transgender women are often stigmatised and portrayed as confused, imposters, abnormal, or mentally ill.[78] Stigmatisation makes them worthless to their abusers, who feel more empowered to use physical or psychological violence against them, which could also result in fatality.[79] As a consequence of this, transgender women have greater rates of victimisation.[80] Stigma may cause shame. Both increased victimisation and shame affect transgender identities and marginalised communities' willingness to report violence to the police.[81] This may be linked to their fear of being exposed and 'outed', or the fact that their reports may not be seriously considered as they are viewed as "abnormal".[82]

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73 Rogers, "Transphobic 'Honour-Based Abuse", .232; Joseph, 'Transphobic Femicide', 112

74 Kae Greenberg, "Still Hidden in the Closet: Trans Women and Domestic Violence", *Berkeley Journal of Gender, Law & Justice* 27, no. 2 (2012): 211.

75 Lee and Kwan, "The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women", 90.

76 Marie Hailey Brown, "The Forgotten Murders: Gendercide in the Twenty-First Century and the Destruction of the Transgender Body", in *Denial: The Final Stage of Genocide*, ed. John Cox, Amal Khoury, and Sarah Minslow, first (London: Routledge, 2021), 184.

77 Brown, "The Forgotten Murders", 185.

78 Greenberg, "Still Hidden in the Closet: Trans Women and Domestic Violence", 213; Valo Vähäpassi, "User-Generated Reality Enforcement: Framing Violence against Black Trans Feminine People on a Video Sharing Site", *European Journal of Women's Studies* 26, no. 1 (February 2019): 87, https://doi.org/10.1177/1350506818762971.

79 Greenberg, "Still Hidden in the Closet: Trans Women and Domestic Violence", 211.

80 Greenberg, "Still Hidden in the Closet: Trans Women and Domestic Violence", 213.

81 Jauk, "Gender Violence Revisited", 813.

82 Jauk, "Gender Violence Revisited", 814.

Stigma and shame are key to understanding the ideology of honour-based violence, which expects individuals to conform with their identity and its related gender norms.[83] As regards transgender people, this type of violence results from the intersection of gender with status, social stigma, and heteronormativity.[84] In familial contexts, women's trans identity may represent a source of shame and a threat to the family's social reputation and status. The latter could become a priority over the well-being of the victim.[85] Discrimination, rejection, and violence in this context constitute a response to transgender women's refusal to adhere to heteronormative and gender expectations, which are strictly tied to cultural beliefs.[86]

Generally, transgender people have been confined to one single category, and their lives have been explored using essentialist lenses.[87] However, their experiences are not the same, as noted above, and are rather shaped by different existing and intersecting inequalities.[88] Considering them as belonging to a uniform category fails to address such structures and fuels a system based on the experiences of white, cisgender, and middle-class people.[89] When gender intersects with other systems of oppression such as race and class, transgender women are more exposed to stereotyping, marginalisation and stigmatisation, which can culminate in serious violence.

Since 2013, the Human Rights Campaign (HRC) has been monitoring the killings of transgender people in the United States, revealing that transphobic, sexist violence disproportionately impacts transgender women of colour.[90] For instance, in 2015, the HRC, together with the Trans People of Colour Coalition, reported that the likelihood of encountering discrimination, violent behaviours, and harassment increases dramatically for transgender women of colour, as compared to white transgender

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83 Rogers, "Transphobic 'Honour'-Based Abuse", 230.

84 Rogers, "Transphobic 'Honour'-Based Abuse", 231.

85 Rogers, "Transphobic 'Honour'-Based Abuse", 237.

86 Rogers, "Transphobic 'Honour'-Based Abuse", 237

87 Human Rights Campaign, "Understanding the Transgender Community", n.d.

88 Rayna E. Momen and Lisa M. Dilks, "Examining Case Outcomes in US Transgender Homicides: An Exploratory Investigation of the Intersectionality of Victim Characteristics", *Sociological Spectrum* 41, no. 1 (2 January 2021): 53–79, https://doi.org/10.1080/02732173.2020.1850379.

89 Momen and Dilks, "Examining Case Outcomes in US Transgender Homicides", 60.

90 Joseph, "Transphobic Femicide", 110; Human Rights Campaign, "Report: Fatal Anti-Transgender Violence in the U.S. in 2018", n.d.

women.[91] Between 2010 and 2016, 111 transgender people were killed because of their gender identity, and 72 per cent were Black transgender women.[92]

However, there exists limited evidence about transgender women victims of femicide violence. Recall, transphobic femicide or trans-cide as the killing of transgender or transsexual identities.[93] In most instances, their deaths are not counted as femicides but rather as homicides.[94] This is the result of a cultural system that still struggles to recognise transgender women, and as such, prioritises an exclusionary, binary, and sex-based framework. In order to understand intersectional identities, such as those of transgender women of colour mentioned above, there is a need to adopt a multidimensional approach to femicide which sheds light on the different forms of discrimination they face[95] and reflects the various existing structures of power, such as race, disability, gender identity, class, and so forth.

Conclusion

To conclude, this article has argued that existing definitions of femicide have been essential for recognising such crime as a distinct phenomenon and distinguish it from the gender-neutral term, “homicide”. Nevertheless, there is a need to go further and develop more inclusive definitions, which shed light on marginalised or unspoken identities, such as those of transgender women, and go beyond the binary, heteronormative sex-based men/women framework which has been used so far. Future research should take this into account in order to shape new definitions which are both more inclusive and less biased. Research should focus on how multiple existing systems of power such as gender, race, sex, class, and age intersect and lead to differing forms and severity of discrimination. This would help to avoid falling into the trap of essentialism and universalism.

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91 Human Rights Campaign, "Addressing Anti-Transgender Violence: Exploring Realities, Challenges, and Solutions for Policymakers and Community Advocates", 2015; Momen and Dilks, "Examining Case Outcomes in US Transgender Homicides".

92 Meredith Talusan, "Unerased: Counting Transgender Lives", *New York, NY: Mic, National Coalition of Anti-Violence Programs, GLAAD. Https://Mic. Com/Unerased*, 2016.

93 Sonia M. Frías, "Femicide and Feminicide in Mexico: Patterns and Trends in Indigenous and Non-Indigenous Regions", *Feminist Criminology* 18, no. 1 (January 2023): 7.

94 Joseph, "Transphobic Femicide", 109.

95 Joseph, "Transphobic Femicide", 112.

By adopting an intersectional approach, this paper has discussed that although gender and patriarchy are key to understanding femicide violence, femicide also results from multiple intersecting structural inequalities, such as race, class, identity, disability, sexuality, and cultural beliefs. Considering patriarchal oppression as the sole driving factor of gender-based violence fails to recognise that there exist differences among women's experiences of harm, and therefore they cannot be essentialised. The analysis of transgender women's experiences in this article has aimed to highlight the importance of including them in conceptualisations of femicide and considering how intersectional experiences differ from each other. This will help make definitions of femicide more inclusive and overcome a culture which still conceives gender as fixed and binary.

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A Critical Assessment of Zemiology's Appropriateness in the Analysis of Atrocities and More Specifically the Situation Experienced by the Uyghurs in Xinjiang

Colomba Baird-Smith

Abstract

The purposes of this paper are to assess whether the tools provided by zemiology contribute to positive ways forward in the field of atrocity studies beyond criminology and whether this proposed zemiological framework contributes to a furthered understanding of the situation experienced by the Uyghur community in Xinjiang. This paper argues that zemiology allows a valuable questioning and broadening of the criminological lens on episodes of atrocities. When applied to the case study, two relevant zemiological tools (i.e., a state/elite defined and constructed perception of the concept of crime and Simon Pemberton's three categories of social harm) allow the qualitative and quantitative improvement of our understanding of the volume and origins of the harms experienced by the Uyghur community. However, two main zemiological shortages are identified throughout this paper: an obsessive focus on the critique of criminology and a contradictive reproach about criminology's ideological bias.

Introduction

An attempt to index genocidal events from 1933 to 1999 suggests at least 26 headline events.[1] This non-exhaustive list displays the frightening occurrence of a genocidal event roughly every two and half years for 66 years. This statement manages to convey the idea of a global failure to prevent the occurrence of large-scale human suffering.

[1] Andy Aydin-Aitchison, "Genocide and 'ethnic cleansing'", in *Handbook on Crime*, ed. F. Brookman (Cullompton: Willan, 2010), 777-778.

This paper seeks to determine whether the zemiological critique of criminology is relevant and valuable to studies of atrocity. Once put forward, theoretical findings are applied to a concrete event: the treatment of Uyghurs, Kazakhs, and other Turkic Muslim minorities (hereinafter referred to as Uyghurs) in the Xinjiang Uyghur Autonomous Region (Xinjiang) situated in the People's Republic of China (PRC). This research seeks to answer two main questions: how do the tools provided by zemiology contribute to positive ways forward in the field of atrocity studies beyond criminology? How can the framework proposed by zemiology contribute to the explanation and regulation of the atrocities experienced by the Uyghurs in Xinjiang?

This paper argues that zemiology allows a valuable questioning and broadening of the analytical lens adopted by criminologists, notably with its critique of the concept of crime and a specific framework to identify and categorise different harms. When applied to the concrete event, the zemiological framework is judged valuable for its comprehensive assessment of the harmful situations experienced by the Uyghurs in Xinjiang.

This paper uses the term 'atrocities' inspired by the term 'atrocity crimes' coined by David Scheffer to amend an unproductive lack of clarity on the defining of atrocity events.[2]

Scheffer justifies the label 'atrocity crime' by an urgent need to:[3]

> "(…) describe as ''atrocity crimes'' a grouping of crimes that includes genocide but is not confined to that particular crime. In short, we need to simplify (…) both public dialogue and legal terminology about such crimes. At present, there is far too much confusion and garbled terminology about what is in fact occurring in an atrocity zone".

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2 Miren Odriozola-Gurrutxaga, "Criminology of atrocity crimes from a macro-, meso- and micro-level perspective", *International E-Journal of Criminal Sciences* 5, no. 9, (2015): 2.

3 David Scheffer, "Genocide and Atrocity Crimes", *Centre for International Human Rights* 1, no. 3 (2006): 2.

Thus, this label encompasses war crimes, genocide, crimes against humanity, and the events these terms include (for example, torture, slavery, and apartheid).[4] Although the atrocity label encompasses terms which have been legally defined, it is an analytical category looking at large-scale, collective, and organised acts of violence. This umbrella term allows the removal of technical, political, and emotional implications often attached to the events it observes without undermining their seriousness.[5] In coherence with the critique of the concept of crime explored throughout the paper, which includes an emphasis on the importance and influence of language,[6] the label 'crime' has been dropped.

Firstly, a literature review settles this article in its academic context whilst assessing the criminological and zemiological contributions to atrocity studies. Then, a section on methods presents the research strategy of this project. Finally, I proceed to the case-study through the application and assessment of the zemiological tools identified in the literature review. Throughout these sections, the argument that zemiology allows a valuable questioning and broadening of the criminological lens on atrocities is developed.

Literature Review

Criminological analysis of atrocities

The criminological analysis of atrocity consists of relatively distinct strands of criminology focusing on different events covered by the overarching label;[7] war-crimes,[8] genocide,[9] and crimes against humanity.[10] In an attempt to grasp the

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4 David Scheffer, "The Future of Atrocity Law", *Suffolk Transnational Law Review* 25, no. 3 (2002): 394-396.

5 Barbora Holá, Hollie Nyseth Nzitatira and Maartje Weerdesteijn *The Oxford Handbook on Atrocity Crimes* (New York: Oxford University Press, 2022), 2-3.

6 Victoria Canning and Steve Tombs, *From Social Harm to Zemiology* (London: Routledge, 2021), 117.

7 Andy Aydin-Aitchison, "Bringing Together the Criminologies of Atrocity and Serious Economic Crimes", *Edinburgh School of Law Research Paper Series* 2022, no.10, (2022): 22.

8 Stephanie DiPietro, "Criminology and war: where are we going and where have we been?", *Sociology Compass* 10, no.10, (2016).

9 Andy Aydin-Aitchison, "Genocide and State Sponsored Killing", in *The Handbook on Homicide*, eds Fiona Brookman, Edward R. Maguire, Mike Maguire (West Sussex: Wiley-Blackwell, 2017).

10 Daniel Maier-Katkin, Daniel Mears and Thomas J Bernard, "Towards a Criminology of Crimes Against Humanity", *Theoretical Criminology* 13, no.2, (2009).

dynamics underlying episodes of atrocities in order to explain and prevent them, criminologists analyse multiple factors and actors involved in the event.[11] Certain criminologists formulate comprehensive frameworks at different levels (macro, meso and micro) for different groups (such as victims).[12] Others adopt a more precise focus, such as the study of actors like the International Criminal Court and its deterrence potential.[13] John Hagan is widely credited for the development of a criminological analysis of atrocities, through his documentation and analytical work,[14] notably of the atrocities which occurred in Darfur.[15] Another recurring theme, is the importance of multidisciplinary work in the context of atrocity studies[16] or the necessity to keep the borders of criminology open in order to (critically) incorporate other perceptions [17] and formulate a relevant over-arching theory.[18] By softening criminology's borders these approaches positively contribute to a crucial challenge for the future of criminology.[19]

Despite varying levels of attention,[20] the criminological scholarship has made a non-negligible contribution to the field of atrocities. For instance, due to criminology's

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11 Miren Odriozola-Gurrutxaga, "Criminology of atrocity", 2.

12 Andy Aydin-Aitchison, *Genocide and State Sponsored Killing;* Susanne Karstedt, Hollie Brehm, and Laura Frizzell, "Genocide, Mass Atrocity, and Theories of Crime: Unlocking Criminology's Potential", *Annual Review of Criminology* 4 (2021); and Miren Odriozola-Gurrutxaga, "Criminology of atrocity".

13 Tom Buitelaar, "The ICC and the Prevention of Atrocities: Criminological Perspectives", *Human Rights Review* 17, no. 3, (2016)

14 Andy Aydin-Aitchison, "Criminological Theory and International Crimes: Examining the Potential", *Edinburgh School of Law Research Paper Series* 2018, no. 10, (2018): 9; Stephanie DiPietro, "Criminology and War", 840; Joachim Savelsberg *Crime and Human Rights Criminology of Genocide and Atrocities* (London: SAGE Publications, 2010), 67.

15 John Hagan and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge: Cambridge University Press, 2009).

16 Wim Huisman, "Corporations and International Crimes", in *Supranational Criminology: Towards A Criminology of International Crimes*, eds. Alette Smeulers and Roelof Haveman, (Antwerp: Intersentia, 2008).

17 Andy Aydin-Aitchison, "Criminological Theory".

18 David Friedrichs, "Crimes of the Powerful and the definition of Crime", in: *The Routledge International Handbook of The Crimes of the Powerful*, ed. Gregg Barak, (New York: Routledge, 2015); Daniel Maier-Katkin, Daniel Mears and Thomas J Bernard, "Towards a Criminology", 231; William Pruitt, "Testing Hagan and Rymond-Richmond's collective action theory of genocide", *Global Crime* 16, no. 1 (2015), 1.

19 David Garland, "Criminology's Place in the Academic Field", in *What is Criminology?* ed. Mary Bosworth, (Oxford University Press, 2011).

20 Andy Aydin-Aitchison, "Criminological Theory"; Andy Aydin-Aitchison, "Bringing Together Criminologies"; Stephanie DiPietro, "Criminology and war"; Susanne Karstedt, Hollie Brehm, and Laura Frizzell, "Genocide, Mass Atrocity"; Daniel Maier-Katkin, Daniel Mears and Thomas J Bernard, "Towards a Criminology of Crimes Against Humanity", *Theoretical Criminology* 13, no. 2, (2009); Joachim Savelsberg *Criminology of Genocide and Atrocities Crime and Human Rights* (London: SAGE Publications, 2010).

ease with definitional work,[21] criminological scholars have shown definitional flexibility for certain key concepts such as genocide. Indeed, the acknowledgement that actions such as preparation, cooperation, and organisation, exist on a continuum allows further analysis and the formulation of multi-level frameworks of explanation.[22] An especially valuable type of criminological framework is an integrated analysis of multiple scales which recognises the interdependence of macro (state), meso (organisational) and micro (individual) levels and their interactions.[23] Some scholars working against the fragmentation and isolation of the criminological field have produced comprehensive works drawing on different strands of criminology such as the criminology of serious economic crimes[24] or distinct fields, such as psychology.[25] A crucial restriction is criminology's relationship to state and power. This point is illustrated by criminology's failure to produce material on atrocities during the second half of the twentieth century, when dynamics such as latent antisemitism or political world order (Cold-War bipolarity) did not support it.[26] Whilst certain authors actively attempt to correct the criminological gap within the atrocity scholarship,[27] others adopt a more pessimistic approach by questioning the capacity of criminology, as an academic field, to analyse events with an international dimension.[28]

Zemiology's contribution to atrocity studies

Zemiology is an academic movement which originates from discussions around the concept of social harm and its potential as an alternative to the concept of crime.[29] Its contribution to the field of atrocities is less straightforward than criminology's. Thus, I

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21 Stephanie DiPietro, "Criminology and War", 841.

22 Andy Aydin-Aitchison, *Genocide and State Sponsored Killing*, 11; Susanne Karstedt, Hollie Brehm, and Laura Frizzell, "Genocide, Mass Atrocity", 77.

23 Andy Aydin-Aitchison, *Genocide and State Sponsored Killing*, 11; Susanne Karstedt, "Scaling criminology: From street violence to atrocity crimes", in *Regulatory Theory: Foundations and Applications*, ed. Peter Drahos, (Canberra: ANU Press, 2017); Joachim Savelsberg, *Address Contemporary Atrocities*?.

24 Andy Aydin-Aitchison, "Bringing Together Criminologies".

25 Tom Buitelaar, "The ICC and Atrocities".

26 Katya Franko Aas, "The Earth is One, But The World is Not': Criminological theory and its geopolitical divisions", *Theoretical criminology* 16, no. 1, (2012); Alex Alvarez, "Governments, citizens", 18; Stephanie DiPietro, "Criminology and war", 840; John Hagan and Wenona Rymond-Richmond, *Crime of Crimes*, 32.

27 Manuel Eisner, "The Uses Of Violence: an Examination of Some Cross Cutting Issues", *International Journal of Conflict and Violence* 3, no.42, (2009).

28 David Garland, *Criminology's Place,* 301.

29 Victoria Canning and Steve Tombs, *From Social Harm,* 1.

start by framing and analysing the zemiological lens before analysing the zemiological tools relevant in the context of atrocities.

Beyond Criminology: Taking Harms Seriously,[30] gathers analysis and research on the conceptual and empirical shortages of mainstream criminology.[31] Despite dissonances amongst the book's contributors, two important arguments stem from this book. The first is that the concept of crime does not suffice to encompass the full range of harms individuals experience.[32] The second is that efforts of progressive changes are permanently restricted, even within critical currents, and, therefore, unprecedently suggests a clear movement beyond criminology's boundaries.[33]

Indeed, a recurrent theme within the zemiological literature is a critique of the concept of crime. Hillyard and Tombs famously formulated nine criticisms of crime: namely it (1) has no ontological reality, (2) perpetuates a myth, (3) consists of many petty events, (4) excludes several serious harms, (5) is artificially constructed, (6) inflicts pain through criminalisation and punishment, (7) is ineffective, (8) gives legitimacy to the growth of crime control (and its industry), and (9) serves to sustain power relations.[34] Throughout the zemiological literature, with varying emphasis on one or more of these criticisms, academics thoroughly examine the concept of crime.

I have observed two main categories of divergence within zemiology's ranks. The first one is the ontological value of the notion of harm (zemiology's underpinning concept). Canonical authors themselves acknowledged that the broadness of the zemiological scope could be considered ontologically problematic.[35] Despite the advantages of definitional flexibility,[36] several authors admit that a coherent definition and grounding of the social reality of their object of study, namely harm, is a crucial step for the

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30 Paddy Hillyard et al., *Beyond Criminology: Taking Harm Seriously* (London: Pluto, 2004).

31 Simon Pemberton, "Social Harm Future(s): exploring the potential of the social harm approach". *Crime Law and Social Change* 48, no. 1-2, (2007), 57; Justin Kotzé, *Criminology or Zemiology?*,85.

32 Letizia Paoli and Victoria Greenfield, "Harm: A Substitute for Crime or Central to It?" in *Zemiology: Reconnecting Crime and Social Harm*, eds. Avi Boulki and Justin Kotzé (Cham: Springer International Publishing, 2018), 57; Justin Kotzé, *Criminology or Zemiology?*,85.

33 Simon Pemberton, "Social Harm Future(s)", 27.

34 Paddy Hillyard, et al., *Beyond Criminology*,10–16.

35 Paddy Hillyard, et al., *Beyond Criminology*,19–20.

36 Francesca Soliman, "States of exception, human rights, and social harm: Towards a border zemiology", *Theoretical Criminology* 25, no. 2 (2021),10.

development of zemiology.[37] Nevertheless, no clear assessment, of what makes an event harmful, stems from the literature observed. An illustration of this shortage is the unquestioned use of a core and crucial term: "xemia". Xemia is a Greek term with multiple connotations, it can be understood in terms of 'hurt' or 'loss' but also in the context of 'punishment' or 'penalty.[38] Despite being a vague term stemming from a rough translation, xemia gave its name to zemiology, a label which permeates the scholarship observed.[39] In an attempt to correct this lack of characterisation, Pemberton suggests the grounding of harm's ontological reality within Doyal and Gough's theory of human needs.[40] He argues that harm occurs when an individual cannot satisfy specific needs.[41] He proposes three categories of harm which correspond to categories of needs that must be fulfilled for individuals to not be harmed: physical/mental health, autonomy, and relational.[42]

The second group of divergence identified within zemiology's ranks concerns zemiology's position towards criminology. Three stances can be identified. The first considers zemiology to be a sub-discipline of criminology according to which the replacement of crime with harm has no legitimacy.[43] The second position is to advocate for zemiology as an independent discipline defending the idea that zemiology must be emancipated from restrictive and strict legalistic definitions.[44] The last position consists of questioning the necessity to oppose zemiology and criminology. For instance, Simončič uses zemiological and criminological lenses one after the other in order to analyse the harms produced by the fast-fashion industry.

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37 Victoria Canning and Steve Tombs, *From Social Harm*, 53; Simon Pemberton, "Social Harm Future(s)", 35; Simon Pemberton, *Harmful societies,* 14.

38 Justin Kotzé, *Criminology or Zemiology?*, 88-90.

39 Justin Kotzé, *Criminology or Zemiology?*, 88-90.

40 Victoria Canning and Steve Tombs, *From Social Harm*, 50-51; Len Doyal and Ian Gough, *A Theory of Human Need* (Basingstoke: Macmillan Education, 1991).

41 Simon Pemberton, *Harmful societies,* 27-28.

42 Simon Pemberton, *Harmful societies,* 28.

43 Victoria Canning and Steve Tombs, *From Social Harm,* 41–46; Lynne Copson, "Beyond 'Criminology vs Zemiology': Reconciling Crime with Social Harm" in *Zemiology: Reconnecting Crime and Social Harm*, eds. Avi Boulki and Justin Kotzé (London: Palgrave, 2018), 38; Justin Kotzé, *Criminology or Zemiology?*, 93; John Muncie, "Book Review: Beyond criminology: Taking harm seriously", *Crime, Law and Social Change* 43, no. 2–3 (2005); Letizia Paoli and Victoria Greenfield, *Harm: A Substitute*, 59; Lucia Zedner, "Putting Crime Back on the Criminological Agenda" in *What is Criminology?,* eds. Mary Bosworth & Carolyn Hoyle, (Oxford: Oxford University Press, 2011).

44 Victoria Canning and Steve Tombs*, From Social Harm:* 49; Louk Hulsman, "Critical Criminology and The Concept of Crime", *Contemporary Crises* 10, no.1, (1986); Simon Pemberton, "Social Harm Future(s)": 28;30.

Without ignoring the tensions between the disciplines, the author intends to maximise her understanding of the harms addressed.[45]

I argue that two zemiological tools discussed above are appropriate in the context of atrocities: the critique of crime and the categorisation of harms.[46] Zemiologists consider crime as a spatially, temporally, and socially contingent construction whose definition has historically been decided by the powerful, namely state entities and elites.[47] In a zemiologist perspective, crime supports structures and systems benefiting its architects rather than the population.[48] Where it used to serve feudalist or imperialist principles, crime (and the entities materialising it: criminal law, the criminal justice system, etc) now acts according to neoliberalism and its capitalist structures' interests.[49] In other terms, zemiology considers crime as a concept defined, constructed, and enforced by state and elite entities of a given society.[50] This perception of crime has two implications which can be key in the context of atrocities. Firstly, it allows a qualitative and quantitative broadening of the criminological scope through which an episode of atrocity is analysed. It allows us to analyse harmful events beyond standards set by the restricted scope of traditional criminal justice such as intentionality and proximity.[51] Secondly, the state/elite-defined aspect of crime permits the consideration of crime and its derivative terms (for example 'criminal', 'prisoner' and 'illegal immigrant') as indicators of dynamics of power.[52] In the context of an episode of atrocity, this approach permits careful consideration of the use of labels to observe and uncover relationships of power, dynamics of dominance or the involvement of specific actors.[53] The second zemiological tool I judge appropriate is

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45 Katja Simončič, "Fast Fashion: A Case of Social Harm and State-Corporate Crime", *Howard Journal of Crime And Justice* 60, no. 3 (2021).

46 Simon Pemberton, *Harmful societies.*

47 Victoria Canning and Steve Tombs*, From Social Harm,* 3.

48 Victoria Canning and Steve Tombs*, From Social Harm*, 3; Ifeanyi Ezeonu, "Capital and Chlordecone Poisoning in the French Caribbean Islands of Guadeloupe and Martinique: A Thesis on Crimes of the Market", *International Critical Thought* 11, no. 2 (2021), 272.

49 Ifeanyi Ezeonu, "Capital and Chlordecone Poisoning"; Stephen Hall and Simon Winlow, "Big Trouble or Little Evils: The Ideological Struggle over the Concept of Harm", in *Zemiology: Reconnecting Crime and Social Harm,* eds. Avi Boukli and Justin Kotzé (Cham: Springer International Publishing, 2018), 107.

50 Ifeanyi Ezeonu, "Capital and Chlordecone Poisoning", 275.

51 Simon Pemberton, "A theory of Moral Indifference: Understanding the Production of Harm by Capitalist Society" in *Beyond Criminology: Taking Harm Seriously*, eds. Paddy Hillyard, et al (London: Pluto, 2004), 68.

52 Victoria Canning and Steve Tombs, *From Social Harm,* 3 and 118.

53 Victoria Canning and Steve Tombs, *From Social Harm,* 3 and 118.

Pemberton's categorisation of harms. He operationalises a 'needs' approach to harm in an unprecedented manner by defining three categories of harm which stem from the idea that harm occurs when individuals are prevented from fulfilling specific needs, such as autonomy or decent health.[54] As demonstrated in Simončič's work, Pemberton's categories can be used to uncover the magnitude and seriousness of the wide range of harms occurring during a specific event.[55]

Methods

Research Strategy

This article analyses experiences of the Uyghurs through a zemiological lens, more precisely through the two following tools: a state/elite defined and constructed perception of the label of crime and Pemberton's categories of social harm. The litmus test to judge the first tool's appropriateness is whether this specific zemiological critique of the concept of crime allows a quantitative and qualitative improvement of our understanding of the volume and origins of the harms experienced by the Uyghur community. Concerning the second tool, the hypothesis to assess is whether Pemberton's three categories of social harm are relevant and appropriate in the case of the situation experienced by the Uyghurs and whether they allow the enhancement of our knowledge of the magnitude and seriousness of the harms occurring. In other words, these categories will be used to consider whether the harms observed in the data, affect individuals' capabilities and opportunities to maintain sufficient physical/mental health, achieve, and control their self-actualisation, or preserve meaningful social relationships and their identities.[56]

Sources

The data on the concrete events experienced by the Uyghur community in Xinjiang is collected in the Uyghur Tribunal's public evidence base. The Uyghur Tribunal (UT) is an independent People's Tribunal established in June 2020 and it delivered its

54 Simon Pemberton, *Harmful societies*, 28; Katja Simončič, "Fast Fashion", 346.
55 Katja Simončič, "Fast Fashion".
56 Simon Pemberton, *Harmful societies*, 28–30.

judgment in December 2021.[57] The People's Tribunal's purpose is to address a question which needs answering but is left untouched by formal bodies. Their jurisdiction is rooted in citizens' rights to fill a knowledge gap. Their conclusions have no formal power.[58] Additionally, further explanations are found in expert reports which rely on primary evidence such as audio-visual evidence or official documents and were considered by the UT.[59] The events, facts, situations, and emotions delineated in the data will be thoroughly considered through the lens of the two zemiological tools identified earlier.

This database was chosen because the UT represents the (unique) assessment of the Uyghur situation following a wide, evidence-based process by a recognised model. Because of the PRC, alongside its global influence, repeatedly stating that any comments on this situation represents a breach of its sovereignty which will not be tolerated, this data is controversial.[60] The PRC has issued sanctions towards individuals (e.g., academics, deputies) and organisations (including the UT) who publicly addressed this matter.[61]

Case Study: The Uyghurs of Xinjiang

Context

The harms observed are endured by the estimated eleven million Uyghurs living in Xinjiang. Since the conquest of the Qing Empire in 1884, Xinjiang has seen a series of governments until the establishment of the PRC in 1949. With a varying intensity

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57 David Tobin, "How an independent tribunal came to rule that China is guilty of genocide against the Uyghurs", The Conversation UK, 14 December 2021, https://theconversation.com/how-an-independent-tribunal-came-to-rule-that-china-is-guilty-of-genocide-against-the-uyghurs-173604.

58 Andrew Byrnes and Gabrielle Simm *Peoples' Tribunals and International Law* (Cambridge: Cambridge University Press, 2017); Geoffrey Nice, UT- Live Hearing 04/06/2021-Opening Remarks From the Chair, 2021. https://www.youtube.com/watch?v=7aLUj1sQDgQ; Geoffrey Nice, International Justice and the UTs: A conversation with Sir Geoffrey Nice, QC. Edinburgh: The University of Edinburgh's Global Justice Academy, 2022.

59 Uyghur Tribunal Judgement, 2021,14-15, https://uyghurtribunal.com/wp-content/uploads/2022/01/Uyghur-Tribunal-Judgment-9th-Dec-21.pdf.

60 Patrick Wintour, "China imposes sanctions on UK MPs, lawyers and academic in Xinjiang row", The Guardian,14 March 2021, https://www.theguardian.com/world/2021/mar/26/china-sanctions-uk-businesses-mps-and-lawyers-in-xinjiang-row

61 Patrick Wintour, "China imposes sanctions".

until the early 1990s, with a peak of magnitude since the late 2010s, the PRC has issued discriminatory policies towards the Uyghurs.[62] This PRC strategy is underpinned by connected and mutually reinforcing assumptions such as security, political, and economic threats, stemming from the Uyghurs' identity and the strategical aspect of Xinjiang.[63]

A search using the Institute for Scientific Observation's database (Web of Science) demonstrates that several academic disciplines have investigated the Uyghurs' situation (such as area, ethnic, religious studies, political science, sociology, and biology). When applying the filter 'genocide', relevant to atrocity studies, the search reveals only ten results. These resources are less than two years old and mostly stem from government, legal, and political science research areas. No paper proposes any sort of framework attempting to make sense of the events endured by the Uyghurs. Nevertheless, similar explanatory approaches have been adopted in the context of the Rohingya Crisis.[64] The literature, however, lacks an analysis of the criminological lens of a specific event in terms of zemiology.

Zemiological critique of crime

This section explores the validity of the zemiological critique of the concept of crime in the context of the harms experienced by the Uyghurs. It argues that this first zemiological tool qualitatively and quantitively broadens the criminological scope of inquiry.

From the zemiological state/elite constructed perception of crime stems the idea that certain artificial elements attached to the concept of crime reduce the volume of harms observed. The following segments analyse whether an approach bereft of certain

62 Amnesty International, *Like we were enemies in a war*, 18.

63 Amnesty International, *Like we were enemies in a war*, 19: James Millward and Dahlia Peterson, "China's system of oppression in Xinjiang: How it developed and how to curb it", The Brookings Institution, September 2020, 8, https://www.brookings.edu/research/chinas-system-of-oppression-in-xinjiang-how-it-developed-and-how-to-curb-it/; United-States Holocaust Memorial Museum, *'To Make Us Slowly Disappeared': The Chinese Government's Assault on the Uyghurs*, (Washington: Simon-Skjodt Centre for the Prevention of Genocide, 2021),11.

64 Melanie O'Brien, "'There We Are Nothing, Here We Are Nothing!' —The Enduring Effects of the Rohingya Genocide", *Social Sciences* (Basel) 9, no.11, (2020).

excluding elements (respectively intentionality, proximity and subjective narrowness) is relevant in the context of the Uyghurs.

Firstly, zemiologists consider that the concept of crime, through its ties to criminal law, which artificially prioritises intentionality over indifference, excludes the wide range of harm caused and/or allowed by indifference.[65] The situation of the Uyghurs has increasingly been publicly disclosed, evidenced, and discussed by media and academics for at least four years.[66] This paper acknowledges that the PRC's geopolitical and economic power considerably reduce the prospects of significant leverage of individual state-action but argues that it does not justify the almost complete level of inaction displayed[67] beyond fruitless diplomatic statements[68] of governmental actors. It has been identified that at least 83 companies such as Amazon, Mercedes-Benz, or Zara, by employing contractors involved in the Uyghurs forced labour program, participate in Uyghur suffering.[69] Although they do not themselves intentionally employ Uyghurs under enslaving conditions their silence cannot be considered as harmless.[70] Additionally, the global public, despite social media campaigns,[71] shows indifference to the situation experienced by the Uyghurs by not holding their governments accountable nor boycotting companies. For instance, several fast-fashion clothing companies appear in the list of companies participating the Uyghurs suffering, but the industry is still growing[72]. An approach bereft of a focus on intentionality reveals that through indifference a wide range of actors are responsible for the harms experienced by the Uyghurs.

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65 Simon Pemberton, *A Theory of Moral Indifference*, 68–69.

66 Lily Kuo, "China Footage Reveals Hundreds of Blindfolded And Shackled Prisoners", The Guardian, 23 September 2019, https://www.theguardian.com/world/2019/sep/23/china-footage-reveals-hundreds-of-blindfolded-and-shackled-prisoners-uighur.

67 J Packer and Y Diamond, Expert Witness Statement. 11/09/2021 Hearings. London: UT.

68 Human Rights Watch, "UN: Unprecedented Joint Call for China to End Xinjiang Abuses" (2019), https://www.hrw.org/news/2019/07/10/un-unprecedented-joint-call-china-end-xinjiang-abuses; Reuters, "U.N. rights chief regrets lack of access to Xinjiang", (2021) https://www.reuters.com/world/china/un-rights-chief-regrets-lack-access-xinjiang-2021-09-13/

69 Vicky Xiuzhong Xu et al, *Uyghurs For Sale: 'Re-education', Forced Labour and Surveillance beyond Xinjiang* (Branton: ASPI-International Cyber Policy Center, 2020).

70 A Idris, Expert Witness Statement. 10/09/2021 Hearings. London: UT.

71 Mathilde Durand, "Soutien aux Ouïghours : pourquoi les réseaux sociaux sont-ils envahis de carrés bleus ciel?", Le Journal du Dimanche, 01 Octobre 2020, https://www.lejdd.fr/International/soutien-aux-ouighours-pourquoi-les-reseaux-sociaux-sont-ils-envahis-de-carres-bleus-ciel-3995567.

72 Verena Gruber and Marie-Agnes Parmentier, "10 years after the Rana Plaza collapse, fashion has yet to slow down", The Conversation UK, 27 April 2023, https://theconversation.com/10-years-after-the-rana-plaza-collapse-fashion-has-yet-to-slow-down-204481.

Secondly, zemiology argues that crime, through its affiliation with criminal law which mostly indexes events entailing a degree of proximity between the source and object of the harm, dismisses the wide range of harms caused despite spatial and temporal distance.[73] The PRC's governing entities operate from Beijing,[74] more than 2000 kilometres away from the Xinjiang's capital Ürümqi. Their direct responsibility in virtually all harmful decisions concerning the Uyghurs of Xinjiang, clearly demonstrates that spatial proximity is unnecessary to cause harm. Similarly, the decision of a technology company's leadership, such as Huawei or Megvii[75] to sell technologies for mass surveillance to the PRC, is taken far (geographically and temporally), from the Uyghurs' situation. Moreover, in the case of the mass surveillance campaign,[76] time and precise locations are irrelevant to the extent in which the harms caused (e.g., terror climate, intimidation) are omni-present. Thus, spatial, and temporal proximity are irrelevant in the context of certain harms experienced by the Uyghurs in Xinjiang.

Thirdly, zemiologists argue that crime is based on a contingent construction maintained and defined by the society's powerful actors and therefore currently supports neoliberalism's and capitalist structures' interests.[77] Because the concept is formulated far from human considerations it fails to encompass a wide range of events which meaningfully impact individuals' lives in a daily manner: organisational and structural harms or harms normalised by neoliberalism.[78] One of the rationales underlying the PRC's strategy is a belief in Han supremacism from which stems the framing of policies under nationalist efforts to neutralise the threat represented by communities not clearly showcasing a Han sense of identity.[79] According to the expert witnesses, such strategies are underlined by strong anti-Muslim narratives, enabling a form a latent racism to infiltrate the country's structures, which in turn allows the

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73 Victoria Canning and Steve Tombs, *From Social Harm,* 55.

74 E Anderson, Expert Witness Statement. 13/09/2021 Hearings. London: UT; J Batke Expert Witness Statement. 10/09/2021 Hearings. London: UT; C. Parton, Expert Witness Statement. 13/09/2021 Hearings. London: UT; S Roberts, Expert Witness Statement, 04/06/2021 Hearings. London: UT; A Zens, Expert Witness Statement, 07/06/2021 Hearings. London: UT.

75 C Healy, Expert Witness Statement. 12/09/2021 Hearings. London: UT.

76 T Biao, Expert Witness Statement. 10/09/2021 Hearings. London: UT; M Wang, 2021. Expert Witness Statement. 10/09/2021 Hearings. London: UT.

77 Ifeanyi Ezeonu, "Capital and Chlordecone Poisoning".

78 Victoria Canning and Steve Tombs*, From Social Harm*, 55; Paddy Hillyard et al, *Beyond Criminology,* 13.

79 United-States Holocaust Memorial Museum, *To Make Us Slowly Disappeared,* 11.

current Uyghur situation.[80] Companies participating in the forced labour programmes also are an integral part of a global supply chain whose main enabler is one of capitalism's core features: consumerism. The harms stemming from consumerism's main industries (for example fast fashion, communication tools), including slavery-like working conditions,[81] are normalised due to their affiliation with the dominant ideology (that is neoliberalism).[82] Certain harms excluded or normalised by the concept of crime's contingency on elites' interests have been proven as crucial in the situation of the Uyghurs.

Zemiologists argue that the crime language and labels are indicators of a capacity to manage economically, politically, and structurally 'the powerless' according to specific interests.[83] As previously mentioned the 'stability' of the Xinjiang is considered to be imperative by the PRC. This rationale is visible through the criminalisation of the Uyghurs individuals' everyday lives.[84] Several factual witness state that they have observed actions such as regular prayer, dietary restrictions, or even Muslim greetings being considered as reasonable justifications for long term detention or labelled as terrorist activities.[85] The labelling of most aspects of an Uyghur individual's familial, social, cultural, and religious life as crimes displays the PRC's desire to control this group and the means it is ready to deploy.

Pemberton's categories of harm

This segment considers the significance of Pemberton's framework in the analysis, identifies and categories the harms experienced by the Uyghurs. It is divided into three sections which respectively consider the relevance of the physical/mental health, autonomy, and relational categories of harms. The consideration of these three

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80 T Biao, Expert Witness Statement; J Millward, Expert Witness Statement. 12/09/2021 Hearings. London: UT; D Tobin, Expert Witness Statement. 05/06/2021 Hearings. London: UT; C Tyler, Expert Witness Statement. 11/09/2021 Hearings. London: UT; United-States Holocaust Memorial Museum, *To Make Us Slowly Disappeared'* 11.

81 N Abdureshid, Factual Witness Statement. 07/06/2021 Hearings. London: UT.

82 Katja Simončič, "Fast Fashion".

83 Victoria Canning and Steve Tombs, *From Social Harm,* 3 and 18.

84 E Anderson, Expert Witness Statement, 10.

85 R Abbas, Factual Witness Statement. 06/06/2021 Hearings. London: UT; S Abdighafur, Factual Witness Statement. 05/06/2021 Hearings. London: UT; N Abdureshid, Factual Witness Statement; O Bekali, 2021. Factual Witness Statement. 04/06/2021 Hearings. London: UT.

categories showcases that Pemberton's identification of harms increase this paper's understanding of the severity, scope, and origins of the situation.

The physical and mental health category relates to the objective of maintaining a state sufficient for individuals to 'lead an active and successful life'.[86] Pemberton understands physical health beyond deaths and mere survival as he argues that harmful events occur when individuals are unable to secure a quality of life allowing successful self-actualisation and social participation.[87] However, the extreme conditions endured by Uyghurs do not require this furthered understanding to reveal the physical and mental harms experienced. Indeed, it is an understatement to argue that the PRC's policies represent a clear impediment towards the physical and mental health of Uyghurs. In detention centres, the use of violent interrogation methods and torture is systematic.[88] Several factual witnesses report the use of electric shocks on parts of their bodies or 'tiger chairs'.[89] Sexual violence is also described as a routine method of harm by both male and female former prisoners.[90] The exploitation of family ties (disappearance, separation, intimidation),[91] constant technical and physical (infiltration of Hans within Uyghurs household)[92] surveillance and the use of physical torture as an enforcement tool for psychological torture[93] have created a climate of terror in which Uyghurs constantly exist.[94]

Pemberton's second category relates to the objective of securing a level of autonomy adequate for individuals to possess the appropriate decision-making skills necessary for self-actualisation.[95] According to Pemberton, the capability to independently formulate choices and act accordingly is a need which individuals must fulfil in their attempts to achieve self-actualisation.[96] Autonomy harms occurs in three different

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86 Len Doyal and Ian Gough, *A Theory of Human Need,* 59.
87 Simon Pemberton, *Harmful societies*, 28.
88 D Tobin, Expert Witness Statement.
89 A Ayup, Factual Witness Statement. 04/06/2021 Hearings. London: UT; O Bekali, Factual Witness Statement.
90 G Alwauqanqizi, Factual Witness Statement. 13/09/2021 Hearings. London: UT; O Bekali, Factual Witness Statement; D Tobin, Expert Witness Statement.
91 R Abbas, Factual Witness Statement; H Achad, Factual Witness Statement. 06/06/2021 Hearings. London: UT.
92 A Muhammad, Factual Witness Statement. 11/09/2021 Hearings. London: UT.
93 G Cain, Expert Witness Statement. 12/09/2021 Hearings. London: UT.
94 R Abbas, R., Factual Witness Statement.
95 Simon Pemberton, *Harmful societies*, 28.
96 Simon Pemberton, *Harmful societies*, 29.

manners. The first is the inaccessibility of adequate educational systems, preventing the individual from developing their understanding and learning skills, leading to the harmful states of illiteracy or innumeracy for instance.[97] The education of Uyghur children is not understood in terms of supplying necessary tools for self-actualisation but in terms of an opportunity for the state to safeguard their interests.[98] The second is the lack of opportunities for individuals to meaningfully participate in social activities (including paid work or having children) allowing for the development of self-esteem and preventing isolation.[99] Opportunities for Uyghurs to participate in meaningful social activities are extremely restricted. When Uyghurs are not coercively enrolled in labour programmes, they face considerable discrimination in terms of job opportunities.[100] Uyghurs face difficulty in constructing a family due to a mass campaign of Uyghur birth prevention. Inside and outside camps, women have been subject to imposed contraceptive devices (for example annual checking of contraceptive implants), sterilisation (for example removal of reproductive organs) and abortions.[101] This campaign has caused a drop in official birth rates in Xinjiang since 2017 which fell by nearly half between 2017 and 2019.[102] The third, is the inability of individuals to exercise control over important decisions having a direct impact on their lives.[103] The restrictions mentioned above clearly indicate an absence of control over economic and familial decisions. All factual witnesses heard by the UT confirm the occurrence of comprehensive 'health checks' including blood tests and scans.[104] This coercion also applies to an individual's choice of identity as the Han identity is the only accepted one as several factual witnesses report forced assimilation process such as classes in detention camps.[105]

The third category pertains to the objective of maintaining meaningful social relationships crucial to achieve both social participation and self-actualisation.[106]

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97 S., Pemberton, *Harmful societies*, 29.

98 J Milssap, Expert Witness Statement. 11/09/2021 Hearings. London: UT.

99 Simon Pemberton, *Harmful societies*, 29.

100 H Achad, Factual Witness Statement.

101 S Abdighafur, Factual Witness Statement; T Ziyawudun, Factual Witness Statement. 05/06/2021 Hearings. London: UT.

102 N Ruser, Expert Witness Statement. 06/06/2021 Hearings. London: UT, 8.

103 Simon Pemberton, *Harmful societies*, 29; Katja Simončič, "Fast Fashion", 346.

104 G Alwauqanqizi, Factual Witness Statement; A Ayup, Factual Witness Statement; O Bekali, Factual Witness Statement; T Ziyawudun, Factual Witness Statement.

105 A Muhammad, Factual Witness Statement.

106 Simon Pemberton, *Harmful societies*, 29.

Relational harms occur in two different non-mutually exclusive manners. The first is social exclusion which results from the non-accession to social, educational, and emotional networks which are necessary to social participation but also to attempts at self-actualisation due to their supportive nature.[107] Because the group observed is constituted, by eleven million individuals, it is not appropriate to talk of individual exclusion from all sorts of social networks. However, emotional networks have been greatly affected. Indeed, most Uyghur families have been separated by deaths,[108] detention,[109] coercive cuts of communications,[110] or boarding-school schemes for children.[111] The second is misrecognition which stems from the non-accession to qualitative social relationships, namely relationships which accept and acknowledge individuals' identity, lifestyle, and membership to a specific religious, ethnic, and/or social group.[112] Unlike the majority of the Chinese population (Hans), individuals of the group observed show a Turkic ethnicity and are mostly Muslim.[113] Beyond this ethno-religious difference, they have a very rich cultural identity conveyed through their own language, traditions, music, and art.[114] This identity has been targeted by the PRC's policies which as whole represent, according to several expert witnesses, a framework to achieve ethnic extinction.[115] Beyond the criminalisation of the Uyghur individual's everyday life, the PRC also perpetrates to an 'eliticide'[116] by targeting influential members of the Uyghur community (for example religious leaders, intellectuals, teachers) in order to prevent, and eventually eradicate, the transmission of the Uyghur culture.[117] The strategy extends to the physical existence of Uyghur

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107 Simon Pemberton, *Harmful societies,* 30–31; Katja Simončič, "Fast Fashion", 347.

108 O Bekali, Factual Witness Statement.

109 R Abbas, Factual Witness Statement.

110 S Abdighafur, Factual Witness Statement; N Abdureshid, Factual Witness Statement.

111 J Packer and Y Diamond, Expert Witness Statement, 30-31; R Turdush, Expert Witness Statement. 07/06/2021 Hearings. London: UT; A Zens, 2021. Expert Witness Statement.

112 Simon Pemberton, *Harmful societies,* 30–31; Katja Simončič, "Fast Fashion", 347.

113 Human-Rights Watch, *Break Their Lineage Break Their Roots: Chinese Government Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims*, (Stanford: Human Rights Watch, 2019), 7.

114 United-States Holocaust Memorial Museum, *To Make Us Slowly Disappeared,* 5.

115 T Biao, 2021. Expert Witness Statement, 4.; D., Byler, Expert Witness Statement. 06/06/2021 Hearings. London: UT; G., Cain, Expert Witness Statement; D., Tobin, Expert Witness Statement.

116 P., Irwin, Expert Witness Statement. 13/09/2021 Hearings. London: UT; R., Abbas, Factual Witness Statement; H Achad, Factual Witness Statement; J Milssap, Expert Witness Statement; J Packer and Y Diamond, Expert Witness Statement; B Sintash, Expert Witness Statement.

117 R Abbas, Factual Witness Statement; H Achad Factual Witness Statement; J Milssap, Expert Witness Statement; J Packer and Y Diamond, Expert Witness Statement; B Sintash, Expert Witness Statement.

culture through the destruction of cultural property. It is estimated that in October 2019 the authorities demolished between 10,000 and 15,000 thousand religious sites.[118]

Relevant but incomplete

In the context of the harms experienced by the Uyghurs, it is fair to argue that the zemiological critique of the concept of crime is relevant and valuable as it qualitatively and quantitatively broadens the criminological scope of inquiry. However, beyond a valuable broadening, this zemiological critique does not put forward tangible solutions to improve the Uyghurs' situation. This shortage is symptomatic of one of zemiology's failures, namely, to articulate solutions.[119] Certain academics claim that zemiologists concentrate too much on castigating criminology and not enough on developing their discipline.[120] Nevertheless, this obsessive focus on criminology potentially affects zemiology's legitimacy as an independent discipline but does not annul the value of the zemiological critique in the context of the situations experienced by the Uyghurs.
Despite a few elements with a debatable relevance, Pemberton's identification and categorisation of harm allows the improvement of this paper's understanding of the severity, scope, and origins of the situation. However, the application of Pemberton's tool to the case of the Uyghurs highlights a zemiological contradiction, namely zemiology's political character. Indeed, zemiology blames criminology for the contingent, political, and ideological character of its underpinning concept, but the identification of harms proposed above undeniably also has an ideological bias.[121] For instance, the negative judgement of an education emphasising the value of communism can be considered as a liberalist bias. Indeed, despite a significant contribution towards the ontological grounding of the concept of harm, Pemberton acknowledges that a need-based approach is inevitably vulnerable to a lack of objectivity due to the concept of harm being value laden notion.[122] Nevertheless, besides highlighting a similarity with the discipline zemiology has been founded in

118 B Sintash, Expert Witness Statement, 8.
119 Lynne Copson "Beyond 'Criminology vs Zemiology', 38; and Majid Yar, "Critical Criminology, Critical Theory and Social Harm", in *New Directions in Criminological Theory*, eds. Stephen Hall and Simon Winlow (New York: Routledge, 2012), 59.
120 Ian Loader and Richard Sparks *Public Criminology?* (Abingdon: Routledge, 2011), 25.
121 Simon Green, Gerry Johnstone and Craig Lambert, "What Harm, Whose Justice?: Excavating the Restorative Movement", *Contemporary Justice Review* 16, no. 4 (2013), 445.
122 Simon Pemberton, *Harmful societies,* 32.

opposition to, this contradiction does not discredit the achievements of the framework presented above.

Conclusion

A thorough assessment of criminological and zemiological contributions to the field of atrocities allows this paper to argue that the criminological lens provides valuable tools for the analysis of atrocities but simultaneously displays non-neglectable flaws. This paper argues that despite not being straightforward, a zemiological lens attempts to remedy these criminological shortages through two main tools.

The first, namely the zemiological critique of crime, enables a more thorough consideration of more harmful events. This quantitative and qualitative broadening of the criminological scope of inquiry is achieved by endorsing an approach bereft of several excluding factors such as intentionality. However, this approach reveals a symptomatic pattern of zemiology which is a more intense focus on criminology than on the development of an independent and complete discipline.

Secondly, Pemberton's categorisation allows an enhanced understanding of the seriousness, magnitude, and origin of the harm experienced by the Uyghurs in Xinjiang by going beyond the 'crime lens'. Nevertheless, it also reveals zemiology's contradiction on the contingency of criminology's underpinning concept by displaying an ideological bias. Overall, the zemiological framework identified is judged relevant and valuable in the context of the harms experienced by the Uyghurs. The two zemiological shortages identified potentially affect the prospects of zemiology as a discipline independent from criminology but they do not invalidate the value of the zemiological framework in the context of atrocity studies.

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Domestic Violence as a Human Rights Issue Beyond (Criminal) Accountability: A Brazilian Case Study

Helena de Oliveira Augusto

Abstract

The article analyses the domestic implementation of the Maria da Penha Law, a Brazilian federal legal act to combat and prevent domestic and family violence against women. The article first introduces the trajectory of domestic violence from a private matter to a public concern as a human rights violation. Then the article contextualises the Brazilian feminist activism for legal reform and introduces the importance of the 2001 Maria da Penha case in the Inter-American Commission on Human Rights for the enactment of the Maria da Penha Law in 2006. Thereafter, the article presents the Maria da Penha Law's legal provisions and its success in establishing special legal protection for women in situations of domestic violence, as well as it reflects on the Maria da Penha Law's ongoing challenges. A critical analysis of the Brazilian reality demonstrates that offender criminal accountability is the most feasible remedy to domestic violence, whereas the fragmentation and fragility of state measures to protect and assist women in situations of violence perpetuates state neglect of women in the context of gender-based violence. Therefore, the Maria da Penha Law case study demonstrates that legal reform alone is insufficient to tackle domestic violence. Women's effective access to legal protection and integrated and gender-aware public policies is pivotal to eradicating domestic violence against women.

Introduction

The international human rights framework has developed to understand gender-based violence against women (GBVAW), including domestic violence, as a

human rights violation. Inserting domestic violence into the language of rights raises public importance and awareness of the phenomenon, but it also highlights the problem of human rights ineffectiveness. This article builds on this scholarly debate by discussing the Brazilian special legislation on domestic violence, the Maria da Penha Law (MPL). Aware of the gendered dimensions of domestic violence, the MPL is a federal legal act that creates mechanisms to combat and prevent domestic and family violence against women according to international human rights standards. The 2001 Maria da Penha case at the Inter-American Commission on Human Rights (IACHR) was a milestone for the enactment of the MPL as it held Brazil internationally responsible for human rights violations in the context of violence against women, which in turn strengthened Brazilian feminist engagement for legal reform that resulted in the MPL.

Brazil was chosen as a case study because, even though it has implemented gender-aware legislation on domestic violence, there are still elevated rates of GBVAW.[1] By analysing the MPL as a case study of national legislation on domestic violence, this article seeks to provide insights into the achievements and challenges in the domestic implementation of gender-aware and human rights-based legislation on domestic violence. Through the analysis of the case study, the article also raises globally relevant insights regarding the reality of government interventions on GBVAW that reinforce criminal accountability of offenders rather than promote easily-accessible and effective public services to safeguard women in situations of domestic violence.

The article is structured in three sections. In the first section, the article presents a summary of domestic violence within the international human rights landscape. The second section introduces the Brazilian feminist engagement for legal reform and the importance of the Maria da Penha case in the IACHR for the development of the MPL. Thereafter, the third section analyses the MPL case study, organised into four subsections. The first subsection presents an overall introduction of the

[1] Inter-American Commission on Human Rights, “Situation of human rights in Brazil: Approved by the Inter-American Commission on Human Rights on February 12, 2021” (Country report BRAZIL, OEA/Ser.L/V/II.Doc.9/21), https://www.oas.org/en/iachr/reports/pdfs/brasil2021-en.pdf, [90].

MPL's content and its axes of state intervention in domestic violence against women. Subsections B and C analyse the MPL's effects on state interventions on domestic violence, building on scholarly debates to identify the MPL's achievements and challenges. The final subsection then demonstrates the internationally valid insights of the MPL case study regarding states' commitment to eradicate domestic violence through promoting criminal accountability, but also by protecting survivors and endorsing preventive measures. In conclusion, the article indicates that the MPL is a positive legal development toward eliminating domestic violence as it recognises domestic violence as a human rights violation, but its challenges demonstrate the need to offer state responses for women's rights protection beyond the criminal prosecution of domestic violence offences.

The International Human Rights Framework On Domestic Violence

The first section introduces provisions on domestic violence within international human rights law and aims to reflect on feminist developments in the trajectory of domestic violence from what was previously considered a private affair to an acknowledged human rights violation.

The international human rights framework has developed to understand domestic violence as a human rights violation and recognise the need for states to take positive actions to eliminate it. International human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), contain the right of non-discrimination based on sex and equal rights between men and women.[2] In 1979, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination against

[2] "Universal Declaration of Human Rights," 10 December 1948, General Assembly Resolution 217-A, https://www.un.org/en/about-us/universal-declaration-of-human-rights, articles 2 and 6; "International Covenant on Civil and Political Rights," 16 December 1966, 999 UNTS, at 171, https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf, articles 2.1, 3 and 26; "International Covenant on Economic, Social and Cultural Rights," 16 December 1966, 993 UNTS, at 3, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights, articles 2.2 and 3.

Women (CEDAW).[3] While the CEDAW recognises that discrimination against women violates multiple rights, it does not contain any explicit provision relating to violence based on sex or gender. Before the 1990s, the international legal framework did not widely consider domestic violence as a matter of human rights importance. Although women's activism was present throughout the construction of the modern international human rights law framework, "their advocacy centred on the rights to equality and non-discrimination on the basis of sex in a formal sense."[4]

Mainly since the 1990s, feminist legal scholars have raised questions about the human rights framework's inherent male bias, which took men's experiences as the starting point[5] and consequently did not extensively accommodate or address women's experiences.[6] Feminists argued that, due to the public/private dichotomy and the legal protection of the family rather than the individuals within the family, domestic violence was suppressed as a private matter within the family setting.[7] The international feminist movement for women's rights was pivotal for the turn of GBVAW (including domestic violence) from a private to a public matter of violation of human rights.

The repercussions of the women's rights movement were reflected in the CEDAW General Recommendation n. 19 of 1992 (GR 19), which incorporates gender-based violence into CEDAW jurisprudence by making an inherent connection between discrimination and violence.[8] Also, GR 19 overcame the previous

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3 "Convention on the Elimination of All Forms of Discrimination against Women," 18 December 1979, 1249 UNTS, at 1, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women.

4 Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge: Cambridge University Press, 2010), 39.

5 Beth Goldblatt, "Violence against women and social and economic rights: deepening the connections," in *Research Handbook on Feminist Engagement in International Law*, ed. Susan Harris Rimmer and Kate Ogg (New York: Edward Elgar, 2019), 5.

6 Karen Engle, "International Human Rights and Feminisms: When Discourses Keep Meeting," in *International Law: Modern Feminist Approaches*, eds. Doris Buss and Ambreena Manji (Oxford: Hart Publishing, 2005), 52.

7 Joan Fitzpatrick, "The Use of International Human Rights Norms to Combat Violence Against Women," in *Human Rights of Women: National and International Perspectives*, ed. Rebecca J. Cook (Pennsylvania: University of Pennsylvania Press, 1994), 534.

8 UN Committee for the Elimination of All Forms of Discrimination Against Women, Resolution A/47/38, *General recommendation No. 19: Violence against women* (1992), file:///C:/Users/Dell/Downloads/INT_CEDAW_GEC_3731_E.pdf. See also Bonita

understanding of State responsibility only for public acts by declaring that "[s]tates may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."[9] Thus, the full implementation of CEDAW jurisprudence on GBVAW demands that states act with due diligence as to private acts of gender-based violence, which means taking reasonable steps to safeguard women from violence and to hold perpetrators accountable.[10] If states fail in that obligation, "they may be obliged to provide compensation."[11]

Furthermore, the CEDAW General Recommendation n. 35 (GR 35) complements and updates the GR 19 and reinforces the obligation of due diligence "for acts or omissions by non-State actors which result in gender-based violence against women."[12] It is important to highlight that the GR 35 also introduces a more intersectional perspective to states' obligation to combat GBVAW as it recognises diverse factors other than gender itself that affect and heighten GBVAW, thus acknowledging that GBVAW is interconnected to other structures of social inequality and discrimination that women may also face.[13] Domestic violence and GBVAW are also present in other relevant soft law instruments,[14] such as the Vienna Declaration and Programme of Action, the Declaration on the Elimination

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Meyersfeld, *Domestic Violence and International Law* (London: Bloomsbury Publishing, 2010), 34.

9 *General recommendation No. 19: Violence against women*, [9].

10 Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (Cambridge: Cambridge University Press, 2017), 55.

11 Meyersfeld, *Domestic Violence and International Law*, 36.

12 UN Committee for the Elimination of All Forms of Discrimination Against Women, CEDAW/C/GC/35, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (2017), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/231/54/PDF/N1723154.pdf?OpenElement, [8] and [24.b].

13 UN Committee for the Elimination of All Forms of Discrimination Against Women, *General recommendation No. 35*, [14].

14 Although there is no generally agreed definition of "hard law" and "soft law", in a nutshell and for the purposes of this article, hard law may be understood as legally binding, that is, norms that create enforceable legal obligations, whereas "soft law" is non-binding legal norms. According to Sosa, soft law "appears today as a broad conceptual construction that encompasses non-binding resolutions, recommendations, codes of conduct and standards, and also soft rules included in legally binding treaties." See Sosa, "Intersectionality," 45; also Daniel Bradlow and David Hunter, "Introduction: Exploring the Relationship between Hard and Soft International Law and Social Change", in *Advocating Social Change Through International Law: Exploring the Choice Between Hard and Soft International Law*, ed. Daniel Bradlow and David Hunter (Leiden, Boston: Brill, 2019), 4-5.

of Violence against Women, the establishment of the Special Rapporteur on violence against women, its causes and consequences, and the 1995 Beijing Declaration and Platform for Action.[15]

However, feminist scholarship has questioned the efficacy of GBVAW-related norms at the UN level through soft law instruments, which are not binding to states.[16] In contrast to the international framework, regional human rights systems have regional binding treaties on the matter, thus elevating GBVAW and domestic violence to the standard of hard law. The earliest of the regional treaties on GBVAW is the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).[17] Also, the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in 2003, while the Council of Europe adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) in 2011.[18]

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15 World Conference on Human Rights in Vienna, A/CONF.157/23, *Vienna Declaration and Programme of Action* (1993), https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action; UN General Assembly, A/RES/48/104, *Declaration on the Elimination of Violence against Women* (1993), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.21_declaration%20elimination%20vaw.pdf; OHCHR, Resolution n. 1994/45, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women* (1994), https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1994-45.doc; Fourth World Conference on Women, A/CONF.177/20, *Beijing Declaration and Platform for Action* (1995), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.177_20.pdf. Endorsed by the UN in: UN General Assembly, A/RES/50/42, *Fourth World Conference on Women* (1996), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/761/53/PDF/N9676153.pdf?OpenElement.

16 Ronagh McQuigg, "Is it Time for a UN Treaty on Violence against Women?," *The International Journal of Human Rights* 22, no. 3 (2018): 312-313, https://doi.org/10.1080/13642987.2017.1359552. See also Meyersfeld, *Domestic Violence and International Law*, 36-37.

17 "Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women," 9 June 1994, OAS Treaty Series No. 68, https://www.oas.org/en/mesecvi/docs/belemdopara-english.pdf

18 "Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa," 1 July 2003, https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf; "Convention on Preventing and Combating Violence against Women and Domestic Violence," 2011, CETS 210 11.V.2011, https://rm.coe.int/168008482e

As this article focuses on Brazil, it will introduce the Convention of Belém do Pará's provisions on violence against women.[19] The Convention of Belém do Pará recognises violence against women as a breach of women's right "to be free from violence in both the public and private spheres" and other rights embodied in different human rights instruments.[20] Thus, it recognises violence against women practised in the private sphere as a matter of human rights concern. The Convention of Belém do Pará distinguishes between immediate obligations that the states must adopt to prevent, punish and eradicate violence against women (Article 7) and the measures that ought to be adopted progressively to change the gendered norms that legitimate such violence (Article 8).[21] Furthermore, it establishes regional protection mechanisms for women's right to be free from violence, including the possibility of individual denunciations or complaints to the IACHR concerning violations of State Parties' immediate obligations under Article 7.[22] Even though the Convention of Belém do Pará does not specifically mention domestic violence, its definition of violence against women encompasses this form of violence.

In sum, characterising domestic violence as a violation of human rights has been an important feminist development as it raises international political, social and legal awareness of the phenomenon. Adopting a human rights-based approach to domestic violence elevates this form of violence as a breach of human rights, implicating states' obligation to protect survivors and adopt positive measures to combat and prevent this form of violence.[23] Also, it enables holding the state

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19 The author chose to use the terminology "violence against women" instead of "GBVAW" when introducing the Convention of Belém do Pará as the former was the term employed by the Convention.

20 "Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women," articles 3 and 4.

21 Inter-American Convention, articles 7 and 8.

22 Inter-American Convention, article 12; Chapter IV of the Convention of Belém do Pará elaborates on protection mechanisms for women to be free of violence. Besides the provision of individual complaints to the IACHR, the Convention of Belém do Pará also contains provisions to include the measures adopted to prevent and prohibit violence against women and related information in the State Parties' national reports to the Inter-American Commission of Women, as well as the possibility of requesting advisory opinions to the Inter-American Court of Human Rights regarding the interpretation of the Convention of Belém do Pará. Inter-American Convention, articles 10 and 11.

23 Dianne Otto, "Women's Rights," in *International Human Rights Law*, eds. Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2022), 330-331.

responsible for not acting with due diligence when dealing with GBVAW cases.[24] The possibility of state responsibility for domestic violence promotes accountability for aggressors and uplifts domestic violence as a matter of public and criminal importance. Hence, domestic violence is no longer marginalised in the private sphere, as if it were a minor intimate problem to be resolved between individuals.[25] Furthermore, according to McQuigg, the discourse of domestic violence as a human rights violation is an effective tool for change as it attributes dignity and rights to survivors of domestic violence, portraying them as people in search of justice, thus pressuring governments to improve protection and public services for survivors and address the offender's wrongdoings.[26] Therefore, the discourse of domestic violence as a human rights violation breaks the public/private dichotomy as it raises domestic violence as a matter of public importance and recognises survivors' need for protection by the state.

Nevertheless, including domestic violence in the realm of human rights law also attracts the (classic) problem of human rights ineffectiveness. The UN does not have an effective method to demand states to comply with their international human rights obligations.[27] The international and regional human rights systems create bodies to monitor, supervise, and even sanction states according to their compliance with international human rights law. Nevertheless, states have broad discretion on how to implement international regimes,[28] including human rights obligations (except for *jus cogens* norms). The UN Special Rapporteur on violence against women, Dubravka Šimonović, identified that the implementation of GBVAW norms at the national level has been fragmented and uncoordinated,

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24 Rebecca J. Cook, "State Responsibility for Violations of Women's Human Rights," *Harvard Human Rights Journal* 7, (1994): 151.

25 Shazia Choudhry and Jonathan Herring, "Righting Domestic Violence," *International Journal of Law, Policy and the Family* 20, (2006): 110.

26 Ronagh McQuigg, "Domestic Violence: Applying a Human Rights Discourse," in *Domestic Violence: Interdisciplinary Perspectives on Protection, Prevention and Intervention*, eds. S. Hilder and V. Bettinson (New York: Springer, 2016), 32.

27 McQuigg, "Applying a Human Rights Discourse", 31.

28 José E. Alvarez, "State Sovereignty is Not Withering Away: A Few Lessons for the Future," in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 10.

without a “solid legal and institutional framework” to coordinate states’ efforts to combat and prevent GBVAW.[29]

Therefore, domestic political will is imperative for the implementation and enforcement of international human rights norms. This article presents the MPL as a case study of national legislation that incorporates international women’s rights, yet the Brazilian government’s lack of political will to fully implement the MPL’s standards underpins Brazil’s greatest challenges in effectively combating domestic violence.

The Importance Of The Maria Da Penha Case And The Brazilian Feminist Movement For The Development Of The Maria Da Penha Law

As the first section reflected on domestic violence as a human rights concern, the second section aims to demonstrate the importance of international and regional human rights provisions on GBVAW for the development of national gender-aware legislation to combat domestic violence in Brazil.

Brazil has a satisfactory legal architecture safeguarding women’s rights. Brazil has ratified many important international and regional human rights treaties, such as the ICCPR, ICESCR, and the American Convention on Human Rights (American Convention).[30] Furthermore, the 1988 Brazilian Federal Constitution (Federal Constitution) upholds equal rights and obligations between men and women,[31] as well as ensuring legal protection for every individual within the family.[32] As to international treaties focused on women’s rights, Brazil ratified and

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29 OHCHR, A/HRC/32/42, *Report of the Special Rapporteur on violence against women, its causes and consequences* (2016), https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F32%2F42&Language=E&DeviceType=Desktop&LangRequested=False, [43].

30 “Ratification Status for Brazil,” UN Treaty Body Database, OHCHR, accessed 08 April 2023, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=24&Lang=EN; “Current Status of Signatures and Ratifications of the Inter-American Treaties BRAZIL,” Organization of American States, accessed 08 April 2023, http://www.oas.org/dil/treaties_signatories_ratifications_member_states_brazil.htm.

31 Brazil. Constituição da República Federativa do Brasil de 1988 [Constitution of the Federative Republic of Brazil of 1988], https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm, article 5º I.

32 Constitution of the Federative Republic of Brazil, article 226 §8º.

implemented CEDAW in 1984, the Convention of Belém do Pará in 1995, and the Optional Protocol to CEDAW in 2002.[33] Finally, in 2006, the MPL entered into force. The MPL is a federal legal act that creates mechanisms to combat and prevent domestic and family violence against women according to the country's obligations held by the Federal Constitution, CEDAW, and the Convention of Belém do Pará.[34]

However, the MPL was not created due to policymakers' goodwill but rather as a result of a long feminist struggle for the recognition and implementation of women's rights. Since the 1980s, considering the Brazilian historical context of progressive return to democracy after the military dictatorship, feminist movements focused their engagements on legislative and public policy reforms for the inclusion of rights for women, grounded on the recognition of non-discrimination based on gender and the right to live free from violence.[35] However, until the 2000s, "the Brazilian legal system was still insensitive to gender perspectives"[36] as there was no special legislation regarding women's rights nor a gender-sensitive policy or framework to eradicate gender-based violence. The Brazilian legal scholarship considers the Maria da Penha case to be the "driving force" for the gender-aware changes in the legislation and public policies that arose from the MPL.[37]

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33 OHCHR, "Ratification Status for Brazil." See also Organization of American States, "Current Status of Signatures and Ratifications of the Inter-American Treaties BRAZIL."

34 Brazil. Lei nº 11.340, de 7 de Agosto de 2006 [Law n. 11.340 from 7 August 2006] (Maria da Penha Law), http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11340.htm, article 1; To read the Maria da Penha Law in English, see BRAZIL, Special Secretariat for Women's Policies Presidency of the Republic, Maria da Penha Law Law no 11.340 of August 7, 2006, Retrains domestic and family violence against Women (Brasília: 2006) https://www.institutomariadapenha.org.br/assets/downloads/maria-da-penha-law.pdf.

35 Leila Linhares Barsted, "Lei Maria da Penha: uma experiência bem-sucedida de *advocacy* feminista" [The Maria da Penha Law: a successful experience of feminist advocacy], in *Lei Maria da Penha comentada em uma perspectiva jurídico-feminista* [*The Maria da Penha Law commented from a feminist legal perspective*], ed. C. Hein de Campos (Rio de Janeiro: Editora Lumen Juris, 2011), 34-35.

36 Thiago Pierobom de Ávila, "Facing Domestic Violence Against Women in Brazil: Advances and Challenges," *International Journal for Crime, Justice and Social Democracy* 7, no. 1, (2018): 18.

37 Flávia Piovesan and Silvia Pimentel, "A Lei Maria da Penha na perspectiva da responsabilidade internacional do Brasil" [The Maria da Penha Law from the perspective of Brazil's international accountability], in *Lei Maria da Penha comentada em uma perspectiva jurídico-feminista* [*The Maria da Penha Law commented from a feminist legal perspective*], ed. C Hein de Campos (Rio de Janeiro: Editora Lumen Juris, 2011), 115-116.

Maria da Penha is a Brazilian woman who suffered two violent homicide attempts by her ex-husband, which caused irreparable bodily injuries and psychological trauma.[38] For more than 15 years after the fact, the offender was not properly prosecuted and punished.[39] Due to the risk of the case reaching the statute of limitations, Maria da Penha, alongside two non-governmental organisations (the Center for Justice and International Law and the Latin American and Caribbean Committee for the Defense of Women's Rights), filed a petition to the IACHR, claiming that Brazil condoned the domestic violence suffered by Maria da Penha.[40] The IACHR held Brazil responsible for violating Maria da Penha's rights to a fair trial, judicial protection, and equal protection, in breach of its obligation to respect rights (Article 1(1) of the American Convention) and Article 7 of the Convention of Belém do Pará.[41] In the Maria da Penha decision, the IACHR recognised that the human rights violations suffered by Maria da Penha indicated a general pattern of discrimination due to the "[s]tate tolerance of violence against women, in particular as a result of ineffective police and judicial action in Brazil."[42] The IACHR made recommendations regarding the Brazilian state's positive obligation to combat and prevent domestic violence against women, including both specific recommendations for the Maria da Penha case as well as broader recommendations toward a (policy) reform process to "put an end to the condoning by the State of domestic violence against women in Brazil and discrimination in the handling thereof."[43]

The Maria da Penha case was pivotal for the Brazilian feminist movement's strengthening as it recognised the systematic pattern of GBVAW in Brazil. The Maria da Penha case created a bridge between the violations of women's rights

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38 Inter-American Commission on Human Rights, "Case 12.051 Maria da Penha Maia Fernandes v. Brazil," Annual Report of the Inter-American Commission on Human Rights 2000 Report n° 54/01 (2001), http://cidh.org/annualrep/2000eng/ChapterIII/Merits/Brazil12.051.htm.

39 Inter-American Commission on Human Rights, Case 12.051, [2].

40 Inter-American Commission on Human Rights, Case 12.051, [1] and [23].

41 Inter-American Commission on Human Rights, Case 12.051, [60.1].

42 Inter-American Commission on Human Rights, Case 12.051, [60.3].

43 Inter-American Commission on Human Rights, Case 12.051, [61.4]. See also [61.1-4] for full IACHR recommendations to Brazil.

in Brazil and the international and regional human rights frameworks.[44] In line with the Brazilian feminists' historical engagement with legislative processes, the feminist movement employed the Maria da Penha case as a resource to raise awareness and put political pressure on the government to create special legislation to combat domestic violence in Brazil, which ultimately led to the enactment of the Federal Law n. 11.340/06, officially named the Maria da Penha Law (*Lei Maria da Penha)*.[45]

The Maria Da Penha Law Case Study

The Maria da Penha Law

While the two previous chapters reflected on domestic violence as a human rights violation within the international and regional human rights frameworks, subsection A of the third section introduces the MPL's legal provisions and its three axes of intervention to eliminate domestic violence against women. Thereby, the article will further analyse, in the next subsections, the positive developments and challenges to implementing the MPL in the reality of state interventions on domestic violence in Brazil.

As a result of the feminist movement's engagement with the Maria da Penha case, the IACHR decision composed a "key set of guidelines" for the new Brazilian legal approach to domestic violence against women.[46] The first article of the MPL explicitly states that it creates mechanisms to combat and prevent domestic violence according to the CEDAW and the Convention of Belém do Pará.[47] In other words, the international human rights framework on domestic violence informs the MPL's mechanisms.

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44 Paula Spieler, "The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil," *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 139.

45 Brazil, Maria da Penha Law, article 1. See also Cecília Macdowell Santos, "Transnational Legal Activism and the State: reflections on cases against Brazil in the Inter-American Commission on Human Rights," *International Journal on Human Rights* 7, no. 4 (2007): 46-47, https://www.scielo.br/j/sur/a/53tc4SDrrHtL85tJhzpvkDB/?format=pdf&lang=en.

46 Spieler, "The Maria da Penha Case," 134.

47 Brazil, Maria da Penha Law, article 1.

The MPL adopts a wide and gender-sensitive concept of domestic violence against women as “any act or omission based on gender that causes death; physical injury; physical, sexual and psychological suffering; and moral or financial damage”.[48] Regarding its scope of application, there are three requirements for legal protection under the MPL. First, the MPL comprehends five categories of domestic violence against women: physical, psychological, sexual, financial or moral violence.[49] Second, the case must be grounded on the three legally presumed situations of vulnerability: the domestic unit, which is the physical space considered as a home; the family, either biological or by affection; and the intimate affective relationship, current or past, independently of cohabitation.[50] Third, which is the positive discrimination requirement, the MPL explicitly restricts its legal protection to survivors of domestic violence who identify themselves with the gender “woman”, regardless of sexual orientation.[51]

Furthermore, case law on the MPL has expanded its non-discriminatory dimension. Brazilian jurisprudence has established that the applicability of the MPL does not depend on the offender’s gender identity inasmuch as there exists a relation of vulnerability between the offender and the victim, thus amplifying the MPL’s applicability to non-heterosexual and familiar (that is, non-intimate) relationships.[52] Also, case law has applied the MPL’s legal protections to female

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48 Brazil, Maria da Penha Law, article 5.

49 Brazil, Maria da Penha Law, article 7.

50 Brazil, Maria da Penha Law, article 5 I, II and III. See also Brazil, Superior Tribunal de Justiça, Súmula nº 600 [Precedent no. 600 Superior Court of Justice], https://www.tjdft.jus.br/consultas/jurisprudencia/decisoes-em-evidencia/22-11-2017-2013-sumula-600-do-stj#:~:text=S%C3%BAmula%20600%3A%20%22Para%20configura%C3%A7%C3%A3o%20da,coabita%C3%A7%C3%A3o%20entre%20autor%20e%20v%C3%ADtima.%22&text=Todos%20os%20direitos%20reservados.

51 Brazil, Maria da Penha Law, articles 4 and 5 sole paragraph. See also Marta Rodriguez de Assis Machado, Flavio Marques Prol, Gabriela Justino da Silva, Ganzarolli and Renata do Vale Elias, José Rodrigo Rodriguez and Marina Zanata, “Law Enforcement at Issue: Constitutionality of the Maria da Penha Law in Brazilian Courts,” *International Journal on Human Rights* 9, no. 16, (2012): 76.

52 Brazil, Superior Tribunal de Justiça, Conflito de Competência nº 88.027 – MG (2007/01711806-1), https://www.stj.jus.br/websecstj/cgi/revista/REJ.cgi/ATC?seq=4452837&tipo=0&nreg=&SeqCgrmaSessao=&CodOrgaoJgdr=&dt=&formato=PDF&salvar=false, 3. See also Valéria Diaz Scarance Fernandes, "Lei Maria da Penha: O Processo Penal no caminho da efetivadade," [*Maria da Penha Law: The Criminal Legal Procedure Towards Effectiveness*] (PhD thesis, Pontifícia Universidade Católica de São Paulo, 2013), 141-142.

domestic workers who suffer violence within the workplace,[53] as well as to transgender women.[54]

Although many of the MPL's articles focus on criminal investigation and prosecution, the MPL is not concerned only with punishing offenders. According to Pasinato, the MPL has three axes of intervention: criminal procedures, protective measures for survivors, and preventive policies.[55,56] The first axis determines specific police investigation and judicial measures to effectively attribute criminal responsibility to aggressors in cases of domestic violence against women.[57]

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https://tede2.pucsp.br/bitstream/handle/6177/1/Valeria%20Diez%20Scarance%20Fernandes.pdf.

53 Brazil, Superior Tribunal de Justiça, Agravo Regimental no Recurso Especial nº 1900478 - GO (2020/0266644-0), https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=202002666440&dt_publicacao=26/02/2021. See also Brazil, Tribunal de Justiça do Distrito Federal e dos Territórios, Conflito de Competência n° 1111591 – DF 07101370420188070000, https://pesquisajuris.tjdft.jus.br/IndexadorAcordaos-web/sistj?visaoId=tjdf.sistj.acordaoeletronico.buscaindexada.apresentacao.VisaoBuscaAcordao&controladorId=tjdf.sistj.acordaoeletronico.buscaindexada.apresentacao.ControladorBuscaAcordao&visaoAnterior=tjdf.sistj.acordaoeletronico.buscaindexada.apresentacao.VisaoBuscaAcordao&nomeDaPagina=resultado&comando=abrirDadosDoAcordao&enderecoDoServlet=sistj&historicoDePaginas=buscaLivre&quantidadeDeRegistros=20&baseSelecionada=BASE_ACORDAO_TODAS&numeroDaUltimaPagina=1&buscaIndexada=1&mostrarPaginaSelecaoTipoResultado=false&totalHits=1&internet=1&numeroDoDocumento=1111591.

54 Brazil, Superior Tribunal de Justiça, Recurso Especial nº 1977124 - SP (2021/0391811-0), https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=202103918110&dt_publicacao=22/04/2022. For more case law on the MPL's non-discriminatory dimension, see "Jurisprudência em Teses: Violência Doméstica e Familiar contra Mulher," Superior Tribunal de Justiça, accessed 8 April 2023, https://www.stj.jus.br/internet_docs/jurisprudencia/jurisprudenciaemteses/Jurisprud%C3%AAncia%20em%20teses%2041%20-%20Lei%20Maria%20da%20Penha.pdf.

55 Wânia Pasinato, "Lei Maria da Penha: Novas abordagens sobre velhas propostas. Onde avançamos?" [The Maria da Penha Law: New approaches on old propositions. Where did we move on?]. *Civitas* 10, no. 2 (2010): 220. https://revistaseletronicas.pucrs.br/ojs/index.php/civitas/article/view/6484.

56 It is relevant to highlight that the MPL's three axes of intervention are a scholarly interpretation that organises and better explains the MPL's legal provisions to prevent and combat domestic violence against women. The three axes of intervention are not mentioned nor used in the legislation, but rather they are a scholarly legal interpretation developed by Pasinato. The author has adopted the MPL's three axes of intervention classification as it is a renowned scholarly legal interpretation within Brazilian academic research. Also, considering that this article aims to be suitable for an international audience, adopting this scholarly legal interpretation better organises and explains the MPL's *voluntas legis* in comparison to restricting this article's analysis to the formal order of the MPL's legal provisions.

57 Pasinato, "Lei Maria da Penha", 220. For examples of MPL's specific provisions that reflect this axis, see also Brazil, Maria da Penha Law, articles 16, 20 and 41.

The second axis regards the protective and assistance measures to ensure the safety and rights of women in situations of domestic violence,[58] entailing state intervention through judicial decisions to interrupt the ongoing consequences of violence and protect survivors. It embraces three types of state interventions for domestic violence cases. The first type is urgent protective measures for survivors of domestic violence, which entail judicial intervention to protect women in situations of domestic violence from further vulnerabilities, safeguarding women and their dependents' basic needs of protection of their physical and mental integrity and their properties.[59] The second form of state intervention is urgent protective measures that compel the offenders to stop the acts of aggression immediately and measures that seek their re-education and psychological support.[60] Finally, the second axis also embraces assistance measures for women in situations of vulnerability and their dependents. The assistance measures determine interdisciplinary, integrated and gender-aware public policies to provide support services for survivors of domestic violence throughout the fields of health care, judicial assistance, social services, security, education, and employment protection.[61]

The third intervention axis comprises preventive measures for domestic violence. The MPL's preventive measures demand "interdisciplinary, transversal and integrated policies in the fields of justice, police, social assistance, health, education, employment and housing".[62] Also, the third axis determines multiple

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58 Pasinato, "Lei Maria da Penha", 220; "Women in situations of domestic violence" is the literal English translation of the expression used throughout the MPL to refer to survivors of domestic violence. The author has decided to maintain this expression in the article as "women in situations of domestic violence" is an alternative term to refer to survivors without falling into the stereotype of women as "victims".

59 Brazil, Maria da Penha Law, article 23; As examples of urgent protective measures, the judge may determine, according to the circumstances of each case, (i) the survivor's or her dependents' referral to public services, such as enrolment in school or inclusion in official programs of protection and monitoring of domestic violence, (ii) the survivor's removal from the household, or (iii) her return to the household after the aggressor has been removed. Important to note that shortly before the publication of this article, there was a legislative change to the MPL in order to include the possibility for the judge to allow up to 6 months of rent support in favour of women in situations of violence; Brazil. Lei nº 14.674, de 14 de Setembro de 2023 [Law n. 14.674 from 14 September 2023]. http://www.planalto.gov.br/ccivil_03/_Ato2023-2026/2023/Lei/L14674.htm#art1.

60 Brazil, Maria da Penha Law, article 22.

61 Brazil, Maria da Penha Law, article 9.

62 Ávila, "Facing", 20.

positive state obligations to create integrated public policies to tackle gender stereotypes that legitimise domestic violence in the media, promote scientific studies on domestic violence, and raise awareness through public campaigns.[63]

The Maria da Penha Law's achievements

Considering the brief introduction of the MPL's mechanisms to combat and prevent domestic violence, this part of the article will discuss the MPL's legal advancements for eliminating domestic violence. Before the MPL, many forms of domestic violence, except for explicitly violent ones such as homicide, fell under the scope of Law n. 9.099/95, which established special jurisdiction for penal misdemeanours.[64] According to Roure, approximately 70 per cent of penal misdemeanours under Law n. 9.099/95 "were committed against women in a domestic environment or in intra-family relations. The women in Brazil were principally the victims of this violence in the home, which in large part were assault and crimes of 'light' batteries."[65] Thus, Law n. 9.099/95 considered domestic violence cases to be minor criminal offences, which did not take into account the gendered dimensions of domestic violence, and proposed alternative sanctions for offenders, such as "donation of food baskets to charity or payments of fines."[66] While Law n. 9.099/95 intended to provide alternative sanctions other than punitive criminal responsibility for minor criminal offences, it also reinforced the state's non-prosecution of GBVAW, perpetrators' sense of impunity, and survivors' feelings of lack of legal protection.[67]

The MPL's entry into force is paradigmatic as it explicitly recognises a wide range of rights enunciated in the Federal Constitution as women's rights, whereas no other Brazilian legislation has made such recognition before.[68] Furthermore, it

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63 Brazil, Maria da Penha Law, article 8.

64 Brazil. Lei nº 9.099, de 26 de Setembro de 1995 [Law no. 9.099 26 September 1995], http://www.planalto.gov.br/ccivil_03/leis/l9099.htm#:~:text=LEI%20N%C2%BA%209.099%2C%20DE%2026%20DE%20SETEMBRO%20DE%201995.&text=Disp%C3%B5e%20sobre%20os%20Juizados%20Especiais%20C%C3%ADveis%20e%20Criminais%20e%20d%C3%A1%20outras%20provid%C3%AAncias., article 3.

65 Jodie G. Roure, "Domestic Violence in Brazil: Examining Obstacles and Approaches to Promote Legislative Reform," *Columbia Human Rights Law Review* 41, no. 1 (2009): 79.

66 Roure, "Domestic Violence in Brazil", 95.

67 Roure, "Domestic Violence in Brazil", 88.

68 Brazil, Maria da Penha Law, articles 2 and 3.

established a clear legal understanding that domestic violence is a human rights abuse,[69] thus demanding state intervention in domestic violence cases. By classifying domestic violence as a breach of human rights, the MPL prohibited the application of Law n. 9.099/95 to domestic violence cases,[70] thus promoting criminal accountability. Therefore, the MPL changed the Brazilian paradigm of domestic violence from a minor criminal offence to a recognised human rights violation.[71]

The MPL inserted domestic violence within the language of rights, which triggers the state's positive obligations to prevent and eliminate human rights violations. As the MPL's creation was "primarily due to Brazil's non-observance of the CEDAW and the Convention of Belém do Pará", and considering the Brazilian feminist movements' commitment to legislative reform for the recognition of women's rights, the MPL incorporated legal provisions on domestic violence in accordance with international human rights instruments.[72] The MPL's definition of domestic violence and its scope of application are closely related to Articles 1 and 2(a) of the Convention of Belém do Pará.[73] Consequently, Brazil's legislation does not deal with domestic violence through gender-neutral lenses, but rather it is aware of the gendered dimensions of domestic violence as a human rights violation against women. Furthermore, the MPL's first axis of intervention, which is the specialised police investigations and criminal prosecution procedures for domestic violence, delineates the norms for the Brazilian government to act with due diligence in prosecuting and punishing domestic violence cases.[74] As such, the MPL is compatible with CEDAW's jurisprudence as it creates gender-sensitive norms on how the state should proceed in domestic violence cases, enabling the state's accountability if it fails to act with due diligence.[75] Therefore, the MPL's paradigm shift towards domestic violence as a human rights violation

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69 Brazil, Maria da Penha Law, article 6.

70 Brazil, Maria da Penha Law, article 41.

71 Piovesan and Pimentel, "A Lei Maria da Penha na perspectiva da responsabilidade internacional do Brasil," 113.

72 Spieler, "The Maria da Penha Case," 138-39.

73 "Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women," articles 1 and 2(a). See also Brazil, Maria da Penha Law, article 5.

74 Brazil, Maria da Penha Law, articles 10-17 and 25-28.

75 UN Committee for the Elimination of All Forms of Discrimination Against Women, *General recommendation No. 19: Violence against women*, article 9.

has brought the Brazilian legal system closer to the provisions of the international human rights framework in view of promoting women's rights and criminal responsibility for private actors.

Additionally, the MPL introduces a gender justice perspective to combat and prevent domestic violence in the Brazilian legal system. According to Zuloaga, a gender justice perspective entails the recognition of the systematic and structural discrimination against women as the root of women's rights violations.[76] In other words, a gender justice perspective demands that redress for human rights violations recognises the structural forms of gender-based oppression that underpin those violations. Building on Zuloaga's understanding of gender justice, it is possible to conclude that the MPL has also turned the Brazilian legal system towards a gender justice approach to domestic violence. The MPL acknowledges that the relationships of domination and hierarchy due to gender inequality are the underlying causes of domestic violence.[77] As such, the MPL's presumed situations of vulnerability demonstrate a developed understanding of the gendered circumstances in which domestic violence is practised. Thus, it perceives domestic violence as a systematic form of GBVAW rather than isolated events.

As a result of its gender justice perspective and its proximity to international human rights instruments, the MPL establishes special legal protection for women in situations of domestic violence.[78] In sum, besides promoting criminal responsibility for offenders, the MPL's special legal protection (i) provides women and their dependents with public services' support to leave the situation of violence and vulnerability,[79] (ii) engages with the aggressors to prevent them from

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76 Patricia Palacios Zuloaga, "Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?" *Human Rights Law Review* 36, no. 1 (2020): 32.

77 This affirmation is the result of a legal interpretation of the MPL's provisions, especially articles 1 to 8. Brazil, Maria da Penha Law, articles 1-8. See also Wânia Pasinato, "The Maria da Penha Law: 10 years on," *International Journal on Human Rights* 13, no. 24 (2016): 156, https://sur.conectas.org/wp-content/uploads/2017/02/14-sur-24-ing-wania-pasinato.pdf.

78 This article uses the term "special" not as more important but rather as not ordinary or general. Therefore, the legal protection of the MPL is restricted to its scope of application, as explained in the last subsection.

79 Brazil, Maria da Penha Law, articles 9 and 23.

committing domestic violence again,[80] and (iii) raises social awareness of the phenomenon of domestic violence.[81] In other words, the MPL does not seek only to prosecute and punish domestic violence cases, as it also comprehends the gendered reasons and consequences of domestic violence and creates mechanisms to address them. Therefore, the MPL creates special legal protection for women in situations of domestic violence as the MPL is aware of women's vulnerability to domestic violence and how the state should intervene to prevent or stop domestic violence and safeguard women's rights.

The Challenges In The Implementation Of The Maria Da Penha Law

The MPL's achievements sparked significant human rights-based legal changes towards the elimination of domestic violence and, consequently, the underlying patriarchal reasoning that legitimises the practice of GBVAW by hiding it as a private matter and promoting impunity for aggressors.[82] Nevertheless, the MPL's full implementation still faces many challenges. Thus, the following subsection identifies and organises the MPL's challenges into two main themes: (i) the fragmentation among public services for women's assistance and (ii) the primacy of criminal prosecution of domestic violence over protective and assistance measures. By doing so, it aims to identify the key challenges for the full implementation of the MPL.

First, according to Brazilian legal scholarship, the fragmentation of public judicial assistance, health care and social services is the leading reason for MPL's ineffectiveness.[83] One of the MPL's most innovative proposals was the creation of an integrated and multidisciplinary approach to public policies to support women in situations of domestic violence. Unfortunately, integration among public services to support survivors of domestic violence is far from reality. There is a reduced number of specialised services available for women, most of them concentrated in metropolitan cities, which may obstruct access to such

80 Brazil, Maria da Penha Law, article 22.
81 Brazil, Maria da Penha Law, article 8.
82 Pasinato, "The Maria da Penha Law: 10 years on," 156.
83 Ávila, "Facing," 22.

services.[84] On top of that, the public services that are available suffer from a lack of communication between each other, fragile physical infrastructure, lack of funding, and absence of specialised and trained professionals.[85]

The reality of fragmentation and fragility of specialised public services for women in situations of domestic violence breaches the MPL's provision of an integrated approach to public policies to support women in situations of domestic violence. According to Koller et al., survivors' dissatisfaction with the public services offered for women in situations of violence in Brazil is due to "[f]actors such as the impression that these services are woefully inadequate for users, the lack of an appropriate reception and information about procedures, and the fragmentation of the service network".[86] On the other hand, the decrease in women's demand for specialised public services leads some stakeholders to believe that such services are not necessary.[87] Therefore, a critical analysis of the Brazilian reality of fragmentation and fragility of such specialised public services points to the maintenance of state abandonment of women in situations of GBVAW, as criticised by feminists since the 1990s, since the Brazilian state does not effectively intervene through policy measures in the private dimension of women's lives to protect and support survivors of GBVAW.

Second, considering the fragmentation of public services and Brazil's punitive socio-political tendencies,[88] the protective and assistance measures offered by

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84 Especially women that already face other forms of vulnerability or discrimination, such as Black, Indigenous, *ribeirinhas* (riverine), *pomeranas* (Pomeranians), *Quilombolas* women, etc. Carmen Hein de Campos, "Desafios na Implementação da Lei Maria da Penha" [Challenges to the Implementation of the Maria da Penha Law], *Revista Direito GV* 11, no. 2 (2015): 395. See also Pasinato, "The Maria da Penha Law: 10 years on," 160.

85 Stela Nazareth Meneghel, et al., "Repercussões da Lei Maria da Penha no enfrentamento da violência de gênero" [Repercussions of the Maria da Penha Law in tackling gender violence], *Ciências & Saúde Coletiva* 18, no. 3 (2013): 696-697, https://www.scielo.br/j/csc/a/gZtYwLDYSqtgp7wGTTXHw4z/?format=pdf&lang=pt#:~:text=A%20Lei%20Maria%20da%20Penha%20trouxe%20a%20possibilidade%20de%20instaurar,previa%20a%20Lei%209099%2F5.

86 Silvia H. Koller, Priscila Lawrenz, Davi Manzini, Jean von Hohendorff, and Luísa Fernanda Habigzang, "Understanding and Combating Domestic Violence in Brazil," in *Global Responses to Domestic Violence*, eds. Eve S. Buzawa and Carl G. Buzawa (New York: Springer, 2017), 281-282.

87 Ávila, "Facing," 22. See also Campos, "Desafios na Implementação da Lei Maria da Penha," 395.

88 Carmen Hein de Campos, and Salo de Carvalho, "Tensões atuais entre a criminologia feminista e a criminologia crítica: a experiência brasileira" [Current Tensions Between

the MPL are subjugated to punitive criminal accountability as the most feasible response to domestic violence.

The MPL created the specialised Courts of Domestic and Family Violence against Women (specialised courts) as the court of competent jurisdiction for criminal prosecution and civil cases that arise from domestic violence against women.[89] In other words, the MPL established a double criminal and civil competent jurisdiction to the specialised courts. Therefore, the specialised courts coordinate MPL's protective and assistance measures, prosecute domestic violence cases, and determine survivor's access to assistance public services.[90] As the integration between public services is imperative to bring effectiveness to the MPL, Pasinato argues that the articulation among the MPL's three axes of intervention depends, to a certain extent, on those specialised courts.[91]

Nevertheless, until 2017, there were only 131 specialised courts throughout Brazil, many of them understaffed and without an appropriate network of multidisciplinary professionals qualified to deal with domestic violence cases.[92] The reduced number of specialised courts is insufficient for coordinating public services to assist and protect women in situations of domestic violence. Together with the lack of appropriate infrastructure and the court's overburdening with domestic violence cases, the specialised courts are not able to offer a quick response to the urgent protective measures,[93] which leaves women without

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Feminist Criminology and Critical Criminology: The Brazilian Experience], in *Lei Maria da Penha comentada em uma perspectiva jurídico-feminista* [*The Maria da Penha Law commented from a feminist legal perspective*], ed. C. Hein de Campos (Rio de Janeiro: Editora Lumen Juris, 2011), 155.

89 Brazil, Maria da Penha Law, article 14.

90 Brazil, Maria da Penha Law, articles 9 and 14.

91 Pasinato, "Novas abordagens sobre velhas propostas. Onde avançamos?", 220.

92 Brazil, Conselho Nacional de Justiça and Instituto de Pesquisa Econômica Avançada, *Sumário Executivo o Poder Judiciário no Enfrentamento à Violência Doméstica e Familiar Contra as Mulheres* [Executive Summary: The Judicial Branch in the Combat of Domestic and Family Violence Against Women], (Brasília: 2019), https://www.cnj.jus.br/wp-content/uploads/conteudo/arquivo/2019/08/7918e2dc8e59bde2bba84449e36d3374.pdf.

93 Brazil, Senado Federal, *Comissão Parlamentar Mista de Inquérito de Violência contra a Mulher no Brasil: Relatório Final* [Parliamentary Committee of Investigation on Violence Against Women in Brazil: Final Report], (Brasília: 2013), 53, https://www12.senado.leg.br/institucional/omv/entenda-a-violencia/pdfs/relatorio-final-da-comissao-parlamentar-mista-de-inquerito-sobre-a-violencia-contra-as-mulheres.

effective judicial intervention to safeguard them, their dependents, and their rights.

Furthermore, specialised courts work under a restrictive interpretation of their double criminal and civil competent jurisdiction, which in turn favours the criminal justice framework as redress to domestic violence against women. Whereas it is widely established that specialised courts have competent jurisdiction to prosecute and punish domestic violence-related crimes,[94] most specialised courts restrict their civil competent jurisdiction to granting urgent protective measures in order to provide immediate judicial intervention to protect the survivor from further domestic violence.[95] Through this restrictive interpretation, the prolonged and often complex civil and family litigation arising from domestic violence, such as separation of assets and regulation of child visitation, are not encompassed within the specialised courts' civil competent jurisdiction.[96] Instead,

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94 The intentional crimes against life, including feminicide, are an exception to the specialised courts' criminal competent jurisdiction because they fall under the competent jurisdiction of the Jury Tribunal (*Tribunal do Júri*), according to article 5, XXXVIII, d, of the Brazilian Federal Constitution. See also Fausto Rodrigues de Lima, "Dos procedimentos – artigos 13 a 17" [Procedures – Articles 13 to 17], in *Lei Maria da Penha comentada em uma perspectiva jurídico-feminista* [*The Maria da Penha Law commented from a feminist legal perspective*], ed. C. Hein de Campos (Rio de Janeiro: Editora Lumen Juris, 2011), 155.

95 Wânia Pasinato, "Avanços e obstáculos na implementação da Lei 11.340/06" [Advancements and Obstacles in the Implementation of the Law n. 11.340/06], in *Lei Maria da Penha comentada em uma perspectiva jurídico-feminista* [*The Maria da Penha Law commented from a feminist legal perspective*], ed. C. Hein de Campos (Rio de Janeiro: Editora Lumen Juris, 2011), 135. See also Ávila, "Facing," 19; According to Campos, specialised courts also justify the restriction of their civil competent jurisdiction on the basis of the aforementioned problems of lack of proper infrastructure to deal with this double demand. Campos, "Desafios na Implementação da Lei Maria da Penha," 399; The legal debate on the limitations of specialised courts' competent jurisdiction over civil and family law cases is still ongoing. It presents two main strands. The more restrictive one understands that specialised courts' civil competent jurisdiction is restricted to urgent protective measures, whereas the more encompassing one comprehends that the double competent jurisdiction of specialised courts encompasses criminal, civil and family claims that have domestic violence against women as the cause of action. Although feminist scholarship points out that most judicial courts work under the restrictive interpretation, there is growing jurisprudence that supports the more encompassing interpretation of specialised courts' double competent jurisdiction. See Brazil, Superior Tribunal de Justiça, Recurso Especial nº 1.550.166 - DF (2015/0204694-8), https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=201502046948&dt_publicacao=18/12/2017.

96 Article 14-A of the MPL determines that the woman survivor of violence may petition for divorce or dissolution of the steady union in the specialised courts; however, it excludes from the specialised courts the competent jurisdiction regarding the separation of assets. Brazil, Maria da Penha Law, article 14-A. See also Brazil, Centro de Inteligência da Justiça do Distrito Federal, *Nota Técnica 7/2021* [Technical Note 7/2021] (Distrito Federal e Territórios: 2021), 8-9,

such problems fall under the competent jurisdiction of Civil Courts or Family Courts, which are not specialised in the gendered dimensions of domestic violence and may not be fully aware of the concrete circumstances of domestic violence suffered by a particular woman and her dependents. Consequently, women survivors of domestic violence may have to migrate between different courts in order to seek judicial redress for non-criminal problems resulting from domestic violence, which imposes further obstacles to women's access to justice.[97]

The realities of (i) women's abandonment due to fragmentation and fragility of specialised public services for women in situations of domestic violence, (ii) a reduced number of specialised courts and insufficient coordination between protective and assistance measures, (iii) delayed judicial decisions for urgent protective measures, and (iv) survivors' migration to non-specialised courts on domestic violence for judicial redress to civil and family law problems amount to a general prioritisation of criminal accountability as the most easily accessible and feasible remedy to domestic violence against women, despite serious problems surrounding criminal justice interventions.[98] However, the MPL's *voluntas legis* determines three harmonic and non-hierarchical axes of intervention in order to redress the gendered relationships of inequality and discrimination that underpin domestic violence. Therefore, the reality of criminal prosecution of aggressors without proper access and enjoyment of protective and assistance measures to survivors constitutes a faulty implementation of the MPL's special legal protection.

Although the MPL has placed elevated importance on preventive, protective and assistance measures to support women in situations of domestic violence, the

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https://www.tjdft.jus.br/institucional/imprensa/noticias/2021/outubro/cijdf-apresenta-nota-tecnica-sobre-ajuizamento-de-divorcio-nos-juizados-de-violencia-domestica#:~:text=A%20altera%C3%A7%C3%A3o%20normativa%20permite%20que,e%20Familiar%20Contra%20a%20Mulher.

97 Campos, "Desafios na Implementação da Lei Maria da Penha," 399.

98 To name a few, revictimisation of survivors of violence in criminal proceedings, overburdening of courts, and judicial system slowness. Furthermore, according to Ávila, "[d]espite the broad perspective of the MPL, most of the solutions are yet thought of in a solely punitive perspective, disregarding the importance of integrated policies to support victims and to meet their expectations of protection". Ávila, "Facing," 22 and 25.

Brazilian scholar Hein de Campos points out that repressive perspectives have orientated public policies on combating GBVAW in Brazil.[99] The Brazilian state's focus on criminal investigation and prosecution over preventive, protective and assistance measures approximates the Brazilian reality on the fight against domestic violence to a broader trend that Elizabeth Bernstein has identified as "carceral feminism".[100] The latter corresponds to a section of the feminist movement, endorsed by "conservative state agents", that is committed to "the carceral state as the enforcement apparatus for feminist goals".[101] In other words, carceral feminism upholds the punishment of perpetrators as the remedy to GBVAW and gender discrimination. The approximation of Brazilian reality on the combat against domestic violence to the phenomena of carceral feminism points to a neoliberal tendency to remediate GBVAW through criminal justice interventions rather than through redistributive welfare policies that actually engage with the underlying causes of domestic violence,[102] which are mostly located on the MPL's second and third axis.

Therefore, the prioritisation of the MPL's first axis over its second and third axes disrupts the MPL's gender justice perspective. CEDAW jurisprudence and feminist scholarship have been increasingly recognising that gender inequality and discrimination, exacerbated by "cultural, economic, ideological, technological, political, religious, social and environmental factors", comprise the

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99 Campos, "Desafios na Implementação da Lei Maria da Penha," 402. Likewise, according to information provided to the IACHR for the 2020 annual report on the Maria da Penha case, "the Maria da Penha Law had been legislatively amended 10 times to penalize but not prevent domestic violence." Inter-American Commission on Human Rights, "Follow-Up Factsheet of Report No. 54/01 Case 12.051 Maria Da Penha Maia Fernandes (Brazil)" (Annual Report 2020), para. 30, https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/activities/follow-up/sCasos.asp.

100 Elizabeth Bernstein, "The Sexual Politics of the 'New Abolitionism'," *differences: A Journal of Feminist Cultural Studies* 18, no. 3 (2007): 143.

101 Bernstein, "The Sexual Politics of the 'New Abolitionism'", 130 and 143.

102 Elizabeth Bernstein, "Carceral politics as gender justice? The 'traffic in women' and neoliberal circuits of crime, sex, and rights," *Theory and Society* 41, no. 3 (2012): 254. See also Ana María Sánchez Rodríguez, "Contesting Neoliberalism: Bringing in Economic and Social Rights to End Violence against Women in Mexico," in *Economic and Social Rights in a Neoliberal World*, ed. Gillian MacNaughton and Diane F. Frey (Cambridge: Cambridge University Press, 2017), 178; and Karen Engle, "A Genealogy of the Criminal Turn in Human Rights," in *Anti-Impunity and the Human Rights Agenda*, eds. Karen Engle, Zinaida Miller and D. M. Davis (Cambridge: Cambridge University Press, 2016), 46.

structural causes of the systematic occurrence of GBVAW.[103] Criminal justice interventions alone — which focus on punishing perpetrators — do not fully address those structural causes.[104] The general priority of state interventions within the MPL's first axis (criminal investigation and prosecution of domestic violence) over the second and third axis (protective, assistance and preventive measures to protect and support survivors) does not redress the gendered relationships of inequality and discrimination that underpin domestic violence, thus contrary to the MPL's *voluntas legis*.

The Maria Da Penha Law Case Study And Its International Relevance

As the subsections above reflected on the MPL's legal provisions, advancements and challenges, the following subsection aims to present internationally valid insights from a critical analysis of the Brazilian case study on domestic violence.

The MPL is a human rights-based legal act on domestic violence that introduced a gender justice perspective into the Brazilian legal and institutional framework to combat GBVAW. Hence, the MPL is considered by Brazilian legal feminist literature as a positive legal development as it proposed a new paradigm for women's rights and legal treatment for GBVAW in Brazil. As previously highlighted in this article, the MPL establishes special legal protection for women in situations of domestic violence, defines domestic violence as a violation of human rights, approximates the Brazilian legal system to international human rights standards, and sets a gender-aware approach to the legal system and public policies on domestic violence. The MPL's embrace of a gender justice perspective and international women's rights instruments signals future social change through legal reform of patriarchal norms that neglected GBVAW in

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103 *General recommendation no. 35 on gender-based violence against women, updating general recommendation No. 19*, para. 14. See also OHCHR, A/HRC/11/6/Add.6, *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk - Addendum - Political economy and violence against women* (2009), https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/11/6/Add.6, para 2; Jacqui True, *The Political Economy of Violence against Women* (Oxford: Oxford University Press, 2012), 6, https://academic.oup.com/book/6856.

104 Goldblatt, "Violence against women and social and economic rights", 367. See also Engle, "A Genealogy of the Criminal Turn in Human Rights," 44-45; and Rodríguez, "Contesting Neoliberalism," 179.

Brazil. The rise of social awareness of domestic violence due to the popularity of the MPL among Brazilians points out that social changes have already started to happen,[105] but they need to go further.

The MPL case study is of international relevance as it indicates that legal reform alone is insufficient to tackle domestic violence. The Brazilian government's lack of real commitment to adhering to non-criminal aspects of the MPL hinders its full implementation.[106] The MPL still faces many conservative pushbacks to its innovative gender justice perspective and special legal protection.[107] Even though the MPL determines a gender-aware legal and institutional framework on domestic violence against women,[108] the ongoing reality of the primacy of carceral measures to remedy GBVAW points to a disruption of the MPL's values of an integrated approach through criminal accountability of offenders and protection, assistance and preventive measures for survivors in order to tackle the underlying causes of domestic violence as GBVAW.

Therefore, the MPL case study demonstrates the need for states to commit to legal, social and institutional changes, besides pushing for criminal accountability of offenders, in order to redress the *status quo* of gender inequality that fuels GBVAW. Although the MPL introduces a gender justice perspective on domestic violence and women's human rights in Brazil, the existence of the law by itself is not enough to promote true institutional change for the implementation of accessible and effective gender-aware public policies that prevent GBVAW and

105 Pasinato, "Avanços e obstáculos na implementação da Lei 11.340/06," 119.

106 Campos, "Desafios na Implementação da Lei Maria da Penha," 402.

107 Carmen Hein de Campos and Valdir Florisbal Jung, "Mudanças legislativas na lei Maria da Penha: desafios no contexto atual" [Legislative changes in the "Maria da Penha" Law: challenges in the current context], *Revista da Faculdade de Direito da UFRGS* 44 (2020): 127. https://doi.org/10.22456/0104-6594.95274.

108 The key document that establishes the Brazilian public policies' guidelines on GBVAW is the National Pact to Combat Violence against Women. Although the MPL focuses on domestic violence, the Pact extended the gender-aware standards of the MPL on public policies to combat other forms of GBVAW, such as sexual exploration and trafficking; Brazil, Secretaria de Políticas para as Mulheres Presidência da República, *Pacto Nacional pelo Enfrentamento à Violência contra as Mulheres* [National Pact to Confront Violence against Women] (Brasília: 2011), 11-12, https://www12.senado.leg.br/institucional/omv/copy_of_acervo/outras-referencias/copy2_of_entenda-a-violencia/pdfs/pacto-nacional-pelo-enfrentamento-a-violencia-contra-as-mulheres.

assist and empower survivors to overcome situations of violence and vulnerability.

As argued by True, there are three important Ps “in efforts to address violence against women”: prosecution, protection and prevention.[109] As demonstrated by the MPL case study, states’ efforts to eliminate GBVAW should not overfocus on the criminal justice framework and neglect the other “Ps”. Taking into account a domestic context of predominant punitive tendencies in public policies and overburdened and underfinanced courts, criminal law interventions fail to provide timely and enforceable judicial protection for women survivors of violence. The MPL case study indicates that states’ commitment to eliminate GBVAW entails providing women with effective access to special legal protection and integrated public policies for protective, assistance and preventive services in order to promote accountability for perpetrators of domestic violence, protect survivors from further violence, and promote preventive measures that address the underlying causes of GBVAW.

Conclusion

The international human rights framework has developed to comprehend domestic violence as a form of human rights violation. Adopting the language of human rights to domestic violence is important as it raises awareness of the phenomenon. Furthermore, it requires states to take positive measures to combat and prevent domestic violence against women, including the underlying gender inequality and discrimination that underpins gender-based violence.

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109 True, *The Political Economy of Violence against Women*, 25; The “three Ps" to address violence against women are a scholarly classification of the state’s human rights obligations to eradicate violence against women. Feminist scholarship presents other forms of classification of such human rights obligations, for example, Rodríguez’s framework of “(1) prevention, (2) protection, (3) rehabilitation and reintegration, and (4) prosecution and punishment”. As classifications serve the purpose of organising thoughts to make a point, the author adopts the “three Ps” classification as it closely relates to the MPL’s three axes of state intervention. Furthermore, as CEDAW jurisprudence does not hold any form of classification specifically, the “three Ps” are also encompassed within CEDAW jurisprudence on recommendations to State parties to eliminate GBVAW. See *General recommendation no. 35 on gender-based violence against women, updating general recommendation No. 19*, [28]; Rodríguez, “Contesting Neoliberalism,” 173-174.

Nevertheless, when dealing with domestic violence as a human rights matter, it also encompasses the general human rights problem of ineffectiveness.

This article analysed the Brazilian legislation on domestic violence against women, the MPL, as a case study of domestic incorporation and implementation of international women's rights and legal provisions on GBVAW. The development of the MPL was not due to the Brazilian state's goodwill but rather as a result of a long feminist struggle domestically and internationally. The MPL promoted legal reform for combating domestic violence in Brazil through its gender justice perspective and proximity to international human rights instruments. On this account, the MPL demands that the Brazilian state pay attention to the gendered circumstances arising from domestic violence due to systematic patterns of gender inequality and GBVAW. Thus, the MPL promotes special legal protection for women in situations of violence as it determines specific and gender-sensitive forms of state intervention in cases of domestic violence.

Nevertheless, the challenges facing the MPL point to the need for social and political changes beyond legal reform. The state's responsibility to eliminate domestic violence entails more than having repressive criminal legislation. Instead, the MPL case study demonstrates that states' commitment to legal, social and institutional changes should promote women's effective access to gender-aware legal protection and integrated public policies for protective, assistance, and preventive measures as pathways towards combatting domestic violence against women. Domestic violence as a matter of human rights should not focus only on the survivors' rights to have the offender properly investigated and punished, whereas it also requires a broader engagement of women's human rights through legal, policy and judicial measures in order to prevent and tackle the structural causes of gender inequality and discrimination underpinning domestic violence as gender-based violence against women.

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The Effectiveness of Sanctions as a Tool for Resolving Armed Conflicts: An Analysis of Syria and Yemen

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Abstract

The use of sanctions as a tool for resolving armed conflicts has been a topic of debate for many years. This paper undertakes a critical retrospective analysis of the sanctions imposed on Syria and Yemen in resolving armed conflicts. The study examines the types of sanctions imposed on the two countries and the impact of these sanctions on the conflict resolution process. The paper concludes by discussing the implications of these findings for the use of sanctions as a tool for resolving armed conflicts in the future. The findings of the study suggest that sanctions can be effective in resolving armed conflicts, however, it is subject to various factors such as the nature of the conflict, the level of cooperation from the targeted country, and the level of international support. The study puts particular emphasis on the role of the United Nations Security Council, international cooperation among the states, and the timeliness as well as duration of sanctions as key determinants of the success of sanctions. This study seeks to contribute to the decision-making process behind imposing sanctions, both in ongoing and future conflicts by highlighting the best practices and strategies to improve the effectiveness of the sanctions.

Introduction

Understanding Sanctions in International Law

In international law, sanctions refer to systemic political, economic, or diplomatic decisions that are part of the external affairs of the governments of concerned countries or regional organisations imposed to protect national security interests,

public order, or to protect international relations.[1] Such decisions are measures of a coercive nature applicable against states, non-state entities, or individuals to defend against threats to international peace and security.[2] These measures are not considered to be conflicts or wars, but rather efforts to allow states to peacefully settle disputes, to rectify the behaviour of the involved state or entity, and as an alternative to the use of armed force.[3] The nature of sanctions is fundamentally preventive and their extent should be proportionate to the gravity of the conflict as well as the severity of the measures taken for the sanction. Primarily, the modes of sanctions include diplomatic, economic, and military measures.[4] Diplomatic sanctions are imposed against adverse behaviour or dissatisfaction concerning bilateral or multilateral relations among states which essentially seek to protect political and economic relations among them.[5] Such sanctions are carried out by sending political messages to the concerned governments, or in severe cases, by cancelling or limiting diplomatic visits to the concerned states. Economic sanctions include commercial and financial prohibitions and limitations, such as trade bans, travel and visa restrictions, transaction restrictions, and tax regulations to eliminate or cease conflicts.[6] Military sanctions, on the other hand, are imposed through military strikes, an arms embargo, or a military embargo (a restriction on the trade and transfer of military equipment to a country or group).[7]

Irrespective of the mode of imposition, sanctions under international law are required to be in line with international legal and human rights obligations to avoid adverse

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1 Emmanuel Decaux, "The Definition of Traditional Sanctions: Their Scope and Characteristics", *International Review of the Red Cross,* 90, no. 870 (June 2008): 249–5.

2 Bruno Simma et al., *The Charter of the United Nations: A Commentary*, (Oxford, United Kingdom: Oxford University Press, 2002). DOI: 10.1093/law/9780199639762.001.0001

3 Bruno Simma, *The Charter of the United Nations*; UN General Assembly, "Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights", A/HRC/42/46 (July 8, 2021). https://www.ohchr.org/en/documents/thematic-reports/ahrc4246-negative-impact-unilateral-coercive-measures-enjoyment-human.

4 Tom Ruys, "Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework", *Social Science Research Network* (April 8, 2016) https://doi.org/10.2139/ssrn.2760853.

5 Decaux, "Definition of Traditional Sanctions," 261.

6 Masahiko Asada, "Economic Sanctions in International Law and Practice", *Routledge EBooks* (November 7, 2019) https://doi.org/10.4324/9780429052989.

7 Asada "Economic Sanctions"; Surya P Subedi, *Unilateral Sanctions in International Law* (United Kingdom: Bloomsbury Publishing, 2021).

effects on third parties.[8] Under the United Nations (UN) system, sanctions and other coercive measures are primarily regulated according to Chapter VII of the Charter of the United Nations (the UN Charter).[9] Besides the UN, other international or regional organisations such as the European Union (EU), and the Organisation for Security and Cooperation in Europe (OSCE) also impose sanctions.[10] Several countries including North Korea, Iran, Syria, Venezuela, Russia, Ukraine, Sudan and South Sudan, Myanmar, Yemen, and Zimbabwe have been subject to sanctions by various international entities at different times due to issues relating to human rights violations, nuclear proliferation, or for conflict with other countries.[11]

The effectiveness of sanctions on the states involved in armed conflicts has been a subject of debate. This paper undertakes a critical retrospective analysis of the sanctions imposed on two regions of armed conflict, namely Syria and Yemen. The study examines the types of sanctions imposed on the two countries and the impact of these sanctions on the conflict resolution process. The findings of the study suggest that sanctions to resolve armed conflicts can be effective, however, the effectiveness is largely subject to circumstances such as the nature of the conflict, the level of cooperation from the targeted country, and the level of international support. The study puts particular emphasis on the role of the United Nations Security Council (UNSC), international cooperation among the states, and the timeliness, as well as the duration, of sanctions as key determinants of the success of sanctions.

This paper discusses the implications of these findings for the use of sanctions as a tool for resolving armed conflicts in the future. The study aims to make a contribution to the current scholarship on the topic of imposing sanctions in armed conflicts.

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8 Rebecca Barber, "A Survey of the General Assembly's Competence in Matters of International Peace and Security: In Law and Practice", *Journal on the Use of Force and International Law* 8, no. 1 (January 1, 2021): 115–56. https://doi.org/10.1080/20531702.2020.1776505.; Detlev F. Vagts, "The Traditional Legal Concept of Neutrality in a Changing Environment", *American University International Law Review* 14, no. 1 (1998): 83–102.

9 United Nations, Charter of the United Nations, 1945, 1 UNTS XVI, available at: https://www.un.org/en/about-us/un-charter.

10 Asada "Economic Sanctions"

11 Lance Davis and Stanley Engerman, "History Lessons Sanctions: Neither War nor Peace", *Journal of Economic Perspectives* 17, no. 2 (May 1, 2003): 187–97. https://doi.org/10.1257/089533003765888502.; Emma O'Leary, "Politics and Principles: The Impact of Counterterrorism Measures and Sanctions on Principled Humanitarian Action", *International Review of the Red Cross* 103 no. 916-917 (October 5, 2021): 459–77. https://doi.org/10.1017/S1816383121000357.

Specifically, it seeks to provide insights and analysis into the decision-making process behind imposing sanctions, both in ongoing and future conflicts.

The Role of Sanctions as a Means of Resolving Armed Conflicts

Over time, the effectiveness of sanctions in resolving armed conflicts between states has produced mixed results.[12] Some instances have demonstrated that sanctions can play an effective and positive role in resolving conflicts by exerting pressure on the target state to change its behaviour. An example of this would be bringing about a change in government policy or leadership for the resulting conflict.[13]

For instance, the international community imposed sanctions on South Africa to bring about an end to apartheid in the country. These sanctions ultimately helped effectuate positive outcomes in the transition to a democratic government in the early 1990s.[14] Around the same time, sanctions imposed on the Libyan government to give up its weapons of mass destruction turned advantageous and resulted in significant improvement of human rights records of the region.[15] During the 1990s, Serbia was subject to economic sanctions which helped bring about an end to the conflict in Bosnia and Herzegovina.[16] Sanctions imposed on Iran in the 1990s and 2015 played a role in limiting the country's military capabilities and weakening its ability to pursue weapons of mass destruction, and bringing the country to the negotiating table in terms of nuclear deals, respectively.[17]

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[12] Michael Brzoska, "International Sanctions: A Useful but Increasingly Misused Policy Instrument", Vision of Humanity, June 29, 2022. https://www.visionofhumanity.org/international-sanctions-a-useful-but-increasingly-misused-policy-instrument/.

[13] Brzoska, "International Sactions".

[14] Philip I. Levy, "Sanctions on South Africa: What Did They Do?", *The American Economic Review* 89, no. 2 (May 1, 1999): 415–20. https://doi.org/10.1257/aer.89.2.415.

[15] Derek Lutterbeck, "Migrants, Weapons and Oil: Europe and Libya after the Sanctions", *The Journal of North African Studies* 14, no. 2 (June 2009): 169–84. https://doi.org/10.1080/13629380802343558.

[16] Juan Manuel Fabra, "United Nations Embargo against Serbia and Montenegro" (Former) Political Affairs Committee / Committee on General Affairs. UNO, July 1, 1993. https://pace.coe.int/en/files/7216.

[17] Fatemeh Kokabisaghi, "Assessment of the Effects of Economic Sanctions on Iranians' Right to Health by Using Human Rights Impact Assessment Tool: A Systematic Review", *International Journal of Health Policy and Management* 7, no. 5 (January 20, 2018): 374–93. https://doi.org/10.15171/ijhpm.2017.147.

Nevertheless, there are plenty of other instances demonstrating the contrary, where sanctions had limited to no effectiveness. For instance, North Korea did not comply with the sanctions imposed on its nuclear weapons program.[18] The Syrian government was not affected by the economic sanctions imposed on it to pressure Syria to end the conflict or improve human rights.[19] Sanctions imposed on Venezuela have not effectively brought about a change in the government or resolved the ongoing political crisis in the country.[20] Cuba is another example of the failure of sanctions to resolve the political or economic issues in the country.[21] Sanctions imposed on Zimbabwe were not effective in improving human rights or bringing about political change in the region.[22]

Sanctions can be difficult to enforce and they often have unintended consequences, such as causing hardship to the civilian population, strengthening the target state's resolve, or promoting corruption and other illicit activities.[23] A determinant for the effectiveness of sanctions is timely imposition as many instances record that long-delayed imposition of sanctions severely affects its efficacy.[24] Irrespective of the limitations of imposing sanctions, however, the international community widely upholds that sanctions can still be an effective tool for resolving armed conflicts in certain circumstances by building international pressure and galvanising diplomatic efforts to find a solution.[25] It is further recommended by international legal scholars that sanctions can be used in combination with other measures, such as peace negotiations or military interventions, to increase their effectiveness.[26]

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18 Marcus Noland, "The (Non-) Impact of UN Sanctions on North Korea", *Asia Policy* 7, no. 1 (2009): 61–88. https://doi.org/10.1353/asp.2009.0047.

19 HM Treasury, "Financial Sanctions, Syria", UK Office of Financial Sanctions Implementation, June 4, 2013. https://www.gov.uk/government/publications/financial-sanctions-syria.

20 Dany Bahar et al., "Impact of the 2017 Sanctions on Venezuela: Revisiting the Evidence", *Social Science Research Network*, (March 21, 2021). https://doi.org/10.2139/ssrn.3809344.

21 Daniel W. Fisk, "Economic Sanctions: The Cuba Embargo Revisited", *Palgrave Macmillan UK EBooks*, (London: Palgrave Macmillan, 2000): 65–85. https://doi.org/10.1057/9780230596979_4.

22 Heather Chingono, "Economic Sanctions: A Panacea to Democracy and Good Governance in Zimbabwe?", *Turkish Journal of International Relations* 9, no. 1 (February 16, 2010): 192–216. https://dergipark.org.tr/en/pub/alternatives/issue/1696/21105.

23 Dame Rosalyn Higgins et al., *Oppenheim's International Law: United Nations* (Oxford University Press, 2018).

24 Mohamed A. Daw, "The Impact of Armed Conflict on the Epidemiological Situation of COVID-19 in Libya, Syria and Yemen", *Frontiers in Public Health* 9 (June 11, 2021). https://doi.org/10.3389/fpubh.2021.667364.

25 Asada "Economic Sanctions".

26 Asada "Economic Sanctions"; Tom, "Sanctions, Retortions and Countermeasures".

An Overview of the Sanction Situation in Syrian and Yemeni Conflicts

Both Syria and Yemen have been affected by ongoing armed conflicts, with international sanctions being used as a tool to pressure the respective governments to end the violence.[27] Additionally, both countries have seen devastating humanitarian consequences as a result of the conflict, including widespread famine and displacement of civilians.[28]

Several countries, including the United States and Canada, as well as entities such as the UN, the EU, and the Arab League, have implemented sanctions against Syria as a response to the Syrian government's brutal crackdown on opposition forces and human rights abuses during the civil war in 2011.[29] The forms of those sanctions included economic sanctions (such as restrictions on trade and investment), financial sanctions (such as asset freezes and restrictions on access to financial services), and arms embargoes.[30] The purpose of the sanctions is to pressure the government to end the conflict and improve the human rights situation in the region.[31]

Yemen received international sanctions in 2015, as a response to the conflict in the country. Like Syria, the sanctions imposed on Yemen included arms embargoes, asset freezes and travel ban on officials directly concerned with the governmental offices.[32] The UN also imposed sanctions targeting the Houthi rebels, who have been fighting

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27 Asada "Economic Sanctions".

28 Farrokh Habibzadeh, "Economic Sanction: A Weapon of Mass Destruction", *The Lancet* 392, no. 10150 (September 8, 2018): 816–17. https://doi.org/10.1016/s0140-6736(18)31944-5.

29 Clara Portella "The EU Sanctions against Syria: Conflict Management By Other Means?" UNISCI Discussion Papers, (30), (2012): 151-158. https://ink.library.smu.edu.sg/soss_research/1177/

30 John Horgan and Kurt Braddock, "Rehabilitating the Terrorists?: Challenges in Assessing the Effectiveness of De-Radicalization Programs", *Terrorism and Political Violence* 22, no. 2 (March 9, 2010): 267–91. https://doi.org/10.1080/09546551003594748; Clara, "The EU Sanctions against Syria," 154–55.

31 Erica Moret, "Humanitarian Impacts of Economic Sanctions on Iran and Syria", *European Security* 24, no. 1 (January 9, 2015): 120–40. https://doi.org/10.1080/09662839.2014.893427; UN General Assembly, "Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures" https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures.

32 "Security Council Committee Established Pursuant to Resolution 2140 (2014) | United Nations Security Council," n.d. https://www.un.org/securitycouncil/sanctions/2140.

against the government and its allies.[33] The purpose of the sanctions is similar to those of the sanctions on Syria, namely, to initiate peace negotiations and improve the humanitarian situation in the region.[34]

Scholarly Analyses of the Effects of Sanctions in Resolving the Syrian and Yemen Conflicts

The effectiveness of sanctions in resolving the Syrian conflict has been the subject of much debate and analysis by international law and policy scholars through the years, given the complexity of its nature and its relevance with multiple global and diplomatic factors.[35] Based on these discussions, the effectiveness of sanctions resolving the conflict appears to be influenced by several factors, including the level of support for the sanctions by the international community, the enforcement mechanisms in place, and the willingness of all parties to the conflict to engage in peace negotiations.[36] Proponents of sanctions in the international community argue that the sanctions placed on Syria contributed to putting pressure on the government and its allies to engage in peace negotiations and improve human rights in the regions. These proponents cite several outcomes, such as the sanctions that targeted key economic sectors, including the oil and financial sectors, reducing the government's ability to finance the conflict and its military operations.[37] On the other hand, critics of the sanctions on Syria argue that sanctions have had limited effectiveness in resolving the conflict, as the Syrian government has been able to find alternative sources of support, such as Iran and Russia, which have helped Syria withstand the impact of sanctions.[38]

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33 Chris Downes, "'Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike", *Journal of Conflict and Security Law* 9, no. 2 (January 1, 2004): 277–94. https://doi.org/10.1093/jcsl/9.2.277.

34 David P Forsythe, "United Nations Intervention in Conflict Situations Revisited: A Framework for Analysis", *International Organization* 23, no. 1 (December 1, 1969): 115–39. https://doi.org/10.1017/s002081830002556x.

35 Tom, "Sanctions, Retortions and Countermeasures"; US Department of The Treasury, "Syria Sanctions", January 23, 2023. https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/syria-sanctions; Clara, "The EU Sanctions against Syria", 154-55; Erica, "Humanitarian Impacts", 125–30.

36 Erica, "Humanitarian Impacts", 125–30.

37 Hsu Mo et al., "The Sanctions of International Law", *Transactions of the Grotius Society* 35 (1949): 4–23. http://www.jstor.org/stable/743110; Erica, "Humanitarian Impacts", 125–30.

38 Erica, "Humanitarian Impacts", 125–30

Furthermore, the sanctions have also had negative humanitarian consequences, such as exacerbating poverty and food insecurity in the country.[39]

As with Syria, the effectiveness of sanctions imposed on Yemen has been a subject of debate among global scholars and policymakers.[40] One of the main arguments in favour of the effectiveness of sanctions on Yemen is that the sanctions were able to cause adequate economic pressure on the Houthi rebels, the main armed group in Yemen.[41] Sanctions have targeted individuals and organisations connected to the rebels, which has made it difficult for them to access the resources they need to sustain their military activities.[42] As a result, the sanctions have weakened the rebels and forced them to engage in negotiations with the government.[43] Another argument in favour of the effectiveness of sanctions is that they have brought international attention to the conflict in Yemen.[44] The imposition of sanctions has sent a message to the world that the conflict in Yemen is a serious issue that demands attention and resolution.[45] This has led to increased diplomatic efforts to find a solution to the conflict and has encouraged the international community to take a more active role in resolving the conflict.[46] However, despite these positive effects, some argue that the effectiveness of sanctions on Yemen has been limited.[47] One of the key reasons behind this argument is that sanctions have not had a significant impact on the rebel's military capabilities. This is because they have continued to receive support from other sources.[48] Additionally, the sanctions were ineffective to stop the flow of arms into

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39 Alexander Orakhelashvili, "The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria", *Economic Sanctions Under International Law* (2015): 3–21. https://doi.org/10.1007/978-94-6265-051-0_1.

40 Orakhelashvili "The Impact of Unilateral EU Economic Sanctions" 3–21.

41 David, "United Nations Intervention", 115–39.

42 David, "United Nations Intervention", 115–39.

43 Martin D Fink, "Naval Blockade and the Humanitarian Crisis in Yemen", *Netherlands International Law Review* 64, no. 2 (July 2017): 291–307. https://doi.org/10.1007/s40802-017-0092-3.

44 Fink "Naval Blockade" 291–307.

45 Dina Esfandiary and Ariane M. Tabatabai, "Yemen: An Opportunity for Iran–Saudi Dialogue?", *Washington Quarterly*, 39(2), (2016). https://doi.org/10.1080/0163660x.2016.1204415.

46 Emma, "Politics and Principles", 471–475.

47 "Yemen and the Saudi-Iranian 'Cold War'", The Royal Institute of International Affairs, February 18, 2015. https://www.chathamhouse.org/sites/default/files/field/field_document/20150218YemenIranSaudi.pdf; Richard K Russell, "Swords and Shields: Ballistic Missiles and Defenses in the Middle East and South Asia", Orbis, June 1, 2002. https://doi.org/10.1016/s0030-4387(02)00125-4.

48 Russell, "Swords and Shields".

Yemen, as the rebels continue to obtain weapons from external sources.[49] Another factor limiting the effectiveness of sanctions on Yemen is that the sanctions have caused economic hardship for ordinary Yemenis, as they curtailed their regular access to basic necessities such as food, medicine, and fuel, negatively impacting a significant portion of the population.[50] This has resulted in a humanitarian crisis in Yemen and has made it difficult for the international community to support the sanctions.[51]

Determinants of the Effectiveness of Sanctions in Resolving Armed Conflicts and Their Application in Syria and Yemen Case

Considering the outcome of the sanctions imposed on Syria and Yemen over the years alongside scholarly reflections, it is imperative to focus on the determinants of the efficacy of an international sanction.

United Nations Security Council Resolutions

The success of international sanctions depends largely on UNSC resolutions, which provide crucial instructions and guidelines.[52] In this regard, the UNSC has several roles to play. Firstly, the UNSC should make clear definitions and provide precise goals of the sanctions in the drafting of the resolutions, such as mentioning the target to promote regional peace, to convict and deter violations of human rights in any form, to make a clear prohibition on nuclear proliferation, or any other goal.[53] Secondly, the UNSC should make clear specifications as to the target groups, entities, or individuals on whom the sanction applies the most, stating their activities leading to the sanction in order to reduce the generality and breadth of the sanctions to avoid adverse effects

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49 Chris, “Targeted Killings”, 279–89.

50 Chris, “Targeted Killings”, 279–89.

51 Jeannie Sowers and Erika Weinthal, “Humanitarian Challenges and the Targeting of Civilian Infrastructure in the Yemen War”, *International Affairs* 97, no. 1 (January 2021): 157–77. https://doi.org/10.1093/ia/iiaa166; Pettersson, Therése, and Peter Wallensteen, “Armed Conflicts, 1946–2014”, *Journal of Peace Research* 52, no. 4 (July 1, 2015): 536–50. https://doi.org/10.1177/0022343315595927.

52 David, “United Nations Intervention”, 115–39.

53 Farrokh, “Economic Sanctions”, 816–817.

on innocent civilians.[54] Thirdly, the UNSC should establish effective monitoring and evaluation mechanisms in the sanctioned regions in order to directly and immediately assess the impact of the sanctions to adjust its approach over time and ensure that the sanctions are resulting in the intended effect.[55] Additionally, the UNSC should work in close proximity with regional organisations to develop measures tailored to regional contexts. This would also help the Council to seek additional resources to support the implementation of the sanctions, including funding for monitoring and evaluation, as well as technical support.[56] Hence, the clarity and enforceability of these resolutions are key factors in determining the effectiveness of sanctions, exerting pressure on Syria and Yemen to address conflicts, and human rights violations, and work towards peaceful resolutions.[57]

International Cooperation

The efficacy of sanctions is highly dependent on the cooperation of international organisations and entities as they can play a vital role in pressuring the targeted entity to comply with the demands of the international community.[58] It is professed that when a group of countries or international organisations join together to impose sanctions on a state, it creates added pressure on the targeted state or entity making it difficult to resist the demands of the international community.[59] Moreover, it affects the costs of sanctions for individual states, making it feasible for the supporting states to sustain

54 Farrokh, "Economic Sanctions", 816–817; UN General Assembly "Secondary Sanctions, Civil and Criminal Penalties for Circumvention of Sanctions Regimes and Overcompliance with Sanctions: Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights", A/HRC/51/33 (July 15, 2022). Accessed April 12, 2023. https://www.ohchr.org/en/documents/thematic-reports/ahrc5133-secondary-sanctions-civil-and-criminal-penalties-circumvention.

55 Tom, "Sanctions, Retortions and Countermeasures".

56 Tom, "Sanctions, Retortions and Countermeasures".

57 David, "United Nations Intervention", 115–39.

58 Justine Walker, "The Public Policy of Sanctions Compliance: A Need for Collective and Coordinated International Action", *International Review of the Red Cross* 103 no. 916–917 (January 2021): 705–16. doi:10.1017/S181638312100093X.

59 Tom Ruys, "Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions", *in The Cambridge Handbook of Immunities and International Law*, ed. Tom Ruys, Nicolas Angelet, and Luca Ferro (Cambridge: Cambridge University Press, 2019): 670–710. doi:10.1017/9781108283632.034.

over time.[60] Furthermore, international cooperation plays a vital role in sharing intelligence to identify the vulnerabilities of the sanctions as well as to provide assistance in terms of humanitarian or diplomatic support to reduce the negative and unintended impact on civilians.[61] Hence, enhancing international cooperation surrounding Syria and Yemen has the potential to significantly augment the effectiveness of the sanctions imposed on these countries, amplifying their impact in addressing conflicts, and human rights violations, and fostering peaceful resolutions.[62]

Timing and Duration

Timing and duration of sanctions play another key role in the success of a sanction. In this regard, circumstances including the degree of vulnerability, economic status, political condition, and diplomatic behaviours are to be considered.[63] Additionally, the duration of the sanctions should be controlled considering their effect on civilians and their humanitarian implications.[64] Hence, by optimizing the timing and duration of sanctions, and implementing them in a manner that minimizes humanitarian suffering among the general population unrelated to the conflicts, the effectiveness of the imposed sanctions on Syria and Yemen could be greatly enhanced, achieving their intended goals more efficiently.[65]

Conclusion

Through a critical analysis of the effects of sanctions imposed on Syria and Yemen, this paper concludes with three key determinants of the effectiveness of sanctions in

60 Emma, "Politics and Principles", 475–477; David, "United Nations Intervention", 115–39; Francesco Giumelli, "The purposes of targeted sanctions", in *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, Thomas J. Biersteker, Sue. E. Eckert and Marcos Tourinho, eds. (Cambridge, Cambridge University Press, 2016): 40; and Richard Nephew, *The Art of Sanctions: A View from the Field* (New York, Columbia University *Press*, 2017): 9.

61 Justine, "The Public Policy of Sanctions Compliance", 712–13; Larry Minea et al., "Toward More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System", *Institute for International Studies*, no. 31 (January 1, 1998): https://ciaotest.cc.columbia.edu/wps/wibu/0015213/f_0015213_12843.pdf.

62 Mohamed, "The Impact of Armed Conflict".

63 Damrosch, Lori F, "The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts", *Columbia Law School* 37 (2019): 249. https://scholarship.law.columbia.edu/faculty_scholarship/2927

64 Mohamed, "The Impact of Armed Conflict".

65 Mohamed, "The Impact of Armed Conflict".

resolving armed conflicts. In the case of Syria, sanctions were imposed by several countries and international organisations in response to the country's civil war and human rights abuses.[66] These sanctions targeted the Syrian government and its supporters, as well as individuals and entities involved in the conflict.[67] In Yemen, sanctions were imposed in response to the conflict between the government and Houthi rebels. Like Syria, these sanctions also targeted individuals and entities involved in the conflict, as well as the Yemeni government.[68] The effectiveness of these sanctions is a subject of debate, with some studies suggesting that the sanctions had limited impact on the conflict whereas others argue that they contributed to the pressure on the respective governments to engage in peace talks.[69]

Hence, as a tool used by the international community to pressure countries to change their behaviour, the subject of sanctions requires further extensive research and case analysis. This is to consider that sanctions may play a pertinent role in resolving conflicts, but they cannot be considered a magic solution and their impact depends on multiple factors, including the nature of the conflict, the type of sanctions imposed, and the target country's willingness to change behaviour.[70] This paper particularly emphasises the role of the UNSC in issuing resolutions for the sanctions, the necessity of international cooperation among the states and the timeliness and duration of the sanctions. After all, the purpose of imposing sanctions under international law is not to inflict harm on the civilian population by impeding their access to essential goods or subjecting them to inhumane economic conditions, but rather to impose limitations and barriers on specific entities for violating their obligations under international law.

66 Clara, “The EU Sanctions against Syria”, 154–55.
67 Clara, “The EU Sanctions against Syria”, 156–57.
68 Martin, “Naval Blockade and Humanitarian Crisis in Yemen”, 297–306.
69 David, “United Nations Intervention”, 115–39; Erica, “Humanitarian Impacts”, 125–30.
70 UN General Assembly “Secondary Sanctions”.

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A Criminological Study of The Meseritz-Obrawalde Nurses During the Second Euthanasia Phase

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Abstract

The euthanasia programme was established by the Nazi government in 1939 and lasted until the end of the Second World War in 1945. The programme took form as either killing centres or psychiatric institutions, situated all over Nazi Germany and its occupied territories. Nurses played an important role in the euthanasia programme as they intentionally and systematically took part in killing between 200,000 and 250,000 physically and mentally disabled patients.[1] The killing of the so-called "unfit" was justified as scientifically based, partly explaining why some nurses rationalised their action as necessary and even morally good. In the aftermath of the war, only a few nurses were charged with crimes against humanity. The majority were free of charges and able to continue their careers as nurses. This article aims to contribute by adding knowledge about a group of perpetrators that is understudied in the Holocaust literature and ignored by criminological studies, by applying the conceptual tools of ideological and situational factors and neutralisation theory.

Introduction

Criminological studies on atrocity crimes and genocide developed in the 1990s.[2] Despite the vacancy up until that point, criminologists are by no means newcomers to the study of these crimes.[3] Already in 1915, Émile Durkheim analysed German

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1 "Nazi Persecution of The Mentally & Physically Disabled", Jewishvirtuallibrary.org, accessed 16 December 2020, https://www.jewishvirtuallibrary.org/nazi-persecution-of-the-mentally-and-physically-disabled.

2 Andy Aydın-Aitchison, "Criminological theory and International Crimes: examining the potential" in *Criminological Approaches to International Criminal Law*, eds. Ilias Bantekas, I. and Emmanouela Mylonaki (UK, Cambridge university Press, 2014), 22.

3 Susanne Karlstedt, Hollie Nyseth Brehm and Laura C. Frizzell, "Genocide, Mass Atrocity, and Theories of Crime: Unlocking Criminology's Potential", *Annual Review of Criminology* (2021), 4,

mentality and conduct during the First World War.[4] Durkheim's studies on group experiences and state crime continues to be relevant to atrocity crimes today.[5] Other criminological scholars such as Sheldon Glueck, and Hermann Mannheim have looked at international crimes and war crimes.[6] With the development of international law and institutions, there has been a growing interest in the criminological field to study atrocity crimes. Criminology is primarily concerned with understanding the past to shape the future by advancing our understanding of the causes and costs of crime in society. Since the Holocaust we have continued to witness a relentless stream of atrocities, reminding us of the importance of continuing to enhance our knowledge about atrocity crime and its perpetrators, in order to prevent situations of atrocity from being repeated in the future.

The scholarship on how criminology and genocide studies can enrich each other[7] provides important literature for this article. This enrichment partly lies in the combination of perpetrator studies and Holocaust scholarship, offering an insightful and multi-dimensional toolbox that can be used to explain why seemingly 'ordinary' individuals become perpetrators of genocide and atrocity crimes.[8] Criminological research has tended to focus on the micro- (individual) and macro- (state) level to explain criminal behaviour. However scholars such as Annika van Baar and Win Huisman[9] addressed the ignored category of perpetrators at the meso-level. The meso-level is in the

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76; Aydın-Aitchison, "Criminological theory and International Crimes: examining the potential" (2014).

4 Aitchison, "Criminological theory and International Crimes: examining the potential", 2014, 6.

5 Vittorio Cotesta, "Classical Sociology and the First World War: Weber, Durkheim, Simmel and Scheler in the Trenches", *History* 102, no. 351 (London, 2017).

6 Aitchison, "Criminological theory and International Crimes: examining the potential", 2014, 7.

7 William R. Pruitt, "How Criminology can engage in Theorizing on Genocide", *International Journal of Criminal Justice Science* 9, no. 1 (2014); Joachim Savelsberg,"Can Genocide Studies and Criminology Enrich Each Other?" in *Crime and Human Rights: Criminology of Genocide and Atrocities,* London: SAGE Publications Ltd. (2010); Annika Van Baar and Win Huisman, "The oven builders of the Holocaust: a case study of corporate complicity in international crimes", *The British Journal of Criminology* 52, no. 6 (2012); Alette Smeulers, "Female Perpetrators: Ordinary or Extra-ordinary Women?", *International Criminal Law Review* 52, no. 2 *(*2015); Kjell Anderson, "Who Was I to Stop the Killing?: Moral Neutralization Among Perpetrators of Genocide", *Journal of Perpetrator Research* 1, no. 1 (2017).

8 Alexander Alvarez, "Adjusting to Genocide: The Techniques of Neutralization and the Holocaust", *Social Science History* 21, no. 2 (1997); Gresham M. Sykes and David Matza, "Techniques of Neutralization: A Theory of Delinquency", *American Sociological Review* 22, no. 6 (1957); Hannah Arendt, "Eichmann in Jerusalem: A Report on the Banality of Evil", by Hannah Arendt, *The Political Quarterly* 35, no. 1 (1964).

9 Van Baar and Huisman, 2012 analysed the German corporation Topf & Söhne who built cremation ovens for concentration camps and extermination camps in Nazi Germany.

space between the national or international level and the individual level.[10] This article seeks to contribute to new criminological studies from the meso-level of analysis, by trying to make better sense of why a group of nurses at Obrawalde-hospital killed their patients during the second euthanasia phase. Doing so will result in added knowledge about an inter-mediate group of nurses from the Meseritz-Obrawalde hospital that are under studied in the Holocaust literature and ignored by criminology studies.

The article argues that a seemingly 'ordinary' group of nurses turned into perpetrators of atrocity crime due to the extraordinary circumstances at Obrawalde hospital during the second euthanasia phase, where nurses justified the killing of patients "unworthy of living" as part of a twisted form of care. The first part is dedicated to methodology, data, and conceptual tools. The second part will highlight the extraordinary conditions which changed nursing ethics before and during the Nazi regime. The article's contributions are found in the third and fourth part. The third part examines trial statements from the Meseritz-Obrawalde nurses to explore what factors may have influenced them to become perpetrators. The fourth part applies the techniques of neutralisation theory to de-mystify the 'patterns of thought' of the nurses on trial and discuss the specific explanatory styles used to defend themselves. Finally, this article will conclude that by having applied a criminological lens to study this group of nurses in the Holocaust literature, it has led to an increased familiarisation of an understudied group of perpetrators of atrocity crime.

Methodology, Data and Conceptual Tools

This article has been driven by a criminological theorisation of secondary qualitative data, with a particular focus on the meso-level. The secondary qualitative data was collected primarily from health care professionals' work,[11] particularly Susan Benedict who has co-written extensively about the Obrawalde nurses during the second euthanasia phase, in English.[12] Benedict is a healthcare professional who has written

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10 Evgeny Finkel and Scott Straus, 2012, 58.

11 The nurses' political and ethical role during the Third Reich were first addressed in the pioneering work *Krankenpflege im Nationalsocialismus* by Dr Hilde Steppe in 1989.

12 Primarily the nurses' trial testimonies accessed by Susan Benedict. The secondary qualitative data includes Susan Benedict and Jochen Kuhla, "Nurses` Participation in the Euthanasia Programs of Nazi Germany", *Western Journal of Nursing Research* 21, no. 2 (1999); Susan Benedict, "Killing While Caring: The Nurses of Hadamar*", Issues in Mental Health Nursing* 24, no.1 (2003*)*; Susan Benedict, Arthur L. Caplan and Traute Lafrenz Page, "'Duty and

about nurses in Nazi Germany with the intention of educating the nursing profession about this dark past of nursing history and its relevance today.[13] While the trial files were placed and sealed in Staatsarchiv München for 80 years after the birth of the youngest defendant,[14] Benedict gained early access to these files. The Holocaust literature written by historians was applied to provide a broader understanding of the context in which the nurses were placed.[15] To protect the nurses' identity, the available literature examining the Obrawalde nurses' trial testimonies uses pseudonyms and replaces several features and personal identifiers to preserve anonymity. This article aimed to make greater sense of the information available, by performing cross-examinations of the data in two phases. The first phase sought to establish a coherent set of information by comparing each anonymised nurse and their testimonies in all of Benedict's relevant co-authored publications.[16] The second phase entailed cross-examining established information from Benedict's work with the existing literature mainly by historians.[17]

Theory was applied to an under-theorised area of study to make better sense of the nurses' participation. The conceptual tools applied were situational and ideological factors, and techniques of neutralisation theory. Starting with the former, it has become generally accepted by scholars that perpetrators of atrocity crimes are ordinary

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'euthanasia': The nurses of Meseritz-Obrawalde", *Nursing Ethics* 14, no. 6 (2007); Susan Benedict and Tessa Chelouche, "Meseritz-Obrawalde: a 'wild euthanasia' hospital of Nazi Germany", *History of Psychiatry* 19, no. 1 (2008); Susan Benedict and Jane M. Georges Benedict, "Nurses in the Nazi 'euthanasia program': a critical feminist analysis", *Advances in Nursing Science* 32, no. 1 (2009); Susan Benedict and Linda Shields, "Meseritz-Obrawalde: a site for "Wild Euthanasia" in *Nurses and Midwives in Nazi Germany: The Euthanasia Programs* (New York: Routledge, 2014).

13 Benedict and Georges, 2009, 71.

14 Benedict and Georges, 2009.

15 Michael S. Bryant, *Confronting the Good Death: Nazi Euthanasia on Trial, 1945-1953* (Boulder CO: University Press of Colorado, 2005); Henry Friedlander, *The origins of Nazi genocide: from euthanasia to the Final Solution* (Chapel Hill, NC: University of North Carolina Press, 1995); Dick De Mildt, *In the Name of the People: perpetrators of genocide in the reflections of their post-war prosecution in West Germany. The euthanasia and Aktion Reinhar Trial cases* (The Hague/London/Boston: Martinus Nijhoff Publishers, 1996); Brian Shane Stufflet, "No 'Stunde Null': German Attitudes toward the Mentally Handicapped and their Impact on the Postwar Trials of T4 Perpetrators" (PhD thesis, University of Florida, 2005).

16 Benedict and Kuhla, 1999; Benedict, 2003; Benedict and Chelouche, 2008; Benedict and Georges, 2009; Benedict and Shields, 2014.

17 McFarland-Icke, 1997; Friedlander, 1995; De Mildt, 1996; Sylvia Anne Hoskins, "Nurses and National Socialism a Moral Dilemma: one historical example of a route to euthanasia", *Nursing Ethics* 12, no.1 (2005); Roderick Stackelberg and Sally A. Winkle, "The Holocaust" in *The Nazi Germany Sourcebook: An Anthology of Texts* (London: Routledge, 2002).

individuals within extraordinary circumstances. However, one ongoing debate in the field of criminology is to what extent situational and ideological factors can explain why people become perpetrators of atrocity crime, and which one is more important.[18] Christopher Browning[19] and Daniel Goldhagen[20] are often placed at the centre of this debate. Browning emphasised situational rather than ideological factors to explain why the Police Battalion 101 and other battalions shot and killed hundreds of civilian Jews during the Holocaust.[21] 85 to 90 percent of the Battalion obeyed the orders to kill,[22] raising the question of whether perpetrators require predispositions like a particular personality to become perpetrators. In response to Browning's thesis, Goldhagen[23] believed Browning to be naïve as the Battalion turned into killers not because of the situational factors, like group dynamics, but mainly due to an eliminationist anti-semitism ingrained in the German culture even before the Holocaust.[24] This brief description of the debate between the two scholars has evolved since the 1990s, but it is used here to highlight the point that it is not particularly useful to view situational and ideological factors within a false dichotomy. Instead, research would benefit from studying them as a combination, which this article attempts to do.

Another central debate in criminology is "why did they do it?". Gresham Sykes and David Matza's techniques of neutralisation theory was initially developed to understand juvenile delinquency, identifying five commonly employed techniques: denial of responsibility, denial of injury, denial of the victim, condemnation of the condemners, and appeal to higher loyalties. [25] But the theory's usage has since been extended to other groups and crimes.[26] An article by Bryant, Schimke, Brehm and Uggen states

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18 Alette Smeulers, "Historical Overview of Perpetrator Studies" in *Perpetrators of international crimes: theories, methods, and evidence*, eds. Alette Smeulers, Maartje Weerdesteijn and Barbora Holá (1st ed. Oxford: Oxford University Press, 2019).

19 Christopher R. Browning, *Ordinary Men: Reserve police Battalion 101 and the final solution in Poland*, ed. Christopher R. Browning (New York: Aaron Asher Books, 1992).

20 Daniel Jonah Gooldhagen, *Hitler's Willing Executioners: ordinary Germans and the Holocaust,* (Vintage, 1997).

21 Augustine Brannigan, "Criminology and the Holocaust: Xhenophobia, Evolution, and Genocide", *Crime and Delinquency* 44, no.2 (1998).

22 Michael Mann, "Were the Perpetrators of Genocide "Ordinary Men" or "Real Nazis"? Results from Fifteen Hundred Biographic", *Holocaust and Genocide Studies* 14, no. 3 (2000): 357.

23 Goldenhagen, 1997.

24 Brannigan, 1998, 262.

25 Gresham M. Sykes and David Matza, "Techniques of Neutralization: A Theory of Delinquency", *American Sociological Review* 22, no. 6 (1957).

26 Gerd Bohner et al., "Rape Myths as Neutralizing Cognitions: evidence for a causal impact of anti-victim attitudes on men's self-reported likelihood of raping", *European Journal of Social*

there are only three studies applying the "classic techniques" [27], that was coined by Sykes and Matza, to genocide. This article contributes by making use of the "classic techniques" as well as three other techniques developed in other studies on genocide. Because, in agreement with Bryant, Schimke, Brehm and Uggen [28] the "classic techniques" do not fully capture all aspects of defendants' accounts, especially in studying perpetrators of genocide. By adding these techniques: denial of humanity,[29] and victimisation technique as well as appeals to good character,[30] our knowledge about the nurses as a group of perpetrators have advanced.

Research applying neutralisation theory to atrocity crime faces similar problems. This theory has mainly been applied to conceptualise post hoc rationalisation used to avoid stigma and (self-)blame.[31] But in the case of atrocities, scholars have argued that techniques of neutralisation can also be utilised to neutralise internal constraints before the crime takes place, hence ex ante techniques.[32] However, the lack of empirical evidence poses a methodological problem due to difficulties in determining whether the techniques can be in play at the time of perpetration, as opposed to representing merely defensive strategies. With acknowledgement of this limitation and due to the lack of space, this article will focus on all the techniques as post hoc.

Background

The Eugenics Movement and Nazi Ideology

The systematic killing of disabled children and adults signified the first mass-murder of the Second World War, representing a phase which would improve and test killing methods for the Holocaust.[33] But despite its significance, it has gained relatively little

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Psychology 28 (1998): 257-268; Diana Scully and Joseph Marolla, "Convicted Rapists' Vocabulary of Motive: Excuses and Justifications", *Social Problems* 31, no. 5 (1984).

27 Emily Bryant et al., "Techniques of Neutralization and Identity Work Among Accused Genocide Perpetrators", *Social Problems* 65, no.4 (2018).

28 Bryant et al., 2018.

29 Alvarez, 1997.

30 Bryant et al., 2018.

31 Bryant et al., 2018.

32 Alvarez, 1997; Robert Agnew, "Building on the Foundation of General Strain Theory: Specifying the Types of Strain Most Likely to Lead to Crime and Delinquency", *The Journal of Research in Crime and Delinquency* 38, no. 4 (2001): 319–361; Bryant et al., 2018.

33 Friedlander, 1995, 22.

attention in scholarly research.[34] In 1939, on the day the war began, the National Socialist Government secretly implemented a policy of killing disabled children.[35] An adult programme was quickly formed to operate alongside the children's programme.[36] The "lives unworthy of living" was the ideology used to make mentally and physically disabled individuals a group of 'other' and originates from the eugenics movement.[37] In the 19th century, the science of eugenics became a widespread movement dominating the legal and medical discourse in Europe and North America.

Two important scholars of the science of eugenics were Karl Binding and Alfred Hoche who published a book called *Allowing the Destruction of Life Unworthy of Life: Its Measure and Form*.[38] This book and the very term euthanasia would become a great inspiration to Hitler, used to justify the euthanasia programme, because Binding and Hoche applied eugenic ideas to society by rationalising the killing of disabled in several ways. First, the disabled were identified as a burdensome group in society that further stood in the way of enhancing the human race and human progress.[39] This rationalisation was argued to be supported by 'science'. Binding and Hoche also applied biological determinism to state that disabled people were biologically less intelligent and even criminal.[40] In addition, economic factors also played a role to label disabled people "unworthy of living" because they were argued to not provide financial benefits to society, rather the opposite.[41] The latter factor was significant for Hitler since Germany was under poor economic conditions after the First World War.[42] Thus, preservation of food and hospital facilities was key.[43] When Hitler came to power, the Nazi ideology took advantage of the older eugenic ideas and principles, applying them to their new racial and eugenic policy.[44] As a result, the Nazi regime had created an 'other' in society.

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34 Friedlander, 1995.
35 Benedict, Caplan and Page, 2007, 782.
36 Benedict, Caplan and Page, 2007, 782.
37 Friedlander, 1995.
38 The book is cited in Mark P. Mostert, "Useless Eaters", *The Journal of Special Education* 36, no. 3 (2002).
39 Benedict and Kuhla, 1999.
40 Friedlander, 1995.
41 Benedict, 2003.
42 Bryant, 2015.
43 Bryant, 2015.
44 Friedlander, 1995, 20.

During the first phase of euthanasia the killing centres, also called the T4 euthanasia centres, killed an estimated 5,000–10,000 children.[45] Hitler put in place a eugenics and racial policy to justify the euthanasia programme, yet he aimed to keep it a secret,[46] which indicates a moral struggle to justify the killings. Friedlander reflected on this secrecy through the means of discourse, exemplified with the term "mercy killing" that was used by the Nazi state and euthanasia professionals to camouflage the killing.[47] In fact, the very definition of euthanasia changed in the 1890s due to the eugenics movement.[48] As a result, the decision of euthanasia was no longer given to the concerned patient but to the family, professionals, and the state who were handed the power and control to dictate disabled individual's right to life.[49] Despite the attempt to keep the killing centres a secret from the public, an increase of people and leaders of the Catholic and Protestant church started to suspect what took place at these seemingly ordinary hospitals and condemned it.[50]

The increased awareness about what took place in these seemingly ordinary hospitals resulted in Hitler's decision to shut down the six euthanasia hospitals (Grafeneck, Brandenburg, Hartheim, Sonnestein, Bernburg and Hademar) in 1941.[51] But it was only for show, as the euthanasia programme simply took a new form. The second euthanasia phase started in 1942, characterised by decentralised killing independently carried out by a few designated hospitals (Meseritz-Obrawalde, Hadamar, and Tiegenhof) and their staff.[52] Scholars like Benedict and Kuhla point out that this period is often labelled the "wild" phase, a term that was also used by the perpetrators. [53] In order to avoid reproducing the perpetrator's language, this article terms the period of inquiry the second euthanasia phase.

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45 Benedict and Kuhla, 1999.
46 "Program to Murder People With Disabilities", United States Holocaust Memorial Museum, Washington, DC, 2020. Accessed 9 April 2023, https://encyclopedia.ushmm.org/content/en/article/the-murder-of-people-with-disabilities.
47 Friedlander, 1995.
48 Mostert, 2020.
49 Mostert, 2020.
50 Mostert, 2020.
51 Mostert, 2020.
52 Friedlander, 1995.
53 Benedict and Kuhla, 1999, 251.

The killing techniques in the second euthanasia phase involved a more hands-on process, representing the period where nurses turned into active killers.[54] The collaboration and dependency between the medical profession and the Nazi state was strong. Sociologist Everett Hughes states that during state-organised crime, ordinary people can more easily become perpetrators.[55] This is because the criminal behaviour of deviance is learnt under specific conditions.[56] This idea of learned deviance resonates with the Obrawalde nurses, because the Nazi state gave the 'dirty work' of killing disabled people to the nurses and medical professionals.[57] To understand this better, we need to examine what extraordinary conditions enabled health care professionals to kill. As emphasised by Mary-Dean Lagerway, the Nazi ideology demanded radical shifts in the nursing profession and nursing ethics to make it the largest group of healthcare providers during the Third Reich. [58] When Hitler came to power, the nursing profession became government-controlled and therefore was given a new social recognition, professionalisation, and unification.[59] It was a radical shift considering that during the 19th century, the Catholic and Protestant churches predominantly controlled what was then an unpaid 'calling' under so-called Motherhouses.[60] The 'calling' was centred around humility, sacrifice, and obedience,[61] but most importantly selfless devotion towards patients.[62] The Nazi eugenic ideology managed to violate the most important nursing value by making disabled patient's autonomy secondary to the health of the Volk. It was under these extraordinary conditions that nursing became an expression of patriotism, taught to practise killing of "unfit" patients as a twisted form of nursing care.

Nurses on Trial: Accomplices or Perpetrators?

54 Benedict and Kuhla, 1999.
55 Everett C. Hughes, "Good People and Dirty Work", *Social Problems* 10, no. 1 (1962).
56 David S. Davis, "Good People Doing Dirty Work: a study of social isolation", *Society for the Study of Symbolic Interaction* 7, no. 2 (1984): 233-247.
57 Quote in Davis, 1984, 233.
58 Mary-Dean Lagerway, "Ethical Vulnerabilities in Nursing History: Conflicting loyalties and the patient as 'other'", *Nursing Ethics* 17, no. 5 (2010): 590–602.
59 Hilde Steppe, "Nursing in Nazi Germany", *Western Journal of Nursing Research* 14, no. 6 (1992): 744-753.
60 Benedict and Shields, "Meseritz-Obrawalde: a site for "Wild Euthanasia", 2014.
61 Steppe, 1992.
62 Benedict and Shields, "Meseritz-Obrawalde: a site for "Wild Euthanasia", 2014.

14 nurses from Obrawalde were sent to trial in Munich, Germany in 1965. There were initially 15 nurses, but one nurse took her own life before the trial took place.[63] The nurses were accused of killing and/or being compliant with killing during the period between 1942 and 1945.[64] Obrawalde was a psychiatric hospital considered to be one of the most notorious killing centres during the second euthanasia phase.[65] Despite the uncertainty surrounding the number of victims at this hospital, it is said to have included at least 10,000 victims, some of whom were disabled German soldiers.[66] Survivors of this killing centre stated that between 30 and 50 people were killed daily.[67] At the time, the hospital was located near the town of Pomerania in Meseritz, what is now modern-day Poland.[68]

One Obrawalde nurse, Helene Wieczorek, was prosecuted alongside her co-defendant Dr Wernicke in 1946 in the West German Trial. Nurse Wieczorek was one of the few from the euthanasia personnel prosecuted, let alone executed, after the war.[69] This tells us the importance of timing, because in stark contrast to Wieczorek, the prosecuted nurses in the 1965 trial were acquitted. The acquittal in 1965 demonstrated a lack of judicial will to prosecute Nazi perpetrators. The Court portrayed the nurses as accomplices instead of perpetrators reasoned within the new version of the German Code 211, created in 1941 to include the rather subjective requirement of assessing the defendant's entire personality.[70] In this way, the Court considered the nurses not to be ideologically driven with a clear criminal intent but rather driven by "characteristic flaws".[71] The "characteristic flaws" of these "intellectually exceptionally clumsy" nurses were rooted in what the Court believed to be a lack of education and a taught obedience to follow orders.[72] The next part of this article aims to critically examine the most important ideological and situational factors that influenced the nurses to kill.[73]

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63 Benedict, Caplan and Page, 2007, 785.
64 Benedict, Caplan and Page, 2007.
65 "Nazi Persecution of The Mentally & Physically Disabled". Jewishvirtuallibrary.org (1998). Accessed 16 December 2020.
66 Sylvia Anne Hoskins, "Nurses and National Socialism a Moral Dilemma: one historical example of a route to euthanasia", *Nursing Ethics* 12, no. 1 (2005).
67 Benedict, Caplan and Page, 2007, 784.
68 Jewish virtual library, 1998.
69 Friedlander, 1995.
70 Bryant, 2005.
71 De Mildt, 1996, 320.
72 De Mildt, 1996, 320.
73 This part is especially acknowledging the health care professionals' literature, particularly Professor Susan Benedict's work on the Obrawalde nurses.

Political Commitment, Eugenic Ideology and Religion

Martha W. (accused of participating in killing 150 patients): [74]

> "When I'm reproached for the fact that I was brought up as a Catholic and the commandments also represent my convictions, this is correct. Until today, it is my conviction that people are not allowed to interfere. Nevertheless, I participated in the killings, and I recognize that I acted against the commandments and my conviction and have burdened my conscience seriously. The only explanation I can give is that I didn't have enough time to think about it at that time because the nurses were put under a lot of stress.".

Out of the nurses examined, Berta S. and Anna G. were the only members of the Nazi party, however they were allegedly never politically active.[75] The lack of direct political commitment may be explained by the fact that most of the Obrawalde nurses received their education in the late 1920s and early 1930s.[76] Therefore, some nurses must have begun their careers before the Nazi requirement of political commitment while others may have already been working at Obrawalde and re-hired when the hospital become a euthanasia centre. In fact, a mere seven to nine percent of German nurses were Nazi members in 1939 which poses as an interesting comparison to the 45 per cent of physicians.[77] These numbers support Mann's argument that the higher the rank, the more likely they were 'real' Nazi killers.[78] While the nurses might not have been what Mann called "real" Nazi killers, they were ideologically driven, however mostly by other factors.

It appears that the eugenic ideology was a more significant factor than direct political commitment, reflected in the way the nursing profession was used as a political tool of

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74 Quote taken from Ebbinghaus, 1987, 240 in Benedict and Kuhla, 1999, 256.
75 De Mildt, 1996.
76 De Mildt, 1996.
77 Darcy Copeland, "Psychiatric Nurses' Role in the Holocaust and Current Implications", *Journal of Psychiatric and Mental Health Nursing* 28, no. 3 (2021): 488–493.
78 Michael Mann, "Were the Perpetrators of Genocide "Ordinary Men" or '"Real Nazis"? Results from Fifteen Hundred Biographic", *Holocaust and Genocide Studies* 14, no. 3 (2000).

National Socialism's health care policy.[79] Even though the eugenic ideas were deeply internalised within the nursing profession through education and practice, it was also greatly challenged by the nurses' religious beliefs as stated by Martha W. Interestingly, Hitler allowed the nursing profession to keep its religious traditions. By observation, traditional Protestant and Catholic nursing organisations accounted for 67.28 per cent of the total 143,343 nurses registered in 1933, while the National Socialist (NS) organisation accounted for only 7.59 percent.[80] However, Hitler failed to align the two contradictory ideas of the eugenic principle of "life unworthy of life" and the religious belief of 'thou shalt not kill' because, while some nurses managed to believe in the moral importance of relieving patients' suffering, other nurses found this contradiction to be a source of great internal conflict which will be further exemplified.

Obedience, Duty, Gender and Law

Luise Erdmann (accused of participating in 210 killings): [81]

> "I was used to obey strictly the orders of the physicians. I was brought up and instructed to do so. As a nurse or orderly, you don't have the level of education of a physician, and thus, one can't evaluate if the order of the physician is right. The permanent process of obeying the order of a physician becomes second nature to the extent that one's own thinking is switched off".

Luise Erdmann was the main defendant in the 1965 trial, reasoning that she killed because she was taught absolute obedience. The Obrawalde nurses mainly came from middle-class families with a general education not surpassing elementary school.[82] At the time, nursing education was one year of domestic service before working 18 months on-the-job training at a hospital.[83] Additionally, an obligatory 100 hours of theory on eugenics and nursing care was given by physicians.[84] The core

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79 Steppe, 1992.

80 See Figure 1 in appendix for table, Granted re-usage by Nomos Publisher of this figure in: Alison J. O'Donnell, Susan Benedict, Jochen Kuhla and Linda Shields, "Nursing during National Socialism: Complicity in terror, and heroism" in Torture: *Moral absolutes and ambiguities* (eds.) Bev Clucas, Gerry Johnstone and Tony Ward (Germany: Nomos, 2019):159.

81 Quote from Ebbinghaus, 1987, 232 in Benedict and Kuhla, 1999, 255.

82 Benedict, Caplan and Page, 2007.

83 Benedict, Caplan and Page, 2007.

84 Lagerway, 2010.

Christian values of obedience, humility, sacrifice, selflessness and group conformity complimented the eugenic practice at Obrawalde, because orders from physicians and head nurses were taught to be prioritised above independent thinking and responsibility to patients' autonomy.[85] These founding pillars for German nursing also aligned with women's existing role in society.[86] Because since the 19th century, the nursing profession was deemed ideal for women,[87] which may help to contextualise why Erdmann stated she was "brought up" to obey.

The culture of unquestioned loyalty and obedience to the hierarchy at Obrawalde was so extreme that some nurses believed in a (false) law taking form as a written authorisation by Hitler from 1939. It allegedly gave them legalised order to kill. Physicians and head nurses spoke of this false law to lower-ranking nurses presumably with the intent of convincing them that killing still made them law-abiding citizens. However, as stated by Rebekah McFarkland-Icke, a new killing law was not that consequential so long as someone else could take accountability,[88] demonstrated when Martha Elisabeth G. felt "relieved" that Dr. Wernicke agreed to take full responsibility for the killings. Erdmann's statement reflects that the nurses were products of a professional and societal culture of obedience.[89] But as the next two categories of factors show, the nurses also had a level of agency to decide whether to participate or not.

Fear of Punishment

Helene Wieczorek (accused of killing several hundred patients): [90]

> "I only did my duty, and I did everything on order of my superiors. The Director Grabowski always warned us of the Gestapo. He said he would inform the Gestapo if we didn't do what he ordered".

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85 Steppe, 1992.
86 Steppe, 1992.
87 Lagerway, 2010.
88 Elisabeth Bronwyn McFarland-Icke, "Moral consciousness and the politics of exclusion: Nursing in German psychiatry, 1918-1945" (PhD Thesis, The University of Chicago, 1997)*"*.
89 Michael Burleigh "Psychiatry, German society and the 'euthanasia' programme" in *Ethics and Extermination: Reflections on Nazi Genocide* (Cambridge: Cambridge University Press, 1997a) 113-129.
90 Quote from Ebbinghaus, 1987, 219 in Benedict and Kuhla, 1999, 255.

The fear of punishment and unquestioned obedience to authority represents the most frequently used explanations by the nurses. Fear was primarily driven by Walter Grabowski who became Director in the Autumn of 1941, at which point the whole atmosphere at Obrawalde allegedly changed.[91] The staff were required to work 14-hour shifts,[92] and the lack of socialisation and a sense of comradeship left them with a feeling of isolation, fear, and uncertainty. Grabowski was a dedicated Nazi member known for his unpleasant nature and violent reputation, even scaring the physicians and head nurses like Wieczorek.[93] However, Grabowski did not actually punish non-complicit nurses. This is illustrated when Elly Buchsenschuss refused to kill patients, both due to her lung illness, as well as her general moral standing. Despite threats from Dr. Wernicke and head nurse Amanda Ratajzcak, Elly Buchsenschuss refused to kill and was not punished for her decision, other than being degraded from her position as a head nurse.[94] The incident demonstrates the point also made by McFarland-Icke, that the few who refused to actively kill were merely handled by Grabowski as administrative matters.[95] In fact, after 76 years of post-war proceedings, no evidence indicates that any euthanasia staff were ever incarcerated, shot, or penalised for not following orders to kill.[96] However, the fear expressed by these nurses indicates a highly coercive environment at Obrawalde hospital, where fear may have been sufficient enough to secure several nurses' voluntary participation in killing patients.

Economic Factors, Opportunity/Careerism

Margarete Maria M (accused of killing three patients): [97]

> "I might have lost my job if I did not follow her orders. At that time, I had to take care of my grandparents because of my mother had died in 1942 so I was the only one to take care of them. After my son was born, I tried several times to

91 McFarland-Icke, 1997.
92 McFarland-Icke, 1997.
93 McFarland-Icke, 1997.
94 McFarland-Icke, 1997.
95 McFarland-Icke, 1997.
96 O'Donnell et al., 2009.
97 Quote in Benedict and Shields, "Meseritz-Obrawalde: a site for "Wild Euthanasia" 2014, 143.

change my job and leave Obrawalde but they offered me half-time work and I would have otherwise lost my benefits as a civil servant".

Margarete Maria M. demonstrated more banal factors that influenced many nurses to participate in the killing of patients. These banal reasons need to be considered within the socio-economic situation nurses faced during the Second World War when the economy was declining, unemployment was high,[98] and nursing represented one of relatively few easily accessible jobs for women.[99] Martha Moll and Anna G. were both the sole financial providers for their poor families and depended on keeping their job. It has been documented that euthanasia staff had the opportunity to gain financial bonuses if they accepted or participated in the task of killing.[100] For instance, at the paediatric unit of Haar, nurses could earn an additional 25 Reichsmark per month (about 80 U.S. dollars).[101] Valuable possessions, such as gold teeth, were also taken by staff from the patients, and capitalised for personal profit.[102] Thus, it seems as though banal reasons were more significant to explain the nurses' participation than what many of the nurses indicated in their testimonies.

To summarise, situational and ideological factors were examined, from a multi-level approach (macro-, meso-, and micro), to analyse what influenced the nurses' participation. It demonstrated that nurses adapted to the extraordinary situation of having to kill through an ideological lens. However, ideology in this case was not limited to indicators of political party membership and belief in eugenics, but it also intersected with self-interest and the culture of obedience, duty and fear at Obrawalde hospital. In this way, the nurses willingly and with intent, killed patients under their professional care. Thus, in disagreement with the 1965 West German Court's verdict and justification, the Obrawalde nurses should have been understood as seemingly 'ordinary' nurses who turned into perpetrators of crimes against humanity and should have been prosecuted accordingly.

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98 O'Donnell et al., 2009.

99 Amy Liane Zroka, "Serving the Volksgemeinschaft: German Red Cross Nurses in the Second World War." (PhD thesis, University of California, 2015).

100 Burleigh, 1994, 102 cited in Benedict and Kuhla, 1999, 250.

101 Burleigh, 1994, 102 cited in Benedict and Kuhla, 1999, 250.

102 De Mildt, 1996, 179; Henry Friedlander, "The Exclusion and Murder of the Disabled" in *Social Outsiders in Nazi Germany* (eds.) Robert Gellately and Natham Stoltzfus (Princeton: Princeton University Press, 2001).

Techniques Of Neutralisation: Killing as Part of a Twisted Form of Care[103]

Based on the belief that criminology and the Holocaust literature can and should enrich each other, the following part applies an extended version of the "classic techniques" of neutralisation to the study on the Obrawalde nurses as a group of perpetrators. The techniques of neutralisation are manifestations of the ideological and situational factors already discussed. Alvarez explains that the techniques allow us to examine the process where "the opposing forces (beliefs versus behaviour) are reconciled".[104] Thus, the focus of this part is not solely on the perpetrators but also on the process of perpetration. By examining what mechanisms were used to overcome pre-existing values and internal struggles, and which ones were more frequent, it will enable us to better understand how and why so many nurses expressed a lack of guilt for their actions.

Findings

Denial of responsibility represents the second most frequently used technique by the nurses.[105] Denial of responsibility is a broad and often overlapping technique used to refuse or minimise accountability or blame for one's actions by justifying the actions were beyond their control.[106] Kaptein and Van Helvoort refer to the technique as "blaming the circumstances".[107] Six nurses were able to undermine their internal conflicts by blaming the external circumstances of a culture of obedience to authority. Nurses as a group of professionals were at the lower end of the hierarchy at Obrawalde and were thus given what sociologist Everett Hughes termed the 'dirty work',[108] which in this case included killing. The killings were done in groups of two or more, signifying the importance of group dynamics to remove individual responsibility.[109] The strict

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103 See Figure 2 in Appendix for summary of the specific technique of neutralisation, occurrence, and example quotation.

104 Alexander Alvarez, "Adjusting to Genocide: The Techniques of Neutralization and the Holocaust". *Social Science History* 21, no. 2 (1997).

105 See appendix, figure 2 for complete overview.

106 Alvarez,1997.

107 Muel Kaptein and Martien van Helvoort "A Model of Neutralization Techniques", *Deviant Behavior* 40, no. 10 (2019).

108 Everett C. Hughes, "Good People and Dirty Work", *Social Problems* 10, no. 1 (1962).

109 Alvarez, 1997.

hierarchy enabled the nurses to willingly accept the 'dirty work' by conforming to group mentality and pressure from supervisors. The word 'willingly' is used here to emphasise the point already made that conformity was not only driven by struggles but also by opportunity and reward. Anna G. revealed that the nurses were carefully selected for the 'dirty work', explaining that young nurses were rarely chosen as they "couldn't be able to keep their mouths shut".[110] In this situation, a selected group of nurses were taught genocidal behaviour through strict group conformity and routinisation,[111] making it easier for the nurses to separate their deviant behaviour from their individual self-respect. This technique demonstrates a broader point that genocidal behaviour is far easier to accept when no one feels responsible.

The lack of personal responsibility due to external circumstances resonates with a less frequent, yet important technique: appeal to higher loyalties. It is founded on a feeling of sacrifice between choosing one's own beliefs or favouring the larger society.[112] The nurses' loyalty varied between the Führer's orders, their job as nurses, belief in a law, and family commitment. The norm of patriotism as a form of appeal to higher loyalties technique was frequently used to justify killing as a patriotic sacrifice, reflecting language and motives similar to the state-led propaganda. The quotation example for the denial of responsibility technique,[113] supports this claim as the nurse makes a rather heroic comparison between "soldiers at war" and nurses as "soldiers of biology", both doing the necessary means to a greater end. While some believed they 'sacrificed' themselves in the name of patriotism, five nurses expressed a feeling of a total sacrifice or loss by applying the victimisation technique. Nurse Martha Elisabeth G. stated that she was the victim being a "slave" at the "mercy" of the wider circumstances, thus expressed no guilt towards her victims.

The lack of guilt is also an important component in the denial of injury technique which reasons that one's actions neither intended to nor directly harmed anyone.[114] McFarkland-Icke raised the point that some of the nurses might have been ignorant

110 Benedict and Kuhla, 1999, 253.
111 Alvarez, 1997.
112 Bryant et al., 2018. This further explains that this technique is applied to break the link between the act itself and its consequences.
113 See appendix, figure 2.
114 Bryant et al., 2018.

about the killing in the beginning, but with time, likely became suspicious;[115] plausibly due to the high mortality rate or the overdosages of morphine injected into the patients. If not witnessed first-hand, the rumours about the killings which circulated in the Meseritz community by staff members and even patients undoubtedly challenged their ignorance. One explanation is that the moral suppression of guilt was encouraged by superiors, as was seen through the promise of taking full responsibility for the killings. Thus demonstrating that the denial of injury technique is often facilitated by an entire institutional practice and culture.[116] Moreover, it did not help that the church, as an institution of power, followed by many religious Obrawalde nurses, did not vocalise a collective resistance or manage to stop the killings.[117] Some literature depicts the role of the church as having had a vital role in ending the first phase of euthanasia, whilst other scholars have pointed out that, although the churches in general responded with concern about the euthanasia practice, their actions were relatively ineffective for ending the first phase of euthanasia. The scholars further state that the churches' guidance and leadership in relation to eugenic ideas and practices were both unclear and varied.[118]

The denial of injury technique shares close links with the denial of humanity technique, demonstrated by Anna G.'s statement which reflects a twisted granting of humanity where death was considered the lesser evil as opposed to letting disabled people live an "unworthy life". The denial of humanity represents the most frequently used technique by the nurses. As stated by Alvarez, such techniques facilitate atrocities by depriving the victims of their identities and self-worth, thus overcoming socialisation which supports the belief in a shared humanity.[119] In agreement with Michael Mann,[120] dehumanisation is a complex phenomenon that should be critically applied to explain genocidal behaviour. By looking critically at this case, it seems like the patients were recognised as having a sense of 'self', indicated by the nurses' language of addressing

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115 McFarkland-Icke, 1997.

116 Kjell Anderson, "Who Was I to Stop the Killing?: Moral Neutralization Among Perpetrators of Genocide", *Journal of Perpetrator Research* 1, no.1 (2017): 39–63.

117 Hoskins, 2005.

118 Hoskins, 2005; Michael Burleigh, "The Churches, Eugenics and Nazi Euthanasia" in *Ethics and Extermination: Reflections on Nazi Genocide* (Cambridge: Cambridge University Press, 1997b): 130-141.

119 Alvarez, 1997.

120 Michael Mann, "Processes of murderous cleansing/genocide: comment on Hagan and Kaiser", *The British Journal of Sociology* 62, no. 1 (2011): 42-48.

them as “she/he” or “old woman”. Thus, displaying a gradation in the “denial of humanity” because, whilst disabled patients were treated as ‘other’, they still had a human element.

The denial of humanity was the most frequently used technique by the nurses. It is a technique largely influenced by state-led propaganda. At Obrawalde hospital, state propaganda played a fundamental role in the process of creating the genocidal language used to legitimise the perpetration. For instance, Friedlander looked at the way euthanasia was labelled “mercy deaths”, a euphemism hidden behind scientific and technical terms used to disguise the murders.[121] To this degree, medical killings were justified by the nurses as a form of “salvation” done to “release” the patients “unworthy of living”.[122] It can even be argued that Obrawalde hospital functioned on euphemism because, from the outside, it appeared to be a normal psychiatric hospital, but behind the façade, genocidal crime took place. Euphemism assisted the nurses to feel a lack of moral responsibility towards patients, enhanced by so-called “ceremonies of degradation”.[123] These could have been produced through the poor living conditions at Obrawalde and the appearance of the patients as for instance emaciated or naked.

The appeals to good character technique was used by four nurses, and is a technique broadly defined as deeds applied to prove the defendant’s incapability to kill.[124] However, in this specific case the definition is not fully accurate, because good deeds also involved killing as a form of “salvation” or “mercy”. Other expressions of good deeds include the belief in saving the lives of their favourite patients, in addition to caring for patients while they were still alive. To be able to fully comprehend the three justifications for good deeds it is helpful to link them to another technique called denial of victim. Whilst the denial of victim poses as a technique rarely found in the trial statements available, it is still an important facilitator of genocide. Disabled people alongside other groups of victims of the Third Reich were fundamentally scapegoats for the country’s loss of the First World War as well the country’s shame and economic collapse.[125] The Nazi state encouraged the German people to consider disabled

121 Friedlander, 1995.
122 Friedlander, 1995.
123 Alvarez, 1997.
124 Bryant et al., 2018.
125 Alvarez, 1997.

people as an economic cost that, if kept alive, would steal money that should be invested into feeding soldiers at war.[126] In this way, the denial of victim enabled an understanding of the disabled not as victims, but as victimising themselves, which assisted the nurses to justify the killings.

The two less frequently used techniques were condemning the condemners and the denial of victim. Both are essentially about shifting the blame to someone other than themselves, but the difference is that the former technique allows someone to shift blame onto their accusers,[127] while the latter technique is about asserting that the victim caused their own victimisation and therefore deserved whatever that happened to them.[128] The exact reason as to why some techniques were used more than others will remain a mystery, in the sense that we will never truly know what the nurses thought. This relates to the major weakness of the theory: that there is no empirical evidence to support that these techniques operated post hoc or ex ante. However, in this case, the techniques of neutralisation have helped to demystify the 'patterns of thought' of an understudied group of perpetrators, and specific explanatory styles the nurses used to defend themselves when accused of killing or participating in killing. One nurse committed suicide, possibly indicating that she did not manage to neutralise her internal conflicts. Even though the trial took place two decades after the war ended, the majority of the nurses expressed a lack of guilt and responsibility for their actions, which can be better understood by the two most frequently applied neutralisation techniques: the denial of humanity and denial of responsibility.

Conclusion

Applying criminology to the Holocaust literature has showcased that there is a mutual enrichment between them to advance past, present and future research. In this case, it has led to an increased familiarisation of the nurses as a group of perpetrators, based on two main findings. First, in disagreement with the 1965 Court's verdict and justification, it has been argued that the Obrawalde nurses turned into perpetrators of crimes against humanity by reading the situation of having to kill patients through an

126 Hoskins, 2005.
127 Bryant et al., 2018,
128 Alvarez, 1997, 162-163.

ideological lens. However, ideology is not limited to indications of political party membership or adherence to eugenics, but in this case it can be understood to intersect with self-interest, and the culture of obedience, duty and fear at Obrawalde hospital. Second, by applying an extension of the “classic techniques” to study genocide, this research found the nurses’ lack of guilt and responsibility for their actions to be mainly rooted in the two most frequently applied neutralisation techniques: the denial of humanity and denial of responsibility. While we will never truly know what these nurses thought before, during and after the 1965 trial, this article has attempted to make better sense of what has been understood as a group of seemingly ‘ordinary’ nurses who gained an extraordinary power to kill as part of a twisted form of care during the second euthanasia phase. More broadly, the mutual enrichment between criminology and the Holocaust literature is of contemporary and future importance as it can advance our understanding of atrocity crime and its perpetrators, with the aim of learning from the past and preventing such situations from being repeated in the future.

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Appendix:

Figure 1: Percentage of nurses in the different official organisations in 1939

Organization	**Membership**	**% of total nurses**
Reichsbund	21,459	14.96
NS nurses	10,880	7.59
Red Cross Nurses	14,595	10.17
Catholic Nurses (*Caritasverband*)	50,000	34.86
Protestant Nurses (*Diakoniegemeinschaft*)	46,500	32.42
Total	143,434	100%

Note: Granted re-usage by Nomos Publisher of this figure in: Alison J. O'Donnell, Susan Benedict, Jochen Kuhla and Linda Shields, "Nursing during National Socialism: Complicity in terror, and heroism" in Torture: *Moral absolutes and ambiguities* (eds.) Bev Clucas, Gerry Johnstone and Tony Ward (Germany: Nomos, 2019), P. 159.

Figure 2: Summarising the specific technique of neutralisation, occurrence, and example quotation

Technique	**Speakers (N)**	**Occurrence (N)**	**One Example Quotation**
Denial of Humanity	10	8	Quotation NAG: “Like I already told you, our procedure depended on the condition of the patients. Old women, for example, who had to be fed couldn’t drink on their own, so it wasn’t possible to give them the medicine by the spoonful. They were not to be tortured more than necessary, and I thought it would be better to give them an injection. In this connection, I would like to say that, like me, Luise Erdmann, Margarete Ratajczak, T. and Erna E. thought that the patients were not to be tortured more than necessary” (Quote in Benedict and Kuhla, 1999: 254).
Denial of Responsibility	6	7	Quotation NMRT: “It never occurred to me not to follow orders given to us. Just as the soldiers of the front had to do their duty, so did we. To absolutely follow orders given by an attending physician is one of the most important duties of a caregiver” (Quote in Benedict and Shields, 2014: 138).

The Victimisation Technique	5	6	Quotation NMEG: “At that time, nobody would have helped us at Obrawalde if we had refused to do the work, and there wasn’t anybody to pour out one’s heart to and who we could trust. As a sort of slaves, we were completely at the mercy of the rulers and their political line” (Quote in Benedict and Kuhla, 1999: 257).
Appeals to Good Character	3	5	Quotation NAG: “I did not experience it one single time that a patient took such a large quantity of dissolved medicine voluntarily. ... On giving the dissolved medicine, I proceeded with a lot of compassion. I told the patient that they would only have to take a cure. Of course I only could tell these fairy tales to those patients who were still in their right minds ... I took them in my arms lovingly and stroked them when I gave the medicine ...” (Quote in Benedict, Caplan and Page, 2007: 787).
Denial of Injury	4	5	Quotation NEB: “I saw no connection between transferring a patient to a different room and killing them. I myself had absolutely no motive and no intention to transport any of our patients from life into death. I do not remember having been asked by

			anyone to keep events in Obrawalde absolutely secret. But I do remember how physicians and others stressed not to talk much about working conditions" (Quote in Benedict and Shields, 2014: 142).
Appeal to Higher Loyalties	4	4	Quotation NBH2: "I think in Haus 8 the killing started during the summer or fall of 1943. At about this time, Dr Wernicke and Amanda Ratajczak made rounds at Haus 8 and I went with them. At this time, Dr Wernicke proceeded to tell us that there were orders from the Führer telling us that all hopelessly ill patients had to be eliminated. To follow up with these Fuhrer's orders, were to prepare the smaller room with only six beds for such purposes" (Quote in Benedict and Shields, 2014: 140).
Denial of Victim	1	1	NAG2: While working in Haus 3 at the potato cellar, one patient saw two other patients being brought to the small "special room" and said "Oh, my, you dear ones, what will happen to all of us?" Anna responded; "Don't worry, you are so hard-working that nothing will happen to you" (Quote in Benedict and Shields, 2014: 133).
Condemning the Condemners	1	1	Quotation NMMM2: "I took the profession of caregiving to help these poor people. There also was a

			talk about a law that gave orders to kill patients. If it was not right to do it, how come no public prosecution was intervening? How come public health (officials) did not react?" (Quote in Benedict and Shields, 2014: 143).

The US/India Civil Nuclear Agreement of 2008: A Two-Level Game?

Padmini Das*

Abstract

Nuclear power relationships between states have historically determined global power structures in a wider context. Following India's maiden nuclear test in 1974, the international community sidelined the country for a long time. However, within the next three decades, international opinions about the India significantly improved and paved the way for the country's first civilian nuclear deal. That said, the circumstances behind this deal and the United States of America (US)' objectives involved therein merit a review, considering changes in the US' domestic situation and changing political realities around the world. Did the US make an objective foreign policy decision by pivoting its nuclear policy towards India? Or was the US playing a strategic two-level game with both domestic interests as well as its international agenda at stake? This paper seeks to analyze the different layers of interests that were involved in the US' decision-making process resulting in the Agreement. It also aims to apply Robert Putnam's Two-Level Game Theory to understand these interests in a better way.

Introduction

On July 18, 2005, George W Bush, then President of the United States of America ("US"), and Manmohan Singh, then Prime Minister of India, issued a joint statement that laid the foundation for a framework agreement (the "Agreement") on civil nuclear cooperation between the two countries. Under the framework, India agreed to do the following: (a) separate its civil and military nuclear facilities, and (b) put all its civil nuclear facilities under the safeguards of the International Atomic Energy Agency ("IAEA"). Simultaneously, the U.S. agreed to work towards full civil nuclear cooperation with India through the initiation of commercial nuclear trade and collaboration on civil nuclear technology between the two countries.

It was a momentous development in US/India relations and defined a new chapter in international non-proliferation rules. However, for the Agreement to take effect, several changes were implemented in US domestic law, and exceptions were made in international rules to enable India's inclusion in the nuclear cooperation framework.

This case is a strong example in support of Robert Putnam's Two-Level Game Theory in international negotiations. In his seminal article, "Diplomacy and Domestic Politics: The Logic of Two-Level Games", published in 1988, he states that international negotiations proceed on two levels – domestic and international.[1] The negotiators are not only required to pursue gains and objectives in their foreign policies, but they are also compelled to respond to the needs of their domestic constituencies through the granting of concessions in order to builds coalitions.[2] Building coalitions may not be elemental to the maintenance of international peace, but it has been historically relied upon as a show of strength and lasting partnership between nations.

The nature of concessions given to India as part of this "sweetheart deal"[3] becomes relevant under the theory as we delve into the circumstances of the Agreement and the mindset of the key actors involved in the process. The concessions included: (a) an exemption from signing the Non-Proliferation Treaty ("NPT"), (b) a waiver from the Nuclear Suppliers Group ("NSG") to commence civilian nuclear trade, and (c) the ability to buy dual-use nuclear technology[4] from the U.S., including materials that facilitate uranium enrichment of materials and equipment.[5] The advantages to India from the above concessions are twofold. Inclusion in the NPT and NSG club of nations not only allows India access to superior nuclear trade and technological opportunities,

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1 Robert D Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games", *International Organization* 42, no. 3 (1988): 427–60.

2 Putnam, "Diplomacy and Domestic Politics".

3 See definition at Daniel Liberto, "Sweetheart Deal." Investopedia, 30 July 2021, https://www.investopedia.com/terms/s/sweetheartdeal.asp.

4 Jayshree Bajoria, and Esther Pan, "The U.S.-India Nuclear Deal", Council on Foreign Relations, 5 November 2010. https://www.cfr.org/backgrounder/U.S.-india-nuclear-deal.

5 Sharon Squassoni, "The U.S.'s Catastrophic Nuclear Deal with India: Power Failure", Carnegie Endowment for International Peace, 6 August 2007, https://carnegieendowment.org/2007/08/06/u.s.-s-catastrophic-nuclear-deal-with-india-power-failure-pub-19475.

but it also elevates its status to the global nuclear elite – a group of nations that identify as the custodians of international nuclear peace and security. These concessions signify the US' aim to balance both international relations and domestic interests by empowering India as a dependable nuclear ally.

In this paper, I attempt to explore the circumstances which resulted in this Agreement in greater detail. Although the political realities of the time had a big role to play in it, the US' overarching interest in ensuring that India was welcomed into the legitimate nuclear fold of the world was instrumental in the Agreement's success. This paper focuses only on the US side of decision-making. First, it assesses both the political and historical events that led to the Agreement. Secondly, the paper examines the macro-level interests of stakeholders and political actors in the US who steered the decision-making process. Thirdly, it applies Putnam's theoretical perspectives to the facts and illustrates how, and to what extent, the Two-Level Game Theory explains the US' motivation behind the Agreement. Finally, the paper outlines some of the limitations that may have existed in the theoretical application of the Two-Level Game Theory to this case. It is crucial to understand this part of the paper given that the application of the Two-Level Game Theory is not a universal one, and therefore, comes with limitations vis-à-vis other political agreements of similar nature that have concluded in the contemporary times. Ultimately, the paper concludes that it was a combination of the situational advantages and political leadership, influenced by two-level interests and opportunities, that led to the development of this deal.

Key Actors and Circumstances Leading to the Decision

To evaluate Putnam's Two-Level Game Theory and how it relates to the Agreement, it is beneficial to explore the domestic and international circumstances that led to the Agreement. The US Congress passed the Hyde Act in December 2006,[6] which set the stage for the government to negotiate a nuclear agreement with India. The Act

[6] "Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006," 109th Congress 2d Session, House of Representatives, Report 109-721, December 7, 2006. https://bis.doc.gov/index.php/documents/additional-protocol/198-report-109-721/file.

exempted India from the specific criteria[7] under Section 123 of the Atomic Energy Act[8] which qualifies foreign states to enter into nuclear agreements with the US. This is evidence of how US lawmakers amended their domestic law on foreign nuclear partnership to facilitate entering into an agreement with India.

President George W Bush remained central to the decision-making process. Former National Security Advisor Steve Hadley affirms the President's "affinity" with India by saying, "We share common values. We increasingly share common interests … back in '99, [The President] was saying one of his priorities was to develop and intensify and broaden the relationship with India. And he is trying to do that."[9]

After India joined the nuclear club in 1974, relations with the US remained weak and often combative. In the post-Cold War era, the US sought to reframe its nonproliferation and defense priorities.[10] The Bush administration's key appointees – Condoleezza Rice, Stephen Hadley, and Robert Blackwill – were supporters of de-prioritizing arms control regimes.[11] The US' unilateral pullout from the Anti-Ballistic Missile (ABM) Treaty in 2002 is an example of the United States' reluctance to commit to global arms and weapons control treaties.[12] Washington assessed the nonproliferation policies of other countries by whether they constituted a threat to US national security rather than strengthening the international regime. However, when India showed no signs of giving up its *de facto* nuclear status,[13] the

7 "Atomic Energy Act of 1954 [As Amended Through P.L. 117–81, Enacted December 27, 2021]," January 18, 2022. https://www.govinfo.gov/content/pkg/COMPS-1630/pdf/COMPS-1630.pdf.

8 *See full text* at OECD. "U.S. Atomic Energy Act, Section 123. Cooperation With Other Nations." Accessed July 6, 2023. https://www.oecd-nea.org/law/nlbfr/documents/087_090_USAtomicEnergyAct.pdf.

9 United States of America Department of State Archive, "Press Briefing by National Security Advisor Steve Hadley on the President's Trip to India and Pakistan," 24 February 2006, https://2001-2009.state.gov/p/sca/rls/rm/2006/62200.htm.

10 White House Archives, "Remarks by the President to Students and Faculty at National Defense University", 1 May 2001, https://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010501-10.html.

11 Weiss, Leonard. "US-India Nuclear Cooperation Better Late than Sooner." *Nonproliferation Review* 14, no. 3 (November 2007). https://doi.org/10.1080/10736700701611738, 11.

12 Wade Boese, "U.S. Withdraws from ABM Treaty; Global Response Muted | Arms Control Association", Arms Control Association, July 2002. https://www.armscontrol.org/act/2002-07/news/U.S.-withdraws-abm-treaty-global-response-muted.

13 Lalit Mansingh, "Indo-U.S. Strategic Partnership: Are We There Yet?" *Institute of Peace and Conflict Studies*, October 1, 2006. https://www.jstor.org/stable/resrep09109.

US policy shifted towards a tacit recognition. The American business community also grew increasingly wary of the effect that sanctions on India had on US markets.[14]

The Jaswant Singh-Strobe Talbott dialogue,[15] which began in 1998, further accelerated more meetings and policy dialogues on both sides. The shared experiences of terrorist attacks in 2001 – September 11 and the December attack on Indian Parliament – instilled a common interest in defense partnership between Washington and New Delhi. Secretary Donald Rumsfeld's visit to India in November 2001, less than a month after the U.S. began military operations in Afghanistan, showed that Washington's defense commitment to New Delhi had broader political and strategic intentions.

The decision-making process in this case moved towards a White House dominated approach that bypassed the interagency process.[16] Although every administration has its own way of doing things, the centrality of a White House-led policy vehicle as opposed to one led by the National Security Council shows a more pronounced role of the executive branch. It represents the administration's intention to depart from a rules-based strategic context. One advantage of this departure was that the negotiations advanced quickly. On the other hand, the price of adopting this strategy can be measured by the internal politicking and external diplomatic capital, which were warranted to make the Agreement palatable to both sides. A detour from the interagency process may also act against the spirit of deliberative democracy. However, a detour has its advantages when paired with a close-knit advisory circle, like in this instance. Such coordination was a direct manifestation of Putnam's Two-Level Game Theory.

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14 Patrick Mendis and Leah Green, *Dealing with Emerging Powers, Chapter 4. U.S.-India Civil Nuclear Cooperation Agreement* Edited by Richard Weitz. Vol. 1. Center for the Study of the Presidency, Project on National Security Reform, 2008. https://www.academia.edu/7426784/National_Security_Case_Study_on_U.S._India_Civil_Nuclear_Cooperation_Agreement.

15 Brahma Chellany, "Strobe Talbott Chronicles India-U.S. Relations after Pokhran in 'Engaging India...'" *India Today*, October 4, 2004. https://www.indiatoday.in/magazine/society-and-the-arts/books/story/20041004-engaging-india-diplomacy-democracy-and-the-bomb-by-strobe-talbott-789105-2004-10-03.

16 Mendis and Green, *Dealing with Emerging Powers, Chapter 4. U.S.-India Civil Nuclear Cooperation Agreement*, 37.

Evidence of Two-Level Games

Two-Level Game logic: [17]

> "The politics of many international negotiations can usefully be conceived as a two-level game. At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments. Neither of the two games can be ignored by central decision-makers, so long as their countries remain interdependent, yet sovereign."

In the domestic first-level game, the negotiators try to address the concerns of internal actors and build a workable agenda with them. In the international second-level game, the negotiators seek a deal that is among the possible "wins" of their state's designated "win-set".[18] The win-sets are the possible outcomes that are favorable to the state's interests.[19] They are pre-conceived targets in the deal designed by accommodating domestic interest groups who can later ratify the deal or offer some other form of government support. International agreements happen when an overlap occurs between the win-sets of the states involved in the negotiations.[20] The larger the win-set, the more likely they are to overlap and materialize the deal. The smaller the win-set, the greater the risk of negotiations breaking down.

The Bush administration realized that the way to forge an alliance with India was by removing restrictions on nuclear trade while asking India to comply with the minimal nonproliferation commitments.[21] This change in attitude towards New Delhi laid the

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17 Robert D Putnam, "Diplomacy and Domestic Politics", 434.

18 Eugénia da Conceição-Heldt, and Patrick A. Mello. *Two-Level Games in Foreign Policy Analysis*. *Oxford Research Encyclopedia of Politics*. (New York and Oxford: Oxford University Press, 2017).

19 Robert D Putnam, "Diplomacy and Domestic Politics", 427–60.

20 David Milne, "The 1968 Paris Peace Negotiations: A Two-Level Game?" *Review of International Studies* 37 (2011): 577–99. https://doi.org/10.1017/S0260210510000720.

21 Sharon Squassoni, "The U.S.-Indian Deal and Its Impact", Arms Control Association. Accessed December 11, 2022. https://www.armscontrol.org/act/2010-07/U.S.-indian-deal-its-impact.

foundation of trust towards India that shaped all future bilateral relations. The fundamental belief that India is a responsible nuclear power ensured that the political win-sets favoring the Agreement were quite broad, and hence, more likely to succeed.

Rise of Partnership with India as an Asian Counterweight to China

The US' primary international objective was maintaining nuclear deterrence.[22] Despite what critics said about the US setting a dangerous precedent in nonproliferation when it entered into the Agreement with India, the Department of State maintained the vitality of the Agreement and its role in transforming the partnership between "the world's oldest and the world's largest democracy".[23] The rise in trust and international commentary about the partnership with India enabled the US Congress and the President to waive s 123 requirements for New Delhi by citing that the waiver was not "seriously prejudicial to the achievement of [the] United States nonproliferation objectives [n]or [does it] otherwise jeopardize common defense and security".[24]

At the domestic level, President George W Bush based his transformative stance on US/India relations on the core strategic principle that a democratic India was the key to balance the rise of China's power.[25] Robert Blackwill, a key contributor to Bush's India policy, acknowledged that, "without the China factor, the [Bush] administration would not have negotiated the Agreement and the [US] Congress would not have approved it".[26] Relations with Beijing remained adversarial and complex. Washington also frowned upon Beijing's increased military spending, saying "it is not consistent" with the country's stated goal of a "peaceful rise".[27] China's rise in the world, especially following its entry in the World Trade Organization, and its perceived malaise on the US economy has been a burning issue in several Presidential election campaigns

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22 The White House, Washington. "National Security Strategy," October 2022. https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf.

23 United States of America Department of State Archive. "Our Opportunity with India, Secretary Condoleezza Rice (Op-Ed, The Washington Post)," March 13, 2006. https://2001-2009.state.gov/secretary/rm/2006/63008.htm.

24 "U.S. Atomic Energy Act, Section 123. Cooperation With Other Nations." Accessed December 11, 2022. https://www.oecd-nea.org/law/nlbfr/documents/087_090_USAtomicEnergyAct.pdf.

25 Robert D. Blackwill, "The Future of U.S.-India Relations", The RAND Blog, May 6, 2009, https://www.rand.org/blog/2009/05/the-future-of-U.S.-india-relations.html.

26 Saira Bano, "Pakistan: Lessons from the India-U.S. Nuclear Deal", The Diplomat, 22 June 2015. https://thediplomat.com/2015/06/pakistan-lessons-from-the-india-U.S.-nuclear-deal/.

27 Council on Foreign Relations, "Timeline: U.S.-China Relations (1949-2002)", 4 November 2022, https://www.cfr.org/timeline/U.S.-china-relations.

since the 2000s.[28] The impact of trade with China on the US economy affects the American public opinion, and consequently voting behavior, to a great extent.[29] In addition, China's rise as an economic powerhouse and its fast-forging alliance with Pakistan, another nuclear state that neighbors India, presented an opportune convergence of interests from both sides when it came to countering contemporary rivals. The Bush administration, unlike some of its predecessors, departed from the course of maintaining strong alliances with Pakistan, which had become a sore spot for India in the past. A renewed commitment to India, and its interests, by countervailing the positions of two of its biggest regional rivals – China and Pakistan – was a great recipe for peace in Asia. It also appealed to the American public which was growing increasingly wary of China's market emergence and Pakistan's upsetting involvement with the rise of Islamic extremism in the 21st century. During his campaign, President Bush referred to India as an "important but needlessly ignored country".[30] He also complimented the Indian-American community, who are an integral part of the US society and economy and are some of the most important donors to his presidential campaign.[31] Therefore, partnering with India to manage China is an idea that received bold traction domestically in the U.S.[32] In the scheme of two-level games, supporting India's rise in Asia as a counterweight to China is beneficial, seeing as the US public is more receptive to India due to its democratic identity and non-aggressive international relations.[33]

Trade Inclusion and Domestic Economic Opportunity

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28 Laura Ruth Silver "China in the Media: Effects on American Opinion." Publicly Accessible Penn Dissertations, 2016. https://repository.upenn.edu/cgi/viewcontent.cgi?article=3803&context=edissertations, 117.

29 David Autor, David Dorn, Gordon Hanson, and Kaveh Majlesi, "Importing Political Polarization? The Electoral Consequences of Rising Trade Exposure", *NBER Working Paper Series*. MA, Cambridge: National Bureau of Economic Research, September 2016. https://www.nber.org/system/files/working_papers/w22637/w22637.pdf. at 4, 6, and 11.

30 Jane Perlez, "U.S. Ready to End Sanctions on India to Build Alliance", *The New York Times*, 27 August 2001, https://www.nytimes.com/2001/08/27/world/U.S.-ready-to-end-sanctions-on-india-to-build-alliance.html.

31 Perlez, "U.S. Ready to End Sanctions on India to Build Alliance".

32 Chengxin Pan, "The 'China Threat' in American Self-Imagination: The Discursive Construction of Other as Power Politics", *Alternatives: Global, Local, Political* 29, no. 3 (2004): 311, 319. http://www.jstor.org/stable/40645119.

33 Timothy Rich, and Vasabjit Banerjee, "Which Side Would the U.S. Public Choose in an India-China Conflict?", The Interpreter, 30 July 2020, https://www.lowyinstitute.org/the-interpreter/which-side-would-U.S.-public-choose-india-china-conflict.

The second international-level interest of the US was with India's greater participation in the global economy. India's huge nuclear market was an incentive for global nuclear suppliers to lift sanctions against New Delhi that had been imposed due to prior bomb testing. These sanctions from the Clinton-era cut off a significant part of the US' economic and military assistance to India. It also harmed India's ability to source loans from international agencies. Owing to these sanctions, India witnessed massive economic crisis in the aftermath of the Pokhran tests in 1998.[34] The sanctions also affected India's defense and technological capabilities, as the country was perceived as a rogue nuclear state, thereby disincentivizing its nuclear trade or high technological partnership with others.[35] Several countries, including France, Germany, the United Kingdom ("UK"), and Italy were in favor of lifting sanctions on India.[36] As per the accounts of Strobe Talbott, France and Italy had started to "break ranks" with their allies by holding their own strategic dialogues with India.[37] The UK and Germany followed suit by pressing for the need to normalize relations with India.[38] Moreover, Russia violated the NSG guidelines at least twice by supplying reactors to India in 1998 and 2001 and threatened to quit membership in the group when it was flagged for the violations.[39] Soon after the NSG waiver was granted, many countries entered into their own nuclear agreements with India.[40] The willing overtures from other nations to ease, and arguably promote, relations with India testifies to the growing influence of India as an economic power both in the sub-continent and at the global level. Therefore, excluding it from the global nuclear paradigm (despite India being a nuclear power) was antithetical to the narrative of international peace and security, and required amendment. The Bush administration was aware of this and more than willing to act on it.

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34 Charan D. Wadhva, "Costs of Economic Sanctions: Aftermath of Pokhran II", *Economic and Political Weekly* 33, no. 26 (1998): 1605. http://www.jstor.org/stable/4406922.

35 Soumya Bhowmick, "From Pokhran-II to 'Make in India': India's Economic Dimensions and Defence Capabilities." *Observer Research Foundation*, May 12, 2023. https://www.orfonline.org/expert-speak/from-pokhran-ii-to-make-in-india/.

36 Strobe Talbott, *Engaging India: Diplomacy, Democracy, and the Bomb*. 2nd ed. Brookings Institution Press, 2006. https://www.jstor.org/stable/10.7864/j.ctt1287btq, 143.

37 Talbott, *Engaging India.*

38 Talbott, *Engaging India.*

39 Bano, "Pakistan: Lessons from the India-U.S. Nuclear Deal".

40 Pulkit Mohan, and Pallav Agarwal, "India's Civil Nuclear Agreements: A New Dimension in India's Global Diplomacy", Observer Research Foundation, October 4, 2019. https://www.orfonline.org/research/india-civil-nuclear-agreements-new-dimension-india-global-diplomacy/.

Meanwhile, US domestic interests favored trade with India not just in the civil nuclear sector, but also in others.[41] Political commentators in India, like Sanjaya Baru, often point out the underpinnings that led to the Agreement being called a "deal" owing to the transactional nature of its terms.[42] During a meeting with the former Indian Prime Minister Dr Manmohan Singh, a US representative is reported to have said "it's 123 for 126".[43] The reference was made to the [123] Agreement being signed in exchange for the 126 fighter jets that the US was planning to sell to India.[44] This suggests that the US government had to account for the pressure from the domestic military industrial complex in signing the Agreement.

Domestic US sentiments also viewed India's historical affiliation with the non-aligned movement and its strategic tilt towards the Soviet Union as an impediment. Therefore, at the turn of the new century, the Bush administration decided to balance the scales by persuading New Delhi to join the Western camp, while pushing defense sales to a large weapons market in the process. Secretary Condoleezza Rice also affirmed that the Agreement "is good for jobs" considering the open-door approach to civilian nuclear trade and India's plan to buy eight reactors from the U.S. by 2012.[45]

Cultural Alliance and Decoupling from Pakistan

The reliance on India as a "strong, stable, democratic, and outwardly looking global player"[46] intensified considering the post-9/11 revision of US' foreign policy strategy. The administration took the promise of full-scale cooperation with India seriously. Secretary Rice stated that Washington understood and appreciated the cultural exchange between the two countries, particularly the two million people of Indian origin

41 Inu Manak and Manjari Chatterjee, "Boosting Trade, the Key to Stronger Indo-U.S. Ties", Council on Foreign Relations, December 19, 2022. https://www.cfr.org/article/boosting-trade-key-stronger-indo-U.S.-ties.

42 Sanjaya Baru, "An Agreement That Was Called a Deal", *The Hindu,* 21 July 21 2015, https://www.thehindu.com/opinion/lead/India-USA-stand-in-nuclear-deal/article62116541.ece.

43 Baru, "An Agreement That Was Called a Deal".

44 Baru, "An Agreement That Was Called a Deal".

45 United States of America Department of State Archive, "Our Opportunity with India, Secretary Condoleezza Rice (Op-Ed, The Washington Post)", March 13, 2006. https://2001-2009.state.gov/secretary/rm/2006/63008.html.

46 Brookings Institution, "James Steinberg's Speech - Panel Discussion on 'The India-U.S. Nuclear Agreement: Expectations and Consequences'", 23 March 2009. https://www.brookings.edu/wp-content/uploads/2012/04/20090323_steinberg.pdf.

living in the U.S. who represent a cultural bridge between the two nations.[47] This represents a strong domestic-level interest to improve relations with India.

However, one of the important distinctions of the Agreement is that perhaps, for the first time, US/India relations were distinct from US/Pakistan relations.[48] The US' relations with Pakistan in the latter half of the 20th century developed mostly as a counterbalance to India's close relations with the USSR. However, the disintegration of the USSR dispelled the need for such counterbalance any further because American policymakers began to see India's holistic economic and political prominence in Asia. Both the US and India observed similarities in their democratic governments, pluralistic societies, and a shared interest in open global markets, which set the stage for a robust partnership in future US/India relations. In particular, the second term of the Bush presidency focused on seeing India with a separate identity. India's perceived separation from Pakistan became more obvious in the six fundamental premises upon which the US policymakers negotiated the Agreement.[49] For example, one of the premises was that India has never been a threat to the US and that India's possession of nuclear weapons breaks no international treaty; rather, it would make a good partner in combating terrorism and the states that present a threat.[50]

The language of the Agreement became relevant after the revelation that the founder of Pakistan's nuclear weapons program, A Q Khan, was involved in the transfer of technology to Iran, Libya, and North Korea.[51] Pakistan's growing partnership with China also led the US tilting to India's favor in nuclear partnership.[52] This was an important pivot in the US' policy in South Asia, and it contributed a great deal to the

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47 United States of America Department of State Archive, "Our Opportunity with India, Secretary Condoleezza Rice (Op-Ed, The Washington Post)", March 13, 2006. https://2001-2009.state.gov/secretary/rm/2006/63008.htm.

48 Blackwill, "The Future of U.S.-India Relations".

49 George Perkovich, "Faulty Promises the U.S.-India Nuclear Deal." Policy Outlook - Carnegie Nonproliferation/South Asia, September 2005. https://carnegieendowment.org/files/PO21.Perkovich.pdf.

50 Percovich, "Faulty Promises in the U.S.-India Nuclear Deal".

51 The New York Times, "Chronology: A.Q. Khan", 16 April 2006. https://www.nytimes.com/2006/04/16/world/asia/chronology-aq-khan.html.

52 Tanveer Khan, "Limited Hard Balancing - Explaining India's Counter Response to Chinese Encirclement", *Journal of Indo-Pacific Affairs*, March 2023, 92–108. https://media.defense.gov/2023/Apr/24/2003205862/-1/-1/1/04-KHAN_FEATURE.PDF/04-KHAN_FEATURE.PDF.

final win-set of the US' two-level interest in the Agreement. Pakistan's cautious but deepening ties with India's adversary, and the US' chief economic rival, China, acted as the ultimate nail in sealing the Agreement.

Critiques of the Two-Level Game Theory

Although Putnam's theory is immensely useful in explaining the momentum of negotiations that led to the Agreement, it falls short on a few accounts.

Fast-Moving Domestic-Level Interests

While the Bush administration did most of the political heavy-lifting to finalize the Agreement, it did so in a haste so that the Agreement was signed shortly before the next administration took over.[53] The succeeding Obama administration had a different approach towards India. President Obama was critical of the 123 Agreement, expressing his reservations about the "blank check" offered to India through the waiver.[54] His calls for an effective "deterrent" against India's nuclear testing is reflected in the debate on the legislation.[55] Despite President Obama endorsing the Agreement during his term and maintaining favorable relations with New Delhi, the severity of his efforts was not commensurate with that of the Bush Presidency. This is an example of differing domestic-level interests, seeing as the interests changed slightly within a short span of time because of how two successive presidents perceived India.

Uncertainty in Bargaining Tactics

While the US' foreign policy makers are highly-skilled, there are times when personal elements impact the tone of the negotiations.[56] Contrary to popular belief that

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53 Reuters, "Rice Sees U.S.-Indian Nuclear Deal Done by Year End," 27 June 2007. https://www.reuters.com/article/U.S.-india-usa-nuclear/rice-sees-u-s-indian-nuclear-deal-done-by-year-end-idUSN2742161520070627.

54 Brahma Chellany, "Barack Obama's Legacy Weighs Down U.S.-India Nuclear Deal", Stagecraft and Statecraft, 17 June 2008. https://chellaney.net/2008/06/17/barack-obamas-legacy-weighs-down-u-s-india-nuclear-deal/.

55 Chellany, "Barack Obama's Legacy Weights Down U.S.-India Nuclear Deal".

56 Barbara Keys and Claire Yorke, "Personal and Political Emotions in the Mind of the Diplomat", *Political Psychology* 40, no. 6 (October 14, 2019): 1235–49. https://doi.org/https://doi.org/10.1111/pops.12628, 1245.

international negotiations are usually dry exercises, the US/India Agreement was full of "twists and turns".[57] At one point, Vice President Dick Cheney is reported to have intervened in the negotiations.[58] His sudden emergence as an actor was surprising since he had a muted presence in the process up until that point. Uncertainties like these could erode the longevity of predetermined win-sets and impact the outcomes. The involvement of more than a few key actors at the most pivotal points of negotiation and finalization results in the introduction of too many unknowns in the mix, thereby leading to the parties losing their control over expected outcomes. This shows that even if the Two-Level Games help set macro-objectives and functional strategies, the uncertainties can guide the outcomes in a different direction, thus questioning the theory's efficiency.

Limited control over the domestic policy of other states

The Agreement is an international instrument, which means that it has less primacy in terms of enforcement as compared to India's domestic laws. During the negotiations, the left-leaning parties in India were in strong opposition to the Agreement for a variety of reasons which culminated in a vote of no-confidence for the Prime Minister's party.[59] Although the vote passed in the government's favor, domestic opposition has the ability to defeat the win-sets of the ruling administration in both the countries and challenge the validity of the theory.

Heterogeneity of Interests

Although the US' domestic sentiments largely favored positive relations with India, the fact that India was allowed an extremely generous deal was criticized by many.[60] Issuing concessions to New Delhi on several nonproliferation commitments was hard to digest for prominent hardliners who did not vouch for such aggressive concessions

57 Squassoni, "The U.S.'s Catastrophic Nuclear Deal with India: Power Failure".
58 Squassoni, "The U.S.'s Catastrophic Nuclear Deal with India: Power Failure".
59 VOA, "India's Communist Parties Withdraw Government Support Over U.S. Nuclear Deal," 1 November 2009. https://www.voanews.com/a/a-13-2008-07-08-voa20/401994.html.
60 White House Archives, "India Civil Nuclear Cooperation: Responding to Critics", 8 March 2006. https://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060308-3.html.

to India.[61] In situations like these, where opinions are largely divided, gauging the overall domestic-level interest becomes difficult. It could also be detrimental to the idea of deliberative democracy when the administration decides to govern by executive decree, without considering the opinions of a large section of the population. This is yet another deficiency of the Two-Level Theory because it shows how difficult it is to homogenize the two-level interests into a collective bracket while illustrating their application to policy decisions.

Conclusion

The Two-Level Game Theory presents the idea that government leaders act as the "gatekeepers" and "central actors" in international negotiations.[62] It is a distinguished theory in foreign policy that seeks to integrate the concepts in comparative politics and elements from international relations. In the present case, we observed that government actors, in their service as chief negotiators, must balance their executive autonomy with the needs of their domestic constituencies. Although the US/India Civil Nuclear Agreement makes for a good case study of the Two-Level Game Theory, there were some elements in the process that were not commensurate with the theory. The difficulty of navigating through fluctuating domestic and foreign interests, the uncertainties of expectations from the key players involved, and the inflexibilities associated with executive command, are all reflective of the limitations of The Two-Level Game Theory. They are also important reminders about not becoming excessively reliant on the theory when it comes to policy execution in the practical realm. We find good evidence of the overlap between favorable domestic attitudes towards India and favorable international momentum at the time, which makes a doctrinal case for understanding the theory. However, the presence of political redundancies, tactical uncertainties in negotiation, and the lack of a standardized metric to ascertain domestic constituencies' needs, highlights the limitations of Two-Level Game Theory in negotiations of a similar nature. Still, it is beneficial to use the theory as one of many formulae for future policy assessments.

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61 Joel Brinkley, "U.S. Nuclear Deal with India Criticized by G.O.P. in Congress," October 31, 2005. https://www.nytimes.com/2005/10/31/politics/U.S.-nuclear-deal-with-india-criticized-by-gop-in-congress.html.

62 Conceição-Heldt and Mello, *Two-Level Games in Foreign Policy Analysis*.

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Role of Social Media in Inciting the Genocidal Acts: A Case Study on Myanmar's Rohingya

Anamika Modok*

Abstract

For years, security forces and the Myanmar army persecuted the Rohingya Muslims, under the shade of "national security". In 2018, the New York Times published a report accusing Facebook of spreading hate speech, incitements, propaganda, and inflammatory posts against the Rohingyas. According to the report, approximately 700 people worked in a secret operation which was started by the military people of Myanmar a few years back. There are debates regarding social media's involvement, more specifically Facebook's involvement, in causing genocide. This article thus examines the role of social media in inciting genocide in Myanmar against the Muslim Rohingyas. The core argument is that Myanmar was involved in spreading hate speech and propaganda through social media. Considering the role of social media in inciting genocidal acts, this article also proves the Rohingya genocide from the perspective of the 1948 Genocide Convention.

Introduction

Rohingyas originate from the Arakan State, which was an independent State near to Myanmar.[1] Arakan is an ancient name which has been originated to Arabia or Persia.[2]

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1 Maung Zarni and Alice Cowley, "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim law and Policy Journal* 23, no. 3 (2014): 681, 683. https://www.academia.edu/7787141/Compilation_2014_Pacific_Rim_Law_and_Policy_Journal_Association_THE_SLOW-BURNING_GENOCIDE_OF_MYANMARS_ROHINGYA?auto=download.

2 Haradhan Kumar Mahajan, "History of Rakhine State and the Origin of the Rohingya Muslims", *The Indonesian Journal of Southeast Asian Studies* 2, no. 1 (2018): 19, 26. http://dx.doi.org/10.22146/ikat.v2i2.34182.

Since the eighth century, the Rohingyas were part of the Arakan State.[3] The propaganda of genocide disseminated through social media and other platforms has occurred since the persecution of Jewish individuals by the Nazi Party.[4] Nazis used "*The Der Sturmer*" newspaper to spread propaganda against Jewish people, leading to German people actively participating in committing genocide.[5] In 1994, the radio station "*RTML"* promoted hatred against Tutsi group, and played an important role in the Rwanda genocide.[6] A University of Warwick study showed that in Germany, Facebook posts were used to attack refugees.[7] In 2018, Muslim Tamil minorities in Sri Lanka were the targets of rumors spread through social media platforms like WhatsApp and Facebook.[8] Like the above mentioned examples, the situation of Myanmar is no exception. In Myanmar, social media simply allows for the possibility of direct incitements to genocide.[9] For example, print newspapers, radio broadcasts, and social media provide inciters with a platform to disseminate their messages. Indeed, social media may actually enhance the inciter's capacity to dehumanize a protected group.[10] In Myanmar, hatred and propaganda has been spread against the Muslim Rohingyas, through Facebook and other social media platforms, which were one of the causes of committing mass genocide.[11]

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3 The Alal O Dulal Collective, "Timeline: Being Rohingya in Myanmar, from 1784-Now," The Wire, published 23 September 2017, https://thewire.in/external-affairs/rohingya-myanmar-timeline (accessed April 15, 2021).

4 Dr. Simon Adams, "Hate Speech and Social Media: Preventing Atrocities and Protecting Human Rights Online," Global Center for the Responsibility to Protect, published 20 February 2020, https://www.globalr2p.org/publications/hate-speech-and-social-media-preventing-atrocities.

5 Adams, "Hate Speech and Social Media".

6 Amanda Grzyb, "Debate Continues about the media's role in driving Rwanda's genocide", The Conversation, published 1 April 2019, https://theconversation.com/debate-continues-about-the-medias-role-in-driving-rwandas-genocide-114512.

7 Amanda Taub and Max Fisher, "Facebook Fueled Anti-Refugee Attacks in Germany, New Research Suggest", *The New York Times*, 21 August 2018, https://www.nytimes.com/2018/08/21/world/europe/facebook-refugee-attacks-germany.html.

8 Vindu Goel, Hari Kumar and Sheera Frenkel, "In Sri Lanka, Facebook Contends with Shutdown after Mob Violence", *The New York Times*, 8 March 2018, https://www.nytimes.com/2018/03/08/technology/sri-lanka-facebook-shutdown.html.

9 Neema Hakim, "How Social Media Companies Could Be Complicit in Incitement to Genocide", *Chicago Journal of International Law* 21, no. 1 (2020): 83, 86, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1785&context=cjil.

10 Hakim, "How Social Media Companies Could Be Complicit", 83, 86.

11 Goel, Kumar, and Frenkel, "In Sri Lanka, Facebook Contends with Shutdown after Mob Violence".

This article explores the role of social media in inciting genocidal acts against the Muslim Rohingyas in Myanmar. The core argument is that the government of Myanmar was involved in spreading hate speech and propaganda through social media against the Rohingya people. Subsequently, it argues that the persecution against the Rohingya people in the Rakhine State in Myanmar was genocide, as defined by the 1948 Genocide Convention, in order to prove the role of social media. To prove the genocidal acts, this article also discusses the theoretical framework of genocide along with a brief historical background of Rohingya. The methodology that has been used to explore these issues is qualitative which is based on a critical appraisal and analytical approach of cases of the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Court (ICC), books, organisational reports, scholarly articles, international instruments, and other relevant documents.

Historical Background

Rohingyas are the minority ethnic group who used to live in Rakhine State, a coastal region in the west of Myanmar which was previously known as Arakan State,[12] one of the poorest[13] and least developed regions of Myanmar. In Rakhine, around 35.6 per cent of people are Rohingya and 59.7 per cent are Buddhist.[14] The Rohingyas were deprived of their rights immediately after independence in 1948 by the Union Citizenship Act 1948 which termed Rohingyas as “indigenous races of Burma”. The Act required those who lived in Myanmar for two generations to hold identity cards.[15] They were targeted at an extreme level after the military rule came into force in 1962, as in 1974 the government of Myanmar required all citizens to hold National Registration Cards whereas they required the Rohingyas to hold Foreign Registration Cards (which was uncommon for the people of Myanmar).[16] As a result, they faced problems, for example in academic and

12 Alina Lindblom et al., “Persecution of the Rohingya Muslims: Is Genocide Occurring Rakhine State? A Legal Analysis”, *International Human Rights Clinic*, Yale Law School 1, no. 5 (2015).
13 Mohajan, “History of Rakhine State and the Origin of the Rohingya Muslims”, 20.
14 Mohajan, “History of Rakhine State and the Origin of the Rohingya Muslims”, 20.
15 Constitution of the Union of Burma, Chapter II, para. 11(i) (1947); Lindblom, “Persecution of the Rohingya Muslims”, 6.
16 Lindblom, “Persecution of the Rohingya Muslims”, 6.

professional areas.[17] Their cards were not recognised by employers and schools, so Rohingyas had limited job and educational opportunities. Afterward, a new citizenship law was passed by General Ne Win in 1982 in which restrained them to equal access in entire Myanmar.[18] Those who had failed to provide proof were being punished by withholding their identity card, which made them stateless.[19]

In 1974, the Emergency Immigration Act was passed where the Rohingyas were considered illegal immigrants as they settled in Myanmar during British colonial rule.[20] In 1977, the junta began Operation Dragon King or "Nagamine", targeting the Rohingyas and consequently around 200,000 Rohingyas fled from Myanmar to Bangladesh to save their lives.[21] In 1978, another operation began where the junta forcefully relocated the Rohingyas by rape, arson, looting, and profanity of mosques, leading to more than 200,000 Rohingyas escaping from Myanmar to protect their lives.[22] In 1989, a citizenship inspection was carried out across Myanmar when Rohingyas were forced to surrender their all national documents, rendering them *de facto* stateless.[23]

In 1991, the persecution against the Rohingyas increased again and Operation Clean and Beautiful or "Pyi Thaya" was launched by the military, where approximately 250,000 Rohingyas fled from Myanmar to Bangladesh to save their lives from widespread violence against them.[24] In 1992, a special border force was created by the government called

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17 Human Rights Watch, "Burma: The Rohingya Muslims: Ending a Cycle of Exodus?", *Human Rights Watch Asia* 8, no. 9 (September 1996): 29. <https://www.hrw.org/reports/pdfs/b/burma/burma969.pdf>.

18 Lindblom, "Persecution of the Rohingya Muslims", 6.

19 Lindblom, "Persecution of the Rohingya Muslims", 7.

20 Mohammad Pizuar Hossain, "The Rohingya Refugee Crisis: Analysing the International Law Implications of Its Environmental Impacts on Bangladesh", *The International Journal of Human Rights* 27, no. 2 (2023): 238-257. https://doi.org/10.1080/13642987.2022.2081159.

21 The Alal O Dulal Collective, "Timeline: Being Rohingya in Myanmar".

22 The Alal O Dulal Collective, "Timeline: Being Rohingya in Myanmar".

23 Hossain, "The Rohingya Refugee Crisis: Analysing the International Law Implications".

24 United States Holocaust Museum, "Burma's Path to Genocide", United States Holocaust Museum, accessed 16 April 2021, https://exhibitions.ushmm.org/burmas-path-to-genocide/timeline.

"NaSaKa" to persecute the Rohingya people.[25] However, by 1997, more than 230,000 Rohingyas reentered Myanmar because of the repatriation deal.[26]

An anti-Muslim riot broke out in May 2001, where residences of Muslim people and mosques were destroyed. It reached the Rakhine State, confiscated the lands of the Rohingyas and forced them to relocate.[27] In 2016, three posts of the Border Guard Police (BGP) were attacked by 400 Rohingya militants who caused the killing of approximately nine police officers.[28] In response, security forces of Myanmar burned the villages of the Rohingyas indiscriminately, causing the deaths of more than 100 people and forcing approximately 90,000 Rohingyas to flee from Rakhine.[29] However, control was lost in 2017 when the Myanmar army attacked the Rohingyas consecutively. On the 25th of August 2017, 12 Myanmar police officers were killed by The Arakan Rohingya Salvation Army (ARSA) during an attack on more than 30 security camps. ARSA, earlier known as *Harakah al-Yaqin,* were formed in 2012, following a riot in Rakhine State against the Rohingyas, as to protect and defend themselves from repression.[30] The Government of Myanmar then declared ARSA a terrorist group, and launched a "clearance operation" in Rakhine State.[31] During this operation, nearly 725,000 Rohingya people fled from Myanmar to Bangladesh.[32]

On 27 August 2017, the Myanmar army, in collaboration with the Rakhine people, massacred roughly 400 Rohingyas in *Gu Dar Pyin* village, in Rakhine State. This continued on August 30, in the *Tula Toli* village, where 500 children and women were

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25 United States Holocaust Museum, "Burma's Path of Genocide".

26 Yousuf Storai, "Systematic Ethnic Cleansing: The Case Study of Rohingya", *Arts and Social Sciences Journal* 9, no. 4 (2018): 1, 3. DOI: 10.4172/2151-6200.1000357.

27 Haradhan Kumar Mohajan, "The Rohingya Muslims in Myanmar are Victim of Genocide!", *ABC Journal of Advanced Research* 7, no. 1 (2018): 59, 69.

28 Mohajan, "Victim of Genocide!", 70.

29 Mohajan, "Victim of Genocide!", 71.

30 Staff Representative, "Myanmar: Who are the Arakan Salvation Army", *BBC News*, 6 September 2017, https://www.bbc.com/news/world-asia-41160679.

31 BBC, "Who are the Arakan Salvation Army".

32 Human Rights Council, "Report of the Independence Fact-Finding Mission on Myanmar", 12 September 2018, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf.

killed.[33] On 2 September 2017, the massacre continued in *Inn Din* village, when around 10 Rohingyas were killed.[34] In total, during 2017, more than 354 villages were burned, destroyed, and looted, while women were gang-raped by local collaborators and the Myanmar military.[35] The ideology of religiously-based ethnonationalist dictators is the underlying cause of the persecution of Rohingya Muslims. The root cause behind the persecution of the Rohingya Muslims is the mindset of dictators of ethnonationalism based on religion.[36]

As of 8 October 2017, around 519,000 Rohingya people had fled from Rakhine and sheltered in Cox's Bazar, Bangladesh,[37] making it the largest refugee shelter in the world.[38] Cox's Bazar, previously housed 40,000 refugees before the intake of nearly one million Rohingya people. The predominantly young refugees[39] suffered from the shelter's issues with security, hygiene, and more.

Theoretical Framework Of Genocide

The term "genocide" is defined as the systematic and deliberate destruction of any religion, ethnic, national, or racial group.[40] The term "genocide" was unknown until World War II (WWII) when Winston Churchill, Prime Minister of Britain[41] called it the "crime without a name".[42] Following WWII, this crime entered the public consciousness, through

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33 Mohajan, "The Rohingya Muslims in Myanmar", 71.
34 Mohajan, "The Rohingya Muslims in Myanmar", 71.
35 Mohajan, "The Rohingya Muslims in Myanmar", 71.
36 Kyaw Win, "The Root Cause of Rohingya Persecution", New Mandala, published 15 September 2015, https://www.newmandala.org/the-root-cause-of-rohingya-persecution/.
37 Office of the United Nations High Commissioner for Human Rights, "Mission Report of OHCHR Rapid Response Mission to Cox's Bazar," September 2017 https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf.
38 Mark Bowden, "The Current Context to the Rohingya Crisis in Bangladesh", *Humanitarian Practice Network*, 2018 https://odihpn.org/magazine/current-context-rohingya-crisis-bangladesh/.
39 UNICEF, "Rohingya Refugee Crisis: UNICEF Delivers Vital Support to Vulnerable Children and Families," UNICEF, accessed 26 March 2021, https://www.unicef.org/bangladesh/en/rohingya-refugee-crisis.
40 Ana Filipa Vrdoljak, "The Criminalisation of the Intentional Destruction of Cultural Heritage", in *Forgoing a Socio-Legal Approach to Environmental Harms* eds. M. Orlando and T. Bergin (London: Routledge, 2017), 237-266.
41 Adam Jones, *Genocide: A Comprehensive Introduction*, (London: Routledge, 2006), 8.
42 William A. Schabas, *Genocide in International Law: The Crimes of Crimes*, (Cambridge: Cambridge University Press, 2009), 14.

the discovery of Nazi Germany's systematic brutality towards targeted groups.[43] Perpetrators of genocide, such as Mehmet Talaat (an orchestrator of the Armenian genocide), had previously escaped conviction due to a lack of legislation on this crime.[44]

Mehmet Talaat, one of the orchestrators of the Armenian genocide escaped prosecution due to the lack of law on genocide. There is a belief that the attacks against the Armenian People by the Ottoman Empire constituted genocide.[45] The Nuremberg trials made use of the term "genocide", and shortly following this, Raphael Lemkin defined the "genocide".[46]

However, "genocide" was not proven in the Nuremberg trials.[47] In the meantime, the General Assembly of the UN adopted "the Convention of the Prevention and Punishment of the Crime of Genocide, 1948" (Genocide Convention). This included a concrete and detailed definition of genocide.[48] The Convention came into force on 12 January 1951, when roughly 20 countries ratified the convention.[49] The United Nations Security Council established a tribunal called International Criminal Tribunal for the former Yugoslavia (ICTY) for the massacre that happened in Bosnia between 1992 and 1995, during which 8,000 men were killed.[50] In 1998, for the first time, Jean-Paul Akayesu was convicted for committing genocide by the International Criminal Tribunal for Rwanda (ICTR).[51]
A Polish-Jewish lawyer and jurist, Lemkin first created the term "genocide" in a historical and global context in 1944, in his book *Axis Rule in Occupied Europe*.[52] In this book,

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43 We Remember, "The Origin of the Concept of Genocide", We Remember, accessed 25 March 2021, https://www.weremember.gov.tr/what-is-genocide-2/the-origin.html.

44 Katherine Goldsmith, "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach," *Genocide Studies and Prevention: An International Journal* 5, No. 3 (December 2010): 239, 239. https://digitalcommons.usf.edu/gsp/vol5/iss3/3.

45 United States Holocaust Memorial Museum "Genocide Timeline", Holocaust Encyclopedia, accessed 8 May 2021, https://encyclopedia.ushmm.org/content/en/article/genocide-timeline.

46 Jones, "Genocide: A Comprehensive Introduction," 12.

47 Jones, "Genocide: A Comprehensive Instroduction," 12.

48 Convention of the Prevention and Punishment of the Crime of Genocide, signed 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('Genocide Convention').

49 General Assembly Resolution 260 A (III) of 9 December 1948, entry into force 12 January 1951.

50 General Assembly Resolution 260 A (III).

51 General Assembly Resoultion 260 A (III).

52 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (New York: Columbia University Press, 1944), 79.

Lemkin explains the atrocities committed by Nazi Germany during WWII, and argues that a definition of "genocide" is the first of many necessary, preventative measures. Lemkin's passion is best understood with acknowledgement of his experience as a witness to the atrocity committed by the Nazi regime. [53]

The term "genocide" comes through combining two words "*genos*" which is a Greek word that means tribe or race and "*caedere*" (cide) which is a Latin word that means killing.[54] According to Lemkin, "genocide" extends further than the physical destruction of a group. It is the systematic destruction of all identifiers and artifacts of cultural significance, including the religion, language and political institutions of a group. Furthermore, it is the destruction of a group's security, dignity, health is not only the physical destruction of people of a particular group through targeting them by destruction of religion, language, national emotions, and economic assets, cultural, social, and political instructions of a particular group, but also the destruction of liberty, security, dignity, health, and lives of people belonging to a particular group.[55] The term "genocide" was included in the indictments of Nuremberg of the Nazi people who were involved in the war just a year later Lemkin's introduced the term.[56] However, it has not been proven in the Nuremberg trial which was the biggest dissatisfaction of Lemkin.[57] Article 2 of the Genocide Convention states: [58]

> "Genocide means any of the following acts committed with intend to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a. Killing members of the group;
> b. Causing serious bodily or mental harm of members of the group;
> c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

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53 Lemkin, *Axis Rule*, 79.
54 Jones, "Genocide: A Comprehensive Introduction".
55 Lemkin, *Axis Rule*.
56 Jones, "Genocide: A Comprehensive Introduction", 12.
57 Jones, "Genocide: A Comprehensive Introduction", 12.
58 Convention of the Prevention and Punishment of the Crime of Genocide, signed 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('Genocide Convention'), art. 2.

d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group."

Article 6 of the Rome Statute of the International Criminal Court (ICC), 1998 (Rome Statute) also stated the same about the definition of genocide.[59] The definition of the Genocide Convention provides two constructive components of genocide.[60] One is the mental element (*mens rea*) that is the intention to destroy any protected group (ethnic, racial, national or religious) wholly or partly.[61] Another is the physical element (*actus reus*) which is incorporated as the five acts mentioned in article 2 of the Convention.[62] The *actus reus* requires violence committed against any protected group, intending to destroy that group wholly or partly.

Neither the Genocide Convention nor any other convention define the protected groups as racial, ethnic, national, or religious groups, however courts have provided interpretative guidance. In *Akayesu*, the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) defined "national group" for the first time as describing a collection of individuals sharing a legal bond, based on common citizenship by mutual consent of duties and rights.[63] The ICTR defined and ethnic group in *Akayesu* as a group of people who share common culture and language.[64] Further, the ICTR stated in *Kayishema and Ruzindana* that ethnic groups are those whose members share a common culture and language or that group separates itself either by self-identitification or a group identified by others (including perpetrators).[65] According to *Kayishema and Ruzindana*, the racial group is a group which is often formed based on ancestral physical characteristics identified by geography.[66] In *Akayesu*, a racial group was founds to often be based on hereditary physical characteristics identified in a geographical area, regardless of

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59 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).
60 The Genocide Convention, art. 2. See also, *Prosecutor v. Dragan Jokic*, Case No. ICTY-02-60-T, Judgment (17 January 2005), [640].
61 The Genocide Convention, art. 2.
62 The Genocide Conventionc, art. 2.
63 *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998), [512].
64 *Prosecutor v. Akayesu*, [513].
65 *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment (21 May 1999), [98].
66 *Prosecutor v. Kayishema and Ruzindana,* [98].

linguistic, national, cultural, or religious identification.[67] As per the *Kayishema and Ruzindana* case, a religious group is a group where people share common beliefs, including the form of worship.[68] Also, it includes common religion and form of worship of people.[69]

The definition of physical elements is also not included in the Genocide Convention and comes from the decisions of various courts and tribunals. “Killing” is a homicide that has been committed by people with the intention to cause death.[70] It must be proved that the perpetrator killed the victim and the victim belongs to a relevant group, whether national, racial, ethnic, or religious.[71] But there is no need to be premeditated acts.[72] The ICTR in many cases such as *Simba*,[73] *Bagosora*,[74] *Muvunyi*,[75] *Ntagerura*,[76] *Kamuhanda*,[77] *Seromba*,[78] and *Gacumbitsi*[79] held that the prosecution has the burden of proof that the perpetrator had killed one or more than one member of such protected groups.

“Causing serious bodily and mental harm” refers to an internal or external injury to the organs or senses like disfigurement, sexual violence,[80] torture,[81] threat of death,[82] deportation,[83] or forcible transfer,[84] as well as mental injury which can be temporary such as strong fear, intimidation, terror or threat.[85] It is not necessary to inflict a permanent

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67 *Prosecutor v. Akayesu* [514] and [516].
68 *Prosecutor v. Kayishema and Ruzindana*.
69 *Prosecutor v. Akayesu* [515].
70 *Prosecutor v. Seromba*, Case No. ICTR-2001-66-I, Judgment (13 December 2006), [317].
71 *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55-A-T, Judgment (12 September 2006), [486].
72 *Prosecutor v. Stakic*, Case No. ICTY-97-24-T, Judgment (31 July 2003), [515].
73 *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Judgment (13 December 2005), [414].
74 *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, Judgment (18 December 2008), [2117].
75 *Prosecutor v. Muvunyi,* [479].
76 *Prosecutor v. Andre Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe*, Case No. ICTR-99-46-T, Judgment (25 February 2004), [664].
77 *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54A-T, Judgment (22 January 2004), [630].
78 *Prosecutor v. Seromba,* [175].
79 *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment (17 June 2004), [255].
80 *Prosecutor v. Bagosora*, [2117] See also *Prosecutor v. Muvunyi*, [487].
81 *Prosecutor v. Gacumbitsi*, [291].
82 *Prosecutor v. Akayesu*, [711]-[712].
83 *Prosecutor v. Jokic*, [646].
84 *Prosecutor v. Jokic*, [663], [665-666].
85 *Prosecutor v. Seromba*, [46].

injury, but any injury must be serious in nature[86] including those resulting in long term disadvantages which prevents the victim from leading a normal life.[87]

"Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" refers to the circumstances where death would not occur immediately, but will occur slowly (slow death) due to lack of shelter, clothing, medical care, poor hygiene, extreme physical exertion or excessive workload.[88] The conditions of life situations include starvation, rape, and reduction of necessary treatment, and preventing adequate accommodation for a reasonable period of time.[89] It also includes systemic expulsion of the targeted group of people from housing.[90] However, it is not necessary for this conduct to directly kill the person.[91]

A Case Study On The Rohingya Genocide

As above, the Genocide Convention requires that both the *mens rea* and the *actus reus* are satisfied against any protected group before the Rohingya persecution may be considered genocide. The following discussion presents the case that the treatment of the Rohingya people is genocide.

The Rohingyas belong to the Protective Group

The term "group" has no specific definition, but earlier it was used to mean only permanent and stable groups.[92] However, as above, the ICTR and the ICTY made some decisions that a group can be determined on a case-to-case basis, consulting both subjective and

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86 *Prosecutor v. Stakic*, [516].
87 *Prosecutor v. Krstic*, Case No. ICTY-98-33, Judgment (2 August 2001), [513].
88 *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgment (31 July 2003), [517], [518].
89 *Prosecutor v. Kayishema and Ruzindana*, [115]-[116]. See also, *Prosecutor v. Radoslav Brdjanin*, Case No. ICTY-99-36-T, Judgment (1 September 2004), [691].
90 *Prosecutor v. Akayesu*, [505]-[506].
91 *Prosecutor v. Stakic*, [518].
92 *Prosecutor v. Akayesu*, [511], [516], [701], [702].

objective criteria.[93] The ICTR provides the definition of an ethnic group in the *Akayesu*[94], *Nahimana*[95] , and *Kayishema* and *Ruzindana*[96] decisions, stating that an ethnic group is a group where people share common culture and language.

The Rohingyas generally use the Indo-Aryan language which is very close to the Chittagonian (Chattrogram) language, generally used by the Bengali people who lived in Cox's Bazar region, Bangladesh.[97] This language is neither written nor accepted internationally, but is basically used as an oral form.[98] The Rohingya women generally wear hijab, sarong while the men use lungi, they eat rice, vegetables, dried and fresh fish, chicken.[99] They have some other common cultural traits which are different from the majority of people of Myanmar.[100] Generally, most of the Rohingya people practice Islam as a form of religion in a Buddhist society.[101] Hence, they can be categorised as an ethnic group for having similar language and culture, and constitute a distinctive religious group in Islam.

Violence has been Committed against Rohingyas

The Genocide Convention characterises five acts as forms of violence, where proving the existence of any of these acts may lead to a finding of genocide.[102] In the Rohingya context, three methods concerning genocide can be discussed to prove the existence of

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93 *Prosecutor v. Muvunyi*, [484]. See also, *Prosecutor v. Gacumbitsi*, [254], *Prosecutor v. Laurent Semanza* [2003] Case No. ICTR-97-20-T, [317; *Georges Anderson Nderubumwe Rutaganda v. Prosecutor* [2003] Case No. ICTR-96-3-A, [524], [93]; *Prosecutor v. Alfred Musema* [2000] Case No. ICTR-96-13-A, [161]; *Prosecutor v. Jean de Dieu Kamuhanda*, [291]; *Prosecutor v. Seromba*, [318]; *Prosecutor v. Jokic*, [667]; *Prosecutor v. Brdjanin*, [683]; *Prosecutor v. Stakic*, [512].

94 *Prosecutor v. Akayesu,* [513].

95 *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment (3 December 2003), [969].

96 *Prosecutor v. Kayishema and Ruzindana*, [98].

97 United Nations High Commissioner for Refugees (UNHCR), "Culture, Context and Mental Health of Rohingya Refugees," accessed 31 March 2021, https://www.unhcr.org/5bbc6f014.pdf.

98 UNHCR, "Culture, Context and Mental Health of Rohingya Refugees".

99 UNHCR, "Culture, Context and Mental Health of Rohingya Refugees".

100 UNHCR, "Culture, Context and Mental Health of Rohingya Refugees".

101 Beth Van Schaack, "Determining the Commission of Genocide in Myanmar: Legal and Policy Considerations," *Journal of International Criminal Justice* 17, no. 2 (2019): 285, 292. https://doi.org/10.1093/jicj/mqz008.

102 The Genocide Convention, art. 2.

violence (*actus reus*) including killing members of Muslim Rohingyas, causing serious bodily or mental harm, and deliberately inflicting conditions of life on Rohingyas calculated to destroy the group.

Killing requires an intention to cause death to one or more than one member of a protected group to prove genocide.[103] In May 2012, around 100 Rohingyas were killed by the Myanmar Army.[104] In 2016, security forces of Myanmar burned the villages of the Rohingyas indiscriminately using helicopters, leading to the deaths of more than 100 people.[105] After that, on 27 August 2017, the Myanmar army killed around 400 Rohingyas in *Gu Dar Pyin* village.[106] Other operations were carried out in *Tula Toli* village and *Inn Din* village, where many Rohingyas were killed. According to a survey in Cox's Bazar, around 6,700 people were killed deliberately during August 2017.[107] As per the survey, 80 per cent of individuals had witnessed someone being killed[108] and most of the individuals were beaten before getting killed.[109] Hence, it is clearly evident that the existence of killing element of committing genocide is present against the people of Rohingya.

Causing serious bodily and mental harm refers to an internal or external injury to the organs or senses like disfigurement, sexual violence,[110] torture,[111] death threats,[112] deportation,[113] and forcible transfer.[114] It can be mental suffering as well which might be

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103 *Prosecutor v. Seromba*, [317].
104 Mohajan, "The Rohingya Muslims in Myanmar".
105 Mohajan, "The Rohingya Muslims in Myanmar", 12.
106 Mohajan, "The Rohingya Muslims in Myanmar", 12.
107 Medecins Sans Frontieres, "No One Was Left: Death and Violence Against the Rohingya in Rakhine State, Myanmar," published 12 March 2018, https://www.doctorswithoutborders.ca/wp-content/uploads/2023/04/2018-_03-no_one_was_left-advocacy_briefing_on_mortality_surveys.pdf.
108 Schaack, "Determining the Commission of Genocide in Myanmar", 300.
109 Report of UNOHCHR, "Cox's Bazar: UN Special Rapporteur on Myanmar to Visit Bangladesh", published 3 February 2017, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21197&LangID=E.
110 *Prosecutor v. Bagosora*, [2117]. See also, *Prosecutor v. Muvunyi*, [487].
111 *Prosecutor v. Gacumbitsi*, [291].
112 *Prosecutor v. Akayesu*, [711]-[712].
113 *Prosecutor v. Jokic*, [646].
114 *Prosecutor v. Jokic*, [663], [665]-[666].

more minor, temporary as such strong fear, intimidation, terror, or threat.[115] Young girls and women were the victims of rape, gang rape, and physical violence perpetrated by police and soldiers.[116] The report of UN Office of the High Commissioner for Human Rights (UNOHCHR) stated that of 101 women interviewed, most of them were being the victim of sexual violence and rape.[117] One victim testified that she was raped in front of her five-year-old daughter when her daughter was trying to save her mother, she got killed by the perpetrators.[118] Sexual violence and rape can be the cause of psychological damage which can be called a genocidal act.[119] Hence, these situations are leading towards serious bodily and mental harm which can be categorised as genocide.

Deliberate infliction does not mean the direct killing of people,[120] rather it means slow death due to lack of food, shelter, clothing, medical care, poor hygiene, or excessive workload.[121] As above, the government of Myanmar passed a discriminatory Citizenship Law. Afterward, a new citizenship law has been passed by General Ne Win in 1982, in which restrained them to equal access in the entire Myanmar.[122] Sometimes authorities confiscated food and livestock, and ruined all sources of food.[123] Therefore, situations created by the government of Myanmar led to conditions of deliberate inflictions such as slow death to destroy Rohingya Muslims as a whole or in part.

Specific Intend to Destroy the Muslim Rohingyas

The ICTR and the ICTY have held that intention is determined on the facts and circumstances of each case.[124] Neither formal plans nor premeditation is required to

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115 *Prosecutor v. Seromba*, [46].
116 Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls,” published 6 February 2017, https://www.hrw.org/news/2017/02/06/burma-security-forces-raped-rohingya-women-girls.
117 Report of UNOHCHR.
118 Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls.”
119 *Prosecutor v. Akayesu*, [507]-[508], [706]-[707], [731]-[733].
120 *Prosecutor v. Stakic*, [518].
121 *Prosecutor v. Kayishema and Ruzindana*, [115]-[116]. See also, *Prosecutor v. Brdjanin*.
122 *Prosecutor v. Kayishema and Ruzindana*, [115]-[116].
123 *Prosecutor v. Kayishema and Ruzindana*, [115]-[116].
124 *Aloy Simba v. Prosecutor* [2007] Case No. ICTR 01 A, [264]. See also *Prosecutor v. Emmanuel Ndindabahizi* [2004] Case No. ICTR 2001 71 I, [454].

prove the intention to commit genocide. Rather, it can evolve through the activities of the perpetrators.[125] The ICC stated in *Al Bashir*[126] that when a concrete threat has been made against any protected group by the relevant conduct (*actus reus)* can be called genocide. When any protected group's existence is under a concrete threat by the relevant conduct, it is genocide. In August 2017, the government of Myanmar declared the Rohingyas a terrorist group and launched a "clearance operation" in Rakhine State.[127] In this operation, nearly 620,000 Rohingya people fled from Myanmar to Bangladesh.[128] In this operation, they wanted to clear the ethnic group as well as the religious group from Myanmar in the name of national security. In the OHCHR Report, victims were being taunted during the time of persecution that as they are Bangladeshis, they should go back to Bangladesh; otherwise, they will understand what the militants can do with them.[129] Hence, their intent to destroy the group is evident from the previous discussions.

Role Of Social Media In Inciting "Rohingya Genocide" In Myanmar

Social media is a medium by which people can easily connect with anyone across the globe.[130] In this digital era, YouTube, Facebook, Twitter, Instagram, and other social media platforms are not only being used for social networking and sharing information. They also are platforms used to spread "hate speech", "incitements for genocide", and "targeting people for crimes".[131] In recent times, hate speech has been very common around all social media platforms as well as the dark side of the internet.[132] As a matter of fact, it is very difficult for people to identify true information.[133] The following discussion presents the role of social media in driving the Rohingya Genocide in Myanmar.

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125 *Prosecutor v. Katanga* [2014] Case No. ICC-01/04-01/07, [1108]-[1110].
126 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, [124].
127 Mohajan, "The Rohingya Muslims in Myanmar", 70.
128 Mohajan, "The Rohingya Muslims in Myanmar", 70.
129 Report of OHCHR mission to Bangladesh, "Interviews with Rohingyas Fleeing from Myanmar since 9 October, 2016," 3 February 2017, https://www.refworld.org/docid/5899cc374.html.
130 Adams, "Hate Speech and Social Media".
131 Adams, "Hate Speech and Social Media".
132 Adams, "Hate Speech and Social Media".
133 Fatma Elzahraa Elsayed, "Social Media Role in Relieving the Rohingya Humanitarian Crisis," *New Media and Mass Communication* 87, no. 1 (2020): 28, 29. DOI: 10.7176/NMMC/87-04.

Gathering Mass Support in Committing "Rohingya Genocide"

Persecution of the Rohingya Muslims has been continuing for years, beginning immediately after the independence of Myanmar and taking concrete shape in 2017 when the government of Myanmar started operations against the Muslim Rohingyas.[134] However, Facebook fueled the fire to spread genocide in Myanmar.[135] According to the New York Times, the military of Myanmar used Facebook as a tool to spread hate speech and false news, incite violence, and create inflammatory posts against the Rohingyas for years.[136] It shows that the genocide against the Muslim Rohingyas was incited through Facebook. On 12 September 2018, the final report of the Fact-Finding Mission (FFM)[137] came out, where the members of the FFM called on the members of the military of Myanmar to investigate genocide, war crimes, and crimes against humanity.[138] Another report published by the U.S. State Department also showed evidence that the military of Myanmar instigated the genocide against the Rohingyas, which was well planned.[139] According to the New York Times, approximately 700 people worked on a secret operation which was started by the military people of Myanmar a few years back.[140]

The military made fake accounts where they posted false information and hate propaganda but with no direct link to the military, and developed these pages to have huge followings.[141] The pages cumulatively had almost 1.35 million followers.[142] These

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134 Mohajan, "The Rohingya Muslims in Myanmar", 71.

135 Hakim, "How Social Media Companies Could Be Complicit in Incitement to Genocide" 86. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1785&context=cjil.

136 Paul Mozur, "A Genocide Incited on Facebook, with Posts from Myanmar's Military," *The New York Times*, 15 October 2018, https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html?action=click&module=Top%20Stories&pgtype=Homepage.

137 A Fact-Finding Mission is a mission carried out by the United Nations with the intention to discover facts to the trouble areas.

138 United Nations Human Rights Council, "Myanmar: UN Fact-Finding Mission Releases Its Full Account of Massive Violations by Military in Rakhine, Kachin and Shan States", 18 September 2018, https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E.

139 Douek, "Facebook's Role in the Genocide in Myanmar".

140 Mozur, "A Genocide Incited on Facebook".

141 Mozur, "A Genocide Incited on Facebook".

142 "Removing Myanmar Military Officials from Facebook", Meta, last modified 28 August 2018, https://about.fb.com/news/2018/08/removing-myanmar-officials/.

were basically running as beauty information and independent entertainment pages[143] like “Young Female Teachers” or “Let’s Laugh Casually”.[144] These pages were mostly directed at escalating at ethnic tensions to encourage ordinary people to involve the military for their protection.[145] This particular campaign to spread hatred is old now, but the military personnel of Myanmar have continued it to wage a psychological war based on Russian training.[146] One of the Commanders-in-Chief of the military posted on Facebook that they have to complete the “clearance operation” which is a part of their “unfinished job” of resolving the problem of Bengali People (pointing to the Rohingyas).[147]

One of the shocking examples is that of a Buddhist woman who was allegedly raped by a Muslim man that was spreading through a fake Facebook post which made a clash in Mandalay, which is the second-largest city in Myanmar,[148] where two people got killed, and almost 20 people got injured.[149] It was a false rumour that excited the Buddhist people, leading to the Mandalay clash. UN experts also made a statement in August 2018 that military commanders of Myanmar played a very important role in enabling the Rohingya people from Rakhine State through an attack which is Genocide.[150]

As most people did not have any knowledge of the internet in 2017, they believed the misinformation and propaganda about the Rohingya people.[151] A SIM card in Myanmar was expensive before (about $200), but all of a sudden in 2013 it became accessible to all and dropped to about $2 when they allowed the other companies.[152] Then they

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143 Meta, “Removing Myanmar Military Officials from Facebook”.

144 “Violence Conflict, Tech Companies, and Social Media in Southeast Asia”, The Asia Foundation, published 28 October 2020, https://asiafoundation.org/wp-content/uploads/2020/10/Violent-Conflict-Tech-Co.

145 Mozur, “A Genocide Incited on Facebook”.

146 Mozur, “A Genocide Incited on Facebook”.

147 Douek, “Facebook’s Role in the Genocide in Myanmar”.

148 Staff Reporter, “Facebook Admits It was Used to Incite Offline Violence in Myanmar,” *BBC News*, 6 November 2018, https://www.bbc.com/news/world-asia-46105934.

149 Meghann Rhynard Geil and Lisa Inks, “Report: The Weaponization of Social Media”, Adapt Peacebuilding, January 22, 2020, https://adaptpeacebuilding.org/blog/2019/12/20/the-weaponization-of-social-media (accessed April 22, 2021).

150 Staff Reporter, “Facebook Admits It was Used to Incite Offline Violence in Myanmar”.

151 Staff Reporter, “Facebook Admits It was Used to Incite Offline Violence in Myanmar”.

152 Staff Reporter, “The Country where Facebook Posts Whipped up Hate,” *BBC News*, 12 September 2018, https://www.bbc.com/news/blogs-trending-45449938.

reduced the price of mobile phones incredibly, which became accessible to the general people of Myanmar.[153] Most people started using Facebook, as other social media platforms like Google and WhatsApp did not allow access from Myanmar, while Facebook did.[154] At that time, approximately 18 million Myanmar people out of 50 million used Facebook regularly.[155] A *Reuters* special investigation report published in August 2018 found that more than 1,000 posts, images and comments targeted the Rohingya Muslims.[156] In several posts, Rohingyas were termed as "pigs" or "dogs".[157] The term "kalar" is very derogatory and was used against Rohingya Muslims, leading to it being banned by Facebook in 2017, but the ban was subsequently revoked it as the term has a dual meaning.[158] One of the Militants wrote that they must fight against the Rohingyas the way Adolf Hitler did with towards the European Jewish population.[159] Also, they called the Rohingya Muslims "maggots", "dogs", and "rapists" on Facebook.[160]

A young man from Myanmar made a post in September 2017 that read "I am always honing my sword to kill you shit kalar. You Kalar are the son of bitch, son of swine."[161] With some of his pictures, this statement played a role like a sword.[162] It incited the people of Myanmar, to commit violence against the Rohingyas. Nay San Lwin, an active Rohingya activist who lived in Germany, said to the Star Weekend that Rohingya people were termed as illegal immigrants by Thura U Tin, Vice President of the National League for Democracy (NLD), in a Radio Asia interview on 11 October 2011. After that, the people of Myanmar started posting on Facebook about Rohingya people as illegal immigrants.[163] According to Lwin, another trigger point was in June 2012, when director-general of the

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153 Staff Reporter, "The Country where Facebook Posts Whipped up Hate."
154 Staff Reporter, "The Country where Facebook Posts Whipped up Hate."
155 Staff Reporter, "Myanmar Rohingya: Facebook Still Hosts Hate Speech," *BBC News*, 18 August 2018, https://www.bbc.com/news/technology-45196167.
156 Steve Stecklow, "Why Facebook is Losing the War on Hate Speech in Myanmar," *Reuters*, 15 August 2018, https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/.
157 Stecklow, "Why Facebook is Losing the War on Hate Speech in Myanmar."
158 Staff Reporter, "The Country where Facebook Posts Whipped up Hate".
159 Staff Reporter, "Facebook Still Hosts Hate Speech".
160 Hakim, "How Social Media Companies Could Be Complicit in Incitement to Genocide", 86.
161 Maliha Khan, "Is Social Media Inciting Violence in Myanmar," *The Daily Star*, 18 April 2018, https://www.thedailystar.net/star-weekend/social-media-inciting-violence-myanmar-1561876.
162 Khan, "Is Social Media Inciting Violence in Myanmar?"
163 Khan, "Is Social Media Inciting Violence in Myanmar?"

State Counselor of Myanmar, Zaw Htay, posted on Facebook that the Rohingya "terrorists" are entering Myanmar with weapons from Bangladesh.[164]

One of the anti-Rohingya committees, "Ma Ba Tha", was banned by the government, which has been spreading hate propaganda against the Rohingya very openly for years.[165] However, it did not make any kinds of impact as Wirathu, head of that committee, was spreading rhetoric on Facebook by calling the Muslim Rohingyas "mad dogs" and "snakes" and also said that the Rohingyas were taking actions to convert Myanmar to an Islamic State.[166] On 30 July 2017, another post was made by the office of Suu Kyi stating that energy biscuits, which the UN provided, have been found in the "terrorist" camps of the Rohingyas.[167] Propaganda against Myanmar's Muslim Rohingyas played an important role in triggering the violence and amplifying the grievance between different ethnic and religious groups.[168] Hence, through posting misinformation on social media, most people got to know about the hatred against the Rohingya people, and they began to participate in committing genocide.

Ever-increasing Women's Participation in Mass Atrocity in Myanmar

If we look at traditional studies, it is very evident that women played secondary roles in violence as supporters of males, or they became the easy victim of outrages. However, social media is now playing an incredible role in increasing women's active participation in mass atrocity.[169] Now, through social media, women are directly participating in violence which they did not do before.[170] Women basically used social media platforms to spread propaganda and partisan information, and to make contributions to tactical

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164 Khan, "Is Social Media Inciting Violence in Myanmar?"
165 The Asia Foundation, "Violence Conflict, Tech Companies, and Social Media in Southeast Asia".
166 Staff Reporter, "Facebook Still Hosts Hate Speech".
167 The Asia Foundation, "Violence Conflict, Tech Companies, and Social Media in Southeast Asia".
168 Geil and Inks, "Report: The Weaponization of Social Media".
169 The Asia Foundation, "Violence Conflict, Tech Companies, and Social Media in Southeast Asia".
170 Audrey Alexande, "Perspectives on the Future of Women, Gender, and Violent Extremism," *Occasional Paper Series* (George Washington University) (2019) https://extremism.gwu.edu/sites/g/files/zaxdzs5746/files/Perspectives%20on%20the%20Future%20of%20Women%2C%20Gender%20and%20Violent%20Extremism.pdf.

support but not usually as direct combatants.[171] It has been found in some of the research on extremist networks that women are far better networkers than men within online platforms and they also play roles as bookers and connectors.[172]

Women of Myanmar played an important role in Ma Ba Tha,[173] a Buddhist community that works on community and religious-based improvements and is used as a tool against the Muslim Rohingyas.[174] Most of the women learned about the community and their activity just because of social media like Facebook. Again, through social media, the barriers lowered dramatically for women's entry to Ma Ba Tha.[175] Women have played a new role in Ma Ba Tha's growth as they actively participate in social networking sites. Hence, through social media, women spread propaganda and hate speech and actively participate in violence.

Growing Involvement of Youths in Mass Atrocity in Myanmar

Social media gives a platform to extremist groups to reach out to vulnerable people and recruit them.[176] Young people are the most vulnerable to being affected by any kind of propaganda like hate speech, rumors, or fake news, which many easily believe as true.[177] Facebook is the most commonly used social media among the youths of Myanmar.[178] Most of young people responded to posts about hate speech and rumours through

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171 Jytte Klausen, "Tweeting the Jihad: Social Media Networks of Western Foreign Fighters in Syria and Iraq," Studies in Conflict and Terrorism 38, no. 1 (2015): 1–22, https://doi.org/10.1080/1057610X.2014.974948.

172 Klausen, "Tweeting the Jihad".

173 The Asia Foundation, "Violence Conflict, Tech Companies, and Social Media in Southeast Asia".

174 The Asia Foundation, "Violence Conflict, Tech Companies, and Social Media in Southeast Asia".

175 The Asia Foundation, "Violence Conflict, Tech Companies, and Social Media in Southeast Asia".

176 The Asia Foundation, "Violence Conflict, Tech Companies, and Social Media in Southeast Asia".

177 "Fake News, Hate Speech on Social Media Impacting Myanmar's Youth", The University of Sydney, published 7 November 2019, https://www.sydney.edu.au/news-opinion/news/2019/11/07/fake-news-hate-speech-on-social-media-impacting-myanmar-youth.html.

178 Brad Ridout et al., "Mobile Myanmar: The Impact of Social Media on Young People in Conflict-Affected Regions of Myanmar", Save the Children International, published November 2019, https://www.savethechildren.es/sites/default/files/imce/docs/mobile_myanmar_report_short_final.pdf.

comments or emojis or shared propaganda without verifying the truth.[179] They uncritically believe the news they are getting from any social media platform, specifically Facebook.

In Myanmar, the youths are allegedly responsible for spreading hatred and false news throughout the country as they often share posts regarding anti-Muslim hatred.[180] A young man, 22 years of age from Kayah State, said that a person can make people believe what they want to believe through social media, more specifically, Facebook.[181] Some young females between 18-22 years of age told how they believed propaganda and misinformation spreading through Facebook repeatedly for a few days.[182] A 19 year old male from Rakhine State stated that a fight between young people in Rakhine and Chine communities was instigated through online propaganda.[183] Hence, these kinds of propaganda and misinformation led the youth to take wrong steps like involvement in anti-Muslim groups, as they are the most vulnerable to get affected.

Conclusion

In this study; we observed that the Rohingya problem is a complex and controversial issue because of several opinions of their origin. However, it is very much evident from the history of the origin of the Rohingya people that they have been living in Rakhine State since the eighth century. Hence, they can be called citizens of Myanmar. But, the Myanmar government called the Rohingyas an indigenous race, illegal immigrants, and Bengalis. They were deprived of their fundamental rights, such as the right to vote and travel through the entirety of Myanmar through laws. Also, they were restricted from getting access to education and medical treatment. The Muslim Rohingyas have suffered abuses persistently. The government of Myanmar, police, and security forces engaged in violence such as torture, rape, arbitrary detention, and so on. Between 1977-1978 and 1991-1992, many operations have been launched against the Muslim Rohingyas, which

179 University of Sydney, “Fake News, Hate Speech on Social Media Impacting Myanmar’s Youth”.
180 Ridout et al., “Mobile Myanmar: The Impact of Social Media”.
181 Ridout et al., “Mobile Myanmar: The Impact of Social Media”.
182 Ridout et al., “Mobile Myanmar: The Impact of Social Media”.
183 Ridout et al., “Mobile Myanmar: The Impact of Social Media”.

compelled the Rohingyas to flee from Myanmar to save their lives. It is evident from the circumstances that Myanmar's security forces and the military committed genocide.

The paper argues that social media played a vital role in causing genocide in Myanmar against the Muslim Rohingyas. According to the New York Times, the military of Myanmar had used Facebook as a tool to spread hate speech, false news, incitement, and inflammatory posts against the Rohingyas for years. Approximately 700 people have been accused of working in a secret operation and participating in a psychological war that was started a few years back. The New York Times reported on fake Facebook accounts which were used systematically to encourage general people to participate in violence by escalating ethnic tensions. Also, they declared the ARSA to be a terrorist group and launched a clearance operation in Rakhine State.

It finds that social media caused devastation in committing genocide against the Rohingyas through the active participation of the common people of Myanmar, including the active participation of women and youth. By using social media platforms, women basically spread hate speech, and propaganda, supported tactical work and partisan tasks. They also get easy access to the Ma Ba Tha group due to social media. Youth are the most vulnerable group to get affected. Due to social media, they believed all the rumours spreading through Facebook that made tensions in the Rakhine community. The article thus concludes that social media plays an important role in inciting genocidal acts in Myanmar.

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Victims as 'Means to an End': An Investigation into the Construction of CRSV Victimhood in the ICTY

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Abstract

Law has the power to pronounce truth. In the context of conflict-related sexual violence (CRSV), this paper illustrates law's ability to define, legitimise and privilege some narratives of victimhood, while also misinterpreting, silencing, and suppressing others. Looking at courtroom transcripts from the International Criminal Tribunal for the former Yugoslavia (ICTY), this pilot study investigates the witness testimonies of four Bosniak women who, during the Yugoslav Wars, were detained in camps and systematically raped by Serbian soldiers. A contextualised, micro-level, qualitative approach is taken to analyse their testimonies, looking specifically at the courtroom process, conduct between actors and narration of events. Through victim-witnesses' words the wider structures and individual realities of CRSV are brought to light, with their experiences revealing ethnic tensions at play, ideas of nation-wide justice, and a strong, determined character in victims. Yet this paper argues that such narratives of victims were not acknowledged or understood by either the defence or the prosecution, suggesting that the tribunal failed to gauge the reality of CRSV. Given law's power, and therefore the ICTY's power, to pronounce truth, this study is crucial for international legal bodies going forward to improve the comprehension, prosecution, and, ultimately, the interruption of CRSV.

Introduction

Scholars have already investigated the power that international criminal law possesses when constructing narratives of wartime victimhood, especially sexual violence victimhood.[1] However, less is known about the experiences of victims who

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have testified as witnesses before these tribunals,[2] and whether these legal narratives prove accurate to the narratives of victims themselves.

Specifically investigating the International Criminal Tribunal for the former Yugoslavia (ICTY) as an ad hoc tribunal under international criminal law, the main aim of this criminological pilot study is to examine the construction of an ideal victim of conflict-related sexual violence (CRSV). To realise this, the paper examines ICTY courtroom practices, analysing court transcripts to understand how different parties construct victimhood throughout a trial. Overall, the question the paper seeks to answer here is, are the ICTY's courtroom practises aware and acknowledging of victim-witnesses' own narratives of CRSV victimhood? Thinking more generally and throughout analysis it will ask, what is the courtroom process like? How do actors interact? And can victims construct their own narrative within this context?

This article will first look at law's power to pronounce truth and the many discussions surrounding the definition of victimhood. It will then provide some context on the Yugoslav Wars and background information on the case investigated, delving into the processes and aims of the ICTY. It goes on to explain the chosen methodology, including ethical considerations, data collection, and data analysis. Finally, based on the research findings, it uses a criminological approach to argue that victims' narratives and the prosecution's narratives do not always run parallel. Ending with a discussion of the implications of this conclusion for future legal approaches to sexual violence victims as witnesses, it argues that there is a lack of consideration regarding the everyday experience of sexual violence in conflict. An interruption of the production and reproduction of clear dichotomies between victim/agent and exceptional/ordinary used by law both internationally and on a state-level is required to resolve this issue. While the process of extracting witnesses' true opinions required a great deal of scrutiny, this paper also makes an argument for the use of court transcripts as data.

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1 See Doris E Buss, "Knowing Women: Translating Patriarchy in International Criminal Law," *Social & Legal Studies* 23, no. 1 (2014), https://doi.org/10.1177/0964663913487398; Mark A Drumbl, *Atrocity, Punishment, and International Law*, (Cambridge University Press, 2007), 3. https://doi.org/10.1017/CBO9780511611100; and Kirsten Campbell, "The Laws of Memory: The ICTY, the Archive, and Transitional Justice," *Social and Legal Studies* 22, no. 2 (December 2012), https://doi.org/10.1177/0964663912464898.

2 Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005), 17, https://www.jstor.org/stable/j.ctt3fhm43.

This paper asserts that transcripts uncover a great deal about the process, practices, and conduct of the courtroom, as well as witnesses' emotions and thoughts during the experience.

Literature

Defining the 'Ideal Victim' of Sexual Violence

In the past half-century, the world has witnessed numerous incidents of extreme violence within large scale conflicts. The 1990s alone first saw mass genocidal killings of Tutsi political leaders by Hutu militias who believed in Hutu ethnic superiority during the Rwandan Civil War.[3] It saw ethnic cleansing, mass murder and rape of Bosniak Muslims by Serbian army and militias during the Yugoslav Wars.[4] Along with many violent actions during the First and Second Congo Civil Wars, such as the exploitation, hunting, killing, and even eating of Bambuti pygmies.[5] Such extreme and wide-scale violence, targeted at a civilian population, is understood as 'crime against humanity'.[6] Previously, due to the scale and international scope, and complex systems of victimhood associated with such war crimes, many criminologists had either not identified atrocity as relevant or viewed it as too large a task, leaving a general criminological gap in the study of atrocity for most of the 20th century.[7] Yet, legal developments in the 1990s saw a growth in criminological interest in atrocity crime, specifically with the development of international and hybrid judicial institutions.[8] These advancements sparked questions on how to define victimhood.

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3 André Guichaoua, "Counting the Rwandan Victims of War and Genocide: Concluding Reflections," *Journal of Genocide Research* 22, no. 1 (2020): 127, https://doi.org/10.1080/14623528.2019.1703329.

4 Catherine Baker, *The Yugoslav Wars of the 1990s* (London: Bloomsbury Publishing, 2015), 57–76.

5 Jonathan Clayton, "Pygmies Struggle to Survive in War Zone Where Abuse is Routine," *The Times*, December 16, 2004. Accessed July 4, 2023 https://www.thetimes.co.uk/article/pygmies-struggle-to-survive-in-war-zone-where-abuse-is-routine-zb6g8sz50t6.

6 Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst "Crimes Against Humanity," in *An Introduction to International Criminal Law and Procedure*, 2nd edition, (Cambridge: Cambridge University Press, 2010) 230–66. https://doi.org/10.1017/CBO9780511760808.012.

7 Andy Aydın-Aitchison, Mirza Buljubašić, and Barbora Holá, "Criminology and Atrocity Crimes". In *The Oxford Handbook of Criminology* 7th edition, ed. Alison Liebling, Shadd Maruna, and Lesley McAra. (Oxford: Oxford University Press, 2023), 2.

8 Aydin-Aitchison, Buljubašić and Holá, "Criminology and Atrocity," 2.

According to Quinney, there are three main constructions of the concept of 'the victim': the common-sense constructions (public opinion), officially designated victims (recognised through criminal law), and criminologically constructed victims.[9] Crucially, definitions are dependent on the experience and standpoint of the individual producing them.[10] This can prove problematic when conceptualising victimhood within complex conflicts, such as the Yugoslav Wars.[11] Just as Quinney saw victimhood as often constructed through 'common-sense', Christie famously conceptualised the "ideal victim" as victimhood that is acceptable to common social constructions – weak, respectable, blameless, unrelated to the offender, and 'good' to the offenders' 'bad'.[12] Building on this, Schwobel-Patel brought the "ideal" victim into the realm of international law.[13] She argues that the role of victims is becoming central to criminal law's practices and discussions, and that this increased attentiveness to victims is leading to a "visual and discursive specification of victimhood".[14] Using the example of the International Criminal Court, she argues that proponents of international criminal law invoke a certain image of victimhood as a means of self-legitimization.[15] She argues that the 'ideal' victim in the eyes of international law is identified as (a) weak and vulnerable, (b) dependent, and (c) grotesque.[16] These aspects merge to form a "feminised, infantilized, and racialized stereotype of victimhood".[17] Engulfed by innocence and silence, the 'ideal victim' assumes a moral superiority over their victimiser.[18]

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9 Richard Quinney, "Who is the victim", *Criminology*, 10, no. 3, (November 1972): 314–323, https://doi.org/10.1111/j.1745-9125.1972.tb00564.x.

10 For discussion see Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (Ithaca: Cornell University Press, 1991): 268, https://doi-org.ezproxy.is.ed.ac.uk/10.7591/9781501712951.

11 Amaia Álvarez Berastegi and Kevin Hearty, "A Context-Based Model for Framing Political Victimhood: Experiences from Northern Ireland and the Basque Country", *International Review of Victimology*, 25, no. 1, (9 July 2018): 20 –21, https://doi.org/10.1177/0269758018782237.

12 Nils Christie, "The Ideal Victim", In *Revisiting the 'Ideal Victim'* ed. Marian Duggan (Bristol, UK: Policy Press, 2019), 11–24.

13 Christine Schwobel-Patel, "The Ideal Victim of International Criminal Law", *European Journal of International Law*, 29, no. 3, (2018). https://doi.org/10.1093/ejil/chy056.

14 Schwobel-Patel, "The Ideal Victim", 703–705.

15 Schwobel-Patel, "The Ideal Victim", 703–705.

16 Schwobel-Patel, "The Ideal Victim", 703–705.

17 Schwobel-Patel, "The Ideal Victim", 703–705.

18 Jan Van Dijk, "Free the Victim: A Critique of the Western Conception of Victimhood", *International Review of Victimology*, 16, no. 1, (1 May 2009): 6, https://doi.org/10.1177/026975800901600101.

In relation to CRSV, the enthusiasm of justice institutions to acknowledge gender violence and inequality in wartime has been the subject matter of both current feminist activism and critique.[19] For many feminists, international courts offer a space within which the gendered effects of armed conflict can be made visible to the world.[20] Certainly, since the Nuremberg Trials, international tribunals have improved by way of acknowledgement and prosecution of CRSV.[21] In 1997, the International Criminal Tribunal for Rwanda (ICTR) formed a new Unit for Gender Issues and Assistance to Victims of the Genocide in order to address the gendered aspects of atrocity.[22] In this sense, preceding and present ad hoc tribunals, such as the ICTY, could help to end the historic erasure of women from the post-war accounts of violence and its effects.[23] However, despite the advancements that criminal law is making, scholars have critiqued the way transnational justice institutions perpetuate problematic assumptions about victims of CRSV, arguing that these victims' experiences and realities are being incorrectly defined in order to fit an ideal.[24]

First, discourse within criminal law has been found to associate 'victim' with 'women', and 'women' with 'sexual violence'.[25] Buss examines how international criminal courts define women's experiences of large-scale violence, finding that in another case from the ICTY the Srebrenica Genocide was defined as such on the basis that the majority of those killed in Srebrenica were men and that this would have an effect on the "patriarchal nature of the Bosnian Muslim community"[26]. Yet Buss argues that the definition of genocide was clear due to the scale and ethnically- and politically-charged

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19 Nicola Henry, "The Fixation on Wartime Rape: Feminist Critique and International Criminal Law", *Social and Legal Studies*, 23, no. 1, (2014): 93. https://doi.org/10.1177/096466391349906.

20 Fionnuala D. Nı´ Aola´in, "Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies", *Queen's Law Journal*, 35 (2009): 16. http://dx.doi.org/10.2139/ssrn.1507793.

21 Mark A Drumbl, *Atrocity, Punishment, and International Law*, 3.

22 "The International Criminal Tribunal for Rwanda and Women Victims and Witnesses of the Rwandan Genocide - The Facts," United Nations International Residual Mechanism for Criminal Tribunals, February 18, 1998, https://unictr.irmct.org/en/news/international-criminal-tribunal-rwanda-and-women-victims-and-witnesses-rwandan-genocide-facts.

23 Henry, "The Fixation on Wartime Rape", 106.

24 For example see, Fionnuala D. Nı´ Aola´in, "Advancing Feminist Positioning in the Field of Transitional Justice", *International Journal of Transitional Justice*, vol 6 (2012). https://doi.org/10.1093/ijtj/ijs013.

25 Cynthia Enloe, *The Curious Feminist: Searching for Women in a New Age of Empire* 1st edition (Berkley: University of California Press, 2004): 101–109, http://www.jstor.org/stable/10.1525/j.ctt1pnb63.10.

26 Buss, "Knowing Women", 74.

motivations of the killers,[27] rather than gender-based structures of the victimised community. Such misrepresentations have the effect of rendering victims as one-dimensional and their experiences of structural effects of inequality (contingent to large-scale conflict) invisible.[28]

Secondly, Leiby argues that commonly employed definitions of sexual violence are often too narrow and can misrepresent the sexualised nature of violence, notably against men.[29] As Charman found, international legal tribunals have historically described distinct acts of sexual violence against men as torture.[30] Specifically in relation to rape, Sellers states that since international courts interpret rape to constitute torture, slavery, and genocide, that suggests that "acts of sexual violence fit within the prism of peremptory norms".[31] Also referred to as *jus cogens* (Latin for "compelling law"), peremptory norms are the fundamental norms, values, and principles that are widely accepted by international law.[32] Sellers goes on to say that rape and sexual violence may only "reach the glory of *jus cogens*" if linked as part of other crimes.[33] Therefore, in the context of war crimes, rape is only prosecutable when "piggybacked" with larger, organised crime.[34] When instances of rape are distorted in such a way, they ignore the individual, sexual and gendered aspects of such crimes, maintaining problematic societal conventions surrounding both female and male victimisation.[35] This leads to the debate on which CRSV crimes international criminal law should focus on. There has been much discussion about the need to treat international crimes as separate, both procedurally and substantively, from 'ordinary' domestic crimes.[36] For

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27 Buss, "Knowing Women", 88.

28 Nı´ Aola´in, "Advancing Feminist Positioning", 220.

29 Michele Leiby, "Uncovering Men's Narratives of Conflict-Related Sexual Violence", in *Sexual Violence Against Men in Global Politics* 1st edition, ed. Marysia Zalewski et al (Routledge, 2016): 143-147. https://doi.org/10.4324/9781315456492-14.

30 Thomas Charman, "Sexual Violence or Torture?", in *Sexual Violence Against Men in Global Politic*s 1st Edition ed. Marysia Zalewski et al (Routledge, 2019): 200. https://doi.org/10.4324/9781315456492-18.

31 Patricia Sellers, "Sexual violence and peremptory norms: The legal value of rape", *Case Western Reserve Journal of International Law*, 34, no. 3, (2002): 296.

32 Sellers, "Sexual Violence and Peremptory Norms", 296.

33 Sellers, "Sexual Violence and Peremptory Norms", 296.

34 Sellers, "Sexual Violence and Peremptory Norms", 297.

35 Valerie Oosterveld, "Sexual Violence Directed against Men and Boys in Armed Conflict or Mass Atrocity: Addressing Gendered Harm in International Criminal Tribunals", *Journal of International Law and International Relations*, 10, (2014). https://core.ac.uk/download/pdf/215389992.pdf

36 David J. Scheffer, "The Future of Atrocity Law," *Suffolk Transnational Law Review*, 25, no. 3, (2002): 389-432.

example, Scheffer argues that “international courts [should be] used sparingly and fairly to bring the worst perpetrators of atrocity crimes to justice”[37]. Yet, others argue that this campaign to bring “the worst” to justice has come to fruition as part of a pattern of international courts prioritising ‘exceptional’ or ‘extraordinary’ elements of crimes in their prosecution strategies.[38] When seeking to understand this decision-making process, one may argue that ad hoc tribunals, such as the ICTY, cannot undertake every case of sexual violence that has occurred during the sometimes decade-long wars they consider.[39] That they must instead focus on “crimes of significant magnitude that have seized the world's attention”[40] Equally, one may look to Schwobel-Patel again, who explains the construction, normalisation, and reproduction of an 'ideal' victim within international criminal law further by conceptualising the “attention economy”.[41] The “attention economy” sees attention as a limited and in-demand resource.[42] Crucially, global justice actors compete for attention in this system.[43] This desire for both speed and effectiveness proves why international criminal law’s attention is rewarded to severe and spectacular victims at the expense of mild and moderate victims. Indeed ‘outrageous’ rape cases have become somewhat of a passion for international criminal law, “no doubt an important marketing strategy of international criminal law’s image of itself as an enlightened, progressive moral force that has the power to vindicate victims, prosecute villains and end impunity for these egregious crimes”.[44]

Therefore, what must be kept in mind throughout this paper is the clear ability of law to (a) define, legitimise and privilege some narratives, while (b) misinterpreting, silencing, and suppressing others.[45] In short, law has the power to pronounce ‘truth’[46] so acknowledgement of the victims’ realities is essential for international tribunals,

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37 David J. Scheffer, “The Future of Atrocity Law,” 432.

38 Henry, “The Fixation on Wartime Rape”, 100; for further discussion see Mark A Drumbl, *Atrocity, Punishment, and International Law*, 3–6; and David Luban, “A Theory of Crimes Against Humanity”, *Yale Journal of International Law* 29, no. 1, (2004): 100. https://scholarship.law.georgetown.edu/facpub/146.

39 Scheffer, “The Future of Atrocity Law”, 431.

40 Scheffer, “The Future of Atrocity Law”, 431.

41 Schwobel-Patel, “The Ideal Victim”, 703.

42 Schwobel-Patel, “The Ideal Victim”, 703.

43 Schwobel-Patel, “The Ideal Victim”, 703.

44 Henry, “The Fixation on Wartime Rape”, 106.

45 Henry, “The Fixation on Wartime Rape”, 106.

46 Henry, “The Fixation on Wartime rape”, 97; Buss, “Knowing Women,” 88.

especially in the case of victims of CRSV. Here I conduct a criminological pilot study that asks: are the ICTY courtroom practises aware and acknowledging of victim-witnesses' own narratives of CRSV victimhood?

War, Tribunal and Witness

The ICTY is an international ad hoc tribunal, set up with the purpose of prosecuting war crimes committed during the Yugoslav Wars, a series of separate but related ethnic conflicts that took place in the former Yugoslavia between 1991 and 2001.[47] Conflicts both emerged from and resulted in the breakup of Yugoslavia into independent countries corresponding to the six previous republics.[48] Among these was Bosnia and Herzegovina (BiH), inhabited by mainly Muslim Bosniaks and Orthodox Serbs, with a smaller population of Catholic Croats.[49] The Bosnian War started when BiH declared its independence in early 1992, following Slovenia and Croatia which both did so in mid-1991.[50] After declaring independence, the Bosnian Serbs, led by Radovan Karadžić and supported by the Serbian government of Slobodan Milošević and the Yugoslav People's Army (JNA), organised their forces inside Bosnia and Herzegovina to ensure an ethnically Serb territory.[51] The goal of the JNA can be characterised as ethnic cleansing, which included the systematic capture, detention, and rape of Bosniak women across BiH.[52]

In this paper I look at the town of Foča, located in the south-east of Bosnia, where mass rapes occurred as part of this genocidal goal. Women were kept in various make-shift detainment centres such as the Foča High School, or 'Partizan' Sports Hall.[53] They lived there in unhygienic conditions where they were malnourished,

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47 Baker, *The Yugoslav Wars,* 99.

48 Baker, *The Yugoslav Wars*, 24.

49 Baker, *The Yugoslav Wars*, 57.

50 Baker, *The Yugoslav Wars*, 57.

51 Baker, *The Yugoslav Wars*, 50–68.

52 Edina Becirevic, *Genocide on the Drina River* (Yale University Press, 2014) 89, Yale Scholarship Online, https://doi-org.ezproxy.is.ed.ac.uk/10.12987/yale/9780300192582.001.0001.

53 United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia, *Case Information Sheet: "FOČA" (IT-96-23 and 23/1) Kunarac, Kovač and Vuković.* https://www.icty.org/x/cases/kunarac/cis/en/cis_kunarac_al_en.pdf.

mistreated, and repeatedly raped.[54] Serbian soldiers or policemen would come to these detention centres, select one or more women, take them out and rape them; some girls were kept in apartments or even sold as sex slaves.[55] Here I study the testimonies given by four of these women in front of an ICTY court in an attempt to understand their experiences as victims of sexual violence called to testify as witnesses. These four witnesses were chosen due to their varying ages, experiences, and attitudes, in order to understand the complexities of victimhood.

For this pilot study I selected the *Kunarac et al.* Case,[56] often referred to as the 'Foča Trial'. It covers the crimes committed in relation to the mass rape in Foča outlined previously. This was the second ICTY trial to deal entirely with charges of sexual violence, however this wasn't the only aspect of the case that served as a landmark. The judgement widened the definition of enslavement to cover not just forced labour and servitude but also sexual servitude.[57] It also found all three accused to be guilty of rape as a crime against humanity – again, the first conviction of its kind in ICTY history.[58]

A key part of the trial that this paper examines was the evidence given by the victims through oral testimony. Oral testimony refers to testimony where witnesses are physically present in court to answer questions and tell of their experience.[59] In the ICTY the process of testifying follows three key stages.[60] First, witnesses are brought forward by one side (in this case the prosecution), which begins by asking the witness

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54 United Nations, *Case Information Sheet: "FOČA" (IT-96-23 and 23/1) Kunarac, Kovač and Vuković.*

55 United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia, *Trial Summary Judgement Of Trial Chamber Ii In The Kunarac, Kovac And Vukovic Case.* JL/P.I.S./566-e. The Hague: 22 February 2001. https://www.icty.org/en/cases/judgement-list.

56 United Nations, *Case Information Sheet: "FOČA" (IT-96-23 and 23/1) Kunarac, Kovač and Vuković.*

57 ICTY, "Landmark Cases," United Nations International Criminal Tribunal for the former Yugoslavia, accessed March 18, 2023, https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases.

58 ICTY, "Landmark Cases."

59 ICTY, "Witnesses - FAQs," United Nations International Criminal Tribunal for the former Yugoslavia, accessed September 19, 2023 https://www.icty.org/en/about/registry/witnesses/faq#5.

60 ICTY, "Criminal Proceedings" United Nations International Criminal Tribunal for the former Yugoslavia, accessed March 18, 2023 Criminal Proceedings | International Criminal Tribunal for the former Yugoslavia (icty.org).

questions; this is referred to as “direct examination”.[61] When the prosecution is finished with the direct examination, the defence begins “cross-examination”, where they also question the witness.[62] Finally, the side that brought the witness to the stand may ask them further questions related to issues raised in the cross-examination, this is known as “re-direct examination”. On top of this, the judges may ask questions at any time during the witness testimony.[63]

Of note in this trial was the presence of Rule 96 of the Rules of Procedure and Evidence,[64] used specifically in cases of sexual assault. Here I focus on victim-witnesses, who are characterised by the ICTY either by their experience, witnessing, or familial relation to a victim of a crime. Many of these victim-witnesses “still suffer physical and psychological trauma from the horror that they lived through”,[65] and indeed, “for these people, the act of testifying is an extremely courageous one”.[66] Rule 96 states that no corroboration of the victim’s testimony shall be required.[67] Consent shall not be allowed as a defence if the victim has been subjected to, threatened with, or has had reason to fear violence, duress, detention or psychological oppression, or that another person might be subjected to sexual assault.[68] Crucially, prior sexual conduct of the victim shall not be admitted in evidence.[69]

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61 ICTY, “Criminal Proceedings.”
62 ICTY, “Criminal Proceedings.”
63 ICTY, “Criminal Proceedings.”
64 United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, *Rules of Procedure and Evidence.* IT/32/Rev.50, The Hague, The Netherlands: United Nations, July 8, 2015. https://www.icty.org/en/documents/rules-procedure-evidence (Accessed September 19, 2023).
65 ICTY, “Witnesses”, United Nations International Criminal Tribunal for the former Yugoslavia, accessed March 18, 2023 Witnesses | International Criminal Tribunal for the former Yugoslavia (icty.org).
66 ICTY, “Witnesses.”
67 ICTY, “Witnesses.”
68 ICTY, “Witnesses.”
69 ICTY, “Witnesses.”

Methodology

Ethical Considerations

In terms of ethics, there were two main considerations made prior to and during the research and writing stages of this paper. The first I have termed 'harms and benefits'.[70] Research on human suffering is so painful that some argue that it is only justified if it contributes to the end of that suffering.[71] Ethical sensitivity and care are fundamental when investigating horrors and atrocities suffered, most notably in this case where the rape of these women was violent and ugly. Criminologists using public court transcripts have no direct interaction with witnesses, as these are secondary sources of data. Nonetheless what they reveal is by all means personal, and ethical issues are no less severe than during primary data collection. One of the basic ethical principles outlined in the Belmont report is beneficence.[72] Beneficence means minimising the risks of harm and maximising the potential benefits for subjects.[73] To ensure beneficence, data was gathered from enterprises that have already been performed, maintaining confidentiality, and monitoring the data to assure the safety of subjects.[74].

The second consideration is contextualising.[75] In researching war crimes both subjects and researchers become situated in an often extreme, violent, and politicised field.[76] To fully comprehend CRSV one must consider its everyday experience, as sexual violence often becomes daily reality for many victims. Analysis must therefore be contextualised within the circumstances of the conflict.[77] In order to address this, I

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70 Jelena Subotić, "Ethics of Archival Research on Political Violence", *Journal of Peace Research*, 58, no. 3, (2021): 342–344, doi:10.1177/0022343319898735.

71 Karen Jacobsen and Loren B. Landau, "The Dual Imperative in Refugee Research: Some Methodological and Ethical Considerations in Social Science Research on Forced Migration", *Disasters* 27, no. 3, (2 September 2003): 185 –206, doi:10.1111/1467-7717.00228.

72 Subotić, "Ethics of archival research", 343.

73 Subotić, "Ethics of archival research", 343.

74 Subotić, "Ethics of archival research", 343.

75 Subotić, "Ethics of archival research", 347.

76 Kirsten Campbell, "Ethical Challenges: Researching war crimes", *in Research Ethics in Criminology: Dilemmas, Issues and Solutions* 1st edition ed. Malcolm Cowburn, Loraine Gelsthorpe, and Azrini Wahidin (Abingdon: Routledge, 2017): 154. https://doi.org/10.4324/9781315753553-18.

77 Campbell, Kirsten, Elma Demir, and Maria O'Reilly. "Understanding Conflict-Related Sexual Violence and the 'Everyday' Experience of Conflict Through Witness Testimonies", *Cooperation and Conflict* 54, no. 2 (June 2019): 255. https://doi.org/10.1177/0010836719838586.

have first moved analysis beyond single offences by considering the full extent of harms experienced by CRSV victims as well as the everyday experiences and decisions they made when dealing with CRSV.

The context of the trial was also considered. Viewing court documents years after trials can mean that transcripts are often completely decontextualized from the social or biographical context in which they were created, indicating that they may be unreliable and subject to ethically challenging interpretations. I have delved into gender norms and structures of power that affect these victims both inside and outside of the courtroom in order to address the ethical consideration of context.[78]

Using Testimonial Archives as Data

This paper takes its data from the testimonial archives of the ICTY; however, there are some issues that come with using transcripts. For one there is a lot of inaccessible information. Often there are redactions, hidden identities, or invisible early stages where witnesses are briefed.[79] On top of this, large parts of the scripts prove to be somewhat impractical, such as areas where there are issues of communication between parties or technical problems. Such areas interrupt the flow of dialogue and therefore the flow of analysis, extending the amount of time it takes to analyse dialogue.[80]

Crucially, the process of questioning in the court, including what questions are asked and what the aims and direction of questioning are, is out of the researchers' hands.[81] Judges ensure discussions remain relevant to the court's aims, while parties structure their questioning according to their own aims. In this sense, witnesses are being asked different questions than criminologists would perhaps ask them. Despite the differing goals between researchers and courtroom parties, this may in fact be a positive for

78 Campbell, "Ethical Challenges", 156.

79 Andy Aydin-Aitchison, "Handle with Care: ICTY, Juridical By-Products and Criminological Analyses" in *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach* ed. Carsten Stahn, Carmel Agius, Serge Brammertz, and Colleen Rohan (Oxford: Oxford University Press, 2020): 4 https://doi.org/10.1093/oso/9780198862956.003.0012.

80 Aydin-Aitchison, "Handle with care", 3–9.

81 Aydin-Aitchison, "Handle with care", 3–9.

criminological research. The very acknowledgement that courtroom discussions are led by legal parties' interests bears the question of whether victims' interests are being considered. Viewing the interactions between actors without the influence of a researcher's presence allows criminologists to see their goals clearly and to understand the context and processes within which they interact.

The aim of this paper, as mentioned above, is to investigate courtroom practices when defining and recognising witness-victims of rape and sexual violence. It therefore fits that the transcripts of such legal frameworks in action would fit as this papers source of data. In particular, the ICTY is a vast and authoritative body. Its archives contain more than 2.5 million pages of transcripts, indictments of over 160 individuals, and testimonies from over 4,650 witnesses.[82] Specifically for investigations into CRSV, testimonies made by witnesses before international courts can provide richer accounts of these crimes, insights into the situated and lived experiences of such victims, and evidence of the sometimes banal strategies they adopt in order to survive or resist the violent and coercive way of war.[83] In short, despite the complicated process of analysis, testimonies are a useful and relevant source for this paper, offering meaningful and contextualised information that reveals the feelings, interactions and lived experience of the victim-witness.

Data Collection

News articles,[84] the case information sheet,[85] and preceding literature[86] about the trial was read to narrow in and find key witness numbers and events. From here, four key witnesses were identified for investigation, namely Witnesses 62, 51, 50, and 75. Witness 62 is a grandmother; Witness 51 is her daughter, and Witness 50 is her granddaughter. Witness 75 is a similar age to Witness 50. By investigating these particular victim-witnesses, interconnected as family members and varying in age,

82 ICTY, "Infographic: ICTY Facts & Figures" United Nations International Criminal Tribunal for the former Yugoslavia, accessed March 18, 2023, https://www.icty.org/node/9590.

83 Campbell et al, "Understanding Conflict," 257.

84 IWPR, "Foča Rape Case," *Institute for War and Peace Reporting*, February 14, 2001. Accessed March 18, 2023, https://iwpr.net/global-voices/foca-rape-case

85 UNITED NATIONS, *Case Information Sheet: "FOČA" (IT-96-23 and 23/1) Kunarac, Kovač and Vuković.*

86 Becirevic, "Genocide in Eastern Bosnia"

experience, and attitude, I hope to illustrate the complexities of CRSV victimhood. The transcripts of their testimonies were found on the ICTY website and were studied for relevant sections such as mentions of sexual violence and rape. This narrowed the original 2.5 million pages of transcripts available in the ICTY archives down to 1,000 relevant pages, pertaining to court discussions from 20 March to 3 April 2000, which covered the victim-witnesses' experiences in conflict.

Analytical Approach

As advised by Campbell et al, a contextualised, micro-level, qualitative approach was taken to analysis. Micro-level refers to analysis that focuses on small subjects of study, such as individuals, small groups, or social settings.[87] Equally the research of this paper is qualitative, in the sense that it investigates different actors' understandings of concepts and situations through their own words. Qualitative research is interpretivist, in that it aims to "derive meaning and understanding through the interpretations of others".[88] In this case, the narratives and perceptions of victims and legal actors within one courtroom was the focus of the research.

Analysis was conducted through NVivo, a software that works with unstructured data, aiding the researcher in interpreting, coding, and structuring that data. Woolf and Silver make clear that NVivo does not do the analysis for researchers, rather – if "harnessed powerfully" – it can give meaning to the mass.[89]

Coding was done through a process termed "stages of effective coding" by Finch and Fafinski.[90] Through this process, words and phrases were coded into concepts (open coding), which were coded into categories (axial coding), which were then compared to draw a final conclusion (see Table 1). The process began with reading through a few of the interview transcripts in their entirety to familiarise myself, as the researcher, with the data. Starting with the first transcript, I highlighted relevant words, phrases,

87 Campbell et al. "Understanding Conflict," 256.

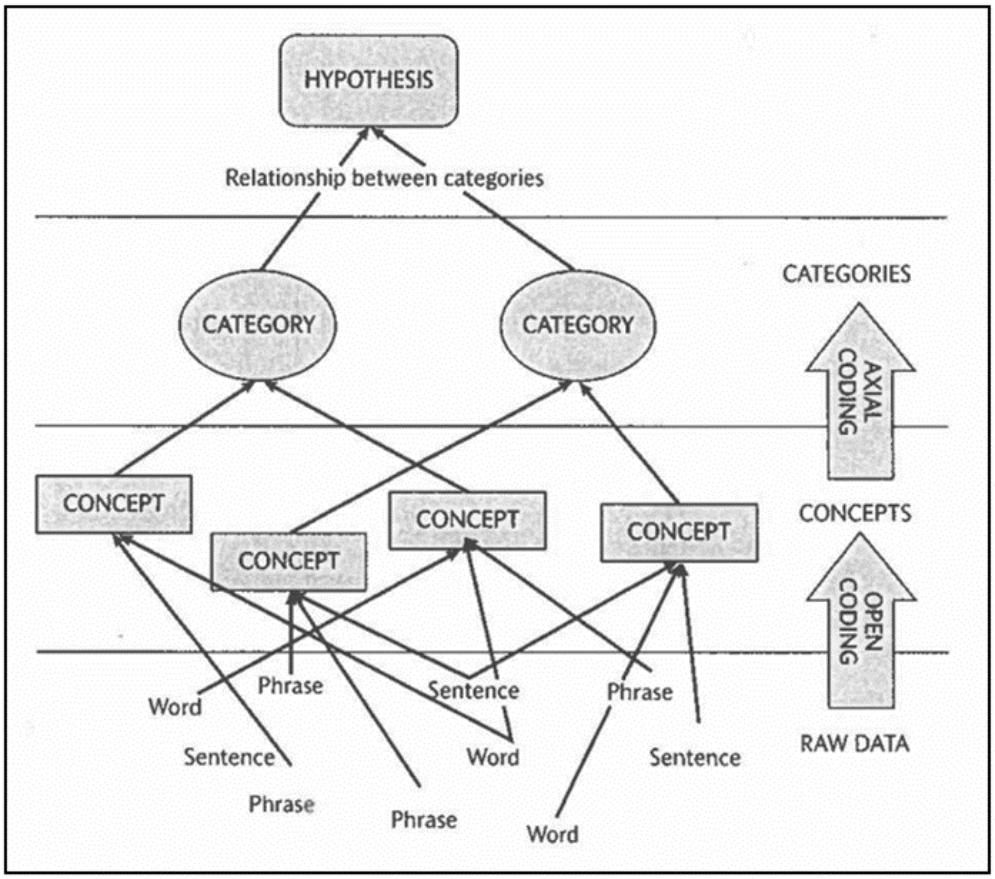
88 Emily Finch and Stefan Fafinski, "Qualitative Analysis", in *Criminology Skills* ed. Emily Finch and Stefan Fafinski (Oxford: Oxford University Press, 2019): 383.

89 Nicholas Woolf and Christina Silver, *Qualitative Analysis Using NVivo: The Five-Level QDA Method 1st edition*, (New York: Routledge, 2017): 1–9, https://doi.org/10.4324/9781315181660.

90 Finch and Fadinski, "Qualitative Analysis", 387.

and sentences and grouped them under different codes. I then moved onto the next transcript and repeated this process. Subsequent transcripts, as expected, revealed new themes that had previously not emerged; therefore, a second read through of previous scripts was necessary to see if new themes were relevant.

Table 1: Approach to Coding (where 'concept' is equal to 'code)[91]



Categories, such as 'Weakness', were somewhat determined from previously read literature.[92] However, a few additional categories emerged as research was being conducted. For example 'War and Ethnicity' had not been previously considered, but it became apparent through reading that to leave out the part that ethnic tensions played would be to gravely misunderstand these victims. Looking specifically at my categories (see Table 2), instances related to 'Rape and Sexual Violence' were identified to first situate the research in the relevant areas of the transcript. General violence was used to identify the threat that accompanies rape in these contexts, and within this the presence of taunting during these crimes revealed much about the

91 Finch and Fadinski, "Qualitative Analysis", 387.
92 Schwobel-Patel, "The Ideal Victim," 710.

ethnic nature of these crimes. These steps led to ‘War and Ethnicity’, which allowed the research to see victim-witnesses within their contexts and better understand their realities before both war and trial. ‘Agency’ referred to moments where victim-witnesses spoke for themselves, their goals, or their experiences. Additionally, ‘Weakness’ allowed an understanding of the prosecution's conceptualisation of victimhood. Lastly, ‘Conduct’ referred to the nature of interactions between courtroom parties, including discernible tone and repetition, revealing what each party found important and how differing narratives related in the context of the courtroom.

Table 2: Codes and Categories

Rape and Sexual violence	General Violence	War and Ethnicity	Agency	‘Ideal’ Weakness	Conduct
Rape Sex Sexual violence Sex crime Sexualised body parts	Assault Threaten Weapon Taunting	Serb/Chetnik Muslim Ethnicity Information Soldiers Before war During war Peace	Justice Speak up Assertiveness	Forced Frightened Trapped Weak/Frail Shame Consent	Care for witness Interrogation Interruption Witness narration Exasperation/Hostility

Overall, NVivo assured a systematic reading and coding of the transcripts without requiring manually noting down phrases or their location. It can be said without a doubt that the process of ‘effective coding’ and analysis thoroughly involved myself as the researcher, making clear the context of the data as a whole, as well as the differences between transcripts and therefore between witnesses' experiences.

Findings

As outlined in preceding sections, my research was aimed towards instances where (a) witnesses’ feelings and thoughts and (b) the courtrooms' aims and pursuits were apparent. Here I will focus specifically on my findings relating to the three most saturated and valuable codes, in the sense that they reveal most clearly how these victims were understood with the Tribunals process: ‘Conduct’, ‘Weakness’, and

'Agency'. For each code, I will look at the narratives of sexual violence victimhood produced by, and the intricacies of exchange between, the defence, the prosecution, and the witnesses.

Courtroom Conduct and Witness Credibility

'Conduct' refers here to the quality of interactions between prosecution, defence, judge and the witnesses. Across the four transcripts, only five references to care being shown towards the victim-witness were found. This included both prosecution and judges expressing words of comfort, such as "I realise this is difficult"[93] and "we appreciate the problems you've gone through, and we know that it's very difficult for you to relive".[94] Having said this, I found that care shown towards the witnesses was particularly scarce during cross examination by the defence. Witnesses' credibility is questioned, particularly their quality of memory, yet it becomes clear that insistent and provocative questioning does nothing to aid such memory as witnesses become angered and exasperated. An example of this is when Witness 62 struggled to remember details about one of the accused:[95]

"W62:	I didn't know what to do with myself, here I was, and I lost my family, eight family members. Eight family members I lost, and my husband.
Prosecutor J:	I know that eight years have gone by since then at this point in time we are talking, but five years ago
Judge M:	Witness, would you like a break?
W62:	No, I wouldn't. But I don't want to be mistreated to such an extent. I don't want to be provoked in this way by anyone".

93 *Prosecutor v. Kunarac et al*, IT-96-23 (27 March 2000): 987.
94 *Prosecutor v. Kunarac et al*, IT-96-23 (27 March 2000): 1045.
95 *Prosecutor v. Kunarac et al*, IT-96-23 (27 March 2000): 1035

Here the witness appears overburdened, as the defence incessantly continues questioning her for answers she does not possess, with one of the judges having to intervene and allow the witness some respite. This was one of many instances where the defence in particular caused witnesses to express exasperation, as Witness 50 found when being cross examined:[96]

"Prosecutor J:	Did you make this statement yourself?
W50:	Yes, I did.
Q.	Do you stand by what you stated here?
A.	I said I can't remember anymore.
Q.	So if I understand you correctly, you don't remember what you gave to the Prosecution.
A.	Is that a terrible thing, if I can't remember every detail?
Q.	I'm not asking you if it's a terrible thing.
A.	Well, then I'm telling you, I don't remember how it came about.
Prosecutor J:	Thank you, Your Honours. I have no further questions."

For witnesses the truth was always seen plainly, that they had been raped and that the rapists should be prosecuted and brought to justice. In the procedure of the court however, prosecution is not so black and white, evidence has to be presented and proven, witnesses must be tested, and their memory must be interrogated. Questions of consistency between statements given pre-trial and during trial are interrogated, and details of location, pictures, present people and even building layouts are all asked of the witness.[97] After a lengthy interrogation about an occasion where the witness

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96 *Prosecutor v. Kunarac et al*, IT-96-23 (30 March 2000): 1340.

97 See *Prosecutor v. Kunarac et al*, IT-96-23 (28 March 2000): 1082; and (29 March 2000): 1243.

and others were taken out to be sexually assaulted, the witness is asked to recall who was taken out with her. Witness 51 could not recall all the names and appears exasperated:[98]

> "W51 (cross-exam by Defence P): What else do you want me to say?"

When told by the Defence that she had no reason to be angry she replied:[99]

> "W51 (cross-exam by Defence P): What do you mean I have no reason? Did I have a reason to be raped? Did I want to be raped?"

While the point of cross-examinations is to elicit the truth and test the witness, it is not unwarranted to ask for recognition of a victim-witnesses' anguish. These women suffered immeasurably, and it is not unsurprising that memories of building layouts and room furniture have been forgotten.[100] Frustration at insistent questioning and misunderstanding is shown here to result in uncooperative and uncomfortable victim-witnesses. For victims of CRSV especially, it often takes years to come forward,[101] so sensitivity towards their situation may in fact aid the tribunal, as victims may feel more comfortable to share difficult memories.

The Prosecutions' 'Ideal' Victim

While the defence questioned the witness's integrity, the prosecution aimed to build a narrative of victimhood that was all too familiar. 'Weakness' here refers to this narrative. I found moments where the fragility or vulnerability of victims was made abundantly clear, and equally I found moments where complex narratives were ignored by the prosecution in an attempt to shape the victim into an 'ideal'.

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98 *Prosecutor v. Kunarac et al*, IT-96-23 (29 March 2000): 1223.

99 *Prosecutor v. Kunarac et al*, IT-96-23 (29 March 2000): 1223.

100 Chris R. Brewin, "Autobiographical Memory for Trauma: Update on Four Controversies," *Memory* 15, no. 3 (2007): 227–248, https://doi.org/10.1080/09658210701256423.

101 Stover, "The Witnesses," 89.

One of the most pivotal moments in Witness 75's testimony was when she recalled one of the accused coming to an apartment she was being kept in.[102] There the accused told Witness 75 that he had killed her uncle because he was forced to, although she says she did not believe this. He told her about what was happening in the war and what his superiors were saying. He then sexually assaulted her:[103]

> "Prosecutor U : You said he forced you. What do you mean by "force"?
>
> W75: Well, that I had to… I don't know how to explain this.
>
> Q: Did he threaten you or did he point a gun at you?
>
> A: No. No. He just said that he couldn't get an erection after everything. And then I had to use my hand and mouth to stimulate him so that he could get an erection to rape me."

This event was crucial for the prosecution, as part of the ICTY definition of rape is sexual penetration "by coercion or force or threat of force against the victim or a third person".[104] It was therefore important to the prosecution that it was clear the witness had been threatened. However, her answer complicated things for them. The witness stated there was no direct threat, yet she complied and even stimulated the soldier to speed the process up, showing the tactics she adopted to cope with and survive the violent circumstances of war. To demonstrate the evil of the accused/defendant the victim is painted as sexually pure, forced and threatened. Yet her reality is more complex than that. This is indicative of the flaws of legal definition of rape, as it is clear

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102 *Prosecutor v. Kunarac et al*, IT-96-23 (30 March 2000): 1451.

103 *Prosecutor v. Kunarac et al*, IT-96-23 (30 March 2000): 1452.

104 United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, *Prosecutor V Dragoljub Kunarac Radomir Kovac And Zoran Vukovic - Judgement.* IT-96-23& IT-96-23/1-A, The Hague, The Netherlands: United Nations, June 2002. https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf (Accessed September 19, 2023)

the prosecution's 'ideal' victim is equally dictated by legal frameworks as well as social constructions.[105]

The focus on penetration is clear through each of these women's testimonies. For example, Witness 50 is further examined by the prosecution and makes this clear:[106]

> "Prosecutor K: And then what did he do?
>
> W50: Then he raped me.
>
> Q. I apologise again for asking you specifics, but the Court needs to know. Can you describe what he did?
>
> A. This time he raped me vaginally.
>
> Q. Do you mean that he put his penis into your vagina?
>
> A. Yes."

And again, the next day:[107]

> "Prosecutor K: When you say "rape" what exactly do you mean?
>
> W50: I don't understand your question.
>
> Q: You said that this 40 -- this elderly man raped you. What exactly did he do?
>
> A: He forced me onto the bed to take my clothes off, and then he raped me, he attacked me and raped me.
>
> Q: Does it mean he put his penis into your vagina?

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105 Schwobel-Patel, "The Ideal Victim", 709-713.
106 *Prosecutor v. Kunarac et al*, IT-96-23 (29 March 2000): 1252-1253.
107 *Prosecutor v. Kunarac et al*, IT-96-23 (30 March 2000): 1390.

A: Yes."

The rigid definitions used provide no scope for nuance. Reducing these crimes to the body parts involved ignores the complexity of identities and social interactions at play between and around the victim and perpetrator. Delving further, the witness reveals a glimpse into their reality of what rape feels like and means to them. Witness 51 talks about her daughter being sexually assaulted for the first time:[108]

> "W51: She did not tell me immediately up there, but it was all clear to me when I saw her, when I saw the state she was in when she walked out, when I saw how much she cried. It was all clear to me what had happened."

In another instance Witness 50 explains she was taken from the high school to a house in Foča and raped by a solider who was a stranger:[109]

> "W50: He had a knife. He said to me, "You will see, you Muslim. I am going to draw a cross on your back. I'm going to baptise all of you. You're now going to be Serbs"."

Again, about another soldier she said:

> "W50: I don't remember exactly what he said to me. They were all speaking and saying the same things. Always they were saying, "You Muslim women, you Bule, we'll show you," and that's what they said, all of them, the same things.[110]"

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108 *Prosecutor v. Kunarac et al*, IT-96-23 (28 March 2000): 1192.
109 *Prosecutor v. Kunarac et al*, IT-96-23 (29 March 2000): 1277-1278.
110 *Prosecutor v. Kunarac et al*, IT-96-23 (29 March 2000): 1252-1253.

This is not the first suggestion that ethnicity played a big part in the rapes of these women. In other testimonies of the *Kunarac et al* Case, Witness 48 stated that soldiers told him of orders from superiors to rape their victims.[111] Another witness's rapist had said to her that Muslim women were being systematically raped "in order to be inseminated by the Serb seed".[112] For the prosecution the presence of a weapon and threat constitutes their definition, and the event is taken no further. However, a closer look here shows firstly, the emotional and often unspoken nature of sexual violence in these contexts and secondly, the ethnically charged motivations of their victimisers. Therefore, again the complex realities of CRSV do not always fit within the prosecution's straightforward and easily prosecutable 'ideal' account of events.

Witnesses' Agency in the Face of Adversity

'Agency' refers here to instances of assertiveness found from witnesses, including mentions of a need to 'speak up' for justice or an overcoming of shame. I found bravery in these victims, clear through their declarations of truth often in spite of the prosecution's efforts to build a weak narrative.

In one event during the witnesses' entrapment, several television channels and news teams visited the school for a day. During this visit, soldiers allowed them to film and told them "How they were looking after us […] how they had saved us"[113] as Witness 75 stated. When asked by the Prosecution why she had not spoken to the journalist and told the truth about what was happening Witness 75 replied:[114]

> "W75: Up to that day I had been raped by almost 50 of them. So how could I say anything, to look them in the eyes?"

Witness 75 shows the shame she feels as a victim of sexual violence, indeed earlier she also stated:[115]

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111 Becirevic, "Genocide in Eastern Bosnia", 122.
112 Becirevic, "Genocide in Eastern Bosnia", 117.
113 *Prosecutor v. Kunarac et al*, IT-96-23 (30 March 2000): 1400.
114 *Prosecutor v. Kunarac et al*, IT-96-23 (30 March 2000): 1401.
115 *Prosecutor v. Kunarac et al*, IT-96-23 (30 March 2000): 1333.

> "W75: When I came here, I got over my shame and decided to tell the whole incident as it happened."

Here it becomes apparent that Witness 75 feels compelled to define her experience truthfully and wholly. This suggests just how important she views her testimony. Choosing only now to tell her story in full, perhaps she saw the legal system as a means to speak the truth. Witness 51 also refers to speaking the truth in her testimony:[116]

> "W51: She was taken out and she wasn't even 17. And you can ask me whatever you like, but that is the truth, that is what happened and nothing else. And I have taken the oath here to tell the truth before this Tribunal and in front of all the people here. And I wanted to tell the truth once and for all so that people know what happened."

And when asked about certain ambushes that occurred in the region, the witness repeats:[117]

> "W51: I don't know about this, and I don't want to talk about things I don't know about. I talk about myself […] I am talking in my own name and on behalf of my children."

And: [118]

> "W51: It's not easier for me to speak about it today, but nevertheless, I wanted everyone to hear about it."

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116 *Prosecutor v. Kunarac et al*, IT-96-23 (29 March 2000): 1207.
117 *Prosecutor v. Kunarac et al*, IT-96-23 (29 March 2000): 1215.
118 *Prosecutor v. Kunarac et al*, IT-96-23 (29 March 2000): 1247.

Most victims of rape are resistant to testify, often finding it difficult to speak up due to social conventions and resultant guilt.[119] The bravery of these victims is clear through their declarations, and refusal of irrational shame imposed on them by patriarchal norms.[120] Here the agency of victims is illuminated, again often ignored by the prosecution in an attempt to build their narrative of 'weak' victimhood as a mirror opposite to 'strong' perpetration. Yet, my research demonstrates that recognition of victims' agency does not take away from, but in fact stands in spite of, the horrific acts they endured. To recognise testifying victims as strong is not to belittle the actions of the perpetrator. Rather, it speaks to the reality of conflict-related victimisation and – particularly in the case of sexual violence – works against problematic notions of shame.

Discussion

From these results two main points arise. The first refers to the conduct and quality of interactions with the witness shown by the defence and the prosecution, and the second refers to the differing narratives between these three parties. Here I will discuss the implications of these findings, making suggestions for their contemporary relevance in today's legal context.

Conduct: Justice for Victims

It is clear that these witnesses have gone through immeasurable suffering, yet the defence fails to show awareness or understanding of this. Some scholars argue that the purpose of post-war tribunals is to establish a factual record of events, and "to expect more, or view these institutions as vehicles for individual psychological healing [...] is wishful thinking".[121] Here however, cross-examinations were overly interrogative, to the point that they proved irrelevant,[122] with judges having to intervene

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119 Stover, "The Witnesses", 89.

120 Henry, "The Fixation on Wartime Rape", 100.

121 Stover, "The Witnesses," 32; for opinion of the theatrics of a trial see also Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1977), 9; and Sam Garkawe, "The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis," *International Review of Victimology* 8, (2001): 275.

122 *Prosecutor v. Kunarac et al*, IT-96-23 (29 March 2000): 1226; and *Prosecutor v. Kunarac et al*, IT-96-23 (30 March 2000): 1338.

and move proceedings along as witnesses became angered and uncooperative. While the point of cross-examinations is to elicit the truth and test the witness, it is not unwarranted to ask that the defence and anyone questioning victim-witnesses "provide a certain degree of acknowledgment and recognition to the victims and their communities".[123] For victims of CRSV it often takes years to come forward,[124] so sensitivity towards their situation may aid the tribunal, as victims may feel comfortable to share difficult memories.

Equally, the aim of the tribunal is to "bring justice",[125] yet through a lack of understanding and recognition, victim-witnesses may feel their justice needs are not being met. Simic outlines five elements of victims' justice interests, namely participation, voice, validation, vindication, and offender accountability.[126] It may be argued that, as the tribunal works within the attention economy,[127] its goals are to be seen as effective and unstoppable, rendering its consideration of justice for victims second to this goal. As Stover found, witnesses "complained that their prosecutors showed little or no interest in them after they testified".[128] If the aim of the tribunal is to bring justice to these victims,[129] then using them as means to an end is to disrespect them and ignore their experiences and justice needs.

Ultimately, if victims regard courtroom procedures as humiliating, unfair, or inattentive to their rights and interests, this may interfere with future cooperation.[130] It is therefore in the interest of the ICTY, and equally in the interest of any courtroom, that witnesses feel acknowledged and respected. Going forward, legal bodies must first treat victim-witnesses with respect and recognition. In doing so they will avoid disrupting their own proceedings and may improve the comprehension and prosecution of CRSV.

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123 Stover, "The Witnesses," 33.

124 Stover, "The Witnesses," 89.

125 "Mandate and Crimes under ICTY Jurisdiction", United Nations International Criminal Tribunal for the former Yugoslavia, accessed March 18, 2023, https://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction.

126 Olivera Simic, *Silenced Victims of Wartime Sexual Violence* 1st edition (London: Routledge, 2018): 216 https://doi.org/10.4324/9781315688398.

127 Schwobel-Patel, "The Ideal Victim," 703.

128 Stover, "The Witnesses," 17–32.

129 "Mandate and Crimes under ICTY Jurisdiction," United Nations International Criminal Tribunal for the former Yugoslavia.

130 Stover, "The Witnesses," 26.

Weakness' vs 'Agency': An Unrealistic 'Ideal' and the Future of CRSV

True understanding of the experiences of CRSV victims should be of the utmost importance to tribunals such as the ICTY. As a body of law that produces truth, international criminal law has the capacity to end the historic erasure of CRSV from post-war accounts. In addition, the implications of a false conceptualization of victimhood are not limited to future legal proceedings; they also affect collective memory.[131] Campbell argues that the ICTY as a "legal archive", functions as a system that produces and aids memory through its structures.[132] Indeed, the ICTY states that "[witnesses contribute] to the process which establishes the responsibility of the accused and creates a historical record of what happened during the conflicts in the former Yugoslavia".[133]

The truth pronounced by legal bodies and tribunals such as the ICTY affects not only legal memories of conflict and legal notions of sexual violence victimhood, but also popular and public understandings. Indeed, the Human Rights Watch asserted that "future generations will use the evidence [of the ICTY] to understand the region's history".[134] As Aroustamian argues, particularly in matters of sexual assault and rape, the limits of the law extend beyond the courtroom and have the potential to frame and constrain any discussion of sexual violence experiences.[135]

Therefore, the legacies of tribunals, such as the ICTY, are essential when looking forward to future cases of sexual violence in the context of conflict. Take for example the ongoing conflict between Russia and Ukraine, where reports of sexual violence against Ukrainians began to emerge less than two months after the initial invasion in February 2022.[136] In the Yugoslav Wars, sexual violence was used as a way of

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131 Campbell, "The Laws of Memory," 247.

132 Campbell, "The Laws of Memory", 248.

133 "Witnesses", United Nations International Criminal Tribunal for the former Yugoslavia, accessed March 18, 2023, https://www.icty.org/en/about/registry/witnesses.

134 Human Rights Watch, "Weighing the Evidence: Lessons from the Slobodan Milošević Trial," *HRW*, December 13, 2006, Executive Summary. https://www.hrw.org/report/2006/12/13/weighing-evidence/lessons-slobodan-milosevic-trial.

135 Camille Aroustamian, "Time's up: Recognising Sexual Violence as a Public Policy Issue: A Qualitative Content Analysis of Sexual Violence Cases and the Media", *Aggression and Violent Behavior*, 50 (2020): 1. https://doi.org/10.1016/j.avb.2019.101341.

136 Jenevieve Mannell "Sexual violence in Ukraine," *BMJ Clinical Research* no. 377 (2022): 1. Doi:10.1136/bmj.o1016.

damaging the lives and reproductive abilities of Bosnian Muslim communities, yet the motivations for sexual violence against Ukrainians is still unknown.[137] Mannell argues that this is a problem that affects whole societies, and, as a result, he states that researchers, funders, and policy leaders must move beyond thinking of sexual violence as a problem for the unfortunate individual and view it as an issue that affects a nation.[138] Mannell also urges that an approach to subjects that is inherently non-discriminatory[139] and intersectional is essential to recognising their differing experiences and needs.[140]

This study has indeed revealed the wider realities of CRSV. The experiences of the victim-witnesses illustrate ethnic tensions at play, ideas of nation-wide justice, and strong, determined victims at the forefront. From a legal perspective, going forward legal bodies must first acknowledge that CRSV victimhood is not inherently weak, feminine, or simplistic and may in fact be powerful, passionate, and intersectional. Finally, they must improve their acknowledgement of the contexts surrounding sexual violence victimhood, as demonstrated here by the structural role of CRSV in wars and conflicts. In doing this, legal bodies – and society as a whole – may move beyond one-dimensional understandings of CRSV and, as a result, improve the comprehension, prosecution, and, ultimately, interruption of CRSV.

Conclusion

This paper sought to answer the question: are the ICTY's courtroom practises aware and acknowledging of victims' own narratives of CRSV victimhood? The process of the court was found to involve multiple stages of questioning for each witness: direct examination, cross-examination and re-direct examination. Witnesses were each questioned over the course of two days, sometimes longer. Most notably during cross-examination by the defence, witnesses were seen to show frustration and anger

137 Mannell, "Sexual Violence in Ukraine", 1.
138 Mannell, "Sexual Violence in Ukraine", 1.
139 Mannell, "Sexual Violence in Ukraine", 1.
140 Mannell, "Sexual Violence in Ukraine", 1; see also Elena Stavrevska, "Enter Intersectionality: Towards an Inclusive Survivor-Centred Approach in Responding to Conflict-Related Sexual Violence," *London School of Economics*, December 10, 2019, https://blogs.lse.ac.uk/wps/2019/12/10/enter-intersectionality-towards-an-inclusive-survivor-centred-approach-in-responding-to-conflict-related-sexual-violence/.

at insistent and irrelevant questioning.[141] Additionally, the prosecution was found to direct questions in a way that proved their narrative of victimhood by ticking boxes for the legal definition of rape. However, in this they failed to reach the truth of experience and identity for many of these women. The victim-witnesses were found to show great agency, particularly in the face of societal shame, and, in spite of the defence and prosecution's methods, witnesses were somewhat able to express their own – albeit ignored – goals. Through this, I can conclude that the narratives of victims were not fully acknowledged or reflected in courtroom practices, suggesting that the tribunal failed to gauge the truth of CRSV. However, through this pilot study, the wider structures and individual realities of CRSV have been brought to light, with the experiences of the victim-witnesses revealing ethnic tensions at play, ideas of nation-wide justice, and a strong, determined nature within these victims.

In the context of future and ongoing conflicts, legal bodies must first treat victim-witnesses with respect and recognition. Secondly, they must recognise that CRSV victimhood is not inherently weak, feminine, or simplistic; as victim-witnesses' realities are in fact shown here to be powerful, intersectional, and complex. Finally, they must improve their acknowledgement of the contexts surrounding sexual violence victimhood, in this case the structural role of CRSV in wars and conflicts. In doing these three things, international criminal law will not only avoid disrupting its own proceedings, but it may move beyond one-dimensional understandings of CRSV and, as a result, improve the comprehension, prosecution, and, ultimately, the termination of CRSV.

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141 *Prosecutor v. Kunarac et al*, IT-96-23 (29 March 2000): 1226; and *Prosecutor v. Kunarac et al*, IT-96-23 (30 March 2000): 1338.

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