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The International Criminal Court and restorative justice: victims, participation and the processes of justice

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ABSTRACT

Until recently, the International Criminal Court (ICC) described its legal practices as offering a balance between retributive and restorative justice. It was held that restorative justice was progressed through its framework of victim participation in legal proceedings. However, there is little research into how, or whether, the Court metes out restorative justice. This article first considers the key pillars of restorative justice as ‘encounter’, ‘amends’ and ‘reintegration’, and the form of victim participation within these practices. It then examines how the ICC aligns to the direct participation of victims prioritised by restorative justice, and shows that victims do not hold such participatory possibilities. Instead, legal professionals take on direct participation in dialogue and decision-making processes. Using Bourdieu’s framing of the juridical field, the article identifies key reasons for the absence of direct victim participation and argues that the ICC primarily functions as a retributive approach to the resolution of conflict.

KEYWORDS Restorative justice; international criminal court; victims; participation

1. Introduction

The Court was created with both a punitive and restorative function, with the Rome Statute giving victims a right to directly participate in proceedings.¹

In December 2012, the then President of the International Criminal Court (ICC), Judge Sang-Hyun Song, addressed the World Parliamentary Conference on Human Rights in Rome, Italy. In his remarks, Judge Sang-Hyun Song said that the ‘Rome Statute and the ICC bring retributive and restorative

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¹ Assembly of States Parties, International Criminal Court, Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims. ICC-ASP/12/41, 11 October 2013, para. 28 (hereafter: Assembly of States Parties, ICC-ASP/12/41).

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justice together with the prevention of future crimes' (ICC Press Release, 2012). Restorative justice, as the ICC has previously held, is meted out through victim participation in legal proceedings and reparations, while retributive justice is evident through its punishment of the perpetrators of mass atrocity.² Together, these forms of justice are considered to be of importance for 'the interests of the victims and affected communities, and for long-term stability in post-conflict societies' (ICC Press Release, 2015).

The proposition that the ICC's practices mete out restorative justice to victims has also arisen in statements given by the current President, Judge Silvia Fernandez de Gurmendo,³ as well as the opinions of judges,⁴ the Registrar,⁵ and the Chambers.⁶ A previous version of the ICC's official website declared that victim participation and reparations represented a 'balance between retributive and restorative justice', and this statement also appeared in the ICC's official newsletter.⁷ Commentators,⁸ as well as state representatives,⁹ have interpreted the ICC as holding a 'restorative mandate' or meting out restorative justice. However, it remains unclear whether the ICC's practices are structured with the deliberate aim of meting out restorative justice, or whether mention of this justice approach is used as a broader description of the 'victim-friendly' practices of the Court by its professional staff. In recent years, the relationship between the ICC and restorative justice has become even more ambiguous; the reference to restorative justice has been removed from the 'victims' section of the current version of the website, and there is now no mention of victim participation or reparations being understood to encompass this form of justice.

How, then, should we understand the 'justice approach' of the ICC? This article explores the ICC's alignment to restorative justice practice through

² A previous version of the ICC's official website held that victim participation and reparations represented a 'balance between retributive and restorative justice'. A new version of the website went live on 8 May 2016 without this statement.

³ President Judge Silvia Fernandez de Gurmendo, 'International Criminal Court Today: Challenges and Opportunities'. Keynote speech given at the seminar 'International Criminal Court – the Past, the Present and the Future', Helsinki, Finland, 9 June 2016. <https://www.icc-cpi.int/itemsDocuments/1600609-Helsinki-keynote-speech-ICC-President-Fernandez.pdf> (accessed 20 December 2016).

⁴ See the dissenting opinion of Judge Eboe-Osuji: *The Prosecutor v. Uhuru Muigai Kenyatta*. ICC-01/09-02/11. Dissenting Opinion of Judge Eboe-Osuji, 26 November 2013, para. 61. https://www.icc-cpi.int/RelatedRecords/CR2013_09980.PDF (accessed 21 December 2016).

⁵ Herman von Hebel, Registrar, 'Remarks to the 15th session of the Assembly of State Parties', The Hague, 21 November 2016, page 11. https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ASP15-Opening-Statement-Registrar-ENG.pdf (accessed 21 December 2016).

⁶ Assembly of States Parties, ICC-ASP/12/41, paras 2, 28.

⁷ 'Victims before the ICC', International Criminal Court Newsletter, No. 2, October 2004, page 7. https://www.icc-cpi.int/NR/rdonlyres/4E898258-B75B-4757-9AFD-47A3674ADBAs/278481/ICCNL2200410_En.pdf (accessed 21 December 2016).

⁸ See, for example, discussion by Findlay and Henham (2011); Hoyle and Ullrich (2014); Kendall (2015); Pena and Carayon (2013). Such commentators often argue that the ICC presents itself as meting out restorative justice, but are critical of such a contention.

⁹ In her analysis of the 'restorative mandate' of the ICC, Kendall notes that representatives of Sweden and Finland have interpreted the ICC's work as restorative for victims (2015: 356).

an exploration of the participation of victims within its legal proceedings. Active victim participation is a key aspect of typical processes of restorative justice (Van Wormer & Walker, 2013: xvi). It is commonly argued that such participation overcomes the usual exclusion of victims (other than as witnesses) from retributive processes to position victims as ‘active agents’ within its proceedings. The article first provides an overview of the role of victims in national or community restorative justice projects, and argues that this category of persons typically has a central participatory role in the three key ‘pillars’ of restorative justice: ‘encounter’, ‘amends’ and ‘reintegration’ (Van Ness & Heetderks Strong, 1997, 2006; Van Ness, 2002a). It then considers the inclusion of victims as participants at the ICC, and analyses the form of such participation. It shows that victim participants do not have the same participatory possibilities as is typical for restorative justice processes. Rather, other more ‘authoritative’ legal professionals take on these forms of participation. Drawing on Pierre Bourdieu’s conception of the actors and activities of the juridical field, the article considers the possible reasons for the exclusion of victims as direct participants. It argues that the seeming subversion of the traditional retributive functions of international criminal justice through the participation of victims does not function in practice. Instead, the ICC retains the retributive focus upon authoritative legal actors, and only hears their voices during proceedings.

To explore the positioning of victims in restorative justice, this article utilises a definition of restorative justice as ‘a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future’ (Marshall, 1999: 5).¹⁰ It is, however, important to note that the ‘term “restorative justice” remains contested’ (Gavrielides, 2015: xi), and there is no universal definition of its practice (Hoyle, 2012: 415). Debates continue as to whether a ‘values’ or ‘process’ conception of restorative justice is most appropriate, or whether we should utilise a definition prioritising the process / encounter element of this justice approach or its outcomes (see Braithwaite, 2002a; Daly, 2016). Moreover, restorative justice practice ‘has not so much evolved along any one trajectory as much as it has emerged along multiple ones, and in increasingly hybridized forms’ (Wood, 2016: 1). While the most frequently discussed examples of restorative justice are victim–offender mediation and restorative or family group conferences (Hoyle, 2012: 415), it is now the case that ‘the term “restorative” is applied to a variety of practices—community reparation boards, surrogate victim (or offender) meetings, community service, and so on’ (Wood & Suzuki, 2016: 150).

¹⁰ Miers points out that Marshall’s definition of restorative justice has long been accepted in the United Kingdom by the Home Office and Youth Justice Board (2012: 486).

For the purposes of this analysis, Marshall's definition is utilised for its prioritisation of a conception of restorative justice as a 'procedure' that encompasses 'participation and communication as its objectives' (Van Camp & Wemmers, 2013: 119).¹¹ This recognition of participation as being intrinsic to restorative practices reflects that which Strang has described as the

sine qua non aspects of the intervention: a face-to-face encounter between those responsible for the harm and those harmed by the offence, in the presence of those who care about them; a thoroughgoing and often robust deliberation by everyone in the room about what happened and what the effects have been; an agreement about what should be done to achieve both material and emotional restoration. (2012: 85)

To structure this exploration of the 'restorative' nature of the ICC's system of victim participation, this analysis uses a comparative framework that draws upon the three key 'pillars' of restorative justice put forward by Van Ness and Heetderks Strong as mentioned above: encounter, amends and reintegration (1997). These elements of restorative practices broadly map onto the prioritisation of participation inherent in Marshall's process-orientated definition, the structure of conferences and mediations, and the structure of this justice approach prioritised by most key scholars and policymakers (see for example Findlay & Henham, 2011: 273; Strang, Sherman, Mayo-Wilson, Woods & Ariel, 2013; Wood & Suzuki, 2016).

Marshall's definition, and the three 'pillars' put forward by Van Ness and Heetderks Strong, are therefore used here as framing devices to depict these aspects of restorative justice practice. In particular, these definitional and analytic frameworks recognise (1) the inclusion of the parties to the offence as participants; (2) the collective nature of that participation; and (3) the problem-solving character of restorative justice. However, as Doak notes, the 'concept of "participation" is something of an abstract term and lacks any concrete definition' (2005: 295). For the purposes of this paper, participation is understood to operate as either 'direct' or 'indirect'. Direct participation represents active, inclusive, engagement with justice processes, and refers to forms of participation such as the right to appear in person as a victim (rather than a witness) during proceedings to contribute to the pursuit of the truth of the events in question, or request reparations. It may also refer to a 'right to intervene in cross-examination, [or] the calling of character witnesses', although it is unlikely that victims will hold such entitlements in typical adversarial proceedings (Doak, 2005: 297). These forms of 'meaningful' participation contrast with more indirect forms such as a right to observe hearings or make a statement (Van Ness, 2002a: 5). Such indirect participation does not position victims as agents in the justice process or enable

¹¹ For critique of Marshall's definition see Braithwaite (2002a: 11).

them to substantially impact upon the structure of the justice process or influence its outcomes.

2. Restorative justice and victim participation

'Lawyers are particularly good at stealing conflicts' writes Nils Christie in his influential paper 'Conflicts as Property' (1977: 4). As he notes in relation to the British context, in the aftermath of an alleged criminal act it is the Crown (and the lawyers that appear before the courts) that describe the losses and talk to the offender (Christie, 1977: 7–8). Lawyers are trained to prevent and solve conflicts, such that they become their 'property' and not that of any other person or group (Christie, 1977: 4). This transfer of a conflict from the people involved to lawyers does, in turn, enable their participation in court proceedings. As Christie notes, the organisational framework of the courts centres upon the opposing parties and the judges (1977: 4). It is their participation that serves to 'solve' a conflict and mete out justice for its perpetration. It is their voices, spoken through structured 'legal' language, which comes to be heard.

Christie describes lawyers as the central actors of conventional criminal justice processes. However, if the resolution of a conflict represents a '*potential for activity, for participation*' as Christie suggests, it also highlights the *lack* of participation of a further group of persons: the victims (1977: 7).¹² Crime, in the retributive approach, is understood to be a violation of the law and the state (Zehr, 2002: 21). The state represents the 'public interest', which includes the interests of the victims. For this reason, victims are not a party to legal proceedings in conventional criminal justice processes. As Doak points out, their 'interests are deemed to fall outside the remit of the criminal trial as a forum for the resolution of the dispute between the state and the accused' (2005: 299). Victims (or their advocates) are thus not afforded the right to 'direct' participation in the sense outlined above. Instead, victims appear as witnesses to a crime or, in some jurisdictions, hold limited rights to participation through processes such as the submission of victim impact statements. While it is the victim that has suffered material, physical or other losses, the conflict of the crime becomes a matter for lawyers and the state (Christie, 1977). Victims have therefore not only suffered loss from the crime, they have also 'lost participation in their own case' if it comes before the courts (Christie, 1977: 7). Their voices have largely 'fallen off the map' (Hagan & Levi, 2007: 374).

Most instances of restorative justice, in contrast, prioritise victim participation as central to its practice (Blad, 2015). If we follow a 'process-orientated' definition of restorative justice it is clear that restorative justice includes different participants, and prioritises a different form of their participation,

¹² Emphasis original.

to that of retributive justice. First, restorative justice works from the premise that it ‘is those individuals who are personally involved in the conflict who own the conflict and, hence, it should be solved by them’ (Gröning & Jacobsen, 2012: 13). Its practice typically involves victims and offenders as the ‘directly affected’ participants of the offence, and understand these persons to be ‘stakeholders’ of proceedings (Hoyle, 2012). Such practices may also involve victims’ communities, and seek to meet out reparations in that regard (Hoyle, 2012). As Gröning and Jacobsen point out, it is often the case that restorative justice is ‘connected to a more “communitarian” view, where the violation of the victims concerns the (local) society itself (2012: 13).¹³ Trained mediators, police or other professionals facilitate restorative justice processes, including ensuring the safety and confidentiality of victims, as well as the appropriate participation of all stakeholders present at the session.

Second, victims and offenders are typically afforded what can be termed as ‘direct participation’ in the resolution of the crime or dispute. Restorative justice does not encompass a ‘duel’ between lawyers representing the prosecution and defence. The conflict of the crime is not transferred to these persons. In fact, lawyers are rarely present during such proceedings. Instead, it is understood that victims and offenders (and other parties noted above) ‘have their own interests to pursue’ that may not be best represented by the state, or lawyers (Van Ness, 2002b: 13). The stress in restorative justice policies is therefore ‘upon inclusive, participatory procedures for all stakeholders’ (Blad, 2015: 2). This participatory structure is understood to be ‘empowering’ for such stakeholders (Hoyle, 2012: 415). It moves participants from being served by a ‘passive reception of external help’ to active participation in the justice process seeking to find resolution for the crime (Bolívar, 2010: 245).

How then do victims participate in restorative justice practice? The following sections draw upon the framework of three pillars of restorative justice—encounter, amends and reintegration—to consider typical community or national practices, and then examine the ICC’s alignment to such practices through its system of victim participation.

2.1. Encounter

The first ‘pillar’ of restorative justice identified by Van Ness and Heetderks Strong is the ‘encounter’ between victims and offenders (1997: 67; also Van Ness & Heetderks Strong, 2006; Strang, 2012). A meeting between these

¹³ See Foley (2014: 78–79) for discussion of the difficulty of identifying a particular ‘community affected’. The degree to which community involvement is integrated into restorative programmes is variable. For example, Hoyle argues that ‘only those restorative measures established with the explicit aim of responding to crimes against a community, such as truth and reconciliation processes, regularly achieve meaningful community integration in the process (2010: 18).

participants is an important element of most instances of this justice practice (Foley, 2014: 77). The meeting must, of course, involve the voluntary participation of victims (Vander Vennen, 2016: 130). Certain meetings may involve a surrogate if the victim does not wish to meet the offender, or a 'shuttle' person that liaises between victims and offenders who are situated in different rooms. The meeting provides a space for communication, such that victims (and offenders) have the opportunity to speak of their experiences of the crime, the harms that flowed from it, and impact upon their lives. Rather than speaking in 'rational' legal language, the story can be told in the victim's own words. Emotion, and emotional language, is 'viewed as contributing to understanding rather than impeding it' (Van Ness, 2002a: 3) and it is assumed that 'all participants will bring with them unresolved (and potentially undiscovered and unacknowledged) emotional consequences from the wrongdoing' (Foley, 2014: 75). It is understood that the expression of emotion can foster healing for both victims and offenders (Van Ness & Heetderks Strong, 2006).

The description of the crime is therefore given as a subjective narrative, instead of a factual objective account. In this way, the telling of the story of the offence and its impact opens up a space for discussion between the victims and offenders (and other participants). Restorative justice seeks to bring 'people together and empower ... them to discuss the offence, its aftermath and sometimes, the future' (Shapland, Robinson & Sorsby, 2011: 6). That dialogue lends itself to the 'collaborative problem-solving approach' that lies at the heart of restorative justice practice (McCold & Wachtel, 2002: 113). The encounter therefore seeks to move toward an 'outcome agreement' between the parties (Shapland et al., 2011: 15). The 'agreement' is a 'bespoke' resolution to the case. It arises from the particular circumstances of the crime and the needs of the victim(s) and offenders and does not rely upon precedent of previous cases or a fixed, pre-determined penalty.

2.2. *Amends*

The second 'pillar' of restorative justice practice is the 'amends' made by the offender (Van Ness, 2002a).¹⁴ As Van Ness points out, if 'encounter' has to do with the practice of restorative justice, then 'amends' refers to its outcome. Moving beyond a punishment-focused approach, restorative justice is concerned with 'healing individuals, communities, and even nations after harm caused by wrongdoing' (Van Wormer & Walker, 2013: xv). It works from the premise that repair 'cannot be achieved in the absence of input from those most affected by the crime' (Bazemore & O'Brien, 2002: 43).

¹⁴ It should be noted that 'amends' was termed 'reparation' in the earlier work by Van Ness and Heetderks Strong (1997).

Accordingly, the offender, in dialogue with the victim(s), agrees to take steps to 'make amends for his or her crime in tangible ways' (Van Ness, 2002a: 4).

One significant way in which offenders can make 'amends' to victims is through a sincere apology. Strang notes that in most restorative justice conferences, the arc of the discussion 'always presents a moment when it is natural for an apology to be offered in recognition of the emotional restoration needed by the victim' (2012: 89). As her research has shown, 'when victims are actually asked about what they want, a sincere expression of remorse from their offender is one of the most frequent responses' (Strang, 2012: 89). Other outcomes include restitution of property or offering 'in-kind' services (Van Ness, 2002a: 4). Prison sentences may also be an outcome if agreed upon by the parties as an appropriate measure 'to protect society, to signify the gravity of the offending or to make amends to victims' (Morris, 2002: 599).

2.3. Reintegration

'Reintegration' comprises the last pillar of restorative justice (Van Ness & Heetderks Strong, 1997). Reintegration has been defined as the 're-entry into community life as a whole, contributing, productive person' (Van Ness & Heetderks Strong, 1997: 116; see also Gonzalez Ramirez, Fuentealba Martinez & Malamud Herrera, 2015: 237). For victims, this typically 'focuses first on crisis intervention and help with the stress resulting from the crime, and then on ongoing support as life is resumed in the new "normal"' (Van Ness & Heetderks Strong, 1997: 114). Victims may experience a 'crisis reaction' as a result of the crime, including depression or other mental health problem, or feelings of guilt or shame as a result of not having prevented the crime, or 'letting' it impact upon their lives (Van Ness & Heetderks Strong, 1997: 112–113). Restorative justice therefore prioritises the involvement of a

stabilizing family or community in which the victim feels secure and cared for [and] offers the victim an environment in which to work out the feelings and fears following victimization, and in which to redefine and redirect his or her life. (Van Ness & Heetderks Strong, 1997: 114)

In terms of offenders, stigmatisation is present in the aftermath of the crime, and may lead to being placed outside typical community institutions and processes or family relationships. It has been argued by some commentators that punishment 'provides the necessary "gateway" for reintegration into the community' (Foley, 2014: 15). This 'just deserts' approach focuses upon the necessary 'payment' for the crime. However, restorative justice also prioritises moves to 'build or rebuild relationships between offenders and their

communities' (Bazemore, 1998: 789). For example, Bazemore refers to 'relational rehabilitation' as a mode of reintegration, which 'must be focused primarily upon strengthening the offender's ties or bonds to conventional adults and peers and on changing the offenders' view of law-abiding citizens and the community' (1998: 787). It is argued that '[p]olicy and intervention strategy must then build on and seek to enhance the capacity of both socializing institutions such as school and work, as well as informal networks and processes to support reintegration' (Bazemore, 1998: 790).

2.4. The pillars of restorative justice and victim participation

Restorative justice then, can be understood as a means to subvert the conventional 'stealing' of conflicts from victims. While many programmes are 'designed with the primary focus being upon the offender' (Achilles & Stutzman-Amstutz, 2008: 219), it has been argued that any form of the exploitation of victims 'as props for programmes that are orientated only to the rehabilitation of offenders are morally unacceptable' (Braithwaite, 2002b: 567). Restorative justice processes, as forms of best practice, are typically those that involve the direct participation of victims (with the caveat of using a 'surrogate' if desired). This approach can be understood to position victims as 'active agents' rather than 'passive objects' of justice processes (Garbett, 2016). As Johnstone and Van Ness point out, the distinct nature of restorative justice processes

is that, rather than remaining passive while professionals discuss their problems and decide what to do about it, victims, offenders and others affected by some crime or misconduct meet face to face in a safe and supportive environment and play an active role in discussion and in decision-making. (2007: 9)

This active role in restorative justice processes is, in turn, held to have positive effects for the victim. In particular, victims have spoken positively in relation to the 'restorative intervention in terms of empowerment' (Van Camp & Wemmers, 2013: 123). The control that is taken from victims during the commission of the crime is returned to them through their direct participation in its resolution (Sharpe, 2007). Neither the offender, nor lawyers, hold a monopoly over the processes of restorative justice. Rather, the organisational framework of restorative justice (typically) includes victims as active participants in both the 'process' of justice and its outcome.¹⁵ They participate in the encounter, amends and reintegration aspects of the restorative justice. Conflicts, then, remain the 'property' of victims, offenders and the broader community.

¹⁵ Although it is the subject of debate, some scholars argue that restorative justice processes can be 'healing' or cathartic for victims (see Van Camp & Wemmers, 2013).

3. The International Criminal Court and victim participation

How, then, does the ICC align to the typical ‘pillars’ of restorative justice, and its prioritisation of victim participation? Much of the ICC’s rhetoric as to its innovative institutional framework centres upon its systems of victim participation and reparations. It is, as the ICC declares, ‘the first time in the history of international criminal justice, [that] victims have the possibility to share their views and concerns in the proceedings, represented by a lawyer’ (ICC website, 2016a). This form of the inclusion of victims is framed as a ‘right’ developed by the Court to enable them ‘to express an opinion independently of the Prosecution or the Defence’ (ICC website, 2016a). As noted above, the ICC and its representatives have expressed restorative justice to be one of the outcomes of its practice.

Victim participation at the ICC arises from Article 68(3) of the Rome Statute. It determines that ‘[w]here the personal interests of the victims 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’.¹⁶ In the recent judgment rendered in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (*Bemba*), victims were authorised to

participate at hearings and status conferences, to make opening and closing statements, to file written submissions, to introduce evidence, to question witnesses subject to a discrete written application decided upon in advance by the Chamber, and to have access to confidential documents in the record.¹⁷

Previous decisions have held that the Trial Chamber ‘may *proprio motu* or upon request by any of the parties or participants, permit victims to participate in closed and *ex parte* hearings’.¹⁸ Victims may also participate, most often through their legal representatives, during trial proceedings.

Mirroring the principles of restorative justice, the ICC describes the possibility of victims having their representatives participate in trials, which presents victims with an opportunity to ‘play an active part in proceedings’ (ICC Booklet, 2016: 16). It determines that such participation ‘can be an empowering experience for victims who would otherwise be left aside in the proceedings as passive observers’ (ICC Booklet, 2016: 16). As a means to enhance the trial process, the ICC has held that victim participation ‘will help the judges to obtain a clear picture of what happened to them or how they suffered, which they may decide to take into account at certain stages

¹⁶ ICC, Rome Statute, Article 68(3). For description of the criteria for persons (or institutions or organisations) to participate as victims see: Situation in the Central African Republic in the Case of *The Prosecutor v. Jean-Pierre Bemba Gombo*. ICC-01/05-01/08. Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 20 (hereafter: *Bemba*, Judgment).

¹⁷ *Bemba*, Judgment, para. 24.

¹⁸ Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*. ICC-01/04-01/06. Decision on Victims’ Participation, 18 January 2008, para. 113 (hereafter: *Lubanga*, Decision on Victims’ Participation).

in the proceedings' (ICC Booklet, 2016: 16). It has, therefore, been argued that the participation of victims may aid the establishment of the truth and 'offer a human perspective on the events being described throughout the proceedings' (Stahn, Olasolo & Gibson, 2006: 221).

However, if the rhetoric of the ICC centres upon the inclusion of victims as participants, its practice often serves as a mode of exclusion. This exclusion comprises the persons that are accepted as victim participants and legal representatives, and the terms of their participation. In their analysis of the representational practices of the ICC, Kendall and Nouwen set out how its processes narrow the persons that may be accepted to participate as victims during proceedings. First, victims must have suffered as a consequence of a crime numerated in the Rome Statute, and not due to 'broader' harms of poverty, natural disasters or the like. A second further narrowing occurs with the Office of the Prosecutor's selection of situations in which it opens investigations and their temporal, geographical, and personal parameters (Kendall & Nouwen, 2013: 243). Once a case has been brought, only victims of specific, numerated charges can act as participants (Kendall & Nouwen, 2013: 244). If charges are not then confirmed by the judges, victims can lose their status as participants. Of course, as Kendall and Nouwen point out, victim participation also requires the arrest, detention and trial of the accused, a situation that has posed an ongoing problem for the Court (2013).

Beyond the constraints of the legal process, other factors may serve to exclude victims from acting as participants. Lack of awareness of the ICC's processes is a central reason for victims not applying to participate in proceedings (Kelly, 2013: 51). Moreover, as argued by Garbett, the Court appears to presume that victims hold particular 'resources' that are needed to access their rights to participation (2016: 52). However, such personal, economic and cultural / social resources may not be held by all victims of crime. First, victims may not have the emotional or physical ability to access and negotiate legal processes, particularly given that they have sustained harm from the crime under adjudication (Garbett, 2016: 52). Second, access to material resources such as the internet to complete application forms or documents to prove their identity, may impede the possibility for victims to act as participants (Garbett, 2016: 53). Third, the notion of an 'active agent' that underpins the ICC's framework of victim participation may not map onto conceptions of persons in diverse communities and societies. Cultural norms and practices may not conceive of all persons, particularly women for example, as autonomous rights-holders able to engage with the law (Garbett, 2016: 54; also see Merry, 2005). Recourse to the law may significantly challenge dominant social norms and effectively negate any possibility for participation.

Returning to Van Ness and Heetderks Strong's three pillars of restorative justice can further illuminate the limitations of victim participation. It

indicates that the ICC does not appear to adhere to the typical practices of restorative justice outlined above.

3.1. Encounter

First, the ICC's proceedings do not allow for a direct encounter to take place between victims and offenders. Most significantly, very few victim participants will appear in person at the ICC. Three victims (out of 129 participating victims) were authorised to give evidence as witnesses in the case of *The Prosecutor v. Thomas Lubanga Dyilo*,¹⁹ while two victims were permitted to give evidence and a further three victims presented their 'views and concerns' to the Court (out of 5,299 participating victims) in the *Bemba* case.²⁰

Most victim participants have their views and concerns put forward by a legal representative rather than appearing in person during proceedings. However, if the ICC restricts the number of directly participating victims, it also restricts the number of victims' representatives (Garkawe, 2003: 361). Representation is rarely an individual practice, with a single representative speaking on behalf of a single victim. Rather, the ICC operates a 'common legal representation scheme'.²¹ The Rules of Procedure and Evidence determine that where there are a number of victims, the 'Chamber may for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, ... to choose a common legal representative or representatives' (Rule 90(2)). There were, for example, only two legal representatives in the *Bemba* case.²² Victims may be 'grouped' together in relation to factors such as harm allegedly suffered and victim status.²³ The consequence of such grouping, as Kendall and Nouwen point out, is that individual views or concerns may not be heard. As they note, when 'distilling generalizable "interests," the legal representative filters, weighs, and selects possibly diverging views' (Kendall & Nouwen, 2013: 250). The views of individual victims may therefore be lost to a more general, or majority view. Nuances of opinion, or conflicting opinions may not be presented to the Court.

Given the lack of direct participation by victims, there is no space for dialogue with the offender. The ICC remains a trial-focused process with no interaction between these groups. The trial setting reflects a further practical divergence from restorative justice practice: the offender has not admitted his

¹⁹ Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*. ICC-01/04-01/06. Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 21 (hereafter: *Lubanga*, Judgment). The evidence of these three victims was deemed to contain 'internal inconsistencies which undermine their credibility' and the permission granted to them to participate was withdrawn (paras 499–502).

²⁰ *Bemba*, Judgment, para. 24.

²¹ *Bemba*, Judgment, para. 23.

²² *Bemba*, Judgment, paras 23–24.

²³ *Bemba*, Judgment, paras 23–24.

or her liability for the offence. They will, at least in part, have pled not guilty to the charges brought against them and so instigated the ‘duel’ between lawyers seeking to prove or disprove their guilt. The offender will not, therefore, enter into dialogue with the victim(s) as to the reasons for their conduct, or the context of its perpetration. Communication flows only through lawyers representing the accused, and legal representatives speaking on behalf of the victim participants.

3.2. Amends

Second, the ICC does not allow for a ‘problem-solving’ approach to amends to the crime, or an agreement made between victims and offenders. The guilt of the accused is based upon the judgement rendered by the judges, and their weighing up of the evidence. If an accused is found guilty, the judges determine the sentence to be completed by him or her. There is no direct involvement of victims as ‘decision-makers’ in these processes. In fact, their ‘views and concerns’ do not even constitute evidence to be evaluated by the Chambers.²⁴ While the judgement may acknowledge the victims of the accused, and the harms sustained as a result of the crime(s), this arises from the judgement of the accused by the Chambers and not the offender themselves. Although an accused that enters a guilty plea may provide an apology to his or her victims, this has not arisen at the ICC to date.

Victims can apply for reparations for harms suffered. However, reparations may not necessarily arise from the accused themselves as a restorative justice approach would favour. Rather, the Rome Statute determines that the Court may look to two sources for financial means: first, the Court ‘may make an order directly against a convicted person’; and, second, the ‘Court may order that the award for reparations be made through the Trust Fund’ (Article 75(2)). To date, reparations proceedings have only progressed in relation to one convicted accused, Thomas Lubanga Dyilo, and it is therefore too early to assess which avenue reparations will likely arise from. It has, however, been argued that direct reparations from an offender ‘is in all probability unlikely to yield very positive results as convicted offenders often do not have any assets to pay over, or they have successfully hid or “given away” their assets’ (Garkawe, 2003: 364).

3.3. Reintegration

Contrary to the principles of restorative justice, the ICC does not have a distinct procedure for the reintegration of either victims or offenders. As set out in the Rome Statute, convicted offenders will serve a sentence of

²⁴ *Bemba*, Judgment, para. 25.

imprisonment in a 'State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons' (Article 103). While the enforcement of a sentence of imprisonment 'shall be subject to the supervision of the Court' (Article 106), there is no explicit mention of procedures for the reintegration of persons into society upon their release. Similarly, there are no explicit guidelines for reintegration of victims either during or after the case in which they are participating is finalised. The Court describes that reparations (for those victims that apply) may 'help the victims themselves rebuild their lives' (ICC website, 2016b). It is not yet clear the degree to which the Court, or the Trust Fund, will assist in this process.

4. The lack of victims in victim participation

Similarly to Nils Christie, Bourdieu characterises the juridical field as a 'social space organized around the conversion of direct conflict between directly concerned parties into juridically regulated debate between professionals acting by proxy' (1987: 831). These professionals (namely lawyers and judges) hold a 'specific power' in their ability to reveal injustices (or not) and the rights held (or not) by persons to have their disputes become the subject of the law (Bourdieu, 1987: 833). They redefine problems (or not) 'into the language of the law' and propose 'a prospective evaluation of the chances for success of different strategies' to their clients (Bourdieu, 1987: 834).

The remainder of this analysis draws upon Bourdieu's conception of the practices of the juridical field and competitive struggles between its professional actors to explore possible reasons for the relative exclusion of victim participants at the ICC (1987). For Bourdieu, a 'field' is 'an area of structured, socially patterned activity or "practice"' (Terdiman, 1987: 805). The juridical field 'is organized around a body of internal protocols and assumptions, characteristic behaviors and self-sustaining values' (Terdiman, 1987: 806). As further discussed below, authoritative legal actors possess these 'learned yet deep structures of behavior' of the field (Terdiman, 1987: 807), and the 'division of juridical labour' between them 'constitutes the true basis of a system of norms and practices' (Bourdieu, 1987: 818). While the examples put forward by Bourdieu are based primarily upon the French legal system, his thesis is understood to be reflective of a 'broad series of patterns ... in general' (Terdiman, 1987: 806). A number of commentators have drawn upon Bourdieu's work to analyse the field of international criminal justice (Dixon & Tenove, 2013), and the influential work of the actors and activities of other international courts and tribunals (Hagan & Levi, 2005; Hagan, Levi & Ferrales, 2006).

Bourdieu's conception of the structured activities and competitive struggles between actors provides a framework to consider the *practices* of the juridical

field. In particular, it enables us to consider how structured practices, and their structuring by authoritative actors, serve to include or exclude particular actors. It provides a means to explore the varying levels of integration within the ICC of diverse actors and the legal activities they are permitted to undertake in accordance with their ascribed role. As Dixon and Tenove point out, 'field theory' highlights the 'shared "rules of the game" that bring actors together in conjoint activity, while at the same time emphasizing their unequal power and continual competition' (2013: 394). This framing is employed here to consider the inclusion (or exclusion) of victim participants and their representatives. In turn, the structure of legal practices that empower certain actors to participate in the juridical field of the ICC is considered for its impact upon shaping the Court's work as 'restorative' or not.

Central to Bourdieu's thesis of the juridical field is the contention that its professionals do not simply work to resolve a conflict. Rather, they are also engaged in 'a competition for monopoly of the right to determine the law' (Bourdieu, 1987: 817). Entering into such struggles over professional prestige and power necessitates that these professionals hold particular attributes, namely, legal qualifications and the 'technical competence' to interpret texts (Bourdieu, 1987: 817).²⁵ These attributes serve to construct a distinction between professionals and lay people (Bourdieu, 1987: 817). Simply put, the former group of persons are qualified to directly participate in the juridical field, while the latter are not (Bourdieu, 1987: 828). Legal professionals 'alone can adopt the attitudes which allow the constitution of situations according to the fundamental law of the field', and those who abandon their conflict by accepting entry into the juridical field 'are reduced to the status of client' (Bourdieu, 1987: 834).

It is clear that the ICC understands victim participants to be lay people or 'clients' to use Bourdieu's terminology and not professionals. Neither victim participants nor their legal representatives are 'parties' to the trial in similarity to the Prosecution or Defence (Friman, 2009: 500). Nor are they able to initiate a case to be heard by the Chambers (ICC Manual, 2016: 27). The procedural rights granted to victim representatives do not equate to those held by the Prosecution and Defence. For example, a legal representative must make an application to the Chamber if he or she wishes to question a witness, an expert or the accused (Rule 91(3)). Moreover, the ICC determines that the 'presumption will be that the legal representatives of victims shall have access only to public filings'.²⁶ While consideration will be given to access to confidential information if it is 'of material relevance to the personal interests of participating victims', it will only be granted if it does 'not breach other

²⁵ Bourdieu's conception of 'texts' encompasses 'not only the written record (in the law, for example, legislation, judicial decisions, briefs, and commentary), but also the structured behaviors and customary procedures characteristic of the field' (Terdiman, 1987: 809).

²⁶ *Lubanga*, Decision on Victims' Participation, para. 106.

protective measures that need to remain in place'.²⁷ Full participation in the juridical field of the ICC is not an automatic right held by participating victims. Rather, the Chambers determine how and when this group of persons may participate, and the limitations imposed upon them.

If we consider the ICC's legal processes through the lens of the pillars of restorative justice described above, we can see that the *direct* participation of victims remains elusive. In fact, the direct forms of victim participation prioritised in restorative justice processes remain the purview of qualified legal professionals. First, victim participants do not participate in an 'encounter' with the accused. The ICC does not allow for an inclusive 'problem-solving' approach to the resolution of crime. It remains true to the central processes of conventional criminal justice, that is, the presentation of evidence by the parties to the trial and their adjudication by the judges.²⁸ Direct participation during trials (or pre-trial conferences, status conferences and the like) is limited to legal representatives acting on behalf of the participating victims. These legal representatives must hold appropriate qualifications and experience.²⁹

Second, victim participants do not have a role in decision-making processes as to the outcome of the case. With the exception of a very limited number of victims permitted to act as witnesses, victim participants do not give evidence to the Court. Rather, their representatives present their 'views and concerns'. Moreover, victim participants do not have any role in determining the guilt or innocence of the accused, or their punishment if convicted. Instead, the ICC's framework follows Bourdieu's contention that it is judges who are responsible for the 'practical evaluation of a specific case' (1987: 821).

There are certainly practical reasons for the limitation of victim participants appearing in person during proceedings. Cases may involve a large number of victim participants. For example, the *Bemba* case included 5,229 participating victims.³⁰ It would be difficult, if not impossible, to accommodate such numbers in the physical space in the courtroom or as persons able to bring their views and concerns individually for every decision, investigation, witness examination or other legal process. Moreover, as the Trial Chamber in *Lubanga* notes, the 'personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings'.³¹ For these reasons, the ICC utilises a common representation scheme with

²⁷ *Lubanga*, Decision on Victims' Participation, para. 106.

²⁸ An exception to this would arise in the case of an admission of guilt by an accused. See Article 65 of the Rome Statute.

²⁹ In accordance with Rule 90(6), a legal representative must hold those qualifications of a defence counsel, namely 'established competence in international or criminal law procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in similar capacity, in criminal proceedings' (Rule 22(1)).

³⁰ *Bemba*, Judgment, para. 18.

³¹ *Lubanga*, Decision on Victims' Participation, para. 116.

only a few representatives present in the courtroom acting on behalf of their assigned victim participants.

Bourdieu's description of the juridical field can further help us think through other reasons for this exclusion of victim participants. A second limitation to the direct participation of victims lies in their lack of professional standing. Entry into the juridical field requires acceptance of 'the rules of legislation, regulation, and judicial precedent by which legal decisions are ostensibly structured' (Terdiman, 1987: 808). It also requires 'professional competence' and 'technical mastery' of these legal texts (Bourdieu, 1987: 828), and knowledge of the 'learned yet deep structures of behaviour within the juridical field' (Terdiman, 1987: 807). This requirement of professional competence appears to underpin the possibility for the participation of individuals in person in the ICC's proceedings. For example, Judge Fulford has argued that 'people without legal training coming to talk about very difficult things that have happened to them could have a real capacity for destabilising these court proceedings'.³² Personal participation of those lacking in knowledge of the Court's texts and practices may undermine its strict legal structures and behaviours. For this reason, personal participation must be strictly controlled. It is largely the purview of (qualified) legal representatives that may voice the 'views and concerns' of the victim participants, and not those individuals themselves.

Judge Fulford's reference to persons 'coming to talk about difficult things' also draws attention to the potential disparity between the 'professional' language of lawyers and the more emotional language of victims. In her analysis of women speaking about wartime sexual violence, Mertus points out that victim-witnesses often offer facts that are seemingly irrelevant and sequence their testimony in a manner that seems nonsensical (2004: 114). As Mertus notes, survivors of trauma may not be able to 'provide a consistent and linear narrative' (2004: 120). Such language does not map onto the 'legal language' required of the courts. Bourdieu notes that courts are 'separate and bounded space[s] within which conflicts are transformed into specialist dialogues' (1987: 830). Those specialist dialogues comprise the language of written codes, Statutes and the like. They also comprise a particular form of dialogue, namely, 'rule-bound exchanges of rational arguments between equal individuals' while questioning witnesses, and liaison between the parties and the judges (Bourdieu, 1987: 830). These learnt behaviours of legal language, and structured argumentation, arise from professional training and experience. They are not, in all likelihood, forms of dialogue used by

³² Situation in the Democratic Republic of the Congo. ICC-01/04-01/06-T-101-ENG ET WT, Transcript of Status Conference, 12 January 2009, page 43. https://www.icc-cpi.int/Transcripts/CR2009_00129.PDF (accessed 23 June 2016) (hereafter: Situation in the DRC, Transcript of Status Conference).

persons who are not legal professionals. The language of victims is therefore unlikely to be the language required by the juridical field of the ICC.

Perhaps most of all, it could be understood that victim participation is limited to ensure the retributive structure of the ICC's proceedings. That structure requires the traditional standing of legal professionals as the only parties to proceedings, and judges as the authoritative actors guiding proceedings and rendering judgements. For Bourdieu, the 'struggle for authorized or legitimized interpretation of the texts of the legal corpus, and also the texts of *legal practice*'³³ (Terdiman, 1987: 808) leads to a 'hierarchized body of professionals' within the field (Bourdieu, 1987: 819). However, to sustain this hierarchised body of professionals necessitates the exclusion of non-professionals. It requires the exclusion of full or direct participation of non-legal actors that may challenge the authority of the operation of the field. Within the specific juridical field of the ICC then, victim participants may not participate as equals to the parties to the trial. Such direct participation would challenge the authority of legal professionals, and so must be constrained in form and substance. The participation of victims is therefore largely symbolic and not substantive in form.

5. Conclusion

Using Van Ness and Heetderks Strong's conception of the three 'pillars' of restorative justice, this article has analysed the ICC's adherence to restorative justice practice. It considered the integration of victims within the 'encounter', 'amends' and 'reintegration' practices of restorative justice. Comparative analysis between restorative justice initiatives considered to comprise 'best practice' and those of the ICC illustrated that victims do not enjoy the same form of direct participation as those in national or community projects. Rather, victims participate through their legal representatives as directed by the Chambers.

The legal proceedings of the ICC highlight two key challenges in its alignment to restorative justice processes: the participants, and the form of their participation. First, the victim participants do not act as independent participants. Rather, as one ICC judge notes, 'the presumption is that those who participate in the proceedings will be lawyers, lawyers acting for individuals or for bodies'.³⁴ Victims are represented by their legal representatives, that is, lawyers who hold the necessary qualifications and competence to enter the juridical field of the ICC. In this way, the ICC retains the traditional model of criminal law as an arena into which only qualified professionals may participate. However, legal representatives do not comprise 'parties' to the trial in

³³ Emphasis original.

³⁴ Situation in the DRC, Transcript of Status Conference, p. 43.

the same manner as the Prosecution and Defence. Rather, the hierarchy of legal professionals determines that they have partial, and not complete, access to the practices of the law.

Second, if restorative justice and the ICC both prioritise (in rhetoric at least) participation as central to justice processes, there is a vast difference in the form that such participation takes. The Trial Chamber in the *Bemba* case has stated that the application process for victims wishing to participate must be managed to ensure their ‘meaningful participation’.³⁵ Other decisions state that victims have ‘the right to participate directly in the proceedings’.³⁶ With very few exceptions, however, victims do not directly participate in the ICC’s proceedings in the sense of a personal appearance before the Chambers. Instead, the ICC’s conception of ‘direct participation’ is actually a form of indirect participation. It takes place through legal representatives, and in accordance with the rulings of the Chambers. Victims rarely appear in person in the courtroom, and given the vast number of victims assigned to legal representatives, may not have their individual views and concerns expressed to the Chambers. As the exposition on the form that participation as best practice takes in typical restorative justice processes shows, it is clear that there is little alignment as to conceptions of participation in these two different justice approaches. The direct participation of restorative justice is rarely found in the ICC’s legal processes.

The participation of victims at the ICC comprises a significant advance on the traditional exclusion of victims from the processes of international criminal justice. As noted above, the ICC previously referred to this practice, alongside reparations, as striking a balance between retributive and restorative justice. This article shows how the ICC’s legal proceedings (fail to) map onto processes of restorative justice. It shows that victim participation does not take the same form as that of conceptions and practices of participation in restorative justice. The assumption, or rhetoric, that the ICC aligns to restorative justice, or metes out this form of justice, is therefore problematic. Victims are not direct participants in legal proceedings, nor do they find a place in the encounter, amends or reintegration practices that are central to restorative justice processes. For this reason, the ICC’s proceedings are better understood to comprise a retributive approach with the additional participants of legal representatives of victims, and not a typical restorative justice approach.

Disclosure statement

No potential conflict of interest was reported by the author.

³⁵ *Bemba*, Judgment, para. 19.

³⁶ *Lubanga*, Decision on Victims’ Participation, para. 115.

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