

Reasserting Agency: Procedural Justice, Victim-Centricity, and the Right to Remedy for Survivors of Slavery and Related Exploitation

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Abstract

One of the biggest failings of contemporary regimes governing human exploitation is their treatment of 'victims'. This paper roots narratives of victimhood and agency in the legal frameworks through analysis of the right to effective remedy in human rights and international law. Dominant characterisations of 'victimisation' are problematised and an alternative formulation - the 'victim-agent' - proposed in order to recognise agency and its abrogation, advocate for participation consistent with the demands of procedural justice, and contribute to meaningful redress.

Key words: modern slavery; remedies; victimhood; agency; procedural justice

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Introduction

Criminal justice responses to extreme forms of human exploitation are vital.¹ Domestic prohibition and punishment for infractions represent a key first step in eradicating these practices. Their importance is heralded by the terms of the cornerstone international instruments dealing with slavery, servitude, forced labour and human trafficking, which place domestic prohibition and criminalisation at the forefront of efforts to eradicate exploitation in international law.² Moreover, their realisation is a central element of victims' right to redress in international law. That states have responded to these international frameworks by prioritising criminal justice processes is therefore unsurprising. Yet, this preoccupation with criminality often obscures both the needs and the legal rights of those made most vulnerable by exploitation—victims themselves—and overlooks the multiple dimensions of the legal obligation on states to ensure the right to effective remedy.

In legal processes designed to address human exploitation, failures occur at all levels. Police, prosecutors, and judges have significant discretion in the investigation and dispensation of criminal cases, and have demonstrated resistance to legal reforms and uncertainty over how to approach cases.³ The number of successful convictions achieved globally remains extremely low in relation to the number of people identified as potential victims and the estimated number of

¹ In this paper, we consider slavery, servitude, institutions and practices similar to slavery, forced or compulsory labour, and human trafficking under the broader category of 'extreme forms of human exploitation' or 'human exploitation'. Although the label 'modern slavery' is increasingly used as an umbrella term encompassing these practices, this language is not rooted in international or domestic laws which define each form of exploitation – including slavery - as distinct offences. As this paper finds its foundations in the legal frameworks governing the identified forms of exploitation, we generally avoid using the term modern slavery - which is a term of art rather than law – except where required in reference to existing literature or legislation.

² See Article 6, Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253; articles 3, 5 and 6, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3; article 25, Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) C029; article 5, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS.

³ See Cassia Spohn, "The Non-prosecution of Human Trafficking Cases: An Illustration of the Challenges of Implementing Legal Reforms," *Crime, Law and Social Change* 61 (2014):169. See also Amy Farrell et al., "Police Perceptions of Human Trafficking," *Journal of Crime and Justice* 38 (2015): 315; William McDonald, "Explaining the Under-performance of the Anti-human-trafficking Campaign: Experience from the United States and Europe," *Crime, Law and Social Change* 61 (2014): 125.

people in slavery and related forms of exploitation.⁴ Shifting the focus from extreme forms of human exploitation to labour exploitation within these categories of abuse creates an even harsher picture. Although labour exploitation (omitting sexual exploitation) is estimated to make up 50% of modern slavery globally, only 6.9% of human trafficking convictions worldwide were cases of labour exploitation.⁵ Moreover, under-reporting of offences compounds the lack of investigation and prosecution, as victims are often hidden and fearful of authorities.⁶ Thus, victims are underserved because of failures in institutional understandings of victimisation and criminality.⁷

The failures of criminal justice responses with regard to victims are not only failures for domestic criminal law but breaches of states' international obligations to ensure effective remedies for victims of human rights violations. This paper places procedural justice at the heart of victims' legal right to remedy, thereby giving participation and the perspectives of individuals subjected to human exploitation a place in responses to violations. Through the reformulation of dominant understandings of victimisation, the complex nature of situations of extreme exploitation is recognised, and the capacity of legal frameworks to respond to these abuses increased. Good intentions of officials (such as, for instance, expressed commitments of governments to combating human exploitation) are insufficient to satisfy the obligation to ensure remedy for victims, particularly where implementation falls short of protecting and assisting victims.⁸ Without a nuanced understanding of the interplay of victimhood and agency in human exploitation, responses to abuses consistently fail to satisfy victims' right to effective remedy.

⁴ For instance, the United Nations Office on Drugs and Crime's 2016 review revealed that only 19% of the 136 countries reviewed conducted more than 100 investigations per year, and only 26% of investigated cases (on average) resulted in first-instance court convictions - UNODC, *Global Report on Trafficking in Persons 2016* (2016), 51. See also UNODC, *Global Report on Trafficking in Persons 2014* (2014), 1; U.S. Department of State, *Trafficking in Persons Report* (2016), at 40.

⁵ International Labour Organisation and Walk Free Foundation, "Global Estimates of Modern Slavery: Forced Labour and Forced Marriage," (report, International Labour Office, Geneva, 2017). https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf; U.S. Department of State, *Trafficking in Persons Report* (2016), 40.

⁶ See for instance Johnny McGaha and Amanda Evans, "Where Are the Victims? The Credibility Gap in Human Trafficking Research," *Intercultural Human Rights Law Review* 4 (2009): 239-266, 243-47.

⁷ On failures in understandings of victimisation and criminality, see for instance, Jack McDevitt and Amy Farrell, "Understanding and Improving Law Enforcement Responses to Human Trafficking: Final Report," (Northeastern University National Institute of Race and Justice, 2008).

⁸ See Jennifer Chacón, "Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking," *Fordham Law Review* 74 (2006): 2977, 2978; Dina Haynes, "Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act," *University of St. Thomas Law Journal* 6 (2008): 81.

Throughout this article, we use the term ‘victim’ fully cognisant of its status as a controversial and loaded term.⁹ In particular, we recognise that the social stigma and weakness associated with the ‘victim’ label have caused many individuals to reject the term in their self-identification.¹⁰ We employ it in identifying individuals who meet, or potentially could meet, the legal definition of ‘victim’ under domestic and international law, and not as a complete definition of these individuals’ identities. Use of the term here is not to deny agency or to contribute to disempowering rhetoric.¹¹ Indeed, tensions regarding victimhood and agency are a central focus of the following analysis. Rooted in legal doctrine, victimology, and socio-legal studies, this paper presents a non-dichotomous perspective on the realities of unfreedom. This approach accounts for the significance and inadequacies of agency, recognising and valuing victims’ voices in the processes of justice and repair.

The Right to Effective Remedy in International Law

The right to an effective remedy for violations of rights is central to the function of legal obligations generally and key to ensuring that the interests of victims are respected. According to general international law, the responsibility to make reparations in the instance of a violation is an ‘indispensable complement’ of legal rules and need not be specifically articulated in the texts of relevant treaties.¹² Thus the failure of most international instruments dealing specifically with extreme forms of human exploitation to address the entitlement is largely irrelevant.¹³ The requirements of public international law in relation to redress supplement the terms of the Conventions themselves, requiring that violations of international obligations to bring about the abolition of human exploitation are met with appropriate remedies.

Although states are traditionally considered the sole subjects of international law, remedies in a claim between states do not necessarily accrue for the benefit of

⁹ See for instance Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights,” *Harvard International Law Journal* 42 (2001): 203; Sara Kendall and Sarah Nouwen, “Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood,” *Law and Contemporary Problems* 76 (2014): 235.

¹⁰ See Stephanie Fohring, “What’s in a word? Victims on ‘victim,’” *International Review of Victimology* 24 (2018): 151.

¹¹ See Janie Chuang, “Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy,” *University of Pennsylvania Law Review* 158 (2010): 1655, 1711.

¹² *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A No 17, 21.

¹³ The omission of consideration of remedies in the 1926 Slavery Convention and 1956 Supplementary Convention, for instance, is not therefore an indication that no obligation in this regard exists.

the wronged state. As the International Court of Justice concluded in *Armed Activities on the Territory of the Congo*, acts of Uganda in respect of which reparations were due related both to injury done to the Democratic Republic of the Congo as a state and to ‘persons on its territory’ as individuals.¹⁴ Wrongdoing states have an obligation to make full reparations for such injuries caused by their wrongful conduct, including for material and moral damage to individuals; awards in respect of damages to individuals are directed to them through the claimant state.¹⁵ Thus, even lacking international legal personality, individual victims may be the beneficiaries of international reparations and states may have a duty to redress the damage done to them. A state breaching its international obligation to bring about the abolition of slavery, for instance, might be obligated to provide reparations to individuals for all injuries caused by their failure, despite the fact that the individuals themselves could not invoke international responsibility. The individual right to remedy therefore takes root in the *corpus* of general international law.

As well as being potential beneficiaries of international reparations in state to state disputes, individuals may also become the subjects of rights and obligations in international law through the terms of specific treaties.¹⁶ In the context of the prohibitions against extreme forms of human exploitation, human rights treaties enshrine the rights of individuals both to be free from exploitation and to reparation in the instance of a violation. Attaching primarily to individuals within the state, the initial function of these rights is to prohibit direct violations — making directly exploiting people legal wrongs. However, they also entail corresponding duties on states to ensure the realisation of the rights of individuals and to ensure access to effective remedy for victims of violations. Thus, the state may be held responsible in international human rights law for failing to exercise due diligence to properly ensure both the protection of primary rights, and individuals’ right to access to justice and redress in the event of a breach.¹⁷

Human rights instruments often also afford individuals rights of petition to bring a claim to an institutional body (whether a Court or Commission) in respect of a breach of their right to be free from human exploitation, and in relation to the

¹⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) [2005] ICJ Reports 257.

¹⁵ International Law Commission (ILC), “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,” (ARSIWA) *Yearbook of the International Law Commission*, 2, no. 2 (2001): 31, article 31.

¹⁶ *Jurisdiction of the Courts of Danzig* (Advisory Opinion) [1928] PCIJ Series B, No 15, 26-27.

¹⁷ African Committee of Experts on the Rights and Welfare of the Child, “Centre of Human Rights (University of Pretoria) and la Rencontre Africaine pour la defense des droits de l’homme (Senegal) v Senegal,” Decision Number 003/Com/001/2012 (15 April 2014).

infringement of their right to effective remedy for such violations.¹⁸ These procedures enable victims to hold states accountable for failures to fulfil their positive obligations in relation to the provision of effective remedies. Moreover, they further situate victims at the centre of international obligations of States responding to, and redressing, human exploitation. The terms of these treaties alone do not, however, clearly articulate the nature and scope of the reparatory obligations.

What does ensuring effective remedy involve?

In considering the scope of the positive obligation on states to ensure victims have access to effective remedies for the violations of their rights, the jurisprudence of a range of international adjudicatory bodies ought to be considered even if a case occurs in the context of a state party to only some of these bodies. This approach was exemplified in *Ahmadou Sadio Diallo*, wherein the International Court of Justice took account of the remedial practices of other international courts, tribunals and commissions including regional human rights courts.¹⁹ Judge Greenwood, in his concurring opinion, emphasised that this approach should be adopted by all international courts in drawing their conclusions.²⁰ It is therefore appropriate to frame the requirements particular states must meet in relation to the *corpus* of international law concerning the positive obligation to ensure effective remedies, regardless of whether the state is party to the particular instrument under which the pronouncements are rendered.

States possess a range of positive obligations in relation to the protection of human rights, and may be in breach of their obligations ‘as a result of... permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.’²¹ Although the European Court in *L E v Greece* highlighted the dominance of criminal justice in fulfilling states’ obligation to ensure remedies are

¹⁸ See, for instance, Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; article 34, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5; article 44, Organization of American States, American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978); Organization of African Unity, African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 ILM 58.

¹⁹ This approach is exemplified in *Ahmadou Sadio Diallo* wherein the International Court of Justice *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation) [2012] ICJ Rep 103.

²⁰ *Ibid.*

²¹ UN Human Rights Committee (UNHRC), “General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant,” CCPR/C/21/Rev.1/Add.13 (2004), [8].

available to victims, penal law alone cannot be considered to meet the positive obligation of individual redress.²² Criminal prosecutions of perpetrators are necessary but insufficient to satisfy victims' right to a remedy for the breaches of their rights constituted by extreme forms of human exploitation. Victims must also have access to legal avenues for seeking and receiving reparations for the violations committed against them. As noted by the Human Rights Commission in relation to the ICCPR: 'Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged.'²³ The Inter-American Court in *Velásquez Rodríguez v. Honduras* similarly highlighted the obligation to provide reparations and 'indemnify the victim for damages' as additional to the state's obligation to prevent, investigate and punish violations.²⁴

For the purpose of satisfying the right to remedy, effective reparation may be provided in a number of different ways, or by a combination of means, but generally requires states ensure appropriate compensation is paid to victims.²⁵ Avenues to claim redress against both the state and the individual perpetrators of the violations must be available to victims in order to satisfy the international human rights obligations in this regard.²⁶ Beyond ensuring monetary redress, reparations appropriately entail measures of restitution, rehabilitation and satisfaction in both general international and human rights law.²⁷ Satisfaction in this context might include measures such as 'public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.'²⁸ Ultimately, reparatory measures provided in the instance of a violation should be responsive to the needs of the victim with regard to all the circumstances of the case in order to ensure effectiveness in both their material and their symbolic functions. Without engaging with victims themselves, the obligation to ensure effective remedy is unlikely to be properly fulfilled.

²² *L E v Greece* [2016] ECHR Application No.71545/12 (21 January), 13.

²³ UNHRC, "General Comment no. 31," [16].

²⁴ *Velásquez Rodríguez v Honduras* (Merits) [1988] IACHR Series C No 4 (29 July), [175].

²⁵ UNHRC, "General Comment no. 31," [16].

²⁶ (see *Judicial Condition and Rights of Undocumented Migrants* (Advisory Opinion) [2003] IACHR OC-18/03 (17 September), 106).

²⁷ ILC, "ARSIWA," art 34; UNGA, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," (UNBPG) UN Doc A/RES/60/147 (2006), principle 18.

²⁸ UNHRC, "General Comment no. 31," [16].

The importance of procedural justice

Unlike criminal justice responses or economic and political reforms, reparations are an inherently victim-centric response to injustice.²⁹ Reparations are an effort on behalf of victims while criminal justice is, in the end, a struggle against perpetrators.³⁰ Approaches that place victims at the heart of reparatory measures in a meaningful, rather than merely tokenistic, way are crucial in incorporating victim-centricity into remedy frameworks. As recognised in 1993 by then Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Theo van Boven, the often overlooked perspectives of victims are crucial in reparations discussions and the needs and wishes of victims should be a central concern in giving effect to the right to remedy.³¹

Current mechanisms in response to human exploitation consistently fail to meet the needs of victims and survivors. Not only do states continue to prioritise criminal justice responses by focusing on perpetrators often to the exclusion of victims, they also fail to enable participation of victims in these criminal justice processes or to provide sufficient support for victims after identification and rescue.³² Measures of procedural justice, which demand the reconceptualisation of victimisation, meaningfully improve this dynamic. Julia Muraszkwicz aptly frames the significance of procedural justice for victims through participation in criminal trials:

Noting the loss of dignity, the inclusion of a human trafficking victim in a trial and not merely making them the subject of evidence makes a contribution to the restoration of agency. It conveys the message that their concerns are as important as those of the state.³³

²⁹ Luke Moffett, “Transitional Justice and Reparations: Remediating the Past?” in *Research Handbook in Transitional Justice*, ed. by Cheryl Lawther, Luke Moffett and Dov Jacobs, (Cheltenham: Edward Elgar Publishing, 2017) 377-400, 1.

³⁰ Pablo de Greiff, “Repairing the Past: Compensation for Victims of Human Rights Violations,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 1-20, 2.

³¹ See UN Commission on Human Rights, “Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr Theo van Boven, Special Rapporteur,” UN Doc E/CN.4/Sub.2/1993/8 (1993), [133] and [137].

³² See Jennifer Burn and Frances Simmons, “Trafficking and Slavery in Australia: An Evaluation of Victim Support Strategies,” *Asian and Pacific Migration Journal* 15, no. 4 (2006): 553; Elaine Pearson, *Human Traffic, Human Rights: Redefining Victim Protection* (London: Antislavery International, 2002); Katharine Cunningham and Lisa Demarni Cromer, “Attitudes about Human Trafficking,” *Journal of Interpersonal Violence*, 31, no. 2 (2016): 228.

³³ Julia Muraszkwicz, “Article 12 of the EU Human Trafficking Directive: Fulfilling Aspirations for Victim Participation in Criminal Trials?” *New Journal of European Criminal Law*, 7, no. 3 (2016): 331, 341.

The dehumanising nature of extreme forms of human exploitation - the denial of rights, subjecthood, identity, dignity and freedom - makes the procedural justice dimension of responses all the more significant. Orlando Patterson's characterisation of slavery as 'social death' entailing *dominium* exercised over a person by another, including 'inner power beyond mere control,' reflects this objectification of victims.³⁴ By incorporating participation of victims, response mechanisms can provide official recognition to their humanity and their suffering. The re-affirmation of the agency of the victim can, in turn, assist in countering the narrative of victimisation, aid recovery and serve a signalling function for other victims.³⁵ Measures of procedural justice which place victims at the centre of reparatory processes and ensure their involvement at all levels of decision-making can thus transform the lives of survivors and help rebuild their civic identities.³⁶

In order to facilitate the full participation and inclusion of victims in reparations processes, outreach, support and education programmes which enable victims to express their own perspectives and desires are essential. Without the operation of these mechanisms, victims might be unable or unwilling to make claims because of lack of knowledge, understanding, or support. Thus, the absence of appropriate procedural support represents a significant barrier to victims' ability to realise their right to remedy. As REDRESS, a prominent non-governmental organisation focused on ending torture and seeking justice for survivors, highlights:

without a fuller understanding of survivors' perceptions and without the necessary support structures in place we are in danger of encouraging people whose lives have been traumatized to exercise rights they are unclear about, through processes that they are not actively involved in and do not understand, which then produce outcomes that do not match their expectations.³⁷

³⁴ Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, Mass.: Harvard University Press, 1982), 31.

³⁵ See Yael Danieli, "Massive Trauma and the Healing Role of Reparative Justice," in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* eds. Carla Ferstman, Mariana Goetz and Alan Stephens (Leiden: Martinus Nijhoff, 2009), 41-78, 66.

³⁶ Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing*, (Cambridge: Cambridge University Press, 2006).

³⁷ REDRESS, "Torture Survivors' Perceptions of Reparation: Preliminary Survey," 2001, accessed October 10, 2017, <http://www.redress.org/downloads/publications/TSPR.pdf>, 9.

The inclusion of victims in the processes through which redress is determined and provided can, therefore, improve the efficacy and efficiency of chosen programmes. The views and concerns of victims, when directly engaged, can impact the substantive outcomes of reparations, increasing their capacity to understand and respond to the specific needs of victims taken in context.³⁸ As Fiona McKay advises, it ‘is not simply a question of whether any remedy or outcome is produced, but whether that remedy or outcome is the right one for the victim.’³⁹ Substantive participation is required in order to achieve responsiveness. Conversely, the effectiveness of reparations mechanisms and their ability to achieve the desired outcomes can be undermined when they fail to meaningfully engage victims in decision-making and negotiation.⁴⁰

Although it is often impossible to satisfy the needs and wishes of all victims in all situations, meaningful measures of procedural justice can assist in ensuring the best possible programmes are implemented in the interests of victims. Brandon Hamber suggests that reparations may be perceived as ‘good enough’ by victims where there has been sincere recognition of the violations and sufficient effort to redress harms, regardless of whether full and proportionate remedy is provided.⁴¹ By integrating the voices of victims into justice processes, reparations awards can more closely respond to the perspectives and needs of victims, leaving them psychologically satisfied. Participatory approaches can therefore ensure that victims accept the justice of the process even where they dispute the substantive outcomes.

Procedural justice can also, in turn, improve the effectiveness of criminal processes, for victims are often central to the successful prosecution of perpetrators. Measures of procedural justice designed to ensure they are sufficiently supported materially and psychologically to recover from the trauma of their exploitation may be essential to their capacity to provide reliable evidence at trial.⁴² Nonetheless, it is important that victims are not seen as a means to a

³⁸ Edgar Lind, and Tom R Tyler, *The Social Psychology of Procedural Justice* (New York: Springer, 1988), 31-34.

³⁹ Fiona McKay, “What Outcomes for Victims?” in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 921-954, 922.

⁴⁰ Carlton Waterhouse, “The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs,” *University of Pennsylvania Journal of International Law*, 31 (2009): 257, 258. For examples of victim dissatisfaction because of failures in procedural justice, see Phuong Pham et al., “Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia,” *Journal of Human Rights Practice*, 3 (2011): 264; Mariko Izumi, “Asian-Japanese: State Apology, National Ethos, and the ‘Comfort Women’ Reparations Debate in Japan,” *Communication Studies*, 62, no. 5 (2011): 473.

⁴¹ Hamber, “Dilemmas”, 137.

⁴² Susan French and Cindy Liou, “The Importance of Strategic, Victim-Centred Human Trafficking Prosecutions,” *Anti-Trafficking Review*, 6 (2016): 114.

conviction but are recognised as agents in their own right, whose roles and responsibilities in legal mechanisms are respected.⁴³ Ultimately, placing the victim as a conscious actor and human being at the centre of responses to human exploitation is vital to the effectiveness of investigations and prosecutions, the recovery of the victim from their experiences, and the prevention of future exploitation. Yet, it is impossible to achieve where victims are perceived as ‘powerless’, ‘helpless’ or ‘depoliticised’.⁴⁴ It is therefore necessary to interrogate the ways in which victimisation is constructed to ensure measures targeted towards redressing exploitation do not perpetuate the very dehumanisation and denial of agency they seek to suppress.

The Dilemma of Victimhood and Agency

Stereotypes and the ‘Ideal’ Victim

The notion of the ‘ideal victim’ significantly infringes on the realisation of victims’ right to remedy, and the integration of procedural justice mechanisms responding to human exploitation. Despite identified ‘victim protection’ objectives in anti-trafficking and modern slavery law, in practice only some victims are afforded protection and assistance. The phenomenon of human exploitation is complex, exacerbated by a lack of conceptual and definitional consensus, yet stereotypes of idealised victimhood shape social perceptions of victimisation. These perceptions influence who qualifies for the sympathy of both society and officials responsible for responding to exploitation, as they shape who receives ‘the complete and legitimate status of being a victim.’⁴⁵ As a result, the law as applied is often under-inclusive of the broad range of victim experiences and thus fails to meet the rights of substantial numbers of victims.

In the context of human rights violations, vulnerability and victimhood intertwine, with the ‘ideal victim’ fundamentally understood as ‘helpless, powerless, unable to make choices for themselves, and forced to endure forms of pain and suffering.’⁴⁶ The ‘ideal victim’ is therefore typically female, weak, either very young or old, blameless, and participating in a respectable activity when

⁴³ Stephen Schafer, *Victimology: The Victim and His Criminal* (Virginia: Reston Publishing Company, 1977).

⁴⁴ Mutua, “Savages”: 203; Kendall and Nouwen, “Representational Practices”: 235.

⁴⁵ Nils Christie, “The Ideal Victim,” in *From Crime Policy to Victim Policy: Reorienting the Justice System*, ed. Ezzat Fattah (London: Macmillan, 1986), 18.

⁴⁶ Sally Merry, “Introduction: Conditions of Vulnerability,” in *The Practice of Human Rights: Tracking Law Between the Global and the Local*, ed. Mark Goodale and Sally Merry (Cambridge: Cambridge University Press, 2007), 195.

confronted by a big, bad, typically male offender who is a stranger.⁴⁷ At the centre of this construct is the notion of agency, such that ‘[r]isk-takers tend to elicit less sympathy when they are injured and are unlikely to be defined as victims of human rights violations.’⁴⁸ In other words, choice must be removed from the equation for recognition of victimhood.⁴⁹

The closer individuals are to meeting the requirements of idealised victimhood, the more likely they are to be considered victims.⁵⁰ Yet, because baseless assumptions often shape these attitudes towards victims, a gap between idealised images and empirical realities arises.⁵¹ In the context of public and legal responses to human trafficking, the issue is frequently narrowed to one of sexual exploitation; of innocent, usually white, women abused by foreign men and in need of rescue.⁵² News media portrayals have contributed to this narrative and legitimised official discourse and policy responses.⁵³ While exploited children might also appear somewhat frequently in paradigm representations of trafficking victims, the press has ‘all but ignored’ labour exploitation of men and women, despite evidence that it is more prevalent.⁵⁴ Moreover, the contemporary anti-trafficking movement has perpetuated racial myths which undermine the identification of minority youth victims, and discount victims who escape on their

⁴⁷ Christie, “The Ideal,” 19. See also Sandra Walklate, “Ways of Thinking About Victims and Victimology,” in *Imagining the Victim of Crime* (Open University Press, 2007), 26-56, 28.

⁴⁸ Merry, “Introduction,” 195.

⁴⁹ Merry, “Introduction,” 195.

⁵⁰ Christie, “The Ideal,” 19.

⁵¹ James Dignan, “Victims, Victimization and Victimology,” in *Understanding Victims and Restorative Justice* (Open University Press: 2005), 13.

⁵² Edith Kinney, “Victims, Villains and Valiant Rescuers: Unpacking Sociolegal Constructions of Human Trafficking and Crimmigration in Popular Culture,” in *The Illegal Business of Human Trafficking*, ed. Maria Guia (New York: Springer, 2015); Gretchen Soderlund, “Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition,” *NWSA Journal* 17 (2005): 64.

⁵³ See Amy Farrell and Stephanie Fahy, “The Problem of Human Trafficking in the US: Public Frames and Policy Responses,” *Journal of Criminal Justice* 37 (2009): 617; Rachealle Sanford et. al., “Framing Human Trafficking: A Content Analysis of Recent U.S. Newspaper Articles,” *Journal of Human Trafficking* 2 (2016): 139.

⁵⁴ Doreen Marchionni, “International Human Trafficking: An Agenda-building Analysis of the US and British Press,” *International Communication Gazette* 74 (2012): 145, 155. On prevalence, see International Labour Organization and Walk Free Foundation, “Global Estimates”.

own or who suffer subtle forms of coercion through a narrow focus on rescues and physical violence.⁵⁵

Dominant frames of victimisation deeply impact both public perception and policy, with many problematic and discriminatory outcomes.⁵⁶ Certain victims are prioritised within response mechanisms, while others are rendered invisible – ‘imperfect victims’ are deemed unworthy of legal protection even at the most basic level.⁵⁷ As a result of the conceptualisation of victimhood identified above, the legislative provisions of many states still fail to include less visible categories of victims — particularly male victims of labour exploitation. Thus, the skewed and narrow construction of the archetypal victim means that individuals are effectively punished for non-conformity and subjected to a ‘hierarchy of victimhood.’⁵⁸ Suffering thereby becomes selectively recognised by the state, with the risk of generating further harm to victims whose rights are breached twice: once by the exploitation itself, and again by the denial of the right to redress.⁵⁹

Defining individual experiences based on ideal victimhood creates additional challenges in relation to groups of people whose agency and voice are already abrogated by paternalistic social attitudes. International emphasis on violence against women, for instance, reinforces stereotypes of women as vulnerable and in need of protection, reinforcing state paternalism. This effectively minimises female agency and the heterogeneity of lived experiences.⁶⁰ Although highlighting victimisation can mobilise action to protect vulnerable people, it may do so at the expense of the further disempowerment of already marginalised or devalued groups of people. This extends to situations where vulnerability and exploitation are substantially connected to other identity factors associated with

⁵⁵ Cheryl Butler, “The Racial Roots of Human Trafficking,” *UCLA Law Review* 62 (2015): 1464; Saskia Blume, “Masculinity and the ‘Ideal Victim’ in the US Trafficking Discourse,” (working paper, Centre on Migration, Policy and Society, University of Oxford, 2015). <https://www.compas.ox.ac.uk/2015/masculinity-and-the-ideal-victim-in-the-us-trafficking-discourse/>; Dina Haynes, “(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act,” *Georgetown Immigration Law Journal* 21 (2007): 337; Srikantiah, “Perfect Victims”.

⁵⁶ For an introduction to framing theory and public opinion, see Dennis Chong and James Druckman, “Framing Theory,” *Annual Review of Political Science* 10 (2007): 103.

⁵⁷ See Maggy Lee “Constructing and Denying Victimhood in Trafficking,” in *Trafficking and Global Crime Control* (Thousand Oaks, California: SAGE, 2011), 65.

⁵⁸ Lee, “Constructing,” 67-71. See also Jayashri Srikantiah, “Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law,” *Boston University Law Review* 87 (2007): 157, at 197.

⁵⁹ See Julia O’Connell Davidson, “Migration, Suffering and Rights,” in *Migration: The COMPAS Anthology*, ed. Bridget Anderson and Michael Keith (Oxford: COMPAS, 2014).

⁶⁰ Ratna Kapur, “The Tragedy of Victimization Rhetoric: Resurrecting the ‘Native’ Subject in International/ Postcolonial Feminist Legal Politics,” in *Erotic Justice: Law and the New Politics of Postcolonialism* (Norwich: Glasshouse, 2005): 129.

paternalistic policy responses—for instance, indigeneity, race, class, and caste. In short, emphasising individual ‘woundedness’ may foreground passivity and helplessness at the expense of capacity for choice.⁶¹

Perhaps the most problematic requirement in the ideal victim construct, in light of international and domestic definitions of human exploitation, is that of innocence. Although legislative efforts have sought to protect rather than criminalise victims, in practice victims are required to be ‘innocent’, demanding ‘the complete absence of consent at all stages of transportation and employment.’⁶² Yet, human exploitation regularly involves some degree of choice on the part of victims through consent to some part of the process—often driven by economic vulnerability.⁶³ At the same time, coercion and the abrogation of consent at other points in the process is central to the abuses. Focusing on victim passivity ignores individual agency and choice, as well as the circumstances of the exploitation.⁶⁴ Thus, the exacting standard of weakness and blamelessness means that the majority of potential victims are deemed unworthy of protection, despite meeting legal definitions of exploitation and being entitled to redress.⁶⁵

The False Victim/Agent Dichotomy

Despite significant progress and calls for greater nuance, the victim/agent dichotomy persists in legal and popular discourse.⁶⁶ On a theoretical level, the law tends to favour binaries rather than ambiguity or complexity.⁶⁷ As Joanne Conaghan has observed, the law is structured in dichotomies such as ‘criminal/

⁶¹ See Wendy Brown, *States of Injury* (Princeton: Princeton University Press, 1995). See also Rebecca Stringer, *Knowing Victims: Feminism and Victim Politics in Neoliberal Times* (London: Routledge, 2014); Jan van Dijk, “Free the Victim: A Critique of the Western Conception of Victimhood,” *International Review of Victimology* 16 (2009): 1.

⁶² Chacón, “Misery,” 3022.

⁶³ See Ramona Vijeyarasa, “Stigma, Stereotypes and Brazilian Soap Operas: Road-blocks to Ending Human Trafficking in Vietnam, Ghana and Ukraine,” *Gender, Place and Culture* 20 (2013): 1016.

⁶⁴ See Lee, “Constructing”; Srikantiah, “Perfect Victims,” 211.

⁶⁵ See Wendy Chapkis, “Soft Glove, Punishing Fist: The Trafficking Victims Protection Act of 2000,” in *Regulating Sex: The Politics of Intimacy and Identity*, ed. Elizabeth Bernstein and Laurie Schaffner (New York: Routledge, 2005), 51; Denise Brennan, “Myths Meet Reality: How We Are Not Fighting Trafficking or Supporting Trafficking Survivors,” *New York Law School Law Review* 60 (2016): 605; Shelley Cavalieri, “The Eyes That Blind Us: The Overlooked Phenomenon of Trafficking into the Agricultural Sector,” *Northern Illinois University Law Review* 31 (2011): 501; Dina Haynes, “Exploitation Nation: The Thin and Grey Lines Between Trafficked Persons and Abused Migrant Laborers,” *Notre Dame Journal of Law, Ethics and Public Policy* 23 (2009): 1.

⁶⁶ See Elizabeth Schneider, “Feminism”, 390.

⁶⁷ See Kathryn Abrams, “Sex Wars Redux: Agency and Coercion in Feminist Legal Theory,” *Columbia Law Review* 95 (1995): 304, 374.

civil, public/private, form/substance, innocence/guilt, good/bad, just/unjust, legal/illegal.⁶⁸ These dichotomous representations within the legal system are especially pronounced in areas directly related to gender.⁶⁹ In short, conventional legal discourse appears to preclude the possibility of being both a victim and an agent. Yet this dichotomy is inadequate to describe victimisation and agency in many contexts—particularly human exploitation—and is remote from lived realities.⁷⁰ As James Dignan notes, ‘questions relating to the concept and identity of victims are highly problematic, often controversial and generally call for highly nuanced answers.’⁷¹

It is not sufficient to shift the narrative concerning victims of human exploitation from one of unfreedom, coercion, and victimisation to affirm individual agency, for the offences require the diminution of choice by definition. While terms such as ‘survivor’ are meant to emphasise resilience, they do not necessarily align with legal frameworks and run the risk of minimising the harm suffered or the need for a legal remedy. An emphasis on agency may exacerbate the problem of failure to recognise, and ensure redress for, ‘imperfect’ victims by playing into existing narratives of choice and consent. Foregrounding choice and personal responsibility may be empowering, but it can also lead to victim-blaming.⁷² In 1971, William Ryan defined the phenomenon as ‘justifying inequality by finding defects in the victims of inequality.’⁷³ In the complex contexts of human exploitation, it can be easier to shift responsibility for harm and suffering to individuals rather than addressing structural causes. Indeed, focusing on the conduct and choices of the individual leads to arbitrary outcomes and risks trivialising the harm suffered.⁷⁴ Thus, the exclusive focus on the agency of victims can also create lacunae in processes to ensure the right to redress.

While representations of the ideal victim and ideal offender may capture attention and interest, the reality is multi-dimensional and ambiguous; most victims are not completely blameless and most offenders are not completely culpable.⁷⁵

⁶⁸ Joanne Conaghan, *Law and Gender* (Oxford: Oxford University Press, 2013), 98.

⁶⁹ Abrams, “Sex Wars,” 375.

⁷⁰ See Chi Mgbako and Laura Smith, “Sex Work and Human Rights in Africa,” *Fordham International Law Journal* 33 (2010): 1178; Deborah Tuerkheimer, “Recognizing and Remediating the Harm to Battering: A Call to Criminalize Domestic Violence,” *Journal of Criminal Law & Criminology* 94 (2004): 959.

⁷¹ Dignan, “Victims,” 13.

⁷² See William Ryan, *Blaming the Victim* (New York: Vintage, 1971).

⁷³ Ryan, *Blaming*.

⁷⁴ See Martha Minow, “Surviving Victim Talk,” *UCLA Law Review* 40 (1993): 1411.

⁷⁵ Christie, “The Ideal,” 29.

The reality of exploitation is complicated and each individual case is unique.⁷⁶ Despite the ‘innocent victim’ and ‘deviant offender’ paradigm which dominates discourse on human exploitation, multiple studies have revealed the diversity of exploited persons’ experiences.⁷⁷ For instance, many individuals willingly migrate in search of better economic opportunities. That does not mean they also agree to abuse and exploitation by others. Initial consent to the movement or type of work must not be equated with consent to exploitation, and this must be true in practice as well as in law.⁷⁸ Thus, overemphasis on agency in cases of human exploitation may be distracting and misses the critical issue: the abuse and exploitation of a human being. Accepting the victim/agent dichotomy cannot correct the failures of measures targeting human exploitation to enable procedural justice and ensure the right to effective remedy.

Not Simply Passive or Active: The Victim/Agent

Is it possible to move beyond stereotypical notions of an ‘ideal’ victim of exploitation or to overcome the persistence of the false victim/agent dichotomy? The law (and wider society) often functions in dualities, and by definition, victims are acted-upon while agents act. Commentators have, however, challenged this binary assessment in a range of contexts. Linda McClain, for instance, proposes a continuum model of agency and responsibility to respond to stereotypes about ‘irresponsible motherhood’.⁷⁹ McClain draws attention to the range of choices and constraints that may impact a woman and her reproductive decisions, rejecting the monolithic notion of the poor, single mother. In the context of domestic violence, Elizabeth Schneider argues that viewing individuals as either victims or agents is static, incomplete, and overly simplistic.⁸⁰ Schneider contends that rather than opposites, victimisation and agency are ‘interrelated dimensions of women’s

⁷⁶ Srikantiah, “Perfect Victims,” 161.

⁷⁷ Michael Wilson and Erin O’Brien, “Constructing the Ideal Victim in the United States of America’s Annual Trafficking in Persons Reports,” *Crime, Law and Social Change* 65 (2016): 29; Lee, “Constructing,” 61.

⁷⁸ See Dina Haynes, “Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers,” *Human Rights Quarterly* 26 (2004): 221, 231.

⁷⁹ Linda McClain, “‘Irresponsible’ Reproduction,” *Hastings Law Journal* 47 (1996): 339.

⁸⁰ Schneider, “Feminism.”

experience.⁸¹ Other scholars have noted that focusing on gender-based victimhood may inadvertently ignore racial or cultural factors in oppression and resistance.⁸²

To counter the exacting standard of an innocent and helpless victim subject, we propose the term ‘victim-agent’ to encourage a more nuanced and inclusive understanding of victimisation in the context of human exploitation. This term rejects the victim/agency dichotomy and instantly evokes the idea that a victim is not necessarily weak and vulnerable, challenging the notion that victim status requires a total lack of agency. The term ‘victim’ remains to recognise that some harm happened to the individual which requires compassion and legal redress according to the relevant frameworks discussed above.⁸³ Simultaneously, the term ‘agent’ implies that the individual maintains some degree of volition despite experiencing exploitation, and provides a pathway to procedural justice.

This reformulation of the language of victim identity is not simply a theoretical foray into the narratives of exploitation, but a necessary element of the attempt to do justice for victims. Cases of extreme human exploitation are complex. Relying on stereotypes of the archetypal victim leads to discriminatory impact in practice through systemic failures to recognise entire swathes of victims, as discussed above. This reflects significant failures in prevention, identification, investigation, prosecution, punishment and the provision of redress globally, and thus a substantial breach of states’ obligation to ensure effective remedies. Moreover, this alternative conceptualisation opens the door for meaningful measures of procedural justice by simultaneously recognising voice and victimisation — measures that are integral to the realisation of reparation for victim-agents.

States’ international obligations to ensure redress for victims of exploitation demand that governments identify cases of exploitation, protect victims, punish perpetrators, and enable reparations for victims. Thus, recognising victimisation according to the established parameters of the legal definitions of exploitation, rather than on the basis of stereotypes, is crucial to the fulfilment of international law.⁸⁴ Focusing on victim choice is a distraction, especially when it means an

⁸¹ Schneider, “Feminism”, 395.

⁸² See Angela Harris, “Race and Essentialism in Feminist Legal Theory,” *Stanford Law Review* 42 (1990): 581; Julie Stubbs and Julia Tolmie, “Race, Gender and the Battered Woman Syndrome: an Australian Case Study,” *Canadian Journal of Women and Law* 8 (1995): 122; Ratna Kapur, “The Tragedy”.

⁸³ See Minow, “Surviving,” 1415.

⁸⁴ The emphasis on non-prosecution of trafficking victims in international guidelines specifically calls for an understanding of coercion which removes liability for the illegal actions of trafficking victims. See Working Group on Trafficking in Persons, “Non-punishment and Non-prosecution of Victims of Trafficking in Persons: Administrative and Judicial Approaches to Offences Committed in the Process of Such Trafficking,” CTOC/COP/WG.4/2010/4 (9 December 2009); Office of the High Commissioner for Human Rights, “Recommended Principles and Guidelines on Human Rights and Human Trafficking,” E/2002/68/Add. 1.

exploited individual is denied crucial services or access to legal remedies. Emphasis on an ideal, non-agentic victim excludes certain people, because there are always complications and inconvenient details if individual blamelessness is scrutinised. The term ‘victim-agent’ is meant to encourage more nuanced approaches and understandings of exploitation, agency, and choice, consistent with the demands of procedural justice, rather than focusing attention on rigid constructs.

Conclusion

Narratives of victimhood and agency in human exploitation do not exist in a vacuum, but within the context of a developed international jurisprudence situating abuses within human rights and general international law demanding that violations be identified, investigated, prosecuted, punished, and effectively remedied. This obligation is incumbent upon all 170 states party to the ICCPR, 173 parties to the Palermo Protocol, and the parties to regional human rights instruments (as well as a range of other international instruments). Ensuring remedies for victims of exploitation within domestic frameworks is an obligation, not an option, for these states. Stereotypes of ‘innocent’ victims and ‘evil’ offenders mobilise public sympathy, determine what is newsworthy, elicit support from moral entrepreneurs and politicians, and impact policy. These archetypes dominate legal, media and political discourse to the detriment of real individuals who do not conform to the ideal representations.⁸⁵ Combined with the polarisation of victimhood and agency, this discourse fails to reflect the realities of exploitation and thereby obstructs justice for the majority of victims.

There is much work to be done to deconstruct the dominant and persistent discourse regarding victims of extreme forms of human exploitation, but this is work that is required by the legal frameworks and necessary to achieve justice. Reconceiving victimhood and agency as a more nuanced equation is vital to counter idealised victimisation, to properly identify and respond to situations of exploitation, and to ensure procedural justice in the provision of redress for victims. For that reason, this article calls for a shift toward the ‘victim-agent’: someone who has made choices, albeit structurally constrained ones, but who still potentially experiences harm and exploitative conditions. By recognising both the agency of victims and the abrogation of freedom inherent in extreme exploitation, this formulation acknowledges the voice and perspectives of victims and survivors in the plethora of contexts in which they exist. Thus, it enables a more effective realisation of the obligations to ensure effective remedies for victim-agents, and

⁸⁵ Dignan, “Victims,” 17 and 20.

does so consistently with the demands of procedural justice — with victims at the heart of the analysis.

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