

**“THE WORLD WOULD START
TURNING AGAIN”: IDENTIFYING
AND MEASURING VICTIMS’
RESTORATIVE JUSTICE NEEDS
AT THE INTERNATIONAL
CRIMINAL COURT**

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A thesis submitted in partial fulfilment of
the requirements of Bournemouth
University for the degree of Doctor of
Philosophy

2015

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ABSTRACT

Elinor Claire Smith

“The World would start Turning Again”: identifying and measuring victims’ restorative justice needs at the International Criminal Court

The integration of victim participation into the Rome Statute introduces a restorative function into the practices and procedures of the International Criminal Court alongside its more traditional, retributive mandate, engendering an obligation on the Court to provide restorative justice, or at least, aspects of it, to participating victims. Restorative justice, however, is under-developed in international criminal law in both theory and practice. Moreover, the Court itself has failed to indicate what it means by restorative justice, or what restorative justice would encompass in practice for participating victims. The thesis demonstrates instead that the restorative mandate is in danger of being either subsumed by the retributive function or usurped by a purely procedural justice model.

Through an exploration of what restorative justice for participating victims would comprise, this thesis addresses the disconnect between the intentions of the drafters of the Rome Statute and the realisation of restorative justice for victims in practice. Through an interdisciplinary approach, using psychological literature and theory, the thesis identifies, examines and argues for an appropriate overarching goal for restorative action at the ICC: the achievement of a sense of justice in participating victims. This goal is developed and disaggregated into its constituent parts with a view to rendering the concept of restorative justice tangible, applicable and operational within the practices and procedures of the Court. The thesis thereby provides a contribution to theory and practice.

The thesis then considers how the Court’s progress in the pursuit of its restorative mandate can be evaluated. In the absence of any existing assessment instrument, the thesis develops and proposes the detailed framework of a psycho-legal assessment tool for the monitoring and evaluation of the Court’s pursuit of restorative justice for participating victims, thereby providing a further contribution to practice.

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ACKNOWLEDGEMENT

I have had the privilege of working with survivors of atrocities for many years, and have been humbled by the trust that many have placed in me in the conduct of my research. My thoughts about justice for victims in the aftermath of systematic and gross violations have largely been shaped over the years by conversations with those survivors, and I am grateful to them for the time they have given me. I have also been lucky enough to work with many dedicated clinical staff, and through them have been introduced to the clinical potential and impact of legal processes for survivors. Again, I am grateful to those clinicians – too many to name – for the patience they have shown.

Many thanks to Bournemouth University for providing the funding for this research, and to my supervisors, Dr Howard Davis and Dr Melanie Klinkner, for their consistently insightful thoughts and support during the writing of this thesis. Thanks, too, go to Newcastle University for the almost daily use of its library facilities.

I am grateful to my family and friends for the positive encouragement and energy they have provided, often when it was most needed. Finally, to my children, Faron and Amber, for whom the phrase “when I finish my PhD” has become a running joke, thank you so much for your patience, enthusiasm and understanding. It’s your time now.

DECLARATION

During the course of writing this thesis, the following articles and book chapters have been either published or accepted for forthcoming publication:

Ellie Smith, ‘Investigating Rape at the International Criminal Court: The Impact of Trauma’ (2012) *Issues in International Criminal Justice*, Special Volume: The Lubanga Trial: Lessons Learned 99

Ellie Smith, ‘Victims in the Witness Stand: Socio-cultural and Psychological Challenges to the Achievement of Testimony’ in Szabo K T J and Hirst M (eds), *Victim Participation in International Criminal Justice* (Springer, forthcoming 2015).

Melanie Klinkner and Ellie Smith, 'The Right to Truth, appropriate forum and the International Criminal Court' in Szablewska N and Bachmann S D (eds), *Current Issues in Transitional Justice: Towards a More Holistic Approach*, (Springer 2015).

The published materials are appended to this thesis.

Introduction

The integration of victims into the practices and procedures of the International Criminal Court (“ICC” or “Court”) has been hailed as a significant and innovative development in the status of victims in international criminal justice. According to Bassiouni, “[o]ne of the most important recognitions of the victim as a subject of international criminal law is contained in the ICC Statute...[reflecting] the most advanced position that exists in established international criminal justice”.¹ Cohen observes that the Rome Statute of the International Criminal Court (the “Rome Statute”) “completely modifies the position of victims from witnesses of crimes to...the subject of rights”,² while Mettraux states that the new role provided for victims in the Rome Statute marks a “momentous advance in the field of international criminal law....The regime adopted by the ICC...is the promise of justice *for*, and not just *with*, the victims”.³

It is widely accepted in academic and expert practitioner literature that in incorporating victim-focussed measures into the Rome Statute, the drafters introduced elements of restorative justice alongside the Court’s more traditional, retributive function.⁴

¹ Cherif Bassiouni, ‘International Recognition of Victims’ Rights’ (2006) 6:2 Human Rights Law Review 203, 230, and see also Wemmers, who describes the integration of victims into the Statute as “one of the major innovations of the ICC”, Jo-Anne Wemmers, ‘Victims’ rights and the International Criminal Court: perceptions within the court regarding the victims’ right to participate’ (2010) 23 Leiden Journal of International Law 629; William A. Schabas, *An Introduction to the International Criminal Court* (3rd edn, Cambridge University Press 2007), 328, who describes the Court’s victim participation scheme as “one of the great innovations of the Rome Statute”; Fiona McKay, ‘Victim Participation in Proceedings before the International Criminal Court’ (2008) Vol. 15, Issue 3, Human Rights Brief, Centre for Human Rights and Humanitarian Law, American University Washington College of Law, available online, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1027&context=hrbrief>, last accessed 26 March 2015.

² Miriam Cohen, ‘Victims’ Participation Rights Within the International Criminal Court: A Critical Overview’ (2008 – 2009) 37:3 Denv. Int’l L. and Pol’y 351.

³ In Guénaél Mettraux, ‘Victims’ Participation in International Criminal Law’ (2010) 8(1) Journal of International Criminal Justice 75. See also Christine Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?’ (Spring 2008) Vol.6, Issue 3 Journal of International Human Rights 459.

⁴ Notably, while there is wide agreement in the literature of the Court’s restorative mandate, agreement is not universal; for an alternative position, see Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 49; Sergey Vasiliev, ‘Victim Participation Revisited: What the ICC is Learning About Itself’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 64; and, to a lesser extent, Conor McCarthy, ‘Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of

McGonigle, for example, describes the Court's victim participation endeavour as "an attempt [by the drafters] to make a court that punishes individual perpetrators as well as a court that focuses on administering restorative and reparative justice."⁵ Mekjian and Varughese write that the Rome Statute represents "the creation of a new dynamic wherein punitive justice, found within adversarial court systems, [is] to be balanced with restorative justice principles",⁶ while Haslam observes that the Statute marks a departure from a purely retributive model of international criminal justice in favour of a "more expansive model...that encompasses social welfare and restorative justice."⁷ Restorative measures in the Rome Statute are manifested in the ability of victims to participate in proceedings⁸ and to seek reparations in respect of the crimes charged.⁹ The focus of this thesis is on the Court's victim participation endeavour.

For proponents of victim participation, engagement has the potential to provide a number of restorative benefits, including the generation in the victim of "healing and rehabilitation"¹⁰ and a sense of empowerment and closure.¹¹ Victim participation is not,

Justice?' (2012) 10 Journal of International Criminal Justice 351. The restorative mandate of the Court is examined substantively in Chapter 1.

⁵ Brianne McGonigle, 'Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavour of the International Criminal Court' (2009) Vol.21 Florida Journal of International Law 93, 96.

⁶ Gerard J. Mekjian and Mathew C. Varughese, 'Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court' (2005) Vol. 17.1 Pace International Law Review 1, 20.

⁷ See Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004).

⁸ Article 68(3) of the Rome Statute.

⁹ Article 75 of the Rome Statute.

¹⁰ See, for example, Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide* Redress, 1999, 15; Women's Caucus for Gender Justice *Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court*, 4th – 15th August 1997, 33.

¹¹ Yael Danieli *Victims: Essential Voices at the Court* (September 2004) 1 VRWG Bulletin 4; Jonathon Doak *Victims' Rights in Criminal Trials: Prospects for Participation* (2005) 32 Journal of Law and Society 294, 295.

however, restorative *per se*. Instead, it is the nature and content of participation that will determine if, and the extent to which, participating victims experience any restorative benefit by virtue of their engagement with the Court, and hence, whether the Court is successfully realising its restorative mandate. It is therefore vital to the success of the Court's endeavour that it has a clear vision of precisely what, in restorative terms, it is seeking to achieve for victims of international crimes, including what, in practice, a restorative aim would comprise within the particular context of the ICC.

Yet despite the ambitions of the drafters to devise and construct a new and innovative restorative regime for the benefit of victims, restorative justice remains an under-developed concept in international criminal law in terms of its specific aims and parameters, thereby inhibiting the operation and realisation of that ambition. While the Court itself formally recognises its restorative mandate, it has not indicated either what it means by restorative justice in the context, or what restorative justice would comprise in practice for participating victims. Moreover, academic and expert practitioner literature does not currently respond to this problem. In particular, where the Court's restorative mandate is acknowledged in the literature, there has been little attempt to expand upon what restorative justice means in the context of international criminal law, or what its manifestation and realisation would constitute in practical terms. Where attempts have been made to amplify the concept, the proposed ambit of the proffered description is confined to the particular article or study at hand, and in any event, provides little in the way of further guidance in the identification and delineation of the concept for broader application within the Court itself. McGonigle, for example, in adopting a working definition of restorative justice for the purpose of her analysis of the Court's joint restorative and retributive mandate, notes simply that "restorative justice calls on international courts to focus attention on the interests of victims rather than strictly on the prosecution and punishment of the accused."¹² A similar approach is adopted by the War Crimes Research Office, Washington College of Law, in its review of the Court's victim participation project, indicating that, for the purpose of the study, the authors understand "restorative justice" to mean that "mechanisms created to deliver criminal justice should focus on the interests of victims, as opposed to strictly punishing wrongdoers".¹³

¹² McGonigle (n 5), 96 (at footnote 7).

¹³ War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, Washington College of Law, 'Victim Participation Before the International Criminal

These amplifications remain, however, working definitions. In the absence of any clearly identified aim(s) or delineated parameters of the concept, they remain ultimately abstract, and while reference is made to the interests of victims, there is no indication what the specific interests of victims of international crimes would constitute in this regard, or whether those interests are themselves consistent with restorative justice theory.

The ability of the Court to identify and proactively pursue the specific restorative needs of participating victims contained in the Rome Statute is essential not only to the success of the innovative endeavour, but also, potentially, to the Court itself.

Failure by the Court to realise its restorative mandate risks victim disappointment and disillusionment, leading potentially to the active disengagement of victims from the Court. The Court would thereby not only fail to achieve a restorative benefit for the very individuals it was designed to help, to their obvious detriment, but a withdrawal of support from within the victim community would also impinge upon the perceived legitimacy of the institution itself in the eyes of the affected population. Moreover, a lack of victim engagement and cooperation with the Court may also have consequences for the ability of the Court to successfully pursue, investigate and prosecute suspected perpetrators, and so affect the achievement of its retributive mandate.¹⁴ At the same time, in the absence of any specific parameters to contain the expectations of participating victims in terms of what they might realistically achieve by virtue of their participation, the potential for victim disillusionment and disengagement is exacerbated.¹⁵

Court' (November 2007) 8 (at footnote 15), available online at <
https://www.wcl.american.edu/warcrimes/icc/icc_reports.cfm> last accessed 10th June 2015.

¹⁴ See, for example, Wemmers, J. A., *Victims in the Criminal Justice System: A Study in to the Treatment of Victims and its Effects in their Attitudes and Behaviour* (Kugler publications 1996) 22 – 24, 27 – 28, 210. Richard Young, 'Integrating a Multi-Victim Perspective in to Criminal Justice Through Restorative Justice Conferences' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000); Jo Goodey, 'An Overview of Key Themes' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice, International Debates* (Ashgate 2000). Significantly, there is already emerging evidence of dissatisfaction with the Court: see for example, *Sudan Victim Lawyers recount their experiences with the ICC so far*, Issue 9, Summer/Autumn 2007 ACCESS, available online at <<http://www.vrwg.org/ACCESS/ENG09.pdf>> last accessed 22nd June 2015.

¹⁵ The need for courts to manage the expectations of victims has been noted, for example, in the case of the Extraordinary Chamber in the Courts of Cambodia, in Nadine Kirchenbauer, Mychelle Balthazard, Lat Ky and others, 'Victims Participation Before the Extraordinary Chambers in the Courts of Cambodia: Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002' (January 2013), available online at <

In addition, the need for the Court to achieve restorative engagement for victims poses a further challenge: at present, the Court has no way of knowing whether, and to what extent, it is meeting its restorative mandate. As a result, it is unable either to assess its progress in the pursuit of restorative justice for participating victims or to make informed, targeted and evidence-based adjustments to its participation regime with a view to enhancing the potential for effective and meaningful engagement.

In particular, to date there has been no monitoring or assessment of the Court's victim participation mandate by reference to the achievement of any restorative benefit in the victim. Without any understanding of the specific parameters of restorative justice for participating victims, evaluation in this regard is not currently achievable, and there is presently no assessment tool for the evaluation of perceptions of substantive justice more broadly in victims engaging with international criminal justice mechanisms. Moreover, despite a heightened interest in victims' experiences of engaging with transitional justice mechanisms, we still know relatively little about why, for some victims, judicial engagement is experienced positively while for others it is not.¹⁶ A greater understanding of those variables which have the potential to affect victims' experiences would improve the potential for the achievement of effective and meaningful participation, and hence victim satisfaction with the Court itself.

In addition to challenges posed to the Court in the realisation of its mandate, the lack of any clear articulation of restorative justice in the context inhibits academic and expert practitioner discussion, and hinders any attempts to modify or refine the endeavour. The endeavour itself has engendered much debate. In some cases, this has concerned an identified need to ensure that participation is effective and meaningful.¹⁷ In other cases,

<http://www.eccc.gov.kh/sites/default/files/Victims-participation-before-ECCC-Baseline-Study-Jan-.pdf>, last accessed 10th June 2015. The need for the ICC to manage the expectations of witnesses has also been noted, see Human Rights Centre, University of California, Berkeley School of Law, *Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses* (June 2014) 5.

¹⁶ Noted, for example, in Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (June 2011) Vol.93 No. 882 *International Review of the Red Cross* 503, and see also David Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) Vol. 31 *Human Rights Quarterly* 592.

¹⁷ See, for example, Mariana Pena, 'Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead' (2009) *Journal of International and Comparative Law* 497, 511; McGonigle (n 5) at 145; Bob Cryer, Håkan Friman, Darryl Robinson

authors have questioned the probity of actively pursuing a restorative mandate within an otherwise retributive mechanism and/or have called for the review and reform of the endeavour.¹⁸ In the absence of any tangible articulation of the functions, aims and parameters of restorative justice within the context, however, these debates lack a unifying, shared conceptual framework and to some extent are premature. Unless, for example, we know what restorative justice should comprise in practice for participating victims, we are unable to say whether or not participation has been effective and meaningful, or what it would take to make it so. Likewise, calls for an overhaul of the participation system that are not based on any clear and common understanding of what the restorative endeavour should be seeking to achieve in practice, somewhat beg the question “overhaul with a view to achieving what?” In short, in the absence of any practical amplification of restorative justice in the context, we lack the language and framework required for these debates, rendering them of limited potential impact in real terms.

The successful identification, pursuit and achievement by the Court of its restorative mandate, including the evaluation and monitoring in its progress in this regard, is therefore essential to both the functioning and legitimacy of the Court. In the absence of any clear understanding of what restorative justice means for victims in the specific context, including any concrete indicators of the restorative needs and interests of participating victims, however, the endeavour itself remains intangible, and hence problematic in its pursuit, realisation and assessment, and the Court is thereby left with the challenge of realising a non-specific mandate that is also essential to its success and legitimacy, and at the same time, has no way of knowing if it is achieving it.

and Elizabeth Wilmhurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 480. The notion of “effective and meaningful” participation is examined and developed further in Chapter 1, at para 1.2.3.(ii).

¹⁸ See, for example, Vasiliev (n 4). Calls for reform have also come from States Parties, see, for example, ASP Resolution on Strengthening the International Criminal Court and the Assembly of States Parties (21 December 2011) ICC-ASP/10/Res.5, para 49; Redress, ‘The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future’ (October 2012), available online at <http://www.redress.org/downloads/publications/121030participation_report.pdf> last accessed 26th March 2015. Mark Kersten, ‘Whither Victim Participation’ (15th November 2012) Justice in Conflict, available online at <<http://justiceinconflict.org/2012/11/15/whither-victim-participation/>>, last accessed 8th June 2015.

The aim of this thesis is therefore to develop and advance the concept of restorative justice for victims of international crimes into one that is tangible and apposite to the particular victim community, and to consider how its achievement can be measured in the particular context of the Court.

The thesis rests on the assumption that the Rome Statute incorporates restorative justice notions into an otherwise retributive context, and hence seeks restorative goals for participating victims. In Chapter 1, the theoretical basis of the participation endeavour is explored in more depth and in light of the drafting history and documentary sources of Article 68(3). The chapter then considers whether and to what extent the underlying restorative rationale for the provision is formally acknowledged in the Court's jurisprudence, and examines the consistency of current approaches to the operation of the endeavour with the restorative intent of the drafters. Particular attention is paid to the potential impact of alternative interests which are operational at the Court on the achievement of restorative benefit for participating victims. These alternative interests include the pursuit of a retributive mandate, the Court's search for the truth, and the achievement of procedural justice for victims.

In Chapter 2, this thesis explores and considers a suitable and appropriate overarching goal for restorative action at the Court. A therapeutic rationale for victim participation is examined, and its suitability to the ICC project is assessed by reference to clinical literature. An alternative restorative aim – the pursuit of a sense of justice in the victim – is then considered, and existing literature from the fields of law, psychology and political science is examined in order to evaluate the feasibility of achieving the aim in the context of the ICC. In the second part of Chapter 2, consideration is given to how a psychological goal can be rendered operational within a judicial forum. A restorative goal is then delineated into its constituent parts with a view to rendering it tangible, meaningful and operational in practice for the Court.

Chapter 3 of this thesis considers how the Court's progress in the pursuit of its restorative mandate can be evaluated, and the detailed framework of a psycho-legal assessment tool for the monitoring and evaluation of the Court's pursuit of restorative benefit for participating victims is developed and proposed. To this end an assessment framework from an alternative transitional justice context is examined with a view to considering the extent to which it is applicable and transferable to the ICC's victim participation project. The Chapter then goes on to consider how assessment might be conducted in the context

of the ICC in respect of factors which have the potential to affect the achievement of effective and meaningful participation. The current state of knowledge in relation those factors known to impact upon experiences of judicial engagement is examined and a number of alternative variables proposed for incorporation into the assessment framework.

Approach to the research

While the International Criminal Court is not a restorative justice mechanism, it has, it is argued,¹⁹ through the inclusion of participative and reparative provisions, effectively integrated restorative justice notions within what is otherwise a traditional, retributive context. Restorative justice therefore provides the theoretical basis of this research.

An interdisciplinary approach is taken to this research which seeks to combine and integrate theory, methodology and practice from the fields of law and psychology. The approach provides an innovative means of analysing and addressing challenges and gaps in legal theory and practice, and, it is argued, in bridging legal and psychological disciplines, better recognises the realities for victims approaching the Court as participants.

Despite a growing recognition of the need for interdisciplinary research as a means of responding to complex, “real-world” problems,²⁰ there is, as yet, no common definition of interdisciplinary studies,²¹ and since interdisciplinary approaches and practices span both academic and professional arenas, there is no single or unified body of discourse on the

¹⁹ In Chapter 1.

²⁰ See, for example, Carole Palmer, who notes that “real-world research problems...rarely arise within orderly disciplinary categories, and neither do their solutions”, *Work at the Boundaries of Science: Information and the interdisciplinary research process* (Springer 2001) vii.

²¹ The lack of any single, unifying definition is noted, for example, in Allen F. Repko, *Interdisciplinary Research: Process and Theory* (2nd edn, Sage Publications 2012) 3, 12; Julie Thompson Klein *Interdisciplinarity: History, Theory and Practice* (Wayne State University Press 1990) 11 – 12; Rick Szostak ‘Modernism, postmodernism, and interdisciplinarity’ (2007) 25 Integrative Studies 32, 34, describing interdisciplinarity as a “contested concept”.

meaning and ambit of interdisciplinarity.²² For critics of interdisciplinary approaches, the absence of any common definition renders the term “close to meaningless” in its application.²³ A number of definitions have, however, gained wide recognition within the literature, and a number of common features can be discerned by reference to them,²⁴ indicating that the term is not so void of meaning as its critics might suggest.

According to Klein and Newell, interdisciplinary studies comprises “a process of answering a question, solving a problem, or addressing a topic that is too broad or complex to be dealt with adequately by a single discipline or profession...[It] draws on disciplinary perspectives and integrates their insights through construction of a more comprehensive perspective”.²⁵ Newell’s subsequent refinement of this definition posits that interdisciplinary studies “draws critically on disciplinary perspectives, and it integrates their insights into a more comprehensive understanding...of an existing complex phenomenon ...[or] the creation of a new complex phenomenon”.²⁶

Boix Mansilla identifies the goal of any interdisciplinary approach as the integration of “knowledge and modes of thinking in two or more disciplines to produce a cognitive advancement – e.g., explaining a phenomenon, solving a problem, creating a product, raising a new question – in ways that would have been unlikely through single disciplinary means”,²⁷ while the US National Academies define interdisciplinarity as “a mode of research...that integrates information, data, techniques, tools, perspectives, concepts, and/or theories from two or more disciplines or bodies of specialized knowledge

²² Noted, for example, in Klein (n 21) 13, and more recently in William H. Newell ‘Six arguments for agreeing on a definition of interdisciplinary studies’ 2007 29(4) Association for Integrative Studies Newsletter 1 – 4.

²³ Jeffrey N. Wasserstrom ‘Expanding the I-word’ (2006) Section B The Chronicle of Higher Education.

²⁴ Repko (n 21) 14.

²⁵ Julie Thompson Klein and William H. Newell ‘Advancing interdisciplinary studies’ in Jerry G. Gaff and Jim L. Ratcliffe (eds) *Handbook of the undergraduate curriculum: A comprehensive guide to purposes, structures, practices, and change* (Jossey-Bass 1997).

²⁶ William H. Newell ‘Decision making in interdisciplinary studies’ in Goktug Morcol *Handbook of Decision Making: Public Administration and Public Policy* (Marcel-Dekker 2007) 248.

²⁷ Veronica Boix Mansilla, ‘Assessing student learning at interdisciplinary crossroads’ (2005) 37(1) Change 14.

to advance fundamental understanding or to solve problems whose solutions are beyond the scope of a single discipline or area of research practice”.²⁸

Notably, the indicated definitions share a number of common features. In particular:

- An interdisciplinary approach provides a means of responding to a problem that is too complex to be dealt with by a single academic discipline and/or one which extends beyond the ambit of a single academic discipline.
- It seeks to draw upon and integrate the knowledge, insights and/or methods of specific disciplines.
- In doing so, it aims to provide a more comprehensive understanding or cognitive advancement in respect of the identified problem.

Drawing upon areas of commonality between current definitions, Repko proposes an “integrated definition of interdisciplinary studies” as:

“a process of answering a question, solving a problem, or addressing a topic that it too broad or complex to be dealt with adequately by a single discipline, and draws on the disciplines with the goal of integrating their insights to construct a more comprehensive understanding.”²⁹

Repko’s definition of interdisciplinary research therefore seeks to unify the existing definitions of interdisciplinary study through the combination and synthesis of elements common to those definitions, and represents the most advanced position to date in the achievement of a single definition of interdisciplinarity. It is therefore used here as the basis for discussion of the interdisciplinary approach taken to this research. With this definition in mind, it is appropriate to consider why an interdisciplinary approach is appropriate to this research:

²⁸ National Academies, *Facilitating Interdisciplinary Research* (National Academies Press 2005) 188, cited in Gertrude Hirsch Hadorn, Christian Pohl and Gabriele Bammer ‘Solving problems through transdisciplinary research’, in Robert Frodeman (ed) *The Oxford Handbook of Interdisciplinarity* (Oxford University Press 2012) 433.

²⁹ Repko (n 21) 16.

Victim engagement with international transitional justice processes is premised upon the assumption that it has the potential to provide the victim with a cathartic, therapeutic benefit and contribute to societal peace and reconciliation.³⁰ The ability of survivor engagement to advance peace goals assumes, in turn, that engagement will generate in the victim a sense of justice, and thereby negate the potential for the re-escalation of violence amongst affected communities.³¹ The aims of victim engagement are therefore articulated in psychological terms, and entail the generation in the victim of a positive psychological impact – be it a therapeutically rehabilitative benefit, or the production in the victim of a sense of justice. Moreover, the extent to which a judicial mechanism is judged to have been successful in the pursuit of its restorative mandate for participating victims will naturally depend upon whether victims feel that participation has been restorative for them (within the meaning of an appropriate and delineated understanding of the concept), and so will be measured by them in psychological terms.

To this extent, the participation endeavour of the Court can be understood as the pursuit of a positive psychological impact in the victim,³² and the Court therefore has both legal and psychological aims. The challenge of this thesis is therefore to identify and delineate, for application and pursuit within the Court, appropriate psychological aims and impacts which are in turn compatible with the Court's mandate in respect of victims. The problem is therefore a complex one which does not reside within a single academic field of enquiry, spanning both legal and psychological disciplines. An interdisciplinary approach which seeks to draw upon and integrate the insights, perspectives and approaches from the fields of law and psychology, as a means of achieving a more comprehensive understanding of the issue and producing a cognitive advancement in respect of the identified problem, is therefore needed. To this end, a thorough review of perspectives from both disciplines has been conducted in order to achieve a more informed and coherent understanding of the issue, and particular consideration given to where and how

³⁰ See, for example, Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2011) 4 – 5, 20 – 23.

³¹ This causal logic is spelled out, for example, in Mendeloff (n 16) 597 – 600, and see also Karen Brouneus, 'The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health' (2010) 54(3) *Journal of Conflict Resolution* 408, 412.

³² The pursuit by the Court of a psychological aim, and the consequent basis of the interdisciplinary approach taken to this thesis, is discussed further below, in the specific context of the identification of an appropriate psychological aim for the Court's innovative endeavour, at para 2.2.1., and in relation to the assessment of psychological impacts, at para 3.2.1.

the insights and approaches of the respective disciplines might be brought together and employed to respond to the identified issue and to enable a furtherance of theory in the specific context of reparative justice for victims in the field of international criminal law.

This thesis seeks to do this in the following ways:

In Chapter 2 of this thesis, the perceived psychological impacts of victim engagement in international transitional justice processes are examined with a view to amplifying the content of restorative justice theory in international criminal law. In doing so, impacts are examined by reference to their compatibility with restorative justice theory and the specific ambit of the Court, and the approach is therefore ostensibly a legal one. Within the course of that examination, the sustainability of assumptions made in transitional justice literature is considered by reference to empirical clinical research with victims. Clinical interpretations of psychological impacts are then explored as a means of expanding legal understandings, and comparisons made between legal and clinical approaches to the incorporation of more qualified, objective elements with a view to rendering the aim appropriate for judicial application.

In Chapter 3, a detailed assessment framework is developed and proposed for the evaluation of the Court's restorative endeavour. In particular, assessment is proposed in respect of the justice goals of participating victims, together with their attitudes and evaluations in respect of the achievement of those goals. Reference to psychological approaches to the assessment and measurement of attitudes and perceptions in a substantial research population is therefore justified, and an appropriate approach is considered, identified and employed.³³ The proposed assessment framework therefore borrows heavily from clinical methodology, providing an appropriate means of evaluating the achievement of the Court's legal mandate in psychological terms.

Interdisciplinary research is not, however, without its challenges, and the respective disciplines from which this thesis draws come with their own language and methodology. In particular, differing terminology is used between (and to some extent, within) legal and psychological disciplines to refer to and describe psychological impacts, an issue which is

³³ The approach, including the basis for its adoption and a consideration of both its relative strengths and weaknesses in the context, is examined in further detail below, at para. 3.2.2.(ii).

examined in some detail at para 2.2.2.(i).³⁴ Time has therefore been taken both during the process of this thesis and through earlier work and research conducted by the author,³⁵ to engage with the literature with a view to obtaining a clear understanding of the various uses of terms within the disciplines. In addition, there are clear differences in methodological approaches between legal and psychological disciplines. For the purpose of this thesis, the starting point for the identification of appropriate methodologies for Chapters 2 and 3, identified above, has been a consideration of the nature of the problem at hand, rather than any specific methodologies within the respective disciplines.

Finally, it is recognised here that in the aftermath of international crimes, affected communities and societies may be seeking ways to come to terms with the legacy of widespread and gross violations. In some cases, societies may themselves be in transition from autocratic to democratic rule, or otherwise be emerging from conflict. The transitional context within which individuals seek justice has a clear bearing on the nature of victims' reparative needs, an issue that is considered in more depth below,³⁶ as well as on how those needs might be effectively pursued and managed within the Court. Transitional justice literature is therefore referred to in this research to the extent it relates to the pursuit and achievement of positive psychological benefit in victims.

Transitional justice is understood here as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability".³⁷ The related concept of "post-conflict justice"

³⁴ This challenge is noted, for example, in Ken Fuchsman, 'Rethinking Integration in Interdisciplinary Studies' (2009) No. 27 Issues in Integrative Studies 70, 73 and subsequently.

³⁵ The author spent eight years designing and conducting legal and interdisciplinary research (legal/psychological/medical) with victims of international crimes at the Medical Foundation for the Care of Victims of Torture (now Freedom from Torture), a UK-based torture treatment centre.

³⁶ See the following section, Scope and Limitations.

³⁷ UNSC, 'The Rule of Law and transitional justice in conflict and post-conflict societies, Report of the Secretary General to the Security Council' (2004) UNSC Doc.S/2004/616. For an alternative definition, see Olsen, Payne and Reiter, who define transitional justice as "the array of processes designed to address past human rights violations following periods of political turmoil, state repression or armed conflict", Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter *Transitional Justice in Balance: Comparing Processes, weighing efficacy* (Institute of Peace Press 2010) 11; The International Centre for Transitional Justice, an international non-governmental organisation, defines transitional justice as "a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs and various kinds of institutional reforms." a response to systematic or widespread violations of human

is understood as encompassing two elements, “retributive and restorative justice with respect to human depredations that occur during violent conflicts” and “restoring and enhancing justice systems which have failed or become weakened as a result of internal conflict”.³⁸ The focus of this research is on the first of these elements.

Transitional justice therefore seeks to respond to the wide and sometimes disparate needs of societies in transition and typically concerns situations of mass victimisation,³⁹ where the justice needs of substantial numbers of victims arise against the backdrop of a need for collective repair and healing. Particular reference is had in this research to the perceived psychological benefits of victim engagement identified in transitional justice literature, and these are examined in Chapter 2 from the specific perspective of their applicability and suitability to the ICC context. The issue of mass victimisation and its relationship to the pursuit of individually reparative benefit is examined further below in this section.

Notably, the research is theoretical in nature. During both the development and conduct of the research, specific thought was given to the possibility of conducting an empirical study involving participating victims. In particular, consideration was given to the possibility of (1) validating the assessment parameters identified in Chapter 2 (and reiterated in Chapter 3 in the context of an assessment tool) with a sample of the ICC participating victim population in order to assess the extent to which the parameters accurately reflect the justice aims of victims participating in ICC proceedings, and (2) piloting the assessment tool and/or conducting an initial assessment of victims’

rights. It seeks recognition for the victims and to promote possibilities for peace, reconciliation, and democracy”, <<https://www.ictj.org/about/transitional-justice>> last accessed 28th January 2016.

³⁸ Cherif Bassiouni, *Post-Conflict Justice* (Transnational Publishers 2002) xv. The definitions of post-conflict justice and transitional justice (UNSC, above) are cited with approval in Stephan Parmentier and Elmar G.M. Weitekamp ‘Political Crimes and Serious Violations of Human Rights: Towards a Criminology of International Crimes’, in Stephan Parmentier and Elmar G.M. Weitekamp (eds) *Crime and Human Rights* (Elsevier 2007) 109, 130 – 131, the authors noting in relation to the two proffered definitions “[a]lthough these two notions are not identical, and although they are not without conceptual problems, they seem to catch best the kinds of situations and the kinds of problems associated with the commission of international crimes”.

³⁹ Defined by Fattah as “victimization directed at, or affecting, not only individuals but also whole groups. In some cases the groups are very diffuse, the members have nothing or not much in common, and the group is not targeted as a specific entity. More often, however, the acts of victimization are directed against a specific population”, Ezzat Fattah *Understanding Criminal Victimization* (Scarborough 1991) 412.

perceptions of their participation experience with a view to obtaining preliminary data in relation to victims' sense of justice in respect of their participation. At a practical level, piloting and empirical assessment in respect of (2) would, of course, first require the physical development of the assessment tool itself, and so evaluation in that regard was not feasible. The decision not to validate justice parameters for participating victims at this stage of the research was taken for a number of reasons:

The conduct of an empirical study, including validation of justice parameters, was recognised to offer potential advantages to the thesis in terms not only of the generation of data but also, from a pragmatic point of view, in framing the scope of the thesis in terms of both content and structure. Against these advantages, thought was given to the impact on the thesis itself of conducting and including an empirical study. In particular, consideration was given to the fact that the identification of the justice aims of victims of international crimes had, to a large extent, already been conducted elsewhere, albeit not in the specific context of the ICC, and there was therefore a concern that the opportunity to make a contribution to knowledge in the field might be limited. In addition, in light of the time taken to conduct an empirical study, it was probable that the scope of the thesis itself would become more limited, such that the identification of an assessment framework would likely not be feasible.

Finally, and decisively from the point of view of conducting any empirical research at this stage, discussions with the Head of the Court's Victims Participation and Reparations Section revealed that while she was amenable, in principle, to the conduct of research into the justice perceptions of participating victims, access for the conduct of such research would only be considered once the findings of a study by researchers from Berkeley University concerning victims' evaluation of the processes and procedures allied to the participation endeavour became available. The findings of the Berkeley study were published in December 2015.

While, however, the thesis is, as a result, theoretical in nature, it provides the basis for a substantive empirical study, and envisages, at a preliminary stage, validation of assessment parameters and piloting of the assessment tool prior to any larger-scale evaluation. These elements are considered further at para 3.6.

Scope and limitations of the research

According to Parmentier and Weitekamp, “human rights discourse has been criticized for overemphasizing the claims of individual persons, without due attention to the duties and responsibilities they bear in society, and without reference to other entities that may possess rights and responsibilities, such as communities and even states.”⁴⁰ In the introduction to their edited book, the authors identify three waves in the development and emergence of human rights, giving rise, in turn, to what they describe as three discrete human rights “generations”: (1) civil and political rights; (2) economic and social rights; and (3) “solidarity rights”, most often viewed in ‘collective’ terms”.⁴¹

While the emphasis of this research is on the justice needs and experiences of individual participating victims, the separation of individual and collective experiences and corresponding reparative needs is somewhat artificial. In particular, it is recognised here that victims’ needs and experiences arise in the context of crimes of mass victimisation that are inherently collective in their perpetration, and which engender a complex and interrelated interplay of individual and collective needs in both individual victims and the affected community.

The reparative needs of victims of international crimes arise ostensibly in response to the harm(s) suffered by the crime(s) committed.⁴² These needs may, in turn, be physical, psychological and/or financial in nature, together with more immediate protection needs and a desire for recognition within the justice system.⁴³ The interdependency of individual and collective needs of victims in the aftermath of international crimes can best be illustrated through a brief exploration of the form and nature of the psychological impacts typically engendered in both individual victims and societies by the perpetration of organised or mass violence.

⁴⁰ Parmentier and Weitekamp, (n 38), 4.

⁴¹ Ibid, citing French lawyer, Karel Vasak, at 2.

⁴² Jo-Anne Wemmers and Anne-Marie de Brouwer ‘Globalization and Victims’ Rights at the International Criminal Court’ in Rianne Letschert and Jan van Dijk (eds) *The New Faces of Victimhood: Globalization, Transnational Crimes and Human Rights* (Springer 2011).

⁴³ Wemmers and de Brouwer, *ibid*, 282, 287.

At an individual level, the trauma occasioned by the perpetration of international crimes can give rise to “a metamorphosis of the psyche...mental decomposition and collapse”,⁴⁴ leading to the rupture of mental functioning.⁴⁵ Associated violations can impact upon a survivor’s sense of self,⁴⁶ producing identity disorientation and depersonalization, and essentially eliciting “the devastation of one’s core identity”.⁴⁷ Man-made trauma such as that associated with gross human rights violations and war can shatter core beliefs, including belief in the world as a just place (“the existential dilemma”),⁴⁸ in others as kind and trustworthy individuals, and in the inviolability of the self.⁴⁹ In addition, survivors may experience feelings of shame, guilt and self-blame, together with a sense of disempowerment and helplessness. Survivors may also suffer grief for the loss of others and the self, anxiety, depression (including suicidal ideation), intrusive phenomena such as flashbacks and nightmares, avoidance, emotional numbness and difficulties in recollection.⁵⁰ Where abuse has included forms of sexual violence, survivors may also

⁴⁴ Marcelo N. Vinar, ‘The specificity of torture as trauma: The human wilderness when words fail’ (2005) 86 *International Journal of Psychoanalysis* 313.

⁴⁵ Henry Krystal, *Integration and Self-Healing: Affect, Trauma, Alexithymia* (The Analytic Press 1988) cited in Lilla Hardi and Adrienn Kroo ‘The Trauma of Torture and the Rehabilitation of Torture Survivors’ (2011) Vol. 219(3) *Journal of Psychology* 133.

⁴⁶ Ibrahim Kira ‘Torture Assessment and Treatment: The Wraparound Approach’ (2002) Vol. 8, No.2 *Traumatology* 54.

⁴⁷ Udo Rauchfleisch, *Allgegenwart der Gewalt*, (Vandenhoeck and Ruprecht 1996) cited in Hardi and Kroo (n 45) 133.

⁴⁸ See, for example, Jane Herlihy and Stuart Turner ‘Should discrepant accounts given by asylum seekers be taken as proof of deceit?’ (2006) Vol. 16, No. 2 *Torture*, 81, 84; Ramsay Gorst-Unsworth and Stuart Turner ‘Psychiatric Morbidity in Survivors of Organised State Violence Including Torture’ (1993) 162 *British Journal of Psychiatry*, 55.

⁴⁹ International Rehabilitation Council for Torture Victims, *Psychological Evaluation of Torture Allegations: A practical guide to the Istanbul Protocol – for psychologists* (2nd edn 2007) 6 – 7. See also Inger Agger, in *The Blue Room: Trauma and Testimony among Refugee Women – A Psycho-Social Exploration* (Zed Books 1992) 13.

⁵⁰ See, for example, Chris Brewin ‘Autobiographical Memory for Trauma: Update on four Controversies’ (2007) 15(3) *Memory*, 227 – 228; Lisa Duke and others, ‘The sensitivity and specificity of flashbacks and nightmares to trauma’ (2008) 22 *Journal of Anxiety Disorders*, 310-320; Ellie Smith and Nimisha Patel, ‘Medical Foundation Statement in Support of the Torture Damages Bill’ (2008), available online at <<http://www.redress.org/downloads/torture-bill/MedicalFoundationStatement.pdf>> last access 12th March 2016.

experience sexual dysfunction, fear of intimacy, self-loathing and rejection of their body, which in turn can engender self-injurious behaviour.⁵¹

In addition to the psychological impact of international crimes experienced at an individual level, affected societies may suffer collective trauma.⁵²

Manifestations of trauma at a societal level can include varying forms of community dysfunction. Abuses such as torture or ethnic violence may create “an order based on imminent pervasive threat, fear, terror, and inhibition,...a state of generalized insecurity, terror, lack of confidence, and rupture of the social fabric”.⁵³ Societies that witness the perpetration of atrocities such as war rape and other forms of violence against community and family members may experience severe trauma.⁵⁴ Collectively, communities enter

⁵¹See, for example, Kenneth Plummer, *Telling Sexual Stories: Power, Change and Social Worlds*, (Routledge, 1995) 70, 74; Cassandra Clifford, ‘Rape as a Weapon of War and its Long-term Effects on Victims and Society’, Conference paper, 7th Global Conference, *Violence and the Contexts of Hostility*, Budapest, 5th – 7th May, 2008; Sophie Yohani and Kristen Hagen, ‘Refugee women survivors of war related sexualised violence: a multicultural framework for service provision in resettlement countries’ (2010) Vol. 8, No.3 *Intervention*, 208 – 209; Kristen Hagen, ‘The Nature and Psychosocial Consequences of War Rape for Individuals and Communities’ (2010) Vol.2, No. 2 *International Journal of Psychological Studies*, 19; Pamela Bell, ‘Consequences of Rape for Women’s Health and Well-being, Family and Society’, in Marie Vlachova and Lea BIASON (eds), *Women in an insecure world: Violence against women, facts, figures and analysis*, (DCAF 2005) 115 – 121, 117 - 119.

⁵² See Jeffrey Alexander, *Trauma: A Social Theory* (Polity Press 2012), who explores the development of social and cultural trauma. See also Stevan Weine and others, ‘Testimony psychotherapy in Bosnian refugees: A pilot study’ (1998) 155 *American Journal of Psychiatry*, 1721; Kira (n 46) 55.

⁵³ See Kira (n 46); International Rehabilitation Council for Torture Victims (n 49). While torture is an act perpetrated against individuals, its effects are intended to be experienced on a wider level, such that, whether implicitly or explicitly, torture represents a threat to the broader community and its value systems; International Rehabilitation Council for Torture Victims (n 49) 7. This broader applicability is reflected in legal definitions of the term, which include third party intimidation and coercion as an underlying, purposive feature of the act; see, for example, within a human rights law context, Article 1(1), United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (adopted 10 December 1984, entered into force 2 June 1987) 1465 UNTS 85.

⁵⁴ Hagen (n 51) 19. War rape serves to instil fear in other women and to demonstrate suppression of a community, and can be interpreted by witnesses as both a physical and psychological defeat; see Joshua Goldstein, *War and Gender* (Cambridge University Press 2001) 362-363; Christoph Schiessl ‘An element of genocide: Rape, total war and international law in the twentieth century’ (2002) Vol. 4(2) *Journal of Genocide Research*, 198. Rape of women can have long-term cultural, social and psychological consequences within a community. For cultures that place specific emphasis on the sanctity of a woman’s sexuality, public rape serves both to undermine the social order and to destroy the self-worth of the victim through the generation of profound feelings of shame and dishonour; see, for example, Bell (n 51) 115 – 121; Annette Lyth, ‘The development of the legal protection against sexual violence in armed conflicts – advantages and disadvantages’

into shock, which is compounded by grief for the loss of the victim through either death, the debilitating physical and psychological impact of the violation, or, in the case of rape, familial and community rejection.⁵⁵

Whilst the perpetration of international crimes can generate psychological trauma at the individual and societal levels, the respective nature of individual and collective traumas may differ. Individual and collective trauma reactions can seemingly be influenced, and therefore differentiated, by factors such as the specific targeting of abuse and the duration or intensity of the stressor.⁵⁶ These factors in turn affect the degree of life threat - i.e. the assessed risk of surviving the event - and hence the resulting trauma response. In particular, individually-targeted violations are more likely to represent a threat of imminent death than a repressive, longer-term and chronic stressor targeted at a specific community.⁵⁷ Notably, while mass conflict is recognised as having a widespread, psychological impact upon society, it should also be acknowledged that its effects will not necessarily be uniform, and may be dependent upon the extent to which specific groups were affected.⁵⁸

Far from being conceptualised discretely, however, individual and collective/societal forms of trauma are interlinked and interdependent. Victims experience international crime(s) in varying and concurrent capacities: individually, as a direct victim; indirectly, as a family member of a direct victim; and as a member of a victimised community or

(2001) available online at <<http://kvinnatillkvinna.se/sites/default/publikationer/rapporter/pdf/development.pdf>>. Ellie Smith and Jude Boyles, 'Justice Denied: The experiences of 100 torture surviving women of seeking justice and rehabilitation', (2009) Medical Foundation for the Care of Victims of Torture, London, available online at <<http://www.freedomfromtorture.org/document/publication/5863>>, last accessed, 14th March 2016. In societies which view women as the purveyors of culture, war rape operates not only to destroy family and community, but also social heritage and communal mores; Hagen (n 51) 16.

⁵⁵ Yohani and Hagen (n 51) 208, 214; Hagen (n 51) 19.

⁵⁶ Jens Modvig and James Jaranson, 'A Global Perspective of Torture, Political Violence, and Health', in John Wilson and Boris Drozdek (eds), *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims*, (Brunner-Routledge, 2004), 37.

⁵⁷ *ibid.*

⁵⁸ Jorge Aroche and Mariano Coello, 'Ethnocultural Considerations in Treatment of Refugees' in John Wilson and Boris Drozdek (eds), *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims*, (Brunner-Routledge, 2004), 57.

group, indicating a potentially complex array of reparative needs in those participating in proceedings before the International Criminal Court. In particular, clinical literature describes a “layering” of trauma, such that an individual, as a member of a particular group or of society more broadly, may experience the first phase of traumatising with the onset or increase in group repression, persecution (which may include elements of social and political change) and violence. The period(s) during which the individual personally becomes a victim of serious human rights violations or international crimes marks the second phase in the traumatising process.⁵⁹

In addition, community or societal allegiance or affiliation in the individual, as aspects of social and cultural identity, form part of the individual’s personal identity system.⁶⁰ Where persecutory or abusive actions, such as genocide or ethnic cleansing, are directed at entire ethnic or cultural populations, the sense of group identity and allegiance is heightened,⁶¹ producing collective solidarity, identity and mutual support.⁶² When the group, or members of it, are attacked, “interdependency can be threatened by the disruption of the social network with a subsequent weakening of people’s individual or collective identity”.⁶³ In these circumstances, the consequences of an act of ethnic cleansing, such as the destruction of a village or community, amounts essentially to the destruction of the personal point of existential reference.⁶⁴

⁵⁹ Dislocation and exile, for those forced to flee violence and seek safety across borders marks the third phase of the traumatising process. See Guus van der Veer, *Counselling and Therapy with Refugees and Victims of Trauma: Psychological Problems of Victims of War, Torture and Repression* (2nd edn, Wiley and Sons, 1998) 5.

⁶⁰ See, for example, Yael Danieli in the introduction to her edited book *International Handbook of Multigenerational Legacies of Trauma*, (New York 1998), cited in Hardi and Kroo (n 45).

⁶¹ See, for example, Aroche and Coello (n 58) 56.

⁶² Modvig and Jaranson (n 56) 37.

⁶³ Joop De Jong, ‘Public Mental Health and Culture: Disasters as a Challenge to Western Mental Health Care Models, the Self, and PTSD’, in John Wilson and Boris Drozdek (eds), *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims*, (Brunner-Routledge, 2004), 165, 168.

⁶⁴ David Becker, ‘Mental Health and Human Rights: Thinking About the Relatedness of Individual and Social Processes’, paper presented at International conference, *Towards a Better Future: Building Healthy Communities* (October 2003) Belfast.

At the same time, psychological trauma can affect the individual's sense of attachment and connectedness, and this, coupled with a loss of trust in others, may impact upon familial and social roles - as parent, spouse, employee, employer, citizen etc.⁶⁵ - engendering a deterioration in social, educational and occupational functioning.⁶⁶ This in turn can lead to social withdrawal and isolation, affecting societal and cultural aspects of personal identity.⁶⁷

Finally, it should be noted that social, political and cultural factors prevalent within the victim's broader societal context may influence the way in which trauma is conceived and interpreted by the individual, in turn affecting the trauma response itself and the victim's corresponding reparative needs.⁶⁸

In addition to the relatively complex nature of reparative needs in victims of crimes that have been perpetrated on a wide and systematic scale against ethnic or community groups, the physical and psychological harms suffered may themselves be exacerbated by the prevailing, mass victimisation context. Notably, this factor will pose additional challenges for the Court in the operation of its victim participation and reparations endeavours. Where, for example, crimes are perpetrated within an ongoing conflict setting, or where there is otherwise insecurity and/or destruction of the healthcare infrastructure, physical and psychological sequelae, and therefore resulting needs in victims before the Court, may be exacerbated by prevailing unsanitary conditions and a lack of access to clinical services

⁶⁵ Ron Baker, 'Psychosocial Consequences for Tortured Refugees Seeking Asylum and Refugee Status in Europe' in Metin Basoglu (ed), *Torture and its Consequences: Current Treatment Approaches* (Cambridge University Press, 1992), 86.

⁶⁶ International Rehabilitation Council for Torture Victims (n 49) 7.

⁶⁷ Kira (n 46).

⁶⁸ See, for example, Derek Silove, 'The Global Challenge of Asylum' in John Wilson and Boris Drozdek (eds), *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims* (Brunner-Routledge, 2004), 21. See also the Istanbul Protocol, the UN-endorsed manual for the effective investigation and documentation of torture, (OHCHR HR/P/PT/8, 2004) which provides that "[t]he psychological consequences of torture... occur in the context of personal attribution of meaning, personality development and social, political and cultural factors... The unique cultural, social and political implications that torture has for each individual influence his or her ability to describe and speak about it. These are important factors that contribute to the impact that torture inflicts psychologically and socially", sections 234 – 236. The issue is illustrated, for example, by war rape, where the psychological impact for an individual survivor may be informed by prevailing socio-cultural views concerning the sanctity of sexuality, and exacerbated by familial, communal and societal rejection; see for example, Hagen (n 51) 19; Bell (n 51) 118 – 119; Smith and Boyles (n 54).

or medication. At the same time, reparative benefit is sought by victims within a participation system that must simultaneously be responsive to the needs of many thousands of victim participants whilst also ensuring that justice is done for the accused in a fair and timely manner.

Besides the challenges posed by the problem of mass victimisation, the related transitional context within which victims seek justice presents further challenges to the Court in the realisation of individual reparative needs. In particular, societies that are seeking to come to terms with past abuses have additional needs, including the need to learn the truth about the abuses that occurred, to ensure accountability in respect of those abuses and the need to pursue and achieve measures aimed at societal cohesion, trust and reconciliation.⁶⁹ The nature of reparative needs in this context is therefore exponential. While the specific focus of this research is on the reparation of the victim, it must be recognised that this is one need amongst many for both the society seeking to come to terms with its violent past and the Court itself.

The challenges for the Court in providing reparative benefit, in whole or in part, to participating victims are therefore significant. While the focus of this research is on the identification and evaluation of reparative benefit in the individual participant, it is recognised here, and subsequently within the research, that victims' needs arise against the backdrop of mass victimisation and the challenges this poses. To this end, it should be noted that it is not the premise of this thesis that individual reparative benefit is necessarily achievable for (all) victims participating in proceedings before the ICC. The focus of this research, instead, concerns an exploration of what that reparative benefit would comprise in victims of international crimes, and how its achievement or otherwise might be evaluated in the context of the ICC.

⁶⁹ Parmentier and Weitekamp (n 38) 131- 136. The elements are ostensibly echoed by Naomi Roht-Arriaza, referring to the need to “stop the atrocities,...bring those responsible to account, to make the facts known, and to succor the victims”, in ‘A new landscape of transitional justice’, Naomi Roht-Arriaza (ed) *Transitional Justice in the twenty-first century* (Cambridge University Press 2006), 1, where cessation of atrocities can be broadly correlated with the need for peace and reconciliation. Teitel in turn describes a number of justice needs in the aftermath of mass victimisation, including “punishment, historical enquiry, reparation, purges, and constitution making”, Ruti G. Teitel *Transitional Justice* (Oxford University Press 2000) 6, where purges (lustration) and constitution making are designed in turn to restore trust in governmental mechanisms and seek to ensure non-repetition.

In addition to the above, it should also be acknowledged that empirical evaluation of the experiences of victims in engaging with international transitional justice mechanisms has been relatively limited to date.⁷⁰ Moreover, in light of the innovative nature of the Court's restorative participation endeavour, available systematic studies typically arise in alternative justice contexts and as such, the direct transferability of their findings to the ICC experiment is limited. In adopting an interdisciplinary approach, this thesis draws together and analyses the findings of studies from both the legal and clinical fields, as well as further afield. In doing so, it presents a consolidated review of current knowledge in the area, thereby maximising the evidential base from which proposals can be advanced and conclusions drawn.

Finally, while much of the clinical literature referred to in this thesis emerges in the specific context of victims of international crimes engaging with international transitional justice mechanisms, in a number of instances, materials refer instead to the experiences of victims within a purely therapeutic context. Particular care is therefore taken in this thesis to ensure that where findings have arisen in an alternative context, the extent of their transferability to the ICC is considered. To this end, differences between judicial and therapeutic contexts are acknowledged, and particular attention is paid within the thesis to the exigencies of the discreet disciplines and the direct transferability of concepts and practices between the two. Where assumptions are made as to the transferability of concepts and outcomes, they are expressly indicated in the text. For the purpose of incorporating clinical insights into legal theory in this thesis, particular regard is had to the need to ensure that clinical evidence is itself methodologically robust, explored further in paras 2.3.1.(ii) and 2.3.2.(iii)(a).

For the purpose of this thesis, the terms "victim" and "survivor" are used interchangeably.

"Restorative" and "reparative" justice are used interchangeably unless otherwise indicated in the text.⁷¹ The terms are examined in depth in para 1.2.1.

⁷⁰ Explored substantively below, at para 2.2.1.

⁷¹ A similar approach is employed in Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) Vol. 3 *International Journal of Transitional Justice* 250; Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal

1. Considering the potential for the realisation of effective and meaningful participation at the ICC: the incorporation and reflection of restorative justice theory and values in the Statute and practice of the Court

1.1. Introduction

The right of victims to participate in proceedings before the International Criminal Court is contained in Article 68(3) of the Rome Statute, which provides:

“Where the personal interests of the victim are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence”.

Article 68(3) therefore provides victim participants with the right to present their views and concerns to the Court where their personal interests are affected, at a stage of the proceedings to be determined by the Court, and in a manner which is not prejudicial to the right of the Defendant to a fair and expeditious trial. The use of the word “shall” in the text of Article 68(3) denotes that, where the various conditions of the provision are satisfied, the right of victims to present their views and concerns is not subject to the exercise of any permissive discretion on the part of the Court.⁷² The provisions of Article

Procedure’ in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000) 193.

⁷² This interpretation is reinforced by the use of the word “may” subsequently in the Article, and is consistent with an “ordinary meaning” approach to treaty interpretation, Article 31(1) of the Vienna Convention on the Law of Treaties (1969). Recognition of a similar approach to the interpretation of the provisions of the Rome Statute has been acknowledged in the caselaw of the Court, see, for example, *The Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga”) (Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008) ICC-01/04-01/06-1432 (11 July 2008) [85]. See also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (“Katanga and Ngudjolo”) (Decision on the Modalities of Victim Participation at Trial) ICC-01/04-01/07-1788-tENG (22 January 2010) [53], in which the right of victims to present their views and concerns is described in terms of a statutory entitlement; *Prosecutor v. Laurent Gbagbo* (“Gbagbo”) (Decision on issues related to the victims’ application process) ICC-02/11-01/11-33 (6 February 2012), in which the single judge describes “her *obligation* to guarantee the rights of victims to express their views and concerns in a meaningful manner” [emphasis added] [5]. See also Mariana Pena and Gaelle Carayon, ‘Is the ICC Making the Most of Victim Participation?’ (2013) *International Journal of Transitional Justice* 1, 2.

68(3), together with Court's Rules of Procedure and Evidence ("Rules" or "RPE"), however, indicate that the *manner* in which the victims' right to participate is exercised is subject to a number of judicial discretions, including the determination of an appropriate stage of proceedings in which victims' views might be presented, the specific modalities of participation and the meaning and ambit of "views and concerns" in the given case.⁷³ In exercising its discretion in this regard, the Court is required by Article 68(3) to give primacy to the right of the Defendant to a fair and expeditious trial. Participants must, in turn, be "victims" within the meaning of Rule 85 RPE.⁷⁴

Victims wishing to participate in specific proceedings before the International Criminal Court are required to submit a written application to the Registrar. Applications are processed by the Victims Participation and Reparation Section ("VPRS") of the Registry, and victim participation status is determined by the Tribunal on a case-by-case basis.⁷⁵ The potential modalities of participation are wide-ranging, and include the ability of victims to attend and participate in specific hearings, either orally or in writing,⁷⁶ the opportunity for victims to present any views and concerns which are specifically engaged by the proceedings in question,⁷⁷ and the chance to make opening and closing statements in a case.⁷⁸ Victim participants may also be able to question, challenge and seek to discredit witnesses,⁷⁹ contest the admissibility of evidence⁸⁰ and submit evidence

⁷³ See *Katanga and Ngudjolo*, *ibid*, [53], including in relation to the ambit of "views and concerns". See also Rule 89(1) of the Court's Rules, indicating the Court is able to specify the appropriate stage for, and modalities of, victim participation.

⁷⁴ The definition of "victim" is discussed in more detail at para 1.2.4.(ii).

⁷⁵ There are modifications to simplify the process in the case of collective forms of application, see *Prosecutor v. Ruto & Sang* ("Ruto and Sang") (Decision on victims' representation and participation) ICC-01/09-02/11-460 (3 October 2012) [10]; *Gbagbo* (6 February 2012) (n 72) and *Gbagbo* (Second decision on issues related to the victims' application process) ICC-02/11-01/11-86 (5 April 2012).

⁷⁶ Rule 91(2) RPE.

⁷⁷ Rule 89 RPE.

⁷⁸ Rule 89(1) RPE, and indicated in caselaw, for example, in *Prosecutor v. Bosco Ntaganda* ("Ntaganda") (Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings) ICC-01/04-02/06-211 (15 January 2014) [87].

⁷⁹ Rule 91(3) RPE. See also *Lubanga* (Decision on the Manner of Questioning Witness by the Legal Representatives of Victims) ICC-01/04-01/06-2127 (16 September 2009) [28]; *The*

themselves,⁸¹ including by testifying as a witness in their own right, independently of the Defence or Prosecution.⁸²

As noted in the introduction to this thesis, the integration of victims into the criminal justice process is widely described in academic and practitioner literature as “[o]ne of the major innovations of the ICC”,⁸³ which “completely modifies the position of victims from witnesses of crimes to that of being the subject of rights”.⁸⁴ The pioneering, victim-focussed provisions of the Rome Statute reportedly provide “the promise of justice *for*, and not just *with*, the victims”.⁸⁵

In this section, the potential of the Court’s victim participation endeavour to provide a positive, restorative benefit to participants is examined and assessed, firstly in terms of its theoretical underpinnings and content, and secondly, in relation to the practical interpretation and application of the endeavour by the Court and expert commentators alike.

Prosecutor v. Jean-Pierre Bemba Gombo (“Bemba”) (Decision on Directions for the Conduct of the Proceedings) ICC-01/05-01/08-1023 (19 November 2010) [18]; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (“Muthaura, Kenyatta and Ali”) (Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings) ICC-01/09-02/11-267 (26 August 2011) [116] – [117].

⁸⁰ *Lubanga* (11 July 2008) (n 72) [101]; *Katanga and Ngudjolo* (22 January 2010) (n 72) [104].

⁸¹ *Lubanga* (11 July 2008) (n 72). Evidence can be either documentary or oral: see *Katanga & Ngudjolo* (22 January 2010) (n 72) [101], and see also *Katanga* (Judgment) ICC-01/04-01/07 (7 March 2014) [31].

⁸² As a witness of the Court, under Article 69(3) of the Rome Statute, whereby the Court is able to “request the submission of all evidence that it considers necessary for the determination of the truth”, subject to certain prior conditions being met; *Lubanga* (11 July 2008) (n 72) [4] and [104]; *Katanga & Ngudjolo* (Directions for the conduct of the proceedings and testimony in accordance with rule 140) ICC-01/04-01/07-1665-Corr (1 December 2009) [19]; *Bemba* (Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims) ICC-01/05-01/08-2138 (22 February 2012) [23]-[24].

⁸³ See, for example, Schabas (n 1), 328; Wemmers (2010) (n 1), 629; Cohen (n 2), 351; Fiona McKay, (Victim Participation) (n 1). See also Bassiouni (2006) (n 1), 230.

⁸⁴ Cohen, *ibid*, 357.

⁸⁵ In Mettraux (n 3), 75. See also Chung (n 3) 459.

1.2 The Court's victim participation endeavour: restorative in theory?

In creating a discrete role for victims in proceedings before the Court, drafters of the Rome Statute intended that role to be distinct both from the role of victims as witnesses, and from the role of the Prosecutor.⁸⁶ It is argued here that in enacting the victim participation scheme, drafters intended to incorporate into the Rome Statute restorative justice notions, designed in turn to be of sole or principal benefit to the individual victim participant.

Article 31(1) of the Vienna Convention⁸⁷ requires that the provisions of a treaty must be interpreted in good faith in accordance with their ordinary meaning *and in light of their object and purpose*.⁸⁸ The recognition and practical application of the restorative rationale for Article 68(3) is therefore instrumental to the achievement of effective and meaningful participation for victims in accordance with the intended object and purpose of the provision.⁸⁹

Before therefore proceeding to a discussion of the potential for victims to achieve effective and meaningful participation at the International Criminal Court in practice, it is appropriate to consider the extent to which the provision, as drafted, could be considered restorative in theory, and so one of potential for victims participating in proceedings before the Court. It is therefore necessary to situate the provision within its broader, conceptual context with a view to substantially exploring its underlying rationale and theoretical basis. The chapter therefore begins with an examination of the concept of restorative justice, and in particular, the application of restorative justice conceptions and

⁸⁶ See also Emily Haslam, who notes that “[t]he provisions on victim participation in the Rome Statute are based upon a belief that victims have their own distinct interests in international prosecution that cannot be satisfactorily represented by another party”, Haslam (n 7), 320. The distinct role of victims as participants is explored in more detail below, at paras 1.2.4 and 1.3.3.(ii).

⁸⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁸⁸ Article 21(1)(b) of the Rome Statute provides that the Court may have recourse to “applicable treaties and the principles and rules of international law” in order to interpret the provisions of the Statute. The Court has had recourse to the Vienna Convention on numerous occasions as a guide to interpretation, discussed further below, at para 1.3.3.

⁸⁹ “Effective and meaningful” participation is discussed and defined below, at para 1.2.3.(ii).

notions within the ICC participation context, as the theoretical basis for this research. The chapter goes on to examine the extent to which the restorative basis of the provision is recognised in academic and Court literature. Consideration is then given to the potential of the provision, as drafted, to provide restorative benefit for the individual victim participant.

1.2.1. Restorative justice as an underpinning theory for victim participation at the ICC?

(i) Overview: restorative justice and the ICC

Drafters of the Rome Statute were seemingly influenced by growing concerns relating to the impact of traditional retributive criminal justice systems on victims both domestically and internationally, and the resulting re-emergence of restorative justice theory as a means of repositioning the victim as the central figure in the criminal process.⁹⁰

Traditional retributive approaches to criminal justice situate the State as the central actor in a criminal action,⁹¹ and the alleged crime that has been committed is thereby conceptualised in turn both as a breach of its laws and as an offence against society, rather than primarily as an offence committed against the victim. To this extent, retributive justice theory essentially designates the State and society as the “victims” of the offence, and the focus of the judicial investigation and action is on the wrong allegedly committed by the perpetrator, rather than on the harm suffered by the victim. As a result, the role of the individual victim in the investigation and prosecution of the offence is essentially relegated to that of information provider/witness.

For proponents of restorative justice, purely retributive approaches to criminal justice result in the effective marginalisation and disenfranchisement of the victim from the

⁹⁰ See also War Crimes Research Office (November 2007) (n13) 2.

⁹¹ The traditional retributive approaches described above stem from the early nineteenth century, when the State began to assume prosecutorial responsibility for criminal acts. Prior to this, prosecutions were pursued through the courts by individual victims of crime or by prosecution societies acting on their behalf; see James Dignan, *Understanding victims and restorative justice* (Open University Press 2005) 63. The assumption of prosecutorial responsibility is described by Renée Zauberman as an expression of sovereignty, see ‘Victims as Consumers of the Criminal Justice System’, in Adam Crawford and Jo Goodey (eds) *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000) 37, 40, although it must also have substantially eased the financial burden for victims of pursuing a private criminal action.

judicial process⁹² and provide an inadequate response to the nature and complexity of harm suffered by the victim.⁹³ Restorative justice theory arises as a response to these concerns. While, therefore, the specific focus of judicial action under a purely retributive process is the prosecution and punishment of the offender, the primary aim of restorative justice theory is the restoration of the victim and, as far as possible, the reparation of harm done.⁹⁴ Howard Zehr notes to this end that while retributive approaches to criminal justice seek answers to three questions: what laws have been broken? Who did it? And what do the offender(s) deserve?, restorative justice asks: who has been harmed? What are their needs? And whose obligations are these?⁹⁵

As indicated in the Introduction, restorative justice is not defined in the context of international criminal law, and it is therefore appropriate to consider how the practice is understood within its broader context of application.

⁹² The assumption by the State of prosecutorial responsibility has been described by Nils Christie as a “theft of conflicts” by the modern state, see Nils Christie, ‘Conflicts as Property’ (1977) 17(1) *British Journal of Criminology* 1, and as the “era of victim disenfranchisement”, in Dignan, *ibid*, 63. See also in Marian Liebmann, *Restorative Justice: How It Works* (Jessica Kingsley Publishers 2007) 38; McCarthy (Reparations) (n 71), 253. The peripheral role assigned to victims in the criminal justice process is described in Ezzat Fattah, ‘Is Punishment the Appropriate Response to Gross Human Rights Violations? Is a Non-punitive Justice System Feasible?’ (2006), Conference paper presented at *The Politics of Restorative Justice in Post-Conflict South Africa and Beyond*, Cape Town, South Africa, 21 - 22 September, 2006; see also Basra Spalek, *Crime Victims: theory, policy and practice* (Macmillan Publishing 2006) 15; John Braithwaite, ‘Juvenile offending: new theory and practice’ (1992), address to the National Conference on Juvenile Justice, Adelaide, Institute of Criminology, September 1992, describing the status of the victim in a criminal trial as “evidentiary cannon fodder”, 36, available online at <http://www.aic.gov.au/media_library/publications/proceedings/22/braithwa.pdf> last accessed 22nd June 2015.

⁹³ See, for example, McGonigle, (n 5) 100; McCarthy (Victim Redress) (n 4) 363.

⁹⁴ In Fattah, (n 92); Liebmann (n 92), at 26. See also Howard Zehr and Harry Mika, ‘Fundamental Concepts of Restorative Justice’ (1998), Vol. 1, *Contemporary Justice Review* 47, 52; Martin Wright, *Justice for Victims and Offenders* (Open University Press 1991) 41.

⁹⁵ See, for example, Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (3rd edn, Herald Press 2005) 191. A similar comparison is made by Wright, who goes on to state that “[t]he ultimate objective is spoken of in terms not of deterrence and coercion but of healing and reconciliation”, Wright, *ibid*, 112.

(ii) Exploring definitions and understandings of restorative justice

Notably, the restorative justice movement is “far from monolithic”,⁹⁶ and a degree of conceptual confusion exists around the meaning of restorative justice as a result. Dignan and Lowey, for example, observe that “restorative justice initiatives display considerable variations, which is why it is difficult to formulate a precise definition that would apply to them all”.⁹⁷ Moreover, it is clear that for (some) restorative justice experts, the flexibility of the concept is valued, such that the emergence of a single and unified definition is unlikely, Zehr and Mika, for example, noting that “we do not believe that any single definition will ever be likely, or even particularly useful...we value its fluid nature, and above all, its responsiveness to the needs of key stakeholders in the justice equation”.⁹⁸ It is further noted in this context that for proponents, the specific parameters or elements of restorative justice are not intended to be static, but instead should be understood as “dynamic in response to changing needs, changing relationships and cultural values”, and in addition, that restorative practices are unlikely to incorporate all parameters in any event.⁹⁹

While the ensuing fluidity of the concept may be valued by proponents, however, it also presents challenges in the conduct of research, as well as for the Court in the realisation of any restorative goal. With this in mind, a number of the definitions of restorative justice proposed in the literature are briefly described and considered here with specific reference to their applicability to the ICC context, their potential responsiveness to crimes of mass victimisation and the specific focus of this research.

⁹⁶ Dignan (n 91) 2 – 3.

⁹⁷ James Dignan and Kevin Lowey, *Restorative Justice Options for Northern Ireland: A Comparative Review*, Research Report 10, (2000) 4.

⁹⁸ Zehr and Mika (n 94) 49.

⁹⁹ *Ibid*, 48.

The most widely accepted definition of restorative justice was proposed by Tony Marshall in 1999,¹⁰⁰ who notes that:

“Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of that offence and its implications for the future”.¹⁰¹

From the point of view both of the ICC’s participation endeavour and the focus of this research, the definition is an interesting one due to its focus on process, and in particular, the notion that substantive justice (or at least aspects of it) may be achievable for the victim within the judicial process rather than solely as a reparative outcome of the legal proceedings. That said, restorative justice, including that for victims of international crimes, naturally also encompasses the award of reparations, a factor which is clearly recognised in the context of the ICC by the inclusion in its mandate of reparations provisions.¹⁰² While the specific focus of this research is on the Court’s participation endeavour, a conception of restorative justice that focuses solely on process to the exclusion of reparative outcome measures is somewhat incomplete in the context. In addition, the definition fails to make specific reference to any restoration of the victim. Moreover, instead of referring to the reparation of harm done, Marshall’s definition refers, in more abstract terms, only to the aftermath of the offence, and hence is arguably insufficiently victim-focussed. Finally, in referring to the collective efforts of all parties, including the Defendant, to consider how best to respond to the harms inflicted, the definition is, it is suggested, more apposite for application within a mechanism designed to be wholly restorative, such as a Truth Commission, as opposed to an international criminal justice mechanisms which remains, first and foremost, a vehicle for the pursuit and delivery of retributive justice.¹⁰³

¹⁰⁰ According to Dignan (n 91), 2 - 3. Walgrave also refers to it as “a recently much referenced definition”, in Lode Walgrave in ‘Extending the Victim Perspective Towards a Systemic Restorative Justice Alternative’ in *Integrating a Victim Perspective within Criminal Justice, International Debates*, Adam Crawford and Jo Goodey (Eds), 2000, pp 253 - 284, at p.259.

¹⁰¹ Quoted in Dignan, *ibid*; also cited and analysed by Walgrave, *ibid*.

¹⁰² Article 75.

¹⁰³ For similar criticisms of the definition within the context of domestic application, see Dignan (n 91) 3; Walgrave (n 100) 259-260. Significantly, Dignan also points out that concentration on criminal process is unreflective of practice in the case of transitional justice mechanisms such as

The Restorative Justice Consortium, a UK national umbrella organisation and charity comprising organisations and individuals with an interest in restorative justice, define the practice in the following terms:

“Restorative Justice works to resolve conflict and to repair harm. It encourages those who have caused harm to acknowledge the impact of what they have done and gives them an opportunity to make reparation. It offers those who have suffered harm the opportunity to have their harm or loss acknowledged and amends made.”¹⁰⁴

Explicit reference to the repair of harm arguably renders the definition more victim-focussed than that proposed by Marshall, and because the notion of harm here is not expressly linked to the direct victim of the offence, the definition would also encompass harms suffered by the victims’ families and communities in the aftermath of mass victimisation. Moreover, reference to the resolution of conflict arguably speaks to the ICC’s broader peace-building aim.¹⁰⁵ The proposed definition is, however, once again of limited broader transferability in its entirety to the ICC experiment. In particular, in seeking to encourage the defendant to acknowledge the harms they have inflicted and to make amends accordingly, the definition is more apposite to a process that is intended to be exclusively restorative. While, therefore, it would arguably be appropriate for application within a transitional justice context such as a Truth Commission,¹⁰⁶ it is of

truth commissions, designed to address intercommunal or group conflict, including wide scale human rights violations.

¹⁰⁴ Restorative Justice Consortium, 2006, quoted in Liebmann (n 92) 25.

¹⁰⁵ Although it could equally be argued that “conflict” is used here in the more limited sense of that existing between the victim(s) and perpetrator. The Preamble to the Rome Statute states that grave crimes threaten the “peace, security and well-being of the world” and goes on to indicate that the Court was therefore designed to end impunity for perpetrators and to contribute to the future prevention of such crimes. Notably, it is not the premise of this research that the prosecution of a limited number of suspected perpetrators by the ICC necessarily enhances peace, or the prospects thereof, in the affected state or community. There is, however, considerable debate as to whether the operation of the Court, including, for example, the issuing of arrest warrants against suspected perpetrators, might in fact disrupt ongoing peace negotiations within the affected State; see, for example, Schabas (n1) in relation to the issuance of arrest warrants against leaders of the Ugandan Lord’s Resistance Army and the developing peace process within the country, 39 – 42; Janine Natalya Clark, ‘Peace, Justice and the International Criminal Court: Limitations and possibilities’ (2011) 9 *Journal of International Criminal Justice* 521.

¹⁰⁶ Discussed further below in this section.

more limited applicability to victim-focused measures designed to operate within a mechanism with primarily retributive aims.

Finally, a broad definition of restorative justice has been proposed by Bazemore and Walgrave, who define the practice as:

“every action that is primarily oriented towards doing justice by restoring the harm that has been caused by a crime”.¹⁰⁷

The proposed definition is interesting in that it makes no reference to the defendant, and in his subsequent expansion of the elements of the definition, Walgrave indicates that “restorative justice can function in the absence of a known offender”.¹⁰⁸ There are obvious issues with the potential interdependence of perpetrator accountability and the extent to which any form of justice can be fully “restorative” or “rehabilitative” where a perpetrator is absent, particularly in the context of gross abuses of human rights.¹⁰⁹ Moreover, as this research goes on to show, a number of the elements of justice, from the perspective of victims of international crimes, require the presence of a perpetrator.¹¹⁰ For the many survivors of abuses who will never see “their” perpetrator held accountable in the International Criminal Court, however, the potential of achieving justice, or at least some aspect of it, beyond the ICC in the absence of an offender is an interesting one which merits further exploration in the context of victims of international crimes.¹¹¹ Within the specific context of the ICC, however, the absence of a perpetrator is not an issue for victims who have been formally recognised as participants in proceedings.

¹⁰⁷ 1999, cited in Walgrave (n 100) 259 - 260.

¹⁰⁸ Ibid.

¹⁰⁹ Walgrave acknowledges that where an offender is available, their contribution towards a restorative action will make it more restorative in nature, but does not go on to question whether restorative action in the absence of an offender can amount to justice *per se*, elements or aspects of justice, or whether the action might be perceived more by the victim as a form of “welfare”, Walgrave, *ibid*.

¹¹⁰ See para 2.4.3.

¹¹¹ The findings of a small scoping study conducted by the author for the University of East London into survivors’ conceptions of justice, for example, suggest that for a number of victims, the granting of refugee status by a Third-Party State comprised an element of justice for survivors in respect of the original crimes suffered where, for example, victims felt that their accounts had been heard, and where the granting of refugee status was seen by the victim as a moral denunciation of the crimes committed, (unpublished, July 2011).

Significantly, in referring to “actions” that are oriented towards repairing harm, rather than to entire judicial processes or practices, the definition is seemingly sensitive to justice mechanisms such as the ICC which were not designed, first and foremost, as restorative justice bodies. While the Court is an ostensibly retributive judicial mechanisms, it also incorporates a number of elements that were designed with primarily victim-centric aims and, it is suggested, in the more limited context of judicial actions aimed at the practical implementation of those elements, the aim and focus of those actions should be the reparation of harm(s) suffered. Moreover, as a definition which takes harm as its starting point and conceives of justice in terms of the reparation of that harm, it is consistent with the focus of this research. In addition, the broad wording of the definition means that it is able to encompass the complex array of harms suffered by survivors of mass victimisation, by both direct and indirect victims, and at the individual, communal and collective levels. Finally, in concerning actions that are “primarily”, rather than “solely” oriented towards repairing harm, the definition is sensitive to the competing interests at play within the context of the ICC, and so is arguably responsive to the need for the Court’s participation scheme to operate within an ostensibly retributive context, where certain actions, whilst primarily victim-centred, are likely to have impacts beyond those experienced by the victim.¹¹²

Despite the absence of a common definition, there is broad agreement in the literature that the primary aim of restorative justice is the restoration of the victim and the reparation of harm done. Fattah, for example, describes the practice as “a justice paradigm that has healing, closure, redress and prevention as its primary goal”.¹¹³ Liebmann similarly identifies victim support and healing as the primary aims of restorative justice.¹¹⁴ Zehr and Mika note that “[t]he needs of victims for information, validation, vindication, restitution, testimony, safety and support are the starting points of justice”,¹¹⁵ while Wright observes

¹¹² This factor is discussed in more depth in the specific context of the Court’s practical application of the endeavour, at para 1.3.3.

¹¹³ In Fattah (n 92).

¹¹⁴ Liebmann (n 92) 26.

¹¹⁵ Zehr and Mika (n 94) 52.

that restorative justice aims at “repairing (as far as possible) or making up for the damage and hurt caused by the crime”.¹¹⁶

That said, it should be noted that while the victim is seen as the *primary* focus of restorative action, they are not the *sole* focus of restorative justice approaches. In addition to repairing the victim of the crime, restorative approaches typically seek to address harm(s) at a community level, as well as to provide the potential for offender rehabilitation and reintegration. Morris and Maxwell, for example, note that “[c]entral to the ideas underlying restorative justice are the involvement of victims in processes that have the potential to repair the harm they have experienced, the involvement of offenders in making amends for that harm, and the restoration of some kind of balance between the two”.¹¹⁷ In comparison with its purely retributive counterpart, restorative justice is described by McKenna as “a more inclusive approach to dealing with the effects of the crime, which concentrates on restoring and repairing the relationship between the offender, the victim and the community at large, and which typically includes reparative elements towards the victim and/or community”.¹¹⁸ To this end, proponents have identified a number of characteristics or constituent elements of restorative justice, although note that, consistent with the fluid nature of the subject, the exact parameters of a restorative justice approach should be determined by the prevailing circumstances. According to Zehr and Mika, key elements of a restorative justice approach include:¹¹⁹

- (i) The notion that the perpetration of a crime constitutes a violation of people and interpersonal relationships. Those most directly affected by the crime, together

¹¹⁶ Wright (n 94) 41.

¹¹⁷ Allison Morris and Gabrielle Maxwell, ‘The Practice of Family Group Conferences in New Zealand: Assessing the Place, Potential and Pitfalls of Restorative Justice’ in *Integrating a Victim Perspective within Criminal Justice, International Debates*, Adam Crawford and Jo Goodey (Eds), 2000, 207.

¹¹⁸ Fionnuala McKenna ‘Review of the Criminal Justice System in Northern Ireland; the report of the Criminal Justice System Review’ (2000) Chapter 9 *Restorative and Reparative Justice*, 189 – 190.

¹¹⁹ Zehr and Mika (n 94) 51 - 53.

with family members, witnesses and members of the affected community have been harmed, and need restoration.¹²⁰

(ii) The violation gives rise to an obligation on the offender to make amends to the victim and the affected community. As primary stakeholders, victims are empowered to effectively participate in the restorative process, including in defining the nature of restorative actions required. Dignan and Lowey describe this as the principle of inclusivity, by which the direct victim and others with an interest in the outcome are entitled to participate.¹²¹ At the same time, the community is understood as having an obligation to support victims in meeting their needs and to support offender efforts at social reintegration.

(iii) Restorative justice approaches seek to heal. In particular, the justice process should produce a context which promotes the recovery, healing and empowerment of the individual victim, and within which victim input and participation is maximised. A similar element is identified by the Centre for Restorative Justice, who note that “[r]estorative responses empower victims by offering them a voice in the process, an opportunity to ask questions and seek answers, afford them a role in decision-making and avenues for healing, restitution and emotional support”.¹²²

The process should also seek to strengthen and support the community by providing a forum for the identification of factors and conditions which generated or facilitated harm, enable articulation of community values and to facilitate action aimed at the prevention of future offences.¹²³

There are, therefore, a number of potentially competing interests at stake within a restorative justice approach, and Dignan and Lowey highlight the need for any process to

¹²⁰ Notably, while affected communities are key stakeholders in the justice process, the State is not considered a primary victim, 51.

¹²¹ See n 96, 4.

¹²² See also *What is Restorative Justice?* <<http://www.suffolk.edu/college/centers/15970.php>> last accessed 17th February 2016.

¹²³ *ibid.*

strike a balance between those interests.¹²⁴ With this in mind, Greif approaches restorative justice as a balance between a number of tensions: between therapeutic and retributive justice models, the needs of the victim and the rights of the offender; and the need to rehabilitate the offender and the duty to protect the public.¹²⁵ These tensions are particularly apparent in cases concerning gross violations of human rights, where, as discussed, the needs of victims are likely to be extensive. Moreover, the need to balance competing interests is expressly recognised in academic literature relating to the ICC, Garkarwe, for example, noting that

“the ICC must attempt to strike a balance between a number of legitimate objectives. There are the fair trial rights of accused persons, the right of victims to have their say and participate in proceedings where their personal interests are affected, and a workable procedure that will not be overwhelmed by the numbers of victims and survivors wishing to participate”.¹²⁶

In addition, the scale of violations under consideration by the ICC and the resulting needs for justice at a communal and societal give rise to a further area of potential tension: that between the restorative interests of the individual victim and those of the affected community.

Restorative justice thereby aims to reassert the position of the victim within the criminal justice process by refocusing the criminal process on the victim and the harm suffered. Restorative approaches seek to repair harm, empower the victim and provide opportunities for acknowledgment of their suffering and validation of their feelings by providing victims a greater role in judicial proceedings, the opportunity to be heard, the right to be kept informed about the progress of their case and the prospect of pursuing reparations.¹²⁷

¹²⁴ See n 96, 4.

¹²⁵ Discussed in Liebmann (n 92) 33.

¹²⁶ Sam Garkawe, ‘Victims and the International Criminal Court: Three major issues’ (2003), 3 *International Criminal Law Review* 345, 359-360.

¹²⁷ See, for example, McCarthy (Reparations) (n 71), 252; Fattah describes the practice as “a justice paradigm that has healing, closure, redress and prevention as its primary goal”, in Fattah (n 92); Zehr and Mika note that “[t]he needs of victims for information, validation, vindication, restitution, testimony, safety and support are the starting points of justice”, at (n 94) 52.

(iii) In the context of the ICC: considering tensions and an alternative theoretical basis for the research

In cases of mass victimisation, the various elements of restorative justice – the individual, offender and societal dimensions – are readily identifiable and operational within transitional justice mechanisms such as Truth Commissions, where, for example, reconciliation is sought at the political,¹²⁸ societal¹²⁹ and interpersonal levels,^{130 131} personal forms of justice are sought through truth-telling by victims as well in the revelation of truths by perpetrators,¹³² and offender rehabilitation and reintegration is sought through their acceptance of responsibility for, and full disclosure in respect of, the crimes committed.¹³³ To this end, Truth Commissions can be seen as the international manifestation of restorative justice practices, dealing with issues of individual victimisation, reconciliation and healing at the group level.¹³⁴

It must be acknowledged, however, that in the more limited context of the International Criminal Court, while the inclusion of dedicated, victim-focused measures is recognised within the academic literature, a restorative basis for those measures is not universally

¹²⁸ To repair the ties between the State and society.

¹²⁹ To address divisions within society that initially triggered the violence.

¹³⁰ To (re)build ties within social groups and communities.

¹³¹ Noted, for example, in Truth and Reconciliation Commission of Peru (2003) Final Report (Vol. 9).

¹³² See, for example, in relation to the South African Truth and Reconciliation Commission, the pursuit of a number of “truths”, including the “personal and narrative truth” of the victims appearing before it, together with a “social truth”, and a “healing and restorative truth”, ‘Report of the Truth and Reconciliation Commission’ Volume 1, Chapter 5, at 110 - 114.

¹³³ See, for example, Liebmann (n 92) 363 – 365, in relation to the South African Truth Commission.

¹³⁴ Recognised, for example, in Liebmann, 363 – 366 (n 92); Parmentier and Weitekamp (n 38) 135; Oliver Ramsbotham, Tom Woodhouse and Hugh Miall, *Contemporary Conflict Resolution: The Prevention, management and transformation of deadly conflicts* (2nd ed Polity Press 2005) 238 – 240; Dignan (n 91); Declan Roche “Accountability in Restorative Justice” (OUP 2003); Eric Brahm, ‘Truth Commissions’ in Guy Bruggess and Heidi Burgess (eds) *Beyond Intractability* (University of Colorado 2004); Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press 1998); Mark Drumbl ‘Retributive Justice and the Rwandan Genocide’ (2000) 2(3) *Punishment and Society* 287; Cristophe Herbert, Charlie Rioux and Jo-Anne Wemmers, ‘Reparation and Recovery in the aftermath of widespread violence’ in Jo-Anne Wemmers (ed) *Reparation for Victims of Crimes Against Humanity* (Routledge 2014) 22, 30.

identified or accepted. The fluidity of the concept of restorative justice has already been noted. According to Daly and Proietti-Scifoni, restorative justice has been attributed various and different meanings “depending on [the author’s]...frame of reference and affiliation with domestic or international criminal justice.”¹³⁵ Within the context of transitional justice, including international criminal law, the authors go on to note that scholars have drawn upon domestic literature to extrapolate an understanding of restorative justice that best suits the proposed context of application and analysis.¹³⁶ To this end, for example, the War Crimes Research Office of Washington University notes in relation to the operation of restorative justice elements at the ICC that “the term ‘restorative justice’ is a broad term used in a variety of contexts, including as a shorthand reference to programs designed to facilitate victim-offender mediation outside the traditional criminal justice realm. However, we restrict our use of the term...to the movement *within* the criminal justice context that holds mechanisms created to deliver criminal justice should focus on the interests of victims, as opposed to strictly punishing wrongdoers”.¹³⁷

For other scholars, however, the adoption of restorative justice terminology and approaches represents the problematic supplanting of selected terms and notions from domestic to international criminal law without reference to the specific exigencies of the international context, and without regard to the nature of restorative justice in its entirety. For Goetz, for example, the purported application of restorative justice within the ICC as a theoretical basis for its victim-focussed measures poses difficulties due to the additional focus of restorative justice practices on the perpetrator, the affected community, and the promotion of victim-offender dialogue as a means of collectively resolving the aftermath

¹³⁵ Kathleen Daly and Gitana Proietti-Scifoni, *Reparation and Restoration* (February 2011), prepared for Michael Tonry (ed) “Oxford Handbook of Crime and Criminal Justice” (OUP), 1, 3, 4. See also Wemmers, who notes in relation to the multidisciplinary interest in justice for victims in the aftermath of international crimes “one word can take on very different meanings”, in ‘The healing role of reparation’, in Jo-Anne Wemmers (ed) *Reparation for Victims of Crimes Against Humanity* (Routledge 2014) 221. The issue is noted further in this research, at para 2.2.2.(i), in relation to the challenges involved in discerning the nature of any identified psychological benefit in participating victims, and see also para 3.6.1.(ii), concerning the need for the development of a common language for the purpose of the proposed assessment project, chiming with Daly and Proietti-Scifonis’ call for a “glossary of key terms” (above) at 49.

¹³⁶ Ibid.

¹³⁷ War Crimes Research Office (November 2007) (n13) 8, at footnote 15.

of the offences charged.¹³⁸ It is therefore appropriate to briefly consider here the alternative and emerging concept of reparative justice in the context of victims of international crimes.

While restorative justice practices are understood to have offender and community aspects in addition to its primary victim focus, reparative justice, according to Goetz, “is singularly concerned with victims’ experience of the justice process in terms of how far it repairs the specific harm suffered”.¹³⁹ Goetz goes on to delineate three aspects of reparative justice: (1) the scope and content of a reparation award, as an outcome aimed at addressing the harm suffered; (2) procedural rights that facilitate effective access in order that victims are able to pursue an outcome; and (3) what she describes as “more subtle and nuanced aspects of victims’ experiences of the justice process”.¹⁴⁰ Reparative justice, as described, would thereby encompass both process and outcome measures, and to that extent, is compatible with the victims’ mandate of the International Criminal Court. The multidimensional nature of reparative justice for victims of international crimes is also recognised by Danieli, who notes that in addition to the award of reparations as an outcome measure, “the justice process as a whole can be reparative, rather than reparation being merely an end result.”¹⁴¹ She goes on to conclude that “reparative justice insists that every step throughout the justice experience...presents an opportunity for redress and healing”.¹⁴² Letschert and van Boven in turn describe reparative justice for victims as comprising “(i) *The Right to Know*, (ii) *The Right to Justice* and (iii) *The Right to*

¹³⁸ Mariana Goetz ‘Reparative Justice at the International Criminal Court’ in Jo-Anne Wemmers (ed) *Reparation for Victims of Crimes Against Humanity* (Routledge 2014) 53, 54. See also Christophe Herbert, Charlie Rioux and Jo-Anne Wemmers in the same volume, who regard restorative justice as being offender-oriented, through its perceived use of victims as a means of offender rehabilitation, (n 134), 22 – 37.

¹³⁹ Ibid.

¹⁴⁰ Ibid, and at 56.

¹⁴¹ Yael Danieli, ‘Healing aspects of reparations and reparative justice for victims of crimes against humanity’ in Jo-Anne Wemmers (ed) *Reparation for Victims of Crimes Against Humanity* (Routledge 2014) 7, 8 and 19. See also Yael Danieli ‘Massive trauma and the healing role of reparative justice’ (2009) 22(5) *Journal of Traumatic Stress*, 351, 356. The therapeutic impact of judicial engagement, as a possible goal for victim participation with the ICC is not without its problems, and is considered subsequently and in depth at para 2.3.

¹⁴² Danieli (Wemmers), *ibid*.

Reparation” (emphasis in the original).¹⁴³ The authors here define the second element – the right to justice – in purely retributive terms,¹⁴⁴ but include within their third element – the right to reparation – a process element which “gives prominence to participation and empowerment”,¹⁴⁵ thereby echoing to some extent the experiential element identified by Goetz.

That said, however, the concept of reparative justice within the specific context of victims of international crimes is not (yet) universally understood and utilised as the multidimensional notion propounded by Goetz and Danieli that encompasses both procedural and outcome aspects of justice for the victim. In his consideration of the approach taken by the Appeals Chamber of the Court to the award of reparations in the Lubanga case, for example, Stahn employs the term to refer to reparative outcomes alone, an approach that is echoed by McCarthy in his examination of the ICC reparations endeavour more broadly. Jones, Parmentier and Weitekamp, too, define reparative justice simply as “the provision of reparations to victims of crimes”, and where the authors refer to victim participation, their consideration is confined to the determination of the nature and manner of reparation to be provided, without reference to any broader participatory role or the more nuanced impact(s) on the victim of their judicial engagement identified by Goetz.¹⁴⁶ Moreover, while writers such as Goetz seek to expressly distinguish the term from “the better-known notion of restorative justice”, others use the two interchangeably. Mani, for example, describes reparative justice as having three discrete focuses: the individual victim, the affected community, and the perpetrator.¹⁴⁷

¹⁴³ Rianne Letschert and Theo van Boven, *Providing Reparations in Situations of Mass Victimization: Key Challenges* in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer and Antony Pemberton, *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 157.

¹⁴⁴ See 158.

¹⁴⁵ At 161.

¹⁴⁶ Nicholas A. Jones, Stephan Parmentier and Elmar G.M. Weitekamp, ‘Transitional Justice in Bosnia-Herzegovina: Understanding accountability, reparations and justice for victims’ in Jo-Anne Wemmers (ed) *Reparation for Victims of Crimes Against Humanity* (Routledge 2014) 143, 144 – 145.

¹⁴⁷ Rama Mani, “Beyond Retribution: Seeking Justice in the Shadows of War” (Polity Press 2007) 175. The terms are also used interchangeably by McCarthy, see McCarthy (Reparations) (n 71) 250.

Jones, Parmentier and Weitekamp observe that “there is a great deal of overlap between reparative and restorative justice”.¹⁴⁸ In particular, each notion calls for a paradigmatic shift that “returns the primary focus of addressing these crimes to the redress and repair of the victims’ needs as opposed to the acts committed by the perpetrators”.¹⁴⁹ While the relatively fluid nature of each concept renders a detailed comparison between the two problematic, Goetz’s understanding of reparative justice, at least, with its sole victim focus and its responsiveness to process as well as outcome, would provide an appropriate theoretical basis for this research. In particular, the specific focus of this research is solely on the participating victim and the reparation of harm done, and to this extent, the restorative justice notions incorporated into the Court’s mandate are understood, for the purpose of this research, to essentially correlate to those victim-focussed measures identified by Goetz, including in particular the experiential component.

There are, however, advantages to preferring a restorative justice approach in this instance. As the preceding indicates, a common understanding of reparative justice in the context of victims of international crimes has yet to emerge and concretise, and while the concept of restorative justice is also somewhat elusive, reparative justice in the broad form identified remains in its comparative infancy. Moreover, as this research observes below,¹⁵⁰ the Court self-identifies a restorative justice mandate in respect of participating victims, and in terms both of access and impact for the purpose of the conduct of assessment, considered substantively in Chapter 3, there are obvious advantages in adopting the same language as the Court. Finally, the acceptance by the Court of a restorative aim in respect of participating victims elevates victims’ restorative aspirations from being simply needs which may or may not be realised within the judicial process, to self-recognised responsibilities on the part of the Court (subject, of course, to the compatibility of those aspirations with the Court’s primary retributive mandate) and hence of considerably greater potential impact from the perspective of the victims concerned.

¹⁴⁸ Jones, Parmentier and Weitekamp (n 146) 143, 145.

¹⁴⁹ Ibid.

¹⁵⁰ At para 1.2.2.

(iv) Restorative justice and the evolution of the Rome Statute

Having examined the concept of restorative justice within the context of the ICC's participation endeavour and for the purpose of this research, it is appropriate to consider whether and the extent to which restorative justice notions were incorporated within the Rome Statute of the ICC.

The momentum surrounding the recognition of victims' needs, rights and status within the judicial process domestically coincided with the emergence of a greater understanding of the rehabilitative possibilities in the aftermath of gross human rights violations internationally,¹⁵¹ and a victim-centred approach to the search for justice in the field of international human rights law.¹⁵² This victim-conscious momentum culminated internationally in the promulgation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985),¹⁵³ (the "UN Declaration"). The UN Declaration itself was adopted unanimously by the UN General Assembly, and provides victim-focused measures aimed at ensuring victims' access to criminal justice mechanisms at the domestic and international level, including the right for victims to receive information about the proceedings in question,¹⁵⁴ to be treated with dignity and

¹⁵¹ Garkawe, (n 126), 350.

¹⁵² The right of victims to access and pursue effective avenues of justice and reparation is widely recognised within the body of international human rights law; see, for example, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered in to force 23 March 1976) 999 UNTS 171, Article 2(3)(a); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered in to force 7 March 1966) 660 UNTS 195, Article 6; Convention against Torture and other Cruel Inhuman and Degrading Treatment, (adopted 10 December 1984, entered in to force 26 June 1987) 1465 UNTS 85, Article 14; European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force September 3 1953) 213 UNTS 222, Article 13; Inter-American Convention on Human Rights (adopted 22 November 1969, entered into force July 18, 1978) 1144 U.N.T.S. 123, Article 25(1); African Charter on Human and Peoples' Rights (adopted June 27, 1981, entered into force Oct. 21, 1986) 1520 UNTS 217, Article 7(a). In addition, the international human rights movement has been particularly significant in the recognition of the ability of victims to pursue an action against an abusing State in their own right at an international level, thereby investing the individual victim with status as a legal actor on the international stage, through the granting of individual rights of petition in certain circumstances: see for example, Inter-American Convention on Human Rights, Article 45(1); African Charter on Human and Peoples' Rights, Articles 55 and 56.

¹⁵³ UNGA (November 29, 1985) UN Doc. A/RES/40/34.

¹⁵⁴ Article 6(a).

respect,¹⁵⁵ to participate in criminal justice proceedings¹⁵⁶ and to receive reparation,¹⁵⁷ thereby directly echoing themes of restorative justice.¹⁵⁸

Against this backdrop, dissatisfaction with the exclusion and isolation of victims from criminal justice processes within the domestic sphere was echoed in the international arena.¹⁵⁹ The *ad hoc* International Criminal Tribunals for the Former Republic of Yugoslavia (“ICTY”) and Rwanda (“ICTR”) respectively, established “for the sole purpose of prosecuting persons responsible for serious violations of humanitarian law”,¹⁶⁰ failed to recognise the interests of victims in the cases before them¹⁶¹ or to provide any role for victims in the proceedings beyond that of witness. As a result, both Tribunals were heavily criticised, with one former ICTY President and former ICC Judge describing survivors as “passive objects” in the judicial process.¹⁶² In addition, their purely

¹⁵⁵ Article 4.

¹⁵⁶ Article 6(b).

¹⁵⁷ Article 4. The forms of reparation are described in Articles 8 – 17.

¹⁵⁸ Noted also in War Crimes Research Office (November 2007) (n13) 2, 10.

¹⁵⁹ See, for example, Wemmers (2010) (n 1) at 32; Liesbeth Zegveld, ‘Victims’ reparations claims and international criminal courts: incompatible values?’ (2010) 8(1) *Journal of International Criminal Justice* 79, 79 – 80. For an overview of the limited role of victims in the ICTY and ICTR respectively, see Mary Will, ‘A Balancing Act: The Introduction of Restorative Justice in the International Criminal Court’s Case of Prosecutor v. Thomas Lubanga Dyilo’ (2007 – 2008) 17:1 *Journal of Transnational Law and Policy* 85, 90 – 93.

¹⁶⁰ UNSC Res 827 (25 May 1993), UN Doc S/RES/827, para 2; UNSC Res 955 (8 November 1994), UN Doc S/RES/955, para 1.

¹⁶¹ In the case of *Prosecutor v. Erdemovic*, for example, the Trial Chamber of the ICTY stated that “[c]rimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. *It is therefore the concept of humanity as victim which essentially characterises crimes against humanity*” [emphasis added], (Sentencing Judgment, Trial Chamber) IT-96-22-T (26 November 1996) [28]; and see also *Prosecutor v. Kambanda* (Judgement) ICTR 97-23-S, (4 September 1998) [15]. Notably, the assumption that it is humanity, rather than the individual that is the victim in such a case is akin to the “theft of conflict” by the State espoused by Nils Christie (n 92) within modern domestic restorative justice approaches, wherein the victim’s interest in the case is conceived of as a property right.

¹⁶² Claude Jorda and Jérôme Hemptinne, ‘The Status and Role of the Victim’ in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds) *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press 2002) at 1389. David Donat-Cattin, for example, notes that

retributive focus meant that they became viewed not only as geographically removed but also conceptually isolated from the affected communities and the harms suffered, and therefore of limited relevance to a society in transition.¹⁶³ Moreover, it is apparent that victims themselves were not satisfied with their level of engagement with the *ad hoc* Tribunals.¹⁶⁴ Within this context, a report written by the judges of the ICTY in September 2000, reflecting upon their observations and experiences of the Yugoslav Tribunal, observes that “justice should not only address traditional retributive justice, *i.e.* punishment of the guilty, but should also provide a measure of restorative justice by, *inter alia*, allowing victims to participate in the proceedings and by providing

“the inclusion of norms on victims’ participation in the Court’s proceedings...was the result of widespread and strong criticism against the lack of provisions of this kind in the Statutes and Rules of Procedure and Evidence of the *ad hoc* Tribunals”, in ‘Article 68: Protection of the victims and witnesses and their participation in the proceedings’, in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft 1999) 1281; McGonigle (n 5) at 113. The limited victim focus of humanitarian law was not peculiar to the *ad hoc* Tribunals; Schabas, for example, observes that “until recently, international humanitarian law focused on the methods and materials of war, and had relatively little to say with respect to victims”, Schabas (n 1), 324. See also Wilhelmina Thomassen, who observes that “[v]ictims of criminal offences have been the focus of growing attention in recent years. They are no longer viewed as mere instruments in the search for the truth....Crimes are now primarily seen as violations of the individual rights of victims. This conceptual shift gives theoretical legitimacy to the more active role for victims in criminal proceedings” in ‘Victims’ Rights and the Rights of the Accused’, lecture given on the tenth anniversary of the adoption of the Rome Statute, The Hague, 3 July 2008, text available online at http://www.iccnw.org/documents/ReplyThomassenCICCquestionnaire_Aug08.pdf from 12, last accessed 26th March 2015.

¹⁶³ See, for example, Redress (October 2012) (n 18). By contrast, the direct and formal involvement of victims in criminal processes arguably provides a link between the Court and the affected community, with the prospect of cultivating a sense of investment in judicial activities and therefore affording the Court legitimacy in the eyes of the affected community. See, for example, Eric Stover, Camille Crittenden, Alexa Koenig and others, ‘The impact of the Rome Statute system on victims and affected communities’ (30th May, 2010), ICC Review Conference document RC/ST/V/INF.4, para 8, available online at <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-V-INF.4-ENG.pdf> last accessed 22nd June 2015; Mekjian and Varughese (n 6) 29. The advantage to the Court in this regard has been formally recognised in its jurisprudence, see, for example, *Katanga and Ngudjolo* (Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case) ICC-01/04-01/07-474 (13 May 2008) [63].

¹⁶⁴ In respect of victims appearing before the ICTY, see Eric Stover, *The Witnesses, War Crimes and the Promise of Justice in the Hague* (University of Pennsylvania Press 2007). In respect of the ICTR, see Redress/African Rights, ‘Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes’ (November 2008), available online at <<http://www.redress.org/downloads/country-reports/Rwanda%20Survivors%2031%20Oct%2008.pdf>> last accessed 26th March 2015; Godfrey Musila, *Rethinking International Criminal Law: Restorative Justice and the Rights of Victims in the International Criminal Court* (Saabruken: Lap Lambert 2010) noting that the lack of engagement by the Tribunal with victims led many to consider it “a wasteful parody of justice”, at 45.

compensation”.¹⁶⁵ The need for more victim-focussed, restorative elements in the prosecution of perpetrators of international crimes was therefore evident in the minds of those engaged in the practical operation of international criminal justice at that time, and according to the Women’s Caucus for Gender Justice, criticisms of the *ad hoc* tribunals “underscore the overall importance of restorative justice in the drafting of the Rome Statute”.¹⁶⁶

At the same time, in situations where international criminal justice mechanisms might otherwise have been employed, States began to resort instead to transitional justice mechanisms such as Truth Commissions, which were perceived to be a more victim-friendly means of addressing widespread and gross human rights violations and serious breaches of humanitarian law.¹⁶⁷

Victim dissatisfaction with international criminal justice processes therefore threatened the continued support for criminal justice institutions from within affected communities, and hence jeopardised the perceived legitimacy of the institution itself, together with any measure of justice it might seek to administer, while active victim disengagement from criminal justice mechanisms was recognised to affect the success of investigative and prosecutorial work both domestically and internationally.¹⁶⁸ As a result, the incorporation of more victim-focussed, restorative measures within criminal justice processes both domestically and internationally, whilst of potential benefit to the victim, should not be understood as a purely altruistic act on the part of the State or drafting body.

¹⁶⁵ Judges’ Report, ‘Victims Compensation and Participation’, International Criminal Tribunal for the Former Yugoslavia (13th September 2000) CC/P.I.S./528-E.

¹⁶⁶ *Recommendations and Commentary for the Elements of Crimes and Rules of Procedure and Evidence*, Submitted to Preparatory Commission for the International Criminal Court, 12th – 30th June 2000, 20.

¹⁶⁷ Garkawe (n 126) at 351; and see also Susanne Karstedt, ‘From Absence to Presence, From Silence to Voice: Victims in International and Transitional Justice Since the Nuremberg Trials’ (2010) 17:9 International Review of Victimology 10.

¹⁶⁸ The impact on investigative and prosecutorial work of negative victim experiences of the judicial process is documented in Wemmers (1996) (n 14). Wemmers notes in particular that “[b]esides enhancing victims’ suffering, negative experiences with legal authorities are associated with diminished victim cooperation with authorities, decreased support for authorities and reduced respect for the law”, at 215; Mike Maguire, *Burglary in a Dwelling: The Offence, The Offender and The Victim* (Heinemann, 1982). See also Young (n 14) 228 – 9.

Article 68(3), together with other pro-victim measures of the Rome Statute, was therefore drafted against this backdrop and as a response to these numerous concerns, and followed significant lobbying efforts on the part of the victim and NGO communities. The intention of the drafters to incorporate restorative elements in to the judicial process of the ICC is evident in the wording of the Rome Statute itself. The Preamble to the Statute makes express reference to the plight of victims of “unimaginable atrocities that deeply shock the conscience of humanity”, thereby acknowledging the harm suffered by victims and their consequential stake in activities aimed at the pursuit of justice. Moreover, in its incorporation of participative and reparative provisions, the Rome Statute borrows heavily from restorative justice themes.

In particular, and in relation to its victim participation endeavour in particular, drafters of the Rome Statute consulted the relevant provision of the UN Declaration to inform the wording of Article 68(3).¹⁶⁹ Article 6(b) of the UN Declaration provides that:

“6. [t]he responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

...

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system”.

The similarities between the wording contained in the UN Declaration and that found in Article 68(3) of the Rome Statute is striking, and the direct incorporation of language from the UN Declaration, itself an international human rights instrument reflecting restorative themes, further evidences the reparative intention of the drafters.¹⁷⁰ In addition,

¹⁶⁹ Notably, states parties were bound to consider the provisions of the UN Declaration because of a footnote included by the Rome Conference’s Working Group on Procedural Matters in its report on Article 68, transmitted to the Drafting Committee, which read “in the exercise of its powers under this article, the Court shall take into consideration the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, reported by David Donat-Cattin, ‘The Role of Victims in ICC Proceedings’, in Flavia Lattanzi and William Schabas (eds) *Essays on the Rome Statute of the International Criminal Court Vol. 1*, (Il Sirente 1999) 260.

¹⁷⁰ See, for example, War Crimes Research Office (November 2007) (n13) 2, 10. The direct incorporation of language from the UN Declaration in to the text of Article 68(3) poses its own

the separation of participation and reparations provisions in the Statute is particularly noteworthy, marking a “significant departure from the mere conceptualization of victim’s rights in terms of reparation”,¹⁷¹ and thereby indicating a recognition of the potential, at least, for participation to be restorative in its own right.¹⁷²

1.2.2. Acknowledgment of a restorative rationale in academic and Court literature

The preceding paragraph naturally incorporates a number of examples of the recognition, in academic literature, of a restorative function for the Court in respect of its participation endeavour. Looking now at this issue in particular, it is noted that the incorporation of restorative elements within the function of the Court is widely recognised in expert academic literature. According to the War Crimes Research Office of the University of Washington, for example, “the framework of victim participation at the ICC is the product of a desire to achieve restorative justice for victims”,¹⁷³ while Emily Haslam notes that

challenges, including a failure on the part of the drafters to recognise and reflect the differing contexts of domestic and international application and the challenges of realising participation in situations of mass victimisation. This is considered further, at para 1.3.2. The influence of the victim-focused, human rights movement has since been formally acknowledged by the Court itself and in academic literature; see, for example, *Situation in the Democratic Republic of the Congo* (Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6) ICC-01/04-101 (17 January 2006) [50]-[51]; Schabas (n 1), 327; Karstedt (n 167) at 10.

¹⁷¹ Carsten Stahn, Héctor Olásolo and Kate Gibson, ‘Participation of Victims in Pre-Trial Proceedings of the ICC’ (2006) 4 *Journal of International Criminal Justice* 219, 219-20.

¹⁷² A belief in the restorative potential of participation as a distinct element is evidenced further in the Statute for the Special Tribunal for Lebanon, which includes victim participation provisions based directly upon the Rome Statute, but which indicates that reparations are to be claimed instead before the State’s national courts. Notably, however, the Court has exhibited a tendency to link victim participation to the interest of the victim in pursuing and receiving compensation or other forms of redress, thereby erroneously combining the procedural and outcome elements of restorative justice included in the Rome Statute: see, for example, *Lubanga* (Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing) ICC-01/04-01/06-462-tEN (22 September 2006), 5. This tendency was formally noted by the Single Judge in *Bemba* (Fourth Decision on Victims’ Participation) ICC-01/05-01/08-320 (12 December 2008) [90]; see also in *Muthaura, Kenyatta and Ali* (26 August 2011) (n 79) [52]. Notably, however, language proposed by the French delegation which specifically linked participation to compensation was not included in the final Statute, see U.N. GAOR, Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/L.3 (1996), Article 126. See also the report of the expert panel plenary session convened at the 12th session of the ASP, in Nick Wilson and Theo Boutruche, ‘Victims’ Rights discussed as ASP 12 Plenary’ 29th January, 2014, available on the website of the Victims’ Rights Working Group, at <<http://www.vrwg.org/home/home/post/51-victims-rights-discussed-at-asp-12-plenary>> last accessed 11th June, 2015.

¹⁷³ War Crimes Research Office (2007) (n 13) 1 – 2.

the Rome Statute marked a “major departure from a hitherto limited theory of international criminal justice, which is centred on punishment and international order,” towards a “more expansive model of international criminal law that encompasses social welfare and restorative justice.”¹⁷⁴

Roy Lee, writing shortly after the inception of the International Court, and in particular, in relation to the innovative, victim-focussed provisions of the Rome Statute, observes that “[t]his new Court has been transformed from an instrument initially designed for punishing individual perpetrators of atrocious crimes to an international court administering restorative justice”¹⁷⁵, while in their analysis of participation by victims’ advocates in proceedings before the ICC, Gerard Mekjian and Mathew Varughese write that Article 68(3) represents “the creation of a new dynamic wherein punitive justice, found within adversarial court systems, was to be balanced with restorative justice principles”.¹⁷⁶

That said, while much of the academic literature agrees that the endeavour introduces, and was intended to introduce restorative elements into an otherwise retributive system, the recognition of a restorative goal for the ICC is not universal. In addition to the concept of reparative justice, described above, additional alternative bases for the Court’s victim-focussed measures are also evident within the literature. McCarthy, for example, argues that restorative justice theory alone is an inadequate justification for the inclusion of

¹⁷⁴ See Haslam (n 7) at 315.

¹⁷⁵ Introduction to Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) lxiv.

¹⁷⁶ Mekjian and Varughese (n 6), 20. The restorative basis of the Court’s victim-focussed provisions is acknowledged in numerous other sources; see, for example, Gilbert Bitti & Håkan Friman, ‘Participation of Victims in the Proceedings’ in Roy S. Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), 457; McGonigle (n 5), 96; Pena and Carayon, (n 72), 4 – 5; T. Markus Funk, *Victims’ Rights and Advocacy at the International Criminal Court*, (2nd edn, OUP 2015), 2; Claire Garbett, ‘The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court’ (2013) Vol.16 No.2 Contemporary Justice Review 193.

reparations provisions in the Rome Statute,¹⁷⁷ and suggests that elements of vindication and moral denunciation, as functions of reparations,¹⁷⁸ indicate the additional incorporation of an expressive rationale or goal.¹⁷⁹ McCarthy, however, seemingly bases his conclusion on the purpose of reparations *per se* rather than on the drafting history of the Rome Statute and the apparent intent of its drafters. Moreover, while McCarthy examines the re-emergence of restorative justice in the context, he does not indicate the definition of restorative justice he is relying upon, and in particular, does not explore the ambit and parameters of the concept in terms of its potential to encompass expressive elements.

Moffett, meanwhile, argues that while the ICC introduces a more victim-orientated notion of justice, it cannot be taken to indicate the introduction of a restorative goal for victims where the prime purpose of the Court remains the investigation, prosecution and punishment of perpetrators of international crimes.¹⁸⁰ Again, however, Moffett reaches his conclusions without any discussion of what restorative justice might comprise in the given context, and adopts a somewhat absolutist approach in assuming that because the Court is not, first and foremost, a restorative justice mechanism, it cannot have been intended to provide restorative justice, or aspects of it, to participating victims.¹⁸¹ Moreover, Moffett's

¹⁷⁷ McCarthy (Victim Redress) (n 4).

¹⁷⁸ Ibid, at 366.

¹⁷⁹ Ibid, 365 – 368.

¹⁸⁰ Luke Moffett (Justice for Victims) (n 4), 49; see also Luke Moffett, 'Realising Justice for Victims before the International Criminal Court' (2014) ICD Briefing 6, 5. Moffett in turn describes justice for victims in terms of procedural satisfaction together with the achievement of retributive outcomes (including a judicial determination of the truth in respect of the charges brought) and the award of reparations.

¹⁸¹ Dan Van Ness, cited in Liebmann (n 92), 33, Paul McCold and Ted Wachtel 'In Pursuit of Paradigm: A Theory of Restorative Justice' (2003) paper presented at the XIII World Congress of Criminology, 10th – 15th August 2003, who similarly divide judicial processes into fully, mostly or partly restorative. Available online at < http://www.iirp.edu/article_detail.php?article_id=NDI0> last accessed 11th May 2015. Notably, there is also somewhat of a "backlash" emerging in the academic literature concerning the restorative rationale; see for example, Sergey Vasiliev, who, while acknowledging that restorative justice was "on the minds of the drafters of the ICC legal framework", suggests that the difficulties occasioned by the practical application of the victim participation endeavour warrants revisiting the rationale for victim engagement. Vasiliev (n 4), 64. To this end, Vasiliev advocates the Court simply drop any restorative intent from its mandate and realign the endeavour instead to its retributive function, 63 - 66. Notably, Vasiliev does not go on to examine how, under his suggested theoretical revisions, the new role of victim participant would be distinct from the role of witness, or how the changes might position the victim participant vis-à-vis the prosecutor, and in particular, whether such an approach would, in part, replicate the

“all or nothing” approach is at odds with restorative justice experts such as Van Ness, or McCold and Watchel, who consider and assess restorative impacts on a continuum in order to gauge whether a judicial system is minimally, moderately or fully restorative in nature, an approach which is more sensitive to the operation of victim-focused measures within a variety of judicial forums, including those such as the ICC that have primarily retributive goals.

Counter arguments to the inclusion of restorative elements within the Court’s mandate therefore raise important issues about what is meant by restorative justice in the specific context of the ICC. The absence of a definition of restorative justice in the context is clearly problematic, and inevitably renders any assessment of the applicability of the concept to the ICC deeply challenging, an issue which is addressed substantively in the following chapter.

In the meantime, it is suggested, the debate over the presence of a restorative element in the mandate of the Court has, to some extent, been obviated by the express recognition by the Court itself of a restorative function, referred to above,¹⁸² thereby providing both an indication of the Court’s recognition and acceptance of the theoretical basis of its victim-focussed provisions and a promising basis for the potentially restorative realisation of those measures.

In particular, in its 2009 Report on the strategy in relation to victims, the Court observes that “[a] key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function.”¹⁸³ The Court’s Revised Strategy in Relation to Victims expressly acknowledges its dual mandate,¹⁸⁴ and its

role of the prosecutor to some extent and affect the right of the accused to a fair trial. The positioning of the victim as second prosecutor is discussed further below, at para 1.3.3.(ii).

¹⁸² At para 1.2.1. Although of course debate as to whether the Court *should* have a restorative role are likely to continue.

¹⁸³ Report of the Court on the strategy in relation to victims (10 November 2009) ICC-ASP/8/45, para 3.

¹⁸⁴ Court’s Revised Strategy in relation to Victims (5 November 2012) ICC-ASP/11/38, para 2, noting that “the ICC has not only a punitive but also a restorative function”. The Strategy goes on at para 10 to note that participation has the potential to empower victims, as well as to provide recognition of their suffering.

subsequent Report on the Revised Strategy notes that the vision of the Rome Statute “is of justice in the broadest sense, an end to impunity for the perpetrators of mass atrocities, and the notion that justice is not just punitive but restorative”.¹⁸⁵

Further reference to the restorative intent is contained in the manual for victims’ legal representatives, prepared by the Office of Public Counsel for Victims (“OPCV”), noting “the clear recognition of the States that drafted and endorsed the Statute that the ICC should not only be retributive, but also restorative”.¹⁸⁶ Moreover, the Court’s own website observes, in specific relation to the victim-focused measures contained in the Rome Statute, that:

“The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that will enable the ICC to not only bring criminals to justice but also to help the victims themselves rebuild their lives”.¹⁸⁷

Finally, in an address to the Assembly of Parliamentarians for the ICC, Judge Sang-Hyun Song, President of the ICC, stated that the Court

“is about much more than just punishing the perpetrators. The Rome Statute and the ICC bring retributive and restorative justice together.”¹⁸⁸

¹⁸⁵ Report of the Court on the Revised Strategy in relation to Victims: Past, present and future (5 November 2012) ICC-ASP/11/40, para 14 and footnote 15, and see also para 34, noting that “the ICC was created with both a punitive and a restorative function, with the Rome Statute giving victims a right to directly participate in the ICC justice process”.

¹⁸⁶ The Office of Public Counsel for Victims, Representing Victims before the International Criminal Court: a Manual for legal representatives, (2nd edn) (December, 2012) ICC-OPCV-MLR-002/13_Eng, available online at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/office%20of%20public%20counsel%20for%20victims/Documents/26-March-2013-EN-Consolidated-Version-2010-2012-OPCVManual.pdf> last accessed 20th June, 2014.

¹⁸⁷ International Criminal Court, Victims and witnesses, (undated), available online at <<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/>>, last accessed 20th June, 2014.

¹⁸⁸ Address to the Opening Session of the 7th Consultative Assembly of Parliamentarians for the ICC and the Rule of Law and World Parliamentary Conference on Human Rights, 10th – 15th December 2012, Rome.

Having examined the restorative basis of Article 68(3), and before going on to consider the individual as intended beneficiary of the provision, it is appropriate to briefly examine and define, for the purpose of this research and to the extent presently possible, the associated notion of “effective and meaningful” participation.

1.2.3. Defining concepts: “effective and meaningful” participation

Having created a new and distinct role for victims within the procedures of the ICC, it is reasonable to assume that the drafters of the Rome Statute meant its innovative, victim-focussed provisions, including victims’ right to participate in the Court’s proceedings, to be more than symbolic. Within the Court itself, as well as within academic and expert practitioner literature, a notion of “effective and meaningful” participation has emerged as the common discourse for any discussion, examination and consideration of the victim participation endeavour.

In its report into the implementation of the revised victims’ strategy during 2013,¹⁸⁹ for example, the Court includes, as a strategic objective, the realisation of the victims’ right to participate effectively in proceedings, thereby providing clear acknowledgment that the measure is intended to be something more than symbolic. In expanding upon the strategic objective in the following paragraph of its report, the Court expressly notes that the right of victims to participate should be rendered both “effective and meaningful”.¹⁹⁰

Similar wording is found in the decisions of the Court in its consideration of victim participation issues. The need for the participation provisions of the Rome Statute to be interpreted in such a way as to render victims’ engagement meaningful was addressed directly in the decision of the Single Judge in her consideration of the procedural rights attaching to victims at the pre-trial stage of the *Katanga and Ngudjolo* case.¹⁹¹ In that case, Judge Steiner, in rejecting a casuistic approach to victim participation in favour of a clear determination of procedural rights at the outset, noted that she sought not only to provide legal certainty but also “to ensure that the role attributed to those granted the procedural status of victim at the pre-trial stage of a case before the Court is...meaningful,

¹⁸⁹ Report of the Court on the Implementation in 2013 of the revised strategy in relation to victims (11 October 2013) ICC-ASP/12/41.

¹⁹⁰ At para 28.

¹⁹¹ *Katanga and Ngudjolo* (13 May 2008) (n 163) [51].

and not purely symbolic”, a requirement that was reiterated by Trial Chamber II in its considerations of the organisation of victims’ Common Legal Representatives in the same case.¹⁹²

In considering the possible modalities of participation in the *Lubanga* case, Trial Chamber I observed that the provisions of Article 68(3) must be given “meaningful effect” for victims, within the limits of a fair trial.¹⁹³ The requirement was repeated by the Appeals Chamber in its subsequent consideration of appeals from both the Office of the Prosecutor and the Defence,¹⁹⁴ while in its consideration of the modalities of victim participation in the *Katanga and Ngudjolo* case, Trial Chamber II made express reference to the need to ensure that participation for victims was both effective and meaningful.¹⁹⁵

The phrase is similarly employed in academic writing on the subject. In her review of the achievements and challenges of the participation endeavour, for example, Mariana Pena calls upon all interested parties to move beyond a debate of the problems and acceptability of the Court’s victim participation scheme to a consideration of how the endeavour might best be rendered effective and meaningful in practice.¹⁹⁶ The language is also adopted by authors in their consideration and examination of a number of issues, including victims’ participation in the pre-trial and investigation stages of proceedings,¹⁹⁷ specific and

¹⁹² *Katanga and Ngudjolo* (Order on the Organisation of Common Legal Representation of Victims) ICC-01/04- 01/07-1328 (22 July 2009) [10(a)]. An identical approach is taken by Trial Chamber II in *Bemba* (Decision on common legal representation of victims for the purpose of trial) ICC-01/05-01/08-1005 (10 November 2010) [9(a)]; *Ruto & Sang* (3 October 2012) (n 75) [10].

¹⁹³ *Lubanga* (Decision on victims’ participation) ICC-01/04-01/06-1119 (18 January 2008) [85], cited with approval in *Prosecutor v. Muthaura & Kenyatta* (“Muthaura and Kenyatta”) (Decision on victims’ representation and participation) ICC-01/09-02/11-498 (3 October 2012) [9].

¹⁹⁴ Noting that “[t]o give effect to the spirit and intention of article 68 (3)...it must be interpreted so as to make participation by victims meaningful”, *Lubanga* (11 July 2008) (n 72) [97]. The decision related in particular to the ability of victim participants to introduce and to challenge the admissibility of evidence before the Court.

¹⁹⁵ *Katanga and Ngudjolo* (22 January 2010) (n 72) [57], [121] and [125].

¹⁹⁶ Pena (n 17), 511; and see also McGonigle (n 5), 145; Cryer and others, (n 17) 480.

¹⁹⁷ See, for example, in Alexandra Guhr, ‘Victim Participation at the Pre-Trial Stage at the International Criminal Court’ (2008) 8 International Criminal Law Review 109, 138-139; Stahn and others (n 171), 238.

appropriate modalities of participation¹⁹⁸ and in relation to victims' access to justice, including in the context of the somewhat lengthy and complicated application process, the perceived unrealistic evidential burden on victims in the establishment of their identity, the need for competent legal representation and the geographical challenges involved in operating adequate victim consultation.¹⁹⁹

Discussion of effective and meaningful participation occurs along similar lines and employs similar language in expert civil society and practitioner literature.²⁰⁰

Notably, however, the phrase "effective and meaningful" is undefined in academic, Court and practitioner materials and, as discussed further below, has come to mean different things to the Court, academics and expert legal practitioners.²⁰¹ It is therefore necessary to consider an appropriate definition of "effective and meaningful participation" for the purpose of this research, and, it is suggested, for wider application within the Court.

The phrase itself is not found in the Court's constituent documents. Despite this, the Rome Statute, together with its supplemental implementing provisions, operates to impose certain limits on any interpretation that can be given to the phrase. In particular, in the absence of any statutory basis, the phrase cannot be interpreted in such a way as to impose additional statutory obligations on the Court or to grant legal rights to victims over and above those contained in the Court's founding documents. Any interpretation must therefore operate within the confines of the Court's pre-existing victims' provisions.

¹⁹⁸ See, for example, Håkan Friman, 'The International Criminal Court and Participation of Victims: A Third Party to Proceedings?' (2009) 22 *Leiden Journal of International Law* 485, 491, 499; Kelisiana Thynne, 'The International Criminal Court: A Failure of Justice for Victims?' (2009) 46(4) *Alberta Law Review* 957, 964, 976, 980.

¹⁹⁹ See, for example, Pena and Carayon (n 72), 2, 16; Pena (n 17), 498, 504 and from 511.

²⁰⁰ See, for example, Redress, (October 2012) (n 18), 25, 60; Victims' Rights Working Group, 'Making Victim Participation Effective and Meaningful' June 2014, available online at <<http://www.vrwg.org/downloads/vrwgpapermakingvictimparticipationeffectiveandmeaningful-june2014.pdf>> last accessed 9th July, 2014; Independent Panel of experts report on Victim Participation at the International Criminal Court, July 2013, para 2, available online at <<http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf>> accessed 16th July, 2014.

²⁰¹ Para 1.3.3.(iii), in relation to the impact of the adoption of alternative language on the potential achievement of the endeavour's restorative aim.

Conversely, there is a danger that a narrow interpretation of the phrase may serve to limit the scope of victims' rights in practice to something less than originally intended by the drafters of the Rome Statute, thereby operating to the detriment of victim participants. Moreover, there is a risk that while the notion of effective and meaningful participation becomes the common discourse for any discussion of victim participation, we lose sight of the Court's restorative aim, and participation thereby becomes divorced from its underlying theoretical rationale.

With these specific limitations and concerns in mind, it is suggested that any interpretation of the phrase must be directly allied to the Court's pre-existing mandate in respect of victims, including its underlying restorative basis.

"Effective and meaningful" participation must therefore be understood as participation which is or has the potential to be experienced by victims as in some way personally restorative within the meaning of restorative justice theory in the specific context of international criminal law. An interpretation that allies the notion of "effective and meaningful" to the underpinning theoretical rationale for the provision is, it is submitted, wholly consistent with the intention of the drafters to enact a system with the potential, at least, to be restorative, either in whole or in part, for the victim participant. Moreover, in allying the term to the Court's restorative aim, the status of the victim as intended beneficiary of the right is maintained.

Finally, the restorative goal of the International Criminal Court must, of course, operate within an ostensibly retributive system, and it is clear from the wording of Article 68(3) that its application is subject to the right of the Defendant to a fair and expeditious trial. To that extent, the Court is required to strike a balance between its retributive and restorative functions.²⁰² The challenge for the Court, therefore, should be understood as facilitating participation, which is experienced by the participant as effective and meaningful, within the specific parameters of the Rome Statute and in light of its primarily retributive function.

It should be acknowledged here that while directly allying the notion of effective and meaningful participation to the underlying theoretical rationale of the endeavour provides

²⁰² The balancing by the Court of its restorative and retributive functions is explored, for example, in Mekjian and Varughese (n 6); and see also Will (n 159).

the basis for the development and application of the notion in tangible and practical terms at the Court, the proffered definition itself is relatively abstract. This is an inevitable consequence of the undeveloped nature of restorative justice in the specific context of international criminal law, and the failure of the Court to indicate either what it means by restorative justice or to articulate the physical parameters of restorative justice within the particular forum, a factor which is considered and addressed substantively in the following chapter.

Having examined and reaffirmed the restorative basis of Article 68(3) and delineated, as far as presently possible, concepts for application of the provision in the specific context, it is appropriate to consider the extent to which the provision, as drafted, has the potential to provide restorative benefit to the victim participant as an individual.

1.2.4. The individual as intended beneficiary of the right to participate

(i) Introduction

As discussed, restorative justice theory entails the supplanting of the notion of crime as an offence against society by the reconception of crime as an act perpetrated against the victim.²⁰³ The victim as beneficiary of restorative action is therefore consistent with restorative approaches. Within the context of international crimes, of course, the transference of this principle from the domestic to the international level is more complex. In particular, while the focus here is on the individual as intended recipient of the right to participate, it is recognised that in light of the scale of victimisation in crimes considered by the ICC and the varying capacities within which victims experience international crimes, the individual is likely, in turn, to have reparative needs that are both personal and collective in nature.²⁰⁴ The practical application by the Court of the right to participate is considered further below, at section 1.3, and particular challenges posed by the issue of mass victimisation are referred to there in more depth. It is appropriate here to briefly consider the extent to which, as drafted, Article 68(3) provides a theoretical basis for individually-focussed, restorative benefit. Particular reference is made in this regard to the notion of “victim” within the meaning of the Statute, together with the elements of “harm” and “personal interests” contained in the Article.

(ii) A theoretical basis for individually reparative participation: exploring the notions of “victim”, “harm” and “personal interests”

An exploration of the evolution of the definition of “victim” adopted for use in the proceedings of the International Criminal Court is particularly enlightening in terms of the further evidence it provides of the restorative intent of the drafters, as well as of the specific individual focus they had in mind in enacting the Statute’s victim participation endeavour.

Rule 2 of the Rules of Procedure and Evidence for both of the *ad hoc* Tribunals defines “victim” as:

²⁰³ Para 1.2.1.

²⁰⁴ Discussed above, Introduction, Scope and Limitations.

“a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed”.²⁰⁵

Notably, the starting point of the definition is the crime which has allegedly been perpetrated, and hence runs counter to the more victim-centred, restorative approaches which had subsequently gained in prominence, and which focus instead upon the harm inflicted. In addition, the definition does not include indirect victims or dependants.

Delegates involved in drafting the Court’s Rules were seemingly keen to move away from the narrow definition adopted by the heavily-criticised *ad hoc* Tribunals in favour of a more expansive approach which was better aligned with restorative thinking.²⁰⁶ Their attention was drawn to the definition contained in the UN Declaration,²⁰⁷ which provides:

“1. ‘Victims’ means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal law operative within Member States, including those laws proscribing criminal abuse of power.

“2. ...The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.

Notably, delegates recognised that the potentially large numbers of victim participants would entail logistical constraints which might overwhelm the Court.²⁰⁸ In acknowledging

²⁰⁵ Rules of Procedure and Evidence of the International Criminal Tribunal of the Former Yugoslavia (adopted 11 February, 1994) UN Doc. IT/32/Rev.49; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (adopted 29th June 1995) UN Doc. ITR/3/REV.1 (as amended) (1995).

²⁰⁶ See, for example, Yvonne McDermott, ‘Some are more Equal than Others: Victim Participation in the ICC’ (2008 – 2009) Vol.5:1 Eyes on the ICC 23, 25.

²⁰⁷ ‘Report on the International Seminar on Victims’ Access to the International Criminal Court’, Annex I, R. X (art. 15) n.1, U.N. Doc PCNICC/1999/WGRPE/INF/2 (1999), and see also Fiona McKay, ‘Paris Seminar on Victims’ Access to the ICC’ (16th June 1998) Issue 12 Int’l Crim. Ct. Monitor 5.

²⁰⁸ Sylvia Gurmendi and Hakan Friman, ‘The Rules of Procedure and Evidence of the International Criminal Court’ (2000) 3 Yearbook of International Humanitarian Law 289, 313 – 314.

the need to produce a realistic system for participation, delegates considered the possibility of limiting the number of participants through a strict delineation of the notion of “victim”, by restricting the mode of participation, or both.²⁰⁹ Within this context, having rejected the definition employed by the *ad hoc* Tribunals as being too narrow, delegates were unable to achieve a consensus around the broad definition contained in the UN Declaration, and were subsequently invited to abandon it as a point of reference. In the spirit of compromise, a group of Arab States offered a simple definition, which provided that:

“For the purpose of the Statute and the Rules of Procedure and Evidence:

“(a) Victim shall mean any natural person or persons who suffer harm as a result of any crime within the jurisdiction of the Court.

“(b) The Court may, where necessary, regard as [a] victim legal entities which suffer direct material damage”.²¹⁰

Paragraph (a) of the proposed definition subsequently became the basis of Rule 85(a). A compromise was then reached in relation to paragraph (b) of the definition, which, by inclusion of the word “may”, retained the Court as final arbiter in the case of legal entities seeking to engage with the Court as victims.²¹¹ The resulting definition is contained in Rule 85 RPE, and provides:

“(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

“(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”

²⁰⁹ Ibid.

²¹⁰ Ibid, at 314.

²¹¹ Ibid, and see generally Silvia A. Fernández de Gurmendi, ‘Definitions of Victims and General Principles’, in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001).

Crimes falling within the jurisdiction of the Court are listed in Article 5 of the Rome Statute, and include genocide, crimes against humanity and war crimes.

Notably, the definition contained in the ICC Rules differs from both those adopted by the *ad hoc* Tribunals and the UN Declaration in a number of respects and can, to some extent, be interpreted in relation to those provisions on the basis of specific points of departure from them.

Firstly, like the UN Declaration, and unlike the definition employed by the *ad hoc* Tribunals, Rule 85(a) defines “victim” by reference to the harm done rather than to the crime perpetrated. As already noted, this is the starting point of restorative justice, and so it is consistent with restorative justice theory in its focus.

Arguably, the corollary of basing the notion of victim on the harm suffered is effectively to broaden the scope of the definition to encompass indirect as well as direct victims, since the link which must be established is between the criminal act and the harm which arises as a result of it, rather than between the criminal act and the direct victim of it,²¹² and the inclusion of indirect victims within the definition has since been affirmed by the Court in its early jurisprudence on victim participation.²¹³

Secondly, unlike the UN Declaration, the definition of victim contained in Rule 85(a) makes no reference to harm which has been suffered collectively. In addition, although Rule 85(a) defines victims in the plural, as opposed to reference to the singular in the *ad hoc* Tribunal definitions, Rule 85(a) does not make any express reference to the possibility that the notion of victims might comprise a collective or group.

²¹² Notably, this argument would assume that the express reference to the inclusion of both direct and indirect victims in paragraph 2 of the definition found in the UN Declaration is superfluous, or otherwise there simply to make explicit what is otherwise implicit in linking victim status to harm suffered. Given that the Declaration was intended for wide domestic implementation, this would seem a plausible explanation.

²¹³ See, for example, the decision of Pre-Trial Chamber I on the participation of victims in *Lubanga* (Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case of the Prosecutor v. Thomas Lubanga Dyilo) ICC-01/04-01/06-172-tEN (29 June 2006) 7. The Appeal Chamber, too, observed in the same case that “harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims”, see *Lubanga* (11 July 2008) (n 72) [32], and cited with approval in *Ntaganda* (15 January 2014) (n 78) [31] – [32]. See also generally in *Friman* (Third Party to Proceedings) (n 198).

Given that the definition of victim contained in the UN Declaration had been expressly considered by the drafters, the exclusion of any reference to collective harm in Rule 85(a) was clearly a conscious act. While, therefore, crimes such as genocide and crimes against humanity, which fall within the Court's remit, are crimes of scale and have an inherently collective component, it is the notion of personal harm to the individual, howsoever it arises, which is determinative of the individual's status as a victim within the meaning of Rule 85(a) and hence decisive for the purpose of participation. In light of this, reference in Rule 85(a) to "victims" and "persons" must surely represent an acknowledgment by the drafters of the likely significant number of potential victim participants in Court proceedings. As a result, as drafted, at least, the requirement that harm be personal to the victim would theoretically exclude a broad, collective, diaspora-type application or one which might otherwise situate the individual participant in a representative capacity vis-à-vis the affected community.²¹⁴

Finally, certain legal entities, albeit those with essentially social purposes, are encompassed by the definition. According to Donat-Cattin, however, "[t]he inclusion of legal entities...within the definition of victim does not detract the focus of [the] Rome Statute system from *individual victims*, given that the rights enshrined in articles 68 and 75 of the Statute are primarily applicable to natural persons."²¹⁵ [emphasis added].

The notion of harm itself is not defined in the Statute or Rules. Notably, however, in allying an individual notion of victimhood to the harm suffered, it is clear that the harm must in turn be personal to the victim, whether as a direct or indirect victim of the crime allegedly perpetrated. In addition, Article 68(3) provides that a victim's "personal interests" must be engaged before they are able to participate in proceedings. Again, "personal interests" is not defined in the Statute or accompanying materials, although the language of the requirement itself, together with the intention of the drafters to create a role distinct from that of society or the Prosecutor and the individual approach to the interpretation of "victim" all indicate that the interests in question must be specific and personal to the individual victim participant.²¹⁶

²¹⁴ On this point, see also McDermott (n 206), 32.

²¹⁵ Donat-Cattin (Article 68) (n 162), at 1295.

²¹⁶ Interpretation of the provision in practice is considered below, at para 1.3.3.(ii).

1.2.5. Discussion: a system with restorative potential for the victim

A review of the drafting history of Article 68(3), the prevailing pro-victim context and the Court's own literature evidence, it is argued, the intention of the drafters to incorporate restorative components into an otherwise retributive system, supporting the view evident in much of the academic literature. As a result, for the purpose of interpretation and application, the object and purpose of Article 68(3) must be understood as the provision of restorative benefit in the participating victim.

While the participation of victims at the ICC occurs within the context of a retributive process, the Court's restorative goal is distinct from its prosecutorial goal, and hence the ICC can be understood as having a dual mandate: to investigate and prosecute alleged perpetrators of crimes falling within its remit, and to provide restorative benefit to victims, albeit within the primary remit of an ostensibly retributive mechanism. The Court is therefore charged with balancing retributive and restorative functions whilst at the same time ensuring the fair and efficient operation of its judicial process. Moreover, an exploration of the definition of victim, together with an examination of the notions of harm and personal interests, as "entry conditions" for participation before the Court, reveals that the right, as drafted, vests in the individual. While, therefore, the reparative needs of the victim are likely to include both individual and collective elements,²¹⁷ the participative provision, as drafted at least, applies to the individual as opposed to the affected community or society more broadly.

The legislative framework of the Court's endeavour therefore provides potential for the realisation of effective and meaningful participation by victims, and this is particularly so when the endeavour is considered and interpreted with its specific intended rationale in mind.

Having considered the potential of the endeavour to provide restorative benefit at a theoretical level, it is appropriate to examine how the victim participation provision has been developed and interpreted by the Court and expert legal commentators with a view to

²¹⁷ Discussed above, Introduction, Scope and Limitations.

considering the extent to which the restorative potential of the provision is recognised and maximised in practice.

1.3. Restorative in practice?

1.3.1. A lack of statutory guidance: leaving the Court to its own devices

Despite recognising the rights of victims to participate in proceedings, neither the Statute nor the Rules indicate how the right should be realised in practice.²¹⁸ This absence of statutory guidance has given rise in turn to a considerable degree of ambiguity and confusion in respect of both the mechanisms and modes of victim participation,²¹⁹ and is reflected in the sometimes disparate views of those in key positions within the Court itself as to the specific nature and purpose of the endeavour.²²⁰

Instead, Article 68(3) indicates that the means by which the right to participate will operate is left for the Court to determine in the course of its jurisprudence,²²¹ and it therefore for the Court to consider how this innovative provision should be operationalised within an international criminal justice context.

²¹⁸ See also in this regard, Haslam (n 7), 315.

²¹⁹ This ambiguity is widely recognised in academic literature; see, for example, Bassiouni (2006) (n 1), 245, noting “there is a great deal of ambiguity as well as lack of clarity in the mechanisms applicable to victims’ access, participation and rights”. See also Friman (Third Party to Proceedings) (n 198), 499; McGonigle (n 5) at 111, and Cohen (n 2), at 353.

²²⁰ In a study examining the perceptions and opinions of those working in the Court in relation to the victim participation endeavour, officers of the Court articulated various different models of participation involving in turn differing levels of victim agency and involvement in the process; see Wemmers (2010) (n 1). The study adopts a 4-level typology of participation developed by Ian Edwards, in ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making’ (2004) 44 *British Journal of Criminology* 967.

²²¹ *Situation in Darfur* (Decision on Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”) ICC-02/05-118 (23 January 2008) 5; *Situation in Darfur* (Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation) ICC-02/05-121 (6 February 2008) 9; See also *Situation in the Democratic Republic of the Congo* (Decision on Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor”) ICC-01/04-438 (23 January 2008) 5.

1.3.2. The legislative roots of the provision: a problematic basis for facilitating restorative participation

Article 21(1)(b) of the Rome Statute indicates that where a provision of the Statute cannot be interpreted by direct reference to its text, the Court may have recourse to “applicable treaties and the principles and rules of international law”. In practice, and as discussed further below, the Court has consulted and applied the provisions of the Vienna Convention as a guide to treaty interpretation. Article 32 of the Vienna Convention provides that where a clear interpretation is not apparent from an examination of the specific text of a provision, recourse might be had to any supplemental materials with direct bearing and relevance to the drafting of the provision in question.

Notably, despite furnishing the legislative roots of Article 68(3), recourse to the UN Declaration as an aid to interpretation and application provides little in the way of guidance to the Court as to how it should implement the provision in practice.

While Article 68(3) of the Rome Statute largely replicates the wording of Article 6(b) of the UN Declaration, there are problems with the wholesale incorporation of the provision into the Statute without any recognition of the characteristics of the nature and scale of international crimes, international criminal law processes or the specifics of the intended forum. Notably, the UN Declaration, as an international human rights law instrument, is intended to be applied primarily within domestic criminal procedures.²²² As a result, it employs vague, aspirational language in order to enable a broad application within the multiplicity of domestic criminal mechanisms and legal systems of member states. Significantly, the detailed practical realisation of the principles contained in the UN Declaration are left for individual member states to determine and apply in any national incorporating legislation or instrument, and in light of the specifics and exigencies of their own criminal justice processes. In contrast, however, drafters of the Rome Statute seemingly failed to anticipate and reflect the realisation of the Declaration’s principles within the specific context of the International Criminal Court, and instead retained language which simply lacks specificity and context.

²²² See Wemmers (2010) (n 1), 632 – 634; Bassiouni (2006) (n 1), 279.

Moreover, the UN's own Policy Guide to the Declaration indicates that it has been implemented domestically through the application of a range of differing models,²²³ none of which it considers to be preferable or otherwise better suited to specific scenarios or judicial contexts,²²⁴ and so is also of little help to the Court in this regard.

The wholesale incorporation of the provision without particular reference to the intended forum is particularly problematic in light of the intended beneficiary of the UN Declaration. As an instrument which was crafted primarily for broad domestic implementation within the territories of member states, the Declaration is designed for application to cases involving one or otherwise few victims, as opposed to the substantial number of victims of international crimes recognised during the drafting process as likely to have an interest in a case before the International Criminal Court and the potentially complex nature of justice needs of participating victims in the specific context of mass victimisation.²²⁵

The delegation of the responsibility to determine a workable process for victim participation therefore represents a missed opportunity to include targeted and practical measures in the Court's Rules for the specific achievement of the intended restorative rationale and for the provision of certainty and clarity amongst victim participants. Instead, differing approaches to victim participation have developed on a case-by-case basis, and in the absence of any guiding or overarching restorative aim to serve as a focal point for victim-oriented measures. As such, the victim participation system as a whole lacks clarity and certainty for victims.²²⁶ At the same time, the terminology of the provision, and in particular, the notion of "views and concerns", is potentially broad. This,

²²³ UN Office for Drug Control and Crime Prevention, Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1999), available online at <http://www.unodc.org/pdf/criminal_justice/UNODC_Guide_for_Policy_Makers_Victims_of_Crime_and_Abuse_of_Power.pdf> accessed 21st June 2014, 20 – 21; see also Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 Hum. Rts. Quarterly 605, 656.

²²⁴ Matti Joustén, 'Listening to the Victim: The Victim's Role in European Criminal Justice Systems' (1987-88) 34 Wayne Law Rev. 95, 122.

²²⁵ Discussed above, Introduction, Scope and Limitations, and considered in more detail below, at paras 2.3.1.(iii) and 2.4.3.

²²⁶ This problem is also identified in the Report of the Independent Panel of Experts (n 200), para 46.

combined with an expansive approach to the definition of “victim” contained in Rule 85(a), renders Article 68(3) of theoretically wide-ranging application in the specific context of the ICC, while the inherent ambiguity within the provision risks raising unrealistic expectations amongst victim participants.²²⁷

While the legislative basis of Article 68(3) does not therefore present difficulties for the theoretical realisation of restorative benefit in victim participants *per se*, the failure of drafters to tailor the provision contained in the UN Declaration to the specific intended forum, and with the nature and scale of victimisation in mind, is problematic.

It is therefore appropriate to consider how the provision has been interpreted and applied in practice. The following section begins with an assessment of the extent to which the restorative rationale for the victim participation endeavour has been acknowledged at a practical level in the jurisprudence of the Court and in related academic literature, and is followed by a consideration of the emergence of competing or potentially alternative rationales for the endeavour, together with an assessment of the potential impact of these rationales on the achievement of effective and meaningful victim participation.

1.3.3. Interpretation of Article 68(3) by the Court and commentators: losing sight of the restorative rationale?²²⁸

Notably, while the Court formally acknowledges its restorative mandate at a theoretical level, any reference to the restorative basis of the provision is conspicuously absent from the Court’s jurisprudence on the issue of victim participation, indicating, it is suggested, a disconnect in the translation by the Court of the principle at a theoretical level into practice.

²²⁷ Noted also in Mettraux (n 3), who observes that the lack of precision and generality may have raised victims’ expectations as to what participation might involve, at 76.

²²⁸ The focus of this section is on how the purpose of the endeavour has been subsumed by other Court-related functions. Notably, however, there is a suggestion that victim participation may have also been co-opted on occasions by intermediaries to pursue a political agenda. Discussion of this area is beyond the scope of this research. For an examination of the issue, see Emily Haslam and Rod Edmunds, ‘Victim Participation, Politics and the Construction of Victims at the International Criminal Court: Reflections on Proceedings in *Banda and Jerbo*’ (2013) 14 Melbourne Journal of International Law, 1.

Significantly, while the Court itself has frequently acknowledged the need to interpret the provisions of the Rome Statute in light both of their specific context and their underlying object and purpose,²²⁹ it has failed to fully explore the theoretical basis for the endeavour in its many decisions on the issue of victim participation. In particular, where it has sought to identify the reasons for victim participation, it has done so without specific reference to the drafting history of the provision or its restorative rationale.²³⁰ The consequences of this failure on the part of the Court, and to some extent, by a number of expert legal commentators, to interpret the provisions in accordance with its restorative object and purpose are explored substantively below, and constitute the remainder of this chapter.

In particular, while it is apparent that the inclusion in the Rome Statute of participatory rights for victims was prompted by the rise in prominence of restorative justice principles and the subsequent criticism of the *ad hoc* Tribunals, it is also clear that the judges and the Court itself are losing sight of the rationale for the endeavour, a problem which is also replicated in the writings of a number of expert legal commentators. Instead, a number of wide-ranging and divergent reasons for the participation of victims in proceedings before the Court have emerged since the Court came into being. Many of these reasons are inconsistent with the specific aims of restorative justice or otherwise call into question the appropriate beneficiary of the participatory right, to the detriment of participating victims and the potential of the endeavour to provide them effective and meaningful participation.

²²⁹ See, for example, Separate Opinion of Judge Pikis, *Lubanga* (Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2nd February, 2007) ICC-01/04-01/06-925 (13 June 2007) [12], referring to the Vienna Convention on the Law of Treaties as the guide by which treaties and conventions should be interpreted. See also *Lubanga* (Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute) ICC-01/04-01/06-108 (19 May 2006) [7]; *Katanga and Ngudjolo* (13 May 2008) (n 163) [78]; *Lubanga* (Judgment) ICC-01/04-01/06-2842 (14 March 2012) [601]; *Katanga* (7 March 2014) (n 81) [43], noting that “[t]he Chambers of the Court have unanimously and systematically based their interpretation of the Statute on the Principles established by the Vienna Convention”, and see also [45].

²³⁰ The argument is developed and discussed immediately below, at 1.3.3.(i) – (iii). For a general discussion, see War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, Washington College of Law, ‘Victim Participation at the Case Stage of Proceedings’ (February 2009) 30 - 34, available online at <https://www.wcl.american.edu/warcrimes/icc/icc_reports.cfm> last accessed 27th March 2015.

(i) Losing sight of the intended beneficiary? Subsumed by the Court's retributive function

Having formally acknowledged the restorative aim of the endeavour in its Revised Strategy,²³¹ the Court goes on, in the same paragraph, to describe the potential benefits that accrue to the Court as a result of victims' participation.²³² In doing so, it employs language that essentially positions these additional benefits on an equal footing with those that the provision was intended to afford to victims, thereby effectively situating itself as co-beneficiary of the provision. This approach is replicated in the Report of the Assembly of States Parties' Bureau on victims, reflecting the results of informal discussions held by members of the Bureau with Court officials and stakeholder, which notes that "participation must be meaningful for victims but also for the purposes of the proceedings, in other words, to provide sufficient relevant information for the Judges, the parties and participants".²³³ A similar approach was also evident during oral discussion of the issue of victim participation during a dedicated plenary session hosted by the Assembly of States Parties in November, 2013. In particular, during panel discussion of the participation endeavour, delegates identified a perceived requirement that participation should be meaningful for both the victim and the trial, and thereby should also provide some form of contribution to the retributive mandate.²³⁴

Notably, it is clear that victim participation has the potential to provide a wide-range of benefits to the Court in addition to those it was designed to bring to the individual victim participant. Moreover, and particularly within the context of a global economic crisis within which State Parties are seeking to reduce their financial contributions in respect of

²³¹ Court's Revised Strategy (n 184) para 2.

²³² Ibid, and see also para 11.

²³³ Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries (15 October 2013) ICC-ASP/12/38, para 10.

²³⁴ The proceedings of the plenary session are documented in Coalition for the International Criminal Court, 'Report on the 12th session of the Assembly of States Parties to the Rome Statute, 20 – 28 November 2013' (undated) available online at http://www.coalitionfortheicc.org/documents/asp12_report.pdf, accessed 11th June, 2014, and see in particular, p.11. The plenary session itself was organised to build on the stocktaking exercise conducted during the Review Conference of the Rome Statute, 31 May – 11 June 2010, held in Kampala, and involved discussion by a high-level panel of experts of recommendations intended to advance the rights of victims contained in the Rome Statute, at 9.

victim-focussed measures of the Rome Statute,²³⁵ it is important for proponents of the endeavour to acknowledge and highlight those additional benefits.²³⁶ At the same time, however, the Court must take care to draw clear distinctions between itself, as an institution that profits from victim participation, and the notion of the victim as right-bearer and intended beneficiary of the provision. Such a clear separation and distinction is not currently evident within Court documents, and instead the Court and a number of commentators alike have failed to distinguish between those benefits which have the potential to arise as a result of the rationale for the provision, and hence accrue to the individual victim as right-bearer, and those which are a consequential by-product of the right of victims to participate.²³⁷ In the absence of such a demarcation, the Court is effectively positioned not only as an institution that profits from the operation of the endeavour, but as a co-right-bearer or subject of the provision.

Further, this partial or wholesale encroachment upon the notion of the victim as right-bearer of the provision is particularly evident in the writings of a number of expert legal commentators, as well as in the jurisprudence of the Court itself, in the specific context of the Court's prosecutorial duties. As a result, rather than presenting an opportunity for restorative action, and hence an end point in itself, the victim participation endeavour is in danger of being subsumed by the furtherance of the Court's retributive function, and in particular, the Court's search for a forensic truth.²³⁸

²³⁵ The budgetary concerns are demonstrated, for example, in the International Criminal Court, Report of the Bureau on victims and affected communities and the Trust Fund for Victims (22 November 2011) ICC-ASP/10/31, recording the discussion between representatives of the various organs of the Court and State Party representatives of the Hague Working Group on Victims concerning the draft Revised Strategy in Relation to Victims, paras 8 – 13.

²³⁶ In its separate report on the Revised Strategy, the Court notes that in addition to seeking to render victim-focused measures of the Rome Statute effective, its other consideration was that they be cost-effective: Report of the Court on the revised strategy (n 185) para 3.

²³⁷ The approach of the Court is also somewhat inconsistent with the expressed "rights-based approach" taken to the Revised Strategy and in particular, the express recognition of the victim participant as right-bearer, para 6.

²³⁸ Within international transitional justice literature a number of discrete forms of truth have been identified which relate, in turn, to their intended beneficiary and reflect the various individual and collective features of the intended recipient(s). These are factual and forensic truth, personal and narrative truth, social truth and healing and restorative truth; see in relation to the South African Truth and Reconciliation Commission, 'Report of the Truth and Reconciliation Commission' Volume 1, Chapter 5, at 110 - 114. Reference here to the forensic truth refers to and is confined to the truth in relation to the guilt or innocence of the Defendant, and hence is allied to the retributive function. It is distinct from the more expansive forms of truth sought by victims of international

Former ICC judge Claude Jorda, for example, writing with Jérôme Hemptinne, notes in relation to victim participation that:

“[t]he presence at the trial of a third protagonist having first-hand knowledge of the crimes, and whose personal intervention in the trial could cast a more subtle perspective on the reality of events which are often depicted by the parties in some-what absolute terms might assist the judge in clarifying the facts of the case, thereby making a decisive contribution to establishing the truth and preventing repetition of the crimes”.²³⁹

In addition, in a 2011 lecture, serving ICC judge Christine Van den Wyngaert, having identified the truth-finding function as the means to achieve the Court’s “basic objective” – the fight against impunity – similarly situates the role of victim participation squarely within that cause,²⁴⁰ whilst Donat-Cattin, states that “any form of positive contribution from victims appears indispensable for the accomplishment of the Court’s [truth-finding] function.”²⁴¹

Finally, there is a clear tendency in the decisions of the Court to consider victims’ participation to be meaningful to the extent it impacts upon, or has the potential to impact upon, the judicial proceedings, thereby allying the endeavour to the Court’s retributive function, and in particular, the extent to which participation makes a tangible contribution to the Court’s search for the truth in its prosecution of the accused.

In her consideration of the procedural rights attaching to victim participants at the pre-trial stage of the *Katanga and Ngudjolo* case, for example, and with particular reference to the right of victim participants to introduce evidence, Judge Steiner notes that “the object and

crimes. The forensic focus of the Court and the broad truth needs of victims are discussed further below, at paras 2.4.3.(iii)(i) and 3.4.4.

²³⁹ Jorda and Hemptinne (n 162), at 1397.

²⁴⁰ Judge Wyngaert notes that “[a]s [victims] are the ones who lived through the relevant events, their experience and knowledge of the circumstances of the case could be helpful in providing judges with important insights about the local situation”, in Christine van den Wyngaert, ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’ (21 November 2011) lecture in the Klatsky seminar in Human Rights, Case Western Reserve University, 10.

²⁴¹ Donat-Cattin (Article 68) (n 162), at 1284. See also Cohen (n 2), at.373.

purpose of article 68(3)...is to provide victims with a meaningful role in criminal proceedings before the Court...so that they can have a substantial impact in the proceedings” [emphasis added].²⁴² Further, in the *Lubanga* case, the Appeals Chamber, in considering the appeals of both the Prosecutor and Defence against the Trial Chamber’s decision on the modalities of victims’ participation, and again, with specific reference to the ability of victim participants to introduce evidence pertaining to the guilt or innocence of the Defendant, indicated that participation would be “meaningful” where any evidence provided by participants was relevant to the Court’s enquiry.²⁴³

The rationale for the victim participation endeavour was also considered by Pre-Trial Chamber I of the Court in its decision, in relation to the situation in the Democratic Republic of Congo, on the application for participation of six prospective victim-participants.²⁴⁴ In concluding that victims had a right to participate at the investigation stage, the Chamber went on to indicate that “the participation of victims...can serve to clarify the facts [and] to punish the perpetrators of crimes”.²⁴⁵

The Pre-Trial Chamber articulated a similar view later the same year in its decision concerning the request for participation of three victims in the Confirmation of Charges Hearing in the *Lubanga* case.²⁴⁶ The Pre-Trial Chamber in that case noted that the purpose of the hearing was to “determine whether there is sufficient evidence providing substantial grounds for believing that [Lubanga] committed each of the crimes presented by the Prosecutor”.²⁴⁷ Having identified the purpose of the hearing, the Chamber goes on to directly ally the participation of victims to that function, noting that “as a

²⁴² *Katanga and Ngudjolo* (13 May 2008) 163) [157].

²⁴³ *Lubanga* (11 July 2008) (n 72) [86] - [97]. A similar approach is evident in *Katanga and Ngudjolo* (22 January 2010) (n 72) [81].

²⁴⁴ *Situation in the Democratic Republic of the Congo* (17 January 2006) (n 170).

²⁴⁵ Para 63. The ability of victims to participate during the investigative stage was subsequently curtailed to apply solely to judicial proceedings; see *Situation in the Democratic Republic of the Congo* (Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 Dec. 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 Dec. 2007, DRC Situation) ICC-01/04-556 (19 December 2008).

²⁴⁶ *Lubanga* (22 September 2006) (n 172).

²⁴⁷ *Ibid.*, 5.

consequence...victims may participate...by presenting their views and concerns in order to contribute to the prosecution of the crimes from which they allegedly have suffered”.²⁴⁸

The approach was replicated by the Pre-Trial Chamber in its determination on the issue of procedural rights for victim participants in the *Katanga and Ngudjolo* case.²⁴⁹ In that case, in considering the ability of participating victims either to discuss evidence or question witnesses in relation to the guilt or innocence of the Defendant,²⁵⁰ the Chamber directly allied the personal interests of the victims to the determination of a narrow, forensic truth in relation to the charges brought and the pursuit of a retributive notion of justice against those responsible for the crimes.²⁵¹ The explicit correlation of victims’ interests to the Court’s truth-seeking and punitive functions arose again in the same case, this time in the Court’s consideration of the appropriate modalities of participation at the trial stage of the proceedings.²⁵² In particular, in observing the need for victims’ personal interests to be directly engaged by the proceedings,²⁵³ and in considering the potential interest of the participant in bringing information before the Court, the Chamber observed that “the only legitimate interest the victims may invoke when seeking to establish the facts which are the subject of the proceedings is that of contributing to the determination of the truth by helping the Chamber to establish what exactly happened.”²⁵⁴ The decision therefore operates to align the roll of victim participation with the retributive function and thereby to position the Court itself as beneficiary of the endeavour.

Allied to any contribution of participating victims to the Court’s search for the truth is a perceived role for victims in assisting the Court to better understand the specific social and cultural context of the alleged abuses. In the *Katanga and Ngudjolo* case, for example, the Court, in considering directions for the conduct of trial proceedings, and in

²⁴⁸ Ibid.

²⁴⁹ *Katanga and Ngudjolo* (13 May 2008) (n 163) [34].

²⁵⁰ Ibid [30].

²⁵¹ Ibid [31] – [44].

²⁵² *Katanga & Ngudjolo* (22 January 2010) (n 72) [59] - [60].

²⁵³ Ibid [58].

²⁵⁴ Ibid [60].

the specific context of its determination of the extent to which Victims' Legal Representatives could question witnesses, indicated that victim participants had a role in enabling the judges to "better understand the contentious issues of the case in light of their local knowledge and socio-cultural background".²⁵⁵ The position was reiterated in a subsequent hearing in the same case, this time concerning an application by four participating victims to appear in person before the Court to give evidence.²⁵⁶ In its deliberations as to whether or not to allow the application, the Court noted that any personal appearance was permitted only where it would contribute to the Court's determination of the truth in relation to the charges brought,²⁵⁷ and went on to indicate that the testimony could provide "a clearer picture of the existing family ethnic and social networks there".²⁵⁸

Finally, where there is recognition of the potentially restorative role of the Rome Statute's victim participation endeavour in the writings of expert legal commentators, it is included in a number of instances as an afterthought, signifying a limited realisation or lack of prioritisation of the role in the minds of those writing on the subject or otherwise responsible for its practical implementation. Jorda and Hemptinne, for example, note that "[l]astly, the participation of the victims in the proceedings and the award to them of compensation are matters which are in the direct interests of the international community, in that they enable victims to regain a certain equanimity, thereby helping to restore the peace".²⁵⁹

Again, while it is undoubtedly true that the Court itself can gain specific benefit from the participation of victims in its proceedings, its approach in directly allying the rationale for the provision to the furtherance of its truth-seeking mandate is problematic for a number of reasons.

²⁵⁵ *Katanga and Ngudjolo* (1 December 2009) (n 82) [82].

²⁵⁶ *Katanga and Ngudjolo* (Decision Authorising the Appearance of Victims a/0381/09, a/0018/09, a/1019/08 and pan/0363/09 Acting on behalf of a/0363/09) ICC-01/04-01/07-2517 (9 November 2010) [16].

²⁵⁷ *Ibid* [5], [9].

²⁵⁸ *Ibid* [16].

²⁵⁹ Jorda and Hemptinne (n 162), at 1401.

Notably, while victims also have a keen, restorative interest in ascertaining the truth about the perpetration of serious violations of humanitarian law, it would be a mistake to assume that the truth needs of victims and those of the Court are necessarily aligned. In particular, victims' needs are likely to include specific information concerning the fate and whereabouts of loved ones, the reasons for and causes of victimisation as well as the broader, prevailing context which facilitated or otherwise enabled the perpetration of gross violations. The International Criminal Court, however, remains responsible for the determination of the guilt or innocence of the accused, and its truth-seeking activities are therefore likely to be allied to that goal, and hence significantly narrower in ambit than that required by victims.²⁶⁰ As a result, the realisation of its truth-seeking function is likely to be of limited restorative potential for victim participants, and may in fact become a source of frustration for them.

Further, a corollary of the Court's tendency to subsume the restorative function of the victim participation regime into its broader retributive function is the seeming inability of the Court to distinguish the discreet victim roles of participant and witness in practice, essentially subsuming the former under the rationale for the latter.²⁶¹

In its decision on victim participation in the *Lubanga* case, for example, the Trial Chamber, in its consideration of the appropriate criteria for permitting participation by victims in the proceedings, indicated the need for victim participants to establish an "evidential link" between themselves and the evidence which the Court was considering,²⁶² thereby openly favouring victim applicants who would also qualify, at

²⁶⁰ The victims' need for truth is discussed further below, at paras 2.4.3.(iii)(i) and 3.4.4. It is beyond the scope of this research to consider in detail the ability of the ICC to meet the specific truth needs of victims. The issue is explored in more detail in Melanie Klinkner and Ellie Smith 'The Right to Truth, appropriate forum and the International Criminal Court' in Natalia Szablewska and Sascha-Dominik Bachmann (eds) *Current Issues in Transitional Justice: Towards a More Holistic Approach*, (Springer 2015).

²⁶¹ Any contribution by victims towards the Court's truth-finding function being more appropriately achieved through the former; see, for example, Fiona McKay, Chief of the Court's Victims Participation and Reparations Section, who indicates that "[p]articipating in proceedings should be distinguished from being called to testify as witness. Some victims may be called as witnesses by one of the parties to give evidence that goes to the culpability or innocence of the accused....in participating, victims are pursuing their own interests, independent of the parties", in McKay (Victim Participation) (n 1), 2.

²⁶² *Lubanga* (18 January 2008) (n 193) [95]. Although the decision was appealed, the Appeals Chamber did not expressly address the requirement of an evidential link. See also Funk (n 176), Part VII (A).

least, as witnesses.²⁶³ As previously noted, however, the criticism of the *ad hoc* Tribunals was centred upon the treatment of victims simply as sources of information, and the Court's victim participation endeavour was an attempt by the drafters of the Rome Statute to liberate victims from the constraints which the *ad hoc* Tribunals imposed. The role of the victim as information provider was therefore "not a significant concern in the drafting of the victim participation scheme".²⁶⁴

Notably, from around 2010 onwards the focus of the Court's caselaw appears to shift away from any attempt to engage with the rationale for victims' participation to the practical matter of how to physically manage the substantial number of victims seeking to participate in proceedings before the Court, including the consideration and introduction of collective approaches to application. As a result, it has been relatively silent on the intended purpose of victim participation *per se*. In her determination of the applications of 982 victims to participate in the Confirmation of Charges hearing and related proceedings in the *Ntaganda* case,²⁶⁵ for example, the Single Judge, while providing both a full and detailed explication of the necessary requirements for victim participant status in accordance with Rule 85 RPE²⁶⁶ and a consideration of the potential modalities of participation in that case,²⁶⁷ was silent on the rationale for participation itself, and made no reference even to the need for participation to be in any way effective or meaningful. The Court was similarly silent on the purpose of the endeavour in its determination of the participant status of 19 applicants in the *Banda* case,²⁶⁸ and in a subsequent decision in the same case the Court, in seeking to clarify its approach to allowing victim participants to express their views and concerns,²⁶⁹ and in identifying modalities of participation, indicates only that participation may enable victims to contribute towards the Court's

²⁶³ See also on this point, Chung (n 3), 480.

²⁶⁴ War Crimes Research Office (2009) (n 230), 33.

²⁶⁵ *Ntaganda* (15 January 2014) (n 78).

²⁶⁶ *Ibid* [17] – [33].

²⁶⁷ *Ibid* [81] – [96].

²⁶⁸ *Prosecutor v. Abdallah Banda Abakaer Nourain* (Decision on 19 applications to participate in the proceedings) ICC-02/05-03/09-528 (12 December 2013).

²⁶⁹ *Prosecutor v. Abdallah Banda Abakaer Nourain* (Decision on the participation of victims in the trial proceedings) ICC-02/05-03/09-545 (20 March 2014) [14].

determination of the truth during the trial.²⁷⁰ The continuing tendency for the Court to allow Victims' Legal Representatives to introduce evidence, as a modality of participation, is, however, consistent with the pursuit and enhancement of its truth-seeking function,²⁷¹ and suggests that even though the Court is no longer making express pronouncements concerning the purpose of participation, its practical operation of the endeavour remains aligned to its retributive function.

While the various bases for the incorporation in the Rome Statute of victims' participatory rights suggested by commentators and the Court alike undoubtedly relate to legitimate and important Court functions, they reveal little recognition of the original restorative rationale for the endeavour. Without proper recognition of the appropriate basis for the victim participation endeavour, it is unlikely that the Court will proceed in a restorative direction. Without such recognition, any restorative impact is likely to be incidental to, or a happy by-product of, a victim's participation, rather than central to it.

Finally, at a more fundamental level, in seeking to ally victims' participation to the realisation of a forensic truth or the achievement of greater clarity in respect of the socio-cultural context in which abuses occurred, the focus of the endeavour becomes the crime which has allegedly been perpetrated rather than the harm suffered by the victims, and hence is inconsistent with a restorative rationale, thereby limiting the potential for the achievement of effective and meaningful participation.

(ii) Losing sight of the intended beneficiary? The emergence of collective and representative approaches

As noted, the participatory right was drafted as a right vesting in the individual. It is therefore appropriate to examine the Court's approach to interpreting the notions of

²⁷⁰ Ibid [22], although notably reference to the ability of the participant to contribute to the Court's determination of the truth did not arise within the context of any broader articulation by the Trial Chamber of the rationale for the participation endeavour. It may be that the Court considers the matter of the purpose of participation to be settled by its earlier caselaw and so no longer feels the need to refer to it. In the alternative, the shift of the Court away from pronouncements concerning the rationale for the endeavour coincides with the examination of the participation scheme at a broader level of the Court apparatus, and hence it may be that the locus of discussion has effectively moved away from the judicial decision-making process.

²⁷¹ See, for example, in this regard, *Ruto & Sang* (3 October 2012) (n 75), directly linking the leading of evidence to the need of the Chamber to determine the truth, [77]; and see also *Vasiliev* (n 4).

“harm”, “personal interests” and “victim” in order to assess the extent to which the individual nature of the right is retained in practice.

Harm has been interpreted to include physical and emotional suffering, together with economic loss.²⁷² The issue of collective harm and, by implication, collective victimhood, was touched upon by the Trial Chamber in its deliberations on the criteria for victims’ participation in the *Lubanga* case.²⁷³ The Chamber in that case noted that:

“a victim may suffer, *either individually or collectively*, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights”. [emphasis added]²⁷⁴

Significantly for the interpretation of the individual as beneficiary of the Court’s participatory rights, the Appeals Chamber added clarification to the Trial Chamber’s statement, noting in particular that:

“[t]he fact that harm is collective does not mandate its inclusion or exclusion in the establishment of whether the harm is personal to the individual victim. The notion of harm suffered by a collective is not, as such, relevant or determinative”.

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²⁷² See *Situation in Darfur* (Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07) ICC-02/05-111-Corr (14 December 2007), [30], [38] – [50], cited with approval in, for example, *Muthaura, Kenyatta and Ali* (26 August 2011) (n 79) [65]; *Ntaganda* (15 January 2014) (n 78) [28].

²⁷³ *Lubanga* (18 January 2008) (n 193).

²⁷⁴ *Ibid* [92], and cited with approval in *Muthaura, Kenyatta and Ali* (26 August 2011) (n 79) [64]; *Ntaganda* (15 January 2014) (n 78) [28].

²⁷⁵ See *Lubanga* (11 July 2008) (n 72) [35]. The need for harm to be personal to the individual was similarly stressed in *Muthaura, Kenyatta and Ali* (26 August 2011) (n 79) [67]; *Ntaganda* (15 January 2014) (n 78) [31], and see also the observations of the Registry in relation to the conduct of the partly collective application process in *Gbagbo* (delivered to the Single Judge overseeing proceedings in the *Ntaganda* case and as an aid to consideration of simplification of the application process in that case), emphasising in particular the focus on individual, as opposed to collective harm, *Ntaganda* (Registry Observations in compliance with the Decision ICC-01/04-02/06-54-Conf) ICC-01/04-02/06-57 (6 May 2013), [6].

While, therefore, harm might be incurred collectively, the Chamber determined that this was not a relevant factor in the consideration of whether an individual fell within the definition of victim contained in Rule 85(a), emphasising instead that the significant criteria is that the harm experienced was personal to the individual, and thereby reinforcing the individual dimension of victimhood.²⁷⁶

In relation to the issue of “personal interests”, the Court has adopted a two-step process for determining whether a victim is able to participate in accordance with the terms of the Statute. The first step concerns a general determination of status, and hence the recognition of an individual’s right to participate, in principal, in a situation or case. The second step concerns the practical application of the right through the Court’s consideration of a specific request to participate at a given stage of the proceedings.²⁷⁷ The participating victim is required to establish that their personal interests are affected at each of the steps.²⁷⁸ In addition, personal interests must be linked to the specific charges against the defendant.²⁷⁹

The Court’s jurisprudence on the issue of “personal interests” reveals a wide and diverse array of potential interests which might satisfy the provision. These in turn range from broad, general and overarching factors to those which are specific in nature.

²⁷⁶ See also Brianne McGonigle Leyh, who notes that “[w]ith respect to the issue of ‘collective’ harm, the Appeals Chamber seemed to disregard its value for the purposes of the definition of a victim under the Rules”, in Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 248

²⁷⁷ *Lubanga*, (18 January 2008) (n 193) [95], cited with approval in *Ruto & Sang* (3 October 2012) (n 75) [13]. The development by the Court of a two-stage process for the purpose of determining participation has met with some criticism; see, for example, in McDermott (n 206); Chung (n 3), 480.

²⁷⁸ Although in *Katanga and Ngudjolo* the Court found that it was sufficient for victim participants to establish that their “personal interests” were affected only at the start of the trial, see *Katanga & Ngudjolo* (22 January 2010) (n 72) [60]–[61].

²⁷⁹ See *Lubanga* (18 January 2008) (n 193) [96] – [98]; *Lubanga* (11 July 2008) (n 72) [53] – [66]; see also *The Katanga and Ngudjolo* (22 January 2010) (n 72) [61]. The concept of personal interests has therefore been interpreted to perform a “gatekeeping role”, see Haslam and Edmunds (Banda and Jerbo) (n 228) 15.

In an application before the Appeals Chamber in the *Lubanga* case, for example, the Court, in considering an application from victims to participate in an appeal from the Defendant in relation to the confirmation of charges against him, observed that “[c]lear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations”.²⁸⁰ In a later decision in the same case concerning the criteria for participation in the trial proceedings, the Trial Chamber, in acknowledging the “multiple and varied” interests of victims, went on to note that these might include a general need to express views and concerns, to receive reparations, to establish the truth and to protect their dignity and safety during the trial process.²⁸¹

Cryer *et al* observe that the interpretation of the “personal interests” requirement should be linked to the rationale for the participation scheme.²⁸² Notably, while the nature of the interests identified by the Court are diverse and varied, they share common features in that they are all personal and specific to the individual victim participant, and hence are supportive of the individual goal of reparative engagement.

In addition, through the identification of qualifying personal interests, the approach of the Court has served to further delineate the discrete role of the victim as a legal actor in proceedings before the ICC. In particular, the Court has refused to accept as “personal interests” those which it considers to be too broad or lacking in specificity, including a general interest in the outcome of the case, thereby distinguishing the interests of participating victims from those of society more generally.²⁸³ Moreover, the Court has also sought to distinguish between the personal interests of participating victims and those

²⁸⁰ *Lubanga* (13 June 2007) (n 229) [28].

²⁸¹ See *Lubanga* (18 January 2008) (n 193) [96] – [98]; cited with approval in *Ruto & Sang* (3 October 2012) (n 75) [10].

²⁸² See Cryer and others (n 17), at 486.

²⁸³ In a decision on an application for participation in the *Lubanga* case, for example, the Trial Chamber observed that a general interest in the outcome of the trial or in specific aspects of evidence before the Court was unlikely to be sufficient for the purpose of establishing that the victim’s personal interests were engaged, See *Lubanga* (18 January 2008) (n 193) [96]. See also McDermott (n 206) who notes that “[t]he personal interests of the victim must necessarily be more than the general interest of the entire international community”, at 46. For an opposing view, see the separate and partly dissenting opinion of Judge Pikis from that of the Appeals Chamber in its decision on appeals brought by both the Defence and the Prosecutor against the above decision of the Trial Chamber concerning victim participation. Judge Pikis opined in relation to the interests of victims that “[t]heir interest is that justice should be done, coinciding with the interests of the world at large”, separate opinion of Judge Pikis, *Lubanga* (11 July 2008) (n 72) [19].

of the Prosecutor, noting that “an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor”.²⁸⁴ Again, the approach is supportive of the notion of the individual as beneficiary,²⁸⁵ and hence, in this respect at least, and at first sight, consistent with the restorative underpinnings of the endeavour.

Where, however, the Court has considered the personal interest requirement in those cases, it has failed to explicitly recognise the intended individually restorative basis for the endeavour or to otherwise seek to base its decision on any underlying theory, restorative or otherwise. While, therefore, it has found its way to identifying interests which are personal and specific to the individual participating victim, it has seemingly done so without any clear recognition of the rationale underpinning the provision. As a result, it is not clear whether the Court in those cases proceeded with any specific restorative intent in mind, or whether the identification of individual components of the participative right was simply coincidental to the Court’s considerations, where, for example, the approach was adopted as a means of limiting the nature and extent of participation in a given case. Significantly in this regard, the approach of the Court to the issue of victim participation more generally suggests that the latter is the case, and that the Court is, indeed, losing sight of the individual as beneficiary of the right.

In particular, in addition to the Court’s encroachment upon the victims’ participatory right through the furtherance of its retributive function, the views of commentators and judges alike indicate a potential erosion of the notion of the individual as beneficiary of the right to participate in favour of a more communal or collective approach which seeks to situate

²⁸⁴ *Lubanga* (18 January 2008) (n 193) [28]; *Situation in the Democratic Republic of the Congo* (17 January 2006) (n 170) [51]. See also generally Jorda and Hemptinne (n 162), 1394 – 1397; Human Rights Watch, ‘Commentary to the Second Preparatory Commission on the International Criminal Court, Elements of Crimes and Rules of Evidence and Procedure’ (July 1999), available online at <<http://www.hrw.org/legacy/campaigns/icc/docs/prepcom-july99.htm>> last accessed 6th May 2015; Marianna Tonellato, ‘Victims’ Participation at a Crossroads: How the International Criminal Court Could Devise a Meaningful Victims’ Participation while Respecting the Rights of the Defendant’ (2012) 20 *European Journal of Crime, Criminal Law and Criminal Justice*, 315, 326 – 327, 329.

²⁸⁵ In this respect, see Donat-Cattin, who notes that “[i]t appears self-evident that individuals who suffered harm from a criminal conduct have a personal interest in the criminal process related to that conduct. Offences of an immense magnitude such as the ones within the jurisdiction of the Court [victimise] not only individuals, but also identifiable groups (genocide) and the International Community as a whole (crimes against humanity, including genocide). Thus, without prejudice to the collective interests of identifiable groups and of human-kind, this provision is specifically addressed to individual victims of a given crime”, in Donat-Cattin (Article 68) (n 162), at 1286.

the victim in a representative capacity or which otherwise suggests a rationale for the endeavour based more upon societal peace and cohesion.

Jorda and Hemptinne, for example, suggest that victim participation enables proceedings to become more representative, and so contribute to national reconciliation,²⁸⁶ a view which is echoed by Donat-Cattin.²⁸⁷ Cohen argues that the participation of a victim in the process serves to “bring a voice to the entire community who suffered”,²⁸⁸ while Morris writes that, at a practical level, the consideration of victims’ views is an essential component in the struggle to prevent individuals from taking justice in to their own hands, and “particularly relevant in the context of the most serious crimes that so often involve societal cycles of violence and revenge”.²⁸⁹ Finally, the Court itself is coming under pressure from State parties to introduce a system which adopts a representative approach to the issue of victim participation,²⁹⁰ a factor that was realised in the *Ruto and Sang* case and the deliberations of Trial Chamber V on a tiered approach to applications for victim participant status.²⁹¹ In that instance, the Court, in considering the appropriate procedures and modalities of participation for victims, observed in relation to any request from a

²⁸⁶ Jorda and Hemptinne (n 162), at 1397.

²⁸⁷ Writing in specific reference to the *ad hoc* Tribunal for Rwanda, Donat-Cattin notes that “[i]n the aftermath of the Rwandan genocide, victims’ participation and legal representation before the ICTR have been identified by many observers and defendants of human rights as a necessary instrument to render that Tribunal closer to Rwandan society”, in Donat-Cattin (Article 68) (n 162), at 1281.

²⁸⁸ In Cohen (n 2), 373.

²⁸⁹ Madeline Morris, ‘Complementarity and its Discontents: States, Victims and the International Criminal Court’ in Dinah Shelton (ed) *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Transnational publishers 2000) at 181 – 182. The view is cited with approval by Garkawe (n 126), 351, and by Cohen (n 2), 353. For an alternative view, see Karstedt (n 167), who observes that revenge is not a priority for victims, at 13. This position is borne out by clinical literature, see, for example, Mina Rauschenbach and Damien Scalia, ‘Victims and International Criminal Justice’ (2008) 90 Intl Rev of the Red Cross 441 at 444, citing Edna Erez and Pamela Tontodonato, ‘The effect of victim participation in sentencing on sentence outcome’ (1990) Vol. 28 Criminology 451.

²⁹⁰ See, for example, Report of the Bureau on victims and affected communities and Trust Fund for Victims (22 November 2011) ICC-ASP/10/31, para 11.

²⁹¹ *Ruto & Sang* (3 October 2012) (n 75).

victim to appear in person before the Court that they should indicated why they should be considered “best placed to reflect the interests of the victims”.²⁹²

As already noted, there are clear advantages that flow from victims’ participation in addition to those which are intended to accrue to the individual participant, and the need for the Court to connect with the affected community, and thereby to gain legitimacy in its eyes, was undoubtedly a motivating factor in the enactment of the participation endeavour. It is essential to the realisation of effective and meaningful participation for participating victims, however, that in recognising the potential to achieve these additional benefits, the Court and commentators alike do not lose sight of the individual as subject of the participatory right and the individually restorative rationale that underpins it.

While traditional international restorative justice practices recognise the need to address societal healing, this is not done at the expense of individual restoration, but rather, through efforts to strike a balance between individual and societal needs.²⁹³ By contrast, the approaches identified above essentially seek to vest the right to participate in either the affected community, as represented by the individual victim, or in society and the international community more generally. The first approach is seemingly based on the problematic assumption that an affected community experiences international crimes as an homogenous group, and that the thoughts, concerns and experiences of the many can be extrapolated from those of an individual.²⁹⁴

²⁹² Ibid, [56].

²⁹³ See in general Hayner (n 30), and see in particular in relation to the wide individual and societal ambit, 20 – 23.

²⁹⁴ A similar concern was expressed by Mariana Goetz, quoted in Wilson and Boutruche (n 172), and see also Redress (October 2012) (n 18), 36-37. Notably, in seeking to participate in proceedings before the ICC victims may be motivated by what Van Camp and Wemmers describe as “pro-social” reasons, which operate in the interests of others, and can include a wish to protect communities from further harm, Tinneka Van Camp and Jo-Anne Wemmers, ‘Victim satisfaction with restorative justice: more than just procedural justice’ (2013) 19(2) *International Review of Victimology*, 117, at 132 - 134. In addition, Stover’s research with victims engaging with the ECCC and ICC indicates that individuals might seek to participate in order to bear witness on behalf of loved ones who did not survive the atrocities under consideration by the Court, Stover and others (*Confronting Duch*) (n14); Berkeley School of Law (n 15). While individuals in these circumstances are essentially speaking in a representative capacity, this representative component is personal to the victim, rather than relating to a broader, community-wide representative approach. Representation in these circumstances is on the victims’ own terms, and so participants retain an element of process control and hence the potential for restorative engagement. See also Emily Haslam and Rod Edmunds, who make a similar observation in the specific context of common legal representation and the expression of views and concerns by participants, ‘Common

The second approach erroneously conflates the interests of the victim with those of society or the international community. In contrast, these latter interests are represented by the Prosecutor.²⁹⁵ Significantly, while the Court and commentators alike have been at pains to point out the separate and divergent roles and interests of victim participants and the Office of the Prosecutor,²⁹⁶ an approach which vests the participatory right in society or the international community rather than the individual victim serves instead to align the victim participation function to that of the Prosecutor, thereby risking heightening, rather than quelling concerns that the endeavour has introduced a second Prosecutor to the obvious detriment of the Defendant and their right to a fair trial. As a result, while such an approach is damaging to the potential of the victim to realise restorative benefit in the proceedings, it is also not in the wider interests of the Court.

While it is clear that, as drafted, the intended beneficiary of the victim participation provision is the individual victim, it is also clear that, at a practical level, and as a result of the very significant number of victim participants potentially engaged in any one case, the adoption of a facilitative, collective component is inevitable. Recourse to collective approaches is unsurprising given that collective elements already appear in the Rome Statute in other areas,²⁹⁷ and a partly collective application process was introduced by the Single Judge in her consideration of victim applications in the *Gbagbo* case,²⁹⁸ while a tiered collective application procedure was introduced by Trial Chamber V in both the *Muthaura & Kenyatta* and *Ruto & Sang* cases.²⁹⁹ Significantly, however, the collective

Legal Representation at the International Criminal Court: More Symbolic than Real?’ (2012) 12 International Criminal Law Review 871, 888.

²⁹⁵ See, for example, Cryer and others (n 17), at 478.

²⁹⁶ See, for example, *Situation in the Democratic Republic of the Congo* (17 January 2006) (n 170). The Pre-Trial Chamber noted that victims would not automatically be an ally of the prosecutor, “their roles and objectives being clearly different”, [51]. *Bemba* (12 December 2008) (n 172) [90]; *Muthaura & Kenyatta* (3 October 2012) (n 193) [13]. See also Cohen (n 2), 372; McKay (Victim Participation) (n 1) 3; Mettraux (n 3) 76.

²⁹⁷ See, for example, the ability of the Court to appoint a common legal representative for victims, Rule 90(3) RPE, or for it to order collective reparations through the Trust Fund, Rule 97(1) RPE.

²⁹⁸ See *Gbagbo* (6 February 2012) (n 72) and *Gbagbo* (5 April 2012) (n 75).

²⁹⁹ *Muthaura & Kenyatta* (3 October 2012) (n 193) [23]; *Ruto & Sang* (3 October 2012) (n 75).

application and participation practices being trialled by the Court retain a recognition of the individual basis of participation and so arguably remain consistent with the Statute. In particular, despite the group dynamic introduced by these approaches, the individual victim is still required to establish their eligibility as an individual victim within the terms of the Rome Statute and to show that they personally fall within the specific scope of the case,³⁰⁰ and in both approaches, collective application and representation remains optional, rather than compulsory, for the victim.³⁰¹

That said, however, while there has been some preliminary assessment of the partly collective process introduced in *Gbagbo*, at least, consideration of the extent to which the new, collective element has or may affect the potential of victims to achieve effective and meaningful participation has been conspicuously absent.³⁰² Instead, focus has been largely on time and cost efficiencies, and the benefit of the process to the Court in terms of the physical handling of a substantial number of applicants.³⁰³ The development of practical and efficient processes of dealing with very substantial victims is, of course, vital for the physical operation of the endeavour, but those processes must also operate in a way that is sensitive to the rationale for the endeavour itself, and as such, any reform of the system should be conducted in light of the need to ensure that participation is effective and meaningful to the individual victim.

Collective approaches to participation are therefore not necessarily inconsistent with the achievement of individually restorative benefit in the victim. They do, however, require the Court to maintain its focus on the individual as the intended beneficiary of the

³⁰⁰ See, for example, Anushka Sehmi (Case Manager for the Legal Representative for Victims in the Kenyatta case) ‘New victim participation regime in Kenya’ (Spring 2013) 22 Access Bulletin 6.

³⁰¹ *Muthaura & Kenyatta* (3 October 2012) (n 193) [24]; *Ruto & Sang* (3 October 2012) (n 75) [25].

³⁰² Although to this end see in the context of collective legal representation, the comments and thoughts of Haslam and Edmunds (n 294).

³⁰³ In its observations on implementing the partly collective application process developed in the *Gbagbo* case, for example, the Registry expressly observes that its assessment does not reflect in any way the experiences of victim participants of the revised process, indicating that its views relate instead to the extent to which the process was both practical and efficient in the circumstances, *Ntaganda* (6 May 2013) (n 275) [5]. The Registry does, however, go on to indicate a number of areas where it felt that victims benefitted from or reacted negatively to aspects of the collective process, see, for example, in relation to the issue of physically bringing victims together in groups [7] – [8]. Assessment of perceived benefit to participants is not, however, systematic or complete.

provision. Instead, the current approach of the Court would appear to be to recognise the individual and personal aspect as a precondition to participation, whilst simultaneously viewing the affected community or society in general as beneficiaries of the endeavour. An approach which recognises the individual nature of participation yet fails to correctly attribute the ensuing benefit which was intended to flow by virtue of that participation simply lacks coherence, and is unlikely to provide or otherwise maximise the potential for the achievement of effective and meaningful participation.

(iii) Losing sight of the restorative rationale? Usurped by a procedural goal

As noted previously,³⁰⁴ the notion of “effective and meaningful” participation has developed as the common language for any discussion or exploration of the Court’s victim participation endeavour. While there may well be some advantage in the adoption of a working language that might appear, at least, to be more accessible and practically tangible to victim participants, lay activists and, to some extent, the politically-minded State representative community, however, there is also the danger that, in the absence of a definition or common understanding, the term will develop a meaning of its own that is divorced from the underlying object and purpose of the provision, to the detriment of participating victims.

Notably, a perusal of the literature reveals that this common term in fact conceals not only a highly fractured and disparate understanding of what effective and meaningful participation entails in practice, but also a clear divergence from the restorative object and purpose of the provision in its application.

The propensity of the Court to consider victim participation to be meaningful where it impacts upon, or has the potential to impact upon, the judicial proceedings, including the Court’s search for the truth, is discussed above. In addition, and perhaps as a natural corollary to this, available literature indicates that the Court’s restorative goal for victim participants is in danger of being usurped by a less ambitious, purely procedural goal.

In particular, where authors of both academic and expert practitioner literature have ventured to explore, rather than simply refer to the need for participation to be effective and meaningful, they have largely exhibited a tendency to focus on the physical

³⁰⁴ At para 1.2.3.(ii).

achievement of participation *per se*. The extent to which participation is considered meaningful is thereby described largely in terms simply of its practical facilitation, rather than by reference to the quality and nature of participation once access to the endeavour has been achieved. As a result, the emphasis of the literature in relation to the notion of effective and meaningful participation is upon those processes and practices of the Court requiring revision in order to better enable the physical access of victims as participants. Any notion of effective and meaningful participation has thereby become allied to the realisation of a number of concrete, process-related elements in the Court's practice, and hence, to the achievement of elements of procedural justice for victim participants.³⁰⁵

Moreover, there is a danger that within the Court itself, and despite its express acknowledgment of its restorative mandate, the concept of effective and meaningful participation is similarly in danger of being allied instead to the achievement of procedural justice for victims. In particular, in its report into the implementation of its revised victims' strategy,³⁰⁶ the Court, in referring to a study of victims' perceptions of participation currently being conducted by a team of researchers from Berkeley University, notes that "[i]t is foreseen that this study will provide very useful information to the Court regarding the question of whether victims' participation is meaningful".³⁰⁷ Significantly, the study in question does not seek to assess the quality and nature of participation *per se*, but instead is confined to an assessment of the achievement or otherwise of procedural justice for participating victims, and in particular, victims' assessment of the services provided by the VPRS of the Court throughout the participation process.³⁰⁸

Finally, the recent discussions of members of the Victims' Rights Working Group to the Coalition for the International Criminal Court on the wording of a paper specifically on the issue of effective and meaningful victim participation revealed a wide and disparate range of views and understandings of the term amongst engaging group members. The

³⁰⁵ This is discussed above in the context of the development and widespread use of the phrase, at para 1.2.3.(ii). See also Pena and Carayon (n 72); Pena (n 17); Redress (October 2012) (n 18); Victims' Rights Working Group (2014) (n 200); Independent Panel of experts (n 200), para 2.

³⁰⁶ (n 85).

³⁰⁷ Para 49.

³⁰⁸ Private communication between E. Smith and the researchers, 7th and 18th November 2014.

Group itself comprises over 300 civil society groups, independent expert practitioners and academics, and its significant, broad, expert and representative base enables it to occupy a persuasive and potentially influential position in relation to the development and conduct of victim-focussed measures at the Court.

In the course of the discussions, the opportunity to develop and propose a definition of “effective and meaningful” participation arose.³⁰⁹ Significantly, while the need for victim participation to be effective and meaningful was unquestioned by all members engaging in the debate, discussion of a definition of the term revealed a multitude of understandings and approaches, variously allied to the achievement of procedural, restorative or rehabilitative elements. Retributive advantages to the Court of participation were also emphasised and there was a clear disparity as to what restorative and/or reparative justice comprised in general, and in the specific context in particular. Finally, there was an express reluctance, particularly on the part of a number of expert practitioner groups, to engage with, and in particular, to ally any resulting definition to, any theory of justice.³¹⁰

The result was a compromise position wherein constituent, practical elements of effective and meaningful participation were identified in the absence of any specific definition and without reference to any justice theory. According to the resulting paper,³¹¹ effective and meaningful participation is described in the following terms:

“To exercise their rights in Article 68(3) effectively the Court must ensure that victims are: informed about their rights; informed about the ICC’s proceedings; enabled to access the participation process, and enabled to present their views and concerns to the Court. Effective systems must therefore be put in place, in particular: a clear and accessible application process; an effective system of legal representation and comprehensive outreach programmes. The system must be able to deal effectively with all victims falling within the mandate of the Court, regardless of the number or location of victims who may be affected by particular

³⁰⁹ Initiated by E. Smith by email on the basis of a review of an early draft of the paper, 19th May, 2014.

³¹⁰ The discussion took place by email between 16th May – 11th June, 2014, with the principal discussions around the meaning of effective and meaningful participation occurring between 5th – 11th June. The above is a first-hand, summary account of the discussions.

³¹¹ Victims’ Rights Working Group (2014) (n 200).

proceedings. The Court should also be able to accommodate the cultural factors and particular sensitivities at play in local contexts.

“The system of participation is likely to have meaning for victims if: they understand the process, including its limitations; they are treated at all times with humanity and respect for their dignity and human rights; appropriate measures are taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families; they are able to follow the proceedings substantively; they feel properly consulted and represented by their legal representative; and they can see how their views are presented and actively considered by the Court”.³¹²

The outcome is somewhat unsatisfactory. Notably, the list combines elements which are focussed on the issue of victims’ access to the endeavour or more appropriately allied to procedural justice components, with little focus on the nature and quality of the participation experience itself, and with no reference to the underlying object and purpose of the participation endeavour. Moreover, without express recourse to restorative justice theory and in particular, its specific parameters in the context of international criminal justice, the list is incomplete, situates the participant in a relatively passive position and is arguably less ambitious for victims than the restorative mandate of the Court might otherwise suggest.

Recourse to an alternative, working language for discussion of the victim participation endeavour, particularly in the absence of any common understanding or definition of the term linking it to the underlying object and purpose of the provision, therefore threatens to divorce the endeavour from its theoretical underpinnings in practice. Instead the endeavour is in danger not only of being subsumed by the Court’s retributive function, but also of being supplanted by a quest for procedural, as opposed to restorative justice for victims. Such an approach would significantly damage the potential of victims to achieve effective and meaningful, restorative participation, relegating them from right-bearers in the system to effective service-evaluators of the Court’s process.³¹³

³¹² At 3.

³¹³ The adequacy of procedural justice as a vehicle for assessing the realisation of the Court’s innovative mandate is discussed substantively in the following chapter, at para 2.2.2.(iv).

1.4. Concluding comments: a system lacking in conceptual clarity and victim focus

This chapter argues that the victim participation provision of the Rome Statute was drafted with the specific purpose of incorporating a restorative, victim-focussed measure into the procedure and practice of the International Criminal Court. As drafted, at least, Article 68(3) appears to offer the potential to provide participation that could be experienced by individual victim participants as effective and meaningful, and hence is a system with promise for the victim. The drafting of the provision itself, however, is problematic in its failure to reflect the specific context of mass victimisation, and in particular, the substantive number of victims that such crimes engender, and the Rome Statute provides nothing further to the Court in the way of guidance as to how the participation endeavour might be rendered physically operational where significant numbers of victims seek to participate in its proceedings.

While the Court itself remains an ostensibly retributive judicial mechanisms, where elements of the Court's practice are expressly designed with primarily victim-centric aims, it is not unreasonable for victim participants to expect to be the specific focus of these. To this extent, the ability of the Court to acknowledge, adhere to, and apply such measures in accordance with their underlying restorative aim is, it is argued, instrumental both to the establishment or maintenance of survivor trust in the institution more widely and the achievement of effective and meaningful participation for victims.

An examination of available Court literature, together with the writings of expert legal commentators, however, indicates that there are difficulties in how the restorative basis of the endeavour has been interpreted and applied in practice, significantly limiting the potential for the achievement of restorative engagement in victim participants.

In particular, while the restorative basis and rationale for the provision is expressly acknowledged by the Court at a theoretical level, recognition of the provision's restorative object and purpose is conspicuously absent from the jurisprudence of the Court, indicative of a disconnect between the theoretical discussion of the endeavour within the Court and the practical interpretation and application of the endeavour in practice.

Instead, it is apparent that the restorative endeavour is in danger of being subsumed by the Court's retributive function, indicating an encroachment by the Court on the victim as subject of the participatory right. In addition, in realigning the endeavour to the furtherance of its prosecutorial role, the goal of participation becomes the investigation of the crime allegedly perpetrated, rather than the acknowledgment and rectification of harm suffered, and hence runs counter to restorative justice approaches.

The research also indicates an erosion of the notion of the individual as beneficiary of the right in favour of a more collective approach to participation or one which situates the victim in a representative capacity vis-à-vis the affected community or society more generally. In light of the numbers of victims seeking to participate in proceedings before the Court, more collective approaches to participation are inevitable. At the same time, it is clear that survivors of crimes of mass victimisation are likely to have needs that are both individual and societal in nature, responding in turn to the form(s) of harm suffered and the various capacities within which victims approach the Court. Victims, however, are required to engage with the Court as discrete individuals rather than as a collective, comprising an 'entry condition' to the participation regime. In seeking to position the victim solely in a representative capacity or otherwise operating the right for the benefit of a broader collective or society more generally, the Court divorces the individual requirement of participation from the proposed benefit intended to flow by virtue of that participation. Moreover, in doing so it displays no obvious or explicit recognition of the complex and interrelated needs of individuals and affected communities in the aftermath of mass victimisation, thereby adopting an approach which both lacks coherence and operates to the detriment of victims and their potential to realise some or all of their justice aims in the specific context.

Finally, the adoption of an alternative, working language for the discussion of victim participation issues without any recourse or reference to the express object and purpose of the provision risks divorcing Article 68(3) from its underlying rationale. In particular, it is evident that the Court's innovative, restorative mandate for victims is in danger of being usurped by a less ambitious quest for procedural justice, to the detriment of the potential of victims to achieve effective and meaningful participation.

At a more fundamental level, while restorative justice approaches are wide-ranging and diverse in their application, the concept of restorative justice remains relatively novel in

the context of international criminal law, and as such, it is as yet undeveloped in relation to the specific judicial forum. In particular, the Court has neither sought to identify an overarching guiding restorative principle or aim for victim-focussed action within the ICC, nor attempted to delineate restorative justice by its specific parameters (or constituent elements) in the context. As a result, and as demonstrated above, current approaches to victim participation fail to directly respond to the Court's restorative mandate, and instead are diverse and lacking in unity, consistency and certainty for participants.

The exploration and articulation of an overarching restorative aim with direct and specific relevance to the ICC, together with the consideration and amplification of the parameters of restorative justice in respect of that overarching aim, would provide a clear and identifiable focus for future victim-centred action at the Court. Moreover, the elaboration of clear restorative justice parameters which are directly tailored to the Court will enable the development of a dedicated assessment tool for the monitoring and evaluation of the Court's progress in its pursuit and achievement of its restorative mandate.

In Chapter 2 of this research, the author seeks to identify and describe an appropriate aim for the pursuit of victim-focussed action at the Court, with specific reference to the victim participation endeavour. The constituent parameters of restorative justice allied to the identified aim are also explored and identified. The parameters and framework for an appropriate assessment tool are considered and developed in Chapter 3.

2. Identifying and delineating an appropriate restorative aim for victim participation at the ICC: the application of clinical theory

2.1. Introduction: the need for a restorative aim and delineated parameters for victim participation at the ICC – a clinical comparison

The previous chapter demonstrates that there is an apparent disconnect between the Court's formal recognition, at a theoretical level, of a restorative rationale for its victim participation endeavour and its application in practice. This disconnect is due, it is suggested, to the Court's failure to consider what restorative justice means within the specific context, including what that would look like in terms of the practical aim and focus of its victim-centred activities.

A brief comparison of the differing approaches between clinical and legal disciplines in their pursuit and evaluation of victims' engagement with therapeutic and judicial mechanisms respectively highlights in stark terms the current shortfall in the legal context.

Notably, therapeutic work with survivors of international crimes entails the pursuit of a clear, specific and widely-understood aim which in turn serves as the direct and targeted focus of all victim engagement: the rehabilitation of the victim.³¹⁴ Rehabilitation itself has clear and recognised parameters in the particular context, enabling specific therapeutic work that is aimed at the achievement of those various constituent elements.³¹⁵ Moreover, the existence of parameters allows clinicians to monitor the progress and success of therapeutic activities, as well as to organise and target limited resources accordingly. Clinicians therefore know exactly what it is they are trying to achieve for the victims they work with, the particular components of that broader goal, and how, in practice, they can pursue that goal.

³¹⁴ The meaning of rehabilitation in the specific clinical context of survivors of international crimes is explored in detail in Ellie Smith, Nimisha Patel and Leanne MacMillan, 'A Remedy for Torture Survivors in International Law: Interpreting Rehabilitation' (December 2010) Medical Foundation for the Care of Victims of Torture, 12 – 13. The interpretation has since been accepted and incorporated into General Comment 3 of the UN Committee Against Torture, Implementation of article 14 by States parties (19 November 2012) U.N. Doc. CAT/C/GC/3.

³¹⁵ Various clinical tools are available, and the choice of which to use may depend upon the form and nature of psychological services offered by a clinical provider. The issue is explored substantively, and the advantages and disadvantages of various instruments discussed, in James M. Jaranson and José Quiroga, 'Evaluating the services of torture rehabilitation programmes: History and recommendations' (2011) Vo. 21 No. 2 Torture 98.

By contrast, the pursuit of a restorative goal for victims engaging with international criminal justice mechanisms is in its relative infancy. While the clinical concept of rehabilitation is clearly defined and widely accepted, the notion of restorative justice in the context of international criminal law, including in relation to the Court's victim participation endeavour, remains an under-developed, vague concept lacking both a specific overarching aim and delineated parameters. As a relatively intangible goal, it is difficult to pursue, and the absence of identified parameters means that monitoring is problematic.³¹⁶ Moreover, there is, at present, no assessment tool by which the Court's progress in the pursuit of its restorative endeavour can be evaluated.

In the absence of a specific restorative goal and associated assessment framework, legal approaches to both the pursuit and evaluation of victims' participation experiences are, at present, ill-equipped for the quest for, or the achievement, monitoring and assessment of any specific restorative element within the international criminal justice context, indicating a significant gap both in knowledge and practice.

The development and clear articulation of the specific theoretical aims of the Court's restorative endeavour would not only maximise the potential of participating victims to achieve effective and meaningful participation, but would also serve as a focal-point for victim-centred action within the Court, leading in turn to the development of consistent Court practices and the efficient, targeted use of resources.³¹⁷ In this chapter, the author identifies, develops and describes an appropriate aim for the pursuit of restorative justice through the victim participation endeavour of the International Criminal Court. In the following chapter, a detailed framework for the assessment of the Court's progress in respect of its restorative mandate is identified, thereby addressing current gaps in both knowledge and practice.

³¹⁶ Notably, studies conducted by legal experts in to victims' experiences of engaging with international criminal justice tribunals, including those mechanisms which provide an enhanced participative and potentially restorative role for victims, do not adopt a restorative framework for the purpose of their assessment. In addition to the ICC, victim-focussed measures providing for a greater, restorative role for victims in proceedings are included in the case of the Extraordinary Chambers in the Courts of Cambodia, Rule 23(1), ECCC Internal Rules (Rev 9)(16 January 2015), and the Special Tribunal for Lebanon, Statute of the Special Tribunal for Lebanon, UNSC Res 1757 (30 May 2007) S/RES/1757(2007), Annex, Article 17. The legal assessment of victims' experiences in relation to international criminal justice tribunals is explored further below, at para 2.3.2.(iii)(b).

³¹⁷ Specific, hypothetical examples of possible targeted, victim-focussed measures are given in the following chapter, at paras 3.4.2, 3.4.5, 3.4.6, 3.4.7(ii)(a) and 3.7.

In Part I of this chapter, an appropriate overarching aim is identified. Part I begins with a brief examination of the nature of any restorative goal, and in particular, the psychological component incorporated within it. It goes on to acknowledge and explore challenges to the consideration and identification of a restorative aim for the ICC and/or assessment of the restorative endeavour posed by current approaches to the evaluation of psychological impacts in victims engaging with international transitional justice mechanisms. The chapter then examines the potential psychological goals of restorative action within the specific context of the ICC. Part II of this chapter includes a consideration of how an appropriate psychological concept, as a goal of restorative action at the ICC, might be rendered applicable and operational within the legal forum. It concludes with an examination of specific parameters of that goal for the practical pursuit of restoratively beneficial action at the Court.

Notably, the application of restorative elements at the ICC is novel in the context of international criminal justice mechanisms, and as a result, there is no specific guidance within the international criminal law field on an appropriate overarching restorative goal for application and pursuit in the specific context. Reference is therefore made on this issue to identified overarching restorative aims within traditional international restorative justice mechanisms with a view to assessing the extent to which they are appropriate for application and pursuit in the Court. Recourse to international restorative justice literature and practice is particularly apposite in this regard since, like the victim-focused measures of the ICC, mechanisms are intended to be responsive to the restorative needs of victims of international crimes, perpetrated on a wide scale. Victims appearing before restorative mechanisms are therefore likely to have suffered comparable harm and have similar restorative needs to victims seeking to participate in proceedings before the Court. In light of the psychological component in this research, recourse is also had to psychological literature involving victims of international crimes and their experiences of engaging with international transitional justice mechanisms to the extent it is able to inform and develop legal theory and fill gaps in current legal practice.

Part I

2.2 A restorative aim for the ICC's victim participation endeavour

2.2.1. The nature of a restorative goal: a psychological component in the judicial process

As argued in the previous chapter, the right to participate in proceedings before the International Criminal Court vests in the individual victim, and the benefit intended to ensue by virtue of that participation must therefore also accrue to the individual.³¹⁸ The fulfilment by the Court of its restorative mandate in relation to its victim participation endeavour therefore entails the accrual or achievement of a positive restorative benefit, or impact, in victim participants.

Restorative impacts in the victim can be assessed in accordance with the extent to which participation is experienced by the victim as effective and meaningful, and hence entails an appraisal of the subjective and personal perceptions of victims in relation to their participation experiences. Survivors will measure the extent to which restorative impacts have been realised within the participative process in psychological terms,³¹⁹ and it is therefore reasonable to expect some form of positive psychological response or benefit when restorative aims are met, either in whole or in part. To this extent, the aim of the Court's victims participation endeavour can be understood as the achievement of a positive psychological impact in the victim.

Notably, the range of potential psychological impacts which might accrue to the individual victim participant during the course of their engagement with the Court is wide and varied. Victims may, for example, feel *satisfied* that the judicial process itself has been a fair one, *pleased* that they have been treated politely and with respect by Court staff, *relieved* to have arrived safely at the Court, or *grateful* to particularly supportive or helpful members of staff or legal counsel. While many of these positive impacts may enhance the participation experience, however, they do not necessarily mean that participation has been restorative for the victim.

³¹⁸ At para 1.3.3.(ii).

³¹⁹ See, for example, Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, 'Therapeutic consequences of civil actions of damages and compensation claims by victims of sexual abuse' (1999) 12 Canadian Journal of Women and the Law 66, 101.

To this end, the aim of the victim participation endeavour should be understood not simply as the pursuit of a broad and amorphous, psychologically positive impact in the victim, but instead, as the pursuit of a specific and targeted impact that in turn is both restorative and apposite to the particular judicial context. The achievement of such an impact would thereby operate as an overarching and unifying goal for victim-focused action within the Court.

The pursuit of a victim-focused, psychological goal is not wholly novel to the legal context in general or to the ICC in particular. The pursuit and assessment of procedural justice, for example, entails the achievement not only of objectively fair and respectful judicial processes, but also of a subjective perception of fairness in victims, and to that end, the views of victims and witnesses are typically sought in order to assess the degree of satisfaction with the process concerned.³²⁰ That said, however, clinical research and practice is understandably more developed and sophisticated in its approach to the pursuit and evaluation of psychological impacts than its legal counterpart. As a result, recourse to clinical practice and theory, as a means of informing and developing legal approaches in this area, is appropriate.

Notably, the failure of the Court to identify a specific and targeted goal, psychological or otherwise, for its participation endeavour occurs against the backdrop of a relatively limited understanding of the psychological aims and impacts of victim engagement within the international transitional justice environment more generally. Notably, despite a heightened awareness of the needs of victims in legal proceedings, little systematic research has been conducted into victims' experiences of engaging with transitional justice mechanisms, and as a result, we know relatively little about the psychological impact on victims of their interactions with international justice processes.³²¹ Available research indicates at best only that victim engagement has the potential to be psychologically beneficial for some.³²² While, however, it is clear that some victims have

³²⁰ The assessment of victims' experiences of procedural justice is considered in more detail below, at para 2.2.2.(iv). The role of procedural justice in the achievement of a restorative benefit in the victim is considered at para 3.4.8.(i).

³²¹ The neglect of research in this area, including the relative dearth of systematic studies conducted in to victims' experiences, is noted, for example, in Stover and others (Confronting Duch) (n 16) 507; Brouneus (The Trauma of Truth Telling) (n 31) 409; Mendeloff (n 16) 595, 601.

³²² This rather nuanced approach is evident, for example, in Stover and others (Confronting Duch) (n 16); and see also Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard International Law Journal 295, 300-301;

positive experiences of testifying and/or gain psychological benefit from judicial engagement more broadly, we do not know why or under what circumstances that positive benefit is achieved, or why for others, the achievement of positive psychological benefit remains illusory, thereby comprising a considerable knowledge gap.³²³

The current state of knowledge in respect of specific potential psychological impacts is discussed in detail below, in the context of the identification of an appropriate restorative aim for victim-focussed action at the ICC.³²⁴ It should be acknowledged here, however, that in addition to the relative dearth of empirical evidence in this area, limitations or challenges to the interpretation of empirical findings may derive from approach(es) taken to a study, either as a result of the emerging multidisciplinary interest in victims' experiences or as an inevitable consequence of the study design. Before exploring and identifying a suitable aim for the Court, it is therefore appropriate to consider these further.

These limitations and challenges may include difficulties in discerning the nature of psychological benefit and the retrospective nature of studies. In addition, the nature and focus of existing studies may operate, to some extent, to limit our ability to glean information of direct relevance and transferability to the ICC's innovative participation experiment. In particular, many of the studies arise in contexts tangibly different to that of the Court, and an appreciation of those contextual differences is therefore essential in considering the degree of applicability of study findings to the Court's victim participation endeavour. The testimony focus of existing studies – both legal and clinical – together with an emphasis on procedural justice in the case of legal studies, are of particular relevance in this regard.

Significantly, difficulties in the realisation of the Court's restorative mandate itself may be engendered by the application of assessment focuses and approaches traditionally employed to evaluate victims' experiences within a purely retributive context to a

Judith Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (April 2003) Vol. 16, No. 2 *Journal of Traumatic Stress* 159, and is apparent from the limited empirical literature on the issue, explored in more detail below, at para 2.3.

³²³ This issue is dealt with substantively in Chapter 3 in the specific context of the ICC, where recommendations are made concerning how that knowledge gap might be addressed through monitoring and assessment with victim participants.

³²⁴ At para 2.3.

consideration of victims' participatory experiences at the Court. To this end, it should be noted that while the focus of earlier studies may be appropriate to the issue and/or tribunal under examination, there is evidence that approaches taken to those studies have been applied directly to the ICC context, and so operate to potentially define and confine the aim of the victim participation endeavour without any further investigation as to their direct transferability or appropriateness to the forum. Specific consideration of this is included in the discussion of limitations arising from the available literature below.

2.2.2. Assessment approach and focus of the literature: recognising challenges in its application to the ICC

(i) Challenges in discerning the nature of psychological benefit from available literature

Victim engagement with transitional justice processes is broadly ascribed one or both of two potential psychological benefits for the victim: the generation of a positive therapeutic impact and the achievement of a sense of justice.³²⁵

Notably, however, the nature of any identified psychological impact is not always indicated or otherwise evident either from the available research or the academic literature more broadly. Moreover, while researchers in both legal and clinical fields seek to gauge or otherwise indicate the psychological impact of judicial engagement and legal procedures on the individual victim, expert practitioners and academics do not employ any common terminology to describe the nature of any psychological impact identified.

A reading of the literature reveals three discernible approaches:

- Experts clearly distinguish between positive psychological outcomes, recognising both a therapeutic impact in terms of the healing of psychological harm or lessening of psychological symptoms, and a psychological sense of justice.³²⁶

³²⁵ The two potential psychological impacts are explored substantively below, at para 2.3, in the specific context of the identification of an appropriate restorative aim for victim participation in proceedings before the ICC.

³²⁶ These discrete elements are expressly recognised, for example, by Mendeloff (n 16), see in general 593 – 600; see also Brouneus (The Trauma of Truth Telling) (n 31) at 412; and see also Metin Basoglu and others, 'Psychiatric and Cognitive Effects of War in Former Yugoslavia:

- In the alternative, clinical experts adopt a broad-brush approach which simply recognises a notion of psychological well-being, or otherwise describe a non-specific, psychologically positive experience, hence potentially encompassing both therapeutic and justice elements without distinction.³²⁷ The approach is replicated to some extent by legal experts who refer to psychologically positive impacts, without distinction between healing and justice.³²⁸
- Legal experts use the term “healing” to refer to a range of positive psychological impacts, some of which may not be typically or exclusively therapeutic in a clinical sense.³²⁹

To some extent, these differences in terminology may be a reflection of the multidisciplinary interest in victims’ experiences with international process within a field that is still in its relative infancy, and is certainly not intended as a criticism of the approaches taken. Moreover, the notion of a sense of justice is wholly undeveloped in the legal context,³³⁰ and hence renders ascription of psychological impacts problematic for legal researchers. The absence of a common language between and, to some extent, within academic disciplines does, however, mean that it is difficult to share and compare results across disciplines in a meaningful way, thereby limiting any contribution to the broader knowledge base by the research in question.

Association of Lack of Redress for Trauma and Posttraumatic Stress Reactions’ (3 August 2005) Vol. 294, No. 5 Journal of the American Medical Association 580.

³²⁷ Herman (The Mental Health of Crime Victims) (n 322); Judith Herman *Trauma and Recovery: The aftermath of violence – from domestic abuse to political terror*, (2nd edn, Basic Books 1997) 212; Feldthusen and others (n 318) at 70, adopting a broad definition of “therapeutic” to encompass “psychological or physical well-being”; Rebecca Horn, Simon Charters and Saleem Vahidy, ‘Testifying in an International War Crimes Tribunal: Experiences of Witnesses in the Special Court for Sierra Leone’ (2009) Vol.3 International Journal of Transitional Justice 135.

³²⁸ Used, for example, by Stover and others (Confronting Duch) (n 16) 535, where they are described instead as “transformative”; see also Haslam (n 7), 315 – 6.

³²⁹ See, for example, Van Camp and Wemmers (n 294), at 123.

³³⁰ Discussed substantively below, at para 2.3.2.

(ii) A shortage of prospective studies

At present, systematic studies in both the clinical and legal fields concerning the psychological impact on victims of their engagement with international transitional justice mechanisms are retrospective in nature.

While it is clearly the case that any study in this somewhat neglected area is better than none, the retrospective nature of these studies also poses difficulties for the interpretation of substantive findings. In particular, it is by no means certain that survivors are able both to recall and accurately describe their attitudes towards the justice mechanism in question or their hopes in approaching it retrospectively, and in some cases, years after the event. It is certainly conceivable that victims' memories are mediated or polarised to a greater or lesser extent by intervening events, including their personal experiences of engagement with the mechanism, any prevailing insecurity or instability in the home environment, ongoing trauma at a societal level and broader conceptions within the local, domestic and international arenas of the institution's success.

Within the clinical context, retrospective studies do not assess and compare psychological symptoms prior to and following testimony. As a result, while it is possible to gauge the psychological health of survivors in the aftermath of testimony, in the absence of an initial baseline study, it is impossible to tell whether testifying served either to reduce or exacerbate symptoms, a factor which was explicitly recognised in one such study as a limiting factor in the interpretation of the study's substantive findings.³³¹

Notably, studies into victims' experiences are currently underway at the ICC, the Extraordinary Chambers in the Criminal Courts of Cambodia ("ECCC") and the Special Tribunal for the Lebanon ("STL").³³² In the case of the ECCC, at least, the study is a

³³¹ Debra Kaminer and others, 'The Truth and Reconciliation Commission in South Africa: relation to psychiatric status and forgiveness among survivors of human rights abuses' (2001) 178 *British Journal of Psychiatry* 373.

³³² In the case of the ICC, a study is being conducted by a team of researchers at the Human Rights Centre, University of California, Berkeley School of Law, led by Eric Stover. A team of researchers from Harvard University and the Cambodian Human Rights and Development Association are assessing the experiences of civil parties appearing before the ECCC in its second case. A study of the STL's participation endeavour is being conducted by Rianne Letschert, INTERVICT, Tilburg University.

prospective one, and baseline standards have been obtained and published, providing a more promising basis for reliable data concerning the impact of participation on victims.³³³

(iii) A focus on testimony

A preponderance of both legal and clinical literature concerning the experiences and perceptions of victims engaging with international transitional justice mechanisms relates to the issue of survivor testimony within the justice process, including the extent to which victims have been able to narrate their personal trauma stories.³³⁴ The focus by researchers on the testimony experience is understandable: in the context of the traditional, retributive international criminal tribunal, a victim's sole source of engagement with the court is as a witness, while the role of individual truth-telling has been a prominent feature of the modern truth commission.³³⁵ The nature of a victim's engagement with the ICC as a participant, however, is tangibly different to that both of a witness in a retributive process or a participant before a truth commission, and while in many respects the role of victims within the Court is considerably more expansive than in a purely retributive process,³³⁶ the opportunities for personal testimony are very limited.³³⁷ As a result, the direct transferability of study findings to the ICC project is limited.

In addition, it should be noted that evidence concerning victims' experiences of the South African Truth and Reconciliation Commission indicates that the psychological impact of their engagement is mediated by their ability to narrate their experiences far less than the

³³³ It is unclear whether baseline standards have been sought and obtained in studies at either the ICC or STL.

³³⁴ Testimony, for example, forms the basis of Stover's enquiries into victims' experiences of both the ICTY and ECCC: Stover (Witnesses) (n 164); Stover and others (Confronting Duch) (n 16). See also Brouneus (The Trauma of Truth Telling) (n 31); Kaminer and others (n 331), 373; and see also the many studies considered in Mendeloff's review of literature in relation to testimony experiences, Mendeloff (n 16).

³³⁵ Moreover, clinical arguments have suggested a possible therapeutic basis for victim narrative in the judicial context, an issue which is considered further below, in the context of the consideration of a therapeutic aim for the Court's restorative endeavour, para 2.3.1.(i).

³³⁶ Outlined, for example, above, at para 1.1.

³³⁷ Victims' limited prospects of achieving testimony at the Court are discussed subsequently, at para 3.4.5.(i).

legal literature might otherwise suggest,³³⁸ indicating the need for a broader approach to assessment. In particular, whilst the desire amongst victims of international crimes to tell their stories is a recognised need, it is by no means their only need in the justice process,³³⁹ and research which seeks to assess the psychological impact of testimony without also considering whether the remaining needs of the individual have been realised is incomplete. Moreover, in the absence of any consideration of the realisation or otherwise of victims other needs, any findings concerning a positive or negative psychological impact cannot be properly ascribed to victim testimony.

(iv) A procedural justice emphasis

To date, systematic assessment of victims' experiences within the field of international law has ostensibly been conducted on the basis of a procedural justice model,³⁴⁰ and as a result, provides little directly applicable and transferable data for consideration of the Court's restorative project.³⁴¹

Significantly for the pursuit of a restorative justice aim at the Court, however, and as indicated above, a study into the experiences of victims participating in proceedings before the ICC is currently underway,³⁴² and despite the Court's express acknowledgment of its innovative restorative function in relation to the victim participation endeavour,³⁴³ the study itself is allied solely to the assessment of procedural justice in participants.³⁴⁴

³³⁸ See David Backer, 'The Human Face of Justice: Victims' Responses to South Africa's Truth and Reconciliation Commission Process' (2004) (Ph.D. thesis), available online at <http://www.sitemaker.umich.edu/backer/dissertation_overview> accessed 13th March 2015, Chapter 8. By "legal literature", the author here means literature emanating from legal experts, commentators and expert practitioners.

³³⁹ The broad range of survivor justice needs in approaching an international justice mechanism is discussed in detail below, at para 2.4.3.(ii).

³⁴⁰ The specific application of a procedural justice model to the assessment of victims' experiences of engaging with an international criminal justice mechanism is considered further below, at para.2.3.2.(iii)(b).

³⁴¹ Discussed further below in the context assessment of a sense of justice aim for the Court, para 2.3.2.(iii)(b)

³⁴² Para 2.2.2.(ii).

³⁴³ See para 1.2.2.

³⁴⁴ Private communication with researchers, 7th November, 2014.

Moreover, it is clear that the Court has high hopes for the study, indicating that “[i]t is foreseen that this study will provide very useful information to the Court regarding the question of whether victims’ participation is meaningful and how it can be improved”.³⁴⁵ With this in mind, it is appropriate to consider both the transferability of similar study findings to the consideration of an appropriate restorative aim for the Court’s innovative endeavour, and the suitability of the current study approach to the assessment of the Court’s restorative mandate in respect of victims.

According to procedural justice theory, the key determinants of survivor perceptions of procedural fairness include the perceived neutrality of the Court and the decision-makers within it, the extent to which individuals feel they have been treated with dignity and respect by those they come into contact with, perceptions of trust relating to the motives of the Court, including the exercise of any discretions, and voice, which in turn includes the opportunity to participate in the process and to present their concerns within that context. Perceptions of fairness also relate to the extent to which victims are kept informed about their case and are provided with information about their role within the legal process.³⁴⁶ Procedural justice theory is underpinned by a normative justice model, by which the fairness of proceedings is perceived as reflecting the victim’s standing within a group,³⁴⁷ thereby affording an element of acknowledgment and recognition of status that is also evident in restorative justice theory.³⁴⁸

Within a traditionally retributive judicial process, an assessment based upon the realisation or otherwise of the tenets of procedural justice theory is unproblematic, since it fully reflects the extent of the victim’s intended engagement with the tribunal in question. As indicated,³⁴⁹ however, the new breed of international criminal justice mechanism was designed to achieve something more for the victim than a simple satisfaction with a

³⁴⁵ Report of the Court on the implementation in 2013 of the revised strategy (n 189) para 49.

³⁴⁶ Tom R. Tyler, ‘Social justice: Outcome and procedure’ (2000) 35(2) *International Journal of Psychology* 117; Van Camp and Wemmers (n 294) 123, 127 – 8.

³⁴⁷ Van Camp and Wemmers (n 294) 120, 132.

³⁴⁸ Referred to above in the context of restorative justice, at para. 1.2.2.

³⁴⁹ Discussed in the previous chapter.

retributive process. As a result, an approach to the assessment of victims' participative experiences that is based solely on procedural justice is, it is argued, incomplete.

Again, an analogy with clinical practice best illustrates the point being made. For the purpose of this example, rehabilitation, as the overarching goal of engagement with victims, is employed as the clinical equivalent of a restorative justice goal for victim participation at the ICC. The example assumes a purely procedural approach to the evaluation of victims' experiences is being taken:

The victim may be satisfied with the directions they received to get to the treatment centre, happy that they were greeted politely and with respect at the reception desk, pleased that the interpreter came to find them and introduced themselves in advance of the therapy session, satisfied that their appointment started on time and that the therapist was polite to them, pleased with the extent to which they were informed about the nature and time-frame of the therapeutic process, content that the therapist listened to and responded to any of their concerns or views relating to the therapeutic process and grateful that their travel expenses were paid promptly.

These elements relate to the procedure of accessing and using the therapeutic services of a clinical centre, and are equivalent to aspects of procedural justice in the judicial context. Moreover, assessment in relation to them provides vital information to the treatment centre about the quality of its interaction with victims, as well as the success of many of the practical services it operates. Significantly, however, it tells us nothing about whether or not the survivor has made clinical progress in relation to their rehabilitation, the substantive goal of both the centre and of the survivor in approaching it. As a result, on its own it cannot provide meaningful data concerning the pursuit or achievement of the overarching aim of either the centre or the victim. In the same way, while an assessment that is confined to victims' subjective perceptions of the procedures and services that facilitate participation may provide important information to the Court about the nature and quality of those services and interactions, it tells the Court, and us, nothing about whether its restorative remit is being met.

Procedural justice, of course, is a legitimate aim of the Court's victims' mandate. The procedural aim is, however, ancillary to the achievement of a restorative goal, and relates to the way in which the restorative goal should be achieved, rather than comprising an end point in itself. As such, the aim of the Court in respect of victims should be understood as

the achievement of a restorative goal (substantive justice for the participant in this regard)³⁵⁰ within a process that is perceived by the victim to be fair and which treats them with dignity (procedural justice for the victim).³⁵¹

In practice, of course, the situation is complicated by the fact that the precise interrelationship between procedural and restorative justice remains unclear, although recent research in the domestic field suggests that restorative practice might incorporate the constituent elements of procedural justice, in addition to other broader, pro-social and expressive elements.³⁵² While the hypothesis remains untested in the context of survivors of international crimes participating in transitional justice processes, it is clear, at least, that the achievement of procedural justice may be a relevant factor in the realisation of a broader, positive psychological response in victims to judicial engagement.³⁵³

The evaluation of victims' participation experiences at the Court is therefore currently incomplete, and a detailed assessment of victims' participation by reference to a restorative justice tool is clearly required. This is examined substantively in the following chapter. In the meantime, a focus on the procedural component of justice to the exclusion of restorative elements risks positioning victims solely as recipients and evaluators of Court services, rather than as actors and right bearers in the judicial process. Moreover, in the absence of a clear and dedicated restorative focus in the monitoring of victims' experiences, participation once again is in danger of simply becoming aligned to the Court's retributive function.

2.2.3. In summary: the lack of a restorative aim at the ICC

A comparison with the clinical pursuit and assessment of therapeutic impacts in victims of international crimes highlights, in stark terms, shortfalls in the judicial context occasioned

³⁵⁰ Where substantive justice is understood here as referring to the nature, quality and content of justice, as opposed to the process by which those elements are pursued.

³⁵¹ It should be noted, however, that primary clinical evidence indicates that the impact of procedural justice on the achievement of psychologically positive judicial engagement is not substantial, a factor which is considered in detail in the following chapter, at para 3.3.2.

³⁵² Van Camp and Wemmers (n 294) from 128.

³⁵³ It is apparent, for example, that victims are more likely to view the outcome of judicial proceedings positively where they perceive the procedure to have been fair; discussed, for example in Van Camp and Wemmers (n 294), 120.

by the lack of any overarching aim or delineated parameters of restorative justice in the particular context of the International Criminal Court, and in international criminal law more generally. Moreover, while restorative justice can be understood as the pursuit of a psychological goal through a legal mechanisms, we still know relatively little about the psychological impacts of engagement by victims with international transitional justice bodies, indicating a significant gap in both legal and clinical knowledge.

In the absence of an identified aim encapsulating what it is that the Court hopes to achieve for victims by virtue of its participation endeavour, it is difficult to see how the scheme might be rendered effective and meaningful for participants, and instead, is in danger of being usurped, or at least confined, by a procedural justice model. In the same way that the goal of rehabilitation acts as a guiding paradigm of therapeutic engagement, the identification and delineation of an appropriate restorative aim would serve to focus and guide victim-centred action within the Court at all levels and to provide the basis upon which the Court could gauge its progress or success in the realisation of its restorative mandate, an issue that is considered further in the following chapter.³⁵⁴ This in turn would not only maximise the potential for restorative engagement by victims, but also enable the Court to better manage and target its limited resources for victim-focused action, thereby enabling the development of an appropriate, targeted and efficient victim service.

A restorative goal, it is argued, must not only be consistent with the underlying restorative rationale of the endeavour, but also appropriate and responsive to the specific context of the ICC, realistically achievable in light of the Court's primarily retributive function and practically realisable in terms of the Court's financial, time and skills resources. With this in mind, the chapter goes on to explore and identify an appropriate goal for victim-focussed, restorative action at the ICC.

2.3. Exploring and identifying an appropriate goal for restorative action at the ICC

As indicate above, international transitional justice processes are typically attributed the potential to achieve one or both of two psychological goals for victims: the generation of a positive therapeutic impact, and the achievement of a sense of justice.³⁵⁵ The two

³⁵⁴ See in particular paras 3.4.2, 3.4.5, 3.4.6, 3.4.7(ii)(a) and 3.7.

³⁵⁵ Para 2.2.2.(i), explored in detail in Mendeloff (n 16) at 593 and subsequently, and cited in Brouneus (The Trauma of Truth Telling) (n 31). See also Oskar N.T. Thoms, James Ron and Roland Paris, 'The effects of transitional justice mechanisms: A summary of empirical research

identified goals are particularly apposite to this research and the functioning of the Court's participation endeavour in that they relate to desired impacts in victims of mass victimisation within a justice mechanism that in turn is intended to accommodate substantial numbers of affected victims. These two overarching restorative goals are therefore explored as potential guiding aims for the Court's participation endeavour.

2.3.1. The achievement of healing: a therapeutic goal for restorative action at the ICC?

(i) Introduction

While transitional justice recognises two possible psychological goals for victim engagement, a great preponderance of the literature assessing the experiences of victim testimony in particular, or participation more broadly, focuses on the potential for engagement to produce a measureable therapeutic impact.³⁵⁶

In many ways the emphasis on therapeutic impact is unsurprising. Clinicians have been engaged in the psychological assessment of victims' participation experiences for some time, and it is, of course, natural that experts concerned with the therapeutic rehabilitation of survivors would have a specific interest in how engagement with judicial mechanisms might affect the victims' therapeutic journey. In addition, the nature of abuses suffered by victims of international crimes generate clear and obvious physical and psychological rehabilitative needs which require redress, and this may also be a contributory factor in the tendency for international transitional justice bodies to champion therapeutic goals for victim participation.

Finally, the therapeutic pursuit of victim narrative and storytelling in the clinical recovery environment has been thought to provide a basis upon which to pursue rehabilitative testimony in the judicial context, again providing possible support for a specific

findings and implications for analysts and practitioners' (2008) Centre for International Policy Studies, University of Ottawa, 4, conflating in that case a sense of justice in the survivor and reconciliation. The assumed relationship between a sense of justice, reconciliation and peace is considered in Mendeloff in light of current empirical evidence, 597 – 8.

³⁵⁶ This tendency is noted, for example, in Brouneus (The Trauma of Truth Telling) (n 31) at 409. See also in Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 Human Rights Quarterly 573; Mendeloff (n 16) at 605. See also South African Truth and Reconciliation Commission Report, Vol. 1 chapter 5, noting that the act establishing the Commission "explicitly recognised the healing potential of telling stories".

therapeutic focus. In particular, rehabilitative services are predicated on the ascertainment and delivery of a full narrative of the survivor's abuse experiences. While this narrative emerges within the private context of the therapy room, many clinical experts have argued that survivor articulation of abuse experiences within a public setting represents "a potential tool for 'rehumanizing' the victims/survivors in their societies, where they may have been stigmatised and criminalized".³⁵⁷ The giving of public testimony is deemed to have the potential effect of repositioning the trauma from the private to the public sphere,³⁵⁸ reaffirming the locus of the traumatic event(s) as lying in the actions of the individual perpetrator, State or armed group responsible for the violation(s) and thereby contributing to the liberation of the survivor from feelings of self-blame and guilt,³⁵⁹ as well as generating feelings of empowerment and personal strength.³⁶⁰ Testimony is also viewed as a means of regaining status as a social actor and participant, and hence standing within a broader group,³⁶¹ as well as role transformation from victim to survivor.³⁶² Moreover, there is, albeit limited, primary evidence of the achievement of a therapeutic benefit in

³⁵⁷ M. Brinton Lykes and Marcie Mersky, 'Reparations and Mental Health: Psychosocial Interventions Towards Healing, Human Agency, and Rethreading Social Realities' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press, 2008) 605. Herman (The Mental Health of Crime Victims) (n 322), 160-1.

³⁵⁸ The notion of testimony has both private and public elements. Agger and Jensen, for example, note that testimony consists both of "something objective, judicial, public, or political, and of something subjective, spiritual, cathartic, or private", in Inger Agger and Søren Buus Jensen, 'Testimony as Ritual and Evidence in Psychotherapy for Political Refugees' (1990) 3 *Journal of Traumatic Stress* 115, 116; Agger, (The Blue Room) (n 49), noting that "[t]estimony" as a concept has a special, double connotation: it contains objective, judicial, public and political aspects as well as subjective, spiritual, cathartic and private aspects", at 9; see also Herman (Trauma and Recovery) (n 327), who notes that "[i]n the telling, the trauma story becomes a testimony. ... Testimony has both a private dimension, which is confessional and spiritual, and a public aspect, which is political and judicial", 181; Weine and others (n 52) 1720, noting that "testimony functions in both the private and the public realms, as a means of individual recovery and as a means of bearing witness to historical and social realities related to political violence".

³⁵⁹ See Agger and Jensen, *ibid*.

³⁶⁰ See Herman (The Mental Health of Crime Victims) (n 322), 160-1.

³⁶¹ See, for example, M. Brinton Lykes and Ramsay Liem, 'Human Rights and Mental Health in the United States: Lessons from Latin America' (1990) 46(3) *Journal of Social Issues*, 151; and cited with approval in Brandon Hamber, 'Do Sleeping Dogs Lie? The psychological implications of the Truth and Reconciliation Commission in South Africa' (1995) Seminar No. 5, Centre for the Study of Violence and Reconciliation, 26th July, 1995.

³⁶² Knut Rauchfuss and Blanca Schmolze, 'Justice heals: The impact of impunity and the fight against it on the recovery of severe human rights violations' (2008) Vol.18, No. 1 *Torture* 38, 48.

victims of international crimes where public articulation of abuse experiences has been employed within a purely clinical, therapeutically-driven context.³⁶³

Notably, however, the direct transferability of this therapeutic benefit to a judicial context is debatable, particularly in the absence of any adjustment or accommodation to take account of the differing settings and the exigencies of the respective environments in which therapeutic benefit is anticipated.³⁶⁴ Moreover, the assumption that survivor testimony and engagement with international transitional justice mechanisms is rehabilitative for participating victims in such circumstances is largely untested,³⁶⁵ and instead, seemingly constitutes an expression of aspiration or hope, rather than of fact.³⁶⁶

It is therefore appropriate to consider whether the positive therapeutic benefit which is often ascribed to survivor engagement with a judicial forum constitutes an appropriate restorative aim for victim participation at the ICC. The examination considers the extent to which a therapeutic basis for victim-focussed action at the Court is both sustainable in the light of current clinical knowledge, and appropriate in the context of the ICC.

(ii) Is a therapeutic goal for victim participation sustainable at the ICC?

Evidence v. aspiration

There are relatively few studies which seek to expressly examine the impact of testifying in particular, or participation more broadly, on victims' psychological health. Where studies exist, many are based upon the impressionistic accounts or observations of clinical

³⁶³ See, for example, Inger Agger, Victor Igreja, Rachel Kiehle and others, 'Testimony ceremonies in Asia: Integrating spirituality in testimonial therapy for torture survivors in India, Sri Lanka, Cambodia, and the Philippines' (2012) 49(3 – 4) *Transcultural Psychiatry* 568. In these studies, clinical researchers, working therapeutically with survivors of international crimes, provided victims with the opportunity to relate their experiences of abuse, as a part of their therapy, in a culturally appropriate public ceremony convened for the sole purpose of enabling those victims to recount their experiences.

³⁶⁴ See also Fletcher and Weinstein (n 356) at 593-4, who argue that the assumption that narrative might be therapeutically beneficial in such circumstances is based upon "a profoundly simplistic view of how psychotherapy works".

³⁶⁵ Thoms, Ron and Paris (n 355) 31; Brandon Hamber, 'Does the Truth Heal? A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence' in Nigel Biggar (ed), *Burying the past: Making peace and doing justice after civil conflict* (Georgetown University Press) 131-148.

³⁶⁶ Noted too in Mendeloff (n 16) 595-6, 600; Brouneus (The Trauma of Truth Telling) (n 31) 411.

staff working with survivors within a justice context, such as South Africa's Truth and Reconciliation Commission.³⁶⁷ As such, while they provide anecdotal evidence of a therapeutic benefit for a relatively limited number of victims, the findings have not been systematically sought or assessed and so, for the purpose of offering a basis for an appropriate restorative aim at the ICC, are problematic. In other instances, while study findings may have been systematically sought, they are based upon very small study samples, and as such, their findings are of limited broader applicability.³⁶⁸

There are, however, three empirical, systematic studies which seek to examine the therapeutic impact of judicial engagement on victims and which involve significant study populations, and their findings therefore merit further consideration here.

Firstly, an epidemiological study of 134 survivors of South Africa's apartheid era considered and compared the psychological health of two distinct groups of individuals: those who had given testimony before the country's Truth and Reconciliation Commission and those who had chosen not to speak.³⁶⁹ The study revealed no significant difference in health impacts and outcomes between the two groups in the aftermath of giving evidence, indicating that testifying before the Truth Commission had neither a positive nor negative impact on the therapeutic wellbeing of survivors.

Notably, however, the findings should be treated with a degree of caution, and the authors themselves acknowledge the limits of their study. In particular, the study sample was non-random, and at 134, was still relatively small. In addition, the psychological assessment tool employed for the purpose of the study had not been validated on non-Western samples, raising the possibility that culturally-specific indicators of psychological health might have been missed. As a result, and as the authors themselves acknowledge, the broader applicability of the study findings is limited.³⁷⁰ Moreover, the potential

³⁶⁷ See, for example, Trudy de Ridder, *The Trauma of Testifying: Deponents' Difficult Healing Process*, 6 Track Two 30, 30-34 (1997), cited in Mendeloff (n 16) 603, 607.

³⁶⁸ See, for example Brandon Hamber, Dineo Nageng and Gabriel O'Malley, "'Telling It Like It Is...': Understanding the Truth and Reconciliation Commission from the Perspective of Survivors" (2000) 26 *Psychology in Society* 18, using a sample of 20 victims. See also Catherine C. Byrne, 'Benefit or Burden: Victims' Reflections on TRC Participation' (2004), 10 *Peace and Conflict: J. Peace Psychol.* 237, using a sample of 30 victims.

³⁶⁹ Kaminer and others (n 331), 373-377.

³⁷⁰ *Ibid*, at 376.

transferability of the findings to the specific context of the ICC is questionable in light of the very different nature of the respective fora, the role of victim narrative within them and the particular ways in which victims are integrated into their practices.

Secondly, in a study conducted by a team of researchers lead by Professor Metin Basoglu, the authors investigated the therapeutic impact of victims' perceptions of retributive justice in the Former Yugoslavia.³⁷¹ The study considered the views of 1,358 victims, and found that issues of perpetrator prosecution or impunity did not significantly affect clinical symptoms of PTSD and depression,³⁷² indicating that the scope for a purely retributive judicial process to provide therapeutic benefit in the survivor is limited.

A relatively small number of respondents - 219 and 224 survivors - told their trauma story to the authorities and/or to an NGO respectively. In just 11 and 16% of cases, study respondents reported satisfaction with this experience, with almost half of the respondents being ambivalent about its potential benefits. According to Mendeloff, the study "strongly suggests that in the case of the former Yugoslavia, truth-telling has had neither the positive, nor the negative psychological effects that are claimed".³⁷³

Notably, the transferability of the study findings to the ICC context is limited. In particular, the study does not relate directly to the experiences of individuals who gave testimony before the International Criminal Tribunal or even within a domestic judicial forum. In addition, while the authors conclude from their findings that "justice for survivors is much more than criminal trials", the findings themselves are confined to a purely retributive notion of justice, and so of limited relevance to the ICC's restorative experiment.

Finally, a more recent study in to the experiences of 1,200 Rwandans of witnessing in the country's *gacacas* found that those who spoke about their experiences suffered higher levels of depression and PTSD symptoms than those who did not testify, and this was the

³⁷¹ Basoglu and others (n 326).

³⁷² This is not to suggest that survivors did not have strong emotional responses to issues of perceived perpetrator impunity. The researchers recorded feelings of anger, distress, demoralisation and a wish for revenge in respondents. These emotional responses, however, did not necessarily adversely aggravate clinical symptoms of trauma.

³⁷³ Mendeloff (n 16) at 609.

case even when controlling for predictors of poor psychological health such as cumulative experiences of trauma, leading the author of the study to conclude that witnessing at the tribunals was anti-therapeutic.³⁷⁴ The findings thereby directly challenge the assumption that truth-telling in a formal judicial context for survivors of gross violations is healing.

Again, however, the extent to which the findings can be deemed directly applicable to the ICC context is debateable. The conclusions relate to the very specific exigencies of the Rwandan project, which itself constitutes a unique experiment in victims' justice. In particular, while *gacaca* hearings, as with most transitional justice hearings, are held in public, the study author notes that the situation in Rwanda is "sharply accentuated", where the minority Tutsi survivors are surrounded by the Hutu majority when testifying, producing a potentially intimidating atmosphere. Moreover, there is evidence from a much smaller study conducted by the same author that witnesses appearing before the *gacacas* have been subjected to threats and reprisals,³⁷⁵ and the author speculates that the prospect of insecurity and personal danger may exacerbate negative psychological reactions to testifying.³⁷⁶ Significantly, and in contrast to the ICC's victim participation endeavour, participation in the *gacacas*, including witnessing, is mandatory for all Rwandan citizens, and it may therefore be the case that the negative findings of the study are due to the unwillingness and fear of witnesses which would not necessarily be replicated in the ICC. While the findings of the study are not, however, of direct transferability to the ICC context, they are of interest and relevance to any consideration by the Court of *in situ* hearings within the territory of an affected State.

The results of the limited systematic scientific literature on the issue are therefore inconclusive, leading Mendeloff, in a review of available research, to conclude that although there was little evidence that survivor testimony dramatically harmed those concerned, the notion that it provided a positive therapeutic benefit was also "highly

³⁷⁴ Brouneus (The Trauma of Truth Telling) (n 31) at 426.

³⁷⁵ Karen Brouneus, 'Truth telling as talking cure? Insecurity and retraumatization in the Rwandan *gacaca* courts' (2012) 39 (1) Security Dialogue 55.

³⁷⁶ There is some support for this suggestion in the research conducted by Horn and others (n 327) in to the experiences of victims who testified before the Special Tribunal for Sierra Leone, noting that anxiety about testifying increased negative perceptions of the experience subsequently, at 147.

dubious”.³⁷⁷ Moreover, the direct transferability of the findings to the ICC’s restorative justice project is limited due to the differing nature of the tribunals in question and the manner in which victims are accommodated within them.

Further substantive clinical research in to the area is clearly required. In particular, the specific victim participation components of both the STL and the ECCC are yet to be clinically evaluated. Both tribunals incorporate victim-focused measures that are comparable to that of the ICC, and an assessment of the therapeutic impact of participation in those fora, together with an assessment of the ICC’s own practice, would provide a clearer picture of the impact of participation in international criminal processes. At present, however, the disparate research findings and the consequential questionability of the possibility of achieving a positive therapeutic impact through participation do not, on their own, justify the pursuit of a rehabilitative goal for the ICC’s victim participation endeavour.

Having examined the primary evidence relating to the therapeutic impact of testimony and participation in international transitional justice processes, it is appropriate to consider whether the pursuit of a therapeutic goal would be appropriate to the international criminal justice context.

(iii) Is a therapeutic goal appropriate to an international criminal justice context?

The pursuit of therapeutic goals within international transitional justice processes is based upon a number of problematic assumptions. In particular, the approach assumes not only that all participants are ill and in need of therapeutic help, but also that survivors are unable to distinguish between justice and rehabilitative services, and thereby look to the Court as an appropriate vehicle for the delivery of therapeutic benefit.

These assumptions however are not borne out by available evidence. It is clear, for example, that while a significant minority of participating victims will likely be

³⁷⁷ Mendeloff (n 16). Notably, the review predates the study conducted by Brouneus (The Trauma of Truth Telling) (n 31). See also Stover (Witnesses) (n 164), 131 – 136.

experiencing ongoing trauma symptoms, not all will be suffering from trauma.³⁷⁸ Moreover, although a substantial number of survivors may have suffered a trauma response at the time of the event(s) concerned, for many survivors, natural recovery responses, which arise spontaneously in the aftermath of a stressful and upsetting event, will mean that psychological recovery will arise naturally.³⁷⁹

In addition, any approach based upon therapeutic need is inconsistent with what we now know about why victims of gross violations seek to engage with international criminal justice mechanisms. Notably, while we know relatively little about the psychological impact of participation, available research with participants and victim witnesses has identified what it is that survivors seek to achieve by virtue of their engagement.

³⁷⁸ A cross-sectional survey of a population-based sample of over 1,300 survivors conducted in the Former Yugoslavia ten years after the conflict, for example, found that a third of those sampled had suffered from PTSD in the immediate aftermath of conflict, with 22% of the study sample experiencing current PTSD symptoms, Basoglu and others (n 326). By way of further example, in a randomised study into the mental health status of 400 survivors of the Rwandan genocide, researchers found that over half of the survivor population still had PTSD symptoms ten years later, while 60% suffered from major depression; Brouneus (*The Trauma of Truth Telling*) (n 31).

³⁷⁹ See Derek Summerfield, 'The Social Experience of War and Some Issues for the Humanitarian Field' in Patrick J. Bracken & Celia Petty (eds), *Rethinking the Trauma of War*, (Save the Children/Free Association Books, 1998), 9, 29, who observes that the preoccupation with therapeutic impact overlooks issues of clinical resilience.

Victims' aims include:³⁸⁰

- A formal public acknowledgment of the crime(s) committed;
- The moral denunciation of the crimes committed (validation);
- The public acknowledgment of the pain suffered;
- Telling their story;
- Educating the world and bearing witness to the abuses that occurred;
- Publically denouncing the wrongs committed against them;
- Confronting the accused;
- Achieving justice for loved ones and bearing witness on behalf of those who did not survive;
- Discovering the truth about the crimes committed and the fate of loved ones;
- Preventing the perpetration of further abuse;
- Contributing to broader peace goals;
- Receiving reparations;
- Receiving an apology;
- Healing mental harm;
- Contributing towards accountability; and
- Exacting revenge on the perpetrator(s).

Notably, the identified aims are wide-ranging, and specific reference to a need for the healing of mental harm emerged in only one study.³⁸¹ In addition, a second study refers to a broader, non-specific notion of psychological easing which would encompass mental health as well as other psychological impacts not necessarily directly allied to therapeutic

³⁸⁰ In no particular order. The aims listed are distilled from empirical studies directly involving victims engaging with an international criminal justice mechanisms: Stover and others (Confronting Duch) (n 16); Kirchenbauer and others (n 15); Berkeley School of Law (n 15); Shanee Stepakoff, G. Shaun Reynolds, Simon Charters and others, 'Why Testify? Witnesses' Motivations for Giving Evidence in a War Crimes Tribunal in Sierra Leone' (2014) *Journal of International Transitional Justice* 1; Phil Clark and Nicola Palmer, 'Testifying to Genocide: Victim and Witness Protection in Rwanda' (2012) *Redress*. It should be acknowledged here that in all but one case, available primary evidence which seeks to assess victims' aims in engaging with an international criminal justice tribunal focusses solely on what it is that victims hope to achieve by testifying, rather than their broader aspirations in relation to any participative process. Victim participation was not, of course, feasible in all of the institutions in question, and the single study which examines motivations for victim participation does not provide any additional information in the way of victims' justice aims. It is, however, conceivable at least that the list of aims identified above as participatory goals may be incomplete, and will require finalisation through the process of validating the resulting assessment tool, discussed further in Chapter 3.

³⁸¹ Kirchenbauer and others (n 15) 19.

healing.³⁸² Significantly, the reporting rate was very low in both instances, at just 1.7% in the first study³⁸³ and 6% in the second, indicating that survivors of international crimes do not, in general, look to an international criminal justice mechanism to provide therapeutic support and recovery.

Instead, far from signalling a need for clinical recovery, or at least, recovery through the medium of the judicial process, the particular rationales identified by victims as their reasons for witnessing or participation indicate the desires of well individuals seeking an appropriate social response to a traumatic event,³⁸⁴ indicating that a therapeutic aim is not appropriate for the Court's victim participation endeavour.

Notwithstanding the above, the fundamental question of whether the Court comprises an appropriate forum for the pursuit of a therapeutic goal in any event is debatable. It has been suggested that purely retributive criminal processes are not designed to attend to the specific needs of victims, and lack the resources to do so.³⁸⁵ The issue, however, is less clear in the case of the International Criminal Court, which was designed not only to punish perpetrators but also to meet and accommodate, where possible, the reparative needs of victims. Moreover, it is resourced to provide psychological support for those engaging with the Court.³⁸⁶

Significantly for the purpose of the assessment of any therapeutic aim, the Court indicates in its Revised Victims Strategy³⁸⁷ that victims' interaction with the Court should be mutually "positive and beneficial".³⁸⁸ While it does not say in what respect the engagement should be experienced as positive, the Revised Strategy goes on to note that

³⁸² Stepakoff and others (n 380) 17.

³⁸³ The study notes that for civil parties to the action before the Extraordinary Chambers in Cambodia's Criminal Court, the healing of physical and mental harm was a priority for just 1.7%. The figure was slightly higher for Civil Party Representatives, at 6.7%, 19.

³⁸⁴ Noted also, in the domestic context, in Feldthusen and others (n 318), 69.

³⁸⁵ Rauschenbach and Scalia (n 289) 443, 446.

³⁸⁶ Through the Victims and Witnesses Unit.

³⁸⁷ Court's Revised Strategy (n 184).

³⁸⁸ Paragraph 11.

“no action of the Court should do harm”, and this, combined with subsequent reference to the need to provide for and protect the psychological welfare of victims,³⁸⁹ would indicate that, at the very least, the Court has an obligation to ensure that survivors do not experience their engagement with it as anti-therapeutic.³⁹⁰ The effect of the Revised Strategy is therefore to incorporate a therapeutic aim in to the practice of the Court, albeit a relatively limited aim that requires the Court to ensure that its impact on victims is at least neutral in therapeutic terms.

Notably, however, while the Revised Strategy evidences a therapeutic aim for the Court, it also indicates that this does not operate as a guiding paradigm for restorative action, but instead, regulates the conduct and interaction of the Court vis-à-vis victims in the pursuit of its retributive and restorative goals. As such, and in common with the need for procedural justice, it constitutes an ancillary aim which relates to the way in which the Court’s broader justice goals should be achieved, rather than a specific and overarching goal in its own right.

(iv) In summary: a therapeutic aim for the ICC’s restorative endeavour?

Available evidence indicates that the probity of pursuing a therapeutic goal as an overarching restorative aim for the Court’s victim participation endeavour is questionable. Primary evidence indicates that the possibility of achieving therapeutic benefit through judicial testimony in particular and participation more generally is, at best, doubtful. Moreover, it is clear that the victims themselves do not seek therapeutic benefit when approaching international criminal justice mechanisms.

It is therefore appropriate to consider the achievement of a sense of justice in victims as an alternative and potentially more fitting aim as a goal for restorative participation at the ICC.

³⁸⁹ Paragraph 15(e).

³⁹⁰ While the wording of the Strategy leaves some scope for interpretation in relation to the extent of the Court’s therapeutic obligation here, an interpretation which puts the duty of the Court at a higher standard than the achievement of engagement which is neutral in therapeutic terms can probably not be justified. The duty not to generate a negative therapeutic response or to worsen a pre-existing psychological problem is the baseline standard of clinical practice, and it would be unreasonable to expect a non-clinical mechanism to operate to a higher clinical standard.

2.3.2. A sense of justice as an overarching restorative aim for victim participation?³⁹¹

(i) Introduction

In addition to the pursuit or achievement of any therapeutic benefit, psychological literature recognises the achievement of a sense of justice in victims as a potential impact of their engagement with international transitional justice mechanisms.³⁹²

This section therefore includes an examination of whether the pursuit of a sense of justice, as an overall restorative aim for the ICC, is both feasible in light of available primary evidence and appropriate to the specific context. It begins with a brief consideration of a sense of justice as a discrete psychological impact in victims of international crimes.

(ii) A sense of justice as a discrete psychological aim for international transitional justice processes

Notably, while the findings of the study by Basoglu and others, cited above,³⁹³ do not support the pursuit of a therapeutic goal, they are of interest in another respect. In particular, the authors of the study found that symptoms of PTSD and depression arose independently of any sense of justice or injustice experienced by study participants. As a result, the study not only differentiates between the two notions of a sense of justice and a therapeutic benefit in the survivor, it indicates that the two can operate independently of one another. The degree of independence and/or interdependence between the two is unclear, and it is conceivable, at least, that some level of pre-existing psychological ill-

³⁹¹ The notion of a sense of justice is developed and defined for specific application in the context of the Court and with reference to victims of international crimes in Part II of this chapter. In the broad sense, however, and for the purpose of discussion in Part I of this chapter, a sense of justice is understood here to mean a feeling in the victim that justice has been done in respect of the harm suffered by the crimes charged.

³⁹² Described, for example, in Mendeloff (n 16). In his review of empirical literature on the issue, however, he does not go on to develop the concept or indicate how achievement of the concept might be assessed. Mendeloff is cited with approval in Brouneus (*The Trauma of Truth Telling*) (n 31) 412. A sense of justice is also recognised in Basoglu and others (n 326) 582, and see also Brandon Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition', in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press, 2008), discussed in detail below, at para 2.4.

³⁹³ At para 2.3.1.(ii).

health in the victim participant may affect their ability to achieve a psychologically positive sense of justice, an issue which is returned to in the following chapter.³⁹⁴ The study does, however, provide evidence that it is theoretically possible to achieve a sense of justice goal in circumstances within which testimony or participation more broadly was simultaneously experienced by the victim as anti-therapeutic, or at least, therapeutically neutral.³⁹⁵

It is therefore appropriate to examine the evidence in order to consider whether the pursuit of a sense of justice comprises a sustainable restorative goal in the specific context of the ICC.

(iii) Is a sense of justice goal feasible? - A review of primary evidence

(a) Assessment in the clinical arena

When compared to the concept of therapeutic impact, the notion of a sense of justice in victims of international crimes is relatively undeveloped in psychological literature. Moreover, while there is some explicit recognition in the clinical literature of a psychological sense of justice in victims of international crimes, there is little systematic empirical assessment and analysis of victims' judicial experiences in relation to any sense of justice notion, and existing assessment is not allied to a particular legal or judicial notion of justice – restorative or otherwise.³⁹⁶

³⁹⁴ At para 3.4.7.

³⁹⁵ There is clinical evidence from the domestic criminal law arena which provides some support for this. Feldthusen and others, in a study of rape victims who chose to testify in civil actions in the domestic Canadian courts, found that while many found the experience of testifying to be therapeutically negative, a significant number of those indicated that the overall experience had provided a distinct, positive psychological benefit, including a “sense of closure, validation, empowerment or relief”. Notably, the researchers do not go on to ally the identified psychological benefit to any notion of justice in the victims. Aspects such as validation and empowerment, however, comprise specific aims of restorative justice, an issue which is returned to substantively later, at para 2.4.3. Feldthusen and others (n 318), 101. See also Stover and others (*Confronting Duch*) (n 16), where the authors note “as difficult as testifying might be, it does not mean that civil parties or witnesses necessarily become traumatized by the court experience *or consider it a negative experience*” [emphasis added], at 525.

³⁹⁶ While, for example, Brouneus expressly acknowledges a possible sense-of-justice impact in victims of international crimes in her study of 1,200 Rwandans and their experiences of witnessing before the court's *gacacas*, her study focuses purely on the therapeutic impact of testifying.

In a number of cases, the described impacts of judicial engagement consist of anecdotal accounts based on the professional experience of clinicians working with victims in a transitional justice setting.³⁹⁷ While, however, these studies may suggest glimpses of elements which might comprise a sense of justice in the victim,³⁹⁸ their unsystematic nature means that they are also ultimately unsatisfying in terms of providing a sound evidential basis for the adoption of a sense of justice aim to guide restorative, victim-focussed action at the Court.

Notably, while there is little systematic assessment directly in relation to a sense of justice in the victim, a number of clinical studies have systematically sought and assessed victims' experiences of testifying or participating more broadly on the basis of a non-clinical model. While the nature of the impact – therapeutic or sense of justice – is not thereby specifically evident from the study findings, researchers have identified psychological impacts that are not exclusively or primarily therapeutic in nature. Moreover, in some cases, victims have couched their responses in language more akin to a sense of justice (or injustice) than to any rehabilitative impact. In a study conducted by Hamber, Nageng and O'Malley, for example,³⁹⁹ victims reported relief at their ability to raise public awareness and knowledge in respect of the abuses perpetrated,⁴⁰⁰ while in a study conducted by Catherine Byrne,⁴⁰¹ victims report a sense of closure in learning the fate of missing relatives.⁴⁰² Both studies, however, are very small, encompassing the views of 20 and 30 victims respectively, and while they provide indications of psychological impacts which might be associated with a sense of justice, or elements of it, the size of the study samples mean that findings are of limited broader applicability.

Finally, however, while the study by Basoglu and others, described above,⁴⁰³ does not provide a promising basis for the pursuit of a therapeutic goal at the ICC, the picture is a

³⁹⁷ See, for example, Mendeloff (n 16), 602, citing de Ridder (n 367).

³⁹⁸ Referred to in Mendeloff, *ibid.*

³⁹⁹ Hamber and others (Telling It Like It Is) (n 368).

⁴⁰⁰ *Ibid.*, 28, 35.

⁴⁰¹ Byrne (n 368).

⁴⁰² *Ibid.*, 244.

⁴⁰³ At para 2.3.1.(ii).

little more optimistic for the pursuit by the Court of a sense of justice in victim participants. In the course of their study, the researchers asked the study participant population if they felt that justice had been served by the ICTY in their case.⁴⁰⁴ The results of their enquiry were not overwhelmingly positive, with just 15% of victims indicating that they had achieved a sense of justice, and a further 6% being undecided in this respect. At first sight, therefore, the findings are not wholly encouraging in terms of the identification of an appropriate overarching restorative aim to guide the Court's victim-focussed actions. Notably, however, as a purely retributive mechanism, the ICTY is tangibly different to the ICC, and as indicated in the previous chapter,⁴⁰⁵ victim dissatisfaction with it was a motivating factor in the decision of drafters to incorporate victim-focussed, restorative elements into the Rome Statute. While, therefore, the results of the study are not positive in themselves, they do at least indicate that the achievement of a sense of justice goal is feasible for a court engaging with victims of international crimes and, given the inclusion of victim-centred measures in the practices of the Court, the potential for achieving greater levels of victim satisfaction in this regard may foreseeably be higher.

Clinical literature therefore provides (limited) concrete evidence of the feasibility of achieving a sense of justice goal in victims of international crimes. In addition, a number of clinical studies provide glimpses of positive, non-clinical impacts in victims that go beyond simple procedural satisfaction, where the terminology employed by victims to describe their experiences is broadly consistent with a sense of justice, discussed further below.⁴⁰⁶ As a result, clinical evidence provides a somewhat tentative basis for the pursuit by the Court of a sense of justice impact in victims.

It is therefore appropriate to consider how the achievement of a sense of justice has been assessed in the legal arena.

⁴⁰⁴ As a result of the relatively undeveloped nature of the notion, psychological assessment is comparatively rudimentary and lacking in clearly identified parameters, Basoglu and others simply asking victims the rather loaded question "Considering what you and/or your close ones went through, do you think justice has been served in your case?", Basoglu and others (n 326), at 582

⁴⁰⁵ At para 1.2.1.

⁴⁰⁶ In Part II of this chapter.

(b) Assessment in the legal arena

There has been very little systematic, empirical investigation within the legal field of the experiences of victims of international crimes in engaging with transitional justice mechanisms. Moreover, while the notion of a sense of justice is less developed than its therapeutic counterpart in psychological literature, it remains a wholly undefined and undeveloped concept within the legal arena of transitional justice, and there is no readily available, standard legal measuring tool for the assessment of victims' sense of justice in the specific and distinct context of international criminal justice. As a result, the few legal studies that consider either victims' testimony or their participative experiences more broadly are not directly allied to any notion of a sense of justice in victims, and so do not systematically seek or investigate information in relation to it. As a result, any research findings in relation to the achievement of any sense of justice in victims are typically peripheral or tangential to the given research focus, and tend instead to be impressionistic and/or observational.⁴⁰⁷

That said, however, and in common with clinical literature, a number of studies provide promising glimpses of a sense of justice in victims alongside their more systematically assessed findings. With this in mind, it is appropriate to examine the available legal empirical studies with a view to assessing the feasibility of achieving a sense of justice in victims of international crimes:

In a study of victims' perceptions of justice at the ICTY, Sanja Ivkovic conducted semi-structured interviews with two samples of victims from the territory of the Former Yugoslavias in order to assess, amongst other things, whether victims felt that the ICTY was fair, that its judgments were just and its punishments adequate. The two study samples comprised, in turn, 263 displaced persons who had fled areas of Croatia, Bosnia and Herzegovina affected by war, and 299 citizens of Sarajevo.⁴⁰⁸ Notably, the study found that respondents were largely positive about the procedural fairness of the tribunal, with well over 90% of those victims who had chosen to approach the ICTY instead of a

⁴⁰⁷ For a detailed critique of the assessment of victims' international transitional justice experiences in the legal field, see Mendeloff (n 16).

⁴⁰⁸ Sanja Kutnjak Ivkovic, 'Justice by the International Criminal Tribunal for the Former Yugoslavia' (2001) 37 *Stanford Journal of International Law* 255, 256 – 7.

domestic court being satisfied that the ICTY process was fair.⁴⁰⁹ While, however, the vast majority of study participants felt that the decisions reached by the tribunal in respect of the charges before it were just,⁴¹⁰ respondents were widely dissatisfied with the sentences imposed by the court, believing them to be inadequate relative to the crimes committed.⁴¹¹ The extent of dissatisfaction with the ICTY's substantive justice outcomes would therefore suggest that the pursuit of a sense of justice in victims of international crimes is problematic. Notably, however, broader aspects of justice for victims were not included in the study, and observations in respect of them are not recorded in the findings. Instead, victims' justice experiences are considered from a purely retributive basis. Like the Basoglu study, the retributive focus of the ICTY and the limited role afforded to victims within it limits the transferability of the findings to the ICC's restorative endeavour, and the study findings should therefore be treated with caution.

Significantly, less pessimistic findings concerning the potential achievement of a sense of justice in victims are evident in other studies in this area, albeit as observational glimpses. In his enquiry into the experiences of 87 victims and witnesses who testified before the same tribunal, Stover observes that, for some victims at least, the experience of witnessing at the ICTY was reported to have been a positive one.⁴¹² Although Stover does not systematically seek or assess victims' experiences in relation to any sense of justice in the victim, he describes a number of positive, psychological impacts in victim-witnesses that would not necessarily be (solely) associated with a therapeutic effect, and which would not be accounted for by a purely procedural justice model, including feelings of unburdening, and elements of acknowledgment and validation. Moreover, while Stover

⁴⁰⁹ In the case of the sample of displaced people, the figure was 96.4%, and in the case of the Sarajevo sample, the figure was higher, at 99.6%. The perceptions of fairness of the ICTY in victims who had chosen instead to approach a domestic court were considerably lower, at 69% and 35.3% respectively; Ibid, 310 - 311

⁴¹⁰ Over 85% of respondents in each study sample, *ibid*, 320 – 21.

⁴¹¹ Over 90% in both samples suggested that either life imprisonment or the death penalty comprised a more appropriate sentence for those convicted, with 34.5% favouring the death penalty, *ibid*, 323.

⁴¹² Stover (Witnesses) (n 164) 88, 106-107.

does not ally his findings to any notion of justice, he observes through his interviews that victims engaging with the ICTY did not speak about justice in purely retributive terms.⁴¹³

Inevitably, the direct transferability of the study findings to the ICC context is again limited. In particular, the purely retributive focus of the ICTY means that it was not designed to furnish or otherwise facilitate any restorative sense of justice in victims appearing before it, so rendering the study findings of limited relevance to the ICC's experiment and the more expansive role it has created for victims in its process. The study does, however, provide some initial evidence of a positive psychological benefit in victim-witnesses, and while the specific nature of that benefit is not directly discernible from the study, it provides, at least, some encouragement for the pursuit of a sense of justice goal for victim participants at the ICC.

In a later study lead by the same author in to the experiences of twenty-one of the twenty-two civil parties who testified in the first trial before the ECCC, many victims reported that testifying had been in some way "transformative" for them,⁴¹⁴ describing feelings that their participation had liberated them from the past and enabled them to move on.⁴¹⁵ Notably, where any notion of substantive justice for victims is discussed in the study, this is done in the abstract and there is no attempt to ally the study's empirical findings to it. Moreover, while the authors purport to situate their findings in the specific context of a "sense of justice",⁴¹⁶ the notion of justice identified to this end is one of procedural justice, rather than any concept of substantive justice in the victim.⁴¹⁷ Significantly for the purpose of this research, however, in recording the "transformative" experiences of many victims, including a sense of liberation from the past and an ability to move forward, the study identifies positive psychological elements in the victim that are not necessarily indicative of the achievement of a therapeutic impact and which cannot otherwise be accounted for by a purely procedural justice focus.

⁴¹³ Ibid, 119 – 120.

⁴¹⁴ Stover and others (Confronting Duch) (n 16) 535 – 6.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid, 531.

⁴¹⁷ Described above, at para 2.2.2.(iv). The issue of what would comprise substantive justice for the victim is explored in detail subsequently, at para 2.4.3.

Finally, Stover lead a team of researchers investigating the testimony experiences of 109 witnesses appearing before the ICC in its first two cases.⁴¹⁸ The aim of the research was to assess the extent to which the ICC was meeting the diverse needs of witnesses appearing before the Court. Notably, the study is expressly allied to the notion of procedural justice,⁴¹⁹ and the survey instrument employed in the study is based upon that used in the earlier ICTY study.⁴²⁰ While the study assesses systematically-recovered data relating to witnesses' perceptions of process, however, the study report also contains more impressionistic or observational comments concerning the psychological impact of testimony on witnesses. In particular, many victims reported experiencing testifying as personally beneficial,⁴²¹ with one witness quoted as saying that it "felt like letting go of something I had been holding on to".⁴²² While the nature of the identified positive psychological benefit is not explored in the research, the described impacts again go beyond purely procedural notions of justice.

While therefore the three studies outlined immediately above pursue and assess a procedural notion of justice, they also give more anecdotal glimpses of positive, non-clinical psychological impacts which go beyond victim satisfaction with the processes and procedures surrounding their engagement, and which therefore cannot be accounted for by a purely procedural justice model. Moreover, in describing positive impacts, the authors adopt terminology that is broadly descriptive of a sense of justice in victims, an issue which is revisited later in this research,⁴²³ and while the studies do not seek to determine why some victims were able to achieve this while others were not, the findings are at least promising in so far as they provide preliminary evidence that the achievement of a sense of justice in victims is, at least, feasible in the specific context of international criminal justice processes, including the ICC.

⁴¹⁸ Berkeley School of Law (n 15).

⁴¹⁹ Ibid, 13.

⁴²⁰ Ibid, 16.

⁴²¹ Ibid, 66.

⁴²² Ibid, 50.

⁴²³ In Part II of this Chapter.

A review of systematic evidence from the clinical and legal fields therefore provides a tentative basis for the pursuit of a sense of justice goal as an overarching aim for the Court's victim participation endeavour. In light, however, both of the shortage of empirical evidence in those fields, and the somewhat inconclusive nature of the findings, it is appropriate to look further afield.

(c) Assessment beyond the legal and clinical field

While there has been very little consideration and assessment of the psychological aspects of victims' justice experiences beyond the legal and clinical arenas, one study provides systematically sourced, empirical evidence of the justice perceptions of a substantive number of victims of international crimes, and so merits attention.

David Backer, a political scientist, conducted a study in to survivor responses to the South African Truth and Reconciliation Commission (TRC).⁴²⁴ The study itself is based upon data collected by survey from over 400 victims of political violence in Johannesburg and Cape Town, and examines the experiences of all victims: those who gave testimony before the Commission's Human Rights Violations Committee, those who participated solely through the submission of a written statement, and those who chose not to participate at all.⁴²⁵

In addition to assessing victims' perceptions of the TRC process, Backer also examined survivors' perceptions of substantive justice as an independent outcome. His findings justify this initial distinction: while respondents generally felt positively about procedural aspects of their engagement with the TRC, their feelings about the achievement of what, for them, would constitute substantive justice were considerably more nuanced.⁴²⁶

⁴²⁴ Backer (n 338).

⁴²⁵ The assessment process employed by Backer is considered substantively in the following chapter, in the context of the evaluation of victims' participation experiences at the ICC. Focus here is limited to the extent to which Backer's study informs consideration of the feasibility of pursuing a sense of justice goal as an overarching aim for the Court's victim participation endeavour.

⁴²⁶ Notably, negative perceptions of justice in victims were not correlated with the use of amnesties and issues of perpetrator impunity, as one might expect, but instead were allied to the achievement or otherwise of personal justice needs in the survivor, and victims' perceptions of justice rose when faced with an amnesty application from a perpetrator. Backer suggests that this might be due to a greater potential in the perpetrator to reveal information about the abuses committed and the fate of

Backer assessed victims' sense of justice in relation to eight justice parameters which he develops, in turn, through the course of his research and by reference to the mandate of the Truth Commission. They are acknowledgment, voice, truth, accountability, apology, punishment, reparation and systemic change.⁴²⁷ Victims' perceptions of justice varied in the study across the parameters, and while, for example, victims produced an aggregated, average score of 3.07 in respect of acknowledgment and 2.43 in relation to voice (where scores are out of 5, thereby indicating a relative level of satisfaction in relation to the specific parameters), aggregate scores for perpetrator apology and the award of reparations was significantly lower, at 1.74 and 1.69 respectively.

Notably, the study and associated tool developed and employed by Backer are not perfect: by his own admission, the questions in his victim survey are skewed towards negative answers.⁴²⁸ Moreover, societal dimensions of the tool such as the achievement of systemic

loved ones. In light of what we know about victims' needs in approaching international transitional justice mechanisms, including their need for information and truth, Backer's posited explanation would seem plausible. In any event, the study suggests that victims' thoughts on perpetrator accountability revolve more around factors such as an admission of responsibility and an apology than retributive punishment, see Backer (n 338) 208. Moreover, the findings make sense within the context of what we already know about victims' justice needs and priorities in the aftermath of gross human rights violations. Reference alone to the list of victims' aims in approaching criminal justice mechanisms, cited above at para 2.3.1.(iii) and discussed further below, at para 2.4.3.(iii), indicates that while the pursuit of retributive justice against the perpetrator of human rights violations may be of interest to some survivors, it appears that it is not their sole, or even prime justice concern. See also in this regard the Sierra Leone Truth and Reconciliation Commission: in seeking the justice needs and priorities of victims, found that just 2% felt that a trial of perpetrators was a priority, Report of the Sierra Leone Truth and Reconciliation Commission, Volume 2, Chapter 4, at para 30. See also, Karstedt (n 167), 9; Stepakoff and others (n 380), in an assessment of justice needs in victims testifying before the Special Court for Sierra Leone, found that approximately a quarter of respondents considered prosecution a priority. For civil parties in appearing before the ECCC, the wish to see a conviction of the perpetrator was a justice need for just 8.2%, Kirchenbauer and others (n 15) at 19; see also Rauschenbach and Scalia (n 289), 444, citing Edna Erez and Pamela Tontodonato, 'The effect of victim participation in sentencing on sentence outcome' (1990) Vol. 28 *Criminology*, 451. For a contrasting study, see Gabriela Mischkowski and Gorana Mlinarevic, 'The Trouble with Rape Trials: Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualized Violence during the War in the Former Yugoslavia' (2009) *Medica Mondiale*, where the authors found that all of the interviewed victims of sexual violence identified the punishment of the perpetrator as a pressing concern for them in testifying before the tribunal. Reference in the study to punishment, as opposed to prosecution, is arguably more closely allied to the notion of revenge than judicial prosecution and potentially specific to the circumstances of the case, providing a possible explanation for a research finding so otherwise out of kilter with available evidence.

⁴²⁷ At 216.

⁴²⁸ Backer includes, for example, a global question in his survey relating to the victim's overall sense of justice in relation to the Commission, asking the somewhat loaded question "When I think about everything that has happened since I/my family member experienced the worst human rights

change are somewhat intangible, and potentially difficult for individual victims to assess. The study is, however, hugely significant in that it provides clear primary evidence that victims' sense of justice is potentially realisable within a transitional justice forum, and can be rendered tangible and concrete in terms of content for the purpose of pursuit and measurement.

Research findings, albeit some at a rather preliminary level, therefore suggest that the achievement of a sense of justice in victims engaging with international transitional justice mechanisms, including international criminal justice processes, is both feasible and measureable. It is therefore appropriate to consider the suitability of the aim to the ICC and its participation endeavour.

(iv) Appropriate to the ICC context

The recognition and pursuit of a sense of justice aim for the Court's restorative endeavour is, it is argued, compatible with the aims of the ICC.

In incorporating elements of restorative justice in to its mandate, the Court has introduced an additional concept of justice in to its practice, with differing justice aims to those of a retributive justice model, where both understandings of justice are legitimately at play within the judicial process.⁴²⁹ As indicated in the previous chapter,⁴³⁰ the Rome Statute situates the victim participant as the intended beneficiary of those differing justice aims, thereby recognising that, to victims, the meaning and substantive content of justice may be tangibly different to those of society and the international community under a purely retributive justice model.⁴³¹ The Statute therefore not only recognises the role of the Court

violations of my/their life, I believe that overall, the wrongs have been put right", at Backer (n 338), 216.

⁴²⁹ Explored substantively in the previous chapter.

⁴³⁰ Para 1.2.4.

⁴³¹ Although this is not to suggest that victims have no interest in the prosecution of the perpetrator, discussed in footnote 315 and further below, at para 2.4.3.(iii)(o). In practice, the Court's recognition of the differing justice interests of victims is further evidenced by its attempts to clearly delineate between the role of the Prosecutor, representing the interests of society in the pursuit of retributive justice against the perpetrator, and those of the victims, discussed above, at para 1.3.3.(ii).

in providing justice to victims, but also indicates the form of justice it is mandated to provide to them. The logical corollary of the realisation of that mandate would therefore be the generation in the victim of a sense that justice, in the form intended, had been done, and the pursuit of a sense of justice in victims that is allied to the Court's restorative aims is therefore, it is suggested, consistent with, and a natural consequence of, the Court's innovative role.

(v) In summary: a sense of justice aim for the Court's restorative endeavour?

While there is very little assessment in either the legal or clinical arena of victims' participatory experiences by reference to their achievement or otherwise of a sense of justice, empirical studies provide glimpses of positive, non-clinical psychological impacts that cannot be accounted for purely on the basis of the victim's satisfaction with process. In addition, the language employed by victims to describe impacts in those studies is broadly reflective of a sense of justice, an issue which is explored substantively in Part II of this chapter. Moreover, Backer's systematic and methodically sound study of victims' sense of justice in relation to their engagement with the South African Truth and Reconciliation Commission provides evidence that a sense of justice in victims of crime is realisable and measureable.

Further, the pursuit of a sense of justice is compatible with the provisions of the Rome Statute and, in contrast to its therapeutic counterpart, its specific justice focus renders it apposite for application within the context of a judicial tribunal. The achievement of a sense of justice in victim participants, where that sense of justice is restorative in nature, therefore comprises a feasible, suitable and potentially measureable overarching aim for restorative action at the International Criminal Court.

At present, however, the concept remains undefined and lacking in identifiable parameters in the specific context of international criminal justice. With this in mind, it is appropriate to consider how a sense of justice can be defined and operationalized in practice within the specific legal context. Part II of this chapter considers how a sense of justice is understood and defined within psychological literature with particular reference to survivors of international crimes. It goes on to explore some of the difficulties of achieving a psychological sense of justice in the given context, before considering how, in light of these difficulties, a psychological notion of justice can be rendered operational

within a judicial forum. The chapter then seeks to disaggregate the notion of a sense of justice in this context with a view to identifying clear parameters for the practical implementation and pursuit of the goal at the International Criminal Court.

Part II

2.4. Delineating the psychological notion of a sense of justice for legal pursuit and application at the ICC

2.4.1. Defining a sense of justice for application at the ICC

“[W]e need to be very careful about how we define the term ‘justice’. For many survivors, justice may not mean trials but a much more personal sense of what they need in order to move on with their lives”.⁴³²

While the achievement of a sense of justice is recognised as a victim-centred goal in a number of traditional international restorative justice mechanisms designed to deal with victims of gross human rights violations,⁴³³ the notion itself is wholly undeveloped in legal literature, and is presently defined solely in clinical terms.⁴³⁴ It is therefore appropriate to take the psychological construct of a sense of justice as the starting point for the development and articulation of the notion for potential application in the specific judicial context of the ICC, thereby utilising psychological literature to address a gap in legal knowledge.

Brandon Hamber, a psychologist who has worked extensively with survivors of South Africa’s apartheid regime, describes the notion of justice in reference to restorative outcomes, noting that “[a]t the individual level the victim is generally seeking...some sort of *reparation*, that is, a psychological state in which they will feel that adequate amends have been made for a wrong committed”.⁴³⁵ As a victim-focussed, harm-centred approach, the definition is consistent with the broader theoretical underpinnings of restorative justice

⁴³² Mikos Biro, Dean Ajdukovic, Dinka Corkalo and others, ‘Attitudes towards justice and social reconstruction in Bosnia and Herzegovina and Croatia’ in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press 2004) 201.

⁴³³ See, for example, Stephen Ellis, ‘Truth and Reconciliation Commission of South Africa Report, Volumes 1-5. Pretoria: Government Printer, October 1998, Review Essay’ (2000) 42 Transformation 57, 61-62.

⁴³⁴ Notably, there is very little research involving survivors themselves which seeks to explore and define the concept of justice from a more subjective and personally restorative sense.

⁴³⁵ Hamber, (Narrowing the Micro) (n 392) at 564.

and hence, it is argued, an appropriate theoretical basis upon which to manifest and pursue restorative action at the ICC.

While the notion of a sense of justice is relatively unproblematic within a psychological context, however, its manifestation and realisation within a legal process is not without its difficulties and limitations,⁴³⁶ and the concept itself requires some further exploration and development in order to render it practically applicable within a judicial forum. It is therefore appropriate to consider the challenges which the Court would face in seeking to achieve a sense of justice in victim participants as a specific restorative aim, and, by reference to clinical theory, to examine how those challenges might be met in practice.

2.4.2. Operationalising a sense of justice goal at the Court: incorporating objective criteria

“When I was tortured, I felt as if the world had stopped turning.
Justice brings confidence, it comes with happiness. It would
mean the world would start turning again for me.”⁴³⁷

As already noted, the ability of the Court to achieve a sense of justice in survivor participants is dependent upon victims’ own subjective assessment of their experiences of engaging with the Court,⁴³⁸ and this subjective component, together with the nature of offences under consideration by the ICC, may present some difficulties in the implementation and pursuit of a sense of justice in victims.

Notably, while the aim of international reparative efforts is to restore the individual and/or the affected community to the position existing prior to the abuse,⁴³⁹ full restoration, including full clinical rehabilitation in the aftermath of gross violations, is generally not

⁴³⁶ Hamber, *ibid.*

⁴³⁷ “Tata”, survivor of torture, interviewed by E Smith for a pilot study of survivor perceptions of justice, University of East London, 19th July, 2011. Tata is not his real name.

⁴³⁸ At para 2.2.1.

⁴³⁹ *Factory at Chorzow (Germany v. Poland) (Merits)* [1928] PCIJ, Series A., No. 17, the Court in that case noting that international reparations should seek to “...wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”, at 47.

achievable.⁴⁴⁰ In addition, in many cases what has been lost simply cannot be replaced, and hence to some extent, reparation can only ever be nominal and symbolic. Difficulties in achieving a sense of justice in victims may be exacerbated where the acceptance of justice is perceived by the survivor as an act of betrayal or otherwise interpreted as a means of buying silence.⁴⁴¹ While the context and environment within which justice is framed may be of particular relevance to survivor perceptions of justice,⁴⁴² in some cases nothing will be enough to satisfy the individual that justice has been done,⁴⁴³ and in that respect, and from the perspective of victims, at least, justice in the aftermath of widespread human rights abuses can never be perfect.

In light of the limitations identified, an objective, qualifying component which attends to more legalistic notions of reasonableness should also be incorporated before the notion can be practically operationalised. Again, such elements are contained in clinical literature. In recognition of the limits noted above, Hamber proposes a more qualified psychological approach to the achievement of reparations, suggesting instead that the relevant tribunal should seek to achieve a level of psychological satisfaction that is “good enough” for a “substantial number” of victims.⁴⁴⁴

The concept of “good enough” reparation is described as a position wherein “the victim feels subjectively satisfied that sufficient actions have been taken to make amends for their suffering and a psychological state is achieved in which some sort of mental resolution concerning past trauma is reached”.⁴⁴⁵ To this end, the “mental resolution” referred to comprises a situation within which “the trauma is no longer seen as unfinished

⁴⁴⁰ See, for example, Ellie Smith and others (n 314), at 12. See also Committee against Torture, General Comment 3 (n 314).

⁴⁴¹ See, for example, Brandon Hamber, ‘Repairing the Irreparable: dealing with the double-binds of making reparations for crimes of the past’ (2000) 5 3/4 Ethnicity and Health 215, 220.

⁴⁴² Discussed below, at para 3.4.8.(i) and (ii).

⁴⁴³ See Hamber (Narrowing the Micro) (n 392), at 568. Hamber in turn borrows the concept of “good enough” from the work of psychoanalyst, Donald W. Winnicott, who employs the concept in relation to parenting. Hamber goes on to note in addition that the context within which reparations are delivered is essential.

⁴⁴⁴ Hamber, *ibid*, at 569, 582.

⁴⁴⁵ *Ibid*, at 569.

business”.⁴⁴⁶ Significantly, such a situation would not necessarily require that the individual concerned had made a clinical recovery in respect of the grief and trauma suffered, thereby distinguishing the notion from any therapeutic goal.⁴⁴⁷

Reference to a “substantial number” of victims in turn seeks to address the problem that, for some survivors, nothing will ever constitute justice for the trauma(s) and loss(es) suffered. The approach is a pragmatic one, and while Hamber is referring specifically to reparations as an outcome, the notion of “good enough” reparation could equally be applied to both the procedural and outcome components of restorative practice.

That being said, in order to operationalise the clinical notion of “good enough” justice within a legal context, the term requires further explanation and delineation.

Notably, while the qualified notion of ‘good enough’ justice is expressed in psychological terms, the application of qualifying criteria is common in legal practice, and in particular, in relation to the reparations provisions of international human rights law instruments.⁴⁴⁸ Article 14 of the UN Convention Against Torture, for example, refers to compensation that is “fair and adequate”,⁴⁴⁹ Article 10 of the Inter-American Convention⁴⁵⁰ makes reference to “adequate compensation”, and Article 41 of the European Convention on Human Rights⁴⁵¹ speaks of “just satisfaction”. Article 6 of the International Convention on

⁴⁴⁶ Ibid.

⁴⁴⁷ Moreover, the nature of mental resolution described above chimes in particular with the notion of “closure and catharsis”, articulated by Edwards as the underlying theoretical aim for participatory aspects of restorative justice, indicating a potential area of common ground between legal and clinical approaches; Edwards (n 220).

⁴⁴⁸ Article 21(3) of the Rome Statute provides that the interpretation of the instrument should be consistent with internationally recognised human rights standards. The provision has been used by the Court in relation to the fair trial rights of the accused; see *Lubanga* (Judgment on the Appeal of Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006) ICC-01/04-01/06 (14 December 2006) [37]. There is no reason why the rule would not equally apply to victims’ rights; see, for example, Schabas (n 1) 198.

⁴⁴⁹ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 2 June 1987) 1465 UNTS 85.

⁴⁵⁰ Inter-American Convention on Human Rights (adopted 22 November 1969, entered into force July 18, 1978) 1144 UNTS 123.

⁴⁵¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force September 3 1953) 213 UNTS 222.

the Elimination of All Forms of Racial Discrimination⁴⁵² refers to “just and adequate reparation or satisfaction”, while Article 21(2) of the African Charter on Human and Peoples’ Rights⁴⁵³ makes reference to “adequate compensation”.⁴⁵⁴

The preponderance of human rights provisions cited above incorporate the qualifying notion that reparations be “adequate”, a term which, it is suggested, ostensibly mirrors the psychological concept of “good enough”. Significantly, the notion of adequacy is expressly adopted by the Court in its own principles on reparations,⁴⁵⁵ and hence, it is argued, constitutes an appropriate qualifying notion for the application and pursuit of a sense of justice in victims participating in proceedings before the ICC.

The overarching restorative goal of the Court’s victim participation endeavour should therefore be understood as the pursuit of a sense of justice that is considered by a substantial number of victim participants to be adequate. An adequate sense of justice would, in turn, comprise a position wherein, while perhaps neither perfect nor complete for some victims, their experience(s) of abuse are no longer seen by them as unfinished business, but instead, they are able to look and move forward.⁴⁵⁶

⁴⁵² Adopted by General Assembly resolution 2106 (XX) of 21 December 1965, entered into force 4 January 1969, 660 UNTS 195.

⁴⁵³ Adopted June 27, 1981, entered into force Oct. 21, 1986, 1520 UNTS 217.

⁴⁵⁴ Discussion of how these various provisions have been interpreted and applied in practice within their respective judicial fora is beyond the scope of this research. Moreover, the award of adequate reparations in the context of widespread and/or systematic abuse, in situations where there are many victims, has its own challenges. Again, discussion of these challenges is beyond the scope of this research.

⁴⁵⁵ *Lubanga* (Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) [242]. The Trial Chamber’s decision was amended somewhat on appeal, although the need for reparations to be adequate was not in issue, *Lubanga* (Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with Amended order for reparations (Annex A) and public annexes 1 and 2) ICC-01/04-01/06-3129 (3 March 2015). While the principles were promulgated in the specific context of the *Lubanga* case, they broadly reflect established human rights reparations principles, and are unlikely to vary appreciatively between cases.

⁴⁵⁶ Notably, the notion of an adequate sense of justice chimes with the language used by victims to describe their feelings in the aftermath of testimony in the three studies lead by Eric Stover, described above, at para 2.3.2(iii)(b), and in particular, of being in some way unburdened, liberated from the past and able to move on as a result of their engagement.

It is unclear what would comprise a “substantial number” for the purpose of implementing Hamber’s clinical aim, and it may be that an appropriate percentage would emerge and evolve through Court monitoring activities, and in conjunction with clinical experts engaging with participating survivors. Moreover, it is foreseeable that where victim-focussed actions at the Court are adapted in response to the findings of monitoring activities, the number of victim participants who experience a sense of justice would rise, and Court goals could be adjusted upwards accordingly. In any event, it is suggested that in order to avoid survivor disillusionment with and disengagement from the Court, a “substantial number” should, in the first instance at least, comprise more than a simple majority of victim participants.

An appropriate overarching aim for the Court’s restorative mandate has therefore been identified and described. Notably, however, in the absence of any explication of the practical components, or parameters, of a restorative sense of justice in the context of victims of international crimes, the aim remains relatively abstract, and its physical implementation is therefore problematic. It is therefore appropriate to disaggregate the aim into its constituent elements to better enable its practical application in the given context.

2.4.3. Identifying constituent elements: parameters of restorative justice for victims of international crimes

(i) Introduction

The elucidation of the parameters of a restorative sense of justice in victims of international crimes for pursuit at the ICC is a three-step process: (1) the identification of the parameters of a sense of justice in victims of international crimes; (2) the correlation of those parameters to restorative justice theory, with a view to identifying those elements which are theoretically compatible with the Court’s restorative mandate; and (3) the practical translation of those restorative parameters into concrete aspects of the Court’s practices, procedures and multi-level interactions with victim participants.

Steps 1 and 2 are explored substantively below. The identification of the component elements of a restorative sense of justice in victims of international crimes will provide a

guide for victim-centred action within the Court, and hence, it is argued, heighten the potential for the effective and meaningful participation of victims.

Notably, step 3 requires a detailed audit of all Court activities and functions involving victim participant engagement, including an assessment not only of how specific aspects might be practically operationalised but also, at a more fundamental level, the extent to which individual identified restorative components are compatible with the criminal judicial forum, and hence appropriate to the given context. This step is beyond the scope of this research. Notably, however, some thoughts are offered both throughout this chapter and the next on areas of Court processes and activities of particular relevance to such a consideration. Moreover, the identification of the parameters of restorative justice for victims of international crimes, considered below,⁴⁵⁷ provides the basis for such an audit.

(ii) Step 1: Identifying parameters of a sense of justice in victims of international crimes

Victims' perceptions of what, for them, would comprise substantive justice in response to their experience(s) of international crimes are key determinants for the pursuit and achievement of a sense of justice in victims participating in proceedings before the International Criminal Court.

As already seen, the rationales for victims' engagement with international criminal justice mechanisms have been expressly sought and obtained in a number of empirical studies.⁴⁵⁸ They are documented above, and repeated here for ease of reference. In particular, in approaching an international criminal justice tribunal, victims may hope:

- To receive formal public acknowledgment of the crime(s) committed;
- To obtain public moral denunciation of the crimes committed (validation);
- To receive public acknowledgment of the pain suffered;
- To tell their story;
- To educate the world and bear witness to the abuses that occurred;
- To publically denounce the wrongs committed against them;
- To confront the accused;

⁴⁵⁷ Step II of the process, at para 2.4.3.(iii)

⁴⁵⁸ See para 2.3.1.(iii).

- To achieve justice for loved ones and to bear witness on behalf of those who did not survive;
- To discover the truth about the crimes committed and the fate of loved ones;
- To prevent the perpetration of further abuse;
- To contribute to broader peace goals;
- To receive reparations;
- To receive an apology;
- To heal mental harm;
- To contribute towards accountability; and
- To exact revenge on the perpetrator(s).

The aims themselves are reflective of the interrelated individual and collective impacts and resulting justice needs of survivors of crimes of mass victimisation, and evidence the multiple capacities within which victims experience international crimes. In particular, while aims such as the need to discover the fate of loved ones or to heal mental harm are inherently primarily personal to the individual, aims such as the desire to contribute to broader peace goals or to prevent the perpetration of further abuse seemingly correspond to the victim's position as a member of an affected society, or, in the case of, for example, the need for societal recognition and acknowledgement of the crime(s) committed and pain suffered, likely arise as a result of the need of the individual to (re)integrate within their community context. Significantly, as indicators of victims' aims of judicial engagement, it is reasonable to assume that the achievement of a sense of justice in victims might come with the realisation of some or all of their aims, within a process that they perceive to be fair and which is not anti-therapeutic.⁴⁵⁹ The aims thereby comprise the constituent elements of a broad, disaggregated sense of justice in victims of international crimes.

That is not to say, however, that all of the constituent elements identified above represent the discrete components of a *restorative* sense of justice in victims of international crimes, consistent with the specific mandate of the ICC. It is therefore necessary to consider the

⁴⁵⁹ Subject to a number of additional variables which have the potential to affect the achievement of a sense of justice in practice, discussed further in the following chapter, para 3.3.

extent to which victims' broad justice aims in engaging with international criminal justice mechanisms, identified above, correlate with restorative justice theory.⁴⁶⁰

(iii) Step 2: Victims' justice needs and restorative justice theory - allying parameters to the Court's restorative mandate

While the concept of restorative justice itself remains relatively elusive and fluid, the aims of restorative justice in terms of what it seeks to achieve for victims remain consistent throughout its diverse operation and range of practices, and despite the varying modes by which those aims are practically operationalised in their given contexts.⁴⁶¹ These aims in turn are both widely documented and ostensibly uncontroversial, thereby providing a suitable basis upon which to assess and compare victims' justice aims in the international criminal justice context. These aims are described in the previous chapter,⁴⁶² and are explored further here in the specific context of victims of international crimes.

In seeking to do justice for the victim, the principal aim of restorative justice is the reparation of harm done. With this broad goal in mind, the component aims of restorative justice practices comprise some or all of the following:⁴⁶³

- Formal acknowledgment and validation in respect of the crimes committed;
- The recognition and acknowledgment of the mental and physical pain suffered by the victim(s) as a result of the crime(s);
- The provision of an opportunity for victims to testify;
- The provision of support;

⁴⁶⁰ Significantly, there are distinct advantages to the victims in their identified justice aims being allied to the mandate of the Court. In particular, victims' aims move from simply being needs to legitimate expectations with a basis in the constituent documents or articulated goals of the judicial body. Moreover, assessment of these legitimate expectations becomes not only an examination of the realisation or otherwise of justice from the perspective of the victim, but also an evaluation of the institution itself in the delivery of its victim-specific mandate.

⁴⁶¹ These practices can include, for example, victim-offender mediation; conferencing (akin to victim-offender mediation, but involving family and community members); victim-offender groups and family group conferencing (which focuses on the offender's family and the development of reparative strategies); see Marian Liebmann, (n 92)

⁴⁶² At para 1.2.2.

⁴⁶³ Notably, not every restorative process will necessarily incorporate all of these aims, and this may be influenced, to some extent, by the nature and exigencies of the forum. For example, a particular tribunal may not have the power to award reparations to victims: see para 1.2.3.(i).

- The achievement of a sense of personal safety in the victim;
- The deterrence of future crimes;
- The provision of information about the offence(s) committed;
- The provision of information about the judicial process;
- The achievement of reparations; and
- Healing in respect of harm suffered.

It is therefore necessary to consider the degree of congruence between the aims of victims in approaching an international criminal justice tribunal and the aims of restorative justice theory, with a view to identifying the discrete components of a restorative sense of justice in victims of international crimes. The results of that examination are presented in summary format in Table 1, immediately below. The examination of individual justice aims and their respective degrees of consistency with the aims of restorative justice, as the basis for the findings indicated in the table, follows subsequently.

Table 1: Consistency of Victims' justice aims with restorative justice aims

<u>Aim in approaching international criminal justice tribunal</u>	<u>Consistent with Restorative Justice</u>	<u>Not consistent with Restorative Justice</u>
(a) To receive formal public acknowledgment of the crime(s) committed	X	
(b) To obtain public moral denunciation of the crimes committed (validation)	X	
(c) To receive public acknowledgment of the pain suffered;	X	
(d) To tell their story	X	
(e) To educate the world and bear witness to the abuses that occurred	X	
(f) To publically denounce the wrongs committed against them	X	
(g) To confront the accused	X	
(h) To achieve justice for loved ones and to bear witness on behalf of those who did not survive	X	
(i) To discover the truth about the crimes committed and the fate of loved ones	X	
(j) To prevent the perpetration of further abuse	X	
(k) To contribute to broader peace goals	X	
(l) To receive reparations	X	
(m) To receive an apology	X	
(n) To heal mental harm	X	
(o) To contribute towards accountability		X
(p) To exact revenge on the perpetrator(s)		X

Taking victims' individual justice aims in turn:

(a) Public acknowledgment of the crime(s) committed

The recognition and acknowledgment of the factual perpetration of crimes by a formal, objective judicial body may be of particular significance to victims where there is some

level of ongoing dispute, denial or suppression in relation to the events either in the victims' community or within the broader national setting.⁴⁶⁴ Acknowledgment may also be of relevance where abuses were committed in a private setting or are otherwise shrouded secrecy, such as the perpetration of sexual violence.⁴⁶⁵ Notably, the acknowledgement of crimes is a feature of both the aims of victims in approaching an international criminal justice tribunal and of restorative justice theory.

(b) Public moral denunciation of the crimes committed (validation)

Allied to the need of victims for the acknowledgment of crimes committed is the need for the public denunciation of those acts as legally and morally reprehensible, thereby "legitimising" victims' feelings in respect of them and effectively "exhonorating" the victim from any public sense that they were in some way deserving or otherwise complicit in the acts committed against them.⁴⁶⁶ Validation may, in turn, begin to address victims' feelings of stigmatisation, victimisation and isolation through the provision of a sense of connection and support.⁴⁶⁷ Again, the aim also features as a practical aspect of restorative justice theory.

(c) Public acknowledgment of the pain suffered

In addition to the need of victims for public acknowledgment of the crimes committed against them is the need for public recognition of the harm suffered as a result of those crimes. Acknowledgment of pain and suffering is identified as a significant need in empirical studies seeking to assess victims' aims in approaching an international criminal

⁴⁶⁴ See, for example, Danieli, who refers to the "conspiracy of silence" in respect of human rights abuses and the impact of this on victims, Yael Danieli, 'Introduction: History and Conceptual Framework', in Danieli (ed) *International Handbook of Multigenerational Legacies of Trauma* (Plenum Press, New York, 1998) 1 - 20; Nora Sveaas and Nils Johan Lavik, 'Psychological Aspects of Human Rights Violations: The Importance of Justice and Reconciliation' (2000) 69 *Nordic Journal of International Law* 35, 43, exploring the impact of silence and denial in respect of abuses on a sense of justice in the victim.

⁴⁶⁵ Observed in victims in Binaifer Nowrojee, "'Your Justice Is Too Slow': Will the ICTR Fail Rwanda's Rape Victims?" (2005) UN Research Institute for Social Development Occasional Paper 10, 4.

⁴⁶⁶ Zehr (n 95) 191.

⁴⁶⁷ Explored, for example, in Backer (n 338) 201-202.

justice mechanism,⁴⁶⁸ and like the need for moral denunciation of the crimes themselves, may be seen by victims as a means of overcoming feelings of isolation and societal disconnection.⁴⁶⁹ Given that the harm suffered by the victim is the starting point and focus of restorative justice, it is unsurprising that the need for acknowledgment of pain and suffering is also a feature of restorative justice theory.

(d) To tell their story

The desire for victims of international crimes to narrate their personal experiences of abuse is widely recognised. Primo Levi, for example, notes that “[t]he need to tell our story to ‘the rest’, to make ‘the rest’ participate in it, had taken on for us ... the character of an immediate and violent impulse, to the point of competing with our most elementary needs”.⁴⁷⁰ Laub, too, notes in relation to survivors of the Holocaust that “survivors did not only need to survive so that they could tell their story; they also needed to tell their story in order to survive”.⁴⁷¹

In all of the studies concerning victims’ justice aims in approaching an international criminal justice mechanism, the need for victims to tell their stories was evident.⁴⁷² Victim narrative also comprises a component of restorative justice theory, and so constitutes an aspect of the victims’ restorative sense of justice in the context of international crimes.

⁴⁶⁸ In the case of the baseline study conducted with civil parties engaging with the ECCC, for example, nearly half of the respondents - 40.8% of civil parties and 47.6% of civil party representatives - reported a need for societal acknowledgment of their pain and suffering; see Kirchenbauer and others (n 15) at 19 – 20; see also Clark and Palmer (n 380), 9 – 10; discussed also in Stepakoff and others (n 380) 9 – 10.

⁴⁶⁹ See, for example, Stepakoff and others (n 380) 9 – 10; Clark and Palmer (n 380), at 9.

⁴⁷⁰ Primo Levi, *If This is a Man: The Truce* (Abacus Press, 1979), 15 – 16. See also Ronnie Janoff-Bulman, *Shattered Assumptions: Towards a New Psychology of Trauma* (The Free Press 1992) 108.

⁴⁷¹ In Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (Routledge, New York, 1992) 78. See also Hamber, (Do Sleeping Dogs Lie?) (n 361).

⁴⁷² See Stepakoff and others (n 380), where 18.5% of victims expressed this as an aim of their testimony before the SCSL, 17; the figure was significantly higher in the case of civil parties in the ECCC’s second case, although the parameter is considered in combination with the need for acknowledgment of pain and suffering, and hence comparisons are difficult, Kirchenbauer and others (n 15), 19 – 20. See also Clark and Palmer (n 380), 9; Stover and others (Confronting Duch) (n 16) 521 – 523.

(e) To educate the world and to bear witness to the abuses that occurred

The desire of victims to contribute towards the establishment of a public, perhaps internationally-recognised truth about the events that occurred is allied to the need for public acknowledgment of the crimes committed and pain suffered, and may again be particularly significant where disputed accounts of events exist or where there is a prevailing state of denial or repression in the home State.⁴⁷³ Where, however, acknowledgment both of the crime(s) committed and pain suffered are aims centred on the individual, the desire in some victims to educate the world about the abuses that took place arguably represents a more externally-focussed motivation.⁴⁷⁴

The need is widely recognised in studies which explore victims' aims in approaching international criminal justice mechanisms,⁴⁷⁵ and while it is not expressly indicated as a component of restorative justice theory, its realisation is responsive to the harm experienced by the victim, and likely represents the practical operation of restorative principles within the context of widespread violations. Moreover, where victims seek to realise the aim through judicial testimony, the aim is directly aligned to the restorative goal of providing victims with an opportunity to testify, such that testimony can be understood as a vehicle for the achievement of specific restorative aims, rather than as an aim in itself. The aim of victims to educate the world and to bear witness to the abuses that occurred is therefore, it is argued, consistent with restorative justice principles.⁴⁷⁶

(f) Publically denounce the wrongs committed against them

This aim is allied to the desire of victims for public validation in respect of the abuses committed, but instead of arising out of a need for connectivity and community support, it

⁴⁷³ Discussed in Stepakoff and others (n 380), at 6.

⁴⁷⁴ Stepakoff and others (n 380), 25. The external focus chimes with the “pro-social”, restorative motivations identified by Van Camp and Wemmers in their research with victims of violent crime, Van Camp and Wemmers (n 294) 129, 132 – 134.

⁴⁷⁵ See, for example, Stover and others (Confronting Duch) (n 16) 523; Clark and Palmer (n 380) 10; Stover (Witnesses) (n 164) 127.

⁴⁷⁶ Notably, there may be other opportunities for victims to contribute towards the establishment of a public, internationally-recognised truth by, for example, engagement with the Office of the Prosecutor and the provision of evidence. The focus of this section, however, is on the victim participation endeavour of the Court.

is primarily based on the victim's need to re-establish personal agency and empowerment. The need of victims to personally denounce violations committed them is evident in the studies of victim motivations in approaching criminal justice mechanisms, and was the principal aim of victims appearing as witnesses before the Special Court for Sierra Leone ("SCSL").⁴⁷⁷ Again, while the aim is not expressly indicated in restorative justice theory, it responds directly to the restorative goal of victim empowerment,⁴⁷⁸ and is aligned to the restorative goal of providing victims with an opportunity to testify.

(g) To confront the accused

The desire for victims to confront the accused was reported in several of the studies into victims' aims in engaging with a criminal justice tribunal.⁴⁷⁹ In seeking to come face-to-face with the alleged perpetrator, the victim may be motivated by a number of goals, including a wish to look the accused in the eye and describe the impact of the crimes committed,⁴⁸⁰ to show that they had not been beaten by the experience,⁴⁸¹ and to receive specific information about the crime (considered further below). Again, while not an explicit aim of restorative justice theory, potential motivations in seeking to confront the accused are consistent with express restorative goals, including the acknowledgment of harm suffered, perpetrator contrition, victim empowerment and the receipt of information. Moreover, the need is ostensibly encompassed by the restorative goal of testimony.

(h) To achieve justice for loved ones and to bear witness on behalf of those who did not survive

The desire of victims to achieve justice for those who did not survive, and to bear witness on their behalf, is reported as a significant aim in approaching a criminal tribunal in all of

⁴⁷⁷ Stepakoff and others (n 380) 17, comprising 33.5% of respondents.

⁴⁷⁸ Discussed above, at para. 1.2.2.

⁴⁷⁹ See Stepakoff and others (n 380) 17. The number of participants reporting this need was not substantial, at just 1.5%. See also Stover and others (Confronting Duch) (n 16) 522.

⁴⁸⁰ See, for example, Stover and others (Confronting Duch), *ibid.*

⁴⁸¹ *ibid.*, 527.

the available studies.⁴⁸² It is unclear from the literature what “justice” for loved ones would comprise in this context, although it is fair to assume that it would not be dissimilar to the victims’ justice needs in respect of themselves. In the specific context of testimony, bearing witness in relation to those who did not survive may be seen as a way of honouring the dead and ensuring that their experiences and identities are retained both in the minds of the listening court, as well as in the official court records.⁴⁸³

Notably, while there is no explicit recognition in domestic restorative justice theory of victims seeking justice for others or any notion of third-party commemoration during the judicial process, the aim is consistent with the broader goals of restorative justice theory, including the need for processes to respond to the harm suffered – in this case, the grief of the surviving victims – in respect of the crimes perpetrated. Moreover, the nature of international crimes means that there are likely to be a significant number of victims who died as a result of the crimes perpetrated, and to that extent, the international context of restorative justice can be differentiated from its domestic counterpart. As a result, bearing witness on behalf of others likely represents a practical application of restorative justice theory in the specific context of international crimes and the harms they typically engender.

(i) To discover the truth about the crimes committed and the fate of loved ones

The desire amongst victims to discover the truth about the crimes committed, including the fate of loved ones, was reported in several of the studies,⁴⁸⁴ and is reflected in the emerging right to truth of victims of gross violations.⁴⁸⁵ In particular, in the aftermath of international crimes, victims have recognised needs for information about the reasons for

⁴⁸² Ibid, 520 – 521; see Kirchenbauer and others (n 15), in which 70.1% of civil parties and 89.2% of civil party representatives report the aim, at 19; in the case of the SCSL the figure was lower but not insubstantial, at 23.5%, Stepakoff and others (n 380), 17.

⁴⁸³ See, for example, Stepakoff and others (n 380) 7; Stover (Witnesses) (n 164) 105.

⁴⁸⁴ The baseline study of victims’ aims in approaching the ECCC, for example, records that 10.9% of civil parties and 13.3% of civil party representatives hope to receive more information about the fate of loved ones; Kirchenbauer and others (n 15), 19. See also Clark and Palmer (n 380) 8 – 9.

⁴⁸⁵ A detailed exploration of the right to truth in general, and in the specific context of the ICC, is beyond the scope of this research. The issue is developed substantively in Klinkner and Smith (n 260).

and causes of victimisation, the broader prevailing circumstances which lead to or otherwise facilitated the abuse, details of specific violations and, in the event of disappearance or death, the fate and whereabouts of loved ones. The aim corresponds directly with the restorative goal of providing the victim with information about the offence(s) committed.

(j) To prevent the perpetration of further abuse

Victims throughout the studies reported, to a greater or lesser degree, a desire to prevent the perpetration of further abuses.⁴⁸⁶ Notably, these aims correlate to the restorative justice aim of providing a sense of safety for the victim, as well as, it is suggested, and in light of the specific context of application, for the wider community. Moreover, the aim chimes with the “pro-social” aims of restorative justice described by Van Camp and Wemmers in their work with victims of violent crime.

(k) To contribute to broader peace goals

The desire of victims to contribute to broader peace goals is allied to the issue of the prevention of further abuse, and serves similar pro-social goals. It is reported by victims in a number of studies,⁴⁸⁷ and, like the desire to prevent further abuses, is consistent with the application of restorative justice theory in the specific context.

⁴⁸⁶ Seventeen percent of victims appearing before the SCSL, for example, hoped that their testimony would serve to prevent the perpetration of further abuses; Stepakoff and others (n 380) 17. In the case of the baseline study conducted with civil parties engaged with proceedings before the ECCC, 5.8% of civil parties and 18.3% of civil party representatives hoped that their participation would have a preventive impact. Reported also in the context of victims of sexual violence testifying before the ICTY, Mischkowski and Mlinarevic (n 426) 13. In contrast, Eric Stover reports in relation to 87 individuals testifying before the ICTY that just 2 indicated any broader, preventive aim, and in Stover and others (Confronting Duch) (n 16), the authors note that victims aims were essentially personal, and while more altruistic, societal aims were not wholly absent, they were few, 520.

⁴⁸⁷ Clark and Palmer, for example, describe is as the need for “rebuilding broken communal relations and broader social reconstruction”, (n 380) 8, and see also Stepakoff and others (n 380) 17.

(l) To receive reparations

In the majority of those empirical studies which examine victims' motivations for testifying, a monetary aim is conspicuously absent,⁴⁸⁸ and in Stepakoff's study of 200 witnesses who appeared before the SCSL, just 2% indicated that their decision to give evidence had been financially motivated. In the only published empirical study to date which seeks to assess victims' aims in participating more broadly with an international criminal justice mechanisms, however, more than a third of civil parties indicated that they had been motivated by a wish to achieve an individual form of reparation in respect of the crimes charged.⁴⁸⁹

The award of reparations is a key feature of restorative justice theory, and hence comprises a restorative aim in the context of victims of international crimes.

(m) To receive an apology

A number of civil parties questioned for the baseline study of victims' hopes in engaging with the ECCC indicated that their decision to engage with the tribunal was motivated, in whole or in part, by a wish to receive an apology from the accused in respect of the harm

⁴⁸⁸ No desire for material benefits is indicated, for example, in the victims' motivations for testifying reported by Stover in relation to witnesses appearing before the ICTY, Stover (Witnesses) (n 164), or by Stover and others in relation to civil parties appearing before the ECCC, Stover and others (Confronting Duch) (n 16). Financial motivations were also absent in the study of victims of sexual violence appearing before the ICTY, Mischkowski and Mlinarevic (n 426), as well as in respect of witnesses testifying about the genocide in Rwanda, Clark and Palmer, (n 380).

⁴⁸⁹ Kirchenbauer and others (n 15) 19 – 20. The study indicated that 36.7% of both civil parties and civil party representatives were motivated by the desire to receive individual reparations. While it is only one study, it provides some initial indication that victims' expectations of a participation endeavour such as that operational at the ICC are likely to be higher than those of a purely retributive institution, where the victim's role is limited to that of witness, at least in the context of material reparation.

suffered.⁴⁹⁰ An apology comprises an aspect of victims' reparations for international crimes⁴⁹¹ and is therefore consistent with restorative justice theory.

(n) To heal mental harm

As already seen,⁴⁹² while the majority of victims do not approach an international criminal justice mechanism with the aim of achieving some element of therapeutic benefit, for some, psychological healing remains a goal. The achievement of therapeutic benefit comprises an aspect of restorative justice theory, and as such, constitutes a restorative justice aim in the specific context of victims of international crimes.⁴⁹³

(o) To contribute towards accountability

The desire of some victims to contribute to the quest for accountability and punishment of the perpetrator in respect of the crimes charged is reported to varying degrees in a number of the studies, and is discussed above in relation to the differentiation between retributive justice outcomes and a sense of justice in the victim.⁴⁹⁴ The aim is not evident in restorative justice theory, and instead is better allied to victims' interests in the Court's retributive function, evidencing the multi-faceted ways in which victims approach justice.

⁴⁹⁰ Kirchenbauer and others (n 15) 17. Notably, it is clear from the study conducted by Stover and others in to the testimony experiences of civil parties in the first trial of the ECCC that any apology must, in turn, be perceived by victims as being sincere; Stover and others (Confronting Duch) (n 16) 527 – 529. In the Duch case, the accused accepted responsibility for the crimes charged and apologised to the victims. The apology was essentially rejected by civil parties.

⁴⁹¹ An apology comprises an aspect of satisfaction, see the UN's 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 (adopted 21 March 2006) A/RES/60/147, Article 22(e).

⁴⁹² Para 2.3.1(iii).

⁴⁹³ While the pursuit of a therapeutic goal is both an element of restorative justice theory and an articulated justice need of a small number of victims who are seeking to engage with international criminal justice processes, as discussed above, it is not an appropriate restorative goal in the case of the ICC. As already indicated, however, the need for the Court to ensure that its interaction with victims is not anti-therapeutic comprises an ancillary goal. The aim of the Court in this respect is not, therefore, to heal the victim, but to deliver justice to the victim in a manner which is not therapeutically detrimental. The need for the Court to consider which of the identified restorative parameters are compatible with the specific forum is discussed above, at para 2.4.3.

⁴⁹⁴ At para 2.3.2.(iii)(c).

(p) To exact revenge on the perpetrator

There is some evidence in the studies of a desire for revenge amongst a (limited) number of victims, including victims who would like the accused, if convicted, to be tortured or killed.⁴⁹⁵ Personal forms of revenge do not, of course, respond to any legitimate aim of an international tribunal, and have no basis in restorative justice theory.

(iv) In summary: the parameters of a restorative sense of justice in victims of international crimes

There is a high degree of congruence between the aims of restorative justice theory and the justice aims of victims of international crimes, and a comparison of the two enables the identification of discrete components, or parameters, of a restorative sense of justice in the specific context. In particular, these comprise the following:

- The formal, public acknowledgment of the crime(s) committed;
- The public moral denunciation of the crimes committed (validation);
- The public acknowledgment of the pain suffered;
- The ability of victims to tell their story;
- To educate the world and bear witness to the abuses that occurred;
- To publically denounce the wrongs committed against them;
- To confront the accused;
- To achieve justice for loved ones and to bear witness on behalf of those who did not survive;
- To discover the truth about the crimes committed and the fate of loved ones;
- To prevent the perpetration of further abuse;
- To contribute to broader peace goals;
- To receive reparations;
- To receive an apology; and
- To heal mental harm;

⁴⁹⁵ In their study of 21 civil parties appear before the ECCC, for example, Stover and others found that just one expressed any desire to take revenge on the accused; Stover and others (Confronting Duch) (n 16) 518. In relation to the aims of civil parties engaging as civil parties in the ECCC's second case, researchers note that a number of victims wanted the accused to be tortured or killed if found guilty; Kirchenbauer and others (n 15) 17.

The identified parameters thereby provide clear, tangible and evidence-based indicators of what would comprise restorative justice for victims of international crimes, responding to the current knowledge gap in this area.

That is not to say, of course, that all of the parameters reflect appropriate targets for victim-focussed, restorative action at the International Criminal Court. As indicated in the previous chapter,⁴⁹⁶ the Court is not a restorative justice mechanism *per se*, but rather, should be understood as a retributive mechanism that has incorporated elements of restorative justice into its mandate. It has, however, yet to indicate what it means by restorative justice within its specific context, including which specific elements of restorative justice it is seeking to operationalise and realise within its practices, and what, as a consequence, it is hoping to achieve for victims in terms of the fulfilment of specific restorative aims. In the absence of any attempt by the Court to define what restorative justice means within the specific field of application, victim participants are likely to approach the Court with restorative expectations that are both legitimate and unachievable in the context, thereby increasing the prospect for victim disillusionment and disengagement.

As indicated above,⁴⁹⁷ the Court must give serious consideration to the extent to which the various restorative parameters are appropriate for application within the forum, including whether they can operate within the confines of the Rome Statute and the Defendant's right to a fair and expeditious trial. As indicated, this assessment is beyond the scope of this research, and requires a substantive and detailed audit of Court processes and practices with a view to identifying those aims that are feasibly realisable within the boundaries of the mechanism. The identification of concrete restorative parameters does, however, mean that such an examination is now possible and provides a tangible basis for the Court's assessment.

Finally, it must be acknowledged that while the list of restorative parameters developed in this chapter represents the constituent elements of restorative justice for victims of international crimes, the achievement of a positive psychological impact in this regard will inevitably also be affected, to a lesser or greater degree, by various factors both

⁴⁹⁶ Para 1.2.3.(ii).

⁴⁹⁷ Para 2.4.3.(i).

within and beyond the operation of the Court. These aspects are considered in the following chapter in relation to the assessment of the achievement of restorative impacts in victim participants.⁴⁹⁸

2.5 Conclusion

The concept of restorative justice is under-developed in international criminal law, and the Court has failed either to identify an overarching restorative aim for its victim-focussed action, or sought to examine and elucidate the specific parameters, or constituent features, of restorative justice in the particular context of its intended application, indicating a significant gap in knowledge and practice. The identification and articulation of an overarching restorative aim, together with the amplification of the constituent elements of that aim, would, it is argued, not only maximise the potential for victim participants to achieve effective and meaningful participation, but it would also provide a clear focus for victim-centred action at the Court, leading in turn to the development of consistent Court practices and enabling the cost-efficient, targeted deployment of limited resources.

In this chapter, the author has identified and described an appropriate aim for the pursuit of restorative justice through the victim participation endeavour of the International Criminal Court, thereby providing a contribution to theory and practice in the field.

In particular, the research demonstrates that while much of the international transitional justice literature advocates the pursuit of a therapeutic goal for victims' engagement with restorative mechanisms in the aftermath of gross violations and international crimes of mass victimisation, empirical evidence calls into question the feasibility of achieving a positive, clinical benefit in victims in practice. In addition, a therapeutic goal is shown to be problematic because it is premised upon the assumption that all victims are psychologically ill, a premise that, as the research indicates, is not borne out by available evidence. Moreover, primary evidence indicates that few victims of international crimes look to a criminal justice institution to provide them with a therapeutic benefit, indicating that a clinical goal is not appropriate for restorative action at the ICC.

Instead, this research argues that the pursuit of a restorative sense of justice in victim participants comprises a more appropriate aim for the Court's restorative endeavour. In

⁴⁹⁸ At para 3.3, in relation to Phase II of the proposed assessment framework.

contrast to its therapeutic counterpart, however, the psychological notion of a sense of justice in victims of international crimes is under-developed in the clinical context and wholly undeveloped in the legal context. In the course of this research, and by reference to clinical theory, the notion of a sense of justice is elaborated and described in the particular context of victims of international crimes. The parameters of a restorative sense of justice in victims of international crimes are indicated through a disaggregation of the concept of a sense of justice in the specific context, providing the basis for their practical application in to the practices and procedures of the Court. In doing so, the research provides concrete indicators of what restorative justice comprises for victims of international crimes, including crimes of mass victimisation. To this end, the research evidences the complex and interrelated justice needs of victims as both direct and indirect victims, as well as members of an affected community or ethnic group. The research thereby responds to the current gap in knowledge in this area and so provides a contribution to theory.

In order for the Court to ensure that it is meeting its restorative mandate in respect of victim participants, however, it is essential not only that it identifies and pursues clearly elaborated restorative parameters through its interactions with victims, but also that it monitors its progress in relation to its innovative endeavour. Significantly, there is, at present, no evaluation of the Court's progress in the pursuit and achievement of its restorative aims in respect of victims. With this in mind, the following chapter seeks to respond to the lack of any monitoring of the Court's restorative endeavour through the development of the framework for an assessment tool.

3. Evaluating the Court's restorative endeavour: a Victims' Justice Index for the ICC?

3.1 Introduction

Monitoring of the Court's progress in its pursuit of effective and meaningful participation for victims with specific reference to the Court's innovative victims mandate will enable the adoption of a clear, coherent and targeted, evidence-based and cost-effective approach to the development and refinement of victim-focussed actions and services within the Court, thereby maximising the potential for restoratively beneficial victim engagement, whilst operating in a resource-sensitive manner.⁴⁹⁹

Despite this, however, there is, at present, no evaluation of victims' experiences of the innovative endeavour by reference to any restorative impacts or by the application of any dedicated assessment model,⁵⁰⁰ indicating a significant gap in practice. Moreover, and at a more fundamental level, there is no available assessment tool – psychological or legal, validated or otherwise – to evaluate the substantive justice perceptions of victims engaging with international criminal justice mechanisms, and there has been little investigation of this area in the broader, traditional international transitional justice literature, indicating a significant gap in knowledge.

In this chapter, the thesis seeks to respond to this gap through the identification and development of a detailed framework for an assessment tool for the monitoring and

⁴⁹⁹ There is evidence to indicate that a number of States Parties are concerned about the costs of the Court, including the participation endeavour, and have encouraged organs of the court to review and streamline activities and processes with a view to reducing corresponding budgets: see for example, ASP Resolution on Strengthening the International Criminal Court and the Assembly of States Parties (21 December 2011) ICC-ASP/10/Res.5, para 49; Redress (October 2012) (n 18); Kersten (n 18); IRIN, 'New ICC Prosecutor Vows to Focus on Victims' (30th July 2012), available online at <<http://www.irinnews.org/report/95982/global-new-icc-prosecutor-vows-to-focus-on-victims>>, last accessed 8th June 2015; Victims' Rights Working Group, 'International Criminal Court at 10: Issues and concerns presented on the occasion of the 11th Session of the Assembly of States Parties 14-22 November 2012, The Hague', 2 – 3, available online at <http://www.vrwg.org/VRWG%20Documents/201114_VRWG_ASP11-ENGLISH-VERSION.pdf> last accessed 8th June 2015. It is beyond the remit of this thesis to conduct a detailed cost-analysis of the proposals made herein. While this research seeks to establish an assessment framework for victims' experiences at the ICC, however, it is mindful of the practical context of proposed application of the tool, and potential cost-efficiency is indicated where appropriate.

⁵⁰⁰ Para 2.2.3.

evaluation of the achievement of a sense of justice for victims of international crimes with specific reference to the Court's victim participation endeavour and its restorative mandate.

Any assessment of the Court's participation endeavour should indicate not only whether and the extent to which the Court is meeting its mandate, but should also identify those areas in respect of which there is any restorative shortfall, together with the reason(s) for that shortfall, thereby enabling the Court to assess and attend to specific areas of its practice with the targeted allocation of resources. Without wishing to pre-empt the results of the assessment, a number of areas where the specific and targeted application of resources might be applied are indicated in the chapter, providing concrete, albeit hypothetical examples of how the findings of the assessment might be used to enhance the prospect for effective and meaningful participation for victims. The examples given are illustrative of the type of adjustment or refocusing that might be considered in the light of assessment findings, and are not intended to be construed as in any way exhaustive.

The assessment process therefore encompasses two discrete aspects - the exploration of the extent to which the remit has been met (including any specific areas of shortfall), and the consideration and identification of the reasons for any shortfall. As discrete aspects of the assessment process, and for the purpose of examining their respective components below, these aspects are considered separately in this chapter, and are described as Phase I and Phase II of the assessment respectively. Notably, however, the two assessment Phases will run concurrently in practice, and will be reflected in the combined elements of a single assessment tool.

The chapter begins with a discussion of the appropriate form and nature of Phase I of the assessment, before going on to consider how evidence might be gathered in practice for the purpose of Phase I evaluation within the specific context of the ICC. To this end, the features of an appropriate assessment model are identified and specific parameters for incorporation in to the assessment tool are indicated.

For the purpose of Phase II of the assessment, the chapter goes on to consider specific variables which have the potential to impact upon the ability of the victim to experience participation as effective and meaningful, thereby seeking to respond to the question of why some victims experience judicial engagement positively while others do not. Gaps in current knowledge in this regard are identified, and a number of alternative variables with

the potential to affect victims' experiences of participation are explored. Notably, these alternative potential variables also introduce challenges in terms of data collection, and the chapter therefore includes practical recommendations in respect of those variables, including the need for cross-Court engagement with the assessment process.

The chapter goes on to consider some additional, broader issues which relate to assessment in the specific context, including the need for interdisciplinary development of the assessment tool and the production of defined terminology.

The proposed assessment framework for Phase I is illustrated diagrammatically at 3.2.3. (figure 3.1) and the various stages within the proposed assessment process indicated and numbered. Notably, the same stages are replicated in the diagrammatic representation of the proposed framework for a combined Phase I and Phase II assessment process, at 3.5 (figure 3.2). Throughout this chapter, reference is made to the various stages in the process in order to indicate the position of the particular assessment aspect under consideration within the broader assessment framework.

3.2 Developing the framework for Phase I assessment

3.2.1 The nature and form of Phase I assessment

The aim of Phase I of the assessment is to examine whether and in what respects the Court is providing effective and meaningful participation with particular reference to the achievement of a restorative sense of justice in participating victims.

While such an assessment has not been conducted to date, either at the ICC or within the context of any other international criminal justice mechanism, the basic process and approach to the assessment is relatively straightforward, and utilises what we already know about victims engaging with international tribunals.

In particular, evidence indicates that victims of international crimes have high hopes that they will achieve both procedural and substantive justice through their engagement with international transitional justice mechanisms,⁵⁰¹ and thanks to the study of victims'

⁵⁰¹ See, for example, Ivkovic (n 408) 320; Mendeloff (n 16), 607; Stover (Witnesses) (n 164) 107 and subsequently.

aspirations in approaching international criminal justice tribunals, examined in the previous chapter, we know what substantive justice for victims of international crimes comprises.⁵⁰² As already indicated,⁵⁰³ it is reasonable to assume that the realisation of some or all of victims' justice aims will provide them with a sense of justice. Moreover, the realisation of victims' aims is likely to produce a psychological impact in the victim in the form of a subjective degree of satisfaction in relation to the specific parameter, or articulated justice aim, in question. The extent to which a sense of justice has been achieved in victims of international crimes can therefore be measured by an evaluation of the degree of victims' satisfaction in relation to the realisation of justice goals in approaching an international criminal tribunal.

Having identified the nature of Phase I assessment, it is appropriate to examine how assessment might be approached and evidence gathered in practice within the specific context of the ICC.

3.2.2. Phase I: approach to assessment and gathering the evidence

While there is no assessment tool for the evaluation of victims' perceptions of substantive justice in the context of their engagement with international criminal justice tribunals, there has been one attempt to evaluate and quantify victims' sense of justice within the broader context of international transitional justice. As indicated in the previous chapter,⁵⁰⁴ the study in question was conducted by David Backer, and concerned an evaluation of the experiences and views of over 400 victims of the South African apartheid regime of engaging with the country's Truth and Reconciliation Commission.⁵⁰⁵ Although the study relates to a markedly different context to that of the ICC, as the only study to date which seeks to assess the subjective perceptions and experiences of victims of international crimes from a sense of justice perspective, the study, and in particular, Backer's approach to assessment, warrants further attention here.

⁵⁰² Discussed above in the context of the parameters of a sense of justice in victims of international crimes, at para 2.4.3.(ii).

⁵⁰³ At para 2.4.3.(ii).

⁵⁰⁴ Para 2.3.2.(iii)(c).

⁵⁰⁵ Backer (n 338).

Notably, in seeking to ascertain and quantify the views of apartheid victims, Backer employs a victims' survey which adopts, as its framework, eight individual components, or "dimensions" of justice: acknowledgment, voice, truth, accountability, apology, punishment, reparation and systemic change.⁵⁰⁶ These justice dimensions were identified in turn through the course of Backer's research, and while they were not specifically sought and obtained from the victims participating in the study, they were subsequently validated with victim groups prior to the evaluation.⁵⁰⁷

Backer then assesses the extent to which victims felt that each individual justice dimensions had been successfully realised by their engagement with the Truth Commission. To this end, victims indicated their satisfaction in relation to each dimension on a five-point Likert Scale, whereby a lower score correlates to a lower sense of justice in respect of the particular justice dimension, while a higher score indicates a greater sense that justice in respect of the particular dimension has been achieved.

Having obtained victims' scores in respect of the various justice dimensions, Backer then produces an average score for each dimension. The average scores of all of the justice dimensions are then combined and averaged, producing an aggregate "justice index" for the TRC.⁵⁰⁸

Notably, the model developed and employed by Backer in his study is not directly transferable to the ICC context for a number of reasons. In particular, the notion of victims' justice adopted in the study, including the specific identified parameters of that notion, was not aligned to any justice model, restorative or otherwise,⁵⁰⁹ and as such, cannot be assumed to correlate to the restorative justice goals of victims approaching the International Criminal Court.⁵¹⁰

⁵⁰⁶ Ibid, 216.

⁵⁰⁷ Ibid.

⁵⁰⁸ See 215 – 217.

⁵⁰⁹ Although in practice, many of the justice dimensions identified by Backer are consistent with a restorative model.

⁵¹⁰ Moreover, since the notion of justice employed was not allied to the specific mandate of the justice mechanism, while the study findings provide an indication of the extent to which victims felt that justice had been done by the TRC, they do not provide an indication of the progress of the institution in the pursuit and/or achievement of its mandate in relation to victims.

Moreover, the institution under consideration in Backer's study had tangibly different aims and objects to that of a criminal justice mechanism, and the model employed reflects the broader, societal aspects of justice which the Commission was intended to address. Finally, it should be noted that the approach taken by Backer is not itself without its shortcomings, and before a similar approach could be deployed at the ICC, adjustments and refinements to the assessment approach would certainly be required.

As an approach which is shown to be functional with the victim community, is relatively straightforward and capable of producing meaningful and readily-understandable data, however, the model has much to recommend it, and while it cannot be directly transferred to the ICC, its unique position as a tool for evaluating perceptions of substantive justice in survivors of international crimes means that it provides a useful basis upon which to consider the constituent features of an assessment tool that is appropriate to the specific forum of the Court.

With this in mind, and with a view to identifying the features of an assessment tool appropriate for application both with the victim participant community and within the specific context of the ICC, this sections goes on to examine (i) appropriate assessment parameters against which to measure victim participants' justice perceptions, (ii) how data might be collected, (iii) how to accommodate the need to correlate justice goals with victim outcomes, and (iv) an appropriate approach to the analysis, quantification and presentation of findings. Examination is conducted here by particular reference to Backer's assessment model. Notably, while Backer's study was relatively substantial in terms of participants, the number of victims engaging with the ICC is significantly higher. As a result, and with a view to rendering assessment functional in practice, proposal are made in respect of (v) operating assessment with a substantial research population. The issue of the proposed timing for assessment at the ICC is considered at (vi), and consideration of the need for a longitudinal assessment is contained in (vii). Reference is made throughout this section to the various stages of assessment indicated in figures 3.1 and 3.2.⁵¹¹

⁵¹¹ The stages in figure 3.1 are directly replicated in figure 3.2, and so reference to assessment stages here applies equally to both figures.

(i) The adoption of appropriate assessment parameters

As indicated, assessment will necessarily be conducted in relation to the specific parameters of a sense of justice in victims of international crimes.⁵¹²

Restorative justice parameters are identified in the previous chapter in relation to the consideration of the constituent elements of a restorative sense of justice in victims of international crimes, and these constituent elements also provide the basis for the identification of parameters for the purpose of a dedicated assessment tool. Evaluation is therefore required in respect of the following parameters (reframed here with a view to their inclusion in a dedicated assessment tool):

- The extent to which victims are satisfied that they have been able to tell their story;
- The extent to which victims are satisfied that they have been able to contribute to public knowledge about the abuses that occurred;
- The extent to which victims are satisfied that they have been able to publically denounce the wrongs committed against them and others;
- The extent to which victims are satisfied that they have been able to confront the accused;
- The extent to which victims feel satisfied that there has been public acknowledgment and recognition of the crimes committed;
- The extent to which victims feel satisfied that there has been public moral denunciation of the crimes committed (validation);
- The extent to which victims are satisfied that there has been public acknowledgment and recognition of the pain suffered;
- The extent to which victims feel satisfied that they have been able to pursue or achieve justice for loved ones and to bear witness on behalf of those who did not survive;

⁵¹² Para 3.2.1.

- The extent to which victims feel satisfied that they have discovered the truth about the fate of loved ones;
- The extent to which victims feel satisfied that their participation has contributed to the prevention of further abuse;
- The extent to which victims feel satisfied that their participation has contributed to broader peace goals;
- The extent to which victims are satisfied with reparations (including the receipt of an apology); and
- The extent to which victims feel satisfied that their participation has in some way eased their psychological pain.

(ii) How to collect the data: a victim survey and Likert scale?

Assessment is therefore proposed in respect of the attitudes and perceptions of participating victims in relation to their justice goals in approaching the ICC and their personal evaluations in respect of the achievement or otherwise of those goals. Recourse to psychological approaches to the assessment of attitudes is therefore appropriate. In identifying an apposite data collection approach, particular reference is also had to the need of the resulting assessment tool to be responsive to a potentially substantial research population and the suitability of any method for application with victims of international crimes.

Within psychological research, self-report methods (by which participants are asked to report upon themselves) include questionnaires, psychological or attitude scales and interviews.⁵¹³ There are distinct advantages and disadvantages to each method, and particular thought is given to these in the identification of an appropriate method for the current proposed assessment project.

The use of questionnaires enables the collection of data from a substantial research population, and provides a means of assessing and quantifying a relatively new area, including the frequency of a particular phenomenon such as the varying justice goals of

⁵¹³ Hugh Coolican, *Research Methods and Statistics in Psychology* (5th edn, Routledge 2013) 151.

victims approaching the ICC.⁵¹⁴ Questionnaires also enable researchers to identify attitudes and opinions in the research population, and to gain an insight into people's motivations and reasons for acting in a certain way.⁵¹⁵ They provide a relatively cost-efficient and resource-sensitive means of data collection,⁵¹⁶ and because they employ ostensibly closed questions, they are less arduous to complete for research participants,⁵¹⁷ less susceptible to subjective interpretative error on the part of the researcher relative to interviews, and are readily amenable to statistical analysis.⁵¹⁸

Questionnaires alone, however, may not enable the researcher to look at an issue in depth. Greater sensitivity to the research population can be achieved through the use of attitude scales, such as the Likert scale, by which respondents are able to indicate the *degree* to which a certain opinion is held, or the extent to which they agree or disagree with any given statement.⁵¹⁹ According to Hayes, consideration of combined responses to a Likert-type scale assessment enables researchers “to obtain a measure of attitude which is often quite thorough”.⁵²⁰ In addition, while questionnaires are less susceptible to problems of social desirability bias than interviews, they remain susceptible to some level of response bias, and thus require careful design and planning.⁵²¹ Moreover, there is a risk of “questionnaire fallacy”, by which researchers assume that the finite list of choices presented to the research participant within, say, a tick-box exercise, represents the full picture or range of options, with the result that they may fail to elicit data which properly represents the true experiences, motivations or attitudes of those engaged in the study.⁵²²

⁵¹⁴ The particular suitability of the questionnaire or survey in evaluating new phenomenon, including frequency of specific phenomenon, is indicated, for example, in Nicky Hayes, *Doing Psychological Research: Gathering and Analysing Data* (OUP 2000) 70.

⁵¹⁵ Ibid 71.

⁵¹⁶ Ibid.

⁵¹⁷ Hayes (n 514) 81.

⁵¹⁸ Gary Heiman, *Research Methods in Psychology* (3rd edn, Houghton Mifflin 2002) 284.

⁵¹⁹ Coolican (n 513) 173, 177 – 178; Heiman, *ibid*, 107, 110, and see also 289; Willie van Peer, Frank Hakemulder and Sonia Zyngier, *Scientific Methods for the Humanities* (John Benjamins Publishing 2012) 114.

⁵²⁰ Hayes (n 514), 93.

⁵²¹ Hayes (n 514), 70.

As a result, particular efforts are required to fully validate the instrument with selected groups of the intended research population, through, for example, the conduct of focus groups and piloting, prior to the finalisation and full administration of the questionnaire.

The conduct of interviews, on the other hand, enables researchers to elicit potentially broader information beyond the specific scope of any questionnaire and which may be more reflective of the individual's position. Even when an interview is structured around the completion of a questionnaire, it enables the researcher to clarify any questions for the participant where necessary, react to any additional information that the participant provides that is of potential relevance to the research itself, and to ensure that the questionnaire is completed as required.⁵²³ The reliability of data generated within the interview may, however, be affected by the interpersonal dimensions and dynamics of the interview itself, including the levels of trust/mistrust between the research participant and the interviewer, and participants may find the completion of anonymous questionnaires a less threatening experience. Moreover, problems of social desirability bias are heightened relative to the conduct of questionnaires, while interviews are relatively time-consuming and resource-heavy to carry out, potentially limiting the size of the intended research population and hence the extent to which the findings are representative of the victim participant community as a whole.

In light of the need for the intended assessment tool to be both responsive to a substantial research population and efficient in terms of cost and resources, the adoption of a questionnaire/survey, which in turn incorporates an attitude scale, is favoured in this instance.

Although the process is used within a different context to the ICC, Backer's employment of a five-point Likert scale victim survey has much to recommend it to an assessment of participating victims' justice perceptions at the ICC. The use of a Likert scale is common in psychological research,⁵²⁴ including that involving victims of international crimes who

⁵²² Heiman (n 518) 285; Hayes (n 514) 81.

⁵²³ See, for example, Heiman (n 518) 286.

⁵²⁴ See, for example, Colin Dyer, *Beginning Research in Psychology: A Practical Guide to Research Methods and Statistics* (5th edn, Blackwell 2001) 130 – 136; David Elmes, Barry Kantowitz and Henry Roediger III, *Research Methods in Psychology* (8th edn, Thomson Wadsworth 2006) 182 – 183; C. James Goodwin, *Research in Psychology: Methods and Design* (4th edn, Wiley 2005) 414 - 415.

are engaging with a criminal justice tribunal.⁵²⁵ Significantly, the assessment approach is already familiar to staff at the International Criminal Court, since the study undertaken by researchers from Berkeley University into witnesses' experiences of the processes and services of the Court similarly employs a five-point Likert Scale survey. Further, the Berkeley, Backer and Horn studies all indicated that it is an effective means of assessing the views of victims of international crimes.

Finally, as a simple and straightforward means of assessment, the approach can be understood by both victims and those engaged in the physical collection of the information required, whilst providing clear and relevant information to the Court and States Parties.

As indicated above, however, the approach is not without its shortfalls. The problem of questionnaire fallacy can be reduced through the prior exploration with groups of participating victims of justice parameters contained in the instrument, in order to ensure that the list is complete (validation),⁵²⁶ discussed further below, at para. 3.6.1.(iii). The issue of social desirability bias is also considered further, at para. 3.6.3.

In addition, the adoption of a questionnaire or survey as a data collection technique presupposes capacity in the victim to understand and complete the instrument with no or little assistance. Participating victims will, of course, approach the Court with varying levels of education and degrees of literacy. Careful drafting, piloting and redrafting of the questions to be included in the survey can reduce these difficulties,⁵²⁷ but will inevitably increase the lead-in time prior to the full administration of the instrument, discussed below at para. 3.6.1.(iii). Particular care is also required in this regard in order to ensure that any measure employed in the intended attitude scale is meaningful within the cultural population, a factor that is considered in more detail below, at para. 3.6.1.(iii). It is, however, feasible that full administration of the questionnaire will require the presence of an interviewer (such that the tool is effectively completed as an oral questionnaire within the context of a structured or semi-structured interview) or otherwise require additional

⁵²⁵ See Horn and others (n 327). The five-point scale questions were completed by victim-witnesses during structured interviews with Court staff, 140 – 141.

⁵²⁶ Explored further in van Peer and others (n 519), 86 – 87, in the specific context of focus groups.

⁵²⁷ See, for example, Heiman (n 518) 293 – 294; Hayes (n 514) 75 – 76.

input through, for example, engagement with intermediaries involved in assisting in the completion of participation applications, or, for example, through interaction with relief agency staff operational within the affected area.⁵²⁸ Such a position is likely to become apparent on piloting the instrument, and may impact upon the size of the research population under investigation.

Finally, it should be acknowledged that there is some debate in the literature as to whether attitudes can be quantified or whether qualitative approaches to psychological research are solely appropriate to evaluation of human experience. It is beyond the scope of this research to engage in depth with this debate.⁵²⁹ It should be noted, however, that while the approach adopted here is quantitative in nature, its content is informed by prior qualitative study, and it is envisaged, through the process of validation and piloting, that the content of the instrument will be refined to best reflect the victim participant experience as far as possible through a more limited qualitative approach. Moreover, it is likely that the findings of the research may themselves give rise to further and more in-depth qualitative study.

Any additional limitations of the proposed assessment tool are considered broadly below at para.3.6.3.

The identified assessment approach is indicated in figures 3.1 and 3.2 at Stages 2 and 3.

(iii) Correlating individual aims to outcomes

As an unavoidable consequence of the retrospective nature of Backer's study, the survey does not include an initial assessment of victims' justice goals in approaching the Truth Commission, and as a result, there is no prospect for any subsequent correlation of victims' psychological outcomes to the realisation or otherwise of specific justice goals.

In order to respond to this problem in the specific context of the ICC project, the assessment of victims' justice perceptions at the ICC would require a modification to

⁵²⁸ Such an approach was adopted, for example, by Brouneus in her study of victims of international crimes in Rwanda, see Brouneus (The Trauma of Truth Telling) (n 31), 415 – 6, where the survey was administered by staff of the International Rescue Committee.

⁵²⁹ The debate is described, for example, in Coolican (n 513) 48 – 53; van Peer and others (n 519); Hayes (n 514) 96.

Backer's model to include an additional data collection stage involving the ascertainment of participants' specific justice aims in approaching the Court, [Stage 2]. This would ideally take place at an early stage of victims' participation, and data could be gathered by reference to a checklist of possible justice goals, indicated in (a), above, and might be sought either via the Court's application form for participation or during the early stages of communication with the victim's legal representative. Subsequent assessment in respect of the achievement of the various elements of a restorative sense of justice could then be confined to the specific aims identified by the victim during the initial stages of their participation, [Stage 3].

(iv) Analysing, quantifying and presenting findings: a Victims' Justice Index for the ICC?

The development of justice scores as indicators of the degree of participants' satisfaction in respect of the various individual justice parameters would provide clear, unambiguous and readily-comprehensible data in relation not only to the achievement or otherwise of the Court's restorative mandate, but the various respects in which there is any restorative shortfall. Such an approach would therefore be consistent with, and appropriate to, the proposed assessment of victims' justice perceptions at the ICC. With this in mind, it is necessary to consider how a "Victims' Justice Index" might be approached and produced in the specific context. (Stages 4 and 5)

Again, the approach adopted by Backer provides the basis for this consideration. Specific modifications to Backer's model are proposed to respond to the differing assessment contexts and in light of the features of an ICC assessment model indicated so far. Refinements are also suggested to accommodate specific findings emanating from clinical research relating to victims' justice aims for judicial engagement, as well as to enhance the potential for accuracy in the assessment results.

Notably, in the absence of identified initial justice aims in victims, Backer proceeds on the basis that each of the justice dimensions identified in the survey applies to all of the victims. This assumption is not, however, borne out by psychological research into the justice goals of victims of international crimes. Stepakoff, for example, in her examination of the justice needs of victims appearing before the SCSL, notes that while about three-

quarters of respondents approached the Court with more than one justice aim, the majority of victims had only between two and four aims in total.⁵³⁰

A failure to accommodate this factor in the ICC assessment may skew the findings, such that any resulting justice score might not necessarily reflect the justice perceptions of participating victims. Where, for example, a victim felt that the Court had failed to realise a particular justice dimension, if the dimension in question did not reflect a need of the individual concerned, its non-achievement, it is suggested, would have little or no bearing on the victim's perception of the achievement or otherwise of a sense of justice in relation to the Court more broadly. As a result, and as indicated above, evaluation of participation experiences in the context of the ICC should be conducted only in relation to those justice aims expressly identified by victim participants as their motivation for engagement with the Court. A justice score in respect of the individual justice parameter can therefore be achieved by the production of a simple average, wherein the composite score for a specific parameter is divided by the number of participants for whom that parameter comprised a justice need.

While confining assessment to those justice aims specifically identified by victims provides an efficient and more reliable means of evaluating the achievement of a sense of justice in participants, however, it also impacts upon the subsequent production of an aggregate justice index for the Court.

Notably, Backer proposes the establishment of an aggregate justice index by a simple averaging of the scores in the case of each justice dimension. Given his approach, the group size of victims responding to the assessment in respect of each justice dimension is equal, and hence a simple averaging approach is not problematic. Where, however, assessment has been sought only in relation to those justice aims identified by the victim during the initial data collection stage, it is highly likely that the resulting scores in respect of the various justice parameters will represent varying numbers of victim participants, with the possibility that a substantial number of participants are represented by some parameters, while relatively few are represented by another. In such a case, the production of an aggregate "Victims' Justice Index" for the Court by simply averaging the various scores is inappropriate, since it would fail to reflect the varying group sizes as between the parameters. In order for the resulting victims' justice index to more accurately reflect the

⁵³⁰ Stepakoff and others (n 380) at 17, 22.

experiences and views of participants, it is therefore appropriate to apply weighting to the various scores prior to the production of an aggregate average. This, in turn, can be done by multiplying each score by the proportion of participants, as a fraction of the study sample, in respect of whom the parameter constituted a justice need. An aggregate Victims Justice Index can then be produced by adding the resulting weighted scores for each parameter.

In addition to the assumption that all dimensions apply to all victims, in assessing victims' perceptions of their achievement of justice before the TRC, Backer apportions equal weight to each of the justice dimensions. It is likely, however, that within the range of justice aims identified by a victim, some are more pressing or important to the participant than others, with the result that, while the non-realisation of some aims may be no more than a disappointment to the victim, producing a limited effect on the overall achievement of a sense of justice, a failure to achieve others may be catastrophic for any perception in the victim of justice having been done. Notably, while the weighting of scores to better reflect the respondent base in relation to specific parameters, discussed above, is relatively straight forward, the introduction of further weighting to reflect justice priorities is more complicated, and practical development of the assessment tool in this regard will require the input of a statistician to inform the appropriate approach. It is likely, at least, however, that during the initial data collection stage victims will need to indicate, where possible, any justice priorities amongst the identified aims, or to rate their aims. These priorities could then form the basis of weighting, thereby improving the ability of the resulting scores to accurately represent victims' justice perceptions.

(v) Operating an assessment with a substantial research population

It should be acknowledged that in light of the very substantial number of victims participating in proceedings before the ICC, a full assessment of all participants is unlikely to be feasible. Recourse to sampling would therefore be appropriate. The sample must, of course, be carefully constructed in order to maximise the applicability of the assessment findings to the victim participant population as a whole. In order to ensure that the sample is as representative as possible, a cross-sectional, random approach would be appropriate. Moreover, greater transferability of findings might be ensured by the prior breakdown of the victim participant community by the demographics of the population, and potential subjects randomly identified from within those strata, [Stage 1].

Notably, the use of a sample also introduces the possibility for sampling error, due to possible random differences between the selected sample and the victim participant population more broadly, although the scale of this error can be minimised by ensuring that the sample used is itself substantial. To this end, a sample of at least 1,000 victim participants would, it is suggested, be appropriate in the first instance,⁵³¹ although notably, a rolling recruitment to the study would be ideal in terms of ensuring adequate victim participant representation within the study sample in respect of the various cases before the Court, as well as to enable year-on-year review, considered below. Sampling may also, however, introduce the potential for systematic error, where, for example, response rates in participants vary and the sample becomes, to some extent, self-selecting. It may be, for example, that participants with certain types of justice needs are more inclined to respond to an approach to become engaged in the assessment. Where it is not possible to establish whether there is or is not a relevant difference between participants who chose to engage with the assessment and those who do not, and where any active encouragement of greater engagement proves unsuccessful, this systematic error must be formally acknowledged as a limitation to the interpretation of assessment findings

(vi) Timing of Assessment

The timing of the assessment of victims' justice experiences in relation to their initial justice aims and the production of parameter-specific scores [Stages 3 and 4] determines the point at which information becomes available to the Court concerning its progress in the realisation of its victims' mandate, and hence dictates when it is in a position to make adjustments and refinements to its victim-focussed actions. There are three options in this regard: (1) assessment is directly allied to the specific case in which participating victims are engaged, and occurs at an appropriate stage of the case; (2) assessment is conducted on a rolling basis, and specific evaluation in relation to initial justice aims occurs at a regular, predetermined time; and (3) a combination of (1) and (2). These options are considered further below.

Option 1: In terms of the physical assessment process itself, allying assessment to a specific case has its advantages, and is relatively straightforward. Recruitment to the

⁵³¹ Similar size samples were employed, for example, in Basoglu and others (n 326), involving 1,358 participants, and Brouneus (The Trauma of Truth Telling) (n 31), involving 1,200 participants, indicating that the proposed sample size is feasible in terms of conducting the assessment, and large enough to provide meaningful data.

assessment would ideally take place when or soon after victims have been granted participant status, and their specific justice hopes identified at that stage, [Stages 1 and 2]. Assessment of victims' experiences in relation to those justice aims [Stage 3] would then naturally arise at the close of trial proceedings, and follow-up could be conducted, for example, when the Chamber has reached a decision concerning the guilt or innocence of the accused, in the aftermath of any reparations award and/or after a predetermined period, in order to assess the extent to which any restorative benefit allied to participation has been affected by outcomes of the trial, or has otherwise endured as time has passed.⁵³² The Victims' Justice Index would therefore relate to the experiences of victims participating in the specific case, and would provide a clear indication of whether victims in that case had achieved a sense of justice.

The approach is not without its problems however. In particular, while the approach described above would give a clear indication of the realisation or otherwise of restorative justice elements for victims, it will be a long time from the point at which participant status is granted before meaningful results are obtained, and for those victims involved in the case, at least, any adjustments made by the Court to its victim-focussed actions and services may be too late to significantly affect or improve their own prospects of achieving effective and meaningful participation. Moreover, there is a danger that areas of restorative shortfall may be case-specific, and so the transferability of assessment findings to other cases before the Court may be limited. While, therefore, a case-by-case approach will enable the production of a clear and meaningful Victims' Justice Index in respect of the case in question, the approach also limits the potential of the Court to monitor and revise its approach to victim engagement on an ongoing basis for the specific benefit of the victims participating in the case itself.

Option 2: In contrast, an assessment approach that involves regular evaluation of victims' justice experiences has the potential to provide data to the Court on its progress in respect of its restorative mandate, and hence enable a timely and responsive ongoing review of actions relating to victim engagement. Recruitment and initial data collection [Stages 1 and 2] would occur in the same way as in option 1, but the evaluation of victims' perceptions of justice [Stage 3] would occur instead on a cyclical basis, such as annually. Ongoing assessment will better enable an evaluation of the participative journey itself,

⁵³² The need for a longitudinal approach to assessment is considered further below, at para 3.2.2.(vii).

and enhance the ability of the Court to understand the restorative “ups and downs” of participants within that journey. Moreover, ongoing assessment of this form will provide an indication of how and at what stages of a case restorative goals might be achieved, as well as revealing what, for the participant, remains outstanding in terms of their restorative ambitions for the Court. Finally, given the length of trials before the ICC, annual assessment will enable consideration of the extent to which victims’ perceptions in respect of specific justice parameters change throughout their participative journey.

Again, however, the approach is not without its problems. In particular, participating victims will be at varying stages of their participative journeys, depending upon the cases in which they are engaged, and in many cases, the opportunity to realise certain restorative goals, such as testimony or reparations, may simply not have arisen at the point of assessment. Moreover, while annual assessment would enable the production of a year-on-year Victims Justice Index, the Index itself may become less meaningful where the participative journey for the victim is not itself complete.

As a result, and as means of responding both to the various advantages and shortfalls in the two approaches described above, a combination of options (1) and (2) is proposed for the purpose of assessing victims’ justice perceptions at the ICC. Under a combined approach, Stages 1 and 2 of the assessment would be conducted as indicated above for options 1 and 2. Annual assessment in respect of the justice parameters identified in Stage 2 would be conducted, ostensibly for internal reference and use [Stages 3 and 4 (prior to the application of weighting)], as a means of discerning progress in respect of the innovative mandate, enabling the responsive adoption of refinements and adjustments to victim-focussed actions during the participative journey, and a formal assessment [Stage 3] and production of a Victims’ Justice Index [Stages 4 and 5] produced on a case-by-case basis at the close of trial proceedings (and subject to follow-up).

(vii) Temporal scope: assessing enduring impact

Finally, it should be noted that external factors beyond the control of the Court may affect the ability of the victim to achieve effective and meaningful participation,⁵³³ and those external factors may continue beyond the victim’s participation experience. In addition, it is certainly feasible that any positive psychological impact in the victim may be mediated

⁵³³ Discussed substantively below, at para 3.4.8.(i).

by subsequent outcome measures of the judicial proceedings, including the judgment of the Court in relation to the Defendant's responsibility for the crimes charged, or the award of any reparative measures. In order to consider the extent to which, if at all, any restorative sense of justice in the victim endures beyond the participatory experience, a longitudinal approach to the assessment is therefore appropriate.

At a practical level, however, post-participation follow-up in the context of the ICC may be problematic in some instances. Security concerns for the victim may prevent researchers or Court officials from approaching them, and where participants live in unsafe areas, travel to them may not be possible. In their survey of the testimony experiences of 109 witnesses appearing before the ICC, both Berkeley researchers and Victims and Witnesses Unit ("VWU") staff reported that, in some cases, individuals had changed their contact details without notifying the Court,⁵³⁴ had no 'phone or simply could not be reached by road, while witnesses who lived a considerable distance from urban centres were not contacted for any follow-up survey, either because travel to meet researchers in urban centres was deemed to be too arduous for the individual, or because of resources were limited.⁵³⁵

Inevitably, therefore, the number of victims responding to a follow-up survey will be fewer than those engaging with the initial assessment, and given the potential exclusion of participants living in unsafe areas or those beyond urban centres, the follow-up sample may not be truly representative. Despite the potential limitations of a follow-up survey of victims, however, a longitudinal approach remains important to any thorough and complete assessment of the participation experience and the achievement of a restorative sense of justice for victims.

3.2.3. Summary of process and some concluding thoughts on Phase I assessment

Adaption of Backer's assessment model to reflect the differing legal fora of operation, to incorporate additional knowledge available from the clinical field and to better enhance accuracy and reliability of assessment findings provides a clear framework for the assessment of the achievement or otherwise of a restorative sense of justice in victims

⁵³⁴ A similar problem was identified by Horn and others (n 327) 142, 148.

⁵³⁵ Berkeley School of Law (n 15) 17.

participating in proceedings before the ICC. In particular, the assessment approach is shown both to be effective with substantive research populations and applicable to victims of international crimes, including those of mass victimisation. The proposed assessment method is indicated diagrammatically below.

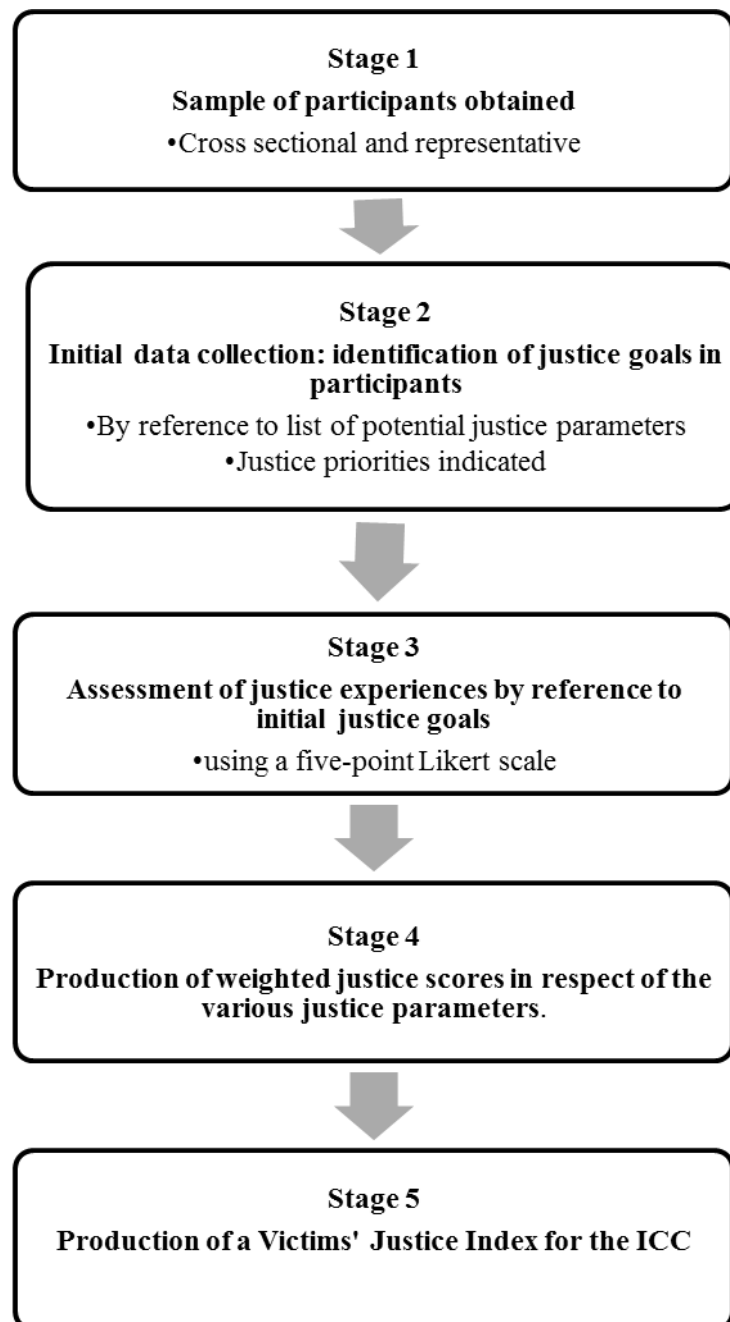
The proposed approach to Phase I of the assessment of victims' justice perceptions at the ICC, and in particular, of the extent to which participants have been able to achieve a sense of justice by virtue of their engagement with the Court, will provide a clear indication, through cyclical evaluation and the generation of a case-by-case Victims' Justice Index, of the Court's progress in the pursuit of its innovative mandate. Moreover, the production of specific justice scores in respect of each justice parameter will provide tangible markers of any specific areas either of best practice or restorative shortfall.

Notably, however, the integration of a restorative function within the statutory framework of the Court, it is argued, requires the Court to do more than simply observe the various respects in which its current practice does or does not fulfil its remit in respect of victims. Instead, in order to render the provisions operational in practice the Court must work proactively towards the achievement of its innovative mandate. This in turn will require an understanding not only of any particular areas of restorative shortfall indicated by virtue of Phase I of the assessment process, but also an appreciation of the reason(s) for that shortfall. This will thereby enable specific, targeted and evidence-based adjustments to the Court's victim-focussed actions,⁵³⁶ and so ensuring the most cost-efficient approach to the achievement of its innovative remit whilst simultaneously operating in the best interests of participating victims. A number of illustrative examples of areas where such adjustments might be made (subject to assessment findings) are included below.

With this need in mind, the aim of Phase II of the assessment is to examine and identify the reason(s) for any failure in the achievement of a sense of justice in participating victims.

⁵³⁶ Any adjustments will, of course, need to operate within the ambit of the Rome Statute.

Figure 3.1: Phase I assessment



3.3 Phase II of the assessment: Considering factors with the potential to affect realisation of the Court's restorative mandate

3.3.1. Introduction

As already noted,⁵³⁷ we know relatively little about why some victims are able to achieve some form of positive psychological benefit from their engagement with a judicial mechanism while others are not. There are, however, a number of variables, including those which are specific to the ICC, which may have the potential to negatively affect the ability of victim participants to achieve positively restorative participation. An examination of victims' experiences of these variables with particular reference to any areas of restorative shortfall indicated in Phase I of the assessment will provide a means of identifying those factors responsible for, or contributory to, any shortfalls in the achievement of effective and meaningful participation, thereby providing an opportunity not only for the Court to understand the reasons for any failure in respect of its victims' mandate and to adjust or revise its processes or practices accordingly, but also, at a broader level, to address a considerable knowledge gap in international transitional justice literature.

With this in mind, this section seeks to examine a range of variables which may negatively affect the achievement of effective and meaningful victim participation, and in respect of which data collection and analysis is required for the purpose of Phase II of the assessment process. The section begins with a brief consideration of the current state of knowledge in respect of factors affecting victims' experiences of judicial engagement, indicating the scale of the current knowledge gap in this area. A combined Phase I and Phase II proposed assessment process is represented diagrammatically below, at 3.5 (figure 3.2) and reference is made in this section to the various assessment stages indicated therein as a means of positioning the variable within the broader assessment framework..

3.3.2. The current state of knowledge

While legal literature contains a number of assumptions concerning factors with the potential to affect victims' achievement of positive engagement with the judicial

⁵³⁷ Para 2.2.2.

mechanism in question,⁵³⁸ there has been very little empirical investigations and verification of those assumptions in the literature,⁵³⁹ and there is no reference to findings emanating from other disciplines to support them, indicating a gap in legal knowledge in this regard.

Significantly, however, the issue has been the subject of some, albeit limited, clinical exploration within the specific context of international transitional justice, including in relation to international criminal justice mechanisms. Recourse to relevant clinical studies is therefore appropriate in this instance, providing an alternative means of addressing a knowledge gap, and of assessing the current state of knowledge in respect of variables with the potential to affect the achievement of a restorative sense of justice in victims participating in proceedings before the ICC.

Notably, although clinical research in this area is still developing, a number of possible variables have been empirically assessed in relation to victims of international crimes, and several of those have been discounted as factors impacting upon positive engagement with the mechanisms concerned. Those factors considered to date, together with the outcomes of that consideration, are briefly outlined below:

Both Kaminer and others, in their assessment of the impact on 134 victims of giving testimony to the South African Truth and Reconciliation Commission, and Brouneus, in her assessment of the experiences of 1,200 Rwandans of witnessing in the country's *gacacas*, found that neither the age of the victim nor their religion had any bearing on their propensity to evaluate their justice experience as either a positive or negative one. A similar conclusion in respect of the victim's age was reached by Horn and others, in a study of the testimony experiences of 171 witnesses appearing before the Special Court for Sierra Leone.⁵⁴⁰ In addition, Brouneus, in assessing for levels of education and

⁵³⁸ Including, for example, unrealisable goals for engagement and the need to manage victims' expectations, discussed substantively below, at para 3.4.2.

⁵³⁹ With the exception of a gender variance, identified in Berkeley School of Law (n 15), within the specific context of procedural justice, and discussed further below, at para 3.4.6.

⁵⁴⁰ Horn and others (n 327) 146-7. Notably, the researchers do not indicate in what respect the witnesses might experience testimony as positive or negative, and while the researchers concerned are clinicians, the experiences are not described or otherwise presented in clinical, therapeutic terms.

economic expenditure as possible impacting factors, found no significant correlation in either case with the victim's assessment of their testimony experience.⁵⁴¹ The length of time spent by victims on the witness stand and the party for whom they appeared were also found not to influence the propensity of the victim to rate their experience either positively or negatively.⁵⁴²

Notably, both the Kaminer and Brouneus studies found that the nature, extent or degree of abuse suffered by the victim had no subsequent impact on how they evaluated their experience of engagement.⁵⁴³ Moreover, the study conducted by Horn and others found that the extent to which victims found the experience of testifying to be a painful one did not significantly affect their appraisal of the testimony experience as being either positive or negative.⁵⁴⁴

Significantly, researchers in the Kaminer study identified a differential in the way in which men and women victims evaluated their experiences of engagement with the South African Truth and Reconciliation Commission,⁵⁴⁵ and a similar gender disparity was seen in the study conducted by Stepakoff and others into the testimony motivations of victims appearing before the SCSL.⁵⁴⁶ Gender as a potential affecting variable in the context of the ICC is therefore considered in further detail below in the specific context of assessment at the ICC.⁵⁴⁷

In addition, researchers in the Horn study found that victims' propensity to evaluate testimony positively or negatively was affected by the extent to which they felt respected

⁵⁴¹ Ibid.

⁵⁴² Ibid, 146.

⁵⁴³ Kaminer and others (n 331) 375; Brouneus (The Trauma of Truth Telling) (n 31) 425 – 426.

⁵⁴⁴ “Painful” in this respect refers to an experience that was upsetting for the victim, and should be distinguished from an experience that was “traumatic”, the latter being clinically significant in terms of the victim's psychological health. The distinction between painful and traumatic engagement is discussed further below, at para 3.4.7.(ii)(b) in the context of psychologically detrimental testimony.

⁵⁴⁵ Kaminer and others (n 331) 376.

⁵⁴⁶ Stepakoff and others (n 380) 19.

⁵⁴⁷ Para 3.4.6.

and supported by Court staff, as well as by the degree to which they felt they had been adequately prepared for testimony. Both of these elements comprise aspects of procedural justice, indicating some level of correlation and dependence between victims' perceptions of a fair and respectful process and their achievement of a restorative sense of justice.

The role of procedural justice as an enabling factor in the achievement of a restorative sense of justice in victims participating in proceedings before the Court is also considered in more detail below.⁵⁴⁸ It should be noted here, however, that while the study by Horn and others indicates that the achievement of procedural justice elements can affect a victim's positive or negative evaluation of their restorative engagement with the Court in question, the impact was not a substantial one.⁵⁴⁹

Perhaps of most significance to any consideration of why some victims experience judicial engagement positively while others do not, however, is the amount of the variance between victims' self-assessed experiences which remains unaccounted for in empirical assessment to date. Notably, in the Horn study the authors employed ten potential affecting variables in their efforts to explain and account for the diverse and disparate range of experiences in the achievement or otherwise of psychologically positive engagement: gender, age, the party for whom the victim was appearing, the length of testimony, the extent to which the victim was worried about giving testimony prior to the event, the level of support given to the victim, the extent to which the victim found testimony to be a painful experience, the extent to which the victim felt respected by Court staff, the victim's evaluation of their experience of examination-in-chief, and the victim's evaluation of their experience of cross-examination.⁵⁵⁰ Significantly, the combined potential variables, including those elements of procedural justice identified above, were found to account for just 20% of the variance between victims.⁵⁵¹ The study conducted by Horn and others therefore highlights in stark terms the scale of the current knowledge gap in this area.

⁵⁴⁸ Para 3.4.8.(i).

⁵⁴⁹ Horn and others (n 327) 146, and thereby highlighting the inadequacy of a purely procedural approach to the assessment of victims' participation experiences.

⁵⁵⁰ Horn and others (n 327) 144 and throughout.

⁵⁵¹ Horn and others (n 327) 146.

With this in mind, and in order that the Court is better able to understand and respond to the reasons for any shortfall in the achievement of its restorative mandate, it is necessary to consider alternative and additional variables which have the potential to affect the ability of victims to achieve effective and meaningful participation at the ICC.

Notably, in order that any positive or negative psychological impact is correctly attributed to a potentially impacting variable, it is important that the range of variables employed in the assessment is complete, or at least, as complete as the assessment process and judicial context will allow. A wide range of variables for inclusion within the assessment framework are therefore explored in the following section. Potential variables include: (3.4.1.) the extent to which the failure to achieve non-restorative justice goals affects the achievement of a restorative sense of justice in victims, (3.4.2.) the degree to which victims' justice expectations have been effectively managed by the Court, (3.4.3.) difficulties in the realisation of a sense of justice posed by both the exercise of prosecutorial discretion and (3.4.4.) the narrow, forensic focus of the Court, (3.4.5.) obstacles engendered by the substantive number of victims participating in proceedings before the Court, (3.4.6.) potential gender differentials, (3.4.7.) barriers which arise as a result of the psychological health and wellbeing of the participating victim and (3.4.8.) the context within which participation occurs for the victim, incorporating in turn both the specific context of the Court and the adequacy of its processes, as well as the broader, external context within which the participant lives.

In a number of instances, the proposed potential variable is readily evident in available literature but remains subject to empirical validation and hence exists, at present, purely as an unproven hypothesis.⁵⁵² Moreover, while there may be speculation in the literature that variables may operate to inhibit the achievement of psychologically positive engagement in the victim, the variable itself may be undeveloped in terms of how it might be evaluated in practice.⁵⁵³ In other cases, the variable in question may be beyond the control of, and

⁵⁵² Such as the need to manage victims' expectations or the exercise of prosecutorial discretion, discussed below at paras 3.4.2. and 3.4.3.

⁵⁵³ Including, for example, assessment in respect of the forensic focus of the Court, at para 3.4.4. and the exercise of prosecutorial discretion, at para 3.4.3.

external to, the Court, and thereby operate as a limiting factor in the achievement of restorative participation.⁵⁵⁴

Specific gaps in knowledge are identified throughout the course of the following section, and areas in which the resulting instrument has the potential to contribute to the development of theory and practice are indicated, including in relation to the potential impact of the variable on Court practice and reform. Recommendations are made on how specific data in respect of potential variables might be gleaned in the particular context of the ICC. Finally, it should be noted that the inclusion of elements which relate to the psychological health of the victim participant evidences the need for an interdisciplinary approach to assessment.

3.4 Considering alternative affecting variables

3.4.1. A lack of justice in respect of non-restorative justice parameters

While the nature and focus of victim-oriented action within the Court is naturally delimited by the provisions of the Court's constituent documents, its restorative mandate and its processes, victims' personal justice aims and expectations are not similarly constrained, and it is conceivable not only that some of the victims' justice needs fall outside of the restorative ambit of the Court, but also that the non-realisation of these additional justice needs will impact upon victims' perceptions of substantive justice through their engagement with the Court. These additional justice goals thereby comprise variables with the potential to affect the achievement of a restorative sense of justice in victim participants.

With this in mind, and in order to better inform our understanding of why a sense of justice impact may have been achieved in some cases but not in others, the assessment tool should reflect the full range of victims' justice goals, rather than only those which are consistent with restorative justice theory and the Court's restorative mandate.⁵⁵⁵ In addition to assessment parameters identified for the purpose of Phase I assessment,

⁵⁵⁴ Such as the external context of participation, at para 3.4.8.(ii).

⁵⁵⁵ Backer did not do this in his study of victims' justice experiences of the South African Truth and Reconciliation Commission, which may explain some of the variance found in the study.

therefore,⁵⁵⁶ and by reference to the list of aims of victims in approaching an international criminal justice mechanism more broadly,⁵⁵⁷ the following parameters should be included in the assessment tool and victims' aims in respect of them identified during the initial data collection stage, [Stage 2].

- The extent to which victims are satisfied that they have achieved a form of revenge;
and
- The extent to which victims feel satisfied that their participation has contributed to the prosecution and/or punishment of the accused.

A bivariate analysis of assessment outcomes [Stage 3] of those victims who both identified and failed to achieve a non-restorative justice goal and those for whom non-restorative aims were not indicated will provide basic data on the possible impact of the non-realisation of non-restorative justice goals on the achievement of a restorative sense of justice in participating victims.

3.4.2. Victims' pursuit of unrealistic aims and the management of expectations

It is reasonable to assume that the potential for effective and meaningful participation will be enhanced where the victim's justice goals in approaching the ICC are reasonable, realistic and achievable in the specific context. The natural extension of this hypothesis is that the effective management of expectations by the Court will enhance the potential for positive, restorative engagement in accordance with the Court's innovative victims' mandate.

Research in to the experiences of victims approaching international criminal justice mechanisms has found that the justice aims of victims may exceed the ambit of what the judicial institution in question is able to provide within its mandate, and study authors have cautioned the need for the Court concerned to proactively manage the expectations of victims seeking to engage with it.⁵⁵⁸ However, as already indicated, there is no research

⁵⁵⁶ Para 3.2.2.(i).

⁵⁵⁷ At para 2.3.1.(iii) and 2.4.3.(ii).

⁵⁵⁸ See, for example, Kirchenbauer and others (n 15) 46; Berkeley School of Law (n 15) 5.

which seeks to correlate victims' experiences of judicial engagement with their initial expectations in approaching the institution, and this is the case whether or not those initial expectations were realistic. As a result, the extent to which a victim's unrealistic or unachievable justice expectations negatively affect or otherwise exacerbate any resulting shortfall in restorative impact is unknown, indicating a knowledge gap.

Conversely, the extent to which any outreach activities of the Court aimed at the management and containment of victims' justice expectations enhances the achievement of psychologically positive engagement is similarly unknown. Notably, while authors have indicated a need for victims' justice aspirations to be contained within the ambit of what the Court in question is able to provide, studies to date of victims' experiences have failed to consider their findings in the light of any practical attempt by the Court to manage victims' expectations, or to otherwise consider the extent to which victims have been exposed to activities aimed at tempering overly-ambitious aims.⁵⁵⁹ As a result, while the hypothesis that the management of victims' expectations will positively affect the ability of victims to achieve effective and meaningful participation seems a reasonable one, it has not been tested empirically, and as a result, the extent to which victims' justice goals are susceptible to activities aimed at their management and limitation is unclear. Moreover, this limitation is replicated within broader transitional justice literature, thereby indicating a knowledge gap in the context of international criminal law in particular, and international transitional justice more generally.

Within the specific context of the ICC, the potential for overly ambitious, unrealistic or unachievable expectations amongst participating victims, and the allied prospect for victims' disappointment and disillusionment in light of the Court's failure to realise those expectations, is manifest, and specific examples of this are discussed below.⁵⁶⁰ Ultimately, it is argued here, the problem of unrealistic and/or unachievable justice expectations in victims stems from the failure of the Court to expand upon the notion of restorative justice

⁵⁵⁹ See, for example, Stover and others (Confronting Duch) (n 16); Kirchenbauer and others (n 15) 6, although notably, the follow-up study is not yet underway, and it is hoped that researchers will seek to analyse their findings in relation to victims' initial expectations.

⁵⁶⁰ Including the extent to which charges reflect harm suffered and the exercise of prosecutorial discretion, para 3.4.3., limitations to the achievement of restorative goals posed by the Court's forensic focus, para 3.4.4., and the extent to which individual goals, including testimony, are realisable in light of the large number of victims participating in proceedings before the Court, para 3.4.5.

within the specific context, and as a result, it has come to mean all things to all people. In fact, it is feasible, at the very least, that in creating a distinct, victim-focused role for survivor participants, justice expectations amongst victims approaching the ICC are higher than those of victims when approaching a traditional, retributive mechanisms, thereby exacerbating the potential for victim disillusionment, and so rendering activities aimed at containing justice aspirations of particular significance.

The first step in any effective management of expectations in participating victims approaching the ICC is, of course, to understand precisely what those expectations comprise, and this is the goal of Phase I of the proposed assessment tool. An appreciation of the nature and scale of unrealistic and/or unachievable justice goals within the victim participant community will therefore provide the focus for the Court's Outreach Unit in the conduct of specific and targeted activities aimed at the management of victims' aspirations, thereby enabling an effective and cost-efficient approach which simultaneously operates to the potential benefit of victim participants. At the same time, knowledge of victims' goals of their engagement with the Court will enable the production of more specific web content (where victims have access) in terms of both what the Court hopes to achieve for victims and, crucially, what is beyond the scope of its operation, as well as informing and framing initial discussions between victims and their legal representatives, including at dedicated meetings convened by Common Legal Representatives.

In addition, an understanding of the extent to which victims have been exposed to both formal and informal activities aimed at managing expectations will enable a basic assessment by the Court of the effectiveness of those activities in relation to the achievement of its restorative mandate, including an indication of the extent to which, and how, victims' justice goals are susceptible to limitation in practice.⁵⁶¹

The assessment process should therefore seek to verify two specific hypotheses: (i) that activities aimed at the management of victims' expectations will result in the articulation of more moderate justice goals; and (ii) that the management of expectations in victims improves prospects for positively restorative engagement.

⁵⁶¹ At present, there is no assessment of the effectiveness of the Court's activities in the management of victims' expectations.

With this in mind, the assessment process should explore with victims the extent to which they have been exposed to, and influenced by, formal or informal activities which seek to affect and contain their justice aspirations. Such activities might include victims' attendance at any dedicated outreach meetings, any discussions or collective meetings held with their legal representative, members of their team or intermediaries, and any meetings with other Court personnel, including staff within the VPRS and VWU, concerning their justice hopes. Assessment should also encompass the extent to which victims have received, read and understood Court literature relating to the ambit of its restorative mandate, including any information contained on the Court's website, where accessible to the victim.

To this end, in addition to ascertaining participating victims' justice aims in approaching the ICC at the initial data collection stage, information should simultaneously be sought, again through the structured interview and/or questionnaire, to assess victim participants' exposure to identified activities aimed at the management of their justice aspirations, [Stage 2]. Prior liaison with the Court's Outreach unit, together with representatives of the VPRS, VWU and the victims' legal representatives, would enable the identification of specific examples of literature or activities aimed at containing victims' justice goals, and participants' exposure to these, including their understanding of the materials, thereby assessed by reference to 'tick-box' or 'yes/no' questions in relation to each activity or piece of literature. The degree of victims' understanding of these can be assessed in turn by reference to a five-point Likert scale. Participating victims should also be asked to indicate whether and to what extent those activities led them to modify their justice aspirations, and again, this can be conducted by reference to a five-point Likert scale.⁵⁶²

A simple bivariate analysis of the justice goals of victims who have been exposed to activities aimed at the containment of their aspirations and those of victims who have not will provide, at a basic level, an indication either of the extent to which the Court's activities have been successful, or the degree to which justice aspirations in victims of

⁵⁶² Notably, it is beyond the scope of the proposed assessment tool to conduct a detailed evaluation of the Court's attempts to manage victims' justice aspirations, and the focus of the assessment remains the extent to which effective and meaningful participation has been achieved. Phase II of the assessment will, however, provide basic, preliminary guidance to the Court on the impact of its expectation-management activities, and may therefore supply the basis of further detailed and targeted assessment in this regard.

international crimes are amenable to limitation in practice, [Stage 2]. Moreover, an examination and comparison of subsequent justice experiences between the two groups will indicate the extent to which, if at all, the management of expectations operates as an affecting variable in the achievement of effective and meaningful participation at the ICC, [Stage 3].

3.4.3. The exercise of prosecutorial discretion

While the investigative and prosecutorial remit of the ICC is theoretically broad, in practice, resource limitations, prosecutorial priorities and the availability of evidence mean that the number of cases brought will be relatively few, representing only a small proportion of crimes actually perpetrated. The exercise of Prosecutorial discretion in this regard will therefore necessarily affect not only the selected target of a prosecution but also the nature of charges brought. In addition, a number of offences, including, in particular, offences of sexual violence, are more challenging to establish evidentially, and remain under-represented within the practice of the Court.⁵⁶³ As a result, where charges are brought, they may not encompass the range or extent of abuses experienced by the participating victim, and hence cannot respond to and reflect victims' justice needs in full, leading, potentially, to unfulfilled justice hopes and expectations in the victim.⁵⁶⁴ Moreover, the resulting, "silencing" of victims in respect of aspects of their abuse, particularly in relation to acts of sexual violence, can prove frustrating and psychologically distressing, and hence may negate the achievement of any effective and meaningful participation.

⁵⁶³ Ellie Smith, 'Investigating Rape at the International Criminal Court: The Impact of Trauma' (2012) *Issues in International Criminal Justice, Special Volume: The Lubanga Trial: Lessons Learned*, 99, 100 and 102; Institute of War and Peace Reporting, 'International Justice Failing Rape Victims' (15th February 2010) available online at <<https://iwpr.net/global-voices/international-justice-failing-rape-victims>> last accessed 23rd March, 2015; Institute of War and Peace Reporting, 'ICC Still Facing Rape Case Challenges' (8th August, 2011) available online at <<https://iwpr.net/global-voices/icc-still-facing-rape-case-challenges>> last accessed 23rd March, 2015; UN Inter Press Service, 'Launch of Gender Report Card on ICC 2011' (14th December 2011) available online at <<http://www.globalissues.org/news/2011/12/14/12224>> last accessed 23rd March, 2015.

⁵⁶⁴ See, for example, Jonathon Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 *International Criminal Law Review* 263, 272; Michelle Staggs Kelsall and Shanee Stepakoff, "'When we wanted to talk about rape': silencing sexual violence at the Special Court for Sierra Leone' (2007) 1 *International Journal of Transitional Justice* 355.

The point is best exemplified by an empirical, multidisciplinary (legal/psychological) study conducted into the experiences of ten women who appeared before the Special Court for Sierra Leone to testify about their experiences of rape and other forms of sexual violence at the hands of the Civil Defence Forces (CDF).⁵⁶⁵ In all cases, victim-witnesses were instructed by the presiding judges not to give evidence of sexual violence because such acts were not included in the indictment, but instead, to limit their testimony to non-sexual forms of abuse. Where victim-witnesses spoke of rape during their testimony, their evidence was expunged from the Court record.

Testimony was subsequently reported by the women to be a psychologically negative experience, and during post-trial interviews with researchers, the women allied their feelings of grave disappointment, dashed expectations, disillusionment and psychological distress to the failure of the Court to fully reflect the ambit of their abuse experiences and to furnish justice in respect of them.⁵⁶⁶ Notably, while the study is a small one, given that relatively few victims physically testify before international criminal justice mechanisms, the limited study sample is somewhat inevitable, and the study is otherwise robust.

Significantly, a comparable problem arose in the context of the ICC in the case of *Lubanga*, indicating that the Court is not immune from similar difficulties. While the conflict in the Democratic Republic of the Congo (DRC) was characterised by the widespread and systematic perpetration of rape, and the use of rape by Lubanga's *Union des Patriotes Congolais* (UPC) was reported and documented by the UN and NGOs alike,⁵⁶⁷ no charges of sexual violence were included in the indictment. Moreover, a subsequent attempt by victims' legal representatives to introduce sexual violence charges, through a reclassification of the charges brought, was unsuccessful.⁵⁶⁸ In light of the

⁵⁶⁵ Kelsall and Stepakoff, *ibid*.

⁵⁶⁶ See in particular 372-373.

⁵⁶⁷ See, for example, UN Organisation Mission in the Democratic Republic of the Congo, Special Report on the Events in Ituri, January 2002 – December 2003 (2004) UNSC Doc. S/2004/573; Women's Initiative for Gender Justice, 'Making a Statement: A Review of Charges and Prosecutions for Gender-based Crimes before the International Criminal Court' (June 2008) available online at <<http://www.iccwomen.org/publications/articles/docs/MakingAStatement-WebFinal.pdf>> last accessed 23rd March, 2015; Human Rights Watch, 'Seeking Justice: the Prosecution of Sexual Violence in the Congo War (March 2005) available online at <<http://www.hrw.org/sites/default/files/reports/drc0305.pdf>> last accessed 23rd March, 2015.

⁵⁶⁸ On 22 May 2009, in response to repeated testimony of rape during the trial, victims' representatives sought the recharacterisation of charges to include sexual slavery and inhuman

failure of the application to reclassify the charges, the Defence sought to challenge the ability of the judges of the Trial Chamber to interrogate witnesses in relation to evidence of harm which fell outside the specific remit of the charges brought.⁵⁶⁹ In the event, the Defence's motion failed. In particular, the Trial Chamber noted that it was able to hear evidence during the trial that was of relevance to sentencing or reparations, as well as evidence relating to the context and background of the crimes charged, the latter including, potentially, allegations of criminality which was beyond the specific charges faced by the Defendant.⁵⁷⁰ In practice, however, and in the aftermath of the Defence's motion, the Court was more circumscribed in permitting the introduction of evidence of sexual violence, and actively sought to prevent witnesses giving testimony of non-charged, gender-based crimes.⁵⁷¹

In the event, there has been no assessment, psychological or otherwise, of the experiences of victim-witnesses affected by the Court's approach in *Lubanga*, and as a result, its impact in psychological terms is unknown. Given the similarities between this case and the case before the SCSL, referred to above, however, it is certainly feasible that victims felt equally disappointed and disillusioned, to the obvious detriment of their ability to achieve effective and meaningful participation. Moreover, while the example relates to victims who were appearing as witnesses, rather than as participants, there is no reason to think that the exclusion of sexual violence charges and evidence would not affect all

treatment. The request was granted by the Trial Chamber, *Lubanga* (Decision giving notice to the parties that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court) ICC-01/04-01/06-2049 (14 July 2009), but subsequently reversed by the Appeals Chamber, *Lubanga* (Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court") ICC-01/04-01/06-2205 (8 December 2009).

⁵⁶⁹ *Lubanga* (Requête aux fins de détermination des principes applicables aux questions posées aux témoins par les juges) ICC-01/04-01/06-2252 (15 January 2010); and see also Victims' Rights Working Group, 'ICC Victims' Rights Legal Update, 1st March – 15th May 2010', available online at <http://www.redress.org/Legal_Update_March-April_2010_final.pdf> last accessed 23rd March 2015, at 2.

⁵⁷⁰ *Lubanga* (Decision on Judicial Questioning) ICC-01/04-01/06-2360 (18 March 2010) [40].

⁵⁷¹ Trial transcript, *Lubanga*, ICC-01/04-01/06-T-276-Red-ENG, 72, lines 9 – 15, cited and discussed in Women's Initiatives for Gender Justice, 'Gender Report Card on the International Criminal Court 2010' (2011) available online at <http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf> last accessed 23rd March, 2015, and see 134.

victims of sexual violence equally, regardless of the capacity within which they engage with the Court.

The SCSL example also raises an important issue about the active generation or positive enforcement of justice expectations in the victims concerned. Victim-witnesses in that case had a positive expectation that they would be testifying before the Court about their experiences of sexual violence. Far from being managed or contained in any way, this expectation was actively enforced by the actions of the Prosecutor, who had explicitly stated his intent to lead evidence of sexual violence in the trial.⁵⁷² The situation in the case of the ICC is less clear, and it may, of course, be that, in the absence of specific sexual violence charges in the indictment, victims did not expect to be able to give details of rape and other forms of gender-based abuse. It is clear, however, that many victims did seek to give evidence of sexual violence during their testimony in the *Lubanga* case, and that this led in turn to an attempt on the part of the victims' legal representative to recharacterise the charges to reflect the sexual violence component. Moreover, this request was initially granted by the Trial Chamber, and hence, at that point at least, a positive and reasonable expectation in victims was surely created or actively enforced.

This is not to suggest that attempts to introduce charges of sexual violence which better reflect the experiences of victims should be abandoned by the Court or legal representatives. Moreover, we do not know what was said during private consultations with victims in relation to the potential success of the application to recharacterise the charges. It does, however, highlight the need for the Court to be alert not only to the need to contain victims' expectations, but to avoid raising expectations in the absence of any accompanying qualification or note of caution.

Finally, it should be noted that the extent to which victims are able to separate their justice needs in terms of those that are before the Court (and hence to experience a sense of justice in relation to them) and those that are not is unclear, and the area requires further

⁵⁷² The Prosecution indicated in its supplemental pre-trial brief that it intended to introduce evidence of sexual violence under the existing counts of physical violence and mental suffering, *Prosecutor v. Brima, Kamara and Kanu* (Prosecution Supplemental Pre-trial Brief Pursuant to Order of the Prosecution to File a Supplemental Pre-Trial Brief 1 April 2004) SCSL-2004-16-PT (22 April 2004), [91(b)], [92], [220(b)] and [221]. The then Prosecutor, David Crane, also noted in his opening statement that the Court would hear evidence of sexual violence, discussed in Kelsall and Stepakoff, (n 564) 356, although of course it is unknown what the Prosecutor told the victim-witnesses in private about the possible introduction of evidence of sexual violence.

enquiry. The findings of the Kelsall and Stepakoff study suggest, however, that victims' testimony experience was over-shadowed by the Court's failure to include all aspects of abuse within the charges brought.⁵⁷³

The exercise of prosecutorial discretion, the issue of charge selection and, in particular, the extent to which charges reflect the abuse experiences of participating victims may, therefore, affect the achievement of a sense of justice in victims, and so should be considered as a potentially affecting variable for the purpose of Phase II assessment. To this end, victim participants should be asked during the initial Phase I data collection stage [Stage 2] whether they feel that the charges before the Court (where they have been brought) fully encompass their experiences of abuse in respect of the Defendant. Results of the Phase I assessment obtained by reference to the Likert scale [at Stage 3] can then be disaggregated by those victims whose experiences of abuse were fully encompassed by the judicial charges and those victims whose abuse(s) were not wholly encompassed by the case brought, and a bivariate analysis conducted in order to assess the extent to which charge selection had affected the achievement of a sense of justice in victim participants.

3.4.4. A forensic focus

Allied to the issue of the limited charges pursued by the Court is the narrow focus of the Court in its quest for the truth in relation to the charges brought, and this specific forensic focus has the potential to affect the ability of victims of international crimes to realise their restorative goals, and hence may operate as an affecting variable in the achievement of a sense of justice in participating victims.

Notably, the need for victims of atrocities to tell their stories to an engaged listener and to receive formal and objective acknowledgment and condemnation of those experiences is widely recognised in both psychological⁵⁷⁴ and restorative justice literature,⁵⁷⁵ as well as

⁵⁷³ Kelsall and Stepakoff (n 564).

⁵⁷⁴ Janoff-Bulman (n 470) 108; Felman and Laub (n 471) 78; Herman (Trauma and Recovery) (n 327) 155 onwards; Hamber (Do Sleeping Dogs Lie?) (n 361).

⁵⁷⁵ Zehr (n 95) 191; Stover and others (Confronting Duch) (n 16) 521 - 523; Kirchenbauer and others (n 15) 19 - 20.

in the writings of victims themselves.⁵⁷⁶ Moreover, as noted above,⁵⁷⁷ the desire for some victims to tell their stories, to educate the world about the abuses perpetrated and to personally denounce the acts committed against them comprise restorative justice goals for victims approaching international criminal justice mechanisms.

In contrast to the wider testimony needs of some victims, however, the truth pursued by the Court is directly allied to, and delimited by, the determination of the guilt or innocence of the accused in respect of the specific charges brought, and as a result, broader or contextual aspects of victims' experiences are likely to be beyond the Court's forensic focus.

The difficulties for victims posed by the narrow, forensic focus of an international criminal justice mechanism are ostensibly reported in the literature within the context of victims as witnesses, and concern, in particular, the inability of victims to narrate their experiences in full, restricting the potential for restorative victim engagement.⁵⁷⁸ While there has been considerably less exploration of the issue in the context of victims who engage with criminal justice mechanisms as participants, rather than as witnesses, (in part, perhaps, due to the relative novelty of the initiative in international criminal law), an empirical study conducted by Stover and others into the testimony experiences of civil party victims at the ECCC provides some evidence of similar frustrations,⁵⁷⁹ indicating that the potential for victim disillusionment in the pursuit of justice goals is similarly apparent, despite the creation of a new, discrete role for victims in proceedings.

In addition to problems for victims in the realisation of their testimony needs, the forensic focus of the Court poses further potential difficulties in relation to victims' needs for

⁵⁷⁶ Levi (n 470) 15 – 16.

⁵⁷⁷ Para 2.4.3.(iii).

⁵⁷⁸ Dembour and Haslam, for example, observe that “[i]n the judicial arena... story-telling can only take the form of giving legal evidence. It is constrained by the judicial endeavour to establish a legally authoritative account of ‘what happened’”, Marie-Bénédicte Dembour and Emily Haslam, ‘Silencing Hearings?, Victim-Witnesses at War Crimes Trials’ (2004) 15 Eur. J. Int’l L. 151, 154; Haslam (n 7), 331; see also Doak, noting that “testimony must be shaped to bring out its maximum adversarial effect, and witnesses are thereby confined to answering questions within the parameters set down by the questioner. The victim is denied the opportunity to relay his or her own narrative to the court using his or her own words...”, in Doak (2005) (n 11), 294, 298; Doak (Therapeutic Dimensions) (n 564) at 272.

⁵⁷⁹ Stover and others (Confronting Duch) (n 16) 523-4, 530.

information about the offence(s) perpetrated.⁵⁸⁰ In particular, victims' restorative needs for broader forms of truth-finding may be ill-suited to a criminal action involving a single perpetrator facing specific and defined charges.⁵⁸¹ As such, there is certainly the potential for disappointment amongst participating victims who had hoped, by virtue of their engagement with the Court, to achieve a greater understanding of the wider circumstances surrounding the abuses suffered.⁵⁸²

Notably, where the Court's narrow, forensic focus has operated to negatively affect the achievement of a sense of justice in participating victims we would expect to see lower satisfaction scores in respect of those justice parameters most directly affected (identified above), [Stage 3]. In the case of parameters allied to the delivery of testimony in particular, lower scores may also be caused by a number of other potentially affecting variables, considered further below.⁵⁸³ In light of the very limited number of participants likely to achieve testimony at the ICC, however,⁵⁸⁴ a more in-depth exploration of these issues through interview with the victim would be appropriate.⁵⁸⁵

3.4.5. A substantial number of participating victims

While the very substantial number of victims participating in proceedings before the International Criminal Court presents logistical challenges for the Court, it will almost certainly also pose difficulties for victims in the realisation of their restorative justice expectations, and may therefore operate as an affecting variable in the achievement of a

⁵⁸⁰ Para 2.4.3.(ii).

⁵⁸¹ In addition, the active pursuit of victims' broader truth needs at the ICC may violate the defendant's right to a fair and expeditious trial in accordance with Article 68(3) of the Rome Statute.

⁵⁸² Similar problems of the pursuit of a narrow notion of truth were identified by Stover in relation to the ICTY, noting that "[a]ccording to some witnesses, 'tribunal truth', based largely on facts about individual events, left little latitude for answering the fundamental 'why' questions: Why had the defendants set out to destroy communities that had lived in harmony for decades? Why the excessive brutality, the mutilations and secret burials of victims? Why the denial and inability to accept what they had done was wrong?", in Stover (Witnesses) (n 164) 117.

⁵⁸³ Paras 3.4.5 and 3.4.8.

⁵⁸⁴ See para 3.4.5.(i).

⁵⁸⁵ See below, at para 3.4.5.

sense of justice in participating victims. This potential impact is particularly evident in the case of justice needs allied to the delivery of testimony. Moreover, those difficulties may be compounded by collective forms of legal representation. These aspects are therefore discussed further below and recommendations on data collection and assessment are made.

(i) Expectations allied to the delivery of testimony

As of December 2014, the number of victims participating in proceedings before the ICC was estimated to be around 10,000.⁵⁸⁶ In contrast, the opportunity for victims to appear physically before the Court in their capacity as participants is very limited.

To date, and after first submitting an application and receiving the formal approval of the Chamber concerned, a limited number of victim participants have been authorised to personally appear before the Court to give sworn oral testimony by virtue of Article 69(3) of the Rome Statute,⁵⁸⁷ or to present their views and concerns.

In the *Lubanga* case, for example, the Court authorised just three participating victims to introduce oral evidence in person.⁵⁸⁸ In the *Katanga and Ngudjolo* case, the number of victims allowed to introduce oral evidence was four.⁵⁸⁹ Victims' legal representatives in the *Bemba* case had initially hoped to enable 17 victims to give oral evidence to the Court, but, with the right of the accused to an expeditious trial in mind, were subsequently restricted by the Court to eight, and in the event, just two victim participants were called.⁵⁹⁰ Three further victim participants in that case were authorised to present their views and concerns personally to the Court.⁵⁹¹ In doing so, their contribution was not

⁵⁸⁶ Victims' Rights Working Group, 'Participation before the ICC: Some Perspectives from the Inside', (Winter 2014 – Spring 2015) Issue 25, Access 1.

⁵⁸⁷ See para 1.1.

⁵⁸⁸ *Lubanga* (Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial) ICC-01/04-01/0602032-Anx (26th June 2009).

⁵⁸⁹ *Katanga and Ngudjolo* (9 November 2010) (n 256).

⁵⁹⁰ *Bemba* (22 February 2012) (n 82), and see paras 2 and 23(i).

⁵⁹¹ *Bemba* (Decision on the Presentation of Views and Concerns by Victim a/0542/08, a/0394/08 and a/0511/08) ICC-01/05-01/08-2220 (24 May 2012), and see [7].

deemed to be part of the trial evidence, but instead, comparable to the presentation of submissions, and victims were requested to confine their submission to the harm they had suffered and the consequences of that harm.

As a result, opportunities for victims to realise restorative justice goals that are ostensibly allied to the delivery of testimony before the Court are likely to be frustrated. These include the ability of victims to narrate their story to an engaged listener, the chance for victims to educate the world about the abuses perpetrated, and their ability to personally denounce the abuses committed against them. In addition, where the victim has no other way of securing their physical presence in the court room, an inability to testify will also mean they are unable to come face-to-face with the alleged perpetrator.

(ii) Difficulties compounded by collective forms of legal representation

In addition to difficulties for victim participants in the realisation of justice goals allied in whole or in part to judicial testimony, further obstacles to the achievement of restorative expectations are posed by approaches designed by the Court to respond to the volume of participating victims and to render the endeavour operational in practice, including, in particular, collective approaches to legal representation.

Notably, during group meetings or forums held by Common Legal Representatives for participating victims, victim narrative, by which participating victims relate their own experiences to the group of fellow participants, can arise spontaneously, at the direct instigation of the victims themselves.⁵⁹² While this spontaneous narrative may occur as a result of victims' restorative and rehabilitative needs to relate their stories to an engaged listener, narrative in such circumstances also risks the emergence of a dominant group understanding or narrative of traumatic events, which in turn can have the effect of stifling or silencing individual narrative, or the narratives of less dominant groups. These less dominant groups can include women victims of sexual violence, as well as those whose individual experiences do not fit with the wider, emerging narrative.⁵⁹³ As a result, victims

⁵⁹² Private communication with the Case Manager for the Legal Representative for Victims, *The Prosecutor v. Uhuru Muigai Kenyatta*, 5th September, 2013.

⁵⁹³ This is particularly so where the dominant narrative is an heroic one; see in relation to truth commission processes, Heidi Grunebaum and Yazir Henri, 'Re-membering Bodies, Producing Histories: Holocaust Survivor Narrative and Truth and Reconciliation Commission Testimony' In Jill Bennett and Rozanne Kennedy (eds), *World Memory: Personal Trajectories in Global Time*

may find themselves without a voice or outlet for the achievement of justice aims that are allied to testimony, whether in the formal context the Court, or the informal (i.e. non-judicial) context of group meetings, and so fail to achieve either recognition and acknowledgement of their suffering, or condemnation in respect of the specific abuses suffered.⁵⁹⁴

In relation to those restorative goals which are allied to testimony (identified above), and for the purpose of Phase II assessment of the impact of failing to achieve testimony, the results for those participants who achieved testimony⁵⁹⁵ – whether formally or informally – should be compared with those of survivors who had hoped to testify but did not, [Stage 3]. Given the limited number of victims able to achieve testimony, a separate sample should be recruited for the purpose of the assessment, consisting entirely of victims who achieved either form of testimony, and their perceptions in relation to the realisation of their justice aims obtained.⁵⁹⁶

While, however, basic assessment in respect of the achievement of a sense of justice in victims who simply failed to achieve testimony is relatively unproblematic, the impact of the active suppression of testimony by the emergence of a dominant narrative is more challenging to establish. In particular, those negatively affected by the emergence of a dominant or group narrative are not readily identifiable, and as a result, assessment in

(Palgrave Macmillan, 2003), 101, 103 - 104. In such circumstances, issues of shame may arise to inhibit personal testimony.

⁵⁹⁴ The emergence of a dominant narrative or group understanding of events also presents potential evidential difficulties for the Court in terms of mediated or contaminated testimony, discussed further in Ellie Smith, 'Victims in the Witness Stand: Socio-cultural and Psychological Challenges to the Achievement of Testimony' in Kinga Tibori Julia Szabo and Megan Hirst (eds) *Victim Participation in International Criminal Justice* (Springer, forthcoming 2015).

⁵⁹⁵ Results having been obtained during Phase I of the assessment, by reference to the Likert scale.

⁵⁹⁶ For reasons of space, the recruitment of a testimony sample is not indicated in the diagram, but would arise in the aftermath of formal or informal testimony, and if the individual does not already form part of the Phase I assessment, they would be asked to indicate their justice aims in approaching the Court, [Stage 2]. Achievement in respect of identified aims would then be assessed subsequently, [Stage 3]. Those victims appearing before the Court in their capacity as participants, either in person or via video link, could be readily identified by staff within the VWU. In the case of informal testimony arising during the course of group meetings with the Victims' Common Legal Representative, victims could be identified by either the Case Manager or by a representative of the VPRS, if present. A representative of the VPRS may be present, for example, where group meetings are convened to initiate collective approaches to application for participation, see Anushka Sehmi (n 300).

respect of their individual justice experiences is not possible. Instead, the potential impact of a dominant narrative on the achievement of a sense of justice in participating victims should be acknowledged as a possible limitation to the interpretation of assessment findings.

Where, however, assessment findings indicate a gender differential in justice experiences for participating victims, an issue which is discussed further in the following section, specific thought should be given by the Common Legal Representative to the holding of gender-specific meetings, where disclosure of sexual violence by women is less likely to be inhibited by the presence of male victims, or otherwise ‘silenced’ by an alternative narrative.⁵⁹⁷ In addition, or in the alternative, the Court itself, in determining the number of groups into which victims can be divided for the purpose of assigning a Common Legal Representative, should give specific consideration to the discrete needs of women victims and the possibility of a group based either on gender or experience of gender-based crimes.⁵⁹⁸

3.4.6. A gender differential

While available studies typically seek to ascertain the gender demographic of the sample population, at present, study findings are not consistently disaggregated and analysed by gender. Significantly, however, where analysis of findings by gender is undertaken, studies reveal possible differences in how men and women experience and respond to participation in general, or to testimony in particular, indicating that gender may comprise a potentially affecting variable in the achievement of a sense of justice for participating victims.

⁵⁹⁷ Victims’ meetings convened by the Common Legal Representative are not gender-specific, private communication with the Case Manager for the Legal Representative for Victims, *The Prosecutor v. Uhuru Muigai Kenyatta*, 5th September, 2013.

⁵⁹⁸ This is not to suggest, of course, that women victims experience international crimes as an homogenous group, but may be one aspect in addressing a gender differential in justice experiences for participating victims identified by the assessment. It is also acknowledged in this context that the Court, at present, favours limiting, as opposed to expanding, the number of victims’ groups represented before it; discussed in depth in Haslam and Edmunds (Common Legal Representation) (n 294) 883.

In their study of the experiences of 134 survivors of the South African apartheid regime, for example, Kaminer and others sought to explore and compare the psychological responses and outcomes of those who testified before the Truth and Reconciliation Commission, those who chose to give a closed, written statement to the Commission and those who gave neither a closed statement nor oral testimony. The researchers found that female respondents reported significantly lower forgiveness rates and mental health outcomes when compared to their male counterparts,⁵⁹⁹ but that this differential was confined to the group of survivors who gave a public statement to the Commission. Moreover, when correlated to abuse experiences, the researchers concluded that the gender differential could not be accounted for by the nature of abuse suffered or any resulting trauma response,⁶⁰⁰ suggesting instead a potential difference between male and female victims in how testimony in particular was perceived.

A gender differential was also detected in the study conducted by Stover and others into the experiences of 109 witnesses of crimes committed in the Democratic Republic of Congo appearing before the International Criminal Court.⁶⁰¹ While the study was ostensibly allied to the achievement of procedural, as opposed to restorative justice for witnesses, subjects of the study were also asked about the perceived efficacy of their testimony to the Court. The results revealed that women were less likely than their male counterparts to consider that their testimony had helped to achieve either justice or the truth.⁶⁰²

⁵⁹⁹ See Kaminer and others (n 331). Forgiveness is used in the study as a measure of moving on, the achievement of closure and improved mental health outcomes.

⁶⁰⁰ *Ibid.*, at 376.

⁶⁰¹ Berkeley School of Law (n 15) 6.

⁶⁰² *Ibid.* While 60% of women witnesses felt that their testimony contributed to the achievement of justice and/or the truth, the corresponding figure for men was 80%. While the study does not indicate the reasons for this differential, the study authors suggest that it may have been caused by a number of factors, including the possibility that female witnesses were from more stable regions of the country, that they had greater familial support than their male counterparts, or that they were less willing to express negative feelings than male witnesses. Significantly, however, the study relates to witnesses rather than to participants more broadly, and so is confined to the testimony experience. Moreover, the study seeks to assess witnesses' experiences of procedural, as opposed to restorative justice, and hence is allied to the processes of the Court rather than the quality and nature of engagement. Where witnesses' views of justice are sought, they are linked to the witnesses' assessment of their efficacy as a witness, and while the notion of justice adopted for the purpose of the study is unspecified, it is seemingly based upon the witness' contribution to the Court's pursuit of retributive justice, as opposed to any personal sense of justice in the victim.

Finally, Stepakoff and others, in their study of the motivations for testifying of 200 witnesses appearing before the Special Court for Sierra Leone, found a difference in justice aims between male and female witnesses. The researchers found that women were more likely to pursue testimony for personal reasons, such as the desire to speak about painful memories and to denounce the wrongs committed against them, while men tended towards the articulation of socio-political motives, including the desire to prevent further abuses and to build peace.

While, however, the evidence indicates a gender differential in victims' experiences with transitional justice mechanisms, it does not explain the reason(s) for this differential. As a result, the targeting by the Court of any specific activities aimed at addressing the differential is problematic.

In particular, while the Stepakoff study suggests a male/female differential in justice aims, and the Kaminer study indicates a differential in outcomes, as already indicated,⁶⁰³ there is no study which seeks to directly correlate victims' original justice aims to outcomes. It is, of course, feasible that a tendency for women victims to prioritise as justice needs those restorative goals that are less readily achievable in the context of the ICC would lead to a restorative shortfall, but the hypothesis requires testing in order that any related Court outreach activities can be conducted to better manage expectations. Moreover, it is equally feasible that a gender differential may be due instead, or additionally, to the non-inclusion of gender-specific crimes in the charges brought before the Court,⁶⁰⁴ procedural aspects of the participatory process, including differences in how women victims are treated by or respond to Court staff, the level of familial and/or societal support they have compared to that of their male counterparts, or a combination of any of the above factors.

In addition, it is unclear whether the various findings in the above studies, in terms either of the justice aims expressed by victims or the outcomes of their engagement, are culturally specific or whether they would be consistently replicated within other contexts. A private interview with the Victims' Legal Representative and Case Manager for the

⁶⁰³ Para 3.3.2.

⁶⁰⁴ Discussed at para 3.4.3.

STL,⁶⁰⁵ for example, revealed that the vast majority of victims seeking to give oral testimony before that tribunal were women, although this is not, of course, necessarily indicative either of the particular participants' emotional health or a guarantee of any positive outcome in the aftermath of narration.⁶⁰⁶ It may be that, within a patriarchal society, judicial testimony represents a rare opportunity for women to speak about and publicly condemn the crimes committed against them. Additionally, or in the alternative, it may be, as Stepakoff surmises, that the need of female witnesses to publicly denounce the crimes committed against them and to emphasise their position as victims stems from the nature of crimes perpetrated against them and the corresponding, ongoing stigmatisation they experience within their communities,⁶⁰⁷ again emphasising the interconnectedness of the individual and collective impacts of international crimes and the need of victims of sexual violence for recognition and acceptance within their communities.

With these various factors in mind, a gender-sensitive approach to the Court's assessment of victims' sense of justice is essential. This would necessarily begin with the collection of basic demographic data during Phase I of the assessment [Stage 1], enabling both a bivariate analysis of the justice aims of male and female victim-participants [Stage 2], and a gender-specific correlation of those aims to restorative outcomes, [Stage 3]. Data indicating the extent to which the charges brought against a defendant fully reflect the abuses suffered by the participant should also be disaggregated by gender [Stage 2] and correlated to corresponding data on justice outcomes, [Stage 3]. A simple bivariate analysis of gender experiences by country will also provide some indication of the extent to which differentials are culturally relative [Stage 3], and potentially provide the basis for cost-efficient outreach activities which are developed and targeted on a (judicial) case-by-case basis.

⁶⁰⁵ Private interview with Peter Haynes and Kinga Tibori Julia Szabo, 5th September, 2013, The Hague.

⁶⁰⁶ In fact, an expressed need for testimony amongst female victims may indicate the opposite – that victims have a strong need for emotional expression due to emotional ill health, or have high expectations as to what testifying might achieve for them. In the absence of any psychological evaluation of participating victims or any baseline study of victims' justice aspirations in the case, it is simply impossible to know.

⁶⁰⁷ Stepakoff and others (n 380) 23.

Restorative outcomes by gender should also be compared to similarly disaggregated findings in relation to participants' experiences of process, obtained in the Berkeley study, in order to assess the extent to which procedural justice has a gender-specific impact on the achievement of substantive justice for victims at the ICC. Finally, questioning during the initial data collection stage of Phase I as to victims' levels of familial and/or societal support for their participation will enable an examination of the impact of this on the achievement of sense of justice for participating victims at the Court.

3.4.7. The psychological health and wellbeing of the victim

Despite the potential for psychological vulnerability in victims engaging with international transitional justice mechanisms, the nature and extent of any interrelationship or interdependence between psychological ill-health and the achievement of positive engagement for victims of international crimes, including the realisation of a restorative sense of justice, remains unclear. In particular, within any academic consideration of why some victims have been able to achieve some form of psychologically positive benefit while others have not, the role of ongoing trauma symptomatology has not been identified and explored as a potentially affecting factor, indicating a knowledge gap in this respect.

It is, however, conceivable, at the very least, that psychological ill-health will negatively impact upon a victim's psychological response to participation, and thereby operate as an affecting variable in their achievement of a sense of justice.⁶⁰⁸ In particular, while it is true that many victims who engage with international transitional justice mechanisms may be in relatively good psychological health, it is also likely that a significant number of other victims will be suffering from some level of ongoing trauma at the time of their engagement.⁶⁰⁹

⁶⁰⁸ While primary research has been conducted into the possible therapeutic impact of testifying before a judicial mechanism, as noted above, that research does not seek to explore the issue of whether pre-existing and ongoing trauma symptoms themselves affected survivors' perceptions of their experience, and in any event, has been confined to a therapeutic assessment as opposed to any notion of justice in the victim. The issue also highlights the need for prospective research and the ascertainment of baseline standards, discussed at para 2.2.2.(ii). Notably, the studies referred to above are retrospective in nature and do not contain any assessment of clinical symptomatology prior to engagement or testimony.

⁶⁰⁹ Discussed above, at para 2.3.1.(iii), and see also footnote 269.

Within the specific context of the ICC, there is clear potential for psychological vulnerability in victim participants. Notably, Article 68(1) of the Rome Statute requires the Office of the Prosecutor to take specific measures to protect victims' psychological well-being during its investigation.⁶¹⁰ Potential witnesses are assessed by a Court-funded psychologist before being interviewed by an investigator, and those deemed insufficiently mentally robust may be excluded from the formal investigative process.⁶¹¹ As a result, the number of Prosecution witnesses suffering from a significant degree of ongoing trauma is likely to be relatively small.

There is, however, no corresponding statutory protection obligation on victims' legal representatives, and representatives do not receive any assistance from a Court-funded psychologist during their consultation, evidence-gathering and evidence-testing activities, including in their consideration of which victims should appear before the Court in person to testify or to present their views and concerns. Moreover, while participating victims' legal representatives undoubtedly seek to act in the best interests of victims, as expert legal practitioners rather than clinicians, they are not equipped to assess a victim's psychological readiness for formal testimony.

Article 68(3) therefore comprises a potentially broader avenue for engagement with the Court for victims than as a prosecution witness, and in the absence of any "screening" along the lines operated by the OTP, it is reasonable to assume that the body of victim participants, including but not limited to those appearing before the Court, will include individuals who are psychologically vulnerable. Moreover, while the Court's participation endeavour was designed with a specific victim focus, the potential nature of engagement,

⁶¹⁰ See Article 68(1) of the Rome Statute.

⁶¹¹ Private communication with OTP psychologist, 9th March, 2012. The approach is also referenced in para 70 of the OTP's Policy Paper on Sexual and Gender-based Crimes (June 2014), available online at <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>>, last accessed 24th March 2015. Notably, while such an approach might be believed to better protect both the emotional safety of the victim and the integrity of the evidence when it is placed before the Court, there has been no psychological assessment, follow-up or research conducted into the psychological impact on the victim of rejection by the OTP's investigators. There is, however, some evidence at least that a denial of justice may be experienced as psychologically detrimental by victims already suffering a degree of trauma, and this may be particularly relevant where engagement with the investigative and prosecutorial process was perceived by the victim as an aspect of justice; see, for example, Danieli (Massive trauma) (n 141) 351; Sveaass and Lavik (n 464), 43-44, noting that in psychological terms the denial of justice represents a continuation of violence; Rauchfuss and Schmolze (n 362) 40.

including testifying as to the form, impact and extent of harm suffered, also means greater exposure of the victim to the trauma story. The potential vulnerability amongst participants, coupled with a high degree of exposure to the trauma story, therefore raises the possibility of psychologically disadvantageous engagement.

Notably, the potential impact of psychological ill-health in participating victims is amenable to assessment. In particular, (i) if psychological ill-health affects a victim's ability to achieve effective and meaningful participation, we would expect to see lower scores given by victims with poor psychological health; and (ii) where participation has actively aggravated existing trauma symptoms, we would expect those scores to be lower still.

Phase II assessment should therefore ideally incorporate, as a starting point and to the extent possible, findings relating to the psychological health of participating victims. Such an approach would help not only to ensure that the assessment takes in to consideration all factors with the potential to impact upon the victim's achievement of a sense of justice, but also, at a more fundamental level, to contribute to the development of knowledge in relation to victims' participation in international transitional processes more broadly.

That said, however, the practical collection and incorporation of relevant clinical data into the assessment process is not without its challenges, and an expert clinical investigation and assessment of the psychological well-being of all victims participating in cases before the ICC is clearly impractical in terms both of time and resources.⁶¹² It is therefore necessary to consider alternative approaches to data collection in relation to the two hypotheses identified above, which are mindful of limited available resources whilst at the same time provide the potential for the generation of meaningful data. Taking each of the hypotheses in turn:

⁶¹² Such an approach would be undesirable in any event in terms of, for example, victim safety and the potential identification to the wider community of participating victims, together with the need to avoid the Court being viewed as an institution with therapeutic goals.

- (i) psychological ill-health adversely affects a victim's ability to achieve effective and meaningful participation resulting in lower scores

An assessment based upon a more limited sample of victim participants would provide an appropriate means of evaluating the impact of psychological ill-health on the achievement of a sense of justice in participating victims at the ICC, [Stage 3]. To this end, a study sample comprising only participants suffering from psychological ill-health should be recruited, and the resulting justice scores compared with those of a control group in order to consider the extent to which, if at all, psychological ill-health in the participant has affected their ability to achieve effective and meaningful engagement.

Notably, while the Court's Trust Fund seeks to provide, amongst other functions, rehabilitative services to victims affected by the range of crimes falling within the Court's remit, it's ground presence tends to lag behind the investigative activities of the Court, and as a result it may not, at the time of data collection, be actively operating services within the territory of the relevant State. As a result, recruitment to a study sample might best be conducted through the auspices of local health service providers, including those operated by international or regional medical charities within the affected area.

Ideally, a second group of participants – those known to be in good psychological health – would be recruited, and operate as a basis of comparison for the findings obtained from the first group. Such an approach would, however, require additional psychological assessment as a means of verifying the psychological well-being of group members, and where resources are limited, ascertainment of positive psychological health, in a situation where many other victims may be psychologically vulnerable, may, quite understandably, not be a priority for the Court.

An alternative approach would be simply to compare the restorative outcome scores of the study sample of victims known to be suffering from psychological ill-health with the scores (pre-weighting) obtained in Phase I of the assessment in respect of the whole study population.

Whilst providing a practical and resource-conscious means of data collection, the suggested approach is not perfect. In particular, the scores obtained in Phase I of the assessment will represent the justice outcome scores of the victim participant community as a whole, and will thereby likely include the scores of an indeterminate number of

victims within the participant community who are themselves suffering from psychological ill-health. That said, however, while the resulting differential might be less than that anticipated if a dedicated control group was used, it is still reasonable to expect some identifiable differential between the respective justice scores if existing psychological ill-health operates to affect victims' ability to achieve effective and meaningful participation.

In addition to the limitation noted above, it should also be acknowledged that psychological ill-health in victims is not a static state of mind, and it may be that, over the course of the victims' participatory experience, symptoms resolve or at least significantly lessen. This in turn may affect a victim's subjective assessment of their participation experiences, including their achievement of a sense of justice. Significantly, where participants have benefitted from ongoing engagement with formal therapeutic services, continuous psychological (re)evaluation would naturally occur within the context of those support services, and clinical findings arising by virtue of that evaluation, to the extent they were available, and where the informed consent of victims had been obtained, would need to be incorporated in to the assessment.

Finally, it should be noted that to a large extent, the impact, if any, of psychological ill-health on the achievement of a sense of justice in victims operates beyond the control of the Court, and may thereby serve as a limiting factor to the ability of the ICC to fully realise its restorative mandate.⁶¹³

(ii) participation aggravates existing trauma symptoms, resulting in lower scores

While it is conceivable that trauma symptoms in participating victims might be exacerbated at various stages of the participatory journey, the potential for the aggravation of trauma sequelae is particularly evident in relation to aspects of victim testimony. As a result, and in the first instance at least, a more limited and targeted focus of enquiry into participants' psychological health that is directly allied to potentially aggravating aspects of the testimony experience may enable the collection of some meaningful data which, in

⁶¹³ Although an appreciation of the impact of psychological health on the achievement of the Court's mandate may prove a useful lobbying tool for an increase in funding for victim-related services.

addition, might be readily available and generated within the day-to-day course of the Court's operation.⁶¹⁴

Notably, this narrower approach to data collection is by no means perfect in terms of providing a complete picture of the full range of possible impacts of poor psychological health on the achievement of restorative benefit. It does at least, however, begin to address the neglect of this area to date within existing literature, whilst at the same time operating within practical boundaries and resource limitations of the Court, and so has much to recommend it.

Significantly, while the occurrence and impact of psychological ill-health in victims participating in proceedings before the ICC is largely beyond the control of the Court, the aggravation of pre-existing trauma symptoms, and the potential effect of that aggravation on the achievement of effective and meaningful participation for victims, lies within the Court's power. Moreover, articulation by the Court in its Strategy of the need to ensure that participation is not anti-therapeutic for victims⁶¹⁵ means that the Court has a self-imposed, positive duty to avoid engagement that exacerbates pre-existing trauma symptoms.

With this in mind, and with particular reference to the collection and evaluation of data for the purpose of Phase II assessment, the remainder of this section comprises an examination of factors allied to testimony with particular potential to exacerbate pre-existing symptoms of psychological ill-health. These factors include the psychological readiness of the victim and the concurrent rehabilitative journey, the potential for psychologically detrimental engagement, and the delivery of psychologically unsafe testimony in the context of collective legal representation. Practical factors concerning the collection of data are incorporated into the relevant sections, as appropriate.

⁶¹⁴ Use of the material would, of course, be subject to the informed consent of the individual concerned.

⁶¹⁵ Discussed above, at para 2.3.1.(iii).

(a) Testimony within the concurrent rehabilitative journey: psychological readiness

The position and timing of judicial testimony within a participant's concurrent rehabilitative journey, and in particular, the extent to which the victim is ready, in psychological terms, to speak about their experiences, may operate to affect pre-existing symptoms of psychological ill-health in the victim, and hence their ability to achieve a sense of justice. Notably, the assessment of psychological readiness is a feature of clinical theory and practice with survivors of international crimes, and therefore provides a useful point of comparison with the occurrence of victim testimony in the international criminal justice context.

Within the therapeutic context, narration of the trauma experience takes place at the survivor's own pace, and at a time when they are psychologically ready to articulate the event(s) in question. In the absence of psychological readiness, narration of the trauma event(s) can be experienced by the survivor as therapeutically detrimental.⁶¹⁶

Psychological readiness is assessed in turn in relation to the prior establishment of a number of facilitative clinical prerequisites, including the development of a trusting relationship between victim and therapist, and the establishment of safety – both physical and psychological – in the survivor.⁶¹⁷

Notably, it is apparent from literature relating to narrative in the clinical context that victims themselves may seek to articulate their trauma experiences before they are clinically ready to do so.⁶¹⁸ A desire on the part of the victim to narrate their trauma

⁶¹⁶ See, for example, Herman (Trauma and Recovery) (n 327) 172 – 176.

⁶¹⁷ It is beyond the scope of this research to explore these facilitating prerequisites for therapeutic narrative in detail. For more information, see Herman, who notes that before proceeding to the construction and articulation of a narrative (a stage which she refers to as “remembrance and mourning”) it is first essential both to establish a healing relationship with the survivor and to achieve, as far as possible within the confines of the therapeutic relationship, safety for them; Herman (Trauma and Recovery) (n 327) 155. Notably, not all clinical experts divide the recovery process into the same stages, although all clinical approaches are broadly congruous with Herman's model. By way of example, the development of a trusting relationship might be viewed as an aspect of safety; Mary Fabri, ‘Reconstructing Safety: Adjustments to the Therapeutic Frame in the Treatment of Survivors of Political Torture’ (2001) Vol. 32, No. 5 Professional Psychology, Research and Practice 454.

⁶¹⁸ Beverley Raphael, ‘Early Intervention and the debriefing debate’ in Robert Ursano, Carol S. Fullerton and Ann Norwood (eds) *Terrorism and Disaster: Individual and Community Mental Health Interventions* (Cambridge University Press, 2003) 154; see also Herman (Trauma and Recovery) (n 327) 172.

experience, or, in the context of the ICC, to provide testimony to the Court or to officials of the Court, does not, therefore, indicate readiness in clinical terms, and may engender psychologically disadvantageous engagement. Moreover, while the timing of narration within the therapeutic context is a matter of careful deliberation which in turn is directly allied to the recovery of the survivor, the timing of testimony within judicial proceedings is largely beyond the control of the participating victim, and may not occur at a time which coincides with the psychological needs of the survivor within the rehabilitative process.⁶¹⁹ For participating victims who are experiencing ongoing trauma at some level, testimony in the absence of psychological readiness may therefore exacerbate trauma symptoms, and so affect their achievement of a sense of justice.

It should be acknowledged here that while the negative psychological impacts of narrative in the absence of psychological readiness within the therapeutic context are widely known and accepted in clinical practice and literature, the assumption that similarly detrimental results would be seen within the judicial context remains untested empirically, and this may be due, in part, to the lack of prospective studies with victims of international crimes and the relative neglect of the area to date. Given, however, that the phenomenon is documented within the more facilitative, victim-centred context of the therapeutic environment, the assumption seems a reasonable one. Moreover, the psychological screening and exclusion by the OTP of victims who are deemed to be insufficiently psychologically robust to stand as witnesses suggests that the Court itself accepts the assumption to be true.

As yet, however, existing research studies which directly involve the assessment of victims' experiences of participation and testimony have failed to consider the absence of psychological readiness in the victim as a possible rationale for the disparate results between participants, and there is no research which seeks to consider the achievement of a sense of justice in particular in light of the victim's concurrent rehabilitative journey, indicating a clear gap in knowledge in this regard.

With this in mind, and for the purpose of assessment, the scores in respect of individual justice parameters provided by victims who have given testimony before the Court should be compared and considered in light of any available evidence as to the psychological

⁶¹⁹ See also Rauschenbach and Scalia (n 289) at 452 on the relationship between the timing of judicial actions and personal healing needs.

readiness of the victim participant, in order to assess the extent to which a lack of readiness has affected their achievement of a sense of justice, [Stage 3]. The study sample in this instance, will, of course, be very small, and the potential to generate findings of broader applicability will therefore be limited. Such an approach would, however, enable the Court to at least begin to respond to a knowledge gap, whilst, at a practical level, enable, where appropriate, a specific and targeted refocussing of its limited psychological resources to the benefit of victims. In particular, thought might be given to the provision of psychological support to assist victims' legal representatives, including Common Legal Representatives, in their evidence gathering and testing activities to mirror that already provided to the OTP.

To this end, evidence might be sourced through the activities of the Victims and Witnesses Unit of the Court. The VWU is mandated to provide protective and supportive measures to ensure the security, physical and psychological well-being of victims and witnesses once they are physically before the Court.⁶²⁰ In light of the potential vulnerability of some victim participants, liaison with the VWU is clearly desirable, and the victim themselves, or their legal representatives, may ask for special measures to facilitate testimony, including the attendance of a psychologist during testimony and/or a psychological debriefing following testimony.⁶²¹ Where testifying has proved to be a therapeutically detrimental experience for a participating victim, it is therefore likely that recourse will be had to expert clinical staff in the VWU, and there will be some clinical assessment of the participant at that stage, including, potentially, a consideration of the victim's psychological readiness for testimony and the prior achievement of facilitative recovery stages. As a result, evidence relating to the victim's progress in their therapeutic journey may be readily available and generated within the day-to-day conduct of the Court's protection and safe-guarding activities.⁶²²

⁶²⁰ Article 43(6) of the Rome Statute; Rules 16 – 19 RPE.

⁶²¹ Provided for explicitly in the case of the ICC, Rules 88(1) and (2) RPE.

⁶²² Again, the use of victims' clinical records for the purpose of an assessment of the Court's restorative mandate will require the written, informed consent of the participant concerned.

(b) Testimony as psychologically detrimental engagement

In addition to the issue of psychological readiness and the position of testimony within the victim's therapeutic journey, the nature and quality of the testimony experience itself may provoke or exacerbate an adverse psychological reaction in victims suffering from ongoing trauma, to the detriment of the victims' ability to achieve a sense of justice.

It is important at this stage to distinguish between testimony which is upsetting for the victim, and that which is therapeutically injurious for them:

Testifying about experiences of abuse can be highly distressing for victims. Where, however, the testimony experience has been an upsetting one, this does not mean that the victim has suffered an adverse psychological reaction or that the experience has been otherwise therapeutically detrimental for the individual concerned.⁶²³ Moreover, as already seen, it is apparent that the extent to which testimony was painful or upsetting for a victim does not affect their subsequent evaluation of the testimony experience as either positive or negative.⁶²⁴ Testimony may, however, be problematic in psychological terms where the victim participant experiences a trauma reaction at the time, or where testimony otherwise exacerbates pre-existing trauma symptoms, and it is this potentially psychologically disadvantageous aspect of victim testimony that is the focus of this section.

The therapeutic needs of a victim participant with ongoing trauma symptoms may be incompatible with the needs of the Court in a number of ways, and this is particularly the case where the participant appears before the Court to give sworn oral testimony by virtue of Article 69(3). Again, given the potential therapeutic impacts under discussion, reference to clinical practice in the achievement of psychologically beneficial narrative within the therapeutic setting is appropriate, and provides a useful point of comparison with the judicial context in this regard.

⁶²³ Kaminer and others (n 331) 375. Clinical literature indicates, in fact, that an upsetting testimony experience can also be an empowering one for victims of international crimes; see Kelsall and Stepakoff (n 564) 366. It should also be noted that narration of traumatic experiences within the therapeutic context can be distressing for the victim, yet it is not therapeutically detrimental.

⁶²⁴ Discussed above, at para 3.3.2.

Notably, while the survivor in the therapeutic environment is in control of the way in which they choose to narrate their experiences, thereby providing an element of personal agency and empowerment, this facilitative factor is significantly less evident within the judicial processes of international criminal law mechanisms. In many cases, while survivors need to re-establish control over their lives, the court requires them to submit to rules and procedures which are not of their making and which they may not understand. While survivors need to tell their story in their own way, the court will typically require them to respond to a series of questions which often disrupt the ability to construct a cogent narrative. Finally, while survivors need societal acknowledgement and support, a court requires them to undergo a public challenge to their credibility, leading Herman to conclude that:

“...if one set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law”.⁶²⁵

In addition to the potential for testimony to aggravate trauma symptoms, testimony may actively provoke an acute trauma reaction in the victim, and this is particularly the case where the trauma experience itself has affected the way in which the victim's memories of the event(s) have been laid down and processed. Notably, there is a growing consensus in clinical literature that traumatic memories are recorded, processed and accessed by victims in qualitatively different ways to normal, autobiographical memories.⁶²⁶ A detailed examination of the impact of trauma on the memories of victims of international crimes is beyond the scope of this research.⁶²⁷ It should be noted, however, that the retrieval of such memories may be subject to specific cues, which can include questioning

⁶²⁵ Herman (*The Mental Health of Crime Victims*) (n 322) 159. For a similar view, see also Mendeloff (n 16) 613. The factors identified above can, of course, also impact upon the realisation of restorative justice parameters for the victim, including their ability to tell their story, to educate the world about the events that occurred in their countries and their wish to publicly denounce the acts committed against them.

⁶²⁶ See generally Chris Brewin, *Posttraumatic stress disorder: Malady or myth?* (Yale University Press 2003); Jane Herlihy, Peter Scragg and Stuart Turner, 'Discrepancies in autobiographical memories - implications for the assessment of asylum seekers: repeated interviews study' (2002) *British Medical Journal*, 324; Herlihy and Turner (n 48).

⁶²⁷ The potential impacts of trauma on victims' memory, and their corresponding effects on victim testimony, is discussed in detail in Ellie Smith (*Victims in the Witness Stand*) (n 594). In the case of memory and testimony in the specific context of victims of sexual violence appearing before the ICC, see Ellie Smith (*Investigating Rape*) (563).

during testimony.⁶²⁸ Significantly for the purpose of this section, these memories may be experienced by the participant in the present, rather than being perceived by them as occurring in the past,⁶²⁹ and hence can be both deeply distressing and potentially retraumatising for the victim.

While the possibility for testimony to aggravate pre-existing trauma symptoms is recognised in existing academic literature,⁶³⁰ the potential impacts of trauma on memory and testimony within the international criminal law context have been largely overlooked to date. Moreover, while there has been some empirical clinical research which has evidenced a negative therapeutic effect of testimony in victims of international crimes, there has been no attempt to relate those negative impacts to the ability of the victim to achieve a sense of justice in respect of the process more broadly, indicating a gap in knowledge.

Again, where the experience of testifying has been therapeutically detrimental for the victim, recourse will likely be had to expert clinical staff in the VWU, and there will be a clinical assessment of the victim at that stage. Expert clinical data concerning any adverse psychological impact of testimony would therefore be generated which, with the victim's informed consent, could be used to enable an examination of the impact of psychologically detrimental engagement on the achievement of a sense of justice in the victim, [Stage 3].

(c) Psychologically unsafe testimony: informal testimony and collective representation at the ICC

The emergence of informal (i.e. non-judicial) testimony during meetings convened by victims' common legal representatives has already been considered in the context of the development of a group understanding of the events in question and the consequent

⁶²⁸ Jane Herlihy, Laura Jobson and Stuart Turner, 'Just Tell Us What Happened To You: Autobiographical Memory And Seeking Asylum' (2012) 26 Applied Cognitive Psychology 661.

⁶²⁹ Steph J. Hellawell and Chris R. Brewin, 'A comparison of flashbacks and ordinary autobiographical memories of trauma: content and language' (2004) 42(1) Behaviour Research and Therapy 1.

⁶³⁰ Doak (Therapeutic Dimensions) (n 564) generally, and at 283; Stover and others (Confronting Duch) (n 16), citing Herman (Trauma and Recovery) (n 327) at 525.

silencing of less dominant victim groups.⁶³¹ In addition, however, informal testimony also introduces the possibility of psychologically unsafe victim narrative, with the potential to negatively affect the achievement by the victim of a sense of justice.

As already indicated, the VWU is responsible for ensuring the physical safety and psychological wellbeing of vulnerable individuals once they are physically before the Court. The remit of the unit is thereby limited to formal judicial testimony, and victims' legal representatives do not have the benefit of psychological support in their interaction with victims in their evidence-gathering or evidence-testing activities.

As a result, informal victim testimony during group meetings with legal representatives emerges in the absence of any available professional psychological support for potentially vulnerable victims, and hence risks psychologically detrimental engagement. Notably, there is no clinical assessment or follow-up for those victims who have attested to their trauma experiences during group meetings, and as a result, the psychological impact is unknown. Moreover, while analysis and comparison of the justice scores of victims providing informal testimony with those of the victim participation group as a whole would provide a rudimentary assessment of the impact of informal testimony on justice outcomes, the lack of clinical follow-up and resulting evidence means that the specific impacts of psychologically unsafe testimony cannot be formally assessed in relation to the achievement of a sense of justice in the victim, and should therefore be acknowledged as a limitation to the interpretation of assessment findings in respect of those participants affected.

3.4.8. Situating the participation experience in its context

Participation, does not, of course, occur within a vacuum, and the Court cannot be divorced from its context. It is conceivable that aspects of the prevailing circumstances surrounding the victim's participation have the potential to affect the achievement of effective and meaningful participation. These aspects, in turn, can include elements specific to the Court, and in particular, the victim's experience of process, as well as broader aspects of the victim's circumstances which are beyond the Court experience.

⁶³¹ Above, at para 3.4.5.(ii).

(i) Within the Court: experience of process

As previously noted, evidence indicates that the realisation of elements of procedural justice can affect the ability of victims to achieve some level and form of psychologically positive engagement with the justice mechanism in question.⁶³² While the impact of procedural factors on the achievement of positive participatory experiences is shown by clinical evidence to be limited, the impact is not insignificant, and hence the degree of victim satisfaction with procedural justice elements should be incorporated in to Phase 2 of the Court's assessment process, [Stage 3].

As already indicated,⁶³³ an extensive research project concerning the achievement of procedural justice for victims participating in proceedings before the ICC is underway, and there is little point in ostensibly replicating the study for the purpose of the Court's assessment of the achievement or otherwise of a sense of justice in participating victims. Instead, the findings of the Berkeley study should, as far as possible, be reflected in Phase 2 of the assessment.

That said, however, it is conceivable and indeed, on the basis of a similar study conducted by the same authors involving witnesses appearing before the ICC,⁶³⁴ likely, that the data generated by the Berkeley study will not be in the most amenable form for direct application to the Phase 2 assessment. In particular, it is likely to lack the detail necessary to enable a direct correlation of *individual* findings in respect of the achievement of procedural justice and their corresponding restorative sense of justice outcomes. While therefore, the suggested approach here is both practical and resource-sensitive, it is imperfect in terms of the data produced.⁶³⁵

In practice, however, this may not be a significant difficulty for the Court in its assessment of victims' achievement of effective and meaningful participation: the fact that

⁶³² At para 3.3.2. See also War Crimes Research Office (2009) (n 338); Robert J. MacCoun, 'Voice, Control, and Belonging: the Double-Edged Sword of Procedural Fairness' (2005) Vol. 1 Annual Review of Law and Social Science 171.

⁶³³ Para 2.2.2.(iv).

⁶³⁴ Berkeley School of Law (n 15).

⁶³⁵ It may be that the researchers are able and willing to supply more meaningful data to the Court in the form of their individual, pre-report findings, with, of course, the further consent of victims.

procedural justice is known to affect victims' ability to achieve some level or form of psychologically positive engagement with a judicial mechanisms means that, as an affecting variable, it is not an unknown quantity in this context. As a result, some degree of variance between victims' experiences (in terms of why, for some, participation was experienced positively while for others it was not) can feasibly be attributed to it. Moreover, the Berkeley study may provide guidance on procedural satisfaction across particular aspects of the participation experience, and so enable some level of basic correlation of results with those of the Phase 1 assessment. Finally, where the study disaggregates by, for example, gender, any procedural justice differential might also be relevant to an examination of the achievement of effective and meaningful participation between men and women participants.

(ii) Beyond the Court: the broader context

There are likely to be factors that are external to the Court and beyond its control which impact negatively upon the achievement and/or longer-term retention of any positive restorative benefit in victim participants.⁶³⁶ Such factors thereby operate as limitations to the Court's realisation of its restorative endeavour, and might include ongoing insecurity or instability in the victims' home context and an accompanying lack of any personal sense of safety in the victim, continuing isolation and stigmatisation resulting from the perpetration of sexual violence, ongoing financial hardship and the possible impact of continuing levels of trauma at the societal level.⁶³⁷

Assessment findings should therefore be considered in relation to the participant's broader context in order to assess the extent to which, if at all, external factors affect the achievement of a sense of justice in the victim. To this end, participants should be asked during the initial data collection stage of Phase 1 [Stage 2], and again at the point where

⁶³⁶ Stover, for example, notes in relation to witnesses returning to their homes after testifying before the ICTY that the initial glow they experienced soon faded, Stover (Witnesses) (n 164) 131. Moreover, it seems unlikely that this was due simply to the passage of time, as Horn and others observes in relation to victims appearing before the STL that the length of time between the testimony and interviewing for the study varied greatly between victims but had no tangible impact on the subsequent evaluation of victims of their testimony experiences, Horn and others (n 327) 146 - 7.

⁶³⁷ Notably, clinical literature evidences a complex interrelationship between individual and societal trauma. It is beyond the scope of this research to explore this interrelationship in detail; see Sveaas and Lavik (n 464) 41 - 2; Rauchfuss and Schmolze (n 362) 40.

victims' scores in relation to their identified justice parameters are ascertained [Stage 3], about aspects of their personal wellbeing, including, in particular, their financial and physical security, as well as levels of familial and/or community support. Information concerning levels of security within the participant's region is also likely to be a matter of public record, and may be readily available from the OTP in relation to any risk assessment for the purpose of the conduct of its investigative activities. Information relating to concurrent levels of societal trauma may be available either from existing assessment activities of mental health needs carried out by the Trust Fund or, in the alternative, via external clinical organisations operational within the area. Findings in respect of restorative outcomes [Stage 3] could therefore be disaggregated by country, and compared and considered in light of prevailing security factors and issues of widespread trauma. Findings should also be disaggregated and compared by reference to victims' sense both of financial security and social support. Finally, disaggregated findings should be analysed by gender where, for example, a sense of insecurity or need for social support may be a more pressing need.

3.5. Summary of potentially affecting variables and concluding thoughts on Phase II assessment

Empirical clinical evidence has assessed and discounted a number of factors as having the potential to affect a victim's psychological response to judicial engagement. These factors include the victim's age, religion, level of education, economic status, the time spent giving testimony and the party for whom they appeared. The nature, extent and degree of abuse suffered, together with the extent to which the victim found the testimony experience to be painful, have also been shown not to subsequently affect the propensity of the victim to consider their experience to have been either a positive or negative one.

An impact has, however, been documented in the case of gender, as well as in relation to procedural elements, although notably, the identified impact accounts only for a relatively limited amount of the documented variance between victims' experiences. With this in mind, and as a means of enabling the Court to understand the underlying reasons for any restorative shortfall in the operation of its participation endeavour, a number of additional variables have been proposed for inclusion in Phase II of the assessment process, which may affect the achievement of effective and meaningful participation. Phase II assessment variables therefore comprise:

- The extent to which the non-realisation of non-restorative justice goals affects the achievement of a restorative sense of justice;
- The extent to which victim participants' expectations have been effectively managed by the Court;
- The extent to which charges reflect the ambit of abuse(s) experienced by the victim (charge selection and the exercise of prosecutorial discretion);
- The impact of the narrow, forensic focus of the Court on the achievement of justice aims;
- Difficulties in the achievement of testimony (formal and informal);
- A gender differential;
- Factors emanating from the psychological ill-health of the participant, including any aggravation of trauma symptoms during judicial engagement, psychological readiness and the delivery of psychologically unsafe informal testimony;
- The impact of the participation context: experience of process; and
- Factors arising from the external participation context.

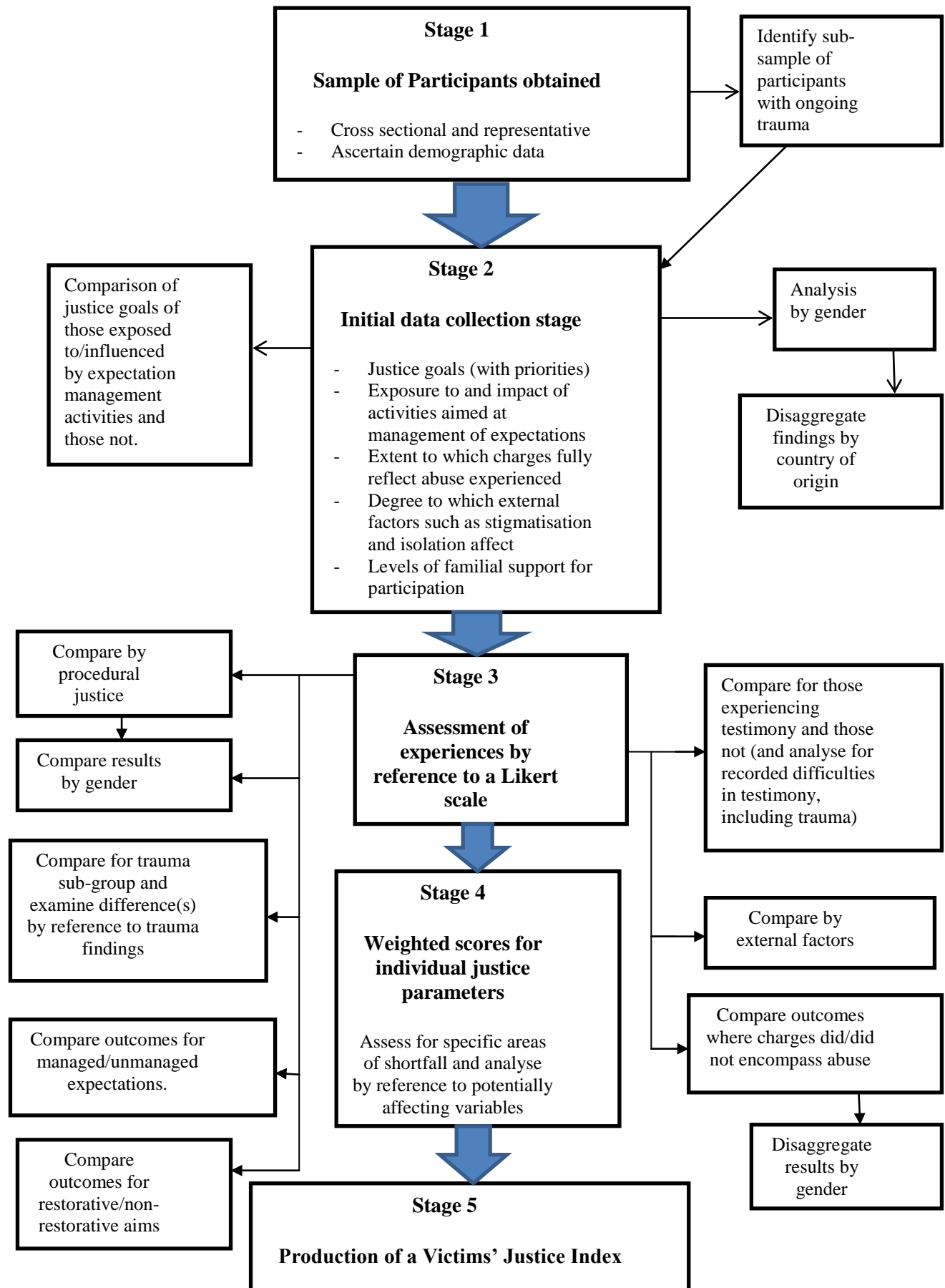
In addition, two further variables may affect the achievement of a sense of justice in participating victims but are not susceptible to evaluation. They are:

- Impact of the emergence of a dominant group narrative; and
- Psychologically detrimental testimony arising within a group context (informal testimony).

As indicated,⁶³⁸ while Phase I and Phase II of the assessment process are described separately here, data collection will operate concurrently in respect of them. With this in mind, a combined Phase I and Phase II assessment process is illustrated diagrammatically below:

⁶³⁸ Para 3.1.

Figure 3.2: Assessment process (Phase I and II)



Having identified and explored a number of additional variables which have the potential to negatively affect the achievement of effective and meaningful participation for victims, and which may therefore account for the degree of variance in victims' experiences of judicial engagement, it is appropriate to briefly consider how the assessment tool might be developed and rendered operational in practice.

3.6. Rendering the tool operational: practical approach to the development and application of the tool

In order to render the assessment tool physically operational and appropriate to the forum it will, of course, require careful and methodical drafting and development, and some thoughts on an appropriate approach to its elaboration and temporal scope are included below. The section then goes on to consider a number of factors that relate to the practical application of the tool itself. Finally, the assessment process described in this chapter is not, of course, without its limitations, and the section concludes with some observations to that end.

3.6.1. The physical development of the assessment tool

The application and assessment of psychological impacts within a judicial context, and for a primarily legal audience, is not without its challenges, requiring both the incorporation of psychological approaches in a clear and meaningful way whilst ensuring the tool is appropriate and applicable to the diverse victim participant community of the ICC. With this need in mind, a number of factors relevant to the physical development of the assessment tool are explored briefly below. These factors include the need for an interdisciplinary approach, the development of a common language between academic disciplines and the need to tailor the tool to the ICC's victim participant community.

(i) The need for an interdisciplinary approach

The assessment tool is intended to measure victims' subjective evaluation of their participation experience in direct relation to the achievement of personal justice goals, and while the assessment of psychological responses in victims of international crimes is not wholly novel to the legal arena, the considerable experience of psychological experts in this field, combined with the incorporation of clinical trauma impacts in to the assessment tool as a potentially mediating factor in the achievement of effective and meaningful

participation, suggests the need for an interdisciplinary approach to the physical development of the instrument.

Notably, however, while an interdisciplinary approach provides, it is suggested, the greatest opportunity for meaningful assessment which best reflects the realities of victims' experiences, it is also more complex, and will inevitably entail additional lead-in time which will need to be factored in to the development process.

(ii) The development of a common language between academic disciplines: defining terminology

As noted in the previous chapter,⁶³⁹ there is no common or shared terminology between legal and clinical disciplines by which to describe the nature of any psychological impact experienced by victims of international crimes who engage with transitional justice mechanisms. As a result, and in particular, as a corollary of adopting an interdisciplinary approach to the physical development of the assessment tool, a shared understanding of terms employed for the purpose of the assessment should be developed at the outset of the drafting process in order to ensure both internal coherence and consistency within the tool itself, and the subsequent framing of the assessment findings in unambiguous terms for an ostensibly non-clinical audience.

The notion of a restorative sense of justice for victims participating in proceedings before the ICC is developed in the previous chapter, and findings of the assessment can be directly allied to it. In addition, a clear delineation of any clinical terms should be produced, including those relating to trauma impacts, as well as the concept of trauma itself.

(iii) Tailoring the assessment tool to the victim participant community

In order to render the assessment tool fully responsive to the ICC victim participant community, particular thought should be given to the validation of the tool. Validation in turn should ideally be conducted by, or in conjunction with and led by, a Research Psychologist, and should be considered in particular reference to the need to ensure the operation of the instrument in relation to different populations in order to ensure that

⁶³⁹ Para 2.2.2.(i).

culturally specific markers of satisfaction or disappointment are equally encompassed, and that indicators of satisfaction are recognised within the intended study population.⁶⁴⁰

In addition, and as noted above,⁶⁴¹ our knowledge of victims' justice aims in approaching an international criminal law mechanism emanates largely from research conducted with victims appearing before a purely retributive tribunal to testify, rather than within the context of any broader participative process. It is therefore conceivable that the list of justice goals identified in this research is incomplete in the context of victims participating in proceedings before the ICC. As a result, the list of restorative justice aims which form the basis and framework of Phase 1 of the assessment process should therefore ideally be validated with a cross-sectional focus group of victim participants.⁶⁴²

In addition, the tool will require piloting in order to assess the extent to which the questions posed within it are comprehensible to the intended research population and thereby capable of generating meaningful data for the purpose of assessment. Piloting would ideally be conducted through the conduct of focus group(s) of participating victims, refinements to the tool made in response to the pilot, and a second pilot, this time of the revised tool, conducted with a second group.⁶⁴³ While, however, focus groups provide a useful means of developing and refining variables and questions for the conduct of quantitative research,⁶⁴⁴ they pose their own challenges in the specific context of the ICC. In particular, physically bringing victims together presents ethical problems in terms of victim confidentiality where victims would not otherwise come into contact with each

⁶⁴⁰ This might include the format for the proposed five-point Likert scale, for example, and in particular, whether numbers or diagrammatical representations should be employed, and in the latter case, whether the diagrammatic representation is meaningful to the participant community; employed, for example, in the study by Horn and others (n 327).

⁶⁴¹ See para 2.3.

⁶⁴² An alternative approach would be to include an "other" box within the Phase 1 assessment which would enable researchers to record the nature of any justice goals which are additional to those identified. These additional goals could then be considered during a review of the instrument and any adjustments made accordingly. Notably, however, the use of a focus group would also enable consideration of the suitability and comprehensibility of the language employed in the assessment tool.

⁶⁴³ The use of a focus group as a means of refining and piloting a quantitative assessment instrument is considered further in van Peer and others (n 519), 86 – 89.

⁶⁴⁴ Ibid.

other, as well as possible security concerns and issues of physical access for the researchers themselves. In light of these issues, thought would need to be given to, for example, the feasibility of convening a focus group in conjunction with any meeting called by the Common Legal Representative, or otherwise seeking to conduct the pilot with existing victims' groups within an area affected by the crimes charged.⁶⁴⁵

3.6.2. The practical application of the assessment tool: ethical approval and additional factors

The proposed assessment framework is ostensibly written here on the basis that it will be conducted from within the Court, although, of course, it is feasible that the assessment might be conducted by an external body, such as a university, in conjunction with Court staff.⁶⁴⁶ In any event, the relative body will have its own ethical processes, and the assessment process should comply with ethical standards.

Participating victims may be psychologically vulnerable and/or have particular concerns about the physical security of themselves and their families, and the assessment process, including the development, validation and piloting of the assessment tool itself, must therefore be sensitive to these issues. Victim engagement with the project should be on the basis of informed, written consent. Researchers should, in turn, explain to victims the nature and aims of the project, together with the role and extent of the participant's anticipated involvement in it. Researchers should clearly indicate to participating victims that their decision in relation to the research will not affect their participatory status before the Court, nor the nature of the participation they may expect to achieve. Victims should be aware that they are free to withdraw from the assessment at any time without affecting their participation in proceedings at the Court, and should be given the contact details of an appointed individual who is able to answer any further questions relating to the assessment.

⁶⁴⁵ In addition, piloting might be conducted with a group of victims who are no longer in the country, having fled to seek safety elsewhere. In such a case, however, there is the risk that responses might be additionally informed by issues of dislocation and isolation, such that the group may not be fully representative of the views of victims who remain within affected countries/communities.

⁶⁴⁶ In light of its limited resources, this may be the most desirable option for the Court.

Researchers should also ensure that issues of confidentiality are fully explained to, and understood by, victim participants, and should indicate plans for secure data storage and disposal of information concerning the participant at the end of the project. Researchers should also assure victims that their data will only be accessible to members of the research team, and that the information will not be used for any other purpose. The assessment findings themselves do not rely on the specific identification of individual victims, and as a result, victims should be assured that their contribution to the research will be anonymised in the data.

Given the inclusion in the assessment of questioning concerning the extent to which charges fully reflect the abuse experienced by the victim, and the particular vulnerability of crimes of sexual violence to issues of proof and Prosecutorial discretion, gender-appropriate interviewing with women victims, wherever possible, is required. Researchers themselves should be trained in interviewing potentially vulnerable survivors.

In addition, while the assessment tool itself is not designed to explore and record the victim's trauma story in full, narrative needs in the participant may mean that the victim chooses to speak about their experiences to the researcher, as an objective listener, and time should therefore be factored in to the researcher's interviewing schedule to accommodate this potential need. Allied to the potential narration by victims of their abuse experiences is the risk of vicarious traumatisation in the researcher, and the research schedule should therefore also provide opportunities for interviewer debriefing and support where appropriate.

Finally, in light of the novelty of the assessment tool within the specific context of international criminal justice mechanisms, the tool itself is likely to require some degree of modification and refinement during its development and use, and to this end, should be kept under regular review.

3.6.3. Acknowledging the potential limitations of the assessment

A number of limitations to the described assessment process have been identified and included throughout this chapter. In addition, it should be noted that the initial data collection stage in Phase 1 of the assessment essentially provides a snapshot of justice needs at a specific moment in time, and it is conceivable that these needs may shift with time, as new priorities arise for the participant. Where this has happened, it is likely to

disrupt resulting scores in relation to a victim's sense of justice. To this end, the assessment instrument should be kept under regular review and, if required, an additional stage might be included, if deemed to be feasible, to verify justice goals with victims at a later stage of their participative journey.

In addition, it should be acknowledged that where interviews are administered by a staff member of the ICC, there is the potential for a positive bias in victims' responses due to a need in victims to please the interviewer. Moreover, while continuity of interviewers may be beneficial in terms of the establishment of a relationship of trust between the participating victim and the researcher, this also has the potential to aggravate any positive bias in victims' responses.

This potential effect is known as "social desirability bias", and is similarly recognised by Horn and others in their study in to the witnessing experiences of victims appearing before the SCSL. Notably, however, the researchers in the latter instance go on to indicate that the effect on victims' responses may be more nuanced than the Berkeley study implies. In particular, they suggest that where the interviewer is known to the victim and a relationship of trust exists between them, this might also render the victim more comfortable about revealing negative experiences. The use of Court staff for interviewing therefore has the potential to affect the results of the assessment one way or another, although the nature and extent of that impact is seemingly unclear. Finally, it should be noted that the use of external interviewers as a means of avoiding this effect may not necessarily address the problem, and this is particularly the case where the introduction of strangers to victims may be experienced as especially challenging where victims fear identification.⁶⁴⁷ As a result, it is likely that the identity of the researcher/interviewer for the purpose of the assessment will affect victims' responses to some degree.

3.7. Concluding summary

There is, at present, no monitoring or assessment of the Court's victims' mandate by reference either to any restorative parameters or substantive notion of justice in the victim. As a result, we simply do not know if and to what extent participating victims achieve a sense of justice by virtue of their engagement with the Court. Moreover, and at a more fundamental level, there is no assessment tool for the evaluation of victims' substantive

⁶⁴⁷ See Horn and others (n 327) 148.

justice experiences in the specific context of international criminal justice, indicating a gap in both knowledge and practice.

Regular assessment and monitoring of the endeavour is essential not only for the evaluation of the Court's progress in respect of its innovative mandate, but also to enable the adoption of specific, targeted and cost-efficient measures aimed at the improvement of the participatory experience, thereby maximising the potential for victims to achieve effective and meaningful participation, whilst operating within a resource and context-sensitive manner. Assessment in turn should indicate not only whether and in what respects the Court is providing effective and meaningful participation, but also the reasons for any identified restorative shortfall.

While the findings of any assessment will not be legally binding on the Court, they are likely to be of persuasive value, and so may prompt some form of responsive action. As discussed, victim disillusionment and dissatisfaction with the Court threatens its perceived legitimacy in the eyes of the affected community, while active victim disengagement or withdrawal impinges upon the Court's investigative and prosecutorial activities.⁶⁴⁸ Victim satisfaction is therefore significant for the legitimacy, perceived relevance and practical functioning of the institution. In addition to any wish to ensure justice for victims *per se*, the Court therefore has a specific self-interest in ensuring that its goal for victims is realised as far as feasible within the framework of an international criminal justice mechanism, and a full understanding of victims' justice hopes and needs is therefore of particular value to it.

Realisation of the full spectrum of victims' justice needs is clearly both impracticable and undesirable in the specific context of the Court. As already noted, it is not, first and foremost, a restorative justice mechanism, and the realisation of any restorative notions it has incorporated into its innovative mandate is necessarily subject to the primacy of the Court's retributive function and the right of the Defendant to a fair and expeditious trial.

With this limitation in mind, a number of concrete examples of how the Court might respond to particular assessment findings have been indicated in this Chapter, including in relation to the conduct of activities by the Court's Outreach Unit,⁶⁴⁹ measures to respond

⁶⁴⁸ Discussed above, Introduction, and see also in more depth, at para 1.2.1.

⁶⁴⁹ Para 3.4.2.

to any gender differential in justice experiences,⁶⁵⁰ and steps which may serve to limit negative reactions to narrative in victims with ongoing psychological needs.⁶⁵¹

In addition, and again, subject to the findings of any assessment, a number of other actions which seek to respond to unrealised justice goals and which entail little in terms of resources might be considered by the Court. In particular, in many cases before the Court, the fact that gross violations have occurred is not in dispute, and instead, argument focuses on the Defendant's responsibility or otherwise for those violations.⁶⁵² Moreover, in light of the Court's practice of identifying and prosecuting high-ranking officers and leaders, as opposed to foot-soldiers, this is a situation that is likely to continue. In such a situation, and without prejudice to the Defendant's right to a fair and expeditious trial, the Court, through its judges, might consider making a formal statement at the opening of a trial in which it explicitly and publicly recognises and denounces the crime(s) that took place, and acknowledges the harm suffered by the many victims. Thought might also be given to listing the names of the dead as an appendix or schedule to any judgment in order to respond to the needs of many victims to bear witness on behalf of loved ones who did not survive the crimes charged.⁶⁵³ Finally, and again in situations where the fact of violations is not in issue before the Court, while the truth needs of victims are likely to be more expansive than the forensic focus of the Court, thought might also be given to the possibility of sharing with victims additional information gleaned by the OTP in its investigation which goes beyond the narrower focus of the trial itself.⁶⁵⁴

With an array of specific assessment needs in mind, and as a response to the identified knowledge gap in this area, the author has proposed a framework for assessment that is both sympathetic to the exigencies of the Court and appropriate to the victim participant community. Moreover, the proposed assessment model will provide clear indicators of specific areas of restorative shortfall, through the production of justice scores in respect of

⁶⁵⁰ Paras 3.4.5.(ii) and 3.4.6.

⁶⁵¹ Para 3.4.7.(ii)(a).

⁶⁵² This is the case, for example, in *Katanga*, and noted specifically in *Katanga* (Judgment, Minority Opinion of Judge Van den Wyngaert) 7th March 2014 (ICC-01/04-01/07-3436-AnxI) [4].

⁶⁵³ Such an approach was taken, for example, by the ICTY in the case of *Prosecutor v. Mile Mrkšić, Miroslav Radić & Veselin Šljivančanin*, (Judgment) 27th September 2007 (IT-95-13/1-T).

⁶⁵⁴ This possibility is examined further in Klinkner and Smith (n 260) 22.

the various restorative parameters, as well as an overall Victims Justice Index for the Court, thereby facilitating a readily intelligible and accessible means of charting progress in the pursuit of effective and meaningful participation.

Finally, as indicated, we still know relatively little about why some victims experience judicial engagement positively while others do not. Thanks to empirical clinical research, the scale of that knowledge gap can be broadly quantified, with 80% of variance between victims' experiences remaining unaccounted for. With this particular knowledge gap in mind, the author proposes a number of additional and alternative variables which may, it is argued, affect the ability of victims to achieve psychologically positive participation in proceedings before the ICC, and which are included for evaluation in the proposed assessment tool framework.

Conclusion

The aim of this thesis is to analyse, develop and concretise the concept of restorative justice in international criminal law in order to render it tangible, applicable and measureable within the specific context of the ICC. To this end, this thesis (1) identifies and delineates an appropriate restorative aim for the International Criminal Court for participating victims, and (2) examines and demonstrates how the Court's progress in the pursuit of its restorative mandate can be assessed in practice.

In Chapter 1 of this thesis, the restorative rationale for victim participation is examined by reference to its drafting history, documentary sources, the prevailing pro-victim context and literature emanating from the Court itself. The examination reaffirms the Court's restorative mandate, and the Chapter demonstrates that, as drafted, Article 68(3) of the Rome Statute offers genuine potential for the provision of participation that could be experienced by individual participating victims as effective and meaningful. It is, therefore, in principle at least, a system with promise for the victim.⁶⁵⁵

The Chapter goes on to demonstrate, however, that while the restorative basis and rationale for the provision is expressly acknowledged by the Court at a theoretical level, there is no recognition of the provision's restorative object and purpose in the Court's jurisprudence, evidencing a disconnect between the theoretical discussion of the endeavour within the Court, and its practical interpretation and application.⁶⁵⁶ This thesis shows instead that in the absence of a clear guiding focus or aim, the restorative mandate is in danger either of being subsumed by the Court's retributive function⁶⁵⁷ or of being usurped by a less ambitious quest for procedural justice for victims.⁶⁵⁸ In addition, Chapter 1 submits that the current practices of the Court indicate that it may be losing sight of the individual victim as intended beneficiary of the right in favour of a more collective approach to participation or one which situates the victim in a representative

⁶⁵⁵ Para 1.2.5.

⁶⁵⁶ Para 1.3.3.

⁶⁵⁷ Para 1.3.3.(i).

⁶⁵⁸ Para 1.3.3.(iii).

capacity,⁶⁵⁹ to the detriment of the potential of victims to achieve effective and meaningful participation.

Chapter 2 of this thesis responds to the problem of what restorative justice means in the context of international criminal law, including what restorative justice would comprise in practical terms for participating victims. Part I of Chapter 2 identifies, examines and argues for an appropriate overarching goal for restorative action at the ICC: the achievement of a sense of justice in participating victims.⁶⁶⁰ In Part II of Chapter 2, and by reference to clinical theory, the notion of a sense of justice is developed for application within a judicial forum and with specific reference to victims of international crimes. To this end, this thesis proposes a definition of a sense of justice in victims of international crimes as:

A psychological state in which the victim feels that adequate amends have been made for a wrong committed.⁶⁶¹

For the purpose of application in the specific context of the ICC, and as an overarching aim for its restorative action, this goal is understood as the pursuit of a sense of justice that is considered by a substantial number of victim participants to be adequate. An adequate sense of justice would, in turn, comprise a position wherein, while perhaps neither perfect nor complete for some victims, their experience(s) of abuse are no longer seen by them as unfinished business, but instead, they are able to look and move forward.⁶⁶² A “substantial number of victims”, this thesis argues, should, in the first instance, comprise more than a simple majority, and the percentage should be adjusted upwards where monitoring activities evidence increasingly positive scores for the achievement in victims of a sense of justice.⁶⁶³

In Part II of Chapter 2, the sense of justice goal is disaggregated into its constituent parts with a view to rendering the concept of restorative justice tangible, applicable and

⁶⁵⁹ Para 1.3.3.(ii).

⁶⁶⁰ Para 2.3.2.

⁶⁶¹ Para 2.4.1.

⁶⁶² Para 2.4.2.

⁶⁶³ Ibid.

operational within the practices and procedures of the Court. In doing so, the chapter provides concrete indicators of what restorative justice comprises for victims of international crimes.⁶⁶⁴ These indicators are:

- The formal public acknowledgment of the crime(s) committed;
- Public moral denunciation of the crimes committed (validation);
- The public acknowledgment of the pain suffered;
- The ability of victims to tell their story;
- The ability of victims to educate the world and bear witness to the abuses that occurred;
- The ability of victims to publically denounce the wrongs committed against them;
- The ability of victims to confront the accused;
- The achievement of justice for loved ones and the ability of victims to bear witness on behalf of those who did not survive;
- The discovery of the truth about the crimes committed and the fate of loved ones;
- The prevention of further abuse;
- The ability of victims to contribute to broader peace goals;
- The receipt of reparations;
- The receipt of an apology; and
- The healing of mental harm.

The parameters, in turn, are developed by reference to the findings of clinical research concerning the aims of victims of international crimes, and are analysed in terms of their compatibility with restorative justice theory.

⁶⁶⁴ Para 2.4.3.

Chapter 3 of this thesis responds to the current lack of monitoring of the Court's participation endeavour by reference to any restorative aims or parameters. It considers how the Court's progress in the pursuit of its restorative mandate can be evaluated,⁶⁶⁵ and the detailed framework of a psycho-legal assessment tool for the monitoring and evaluation of the Court's pursuit of restorative justice for participating victims is developed. To this end, the thesis proposes assessment of victims' satisfaction in relation to the achievement of restorative justice parameters, identified in Chapter 2, on a five-point Likert scale. The Chapter then argues for the production of a Victims Justice Index in respect of the Court as a means of providing clear and readily comprehensible, case-by-case markers of the Court's progress in the pursuit of its restorative mandate.⁶⁶⁶ The production of justice scores in respect of the individual justice parameters identified in Chapter 2 are proposed in order that any areas of restorative shortfall can be easily identified.⁶⁶⁷

Chapter 3 goes on to examine variables which have the potential to affect the achievement of effective and meaningful participation in victims of international crimes, and proposes a number of additional variables for assessment.⁶⁶⁸ The proposed variables for incorporation into the assessment tool are:

- Whether, and the extent to which the non-realisation by victims of justice goals that are not consistent with restorative justice theory (such as a desire for revenge or goals that are otherwise better allied to a retributive justice model) affects their ability to achieve a restorative sense of justice;
- The extent to which participating victims' expectations have been effectively managed and contained by the Court such that they are realistic in the context;
- The extent to which the charges before the Court reflect in full the ambit of abuse(s) experienced by the victim. Challenges may arise in particular as a result of charge

⁶⁶⁵ Para 3.2.

⁶⁶⁶ Para 3.2.2.(iv)

⁶⁶⁷ Ibid.

⁶⁶⁸ Para 3.4.

selection and the exercise of prosecutorial discretion, with the effect that proceedings may not be fully responsive to the harm suffered and justice therefore seen by the victim as incomplete;

- The impact of the narrow, forensic focus of the Court on the achievement of justice aims, and in particular, on the ability of the victim to learn the truth about the context and nature of abuses perpetrated, together with the fate and whereabouts of loved ones;
- Difficulties in the achievement of testimony, both within the formal judicial setting and the informal context of group meetings. Difficulties may be generated in particular as a result of the very limited opportunities for formal testimony, and the emergence of a dominant narrative in the group context which may operate to stifle other narratives, including those of women victims of sexual violence;
- A gender differential in victims' perceptions of justice experiences. This is identified in legal and clinical research with victims of international crimes, and therefore justifies the consideration of outcomes by gender;
- Factors emanating from the psychological ill-health of the participant, including any aggravation of trauma symptoms during judicial engagement, psychological readiness and the delivery of psychologically unsafe testimony during informal group meetings; and
- The impact of the participation context. This can include victims' experiences of process, as well as factors external to the Court which instead relate to the victim's broader context, and which therefore lie beyond the control of the Court.

The identified variables are incorporated into the framework assessment tool through the inclusion of additional questions in the proposed questionnaire and, in the case of non-restorative justice goals, as additional justice parameters. In the case of trauma impacts, the tool envisages the engagement of clinical specialists from within the Court's Victims and Witnesses Unit.

The proposed tool itself is not without its limitations. In particular, data collection does not, at present, take into account the possibility that the justice needs of participating

victims may change over time. In addition, there is the potential for bias in victims' responses, including where they have a relationship of trust with the interviewer. Follow-up may be problematic where security concerns mean that it is not appropriate to approach the victim, or where the victim is inaccessible for researchers because the area where they live has become or remains unstable and unsafe. Finally, a number of variables – including the potential impact of the emergence of a dominant group narrative and the occurrence of psychologically detrimental testimony within the informal, group context – are not, at present, susceptible to monitoring. These factors will therefore qualify the results of any assessment to some extent. While, however, the proposed approach to assessment is not, and cannot be, perfect, the framework assessment tool represents a substantial step in addressing the significant knowledge gap in this area, and has the potential to provide a real contribution to theory and practice.

Implications for theory

In identifying and defining an appropriate restorative goal for the Court, and in amplifying and delineating its content, this thesis has advanced restorative justice theory in the context of international criminal law. While the specific focus of this thesis is on the experiences of victims engaging with the International Criminal Court as participants, the development of restorative justice in the particular context has implications for academic and practitioner discussion of the victim participation endeavour more broadly. In particular, the identification of the constituent elements of restorative justice for victims of international crimes advances understanding and knowledge in the field, and provides the basis and context for debate concerning the pursuit of effective and meaningful participation within the Court, as well as the framework for any future review or overhaul of the endeavour by the Court which might be anticipated. Moreover, while the development of restorative justice theory is situated here within the specific context of the International Criminal Court, the parameters identified relate to victims approaching international criminal justice mechanisms more broadly, and hence can be employed beyond the ICC to other international criminal justice mechanisms such as the Special Tribunal for Lebanon.

In addition, in integrating the various perspectives, insights, approaches and methods within legal and psychological literature, this thesis provides a more comprehensive understanding of victims' justice needs in the context, and enables cognitive advancements in both disciplines. Within the legal context, this thesis has engaged

psychological concepts and practices to further legal understanding in a number of ways: in its discussion and analysis of the Court's innovative endeavour by reference to psychological aims and impacts,⁶⁶⁹ in its consideration of the consistency of clinical findings of victims' aims with restorative justice theory,⁶⁷⁰ and in the identification of the framework for an assessment tool that is designed to gauge psychological impacts and operate in accordance with a clinical assessment method, where the content and focus of assessment has been generated by reference to legal theory and the needs of a judicial mechanism. Moreover, in reconceptualising psychological aims, identified in clinical literature, as justice parameters consistent with restorative justice theory, this thesis repositions those aims as legal rights, thereby informing and advancing clinical understanding of the needs identified. The interdisciplinary approach to this research as a means of addressing a complex problem that has both legal and psychological elements has therefore provided an innovative means of considering and responding to the challenges identified.

Implications and recommendations for practice

The identification in this thesis of an overarching goal for restorative action at the Court has the potential to impact significantly on the institution's practice should it chose to adopt the finding. In particular, recognition of the restorative aim would provide a clear, guiding focus for victim-centred action at the Court, increasing the potential for consistent practices that are, in turn, predictable for participating victims and their legal representatives, and responsive to the innovative mandate, thereby supporting the legitimacy of the Court in the eyes of the affected community.

While the Court has a mandate to provide elements of restorative justice to participating victims, however, it is not a wholly restorative mechanism, and instead, must seek to realise restorative impacts for participating victims within a primarily retributive process. As this thesis indicates, the retributive function of the Court has the potential to affect the realisation of a number of the identified justice parameters, including the ability of victims to achieve goals allied to the delivery of testimony⁶⁷¹ or those which concern broader truth

⁶⁶⁹ Paras 2.3.1. and 2.3.2.

⁶⁷⁰ Para 2.4.3.

⁶⁷¹ Para 3.4.5.(i).

needs.⁶⁷² In order to minimise the potential for victim disillusionment, the Court must indicate to victims, through its outreach and information activities, the extent to which the full realisation of those parameters may be inhibited by the particular context of their application.

The monitoring and evaluation of victims' participation experiences by reference to restorative aims will facilitate the adoption by the Court of targeted, resource-sensitive measures within the Court to respond to areas of restorative shortfall, and specific, albeit hypothetical illustrative examples of such possible measures are included in this thesis. It would thereby operate both in the best interests of participating victims and the Court itself. It is therefore recommended that the Court, either itself or in conjunction with external researchers, and on completion of the development of an assessment tool, initiate an ongoing, rolling assessment of its innovative endeavour.

On a broader level, in construing victims' psychological aims as parameters of a sense of justice in victims, this thesis identifies what justice means for victims in the aftermath of widespread and systematic violations. Where, therefore, international criminal justice mechanisms seek or claim to provide substantive justice for victims, the identified parameters provide the basis for discussion of what "justice" for victims comprises,⁶⁷³ and so enables the development of legal approaches and practices that are responsive to victims' justice needs, enhancing the potential for the achievement of justice for victims of atrocities. Moreover, as this thesis demonstrates, the achievement of substantive justice for victims is measureable, and so provides the potential for assessing and validating the underlying aim of those mechanisms. Moreover, the conduct of monitoring within more than one tribunal would provide the opportunity for comparison between assessment outcomes and the cross-fertilisation of approaches where examples of best practice emerge.

Directions for future research

This thesis engenders an ambitious research agenda of its own:

⁶⁷² Para 3.4.4.

⁶⁷³ As indicated above, at para 3.2.2.(iv), victims justice needs will be diverse, and will be represented by a number of parameters from the list identified in this thesis at para 2.4.3.(ii).

(i) The detailed assessment framework proposed in Chapter 3 provides the structural basis for the development and production of a formal assessment tool for application at the International Criminal Court. The proposed assessment tool is intended to evaluate the psychological impact on victims of participation, and to that end, borrows heavily from clinical assessment methods. In light of the interdisciplinary nature of the proposed tool, assessment should be robust in psychological terms, as well as providing meaningful, systematically-sourced information to the Court as a legal mechanism, indicating the need for an interdisciplinary approach to its further development. In particular, psychological engagement is required in order that questions are phrased in a way which renders them readily comprehensible to a diverse victim participant population, to consider and apply an appropriate means of representing the Likert scale to victims, and in order to validate the instrument with a view to ensuring that generated data is reliable.

In addition, assessment at the ICC would require the active participation of the Court itself. The head of the Victim Participation and Reparation Section has indicated her interest in principle in the proposed assessment process, and further discussion is scheduled to take place once the procedural justice findings of the Berkeley study become available, in the autumn of 2015.⁶⁷⁴

(ii) Research is also required to develop a common terminology between the legal and clinical fields to refer to the psychological impacts of engagement by victims with international justice mechanisms. The development of a common language would help to clarify the terms of the debate in the alternative academic discipline. In addition, an appreciation of the terms and content of the alternative discipline will effectively serve to expand the available knowledge base upon which researchers in this field can draw, thereby enabling an advancement of understanding. Finally, a common language enables the establishment of a shared conceptual framework between interested disciplines for the conduct of research,⁶⁷⁵ and therefore provides the basis for the conduct of future interdisciplinary work in this complex area. Again, the process of developing and/or defining terminology should be an interdisciplinary one.

⁶⁷⁴ Private communication between E. Smith and F. McKay, November 2014.

⁶⁷⁵ See, for example, Patricia Rosenfield 'The potential of transdisciplinary research for sustaining and extending linkages between the health and social sciences' (1992) 35 *Social Science and Medicine* 1343.

(iii) While the particular focus of this thesis is on the restorative aim and impact of participation on victims, the thesis argues that the Court's restorative aim should be pursued within a process that victims feel is fair and which is not anti-therapeutic, where these elements comprise ancillary goals to the Court's pursuit of its restorative mandate. As yet, there has been no evaluation of participating victims' experiences from a purely clinical perspective with a view to assessing whether engagement has been anti-therapeutic for victims. This thesis has highlighted some of the challenges involved in conducting a clinical assessment of victims engaging with the endeavour.⁶⁷⁶ It may, however, be feasible to conduct a review of the practices and procedures of the Court in relation to their potential to replicate or reproduce in victims the characteristic impacts of abusive behaviour. A similar approach is currently adopted in relation to the formal practices and procedures of trauma treatment centres, where processes and practices are examined in light of their potential to replicate in the survivor feelings of debility, dependency, disorientation and an ongoing sense of dread.⁶⁷⁷

(iv) Finally, as yet, there is no research which seeks to gauge the success of the Court in the pursuit of its broader peace aims, including in particular, whether the achievement or otherwise of a positive restorative impact in individual victims has quelled any desire in them for revenge. A parameter to this effect, however, is included in the proposed assessment tool framework, and so would provide a basis, at least, for future exploration of this area.

⁶⁷⁶ Paras 3.4.5 and 3.4.7.

⁶⁷⁷ These four characteristics are indicated, for example, in Peter Suedfeld, *Psychology and Torture*, (Hemisphere 1990) 3.

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