Towards Positive Peace:

A Critical Rearticulation of the Role of Victims in International Criminal Justice

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Abstract

This thesis examines the role of victims in international criminal law and details how ensuring they receive justice is an important element that needs to be fulfilled to achieve positive peace. As the preamble to the Rome Statute of the International Criminal Court details, international crimes have a devastating effect on millions of victims and threaten international peace and security. However, currently the practice of the international criminal justice system has been criticised as not achieving justice for many victims. Further, its influence on peace, if any, takes on a form of negative peace. The search for justice for victims is claimed to be a central mandate of the International Criminal Court. In contrast, as this thesis details, an abstraction of victimhood occurs through both the concept of victims and the practice of the court - meaning that individual victims do not have a voice and cannot influence the forms of justice they receive. Alongside this, many victims are not recognised and are not provided an opportunity to seek justice. The thesis critically deconstructs the concepts of peace, justice and victims in international criminal justice to reveal their polemic nature and historical interplay. This highlights how in the justice system, including hybrid courts, victims are on the periphery, with limited influence. Additionally, the narrow focus on negative peace - concerned only with the absence of armed violence - excludes issues of social and cultural justice along with the root causes of conflict and international crimes.

To move towards positive peace this thesis presents a victim centric rearticulation of international criminal justice, incorporating understandings from the underside: including transmodern and grass roots lessons, to provide a wider range of justice opportunities and grant greater agency for victims. This offers an option to strengthen the recognition by victims that 'justice has been done', aiming to enhance the legitimacy of international criminal law and its role as an integral part of a stable peace.

1 CHAPTER 1: INTRODUCTION

> The States Parties to this Statute:
> Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,
> Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
> Recognizing that such grave crimes threaten the peace, security and well-being of the world… [1] (Preamble to the Rome Statute of the International Criminal Court)

1.1 Introduction to the research topic

The preamble to the Rome Statute (RS) of the International Criminal Court (ICC), cited above, recognised the devastating effects of international crimes on victims and how these crimes threaten peace. While the destructive effect of international crimes on victims may seem obvious, the Rome Statute was the first instrument to recognise the importance of involving victims in the search for justice. The inclusion of an extensive victim regime in the RS, which provides for victim participation and reparations, has been celebrated as a milestone for victims' rights. According to some, the RS has at last placed the search for justice for these victims at the centre of the international criminal legal system.[2]

Additionally, the third sentence of the preamble of the RS, following the practice of previous international criminal tribunals, recognised international crimes as a threat to peace and security.[3] The role of the ICC in achieving justice for victims is fundamental to delivering on its wider objective of promoting peace. The participation of victims may assist the role of the courts to contribute to the reconciliation of a community or nation.[4] As Jorda and De Hemptinne have set out, 'by participating in the proceedings and by

[1] Preamble Rome Statute of the International Criminal Court (last amended 2010) 1998 Emphasis in Original .
[2] Håkan Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?' (2009) 22 Leiden journal of international law 485.
[3] Preamble Rome Statute of the International Criminal Court.
[4] Carsten Stahn, Hector Olasolo and Kate Gibson, 'Participation of Victims in PreTrial Proceedings of the ICC' (2006) 4 Journal of International Criminal Justice 219, 221.

obtaining compensation, a victim may be able to regain his dignity, thereby contributing, ultimately, to the restoration of peace and security'.[5]

The normative practice of ICL, established by the Nuremberg retributive justice model, centres on fair trial rights and deontological principles of punishment for crimes, and views individual criminal responsibility as a key tool to deter future crimes and threats to peace.[6] This retributive form of justice, with its focus on deterrence, resulted in a lacuna in international criminal trials in which justice for victims was not considered a central part of the practice. In contrast, the RS of the ICC provides the opportunity for a more 'victim-orientated' approach to international criminal law (ICL) through the creation of a victims' regime.[7] The victims' regime brings restorative justice procedures into International Criminal Justice (ICrJ), with victims' participation opening up the possibility for procedural justice and also for reparative justice to be provided directly through the court, alongside the retributive justice traditionally expected within ICL. [8]

International law has approached the challenge of obtaining stable peace through a restrictive focus on negative peace. Negative peace is characterised by the removal of direct violence, without challenging unjust and oppressive regimes or institutions that perpetuate the underlying causes of conflict.[9] Negative peace limits the search for justice for victims by upholding the injustice of widely accepted societal practices.[10] This is a peace in which the marginalised groups, suffering under unacknowledged structural violence or oppressive power structures, do not have their victimhood recognised.[11] This thesis moves beyond the common, simplistic presentation of peace and justice as

[5] Claude Jorda and Jérôme De Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: a commentary*, vol 2 (Oxford University Press 2002) 1389.
[6] Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press).
[7] Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014).
[8] T Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Second, Oxford University Press 2015).
[9] Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 Journal of Peace Research 167.
[10] Discussed in chapters 5 and 6, including a case study on the Canadian Genocide report in chapter 6
[11] See chapters 5 and 6, victims are recognised within Post-Colonial and Decolonial critiques and Positive Peace theory

dichotomous, by exploring the need to examine justice issues as an essential component of creating lasting peace.[12]

Despite its good intentions, in practice, the 'victim-centred' approach has struggled to live up to the RS's promise in two different ways. Firstly, the abstraction of victimhood has arisen in which stakeholders speak on behalf of the 'victims', while individual victims have limited voice or agency.[13] Secondly, the role of victims has been restricted both through the jurisprudence of the ICC and within the hybrid courts of wider ICL.[14]

Unfortunately, these failings are not unique to the ICC. Victimology scholars have detailed the 'theft of conflicts' in which other stakeholders have side-lined the victim in both domestic and international criminal procedures.[15] Historically, victim-centred proceedings in domestic criminal law granted victims the opportunity to influence the justice process, but many justice systems, particularly in euro-centric cultures, have evolved away from a victim-centred model to one that is centred on the punitive authority of the state.[16]

The challenge for ICrJ is how to provide a mechanism for localised justice procedures, ensuring the voice of marginalised victims will be provided a forum.[17] Providing a meaningful role for victims includes setting up mechanisms in which agency is returned to them, even if it means they follow procedures outside the standard criminal justice model.[18] The practical impacts of these limitations can be seen in the experiences of victims in ICL. For example, victims are required to 'sell' their victimhood to an

[12] Thomas Hippler and Miloš Vec, 'Peace as a Polemic Concept' in Thomas Hippler and Miloš Vec (eds), *Paradoxes of Peace in Nineteenth Century Europe* (Oxford University Press 2015).
[13] Sara Kendall and Sarah Nouwen, 'REPRESENTATIONAL PRACTICES AT THE INTERNATIONAL CRIMINAL COURT: THE GAP BETWEEN JURIDIFIED AND ABSTRACT VICTIMHOOD' (2013) 76 Law and Contemporary Problems 235.
[14] Liesbeth Zegveld, 'Victims as a Third Party: Empowerment of Victims?' (2019) 19 International Criminal Law Review 321.
[15] Nils Christie, 'Conflicts as Property' (1977) 17 The British Journal of Criminology 1.
[16] MC Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Human Rights Law Review 203.
[17] Carsten Stahn, 'Justice Civilisatrice?' in Carsten Stahn, Christian De Vos and Sara Kendall (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015).
[18] Mark J Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Willan Publishing, Routledge, Willan 2011). Although (replace word)

international audience, by ensuring recognition of the harms they have suffered.[19] This provides the first step they must take in the hope of a justice process being developed.[20]

1.2 Central Issues

There are three sections which explore the central issues of this thesis. Firstly setting out the need for a rearticulation of the victims in ICrJ. Secondly, conceiving how a transmodern approach, including the voice of the traditionally marginalised in societies can enhance the practice of ICL and its approach to victims. Thirdly, it sets out the importance of the role of positive peace; ensuring issues of social and cultural justice are included within any peace can aid the work of ICrJ.

1.2.1 How will a critical rearticulation of international criminal justice and the victims strengthen the opportunities for lasting peace?

This thesis deconstructs the concepts of peace, justice and victims within international criminal justice to reveal their polemic nature. It reviews the historical interplay of peace and justice to demonstrate how these ideas have taken on very different forms. Traditional criminal law constructs these concepts narrowly, with the effect that many victims are excluded from the possibility of receiving justice and have limited influence over the form that justice takes. Additionally, the narrow focus on negative peace, concerned only with the absence of armed violence, excludes issues of social and cultural justice which are important for lasting peace. Individual victims must actually have a voice in the justice process to ensure that 'justice for victims' is the justice individual victims seek and that it includes these wider social and cultural understandings of justice.[21] The recognition by victims that 'justice has been done' is essential for the perceived legitimacy of the justice system: an integral part of a stable peace.[22] Achieving such justice for victims requires a re-articulation of justice and peace within ICrJ as well as its conceptualisation of victims.

[19] Joris van Wijk, 'Who Is the "Little Old Lady" of International Crimes? Nils Christie's Concept of the Ideal Victim Reinterpreted' (2013) 19 International Review of Victimology 159.
[20] See section 2.5
[21] Leila Ullrich, 'Beyond the "Global–Local Divide" Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court' (2016) 14 Journal of International Criminal Justice 543.
[22] Frédéric Mégret, 'In Whose Name? The ICC and the Search for Constituency' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice* (Cambridge University Press 2015).

The development of victims' rights has progressed in both domestic and international criminal law. However, the challenge remains of how to ensure the voice of individual victims is heard. This ambition requires procedures to move beyond the representational practice of the ICC, which has limitations. As it stands, the ICC does not allow the role of victims to have the meaningful influence in proceedings that was intended by the drafters of the RS.[23] A localised justice approach presents opportunities to enhance the legitimacy of ICL by providing mechanisms in which the victims shape justice procedures. Localised justice is a bottom-up approach, which stands in contrast to top-down procedural practice that has developed at the international or state level.[24] A bottom-up approach could limit the risk of the ICC being monopolised by political interests, in which the interests of states and not individual victims are prioritised.

The critical rearticulation carried out in this thesis is based upon the need for a bottom-up understanding of international criminal justice and victims, providing an opportunity to address the complex justice needs of the victims.[25] A bottom-up approach provides tools to give victims increased ownership over justice processes.[26] The importance of the voice from below in strengthening the legitimacy of ICL has been highlighted by Luban, who has explained that:

> Lacking the authority of world government, these norms build their legitimacy from the bottom up, by the fairness of their proceedings and the moral power they project. The success of the project is improbable; its failure, if it happens, is the failure of law itself.[27]

As domestic criminal justice systems have demonstrated, victims may seek procedures outside traditional punitive justice, depending on their justice aims.[28] For international

[23] Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?' (2008) 90 International review of the Red Cross (2005) 441.
[24] Rosalind Shaw, Lars Waldorf and Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University press 2010).
[25] M. Mamdani, 'Beyond Nuremberg: The Historical Significance of the Post-apartheid Transition in South Africa' (2015) 43 Politics & Society 61, 80.
[26] Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 Journal of Law and Society 265.
[27] David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' (Social Science Research Network 2008) SSRN Scholarly Paper ID 1154177.
[28] Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart 2008).

criminal law, there are limited number of justice possibilities arising from a detached legal system which only hears a small number of cases and is based in the Hague, far from the situation involved. The challenge for the ICC, as a court of last resort, is how to strengthen the provision of justice opportunities in a way that is relevant to different cultures, without reducing them down to one universal standard.[29] Failure to adequately meet this challenge has led to the feeling amongst victims that the court has overpromised and under delivered on justice for victims.[30] The rearticulation in this thesis combines ICL with transitional justice (TJ) processes.[31] Grassroots transitional justice mechanisms, which utilise culturally relevant justice processes, present opportunities for rethinking the approach of the ICC.[32] Within ICrJ and the wider international legal sphere, there is greater acceptance that elements of ICrJ – such as hybrid courts – are a crucial aspect of wider transitional justice procedures.[33] A current example of this is the recognition, by the United Nations, of the importance of establishing hybrid courts alongside wider justice mechanisms, such as truth and reconciliation commissions and reparation authorities in South Sudan.[34] In this context, the hybrid court provides one justice procedure that sits alongside others which do not follow conventional criminal justice approaches, to ensure a variety of justices are sought within the peace process. Providing a bottom-up focus will limit the potential that justice procedures are monopolised by top-down or elite interests.

[29] Kamari Maxine Clarke, '"We Ask for Justice, You Give Us Law": The Rule of Law, Economic Markets and the Reconfiguration of Victimhood' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice* (Cambridge University Press 2015).
[30] Catherine Gegout, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace' (2013) 34 Third world quarterly 800.
[31] See further discussion in Chapter 7
[32] Kieran McEvoy and Lorna McGregor, *Transitional Justice from Below : Grassroots Activism and the Struggle for Change* (1st edn, Bloomsbury Publishing 2008).
[33] Mark Drumbl, 'The Future of International Criminal Law and Transitional Justice' in William A Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate research companion to international criminal law: critical perspectives* (Ashgate 2013).
[34] Section 8.5 UN Commission member Barney Afako. 'Sustainable peace in South Sudan requires that Chapter V mechanisms of the Revitalized Peace Agreement, including the hybrid court, be established,' https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25539&LangID=E

1.2.2 How can a transmodern enunciation of victims and international criminal law address the current limitations of its practice?

This thesis builds upon Dussel's concept of transmodernity, which advocates overcoming the Eurocentrism of the international order, and its prioritisation of European laws and concepts over the laws and ideas from other cultural traditions. It, therefore, seeks to utilise knowledge from a wide variety of sources and 'provide fresh views about our collective histories, current condition, and the possibilities for future co-existence'.[35]

This builds upon the concern, raised by De Sousa Santos, that societal structures maintained by international law (IL) are founded on Universalist approaches; they have historically supported a hegemonic worldview that fails to examine the legacy of colonial procedures embedded within the structure of societies.[36] Torres presents how maintains the position of elites who are the beneficiaries of colonialism, to the exclusion of the subaltern in society whose victimhood is not recognised within ICrJ discourse.[37] James Stewart and Asad Kiyani further highlight the need to re-examine ICL, arguing that its hegemonic origins – stemming from IL or domestic criminal law – can 'risk condoning illegitimate law'.[38] The problem of unjust law undermining the search for justice for victims is prominent in the argument:

> If the Law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class' hegemony. The essential precondition for the effectiveness of Law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity, indeed, on occasion, by actually being just.[39]

[35] Enrique D Dussel, 'Transmodernity and Interculturality: An Interpretation from the Perspective of Philosophy of Liberation' (2012) 1 TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World.
[36] Boaventura de Sousa Santos, 'Nuestra America: Reinventing an Subaltern Paradigm of Recognition and Redistribution' (2002) 54 Rutgers law review 1049.
[37] Nelson Maldonado-Torres and others, *Against War: Views from the Underside of Modernity* (Duke University Press 2008).
[38] James G Stewart and Asad Kiyani, 'The Ahistoricism of Legal Pluralism in International Criminal Law' (2017) 65 The American Journal of Comparative Law 393.
[39] Edward Palmer Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin Books ; Pantheon 1975).

Transmodernity considers ICL 'from below', and asks how lessons from the grassroots can be utilised to increase the influence of non-Eurocentric worldviews in the development of the law and its practice.[40] The transmodern approach allows the voice of the marginalised victim to be expressed, valuing their epistemological understanding of peace and justice which may be significantly different from the dominant script of ICrJ. This moves away from the idea of the victim as a passive on-looker; instead, making space for the voice and agency of 'the Other' and their role in creating lasting peace. Dussel explains that a transmodern conceptualisation of victims could consider them to be 'negated alterity in modernity' and that this understanding of the victims could increase the political agency, which is currently limited.[41]

A pluriversal transmodern approach is in keeping with ideas of legal pluralism as set out by Sally Engle Merry that legal pluralism is 'challenging the idea of legal centralism'.[42] The transmodern enunciation of ICL seeks an alternative to the universalised hegemonic practice which has been passed down from the origins of ICL. Instead, it brings in relevant concepts of law and justice from different cultures and legal systems.[43] Building on the lessons of the theory of transmodernity, this thesis advocates for situating the best practice of ICrJ alongside different understandings of justice, recognising how the positive elements of each of these approaches can bring together peace and justice concepts and provide wider justice options to victims. The critical theories throughout the thesis are intended to highlight the presence of an underside to ICrJ and to make sure it is given due consideration. The later chapters of the thesis will build upon these critiques to develop an alternative approach to the role of victims in ICC procedures, addressing existing challenges.[44]

[40] Nelson Maldonado-Torres, 'Decoloniality at Large: Towards a Trans-Americas and Global Transmodern Paradigm (Introduction to Second Special Issue of "Thinking through the Decolonial Turn")' (2012) 1 Transmodernity.
[41] Enrique Dussel, *The Invention of the Americas: Eclipse of 'the Other' and the Myth of Modernity* (Michael D Barber tr, Continuum Intl Pub Group 1995).
[42] Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law & Society Review 869.
[43] See chapter 5
[44] See chapters 7 and 8

1.2.3 Why is there a need to consider a positive peace goal for international criminal justice?

Galtung's theory of positive peace includes social and cultural justice, viewing justice as a fundamental component of peace.[45] Galtung distinguished positive peace from negative peace. He recognised the oppressive nature of an unjust negative peace, which is focused upon the removal of direct physical violence.[46] In contrast, positive peace identifies the justice issues that arise from the existence of structural and epistemic violence.[47] Galtung imagines a fuller or 'thicker' understanding of justice for victims, arising out of social and cultural justice, alongside selective punitive justice.[48] Kastner has argued that a peace in which the justice needs of victims are not addressed leads to an unfair peace.[49] Those who search for justice for victims within ICrJ need to consider that it may be impossible to meet the justice needs of victims within the narrow constructs of an international court, and, that this shortcoming limits the ICC's potential for contributing to a stable peace.[50] This requires that the aim of justice for victims within ICrJ should examine the role ICL can play alongside transitional justice mechanisms.[51]

In the midst of the debate on the relationship between justice and peace which arises within ICL scholarship, the voice of the victims brings forth important nuances. It is the victims who have to live with the impact of international crimes. When their voices are heard, the peace/ justice discussion is no longer an incongruous debate involving separate immutable values. Rather, complex understandings of peace and justice can emerge, in which an unjust peace can arise or there can be some forms of justice occurring in the midst of conflict.[52] The concern that justice is a stumbling block to peace overlooks the various forms of reparative, restorative and transitional justice which operate alongside retributive justice.[53]

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[45] Galtung, 'Violence, Peace, and Peace Research' (n 9).
[46] IBID
[47] Johan Galtung, 'Cultural Violence' (1990) 27 Journal of Peace Research 291.
[48] Galtung, 'Violence, Peace, and Peace Research' (n 9).
[49] Philipp Kastner, *International Criminal Law in Context* (Taylor and Francis 2017).
[50] Section 7.3 & 7.4
[51] Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, vol no. 117. (Cambridge University Press 2015).
[52] Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace: Reconciling Judicial Romanticism with Political Realism' (2009) 31 Human Rights Quarterly 624.
[53] Janine Natalya Clark, 'From Negative to Positive Peace: The Case of Bosnia and Hercegovina' (2009) 8 Journal of Human Rights 360.

1.3 Focus and Scope: The Victim in ICL

The concept of the victim in ICL is constructed through both the role provided for victims in the jurisprudential practice of international criminal courts and tribunals, along with the wider conceptualisation of victims and the recognition of their victimhood.[54] The victims' regime developed through the RS creates a *sui generis* system bringing together the domestic criminal law standards of both common and civil law jurisdictions.[55] On the one hand, this has caused concern that victims' interests have been placed too high in the drafting of the RS.[56] On the other hand, the jurisprudential practice of the court has been criticised, with stakeholders accused of restricting the victim-centric mandate of the RS.[57] In practice, the role of the victim is limited initially by the court's selective recognition of victims. This occurs through the selective eligibility of the criminal trial, often influenced by a specific narrative of the conflict, in which the victims who are deemed to be innocent are the most valued.[58] Additionally, victims' interests in the ICC are balanced alongside the interests of more influential stakeholders in the court, including the defence, the prosecution, and the judiciary.[59]

Recognition of victimhood within the ICC requires a causal connection with the crime under the jurisdiction of the court, and the demonstration of individual criminal responsibility on behalf of a named perpetrator. Walklate argues that the term 'victim' is constructed by the criminal law or by the 'self-evident nature of the suffering of the victim', and that this construction arguably 'conceals an inherently static functionalist view of society, focusing on consensus and stability'.[60] Kendall and Nouwen have documented the 'pyramid of juridified victimhood' created by ICL.[61] Additionally, the narrow construction of victimhood within ICL excludes large numbers of victims,

[54] Immi Tallgren, 'Come and See? The Power of Images and International Criminal Justice' (2017) 17 International Criminal Law Review 259.
[55] Section 2.4
[56] Charles P Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29 Michigan Journal of International Law 777.
[57] Brianne McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and Its Pitfalls' (2012) 12 International Criminal Law Review 375. Check this
[58] Kieran McEvoy and Kirsten McConnachie, 'Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy' (2012) 9 European Journal of Criminology 527.
[59] Section 3.3
[60] Sandra Walklate, *Understanding Criminology: Current Theoretical Debates* (3rd edn, Open University Press 2007).
[61] Kendall and Nouwen (n 13).

restricting international recognition of their search for justice, and instead, confines their search within the jurisdiction of a state whose agents may have carried out the crimes.[62]

However, the search for justice is further limited by the manner in which stakeholders speak on behalf of the victims. They utilise simplistic conceptions of an 'Ideal' victim or create an abstraction of victimhood which in effect silences individual victims and reduces their individual experiences into a singular story of suffering.[63] This can occur through the prosecution choosing which victims will be involved, in order to increase the chances of conviction. The stories told by victims will be altered to ensure they fit a more general narrative, reducing their feelings of being heard? This is documented by Duggan, who argues that the 'ideal victim' is one who 'most readily [is] given the complete and legitimate status of being a victim'.[64] This restriction of victimhood is further limited through the abstraction of victimhood and the silencing of victims voices, which has a more significant impact within ICL, in contrast to domestic criminal law. This occurs due to the large number of victims of international crimes along with the increased challenges of having their victimhood acknowledged outside of the state system by an international community.[65]

The priority placed upon engagement with victims, and their search for justice, provides an important tool of legitimacy for ICrJ alongside criminal justice standards, including fair trial rights.[66] This is an important tool for the entire international criminal legal system in the face of criticism accusing it of hegemony, bias or victors' justice.[67] The Office of the Prosecutor (OTP) has highlighted the need to seek justice for victims from all parts of the world, in response to the criticism of African bias.[68] As Finlay highlights, 'international criminal justice has no choice but to move towards a victim constituency if its legitimacy

[62] See chapter 4
[63] Nils Christie, 'The Ideal Victim' in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Palgrave Macmillan UK 1986).
[64] Marian Duggan, *Revisiting the 'Ideal Victim': Developments in Critical Victimology* (Policy Press 2019).
[65] van Wijk (n 19).
[66] Sergey Vasiliev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in Cecilia M Bailliet and Nobuo Hayashi (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017).
[67] Tor Krever, 'International Criminal Law: An Ideology Critique Hague International Tribunals: International Criminal Courts and Tribunals' (2013) 26 Leiden Journal of International Law 701.
[68] 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: "The ICC Is an Independent Court That Must Be Supported"' <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-24-11-2015> accessed 11 October 2020.

and functional relevance are to be confirmed beyond the authority of legislative instruments and sponsor agencies'.[69] Failure to properly fulfil the justice aims of individual victims reduces the legitimacy of the entire ICL enterprise.[70]

1.4 Methodology

The methodology is desk-based, critically examining victim practice within ICL alongside issues of peace and justice to present how an enhanced role for victims in ICrJ could strengthen the search for justice for victims. It brings together lessons from critical theories to enhance the counter-hegemonic role of ICL, and to move beyond the previous lacunae of the role for victims within ICL.[71] This deconstructivist approach is developed throughout all chapters of this thesis, in conjunction with the decolonial critique exposing legacies of domination within ICL and its approach to victims, peace and justice.[72] A linear approach provides a sense of order that is not justified by the facts and can lead to hegemony. Instead, the chaotic narrative, occurring through deconstructing histories, presents what has transpired through its myriad layers, including counter-hegemonic social accounts.[73]

The deconstructivist methodology contextualises complex concepts, bestowing them their multi-layered nature, whilst the deconstructivist analysis breaks down concepts generally presented in a simple form and, instead, demonstrates their complexities.[74] This method is utilised within the early chapters and provides the building blocks for the rearticulation of ICL detailed in later chapters. Deconstructing attitudes to peace and justice within ICrJ provides a nuanced understanding of how areas of overlap have developed. This deliberately moves away from approaches presenting these ideas as immutable values, and, instead, demonstrates that the understanding of these concepts, and how they are used and valued, changes depending upon the perspectives of the

[69] M Findlay, 'Activating a Victim Constituency in International Criminal Justice' (2009) 3 The international journal of transitional justice 183.
[70] Harry Hobbs, 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy' (2016) 16 Chicago journal of international law 482.
[71] Section 2.4
[72] Section 5.2 & 5.3
[73] Gerry Simpson, 'Linear Law: The History of International Criminal Law', *Critical Approaches to International Criminal Law* (1st edn, Routledge 2014).
[74] Gayatri Chakravorty Spivak, 'Touched by Deconstruction' (2005) 20 Grey room 95 This is guided by Gayatri Chakravorty Spivak's interaction with Derrida's concept of deconstruction. This thesis problematises traditional understanding of peace, justice and victims within international criminal law.

parties involved. The legacy of historical practice is acknowledged, and the origins of these concepts are examined, acknowledging their limitations and determining a possible path for the ICC to better support positive peace.[75]

Using decolonial and deconstructivist critiques, this thesis exposes the limitations in the traditional understanding of victims and victimhood and how this understanding impacts upon the practice of the ICC, including the decision to exclusively use the term 'victim' within the RS of the ICC. Acknowledging the need for new terminology for victims with ICL recognises greater agency on the part of those who have suffered crimes. Alternative concepts, such as 'survivor', move beyond the exclusive focus on victimhood, which conjures up images of helpless individuals with limited agency.[76] Building upon the decolonial critique of modernity, which examines ICrJ from the underside, this thesis also presents a rearticulation of the concept of victims in line with ideas of the 'Other'.[77] Recognising the limitations of 'ideal' victims – whose value is connected to their innocence – limits the potential for political manipulation of the victims by third parties.[78]

Deconstructing the jurisprudence of the ICC and hybrid courts contextualises the influence of victim rights on ICL, and exposes restrictive normative practice.[79] This research will draw upon empirical work on the current practice of the ICC and relevant hybrid tribunals, and the potential to achieve justice in this system, including localised justice.[80] It examines the narrow parameters of victims within ICL, which directly connects victimhood to the harm suffered at the hands of individual perpetrators, while excluding the effect of structural and epistemic violence, which remains unchallenged in negative peace. Drawing from the field of victimology, this thesis explores the development of the concept of victim, and the influence of this concept on the understanding of victim-centric justice within the ICrJ system. In particular, it explores the victimological assessment of the recognition of the victims of serious human rights abuses. It includes a secondary analysis of interviews carried out by victimological

[75] Section 4.6
[76] JJM van Dijk, 'Free the Victim: A Critique of the Western Conception of Victimhood' (2009) 16 International Review of Victimology 1.
[77] Chapter 5
[78] Chapter 2
[79] Chapter 3
[80] John D Ciorciari and Anne Heindel, 'Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands' [2015] Challenges, and Fair Trial Demands (April 1, 2015).

scholars of victims of international crimes. The countries and case studies have been chosen to highlight the justice needs of victims who are not adequately represented by the ICrJ system, experiencing negative peace through structural or slow violence, and to demonstrate how to improve victim-orientated processes.[81]

Additionally, post-colonial and decolonial recognition of the marginalisation of the subaltern demonstrates an important aspect of victimology which remains overlooked within ICrJ.[82] Reimagining the active role that victims could play, in which the limitations of the 'Other' are overcome, requires an acceptance of, and value for localised justice procedures.[83] Following a deconstruction of limited negative peace, this thesis builds upon the current recognition within transitional justice literature of the limitations of top-down processes which exclude 'from below' understandings.[84] Positive peace theory is an important critique for ICL; but it is from a western school, and the broader post and decolonial critiques can provide a deeper understanding of issues of colonial structural violence. Additionally, a more comprehensive critique on the colonial structures which have moved from war time to peace time highlights the many unrecognised and unacknowledged victims. This thesis brings positive peace and colonial critiques together to strengthen the opportunities both for lasting peace and for the victims who are excluded or unheard within international criminal

[81] This secondary analysis provides the opportunity to bring together work of ICl scholars interviewing victims who have had access to retributive or restorative justice from the ICC along with victims within sui generis Hybrid courts alongside the work of scholars critical of ICL who have carried out extensive interviews with victims or international crimes who have taken part in alternative justice procedures and localised, from below justice processes
See chapters 3 for analysis of victims experiences practice of ICl and ICC in which demonstrates a lack of victim-orientated approaches
Chapter 4 on Northern Uganda and victim experiences of ICL, peace and justice demonstrating the complexities of the variety of justice aims
Chapter 5 detailing experiences of subaltern and victimhood unrecognised in ICrJ
Chapter 6 and the Canadian genocide report, victims of structural violence, limited recognition in ICl
Chapters 7 and 8 victim justice experiences outside ICrJ, from below localised justice, with the rearticulation in chapter 8 addressing lessons from previous chapters, presenting greater victim-orientated options .
[82] Discussed in chapter 5
[83] David S Koller, 'The Global as Local: The Limits and Possibilities of Integrating International and Transitional Justice' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice* (Cambridge University Press 2015).
[84] Catherine Turner, 'Deconstructing Transitional Justice' (2013) 24 Law and Critique 193.

1.5 Terminology

In this thesis, specific terms are used to advance the argument. These terms have extensive background debates and commentary in academic writing, allowing them myriad understandings. To provide clarity, this section explains the nature of their usage throughout this thesis. These terms will be used consistently throughout.

Firstly, the main ideas of peace, justice and victims within ICL, and the connections between them are explored throughout the thesis. The issues of peace and justice are presented as complex ideas that require a polemic reading as the precise understandings vary depending on the interests of the parties using them. I explore this complexity by examining the history of these terms in relation to IL in general, and ICL in particular. The term 'victim' is used in accordance with the terminology within the Rome Statute of the ICC. The impact of exclusively using the term 'victim' is analysed within this thesis.[85]

The decolonial critique, detailed in Chapter 5, provides an alternative lens through which to analyse the Western concepts of justice, peace and victim. The term 'pluriversal' follows decolonial literature and is understood as a 'world consisting of many worlds, each with its own ontological and epistemic grounding'.[86] Pluriversality stands in contrast to a hegemonic universality, described as 'Modernity' by decolonial authors, which is coupled with a colonial matrix of power. Eurocentric understandings of the world, based in European logic – including Eurocentric scientific method, philosophy, hierarchies of race and gender, and capitalist modes of economic development – are deemed to set a universal standard that provides the basis for universally applicable international norms, structures and institutions. In the decolonial view, the legacy of this modernity/coloniality connection has resulted in 'inferiorizing all non-Western knowledge'. Dussel has proposed an alternative, which he has termed 'transmodernity', a 'utopian project meant to transcend the Eurocentric version of modernity,' constructing alternative futures through critical dialogue between non-Eurocentric cultures, taking the best parts of all ways of being (including modernity) to imagine alternative futures.[87] 'Subaltern' is understood as an oppressed subject or one considered to be of 'inferior

[85] Tessa Lacerda, '"Victim": What Is Hidden behind This Word?' (2016) 10 International Journal of Transitional Justice 179.
[86] Arturo Escobar, *Pluriversal Politics: The Real and the Possible* (Duke University Press Books 2020).
[87] Dussel, 'Transmodernity and Interculturality' (n 35).

rank'; 'in the context of colonial production, the subaltern has no history and cannot speak'.[88] This definition is based upon critiques of concepts of victimhood by Spivak and lessons from Quijano's decolonial reading of Coloniality of Power, although the historical origins differentiate depending on the related period of conquest and colonialism.[89] Subaltern epistemic perspectives, traditionally overlooked or excluded in contrast to dominant universal understandings, represent knowledge coming from below that produces a critical perspective of hegemonic knowledge and the power relations involved. This critical stance considers that there is no neutral knowledge; instead, any given knowledge stems either from a dominant or subaltern side.[90]

References to grassroots mechanisms follow the readings of transitional justice scholars who consider this a method through which to develop programmes involving significant local ownership, in contrast to state-led or internationally conceived programmes.[91] This is further developed by scholarship presenting bottom-up procedures, taken by this research to provide a counter-hegemonic challenge to top-down standards that maintain an elite-focused status quo.[92]

The idea of protecting against impunity is understood as a foundational motivation of the work of the courts, seeking to address legacies in which perpetrators understood they could act without any accountability. This thesis follows the ideas of impunity set out by the UN. Impunity has been defined as:

> the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused,

[88] Gayatri Chakravorty Spivak, '"Can the Subaltern Speak?"' (Cary Nelson and Larry Grossberg, eds Marxism and the interpretation of Culture Chicago, University of Illinois Press 1988).
[89] Aníbal Quijano, 'Coloniality of Power and Eurocentrism in Latin America' 15 International sociology : journal of the International Sociological Association. 215.
[90] Ramón Grosfoguel, 'World-Systems Analysis in the Context of Transmodernity, Border Thinking, and Global Coloniality' (2006) 29 Review 167.
[91] McEvoy and McGregor (n 32).
[92] Kieran McEvoy and Anna Bryson, 'Justice, Truth and Oral History: Legislating the Past "from below" in Northern Ireland' (2016) 67 Northern Ireland legal quarterly 67.

arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[93]

1.6 Structure of Chapters

Chapter 2 deconstructs the genealogy of the conceptualisation of the victim within ICL, to expose the limitations of the claim that the central mandate of the ICC is the search for justice for victims. This chapter argues that a victim-oriented approach should be utilised within ICL; to ensure justice for victims is more than an empty statement but actually occurs in practice, overcoming the theoretical limitations and jurisprudential limitations set out in this chapter and Chapter 3. Historicising the evolution of the 'victim' throughout community and European criminal justice systems demonstrates the importance to all victims, both poor and wealthy, of having the ability to shape the justice process. This desire on the part of victims contrasts with the dominant motivation of states to establish justice systems that will maintain political stability and avoid civil unrest. The argument is made, that this focus on maintaining stability devalues the issue of justice for victims. Drawing on literature from the field of victimology, the chapter demonstrates how stakeholders within ICrJ utilise an oversimplified conceptualisation of an 'ideal' victim, which does not adequately reflect the complex nature of victims in real-life events.

Chapter 3 analyses the jurisprudence of the victim regime in ICL. This jurisprudential analysis examines the influence of the 'constructive ambiguity' included within the RS, in which the details of victim practice were a lacuna left to be determined by judicial decisions. Areas in which judicial decisions have limited the influence of victims' rights in the jurisprudence of the court are explored through an examination of case law at both the ICC and hybrid tribunals. Additionally, it explores the tendency to prioritise collective awards rather than individual monetary payments, which poses a challenge to the adoption of a reparative justice approach when it goes against the victims' wishes.

Chapter 4 examines the complexities surrounding the peace/justice debate within ICL and its interplay with the question of justice for victims. While international courts are established to facilitate the maintenance of stable peace, if this peace does not include

[93] COMMISSION ON HUMAN RIGHTS, 'PROMOTION AND PROTECTION OF HUMAN RIGHTS Impunity Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' <https://www.refworld.org/pdfid/42d66e7a0.pdf>.

justice for victims then it leads to a negative peace. The chapter builds on an understanding of the rise of individual rights within IL, to explore the victims' rights to justice and the complex forms of justice sought. It then goes on to argue that the framework of IL (including peacebuilding) has evolved according to a conceptualisation of peace that is consistent with Galtung's 'negative peace', and that this narrow framing of peace limits the opportunity for victims to search for justice within IL. Finally, the role of ICC involvement in Uganda is examined, detailing the manner in which a negative peace has been created.

The decolonial and post-colonial critiques utilised in Chapter 5 are not conceived as being against ICL per se, but instead provide an opportunity to overcome unjust legacies or unfair pluralistic practice, and strengthen the counter-hegemonic role of ICL that was imagined at its inception. Additionally it sets out how a 'paradigm of war' exists within the understandings of peace in IL, in which structures established in war time or through colonialism are maintained within peace time. Importantly, these critiques challenge the current claims, that ICrJ is counter-hegemonic in nature, and the notion that it speaks justice to power instead of merely speaking justice to the defeated. Further, this details the critique by Spivak that the victim in ICL is portrayed as helpless and in need of a saviour, reducing their voice and agency, especially for the overlooked subaltered section of society.[94] Recognising that this critique could be co-opted by powerful individuals, Mutua has argued that efforts to address potential bias within ICL should not protect top-down interests which exclude the search for justice for victims, especially the marginalised.[95]

Chapter 6 analyses the theory of positive peace as a methodology to bring together the justice/peace aspects of ICL. Through this approach, the search for justice for victims includes social, cultural and epistemic justice, and recognises the impact of hidden violence, such as structural violence, maintained within social constructs. Following the epistemic limitations of ICL detailed in Chapter 5, this chapter delves deeper into the problem of structural violence, such as the existence of racial hierarchies, utilising a case study of the Canadian genocide report.[96] Engaging with issues of social and cultural

[94] Spivak (n 88).
[95] Makau W Mutua, 'Africans and the ICC: Hypocrisy, Impunity, and Perversion' 47.
[96] Section 6.3.3

violence provides a fuller understanding of justice for victims, alongside retributive justice, reparative justice and restorative justice.

Considering that most victims of international crimes will not receive justice through the ICC, which is a court of last resort, Chapter 7 analyses the role ICL can play to strengthen the opportunity for justice for victims within TJ procedures. This approach removes the current disconnect between ICL and wider justice and peace procedures. Examining the influence of Article 17 and Article 53 of the RS, it analyses the influence of complementarity and ICC investigations on peace processes through a case study on Colombia. Finally, the chapter addresses the 'interests of justice' question, stemming from Article 53 of the RS, and asks in whose interests the ICC works. The arguments in this chapter build on the work of Dixon and Tenove, who have observed that ICrJ exerts influence on TJ processes through its ability to mobilise authority.[97] Additionally, this chapter introduces the opportunities offered by grassroots bottom-up theories and practice, which are demonstrated through current TJ mechanisms and approaches within peacebuilding. The 'from below' approach opens up a method in which ICL can work in conjunction with wider TJ and peacebuilding efforts, strengthening a victim-centric approach. It distils lessons from localised justice procedures in South Africa and Rwanda, through a victim-centric lens.[98] These lessons provide an important element of the rearticulation set out in Chapter 8.

Chapter 8 presents a reconceptualization of victims within ICL. It employs a three-layered approach to move beyond the limitations in ICrJ exposed throughout the earlier chapters. The reconceptualization places victims firmly at the centre of proceedings and increases their political agency within ICL. The chapter also proposes steps to situate ICL coherently alongside TJ procedures. The first layer addresses the need to recognise the complexity of victims, moving beyond the limitations of the 'ideal' victim. To illustrate this point, the chapter discusses the example of child soldiers – who may be simultaneously both victims and perpetrators. Justice in this context requires an innovative approach that incorporates restorative justice procedures. The second layer highlights improvements to the current practice of victim regimes within the ICC and Hybrid Courts, following existing

[97] Peter Dixon and Chris Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims' (2013) 7 International Journal of Transitional Justice 393.
[98] Section 7.9

structures. The final layer proposes a victim-centred hybrid tribunal situated within wider transitional justice procedures to ensure greater victim influence and grassroots ownership of justice processes. This chapter presents mechanisms which could be incorporated within the development of new hybrid tribunals. It provides a flexible best-practice model in which the complexities of societies, moving beyond international crimes, can utilise a *sui generis* hybrid court to balance local justice needs alongside ICL standards.

2 CHAPTER 2: HOW THE THEORETICAL UNDERPINNINGS OF ICL UNDERMINE THE VICTIMS IN THEIR SEARCH FOR JUSTICE

> Our mandate is justice, justice for the victims: the victims of Bogoro; the victims of crimes in Ituri; and the victims in the DRC.[99]

2.1 Introduction

This chapter details the theoretical articulation of victims within ICL, through an examination of the role of victims in domestic criminal legal systems in international human rights law, and how this influenced the construction through the drafting of the Rome Statute of the ICC. It argues that, at the centre of ICL is a notion of the 'ideal victim' – an innocent who has been wronged by an evil perpetrator, and in whose name justice must be done. The final section of this chapter examines academic perspectives problematising this articulation of victimhood, demonstrating how it silences individual victims' experiences and needs and stands in the way of them achieving meaningful justice. A victim-orientated approach is required to overcome the marginalisation of victims and ensure that the aims of achieving justice for victims can be met.

2.2 Need for Victim-Orientated Approach to ICL

The Rome Statute of the ICC was developed on account of the devastating effect of international crimes upon victims, and their need for justice through redress for the harm they have suffered. The importance of the victim to ICrJ has been extolled by many stakeholders, to explain the creation of the ICC and to justify its work. The UN Secretary-General, Kofi Annan, stressed at the opening of the Rome Conference that the overriding interests of the ICC must be those of the victims.[100] Likewise, during the drafting of the Rule of Procedure and Evidence (RPE), it was stated that victims having their rightful place is the 'reason for and the objective of international criminal justice'.[101] In light of this, the drafters of the Rome Statute of the International Criminal Court intended to offer

[99] ICC Deputy Prosecutor in Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Judgement) ICC-01/04-01/07 (25 September 2009)

[100] Press Release SG/SM/6597 L/2871 UN SECRETARY-GENERAL DECLARES OVERRIDING INTEREST OF INTERNATIONAL CRIMINAL COURT CONFERENCE MUST BE THAT OF VICTIMS AND WORLD COMMUNITY AS A WHOLE https://www.un.org/press/en/1998/19980615.sgsm6597.html

[101] Yael Danieli, Report of the Victims' Rights Working Group, Rome Conference 15 June – 17 July 1998, p3

'justice to victims' by achieving a more effective balance between the parties, reflecting victimological and human rights developments.[102] The Prosecutor of the ICC has described the role of victims within court proceedings as integral.[103] As the initial quote of this chapter illustrates, the ICC Deputy Prosecutor has declared that ensuring that victims experience justice has become a mandate of the ICC. As set out in the preamble of the Rome Statute, the drafters deliberately made the interests of victims a high priority.[104] The Assembly of State Parties (ASP), overseeing the running of the court, has, in addition, recognised how there has been a growing international consensus of the important role victim participation and reparations play in achieving justice for victims.[105] The ASP added that 'victims also bring a unique perspective to the judicial process.'[106] Additionally, Judge Mindua reinforced that victim participation is in 'conformity with the idea of victim-oriented justice which is at the heart of the ICC system'.[107]

This appraisal continues elsewhere, with The Rome Statute of the ICC being declared a 'high watermark' in the positioning of victims within ICL, especially through participation.[108] 'We are their Court', stated the Prosecutor, 'all of them are contributing to the prosecution of perpetrators ... and to the legitimacy of the system'.[109] Seeking to remedy the suffering and devastation caused to victims provides an important legitimacy claim for ICL.[110]

Despite these claims, concerns have been raised that this great promise of providing justice for victims is not living up to the mandate in practice, with the focus on prosecution and punishment taking precedent. While the Rome Statute is a 'victim-centred legal

[102] Christopher Muttukumaru, 'Reparations to Victims' in Roy S Lee (ed), *The International Criminal Court: the making of the Rome statute : issues, negotiations, results* (Kluwer Law International 1999). 270
L Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague' (2015) 13 Journal of international criminal justice 281.
[104] Preamble to the Rome Statute
[105] Report of the Court on the strategy in relation to victims, Assembly of States Parties, ICC-ASP/8/45 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf
[106] IBID
[107] SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN (Decision on the Prosecutor and Victims' Requests for Leave to Appeal) ICC-02/17 (17 September 2019) Annex Partially Dissenting Opinion of Judge Antoine Kesia-MBE Minda
[108]Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NW. J. HUM. RTS. 459 (2008). Pg. 516
[109] Mr Luis Moreno, 'Council on Foreign Relations' [2010] Keynote Address: International Criminal Court 13.
[110] Susana Sacouto and Katherine A Cleary, 'Victims' Participation in the Investigations of the International Criminal Court' 18 64.

instrument', the experiences of victims has resulted in them feeling let down.[111] Statements detailing how important the justification of 'the victims' have been for the international criminal justice movement have queried whether this applies to individual victims or, instead, provides a useful tool of rhetoric for the court.[112] As Chapter 3 details, the practices of the ICC and wider hybrid tribunals or courts have not provided the victim with centrality. This chapter argues that their positioning in the Rome Statute provides victims with limited agency to shape or influence the justice process in comparison to other justice systems.[113] Additionally, recognition of victimhood within ICrJ is faced with many hurdles, ranging from the prioritisation of the innocent helpless victims to the need for victims to connect within the international community and 'sell' their victimhood. As a consequence, victims of international crimes are faced with these considerable challenges, which are significantly greater than for domestic crime victims. To overcome this, it is important that a victim-orientated approach is taken within ICL. The search for victims' justice provides to the ICC, and ICrJ in general, an important tool of legitimacy. This is routinely invoked when there is criticism of the court, suggesting it is influenced by political interests or is following a Western hegemonic agenda; ensuring the search for justice for victims should therefore be a priority for the court, alongside fair trial rights for the defendant.[114] For instance, to ensure victims are not used merely as objects to justify the legitimacy of the court, they need to have influence within the investigations and proceedings. Ensuring victims are subjects within ICL requires a change in the approach taken. This should take the form of what Findlay has termed a 'victim constituency', aiming for a more victim-centred approach in which the victims are placed in a position of priority.[115] This provides an important basis for the legitimacy of ICL – that international crimes cause a large number of victims to suffer, and that recognition of this suffering requires the creation of a process to achieve justice for these many victims. This is in recognition that victims in the ICC do not have the opportunity to pursue justice through domestic courts. Indeed, Finlay has explained this: 'international criminal justice has no choice but to move towards a victim constituency if its legitimacy and

[111] Rauschenbach and Scalia (n 23).
[112] Sarah MH Nouwen, 'Justifying Justice' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (1st edn, Cambridge University Press 2012).
[113] Section 2.5
[114] Mirjan Damaska, 'Reflections on Fairness in International Criminal Justice' (2012) 10 Journal of international criminal justice 611.
[115] Findlay (n 69).

functional relevance are to be confirmed beyond the authority of legislative instruments and sponsor agencies'.[116] The nature of how this victim-orientated approach can work in practice is detailed throughout the chapters of this thesis, highlighting, especially, the need for marginalised victims to be heard and have an active role in any justice process. Without this, ICrJ will ultimately struggle to justify its existence.

2.3 Victims' Centrality within Domestic Justice Systems

It has been claimed that the victims' regime within the Rome Statute of the ICC marks a high watermark for victims' rights. While it is correct to claim their position within ICL has been strengthened, this has to be viewed in light of their previously extremely limited role within ICL. The role of the victim in domestic justice systems provides a useful example of what a central role for victims would be, as a key component arises from victims being granted the option to choose the forms of justice they receive.

Starting with an analysis of the earliest forms of remedy, this section examines the use of community-based dispute resolution systems, in addition to the development of the formal justice system in Europe. It argues that, whilst all justice systems have sought to provide forms of redress to the victim, there is a wider scope of remedies available within community dispute resolution compared with Euro-centric justice systems. Part of the reason for this is the gradual co-option of justice by the state in order to reinforce state power, as states emerged as the primary social unit in post-Westphalian Europe. As a result, the opportunity for the victim to influence the form and outcome of proceedings has been diminished. However, through the influence of victimology, alternative restorative justice procedures have begun to develop, granting the victim a more central role once again. On the other hand, community-based forms of dispute resolution are not perfect solutions to the question of how to ensure victims receive justice, as the needs of victims in these systems may be subordinated to the perceived needs of the wider community. This conclusion demonstrates the complex challenge of designing justice systems that achieve meaningful justice for victims and argues against the common assertion that a 'utopia for victims' has ever existed. However, these domestic examples

[116] ibid.

have provided greater opportunities for justice for victims in comparison to the ICC, detailed in the next section.

Analysing the role of victims within community-based justice practice demonstrates that the motivation was to remedy the harm suffered by victims of crimes, based upon the fundamental legal principle to provide redress of wrongs.[117] The community and inter-personal nature of these systems provided to victims a central role, alongside that of the offender. While it might not be correct to claim this amounted to a 'victim utopia' in an ancient justice system, victims are granted more influence over the procedures.[118] In the early forms of legal systems, opportunities were available for victims to receive redress, deterrence and punishment for both public and private matters.[119] Henry Maine's influential work claims that, in comparison to modern examples, ancient societies acknowledged that the person injured had been wronged and not the state.[120] Funk details how the motivation to ensure victims were 'made whole again', was an ancient principle, recognising the crucial importance to provide victim remedy.[121] The healing and restoration of the victims were part of the justice sought through these processes. Indeed, the wrongdoer had an obligation to 'make good on the injury caused'.[122] It was not simply focused on punishing the offender; rather it was examining the needs of the victims as well and providing a clear forum to express these interests.

An important aspect within communities is the variety of justice options provided to the victim, as redress or remedies could take the form of both punitive and restorative damages. Shelton details how, in early legal systems, 'punishment of the perpetrator and justice for the victim usually were merged through victim self-help encouraged or regulated by law.'[123] This is witnessed through the ancient legal system within Mesopotamia, in which the victims could choose between revenge and reparations, with

[117] Bassiouni, 'International Recognition of Victims' Rights' (n 16).
[118] ibid
[119] Dinah Shelton, *Remedies in International Human Rights Law* (2nd,Revis edn, Oxford University Press, Incorporated 2006) 3.
[120] Henry Sumner Maine, *Ancient Law: Its Connection With the Early History of Society and Its Relation to Modern Ideas* (Forgotten Books 2019) 380 Mainly focusing on the Roman Period.
Walklate and Mawby introduce how many scholars including Harding, Fry and Mainers have built upon a similar argument set out by Maine however they query the conclusion that a Utopia existed in ancient societies
[121] Funk (n 8) 19.
[122] Shelton (n 119) 5.
[123] ibid 3.

the court determining the suitable amount.[124] In this manner, the victims held agency within the process, on account of the harm and the loss they had suffered. Generally, though, victims would initiate proceedings, agree to the forms of justice presented and influence the form of remedy or the restoration of the loss they had suffered, and received compensation from the accused directly.

As Bassiouni recognises, remedies to victims were considered a way to settle disputes between the offender and the victims, preventing further disturbance of the peace.[125] The need to provide a remedy to the victims was an important aspect in the maintenance of peace within societies. If the victim of a crime was not provided an adequate remedy for their harm, there was a risk that this would lead to 'individualised vindication' and escalating violence.[126] Achieving remedy for victims was therefore considered an important component of facilitating future peace.

The specific mechanisms involving victims in justice processes vary between cultures and historical periods. Standards of retribution or revenge were carried out in various societies, in which the need to provide equal punishment to the harm suffered provided the standard, e.g. Mosaic law following *lex talonis* detailed 'an eye for an eye'.[127] Regardless, in many systems, such as the tribes in Afghanistan, the Assyrian Code, and the Chinese Tang Code or African Bantu societies, and including Islamic and Roman Law, compensation would be provided for certain harms, while retaliation could be retained for serious physical injury. [128]

Dispute resolution is a method utilised in many different societies throughout history.[129] It places the interaction between victim and offender centre stage, ensuring a prime position for the victim's interests.[130] This type of resolution sought a solution that would be acceptable to both parties and the wider community. Dispute settlement was a process

[124] Shelton (n 119) referencing Raymond Westbrook (ed.), A History of Ancient Near Eastern Law (Leiden, 2003), 78.
[125] Bassiouni, 'International Recognition of Victims' Rights' (n 16) 225.
[126] ibid 230.
[127] Shelton (n 119) 3.
[128] Bassiouni, 'International Recognition of Victims' Rights' (n 16).
[129] Kieran McEvoy and Tim Newburn, *Criminology, Conflict Resolution and Restorative Justice* (Palgrave Macmillan 2003) ch 3.
[130] through its victim-centric dispute resolution procedure which includes the requirement for the accused to provide punitive damages to the victims within the collective approach

overseen by the community and could vary considerably between different cultures, including ritual, mysticism, talk or even violence, tightly regulated by custom.[131] Funk's analysis of the restorative and punitive elements of dispute resolution in societies throughout history, recognises how 'ancient customary laws worldwide, as a consequence, were almost exclusively victim-centric'.[132]

Modern examples of dispute settlement procedures have remained in many cultures and societies not ruled by European kings.[133] Within indigenous societies, traditional forms of conflict resolution have persisted, although at times balanced alongside the arrival of colonial legal systems.[134] In Nils Christie's influential work, detailing how a 'theft of conflicts' occurs within modern criminal justice, outlines how the conflict or judicial process is stolen by lawyers, with victims moved to the outside.[135] He contrasts this through a modern alternative from the courtroom processes of Tanzania, where the victim and offender hold centre stage, while other members of the local community participate fully, and court officials play a backstage role.[136] Additionally, Walklate and Mawby examine the positioning of victims within modern forms of dispute resolution which occurred within communist societies. They researched both China and Cuba in which 'institution of settlement is used as much as a means of educating the people as a mechanism of conflict resolution'.[137] While they recognise that these systems initially provided a greater deal for victims, they argue that this will lessen in the face of community interests. Walklate and Mawby highlight that 'the interests of the new order thus transcend individuals' and victims' rights, and the victims may be 'used' (or abused) to serve society's interests'.[138][139]

[131] RI Mawby and Sandra Walklate, *Critical Victimology: International Perspectives* (SAGE 1994) ch 3.
[132] Funk (n 8) 30.
[133] John Braithwaite, *Restorative Justice & Responsive Regulation* (University Press 2002) 5 Such as Indigenous peoples of the Americas, Africa, Asia and the Pacific: restorative justice practice persisted alongside retributive practice of blood feuds.
[134] Rianne M Letschert, *Victimological Approaches to International Crimes: Africa*, vol 13 (Intersentia 2011) 357.
[135] Christie, 'Conflicts as Property' (n 15).
[136] ibid 4.
[137] Mawby and Walklate (n 131) 20.
[138] ibid.
[139] Mawby, R. & Walklate, S. (1994). Critical victimology: International perspectives London: SAGE Publications Ltd doi:
When a young married couple under stress due to their conflicting hours of employment are told that they must 'serve national construction'; when a landlord is told that his tenant cannot afford rent and so should not

While modern settlement of disputes can be better for victims it does not amount to a utopia for all victims. Individual victim interests can be overlooked in favour of community interests, or marginalised victims can actually have very little say over the outcome of these procedures. The forms of justice, therefore, could actually be harmful to the individual victim while meeting family or community interests.[140]

Another key issue is the criticism that both ancient and modern forms of dispute settlement do not adequately recognise those with marginalised interests within societies. In contrast to powerful individuals, groups such as women or youths, would not have their interests prioritised.[141] While this thesis recognises that the voice of the marginalised is frequently overlooked in the context of ICrJ, it does not present dispute settlement mechanisms as a perfect alternative. Instead, it acknowledges the possibility that the uncritical use of alternative mechanisms may even result in a loss of victims' rights, compared with those afforded to victims - however imperfectly - through a trial process.[142] As Chapter 7 details, alternative forms of justice procedures are currently a tool to provide justice for victims within transitional justice mechanisms. These operate as an alternative to criminal justice or in instances in which criminal justice procedures are non-existent, although, protection for individual victims is necessary within these procedures.[143]

2.3.1 Development of European Criminal Justice systems: 'Utopia' in the Middle Ages

The English and European criminal justice systems lie at the core, and are, in many ways, the foundation of ICL.[144] By deconstructing the evolution of the historical legal principles

be forced to pay it; and when a wife is refused leave to divorce her adulterous husband who happens to be a party member, the interests of the 'victims' involved are clearly not being addressed.
In this manner the interests of the victims involved in the mediation procedures are not addressed if they go against the interests of the wider communist society

[140] Letschert (n 134) 361 discusses the example of a girl who is required to marry the man who raped her, prioritising saving the honour of her family.

[141] Letschert (n 134).

[142] Marianne Wade, Christopher Lewis and Bruno Aubusson de Cavarlay, 'Well-Informed? Well Represented? Well Nigh Powerless? Victims and Prosecutorial Decision-Making' (2008) 14 European Journal on Criminal Policy and Research 249.

[143] when considering forms of dispute resolution, including alternative dispute resolution currently used in contrast to criminal law procedures,

[144] Section 2.4
While the RS of the ICC had input from other jurisdictions, the significance of English and European legal systems, and their former colonies, which continue to follow the criminal justice standards, continues through the influence of these judicial standards within the case law of the ICC

we can look at what has led to the current format of ICL. The chaotic aftermath following the fall of the Roman Empire led to a shift towards greater 'individual vindication', and resulted in the use of blood feuds in which the victims utilised a form of direct enforcement upon the offender.[145] There were concerns this would create instability, and the practice lessened due to the increased focus, within Europe, upon kings who sought to enhance their power and position within society through the legal system. Indeed, as the restorative justice scholar John Braithwaite argues, the move of transforming crime into a matter of fealty to, and felony against the king, instead of the wrong done to another person, was a central part of the monarch's program of domination of his people.[146] As a result, the increasing focus on state stability meant that crime began to be considered as a threat to the King's peace or to society. This marked a significant shift away from the previous focus on providing redress for victims, in which crime was considered an interpersonal dispute. In this manner, the notion developed that it was the king who was harmed when someone had been victimised, and breaches of the peace had to be brought to the king's courts. Through this understanding, the victim and their need for remedy no longer held such a central role, as the interests of the king came first. This period, therefore, marked a transition from local feudal justice processes towards a more centralised system.[147] Ashworth has suggested that this arose 'less to doctrinal legal distinctions than to the usefulness of criminal jurisdictions as a source of funds for the Crown … and to the social significance of the administration of criminal justice as a mark of royal authority'.[148]

In the Middle Ages, prosecution was still, in theory, a victim-instigated process, while the state increasingly adopted powers to allow it to take up and pursue cases initiated, and subsequently, dropped by a victim.[149] For instance, the payment of any fines by the offender to the victim would no longer be automatic. These payments could now be taken by the state, demonstrating the lessening impact of the victims. Crime was still conceived as something carried out against the peace of society, while private wrongs, civil

[145] Maine (n 120) 158 Move away from Roman Tablets code approach an instead embraced a greater blood feuds for individual vindication in society, shifted with influence of Norman Conquest in Europe, growth in focus upon King peace and power.
[146] Braithwaite (n 133) 8.
[147] Maine (n 120) 160.
[148] Andrew Ashworth, 'PUNISHMENT AND COMPENSATION: VICTIMS, OFFENDERS AND THE STATE' (1986) 6 Oxford Journal of Legal Studies 86, 90.
[149] Sandra Walklate, *Handbook of Victims and Victimology* (Second, Routledge 2018) 5.

procedures or tort would need to be initiated by the victims, who were liable for the expense. However, as Seipp explains, in the Middle Ages, 'crime and tort were different ways for a victim to pursue justice for the same wrongful act'.[150] This provided the victim with the opportunity to achieve vengeance or damages. Walklate and Mawby reference how Harding has detailed the centrality of victims in fixed monetary sanctions. Through this, the offender could buy back the peace he has broken by paying a 'wer (payment for homicide) or bot (payment for injuries other than death) to the victim or his kin'.[151] Additionally, Schäfer, who argues that victims have become the Cinderella of criminal law, has labelled the Middle Ages as the golden age of victims.[152]

This claimed 'Utopia' for victims has, however, been contested by scholars. They instead detail how the benefits of this system were felt by the wealthy, while the experience of poor victims was very different. Doak opposes Schafer's interpretation of the 'Golden Age' for victims in the Middle Ages. He suggests this utopian view was optimistic with the burden of proof and expense of the prosecution weighing solely upon the victim's shoulders.[153] A similar view is shared by Wright, as he highlights that the wealthy within society benefited from the justice system while the poor experienced a lack of redress as a victim. Wright has examined this, stating that 'as for the poor man, with no kin, who became a victim, the historians do not say how he could enforce his claim'.[154] He points out that the Golden Ages or 'Utopias' appear to be 'golden only for the rich and powerful'.[155] Countering the notion of a 'Utopia' for individual victims, Walklate and Mawby argue that, while the Middle Ages provided some centrality for victims, seeking a manner in which victim and offender were reintegrated into society by providing amends, these were lessened in the face of community interests.[156] Not unexpectedly, the shift in the positioning of victims within criminal justice systems coincided with the development of state systems. As Walklate and Mawby point out, 'the more bureaucratic and professional those systems the less the concern with the individual victim and the more

[150] David J Seipp, 'The Distinction between Crime and Tort in the Early Common Law' (1996) 76 Boston University law review 59, 83.
[151] Mawby and Walklate (n 131) ch 3.
[152] Referencing Schafer Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (n 28) 3.
[153] ibid.
[154] Martin Wright, *Justice for Victims and Offenders: A Restorative Response to Crime* (2nd ed., Waterside Press 1996).25
[155] ibid.
[156] Mawby and Walklate (n 131) ch 3.

with the interests of the state'.[157] As the next section details, the growing concern for state stability also resulted in a significant lessening of victim interests within justice systems.

2.3.2 Crimes against the State: 1649 onwards

Following the establishment of the state system in Europe (including its colonies) with the Peace of Westphalia Treaty 1649, a strengthened state-centric approach to justice developed in the 1700s and 1800s.[158] At heart, these systems prioritised reducing crime, consolidating state power and developing a tariff system in which victims could petition for compensation.[159] This focus on state-centric justice resulted in the lessening of the position of victims. Funk suggests the priority following Westphalia was to ensure the strength of the state, which consequently led to a reduction of the influence of the victim.[160] Precedence over providing victims with restitution, therefore, was given to the importance of maintaining security and ensuring criminal acts were not committed again. In essence, as victims took on more of a third party role in comparison to the offender and the prosecution, they could no longer be considered central players within the criminal justice system.[161] The only method available for victims to seek justice was by testifying for the prosecution, as the criminal justice system itself now held prominence in the proceedings.[162] Victims could also be fined if they did not participate as witnesses of the crime to support the prosecution. The justice provided to victims would result in witnessing the offender being convicted of the crime, and additionally, they would not be involved in determining the length of sentence the offender received.[163]

In the common law jurisdictions, such as England and Wales, a distinction developed between criminal and tort proceedings. Criminal proceedings were perceived as being against the state or the King's peace, or society, and therefore the providence of state. In contrast, tort was viewed as conduct harmful to individual interests and the only available role for individuals seeking redress. Through this, arose strong opposition to

[157] Mawby and Walklate (n 131).
[158] Stephen C Neff, *Justice Among Nations: A History of International Law* (Harvard University Press 2014) ch 4.
[159] Epstein, L, Knight, J (2000) Towards a strategic revolution in judicial politics: A look back, a look ahead. Political Research Quarterly 53(3): 625.
[160] Funk (n 8) ch 2.
[161] Funk (n 8).
[162] Godfrey, B. S., & Lawrence, P. (2005). Crime and justice 1750-1950. Cullompton: Willan. Cox P, Godfrey B. Editors' Introduction: 'Access to Justice: Historical Approaches to Victims of Crime. Societies. 2019;9:73.
[163] Ashworth (n 148).

participatory rights for victims based upon a concern that these undermine the conception of criminal law and presumption of innocence.[164]

In the early 19th century, police took over the victims' role in the prosecution process.[165] Prior to this, enforcement of criminal law was largely a matter of private enterprise. Roberts specifies that it is generally accredited that industrialisation and urbanisation were 'heralding the decline in the importance of the victim within the criminal justice system'.[166] Further, it has been argued that it was not merely the growth of the state that shifted the position of victims in the midst of criminal justice proceedings, as increased levels of geographical mobility led to problems for prosecution systems based on small close-knit communities.[167]

Following these developments, the current position of victims within English law is that it provides to them no special status in criminal proceedings brought in relation to an offence. Like other citizens, the victim of the offence has the right to bring a private prosecution; however, they will receive no help from the state and may have to pay the defendant's costs if the proceedings result in an acquittal. In addition, if the police and Crown Prosecution Service decide to bring proceedings, the victim has no legal rights to join in, nor legal means to ensure the court hears his side of the story.[168]

In contrast, French law, through the inquisitorial system, has recognised the right of the victim to directly institute criminal proceedings and to participate in the proceedings once they have started.[169] The 1808 Napoleonic Code conferred wide rights to crime victims in criminal proceedings, especially participatory rights. Subsequently, both statutes and case law have widened the role of victims in criminal proceedings under French law.[170] The influence of the Napoleonic Code has been recognised within continental European

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[164] Claude Jorda & Jr6me de Hemptinne, The Status and Role of the Victim, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1387, 1403

[165] JR Spencer and Mireille Delmas-Marty, *European Criminal Procedures* (University Press 2002) 14.

[166] Bottoms A, Roberts J. Hearing the Victim: Adversarial Justice, Crime Victims and the State. Cullompton: Willan Publishing; 2010.

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[167] Mawby and Walklate (n 131) ch 3.

[168] Spencer and Delmas-Marty (n 165) 14.

[169] Ibid 15

[170] ibid

jurisdictions, such as those in Belgium, Italy and Germany. In these systems, the position of the victim is theoretically stronger than in England.[171]

These historical legal principles from domestic jurisdictions have shaped the development of ICL. The adversarial system utilised within common law jurisdictions was influential in the development of ICL through the Nuremberg and Tokyo tribunals, in which victims held no role. However, the influence of the inquisitorial model from civil law systems has been credited with the development of the victim regime within the Rome Statute of the ICC.[172]

2.3.3 Victims as agents of change in criminal law

In contrast to victim scholars presented above, who argue that the role of victims was reduced resulting in a near exclusion with the evolution of the state, there is an alternative argument that 'victims have been both central to and indispensable for the processes of justice'.[173] Scholars of this view highlight that, without victims, there would be no recorded crimes.[174] Kirchengast presents the victim as integral to many of the discursive developments in criminal law and the justice system, arguing that the 'historical power of the victim to police, prosecute and punish offenders informed the modern criminal law and justice system'.[175] This introduces a new perspective for analysing justice systems, recognising the role of the victim as an agent of change. Out of this perspective, criminal law developed through a 'fragmented, decentred and discursive process, inclusive of the victim', rather than 'monarchical or stately interests'.[176] Instead of following the argument of the gradual removal of victim power for the development of royal and social justice, this approach suggests that the victim played a formative role in the discursive changes that led to the 'establishment of criminal law and justice as a jurisdiction consolidated around the social'.[177] In this argument, the victim has been more central to the development of criminal legal institutions than is often recognised, and the historical

[171] Spencer and Delmas-Marty (n 165) 37.
[172] Discussed below, see section 2.4
[173] Walklate (n 149) ch 2.
[174] Walklate (n 149).
[175] Tyrone Kirchengast, 'Victims and the Criminal Trial Process' in Tyrone Kirchengast (ed), *Victims and the Criminal Trial* (Palgrave Macmillan UK 2016).
[176] ibid 20.
[177] ibid 22.

interaction of the victim with various institutions has led to the evolution of justice systems as we know them today.

While the role of the victim has been altered by the 'increasing centrality of the national authorities and their vacillating desire to take control of the prosecution of offences', the influence of victims is witnessed in the fact that private action by aggrieved individuals was, for centuries, the mechanism and impetus for legal proceedings.[178] Shapland explains how victims provide the basis for a large number of criminal justice processes:

> The numbers and types of cases entering the system and thereby eventually providing the workload for the courts, prison service and other conventional agencies, appear largely to be determined by the reporting behaviour of victims and witnesses, not action initiated by the police.[179]

While it is correct to argue that criminal justice systems have always required victims to report alleged crimes, their influence over the outcome of the justice process has frequently been unclear, and their role within any procedures was limited.

A similar paradox can be found in the development of the RS of the ICC. As discussed below, it is possible to recognise the victim as an agent of change within ICrJ.[180] However, as Chapter 3 demonstrates, their influence over the proceedings remains extremely limited compared with that of more powerful actors, particularly judges.

2.3.4 Victimology – victim revival

Recognising the limited role of victims within criminal justice encouraged the development of victimology.[181] Schafer explains how the focus within criminology was upon 'the contribution of the victim to the genesis of crime and the contribution of the criminal to the reparation of his offense'.[182] In this manner, the examination of victims

[178] Dale C Spencer and Sandra Walklate, *Reconceptualizing Critical Victimology: Interventions and Possibilities* (Lexington Books 2016) 19.
[179] Joanna Shapland 1950, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System*, vol 53 (Gower 1985) 585.
[180] See section 2.5
[181] Adam Crawford and Jo Goodey, *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate 2000) 11.
[182] Stephen Schafer, *Victimology : The Victim and His Criminal* (1977) 12–14.

was focused on issues surrounding the crimes, and not concerned with their experiences or needs. The work of victimology highlighted how the victims had become the forgotten actor in crime and justice.[183] Goodey brought to attention how this was only recognised by practitioners and policy makers once there was an increase in crime within developed countries.[184] The recognition of increased numbers of victims therefore drew attention to the fact that they were not receiving aid from the criminal justice system.

Additionally, maintaining a focus for criminal law based upon state stability justified the need to punish crimes due to the impact of the action upon the public interest. This overlooked the inter-personal nature of the crimes and the repercussion upon the victims who had been wronged. Due to this, the impact upon the victims would not be adequately explored and they would not receive sufficient remedy or redress for the harm. The option of seeing justice done would involve witnessing an offender being punished and sent to prison for their actions. While this might satisfy the retributive needs of society, it would not aid the victim in searching for other forms of justice.

The turning point for rights for victims arose in around the 1970s in which there was increased focus on the marginalisation of victims.[185] This was acknowledged through surveys of crime victims.[186] Likewise, the rise in individual rights influenced the recognition of rights for victims, in particular, recognition of the right to remedy within human rights law.[187] Even within the English common law system, the arrival of the State compensation scheme for victims of violent crime in 1964 marked a significant new development by considering a victim's right to compensation.[188] Erez and Ibarra presented how this opened up newly institutionalised channels between victims and the justice system.[189] An important step was the recognition of victims of human rights abuses within the field of victimology. This evolved the focus beyond penal victimology concerned only within conventional crimes, and, instead, called for the recognition of

[183] Walklate (n 149).
[184] Jo Goodey, *Victims and Victimology* (1st edn, Pearson Education MUA 2005) 20.
[185] Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 Journal of Law and Society 303.
[186] Shapland, Willmore and Duff (n 179).
[187] Discussed below section 2.4
[188] Jonathan Doak, 'Enriching Trial Justice for Crime Victims in Common Law Systems: Lessons from Transitional Environments' (2015) 21 International Review of Victimology 139.
[189] Erez E, Globokar JL, Ibarra PR. Outsiders inside: Victim management in an era of participatory reforms. International Review of Victimology. 2014;20:169-188

victims for crimes which were not defined within a nation's criminal code. It was emphasised that victimology should be independent of the state and the political aims, and be concerned with victims of state abuses.[190]

Although the development within victimology has highlighted the importance of victims within criminal justice systems, they remain marginalised in the face of state and offender interests. Indeed, even the French civil system, celebrated for its stronger role for victims, updated its provisions in 2000, with the introduction of a guiding principle in its Preliminary Article requiring judicial authorities to ensure that victims' rights are respected throughout the entire criminal process.[191] As such, there remains validity in the concern raised by Christie, that victims within criminal justice are a double loser. Firstly 'vis-a-vis the offender, but secondly and often in a more crippling manner by being denied rights of full participation in what might have been one of the most important ritual encounters in life. The victim has lost the case to the state'.[192] His concern stems from the fact that conflicts are 'stolen' from victims by lawyers.[193] A call for alternative approaches, in which victims would be granted a more central role, began to hold influence and through this, recent developments in restorative justice have emerged. The aim of proponents of restorative justice has been to ensure victims have greater participation within the justice processes.[194] This has resulted in an increased use of alternative dispute procedures or mediation within domestic jurisdictions.[195] However, while they provide important alternative justice options for victims, they do not improve the role or influence for victims within criminal justice processes. This chapter argues that the same observation occurring within domestic criminal justice – that recognition of the importance of victims does not automatically result in a victim-centric system – can be made in relation to the ICC.

[190] Robert Elias 1950, *Victims Still: The Political Manipulation of Crime Victims* (SAGE 1993).
[191]Spencer and Delmas-Marty (n 165) 17.
[192] Christie, 'Conflicts as Property' (n 15).
[193] ibid.
[194] James Dignan and Michael Cavadino, 'Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from a Victim's Perspective1:' [2016] International Review of Victimology 154.
[195] The recognition that European justice practices were only one standard of justice, in which, as discussed below, the needs of the state held crucial importance. As chapter 5 of this thesis discussed the exportation of colonial justice systems created significant challenges in societies resulting in the creation of an 'Other' under the justice system

2.4 Introducing Victims' Rights into ICL: Enshrining the search for justice for Victim's

Following WWII, individual criminal responsibility provided the basis to hold perpetrators accountable for international crimes within ICrJ. However, while there was recognition of the harm suffered by many victims, they were not provided with an opportunity to participate within the Nuremberg or Tokyo tribunals. Furthermore, they would have no say over who stood trial and would not receive reparations at the end of the trial. While developments within ICL did not advance significantly until the 1990s and the creation of the Ad Hoc tribunals - International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal in Rwanda (ICTR) – there were developments within international human rights law (IHRL).[196] Developments in both regional and international human rights mirrored the resurgence of the victim within domestic criminal justice and the need to provide a remedy for victims and grant them agency.[197]

The growing influence of calls for victims' rights, both through witnesses and non-governmental organisations (NGO)s, within the Ad Hoc tribunals and the influential UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the UN Basic Principles), came to the attention of the drafters of the Rome Statute.[198] In spite of this, the drafters did not provide an automatic right for victim participation. Instead, it would be left to the judges to determine when victims would be allowed to participate. As such, this has actually led to victims appearing to be more secondary participants. While the claims of victim centrality, and that the ICC is a victims' court, are often invoked by stakeholders within the court, in practice their centrality can be debated.

[196] International Criminal Tribunal for the Former Yugoslavia, Judges' Report, Victims' Compensation and Participation, 1, CC/P.I.S./528-E (September 13, 2000), available at www.un.org/icty/pressreal/tolb-e.htm.
[197] Funk (n 8).
[198] Muttukumaru (n 102).

2.4.1 Recognition of victims' rights within international human rights law

It might reasonably be assumed that the growth of victim rights within domestic criminal law brought about a similar rise in rights for victims in ICL. In fact, it was developments in the field of human rights that led to this shift. The rights of victims have been protected in international human rights law from the beginning, starting with the right, under Article 8 of the Universal Declaration of Human Rights 1948, to an effective remedy.[199] This was followed by the protection of various rights through the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).[200] Especially relevant is Article 2.3 of both these Covenants which provides that states 'must generally accord an effective remedy to any person whose rights are violated'.[201] Additionally, the need for redress or remedy has been recognised on account of racial discrimination, torture and within the convention on the rights of the child. [202]

The rise of victim rights within domestic human rights law has further shaped the recognition of victims within IHRL. In the 1970s, the limited scope of legal protection for victims of human rights (HR) abuses carried out by the state was acknowledged, particularly in light of mass disappearances of civilians in Latin American countries, which drew attention to victims of political crimes.[203] This shift of focus resulted in victims' rights being included in the statutes of the European and Inter-American Courts of Human Rights (IACtHR) and the African Commission on Humans and Peoples' Rights, including

[199] UN General Assembly Universal Declaration of Human Rights 10 December 1948 217 A (III) http://www.un.org/en/universal-declaration-human-rights/
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

[200] UN General Assembly, *International Covenant on Civil and Political Rights* 16 December 1966 United Nations, Treaty Series vol. 999 171
UN General Assembly, *International Covenant on Economic Social and Cultural Rights* 16 December 1966 United Nations Treaty Series vol. 993 3

[201] Ibid
The developments have included the rights of individuals against the state, recognising individuals as subjects of international law, and preventing the state from being able to waive claims without consulting victims. The

[202] article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination
article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Article 39 of the Convention on the Rights of the Child

[203] Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (Penn State University Press, Pennsylvania State University Press 2010).

procedural and substantive rights.[204] Indeed, the practice of regional human rights courts has been referenced within judicial decisions at the ICC.[205]

Finally, the two UN Declarations on victims' rights had significant influence over the recognition of victims' rights and demonstrate a move beyond the narrow focus on crime victims. Firstly, the 1985 UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power focused mainly on conventional crime victims, with a shorter provision relating to victims of human rights violations. [206] The specific provision for access to justice was, however, only provided in relation to victims of ordinary crimes, including a framework for victims' rights in criminal proceedings. Secondly, the UN Basic Principles, provided extensive provisions on remedies and reparations for victims within IHRL.[207] These two Declarations included a shared definition for victims in IHRL:

> For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes 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.[208]

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[204]Article 7 of the African Charter on Human and Peoples' Rights, (United Nations, Treaty Series, vol. 1520, No. 26363.)
Article 25 of the American Convention on Human Rights, (United Nations, Treaty Series, Ibid., vol. 1144, No. 17955.)
and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms,13

[205] SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN (Decision on the Prosecutor and Victims' Requests for Leave to Appeal) ICC-02/17 (17 September 2019) Annex Partially Dissenting Opinion of Judge Antoine Kesia-MBE Minda

[206] Declaration of the Basic Principle of Justice for victims of crime and Abuse of power, Section 1, GA Res.40/43,29 November 1985. Section 2 . 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, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/ L.10/Add.11 (19 April 2005). (Basic Principles)

[207] 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, ECOSOC Resolution 2005/30, 25 July 2005.

[208] Ibid

The General Assembly of the UN adopted the 2006 Basic Principles, affirming the importance of remedy and reparations for victims while highlighting the need for states to take the guidelines into account and promote respect for them within their societies.[209] This Declaration is not legally binding, but, as Bitti & Gonzalez Rivas note, it was accepted as a reference point for victim participation by the drafters of the RS.[210] The UN Basic Principles have been noted by the drafters of the RS as providing clarification for jurisprudence and practice of the ICC.[211]

2.4.2 Influence of victims' rights within ICL

In contrast to wider IHRL and domestic criminal justice, before the RS of the ICC, victims' rights held little influence within ICL. As Ferstman has argued with the ICTY and ICTR, 'only sparse consideration was given to victims' views and concerns, and only limited space was given to their engagement with such institutions other than as prosecution witnesses'.[212] Victims were not referenced within the London and Tokyo Charter, which established the Nuremberg and Tokyo Tribunals.[213] Victim recognition was associated with the three crimes under the jurisdiction of the Tribunals: crimes against peace, war crimes and crimes against humanity.[214] However, principal crimes committed by the Nazis and the Japanese were deemed crimes against peace (waging an aggressive war), in which states are the primary injured party, rather than individual victims. As such, war crimes and crimes against humanity were considered only as manifestations of aggression, excluding many German victims in Nuremberg and the sexual slavery experienced by the South Korean 'comfort women' in Tokyo. The actual influence of victims was reduced because of the 'prosecution's reliance upon documentary evidence

It recognised the term 'victim' as including 'immediate family members or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization',

[209] https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx

[210] Bitti & Gonzalez Rivas 302 referencing the Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/Conf./83/2 (1998)

[211] *Redressing Injustices through Mass Claims Processes : Innovative Responses to Unique Challenges* (2006)

[212] C Ferstman 2010: 407 American Journal of Sociology, 94(5), 1226-1227. doi:10.1086/229129

[213] Only in the Potsdam Declaration, which paved the way for the Tokyo Tribunal, were mistreated Allied prisoners of war referred to as victims.

[214] Christian Tomuschat, The Legacy of Nuremberg, Journal of International Criminal Justice 4(4) (2006)

through the Nuremberg and Tokyo Tribunals'.[215] Only 14 victim-witnesses testified at the Nuremberg Tribunal and 27 at the Tokyo Tribunal.[216]

Later, victims were provided a role to stand as witnesses during the trials at the ICTY and ICTR.[217] Victims are defined under common Rule 2(A) of both Tribunals as a 'person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed'.[218] Though limited procedural rights were granted to victims, they did have four ways to participate: *amicus curiae*, writing a letter to the Prosecutor, victim impact statements and testifying as witnesses.[219] In practice, however, victims mostly appeared as witnesses. The prosecution represented the victims at all stages throughout the trial process and the primary concern remained the prosecution of perpetrators.[220] Yet, within the ICTY and ICTR, sentencing discussions focused on the primary objectives of the tribunals: deterrence and retribution. This is consistent with the statutes of these tribunals, which only discussed retribution, not reparations. Furthermore, criticism has been levelled against the ICTY and ICTR, as the victims' experiences of the trial process – particularly those who testified – led in many cases to secondary victimisation. This is despite the ad hoc tribunals' Statutes and Rules specifying provisions on the participation, treatment, protection and support of victims. It has been argued that the victims were not treated with respect, nor their interests fairly balanced with those of the other parties.[221] Nevertheless, the recognition of the influence of victims' rights within domestic systems and its growing impact on IHRL, through the UN Declaration, was recognised by Judges within the tribunals.[222] Acknowledging the limitations of the trial process, the President of the ICTY admitted that 'victims have largely been considered as 'object matter or an instrument' in the proceedings of the ad hoc Tribunals'.[223] The shortcomings within the

[215] Yael Danieli, Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law, 27 CARDOZo L. REv. 1633, 1641 (2006)
[216] ibid
[217] International Criminal Tribunal of Yugoslavia and Rwanda. Resolution 827(1993) established the Tribunal for the Former Yugoslavia (ICTY)
[218] IBID
[219] Moffet (n 7) ch 2
[220] ibid
[221] Jorda and De Hemptinne (n 5).
[222] International Criminal Tribunal for the Former Yugoslavia, Judges' Report, Victims' Compensation and Participation, 1, CC/P.I.S./528-E (September 13, 2000), available at www.un.org/icty/pressreal/tolb-e.htm.
[223]Ibid

ICTY and ICTR on the procedure for victims increased the discussions that an alternative procedure should be taken within the RS of the ICC.[224]

2.4.3 Victims' rights in the Rome Statute of the International Criminal Court

The development of the Rome Statute of the ICC created an unprecedented victim regime by providing victims with the opportunity to search for justice through the work of the court.[225] In contrast to previous international criminal tribunals, the Rome Statute was created on a treaty basis involving 160 states and hundreds of NGOs.[226] This encouraged a more pluralistic development of international criminal justice, including civil law standard and increased recognition of victims' right to remedy.[227] Consequently, 'the resulting legal framework allows victims to express their views and concerns throughout the judicial cycle and seek reparation for the harm suffered'.[228] The Rome Statute and RPE reflect these standards by including victim provisions on recognition, participation, protection, treatment, support, reparations and a Trust Fund for Victims. As detailed in Chapter 3, the introduction of the victims' regime within the Rome Statute of the ICC was innovative in its time and more advanced than any previous tribunal within ICL, which had been based on the common law adversarial system but did not afford victims the same rights.

In the ICC, victims are defined under Rule 85(a) as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'; and under Rule 85 (b) that also: '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 purpose'.[229] This is an expansive definition for

[224] Antonio Cassese, Paola Gaeta and John RWD Jones, *The Rome Statute of the International Criminal Court: A Commentary : Vol. 1*, vol Vol. 1 (University Press 2002).
[225] Th C van Boven and others, 'Victims' Rights and Interests in the International Criminal Court', *The Legal Regime of the International Criminal Court; Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhof Publishers 2009).
[226] Philippe Kirsch and John T Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 The American journal of international law 2.
[227] Emily Haslam, 'Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society' (2011) 5 International Journal of Transitional Justice 221, 325.
[228] Judge Silvia Fernández de Gurmendi President of the International Criminal Court Seminar on victim participation at the International Criminal Court https://www.icc-cpi.int/itemsDocuments/180206-pres-stat_ENG.pdf
[229] Rule 85 Rome Statute of the International Criminal Court Rules of Evidence and Procedure. (herein REP)

victims in keeping with the UN Declarations. However, as Chapter 3 will detail, in practice, the number of victims is restricted by both prosecutorial and judicial decisions.

The Rome Statute of the ICC takes on a bespoke approach combining elements of both the inquisitorial and accusatorial models of domestic criminal justice systems. Indeed, while bringing in victim participation, which has been influenced by the inquisitorial model, Article 68(3) retains in the hands of the judges the determination of when victims shall be allowed to participate.[230] Within the Rome Statute, 'a constructive ambiguity' was included in which it has been left to the judges to shape the ICC's structure.[231] Through this, the judges will find the balance between the rights of the accused and the rights of the victims.[232] However, as will be examined further below, and in Chapter 3, in practice, victims have been granted only limited agency through the Rome Statute of the ICC and it can be restricted due to judicial determinations or prosecutorial strategies. As the case law in Chapter 3 demonstrates, the practice of the court to date has caused victims to feel let down, believing they have not received the justice they expected. Additionally, the theoretical understanding of victims within ICL has the impact of reducing their agency ever further. In this manner, the option for individual victims to receive the justice they seek is actually very small. While justice of a form may be achieved, this is often not in the manner the victims themselves wish for.

As a result of developments in domestic and international law, ICL conceptualises the victim as an innocent party, in whose name justice must be done. In practice, this conceptualisation of the victim has shaped the practice of the courts and been co-opted by other actors – such as NGOs – in service of their own agenda, potentially contrary to the interests of victims. The next section draws from academic literature to show how the conventional concept of an innocent victim disempowers those supposedly at the centre of the justice process, and limits their ability to receive justice on their own terms.

[230] Article 68 (3) ibid.
[231] C Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 Journal of international criminal justice 603.
[232] Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 Human Rights Quarterly 605.

2.5 Theoretical Limitations of the Role of Victims

The victims' regime within the ICC has not translated into actual agency for victims within the court.[233] This is in contrast to the expressed aim of the drafters of the Rome Statute: to achieve a positive engagement with victims. This section utilises a theoretical examination of victimhood in ICL to present why the victim-centric mandate is not being achieved.[234] In essence, restrictions in the opportunity for victims to receive justice arises both through the conventional understanding of victimhood, which prioritises their innocence while limiting their agency, and the construction and recognition of victims through the court.

2.5.1 The terminology of victimhood – scapegoats or precipitation

Standard approaches to victimhood in ICL arise through a modern understanding of victims in which there remains limited capacity to respond to victims' needs in the midst of the criminal justice system. It has been acknowledged within ICL, and in the practice of the IACtHR, that recognition of the harm suffered by individuals and their victimhood can be a form of reparations.[235] Labelling people as victims can be empowering. However, the empowerment which arises through such recognition only translates into agency if the victim is perceived as a subject who can provide their experience of harm, which had previously been hidden or overlooked, and give their view on the form of remedy sought. An important distinction occurs between the 'victim subject' and the victim who is an object.[236] As introduced above, victims who are perceived as objects of the criminal justice system can result in disempowerment.[237] Justice can be done for them, but they will have no influence over the forms of justice nor the procedures taking place.

The standard understanding of victims conceives a passive, inferior, vulnerable person in need of a saviour.[238] According to David Miers, the very term 'victim' inevitably promotes an image of passivity, where the victim has 'traditionally been viewed as the 'sufferer' in

[233] McGonigle Leyh (n 57).
[234] This is followed up by an examination of the practice of the role of victims in the ICC and wider ICL in chapter 3.
[235] Section 3.3
[236] Ratna Kapur, 'Babe Politics and the Victim Subject: Negotiating Agency in Women's Human Rights' (*Effective Strategies for Protecting Human Rights*, 1 November 2017)
[237] Section 2.3
[238] Spivak (n 88).

a simple 'doer-sufferer' model of criminal interaction'.[239] Furthermore, the concept of 'victimhood' creates an evocative image that some victims will not identify with, nor do they desire to be labelled as such. Arendt has described a scapegoat theory, in relation to the perceptions of victims of the holocaust in the aftermath of World War. She suggests that the term 'victim' presents a group of people lacking in political agency, who have no influence on the events that occurred.[240] As such, they cannot improve their situation and require additional help and rescue, placing them in a perpetually vulnerable position. The scapegoats were objects with no influence, rather than subjects exercising political agency, as Arendt sets out:

> This means that, as scapegoats, any other group could have taken their place and received the blame for the evils of the time. Here is the complete and apparently indisputable innocence of the victim, who appears, therefore, as an object of gratuitous hatred. The word 'object', here, cannot be sufficiently emphasized. [241]

Additionally, the importance of recognition of the harm suffered by victims is an essential role of the ICC. As argued by Zur, '[t]he victim status is a powerful one. The victim is always morally right, neither responsible nor accountable, and forever entitled to sympathy.'[242] There is often a presupposition that innocence is integral to the nature of a victim.[243]

The lack of agency, which arises from victims who appear as an object within a process, can actually result in victims not wishing to use this description as they do not identify with the 'helpless' image it evokes. As Lacerda details, many people who have suffered through the conflict in Brazil do not categorise themselves as 'victims'.[244] She sets out how there remains ambiguity in the word 'victim' dating back to the word's Latin origins: '*victima*', meaning the animal offered in sacrifice to the gods.[245] Referencing the results of the study by Mezarobba, she explains that, within Brazil, many victims chose to disengage from the recognition of victims provided by the state. Lacerda points out that not all

[239] David Miers, *Responses to Victimisation: A Comparative Study of Compensation for Criminal Violence in Great Britain and Ontario* (Professional Books 1978).
[240] Hannah Arendt 1906-1975, *The Origins of Totalitarianism* (Schocken Books 2004) 14.
[241] ibid 18.
[242] Quoting Zur in Thorsten Bonacker, 'Global Victimhood: On the Charisma of the Victim in Transitional Justice Processes' (2013) 9 World Political Science 97, 96.
[243] McEvoy and McConnachie (n 58) 530.
[244] Lacerda (n 85).
[245] ibid.

victims identify with the term, perceiving a legacy of vulnerability or weakness that is tied into the term.[246] Additionally, Fattah highlights that the nature of victimisation experienced by the victim can be a loss of control over their life: 'victimization implies an imbalance of strength and a disequilibrium in the positions of power: the strong, powerful victimizer and the weak, helpless victim.'[247]

A further problem with victim terminology is the legacy of 'victim precipitation', which arose in the early days of victimology.[248] In the 1940s and 50s is period, labelling someone as a victim involved placing a certain level of blame upon the individual, in contrast to other 'non-victims' within society. A field of positive victimology evolved initially through a scientific study of crime victims, in which early victimologists, such as Benjamin Mendelsohn, Hans von Hentig and Marvin Wolfgang, tried to explain crime by examining the role of the victim.[249] Von Hentig argued that a victim will not always be a 'passive player in the victimisation but will most probably have consented tacitly, cooperated, conspired or provoked the perpetrator,' and developed typologies of victimhood to try and determine who becomes a victim.[250] Mendelsohn included the idea of culpability from the 'completely innocent' to the 'most guilty victim,' feeding into the prioritisation of the innocent victim in the recognition of victimhood, both within domestic and criminal law.[251] This has been contested by later feminist scholars who determined that this focus upon victim precipitation, or why the victim suffered the crime, led to a perception of the 'victim asking for it'.[252] Rock considers that precipitation may have arisen through design, as the concept of victim precipitation came to be regarded as 'victim-blaming' and victimology to be seen as a 'weapon of ideological oppression'.[253] Various scholars from the critical and radical schools of victimology have, however, detailed how these positivist

[246] ibid.
[247] E.A. Fattah, Understanding Criminal Victimization. An Introduction into Theoretical Victimology (Scarborogh 1991) pp. 96–101 (that cultures 'create its own popular stereotypes of offenders and victims' p. 96); see also S. Cohen, States of Denial. Knowing about Atrocities and Suffering (Cambridge 2001).
[248] Neil Olley, David Denham and Lorraine Wolhuter, *Victimology: Victimisation and Victims' Rights* (Taylor and Francis 2008).
[249] ibid.
[250] Hans von Henting, *The Criminal & His Victim: Studies in the Sociobiology of Crime* (Yale University 1948).
[251] Beniamin Mendelsohn, 'Victimology and Contemporary Society's Trends' (1976) 1 8.
[252] Lucia Zedner, Victims in Mike Maguire, Rod Morgan and Robert Reiner, cited by the Oxford Handbook of criminology 578, (Eds. 1997) Oxford University Press.
Wolhunter
[253] Paul Elliott Rock, *Victimology* (Dartmouth Pub Co 1994) 8.

victimology approaches have been discredited as they do not take into account the impact of wider social contexts upon victimisation.[254]

The challenge of existing legacies of victim precipitations can be witnessed within ICL, discussed through the analysis of the ideal victim, below, and the value placed upon innocence. The term 'victim' is exclusively used within ICL, witnessed through the RS of the ICC. However, UN Agencies and transitional justice processes working on sexual violence in conflicts have chosen to use the term 'survivor' in contrast to 'victim' which removes the helpless legacy conjured up by the term victim.[255] Instead, the term 'survivor' presents an image of active resistance to the violence against them.[256]

2.5.2 'Ideal' victims in ICL

The influence of the 'ideal' victim, discussed initially within domestic criminal justice, limits the recognition of victimhood within ICL. Christie's ground-breaking victimological concept detailed the elements which made up the 'ideal' victims who would be more easily recognised as a victim than those who did not meet these criteria. [257] Those victims who meet the 'ideal' victim standard, demonstrating weak and helpless characteristics will elicit more sympathy than other victims. Importantly, as Daly details, 'a victim status is not fixed, but socially constructed, mobilized and malleable'.[258] The 'ideal' victim, therefore, is based upon society's view of what a victim should be. From this, the state can prioritise the defenceless victim while implementing a prejudicial approach against those who they determine to be unworthy. As Christie explains, while victims need to have a minimum amount of strength to be listened to, this must not rise to the level which would threaten others. Fattah builds upon Christie's work detailing that:

[254] Mawby and Walklate (n 131).
[255] Hildur Fjóla Antonsdóttir, '"A Witness in My Own Case": Victim–Survivors' Views on the Criminal Justice Process in Iceland' (2018) 26 Feminist legal studies 307.
[256] Discussed further in section 8.3
[257] Christie, 'The Ideal Victim' (n 63).
[258] Sarah Curtis-Fawley and Kathleen Daly, 'Gendered Violence and Restorative Justice: The Views of Victim Advocates' (2005) 11 Violence Against Women 603.

> The more power a victim or category of victims has the less likely that they will fit the ideal victim type or have the sympathy, compassion and commiseration that victims crave, bestowed upon them.[259]

Significantly, Christie's representation of the 'ideal' victim has moved beyond domestic criminal justice and begun to resonate with the examination of victimhood within post-conflict societies. The prioritisation of innocent victims within transitional justice has recognised the value placed upon the 'ideal' victim who lacks culpability. This has, for example, resulted in a controversial approach to victimhood within Northern Ireland, where some organisations made a clear distinction within the debates over justice for victims.[260] McEvoy presented the impact of views on victims through interviews in which one respondent replied:

> There are innocent victims and there are terrorists and I find it offensive that anyone would seek to equate the two. People make choices to become involved in paramilitary groups and if they were killed, that was the choice they made. They didn't give their victims any such choice.[261]

The recognition of innocent victims is, therefore, very carefully distinguished from those who do not fit this classification. Only innocent victims can fully benefit from their victim status, such as receiving compensation, while other victims will be faced with much greater struggles to have their victimhood recognised.[262] Political constructions of the victim label legitimises certain victims' suffering while neglecting others or allowing 'victor's justice'. As such, the prioritisation of the innocent 'ideal' victim can exclude the recognition of the complex victims and create greater hurdles in seeking to achieve justice.[263] This can, ultimately lead to a hierarchy of victimhood in which distinctions between the most and least deserving can be devised, based upon issues of blame and political influences. Governments or the international community can obviously reinforce

[259] Ezzat A Fattah, *From Crime Policy to Victim Policy: Reorienting the Justice System* (Macmillan 1986).
[260] Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) 22 Social & Legal Studies 489.
[261] ibid 500 Interview with Unionist victims' group spokesman in March 2010, Belfast, UK.
See also FAIR (Families Acting for Innocent Relatives), GIVE (Give Innocent Victims Equality), Positive Action For Innocent Victims in North Down (PAIN) listed in https://cain.ulster.ac.uk/issues/victims/victimgroups.htm
[262] McEvoy and McConnachie (n 260).
[263] Luke Moffett, 'Reparations for "Guilty Victims": Navigating Complex Identities of Victim–Perpetrators in Reparation Mechanisms' (2016) 10 International Journal of Transitional Justice 146.

these hierarchies, which can practically impact the ICC, as donors will be more likely to support fundraising for an 'ideal' victim.

Victim services will invoke the notion of an 'ideal' victim to seek support and justify their work. This is based upon a recognition that those who do not meet these standards will not provoke the same acceptance of their need for support.[264] For victims of international crime, their victimisation is utilised as a tool to ensure support in the midst of a competitive field of global justice. Schwöbel-Patel argues that this 'commodification' of victims stems from an 'attention economy' that deems those elements which command the greatest attention as being prioritised, and therefore reward the 'extreme and spectacular' while downplaying the 'moderate and considered'. [265] The victims who meet the characteristics of the 'ideal' victim of international crimes: 'weakness and vulnerability, dependence and grotesqueness', are therefore most sought after.[266] Schwöbel-Patel references Kamari Clarke, who details that '[t]he more spectacular the conjuring of the victim, the more urgent the call to support – morally, fiscally, legally – the rule of law'.[267] Businesses and agencies seek the 'best value' innocent victims; these are the most vulnerable and fearful victims. As Chapter 6 explores, the focus upon these 'ideal' victims within ICL can result in the exclusion of marginalised victims, especially those whose harm is caused by structural violence. Their experiences will thus not command the attention of the international community in a similar manner to the 'extreme and spectacular', especially if their victimisation is caused by government policies played out over a long period of time.[268]

In ICL, there is an overlap with Nils Christie's concept of the 'ideal' victim of conventional crimes, although victims of international crimes face arguably greater barriers to getting their victimhood recognised. In ICL, victims must find a way to publicise their fate to provide them with the opportunity to benefit from their status as a victim.[269] The victims only receive their status when 'potential status givers' recognise their existence. As van

[264] Basia Spalek, *Crime Victims: Theory, Policy and Practice* (Palgrave Macmillan 2006).
[265] Christine Schwöbel-Patel, 'The "Ideal" Victim of International Criminal Law' (2018) 29 European Journal of International Law 703.
[266] ibid.
[267] ibid referencing Clarke, 'The Rule of Law through Its Economies of Appearances: The Making of the African Warlord'.
[268] ibid.
[269] van Wijk (n 19).

Wijk explains, 'It is argued that, to grasp international media attention, particular attributes of a conflict should also be present: the conflict should be comprehensible, have a unique selling point, have a limited time span and be well-'timed''.[270] This has affected the recognition of victims of the 1993 massacres in Burundi, as Van Wijk details how their victimhood has been overlooked due to the attention given to the Rwandan genocide.[271] Taking that into account, the opportunity for victims to exercise their rights within the international sphere is restricted, as a result limiting the opportunities to receive justice, accountability, deterrence or redress.

2.5.3 Construction and representation of victimhood in ICL

ICL deals with greater numbers of victims who are represented collectively, compared to domestic legal systems. As a result, there is a greater danger that 'theft of conflict' will occur as the influence of individual victims is more limited.[272] The voices of 'victims' are often picked out, appropriated, and then re-presented to suit the aims of the prosecution.[273] In recognition of this influence of 'theft of conflicts' by lawyers within court processes, commentators have argued that, in practice, the victim is not as central as imagined.[274] The issue of victims holding direct rights was part of the analysis by Emily Haslam and Rod Edmunds in the Banda and Jerbo case at the ICC.[275] In this case, two victims sought different legal representation, arguing their interests were diverse from the others within the group.[276] Additionally, Zegveld notes that within the ICC victims are treated as objects rather than subjects, ie they are provided with collective reparations against their expressed wishes, and the interests of a large number of victims are represented collectively.[277] This reduces the agency of victims because, as Zegveld argues,

[270] ibid.
[271] ibid.
[272] See section 2.3.2
[273] Wade, Lewis and Aubusson de Cavarlay (n 142). The concept of the victims is often a construction utilised by other parties claiming to speak on behalf of the victims, to justify or explain their own actions.
[274] B McGonigle, 'Apples and Oranges? Comparing the Victim Participation Approaches at the ICC and ECCC', *The Effectiveness of International Criminal Justice* (2009).
[275] 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 727.
[276] ibid.
[277] Zegveld (n 14).

in ICL, individual victims are entitled to remedy for the harm they have individually suffered.[278]

The term 'victims' can be useful and convenient, as it maintains abstract wishes and a wide variety of interests can be attributed to them. Critical research into the concept of 'victims' recognises how they are 'the ultimate bulwark of ICL'.[279] Megret identified how this provides justification for the work of ICL through the form of a 'pathos inducing figure of the 'victim'', in the context in which tribunals 'cannot simply claim to be protecting an international public order'.[280] Similarly, Garland perceives how this projected image of the victim can be a tool to justify and explain actions that are, in fact, contrary to the wishes or interests of actual victims.[281] Commentators utilise the voice of victims to provide evidence and justification for their competing policies, arguing, for example, that victims wish a punitive approach to be taken against offenders. Unfortunately, this may go against the wishes of victims who seek reconciliation.[282]

This form of political manipulation, as expressed by Elias, occurs through the value placed upon victims' vulnerability and how it is connected with wider societal ideological and economic interests, arising from the 'deserving' or innocent victim who elicits sympathy and public support for victim services.[283] This can result in the victims being silenced by those speaking on their behalf or policies designed in their name. The consideration of the idea of 'The Victims' demonstrates the political influence which can be utilised by those who profess to be acting on behalf of the victims, without an acknowledgement of the actual suffering experienced by the individuals.[284] This is particularly relevant for the ICC, which sets forth the mandate for victims' rights and utilises justice for victims as a key explanation of the role of the court. However, as Lohne explains, 'compassion for victims, and voicing of their suffering, does not translate to a realization of their rights as political

[278] ibid 322.
[279] IBID
[280] Frederic Megret, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project' SSRN Electronic Journal.
[281] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon 1990).
[282] MB Dembour, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials' (2004) 15 European journal of international law 151.
[283] Elias (n 190).
[284] Laurel E Fletcher, 'Refracted Justice' in Carsten Stahn, Christian De Vos and Sara Kendall (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015).

subjects'.[285] Indeed, as Chapter 3 demonstrates, the victims' regime within the ICC has not translated into actual agency within the court processes.[286]

Correspondingly, when victims wish to exert political influence over the situation themselves or have their own political power, this creates friction when their demands deviate from the standard approach utilised by others who have benefited politically. For example, if victims do not wish for punitive responses to crimes, then this creates a problem for the political groups who argue for a 'tough stance on crime' based upon the rationale that it is in the victims' interests. As Koskenniemi has observed concerning the role of the victim in the doctrine of humanitarian intervention, the victim is determined 'worthy of humanitarian support as long as he remains a helpless victim – but turns into a danger the moment he seeks to liberate himself'.[287]

The construction and representation of victims by the workers of the court, and through the international community, have been challenged on the basis that they seek to construct an articulation of victims, which may suit their purposes while not accurately representing the victim. Kendall and Nouwen discuss the pyramid classification for victim participation at the ICC, where the influence of victims appears to be more symbolic and in which they have not fully realised their substantive rights.[288] The construction of a victim within ICL is based upon the wider social recognition which arises due to the 'specific political context within which a court operates'.[289] Additionally, victimhood is produced by actors working for the court. This recognises the construction of the meaning of the term 'victim' within criminal law and transitional justice. It is not sufficient that persons claim the status of victims without sufficient social acknowledgement. Killean argues that this is a 'consequence of the 'social construction of reality' – the claim must be socially supported – and in this sense, the term 'victim' is a social construction'.[290] In turn,

[285] Kjersti Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice* (University Press, Oxford University Press USA - OSO 2019) 184.
[286] Section 3.3
[287] Martti Koskenniemi, 'The Politics of International Law - 20 Years Later' (2009) 20 European Journal of International Law 7.
[288] Kendall and Nouwen (n 13).
[289] ibid.
[290] Rachel Killean, 'Constructing Victimhood at the Khmer Rouge Tribunal: Visibility, Selectivity and Participation' (2018) 24 International Review of Victimology 273.

individuals who do not achieve the recognition of victimhood which they seek can experience 'stigma, emotional trauma, and self- blame'.[291]

In examining the traditional ideas of victimhood, the influences upon the standard rhetoric of victimhood can be investigated through a number of lenses. Kendall and Nouwen have argued that the often-discussed commitment to victims within ICL is to the abstract concept, rather than to any real-life victims who could add to the complexities of ICL with conflicting interests and desires.[292] In conceiving of the influence of the collective role of the victims in contrast to individual rights, Kendall and Nouwen present an approach of juridified and abstract victimhood, 'giving purpose to the entire machinery of international criminal accountability'.[293] They explain how the practices of victim representation are utilised by myriad groups both inside and outside the courtroom, such as diplomats, politicians, journalists and scholars, even in instances or tribunals that do not have a practice of victim participation. This creates the conceptualisation of the victims as an abstraction: the other parties 'speaking for' the victim.

It also provides rhetoric that can grant justification to any groups speaking on behalf of the victims, which leads to immunity from disagreements. As Lohne explains, this is a very important tool for donors and NGOs, etc, allowing them to 'speak for' a 'social constituency of victims' which in turn 'endows them with a moral legitimacy', making them hard to ignore.[294] To question the image of the victims is thus very difficult as they demonstrate a concept of collective pain and suffering. Those who criticise the victim advocate can, as a result, also appear to be insensitive or callous.[295] This can make it harder to challenge the approach taken by victim organisations who are striving to work 'on behalf of' the victims, while 'externalising the possible cost of their decisions and actions'.[296] The costs can, however, be passed on to the victims, either in the short term or the long term, and cause them harm by those who believe they are 'helping' the victims. Such an approach has been explained by Makau, who recognises the role of these 'saviours': international lawyers or actors who believe they are working for the benefit of the victims when

[291] ibid.
[292] Kendall and Nouwen (n 13).
[293] ibid.
[294] Lohne (n 285) 181.
[295] Nils Christie, 'Restoration after Atrocities' [2013] Nordisk Tidsskrift for Kriminalvidenskab.
[296] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (New Ed edition, Princeton University Press 2005). 29

actually they end up removing victim agency.[297] The victims end up being conceived as helpless parties who are in need of a saviour to rescue them as they would not be able to achieve this themselves. Indeed, the victims actually provide the basis for ICrJ, which only exists because of the harm suffered by victims. However, Mutua explains how victims provide the purpose behind the system, as '[w]ithout the victim there is no savage or saviour, and the entire human rights enterprise collapses'.[298] This is further supported by Kendall and Nouwen who recognise that 'discursively, victims are presented as the raison d'être of the ICC'.[299] Yet some scholars have argued that such abstractions do not portray the real picture of the experiences of individual victims.[300] This representation extrapolates the experiences of many victims and produces a shape that can be explained according to higher wishes, such as the international community or stakeholder within the ICC.[301] This important issue is analysed throughout this thesis to prevent harmful legacies from developing from good intentions, especially within ICL, addressing concern set forth by critiques that the practice within ICrJ, and also the ICC, can perpetuate a 'pattern of symbolic confiscation of the aspirations of peoples (and not just victims)'.[302]

Tallgren explains how judicial agents remove the 'lived reality' of the individual victims and, instead, produce 'overly homogenous treatments of victimhood'.[303] What is 'good' for victims can actually be determined without hearing or consulting them. This practice removes the autonomy from the victim. It is the actors within the court who will explain the victims' stories, detail the harm they have experienced and express their desire for justice.

Examining how neoliberal influences on the court override the interests of victims, Schwöbel explains how this ensures that the big part players, 'states, organizations, and individuals who have the greatest political and economic power', are strengthened even

[297] Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' 46.
[298] ibid 48.
[299] Kendall and Nouwen (n 13).
[300] Schwöbel-Patel (n 265).
[301] SARA KENDALL, 'Donors' Justice: Recasting International Criminal Accountability' (2011) 24 Leiden Journal of International Law 585.
[302] Christine EJ Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2015) 15 Discussed further in section 5.4.3.
[303] Tallgren (n 54) 267.

whilst ICL claims to fight them.[304] As a consequence, 'the group in whose interest everyone is supposed to be fighting for (the victims of international crimes) are similarly losing out'.[305] This idea calls into question whether or not the search for justice for victims has a possibility of succeeding if it goes against the interests of these 'big part players'. As the later chapters of this thesis detail, within the courts and wider ICL, it is the victims who have not gone against these interests who have achieved some form of justice.[306]

Ultimately, if it is the concept of 'the victims' that benefit, then, it is the powerful voices of those who utilise this concept that benefit, and not the individual victims. This issue is not the prioritisation of the victim over other stakeholders within ICL; rather the challenge is ensuring that the interests and wishes of individual victims are actually listened to, and that their voice is heard if they are seeking something different to the key players within ICL.

2.6 Conclusion

The positioning of victims within ICL is not as central as the ICC mandate of 'justice for victims' would suggest. The exclusive use of the term 'victim' within ICL has a limiting effect, both from the experience of individual victims/survivors who do not view themselves as victims and through the lack of agency granted by the term. This is especially the case in the face of the abstraction and political usage by various actors, with their own agenda, attempting to speak for the victims. The examples utilised in this chapter provide guidance in developing the re-articulation set forth in Chapter 8, which considers potential solutions to the challenges set out in this chapter.

This chapter demonstrates that the articulation of victims within ICL, in keeping with the definition under rule 85 of the Rome statute, does not recognise the agency of victims. This contrasts with the approach of other justice systems, which give victims greater influence over criminal justice processes. The discussion on the abstraction of victimhood, above, shows that ICL places the justice interests of individual victims outside of the entire

[304] Christine Schwöbel-Patel, 'The Market and Marketing Culture of International Criminal Law' in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law,* (Routledge, 2014).
[305] ibid.
[306] See section 4.7.1

justice process.[307] An alternative to the conventional concept of 'ideal' victimhood, moving beyond the limitations introduced above, is presented within Chapter 8. The historical development of the role of victims within domestic criminal justice systems provides a comparison with the evolving treatment of victims within ICL. While it is recognised that the role of victims has increased through the evolution of ICL, Chapter 3 presents how competing interests within the courts have reduced the potential of the Rome Statute. This thesis argues that 'justice for victims' should be a central goal of ICL, as fundamental as fair trial rights and the influential deontological value of punishment, discussed in Chapter 4.

The next chapter will examine the practice of the ICC and other hybrid courts, and the extent to which the theoretical commitment to victim centrality is borne out in practice. These are observations that can help explain the silence of victims within ICL. Chapters 6 and 7 will build on these lessons to strengthen the argument in favour of positive peace grassroots approaches. The limitations of the terminology of victimhood, which are recognised within the rearticulation of the victim in ICL in Chapter 8, build upon alternative terms from the field of transitional justice and postcolonial/decolonial theory.

[307] See chapter 8

3 CHAPTER 3: THE CENTRALITY OF VICTIMS IN INTERNATIONAL CRIMINAL LAW

> The Rome Statute paved the way for two landmark developments: (1) First, it contains the commitment of the international community to take responsibility for the protection of victims of the most serious crimes, should national states fail to uphold their responsibility to do so. (2) Second, it empowers victims as actors in the international criminal justice system, with a right to express their views and concerns independently by giving them a voice in proceedings where their personal interests are affected.[308]

3.1 Introduction

This chapter details how firstly, the opportunity for victims to hold any influence within the investigations or trials through participation, has been restricted from that promised by the Rome Statute through judicial decisions and a lack of meaningful engagement by the Prosecutor. This lack of inclusion has continued into wider ICL through the practice of various hybrid courts. Secondly, it will be argued that the opportunity for reparative justice, a crucial aspect of victims' rights detailed in the UN Declarations as discussed in Chapter 2, has been weakened, both through the forms of reparations included within the awards and in the delays in these reparation awards actually being paid by those convicted of international crimes.

The jurisprudence of victim participation and reparations at the ICC has demonstrated the limited influence of the rights of victims from the procedures set out in the Rome Statute. This has led critiques to contend that international courts provide limited justice in which the majority of international crimes go unpunished. Parallel to this, the centrality of victims has been undermined by selectivity within ICL, through both the limited number of crimes that fall under the jurisdiction of the courts, political considerations and the selectivity of prosecutorial strategies. Now, this calls into question whether victims indeed are central in ICL. Within hybrid tribunals, there are similar issues of selectivity, such as the ECCC receiving criticism from victimised populations.[309] Selectivity restricts justice opportunities for victims; they will often have no influence over which

[308] Reflections from the International, Criminal Court Prosecutor, 2012 Jonathan I. Charney Distinguished Lecture in Public International Law
[309] Killean (n 290).

perpetrators are tried or which crimes are investigated, and no opportunity to challenge decisions by the Prosecutor. [310]

3.2 Victim Participation in ICL

As Chapter 2 explained, victim participation within justice systems is said to provide a central role for victims alongside the perpetrator. The drafters of the Rome Statute, through the victim regime, provided an opportunity for victims to participate within the trials at the ICC. Alongside the potential for reparations, this is regarded to be a key component in providing victims with the opportunity to receive justice. The inclusion of participatory rights for victims is, similarly, recognised as an important victim-orientated development within ICL. It is believed that the participation of victims will ensure their interests are taken into account and to provide the victims with a significantly increased engagement with ICrJ in comparison to previous tribunals.[311] Victim participation empowers victims through recognising their suffering and providing an opportunity to contribute to a historical record. The sense of justice for victims who participate through legal representation and see their perpetrator convicted has been said to 'provide some physical protection by imprisoning responsible perpetrators and reveal some truth as to the atrocities committed against them'.[312] Often, participation holds significance for the victims themselves, in having their experience acknowledged, being able to recover their sense of agency and can 'make negative outcomes in particular more palatable'.[313] Sokol sums this up by claiming that 'the power of the judiciary in officially sanctioning expressions of hurt and shining a light on truth is immense'.[314] Importantly, victim participation aids the goal of preventing impunity and provides the victims with healing.

[310] See section 3.3.1
[311] van Boven and others (n 225).
[312] Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard international law journal 295, 310.
[313] E. Allan. Lind and Tom R. . Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988) 67.
[314] David S Sokol, 'Reduced Victim Participation: A Misstep by the Extraordinary Chambers in the Courts of Cambodia Note' (2011) 10 Washington University Global Studies Law Review 167, 172.

3.2.1 Victim participation practice in hybrid courts

The ICC is designed as a court of last resort and only a limited number of victims will be involved in its trials. Increasingly, however, within the wider ICL picture through the hybrid courts, there is growing normative practice of including victims' regimes through the courts.[315] The following examples of the hybrid courts present the variety, within ICL, of the modalities of participation, as the forms of victim participation and reparations within these different hybrid criminal tribunals indicate the developing pluralistic practice in international criminal justice. They bring together procedures from domestic criminal legal systems, enjoy material jurisdiction over a mix of international and national crimes and may include international judges.[316] So far, there is no consensus on the format of hybrid courts/tribunals. Although, due to the *sui generis* nature of each hybrid tribunals, the extent to which victims are central within the courts depends upon the combination of national and international legislation involved in the establishment of the court.[317]

Hybrid tribunals, like the Special Court for Sierra Leone (SCSL) and Special Tribunal for Lebanon (STL), were created through international agreements between the host state and the UN, operating outside the realm of domestic jurisdiction.[318] Victims within these tribunals have restricted participation in comparison to those from a civil law background. The STL followed the practice of the Rome Statute, with the judge's determination when participation is deemed appropriate.[319] The SCSL followed common law practice in which victims were called as witnesses.[320] Moreover, hybrid practice

[315] Sarah Williams, 'Hybrid International Criminal Tribunals' [2014] International Law.
[316] Sarah MH Nouwen, '"Hybrid Courts" The Hybrid Category of a New Type of International Crimes Courts' (2006) 2 Utrecht law review 190.
[317] Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues*, vol 9 (Hart Publishing 2012).
[318] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, available online at www.refworld.org/docid/3fbdda8e4.html Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, Annex to UNSC Resolution 1757, S/RES/1757, 30 May 2007.
[319] Jérôme de Hemptinne, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon' (2010) 8 Journal of International Criminal Justice 165.
[320] Charles Chernor Jalloh, 'Special Court for Sierra Leone: Achieving Justice' (2010) 32 Michigan Journal of International Law 395.

within the Kosovo Specialist Chambers has a restrictive approach to legal representation only providing a victims' counsel through the Registry's Victims Participation Office.[321]

In contrast, the Extraordinary Chambers in the Courts of Cambodia (ECCC) is a mixed tribunal integrated into the national legal system.[322] Following domestic Cambodian practice, the ECCC allows victims to participate as civil parties and to initiate investigations, question witnesses, appeal decisions and to bring ancillary claims for reparations.[323]

Additionally, the African Union-sponsored *Chambres Africaines Extraordinaires* (Extraordinary African Chambers (EAC)), a minimalist internationalised court giving priority to domestic Senegalese civil law approaches, provides victims with the role of *partie civilie.*[324] Furthermore, the *Cour Pénale Spéciale Centrafricaine* (Special Criminal Court (SCC)) in the Central African Republic (CAR) is established under domestic legislation with Judges from Central Africa and an international prosecutor.[325] It adheres to the domestic civil law practice in CAR and victims can apply to participate as civil parties.

These examples demonstrate that, although hybrid tribunals provide flexibility, this may not always result in a significant role for victims. However, the *sui generis* nature of hybrid tribunals means that victim-centric tribunals could be an option for the future. Chapter 8 conceives a rearticulated victim-orientated hybrid tribunal.[326]

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[321] Article 162 of the Constitution of Kosovo Assembly of the Republic of Kosovo, Constitution of the Republic of Kosovo 2008 (as amended in 2013)
Law on Specialist Chambers and Specialist Prosecutor's Office Assembly of the Republic of Kosovo, Law on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015, Law No. 05/L-053

Emanuele Cimiotta, 'The Specialist Chambers and the Special Prosecutor's Office in Kosovo: The "regionalization" of International Criminal Justice in Context' (2016) 14 Journal of international criminal justice 53.

[322] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006); the law revised previous legislation from 2001. Official web page of the Extraordinary Chambers in the Courts of Cambodia at: www.eccc.gov.kh/english

[323] Sokol (n 314).

[324] Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990

[325] Article. 3, *Loi organique portant création, organisation et fonctionnement de la Cour pénale spéciale*, *Loi no.* 15/003, 3 June 2015

[326] See section 8.5

3.3 Victim Participation: Centrality within the Rome Statute of the ICC

Victim participation is an innovative development within ICL; however, it is not a new concept in criminal trials. As detailed in Chapter 2, unlike common law jurisdictions, many civil law countries permit victims to join proceedings as a third party, such as a *partie civile*.[327] This role provides the victim (or often the victim's lawyer) with the opportunity to request investigatory measures, review the evidence against the defendant, deliver submissions, present evidence, cross-examine witnesses and make closing arguments.[328] Victims' rights through the Rome Statute of the ICC do, in comparison to those granted to a *partie civile,* have restrictions.[329] Importantly, victims cannot initiate prosecutions, do not have access to the evidence gathered by the parties, cannot call witnesses to testify at the hearing and have no right of appeal.[330]

As opposed to previous ICL tribunals, the drafters of the RS have included a significant role for victims in the ICC. This places them in a central position through the opportunity to participate in trials and receive reparations. Significantly, under Article 68 of the Rome Statute of the ICC, victims are allowed to present their interests as participants in proceedings.[331] Additionally, victims have specific rights to make 'representations' to the pre-trial chamber in accordance with Article 15(3), which allows the Prosecutor to initiate an investigation *proprio motu* (by his own authority).[332] Likewise, under Article 19(3), victims can submit their observations to the ICC for decisions relating to the Court's jurisdiction or the admissibility of a case.[333] Moreover, victims' legal representatives are entitled to attend and participate in all proceedings, can make opening and closing statements and may question witnesses and victims may, in principle, choose their own legal representatives. [334] Further, Rule 86 provides that a Chamber shall take into account the needs of all victims and witnesses in accordance with Article 68.[335] Finally, in

[327] Section 2.3.2
[328] Craig M Bradley, *Criminal Procedure: A Worldwide Study* (Carolina Academic Press 1999).
[329]Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Modalities of Victim Participation) ICC-01/04-01/07 (22 Jan. 2010)
[330] Roy S Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001). 457
[331] Article 68 (1-6) deals with victims within the ICC Rome Statute of the International Criminal Court.
[332] Article 15 (3) ibid.
[333] Article 19 (3) ibid.
[334] Rules 89 and 90 ibid REP
[335] Rule 86 ibid REP.

reparation proceedings, under Article 75(3), the Court can 'invite' and 'shall take account of representations' from victims with a right to appeal any reparation decision under Article 82(4) which 'adversely affects' the victim.[336]

These articles of the Rome Statute create a victims' regime which, in theory, provides victims with an influential role over proceedings. Conversely, it has been left to the chambers to shape proceedings and decide upon proper modalities of participation. Crucially, this means that, in practice, judicial decisions may not result in a particularly victim-centric interpretation of the Rome Statute.[337] The text of Article 68(3) ensures that the ICC judges will determine the scope of victims' participation, because it leaves 'personal interests' undefined and calls upon the judiciary to decide the appropriateness of participation at different stages of the proceedings.[338] Nevertheless, these restrictions have led to the perception of victims as secondary participants. As detailed in Article 68(3), victim participation is only permissible where it will not prejudice, or be otherwise inconsistent with the rights of the accused and impartiality of the trial. This can suggest that the Court will be primarily concerned with determining guilt or innocence and the concerns of the victims, and their search for justice would hold secondary consideration.

Additionally, included within the victims' provision under the Rome Statute are a number of support organs for victims within the ICC registry, which are crucial to the operation of victim participation before the court. These include the Victims' Participation Reparations Section (the VPRS), Victims and Witnesses Unit (VWU) and the Office of Public Counsel for Victims (OPCV). The VPRS transmits victims' applications on participation and reparation to the court and copies to the parties. It also provides public information on reparation proceedings and applications. The VWU is tasked with ensuring protection support measures for victims participating before the court and the OPCV provides legal research and advice to participating victims and represents victims at the court's appointment.[339]

[336] Article 82 (4) ibid.
[337] Prosecutor v. Thomas Lubanga Dyilo (Decision on Victims' Participation) ICC-01/04-01/06 (18 January 2008), para. 113 (**hereafter: Lubanga, Decision on Victims' Participation).**
[338] Article 68 (3) Rome Statute of the International Criminal Court.
[339] Article 43 establishes a Victims and Witnesses Unit (VWU), which provides protective measures, counselling, and other appropriate measures for victims and witnesses.75 The VWU must include staff with 'expertise in trauma, including trauma related to crimes of sexual violence.'

3.3.1 Investigations at the ICC and the role of victims

The investigation stage at the ICC provides a fundamental opportunity for victims to receive justice. If the Prosecutor makes the determination that there are no cases following an investigation, then this removes the possibility of any form of victim participation, reparations or retributive justice. [340] The decision of the Prosecutor at the investigation stage can have a significant impact on the potential to achieve truth, justice and reparations at later stages.[341] Victim involvement in investigations is an important aspect of providing information prior to the selection of charges and perpetrators for the trial. The involvement of victims can facilitate the aim to prevent impunity by more accurately identifying those responsible, provide oversight and scrutiny of the Prosecutor and the extent of the investigation.

Situations under investigation at the ICC only require victims to evidence their harm as a result of any crime within the Court's jurisdiction, without having to identify a specific perpetrator.[342] In the early situations at the ICC, the Pre-Trial Chambers (PTC) determined that victims could participate in a variety of investigation proceedings.[343] However, Article 68(3) does not explicitly state that victims can participate in investigations.[344] The Appeals Chamber restricted the Pre-Trial decisions, concluding that investigations are not judicial proceedings in which victims can participate; rather they are an 'inquiry conducted by the Prosecutor'. [345] Victims can make 'representations' to the Prosecutor under Articles 15(2) and 42(1) on the investigation or their interests, but victims have no right to demand that a certain person is prosecuted and they cannot initiate prosecution.[346] Under Articles 53(1) (c) and 54(1) (b), the interests of the victim

[340] Darryl Robinson and others (eds), 'Procedures of International Criminal Investigations and Prosecutions', *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010).
[341] Margaret M deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2011) 33 Michigan Journal of International Law 265.
[342] A situation is defined as the temporal and territorial boundaries,
[343] Jérôme de Hemptinne and Francesco Rindi, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings' (2006) 4 Journal of international criminal justice 342.
[344] Guhr, 'Victim Participation During the Pre-Trial Stage at the International Criminal Court' (2008) 8 International Criminal Law Review 109.
[345] 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 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007) ICC-01/04 (19 December 2008)
[346]. SITUATION IN DARFUR (Public Document 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 3

and justice form part of the Prosecutor's examinations in investigations. Rule 92(2) also provides that the Prosecutor will inform victims when deciding not to initiate an investigation or prosecute under Article 53. This places a greater duty of notification on the Prosecutor at the stage of an initiation of an investigation than is found in many domestic situations.[347]

There is significant prosecutorial discretion in the selection of cases within the ICC. Louise Arbour, United Nations High Commissioner for Human Rights, has explained the 'discretion to prosecute' as 'considerably greater' than in the domestic context. [348] In an international court that is based on complementarity, this discretion is significant. The ICC is a court of last resort and the Prosecutor will determine which limited cases are tried. Frequently, therefore, tension arises when the interests of the Prosecutor and the victims are different. Indeed, the first Prosecutor of the ICC has been accused of not fully considering the interests of victims in the selection of cases.[349]

The opportunity for victims to receive justice was significantly reduced through the controversial decision of the PTC in the Afghanistan case, which determined that an investigation by the OTP would not be in the 'interests of justice'.[350] A factor in the Pre-Trial Chamber decision was that victims of atrocity crimes in Afghanistan could be frustrated if the case was not successful, based upon the difficulties of carrying out the investigation.[351] However, this decision was made without the existence of any victims whose views could have been established. What this argument fundamentally fails to recognise is the fact that 'victims could have been far more frustrated by having the

December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007) ICC-02/05 (2 February 2009)

[347] Marion Eleonora Ingeborg Brienen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Rcommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Publishers 2000).

[348] William A Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 Journal of International Criminal Justice 731, 745.

[349] SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO (Public Document Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed) ICC-01/04 (25 October 2010)

Victims in the DRC situation sought to review the decision of the Prosecutor not to charge Jean-Pierre Bemba for the numerous crimes his militia committed in Ituri

[350]SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN (Public Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17 12 April 2019

[351] Ibid para 96

investigation dismissed *ab initio*, thereby depriving them of even the chance of obtaining justice'.[352] The Appeals Chamber overturned this decision by the Pre-Trial Chamber, which could potentially have both limited the future work of the ICC and restricted the opportunity for victims' justice in instances in which 'investigations could be unsuccessful or pose political challenges or other such factors'.[353] The Appeals Chamber ruling, in allowing the Afghanistan investigation to proceed, confirmed the Prosecutor's discretion in evaluating whether or not to proceed 'in the interests of justice' under Article 53(1)(c) of the Rome Statute. The Appeals Chamber made it clear that 'the Pre-Trial Chamber did not properly assess the interests of justice', noting that it did not properly consider 'the gravity of the crimes and the interests of victims as articulated by the victims themselves'.[354] Nonetheless, while the Prosecutor was granted leave to appeal the decision of the Pre Trial Chamber, the victims' requests of appeal were rejected.[355] This decision reinforces the lack of centrality for victims in determining if investigations will go ahead. This is even more important at these early stages, as a lack of investigation removes any opportunity for victims to receive justice through the ICC.

3.3.2 Which victims are allowed to participate?

The centrality of the role of victims, and the opportunity for victims to experience justice through ICL, is impacted by who is defined as a victim and eligible to be involved with the trial. As Chapter 2 explained, the definition of who is a victim within ICL has been set out in the RS of the ICC.[356] Under the RS, a causal connection is required for victim participation based upon the harm suffered.[357] The actual practice of the ICC has then further defined the issue of victims and harm suffered. The Appeals Chamber in the first

[352]SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN (Observations by Professor Jennifer Trahan as amicus curiae on the appeal of Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan') ICC-02/17 (19 November 2019) 8

[353]SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17 5 March 2020 **para. 49**

[354] ibid

[355] SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN (Decision on the Prosecutor and Victims' Requests for Leave to Appeal) ICC-02/17 (17 September 2019) paras 20 and 24.

[356]See section 2.4.3

[357]Situation in the Democratic Republic of the Congo (Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6,) ICC01/04 (Jan. 17, 2006)

case at the ICC, Prosecutor v Lubanga has set out that 'Material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim.'[358] The Appeals Chamber expansively decided 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'.[359] The court recognised that, whether or not a person has suffered harm as a result of a crime within the jurisdiction of the Court and is, therefore, a victim before the court, would have to be determined in light of the particular circumstances.[360] This requires a determination to be made for individual victims considering their specific factors. The Lubanga decision leads to a situation in which a natural person, as well as an institution or an organisation, who has suffered indirect or non-material harm from a crime falling within the ICC's jurisdiction, may not claim the status of a victim.

The impact of this distinction between direct and indirect harm means that the opportunity for victims to participate is, therefore, entirely dependent upon the scope of the charges brought by the prosecution. The only victims participating in the Lubanga trial were, therefore, those classed as direct victims as a result of the harm arising from the charge of enlisting child soldiers, either alleged former child soldiers and their parents, or relatives.[361] If the charges are narrow then only a limited number of victims will have the opportunity to participate. This resulted in the exclusion of victims who suffered abuse at the hands of child soldiers from participating within the case.[362] For this reason, a significant number of victims of sexual violence were excluded, leading to a belief that their voices were either not heard or not listened to, removing their opportunity to achieve justice.[363] The witnesses called to testify in Lubanga provided substantial evidence of sexual abuse; however, the charges could not be amended at this stage of the

[358] Prosecutor v Thomas Lubanga Dyilo (Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) ICC-01/04-01/06 11 July 2008 para 33-35
[359] ibid para 31
[360] ibid
[361] Prosecutor v Thomas Lubanga Dyilo (Public Redacted version of "Decision on 'indirect victims'") ICC-01/04-01/06 (8 April 2009) Para 54
[362] Valentina Spiga, 'Indirect Victims' Participation in the Lubanga Trial' (2010) 8 Journal of International Criminal Justice 183.
[363] 'International Criminal Law - International Criminal Court International Decisions' (2007) 101 American Journal of International Law 841.

trial.[364] Following the increased recognition of the harm suffered by victims, charges for sexual crimes were included in the arrest warrant for Lubanga's co-accused, Ntaganda resulting in a successful conviction.[365] This demonstrates that the involvement of victims provides the opportunity for the Court to examine prosecutorial strategy more closely, or to enhance future investigations and prevent impunity.

3.3.3 Large numbers of victims: applications and collective claims and representation

The large number of victims of international crimes creates a variety of challenges for the practice of victim participation within the ICC. Potential victims are required to complete applications upon which the Judge will determine whether an applicant qualifies as a victim in a given case. The time and expense required to process victims' applications impacts upon the opportunity for efficient trial proceedings, managing the limited resources of the court and upholding criminal law principles of legality or fair trial rights.[366] In the Bemba case, the defence argued how examining and making submissions on the victim applications was to the complete detriment of its capacity to investigate and prepare its own defence for the trial.[367] Since 2012, Pre-Trial Chambers have experimented with different approaches to address the time taken to process victim applications and make the process more efficient.[368] In the Ntaganda case, the Chamber attempted to simplify the victim application process by paring down the standard application form to one page. It was suggested that this form should ask an applicant only for information 'strictly required by law for the Chamber to determine whether an applicant satisfies the requirements set forth in rule 85 of the Rules'.[369] This approach was

[364] Prosecutor v. Thomas Lubanga Dyilo (Public document 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 (8 December 2009) para 109

[365] Prosecutor v Bosco Ntaganda (Judgment) ICC-01/04-02/06 8 July 2019 (hereafter Ntaganda Judgement)

[366] Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve journal of international law 475.

[367] Prosecutor v Jean Pierre Bemba Gombo (Defense Request for an Extension of Time for the Filing of Submissions on the 18th Transmission of 350 Victims' Applications) ICC-01/05- 01/08-1992 (7 December 2011) para 10

[368] Mélissa Fardel and Nuria Vehils Olarra, 'The Application Process: Procedure and Players' in Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (TMC Asser Press 2017)

[369] Prosecutor v Bosco Ntaganda (Decision Establishing Principles on the Victims' Application Process) ICC-01/04-02/06-67 28 May 2013 para 21

followed in the Ongwen case with the Single Judge recognising the need for simple application forms.[370] However, concern has been raised that the lack of availability of a simplified application form prevented victims from applying for participation.[371]

An alternative approach arises through the use of collective applications aiming to mitigate the cost and time spent on the application procedures.[372] In the Muthaura and Kenyatta case, this type of collective approach was taken, seeking to protect the rights of the defendant from undue delay while allowing victims to present their interests. Trial Chamber V has, however, acknowledged that the collective application process 'does not imply any judicial determination of the status of the individual victims';[373] the collective approach does not provide the opportunity for the suffering of victims to be recognised as there is no individual assessment by the Court. This could undermine the meaningfulness of victim participation. One has to be aware that the differing application approaches can lead to uncertainty for victims and their support organs about which procedures are best to follow when completing application forms.

A further move to address the complexity of large victim numbers has been collective legal representation.[374] Collective representation, requiring victims to join together with others, has occurred within the ICC, and within the ECCC which is assumed to provide more victim-centric procedures than the ICC.[375] The main challenge with collective representation is that it reduces individual victims with conflicting goals, experiences and justice expectations into single entities; frequently with a representative imposed upon them who cannot follow the wishes of all victims and may have very limited time to become aware of the individual experiences. This significantly limits the opportunity for individual victims to explain their interests, which Pues argues is inconsistent with ideas

[370]Prosecutor v Dominic Ongwen (Decision Establishing Principles on the Victims' Application Process) ICC-02/04-01/15-205 4 March 2015 para. 11.
[371] Wayne Jordash and others, 'VICTIMS AT THE CENTER OF JUSTICE: Reflections on the Promises and the Reality of Victim Participation at the ICC (1998-2018)' (INTERNATIONAL FEDERATION FOR HUMAN RIGHTS 2018) 730a. 49
[372]Prosecutor v Laurent Gbagbo (Organization of the Participation of Victims) , 6 February 2012 ICC-02/11-01/11-29 Para 32 Examining pros and cons of collective application forms
[373] Prosecutor v Muthaura and Kenyatta (Decision on Victims' Representation and Participation) 3 October 2012 ICC 01/09-02/11 para 37.
[374] Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Order on the Organisation of Common Legal Representation of Victims) ICC-01/04-01/07 (July 22, 2009) para. 13
[375] Rachel Killean, *Victims, Atrocity and International Criminal Justice: Lessons from Cambodia* (1st edn, Routledge 2018)

of fairness for participants.[376] While collective representation has limitations in ensuring that the different interests of a large group of victims can be properly expressed, the limited resources of the court make this practice necessary. This can lead to marginalised voices being excluded or to the dominance of specific ethnic identities. One key compromise of the aspects arising from the need to pursue a collective group of claims is that the grouping is premised on actual or perceived similarities between group members' individual claims.[377] In reality though, each will typically have his/her own interests and will have experienced victimisation in a unique way. Hobbs has detailed how the issue of collective representation restricted the opportunity for meaningful participation at the ECCC in relation to the fact that victims are not a singular community.[378] Ex-Khmer Rouge members seeking civil party status, who were classified as 'new people', were considered politically unreliable, leading to tensions with other members.[379] Approaching victims in terms of a singular identity can also overlook the fact that victims have different outlooks on punishments and remedies. The Office of Public Counsel for Victims (OPCV) has raised their concerns, noting that victims of gender crimes may be discouraged from participating due to the collective nature of representation, which could place them 'in a very delicate and potentially (re)-traumatizing situation, which would additionally clearly defeat the purpose of the application process and will violate the obligation of the Court pursuant to Article 68(1) of the Statute'.[380] As the Redress Trust highlighted within the Bemba case, 'individuals' recollections of their suffering may also differ, making it difficult for a common factual narrative to be agreed amongst a large group of victims'.[381] Further, as discussed in Chapter 2, collective

[376] Anni Pues, 'A Victim's Right to a Fair Trial at the International Criminal Court?: Reflections on Article 68(3)' (2015) 13 Journal of international criminal justice 951.

[377] Prosecutor v Laurent Gbagbo (Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings) ICC-02/11-01/11 (4 June 2012) para 35

[378] Harry Hobbs, 'Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice' (2014) 49 Texas International Law Journal 306

[379] Hobbs (n 378).

[380] Prosecutor v Laurent Gbagbo (Public Observations on the practical implications of the Registry's proposal on a partly collective application form for victims' participation) ICC-02/11-01/11 19 March 2012 para. 17.

[381] Prosecutor v Jean Pierre Bemba Gombo (Public Document with Public Annex I and Confidential Annex II Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules) ICC-01/05-01/08 (17 October 2016)

representation restricts the opportunity for individual victims to express their interests.[382]

Another concern that has emerged, is that there are increasing restrictions upon the opportunity for victims to choose their own legal counsel through the decision of the PTC in the Ongwen case in 2015.[383] The PTC decided to appoint a second team from the OPCV due to budget issues and concerns surrounding the selection process of the legal representative for victims (LRVs).[384] This removed the access to the courts' legal aid system for the victim-appointed LRVs, requiring them to seek outside funding and to work pro-bono until this was achieved. [385] The decision has thus exposed the level of meaningful participation expected by the court, especially if the Pre-Trial Chamber does not believe that the victims should choose their own counsel. The International Federation for Human Rights' (FIDH) report on victim participation argues that the decision appears to punish victims for appointing their own counsel and 'raises serious questions as to whether the Court will continue to allow for the appointment of external counsel or whether all victims will be represented by the OPCV in future cases'.[386] This, though, would further reduce the potential for victims to be actively involved in the participation process.

3.3.4 Fair trial rights and victim participation

The inclusion of the victim regime in the ICC has raised concerns that it will reduce the opportunity for the accused to have a fair trial. Fair trial rights have always been one of the fundamental principles within ICL.[387] The Appeals Chamber has highlighted the importance of these rights by stating that without them it would not be possible to achieve justice if the accused was put on trial, reinforcing that 'if no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped'.[388] On the other hand, the judges have to balance these competing interests of victims and the defence. This is

[382] section 2.5.3
[383] Prosecutor v. Dominic Ongwen (Decision on contested victims' applications for participation, legal representation of victims and their procedural rights) ICC-02/04-01/15 (27 November. 2015) para. 16-24.
[384] IBID, para. 20
[385] Jordash and others (n 371) 49.
[386] ibid
[387] Florian Jeßberger and Gerhard Werle, *Principles of International Criminal Law* (Oxford University Press 2014).
[388] Prosecutor v Thomas Lubanga Dyilo (Judgment on the Appeal of Mr 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, para. 37

best witnessed through the demonstration of how many victims can participate, and in what manner. The use of anonymous victims, which is important for victim safety, has to be similarly carefully balanced alongside fair trial considerations.

The practice of the ICC demonstrates that judges use a case-by-case approach, based upon individual circumstances, to determine when victims may testify.[389] The judges have control over which victims may provide testimony, and decide this in relation to considerations regarding the fair trial of the accused. However, in practice, the participation of individual victims in trials has been restrictive. In Bemba, the two common legal representatives sought to call 17 victims to appear before the Chamber. Determining the impact this would have on the rights of the accused and a fair and impartial trial, the legal representatives were, nonetheless, instructed to narrow the list to no more than eight individuals, and ultimately, only two victims were allowed to testify in the trial.[390] In relation to the participation of victims and their representatives within the trial process, the Ongwen case has raised an issue in which LVRs have not been able to question witnesses regarding personal responsibility of the accused due to Defence objections; thus, raising concerns about the undermining of victims' rights in the participation process.[391] In the Katanga and Bemba cases, supplementary criteria needed to be satisfied, namely that the victims' legal representative explain how testimony would help the Chamber understand the facts, and provide a signed summary of the testimony, to which the parties would have seven days to respond.[392]

Another area of concern is that victim participation can result in the creation of a *defacto* 'second prosecutor', detrimental to the rights of the accused.[393] Indeed, in the Appeals Chamber in Lubanga, the judge highlighted the need to determine the personal interests of the victim, such as issues affecting their protection and in relation to proceeding for reparations; this in contrast to those which actually fall under the role assigned to the

[389] Salvatore Zappalà, 'The Rights of Victims v. the Rights of the Accused' (2010) 8 Journal of International Criminal Justice 137.
[390] Prosecutor v Jean Pierre Bemba Gombo (Public Document 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 22 February 2012
[391] Stephen Smith Cody and others, 'THE VICTIMS' COURT? A Study of 622 Victim Participants at the International Criminal Court' (2015).
[392] Moffet (n 7) 76
[393] Zappalà (n 389).

prosecutor.[394] In spite of this, there are matters on which victims and defence interests may align, such as calls for trials to be conducted without undue delay and for sufficient investigations.[395] Furthermore, victims do not always align with the Prosecution and their participation to provide them the opportunity to be critical of the Prosecutor's action. As detailed above, victims of crimes committed by Jean-Pierre Bemba in the Democratic Republic of Congo (DRC) disagreed with the Prosecution's decision not to investigate such crimes and to limit the charges to crimes committed in the CAR.[396]

Additionally, the challenge of protecting witnesses still has to be balanced alongside the need for the accused to receive a fair trial. Victim identities can therefore be removed from defence documents as a protective measure, which is not prejudicial to, or inconsistent with the rights of the suspect and a fair and impartial trial, abiding by the principle of proportionality.[397] A study of the Kenyan trials underpins the dangers surrounding witness and victim protection.[398] These cases focused on post-election violence in 2007 and 2008, with the alleged perpetrators including the President and Deputy President of Kenya, and the Kenyatta and Ruto cases. The prosecutor highlighted issues of witness intimidation 'by those acting in the perceived interests of high-ranking Kenyan officials', leading to the collapse of the trials.[399] In the decision to drop the charges in the parallel Muthaura case (co-accused along with Kenyatta), the prosecutor explained the impact of interference with witnesses, with several having died or recanting testimony. In the end, in The Prosecutor v William Samoei Ruto and Joshua Arap Sang, the ICC judges vacated crimes against humanity charges against Deputy President Ruto and a former

[394] Public Document
Prosecutor v Thomas Lubanga Dyilo (Public Document 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 2 February 2007) ICC-01/04-01/06-925 (13 June 2007) para 28
[395] Prosecutor v Uhuru Muigai Kenyatta (Public Redacted Version of 'Victims' response to Prosecution notice regarding the provisional trial date', with Public Annex) ICC-01/09-02/11 (10 September 2014)
[396] Prosecutor v Jean Pierre Bemba Gombo (Public Document with Public Annex I and Confidential Annex II Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules) ICC-01/05-01/08 (17 October 2016)
[397] Prosecutor v William Samoei Ruto and Joshua Arap Sang (Public with public Annex A Decision on the protocol establishing a redaction regime) ICC-01/09-01/11 27 September 2012
[398] David Donat-Cattin, 'Article 68. Protection of Victims and Witnesses and Their Participation in the Proceedings', *The Rome Statute of the International Criminal Court* (3rd edn, 2015)
[399] Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta (Prosecution Notification of the Withdrawal of Charges against Francis Kirimi Muthaura) ICC-01/09-02/11 (11 March 2013) para. 11.

broadcaster, Sang.[400] Judge Chile Eboe-Osuji stated how the Chamber was satisfied that the evidence demonstrated 'incidence of witness interference at a disturbing scale', meaning that 'an acquittal of the accused would be grossly unjust'.[401] Additionally, the ICC Prosecutor, Fatou Bensouda, accused the case of being 'eroded by a 'perfect storm' of witness interference and intense politicization of the Court's legal mandate and work'.[402] As is evident, there are substantial risks for victims and witnesses, especially in instances in which the high-ranking members of governments are being investigated by the ICC. It is, therefore, crucially important that the safety of victims is paramount.

3.3.5 Procedural justice and sentencing

Victim participation forms a key aspect of procedural justice, allowing victims the opportunity to be involved in the justice process. The victims' regime demonstrated a move in ICL away from the purely retributive approaches of previous tribunals to a more reparative and restorative justice approach.[403] The forms of justice arising from ICL vary from a focus on punitive and retributive justice, towards reparative justice or more restorative justice procedures. Victim participation is considered to widen the justice opportunities for victims, including truth-telling, the need to include a permanent record and other forms of therapeutic impact, such as processing trauma.[404] Victim participation is an important process in providing victims with the opportunity to experience procedural justice.

Scholars have recognised various benefits of participation, such as healing and rehabilitation and a sense of agency, empowerment or closure. Hobbs has explained that 'some empirical research suggests that where the judicial sphere values and recognises the victims' plight, victims may report higher overall levels of satisfaction with the criminal justice system'.[405] Herman argues, '[t]he fundamental premise of

[400] Prosecutor v William Samoei Ruto and Joshua Arap Sang (Public redacted version of: Decision on Defence Applications for Judgments of Acquittal) ICC-01/09-01/11 5 April 2016
[401] ibid para 141
[402]'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future' 6 April 2016 https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-160406
[403] Section 4.5.2 on restorative justice
[404] BN Mc Gonigle, 'Procedural Justice? Victim Participation in International Criminal Proceedings' (Intersentia 2011).
[405] Hobbs (n 378). 10

psychotherapeutic work [with survivors of severe trauma] is a belief in the restorative power of truth-telling'.[406] Within the ECCC, a number of examples have arisen in which participants have detailed the benefit they experienced through participation. One participant has explained, '[t]his is the best opportunity after 30 years I have been living with all the suffering… and I would like to thank you, the Chamber, very much for giving me this opportunity to speak it out'.[407] A further participant explained that she had '[s]uffered psychological suffering for so long', but now finally had 'the opportunity to express such suffering' and believed the court would deliver justice and that 'the psychological wound[s]' of victims and civil parties 'would be cured'.[408] In the ECCC however, innovations such as the opportunity to apply for civil party status and utilising 'victim impact hearings' and 'statements of suffering' to describe the harms they suffered, enhance victim empowerment and catharsis.[409] This does not occur in all instances; nonetheless, it is a critical component of the process which needs to be examined further, to determine the most effective approach for empowering and supporting victims to achieve the justice which is meaningful to them.

It is considered that participation can validate and empower the victim, although long proceedings can be stressful and can psychologically strain the victims.[410] There is a risk of secondary victimisation for victims who participate in trials, especially if they are subject to questioning on the stand which prevents their opportunity to tell their story.[411] The adversarial influence on ICL, with its focus on international criminal responsibility (ICR), has been challenged as potentially causing victims to be traumatised further, and is ill-suited for therapeutic narrative. A demonstration of the limited agency that international tribunals grant to victims within ICL can be seen through the example of the ECCC and the experience of its first victim recognised as a civil party, Theary Seng.[412] Initially, she addressed the ECCC directly, proclaiming that it was a 'right and a privilege for victims to speak before the court'. However, four months later, the judges denied

[406] Judith Lewis Herman, *Trauma and Recovery* (Pandora 2001) 181.
[407] TRANSCRIPT OF TRIAL PROCEEDINGS PUBLIC Case File Nº 002/19-09-2007-ECCC/TC 24 October 2012 pg 59. MS. LAY BONY
[408]TRANSCRIPT OF TRIAL PROCEEDINGS PUBLIC Case File Nº 002/19-09-2007-ECCC/TC 22 October 2012 Trial Day 121 pg 22 Ms. Yim Sovann
[409] Ciorciari and Heindel (n 80).
[410]ibid
[411] Ross McGarry and Sandra Walklate, *Victims: Trauma, Testimony and Justice* (Routledge 2015) 30.
[412]Decision on Civil Party Participation in Provisional Detention Appeals (20 March 2008) 002/19-09-2007-ECCC/OCIJ (PTC01) para 36 (Pre-Trial Chamber, ECCC).

Seng's request to speak, determining that only civil party lawyers could address the chamber. Seng stormed out of the courtroom, vowing not to return until '[she has] a voice'.[413] This decision was based upon the fact she did not have a lawyer to speak for her, reinforcing the silencing of individual victims and removing their agency.

While procedural justice includes a variety of justice opportunities, the opportunity for retributive justice can be observed through the sentencing decisions of the court. At the sentencing stage, the ICC judges have the discretion to decide whether to involve victims and may do so if they are of the opinion that a more complete presentation of fact is required in the 'interests of justice'. 'A realistic assessment suggests that the interests of justice are more likely to be equated with notions of retributive justice than victims' rights and reparation.'[414] Victims have expressed disappointment in what they believe to be lenient sentences, such as in the decision to sentence Lubanga to 14 years and Katanga to 12 years.[415] Despite this, it is accepted that exercising their procedural rights during sentencing provides procedural justice, which could be a form of compensation for 'lenient' sentencing.[416] In relation to seeking justice for victims, however, the lack of priority placed upon victims' sentencing interests presents a further example of victims being side-lined. The conflicting victim-justice interests could potentially search for more punitive or restorative influences on sentencing decisions.[417]

3.3.6 Evaluating victim participation practice in ICL

The victims' regime within the ICC retains power in the hands of the traditional actors of the international legal process: the judges, the Prosecutor and the Defence. The continuing role of judges in ensuring victims can participate in the proceeding, and the fact that it is developing on a case-by-case basis, can lead to inconsistencies; increased participation in some cases standing in contrast to more limited access to participation in others. It is also

[413] Mahdev Mohan, 'The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal' (2009) 9 International Criminal Law Review 733, 753.
[414] Ralph Henham, 'Procedural Justice and Human Rights in International Sentencing' (2004) 4 International Criminal Law Review 185.
[415] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, Cambridge University Press 2019) 395
[416] Juan-Pablo Pérez-León-Acevedo, 'Assessing Victim Participation during Sentencing at the International Criminal Court' (2019) 17 Journal of international criminal justice 431, 445.
[417] RALPH HENHAM, 'Sentencing Theory, Proportionality and Pragmatism' (2000) 28 International journal of the sociology of law 239, 239.

not a guarantee that victims will be granted the right to participate at all stages of the trial process, even when they have met the criteria for victims under the RS. The alternative approaches within different chambers demonstrate how the Rome Statute can be interpreted in a greater victim-centric approach, depending upon the understandings of the judges. Given all this, victim participation within ICL has struggled to provide meaningful engagement with individual victims in the trials. In fact, ICC judges have held that victim participation is 'purely incidental to the efficacy of the proceedings and not supplementary thereto'.[418] This understanding of victims' participation is missing an opportunity for the restorative procedural justice described above. There are conflicting opinions between judges on the benefits of victim participation, especially when balanced alongside the cost and delays to the trial which can arise.[419] As Judge Van Wyngaert highlights, the practice of participation at the ICC differs from domestic civil law jurisdictions in which there is one perpetrator with a small number of victims.[420] Critics have similarly queried whether participation is really meaningful to victims. Mohan argues that the promises of victim-centrism in the ECCC are rhetorical devices that have little practical resonance for Cambodians. If anything, they soothe the ECCC's affiliates (and bolster their legitimacy), rather than assisting victims, some of whom complain that their token participation has 'revive(d) memories, bitterness and misery', and caused a 'loss of faith in the ECCC'.[421] This is an important lesson for ICL because it has been criticised for not fully including the voice of victims and recognising their interests.

Despite the many hurdles and shortcomings of implementing victim participation, the benefits of victim participation have been recognised; it contributes cultural and factual information on the context of the events and assists the Court in establishing the truth and creating a historical record. Achieving justice for victims is a complex goal; one in which there is a desire for different outcomes and the work of the court can lead to victims feeling betrayed by the ICL system. The opportunities inherent in participation can provide a means by which these differing justice aims could be met. A concern surfaces from the format of an international trial, questioning if this is the most suitable method of

[418] Prosecutor v Thomas Lubanga Dyilo ('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 Decisions of the Appeals Chamber of 2 February 2007') ICC-01/04-01/06-92 13 June 2007

[419]. See section 8.4

[420] Van den Wyngaert (n 366).

[421] Mohan (n 413) 760.

justice for victims, both culturally and also to prevent them from suffering further trauma in the trial process. Is it fit for purpose to take into account the conflicting reasons why victims choose to participate? It reinforces the need to manage victim expectations carefully, to ensure the experience of their involvement within the ICC is not negative, and does not lead to re-victimisation, especially as victims and their representatives are only able to appeal reparations decisions.

3.4 Reparations

> In honouring the victim's right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations, and reaffirms the international principles of accountability, justice and the rule of law.[422]

It is the evolution of the relationship between victim, perpetrator and the criminal justice system that is applicable in ascertaining the centrality, or otherwise, of victims within international criminal law. The opportunities for reparation or compensation in specific historical criminal justice systems can be contrasted against the current positioning of victims within the reparations regime in the ICC. As explained in Chapter 2, in early criminal justice systems, the victim held an important role within the resolution of conflicts, with a key aspect of justice processes involving the victim receiving direct financial restitution to 'make them whole again'.[423] With the growth of the state, the distribution of compensation also provided an opportunity for the state to receive revenue in the form of a fine, removing the link between the victim and the repayment of 'debt' by the offender. It is this severing of the direct link between the victim and the repayment of the 'debt' by the offender that the development of reparations within the ICC can begin to overcome within ICL.[424] The Rome Statute allows for victims to personally receive reparations, with the award made against a convicted perpetrator.[425]

[422] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147.
[423] See section 2.3
[424] ibid
[425] Prosecutor v Thomas Lubanga Dyilo (Public document 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 (March 2015) (Hereafter Lubanga appeals decision)

The importance of reparations for victims has been acknowledged as seeking to redress victims' harm and provide increased justice beyond solely retributive justice.[426] As the IACtHR highlighted, reparations is a procedure designed to 'repair' the effects of the 'violation committed'.[427] This has been explained by a number of scholars: '[r]eparations, for that matter, are often generally directed at redressing the victims' harm.'[428] Following this:

> We believe that justice before the ICC should include, at a minimum, the enforcement and implementation of the rights attributed to victims according to the Statute, including the right to reparation which aims to redress their harm and while doing so, avoid further harm and secondary victimization.[429]

The Appeals Chamber in Lubanga recognised the importance of reparations: 'The reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. The success of the Court is, to some extent, linked to the success of its system of reparations.'[430]

The concept of reparations is not exclusively monetary in nature, and as such it has been termed 'remedies' by some scholars while others utilise the term 'reparations'.[431] The discussion within the '*travaux préparatoires*' of the Rome Statute covers the mechanisms for reparations within the ICC and this has been set out in Article 79, providing for restitution, compensation and rehabilitation, as well as a trust fund to be set up to forward the reparations award to victims.[432] As set out in chapter 2, the term 'victims' is exclusively used under Rule 85 of the Rome Statute, including those who are entitled to reparations.[433] However, unlike the guilt phase of the trial, victims are defined as 'parties'

[426] Section 4.4.1
[427] Inter-American Court of Human Rights Case of Garrido and Baigorria v. Argentina Judgment of August 27, 1998 (Reparations and Costs)
[428] Luke Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?' (2017) 21 The International Journal of Human Rights: Special Issue: Transformative Reparations for Sexual Violence Post-conflict: Prospects and Problems 1204.
[429] Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, vol 88 (University Press 2012).
[430]Lubanga appeals decision (n 452)
[431] Shelton (n 119).
[432] Muttukumaru (n 102).
[433] Section 2.4.3

within reparations proceedings.[434] Within the reparation proceedings, victims hold procedural rights such as oral and written participation; presentation of evidence, witnesses and experts; the right to appeal reparation orders; and, to have legal representation. The hybrid courts have further developed the position of reparations within ICL.

3.4.1 Developing reparations jurisprudence in international law

The evolution of reparations within the ICC is built upon examples arising from both international law and domestic law. The foundational case for reparations within IL arose through the Permanent Court of International Justice (PCIJ) with the Chorzow Factory Case stating that the purpose of 'reparations is to as far as possible, 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'.[435] This case has been widely cited and reaffirmed within International Court of Justice (ICJ) cases. In the decision in the International Court of Justice in the Republic of Guinea v the Democratic Republic of the Congo, a separate opinion Judge, Cançado Trindade, suggests, 'reparation cannot 'efface' [a violation], but it can rather avoid the negative consequences of the wrongful act'.[436] Traditionally, the PCIJ and ICJ recognised international law as an inter-state matter, requiring reparations to be paid between states. In recent years, within IL, the position of reparations has developed through the affirmation of state responsibility arising through treaty provisions within human rights law.[437] Unlike reparations practice within ICL, the

[434] Prosecutor v Thomas Lubanga Dyilo (Public Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06 (7 August 2012) (Lubanga reparations decision)
[435] Germany v Poland, The factory at Chorzow (Claim for Indemnity) (The Merits), Permanent Court of International Justice, File E. c. XIIL Docket XIV: I Judgement No 13, 13 September 1928 (Chorzow Factory Case), para 125
[436] Separate Opinion of Judge Cançado Trindade, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation Judgment, ICJ Reports (2012) 324, para 26.
[437]The ILC Articles on State responsibility adopted in 2001 support this affirmation. The Articles define reparation as consisting of the following components: guarantees of non-repetition (Article 30); restitution (Article 34); compensation (Article 36); and satisfaction (Article 37). Although human rights are not specifically referred to in the ILC Articles, the official Commentaries to Article 33 assert that
Draft Convention on the Crime of Genocide, UN Doc. E/447, prepared 26 June 1947 by the Secretary-General upon request by the General Assembly.

reparations jurisprudence within IHRL follows the practice of ICJ in which the reparations awards are paid to states.[438]

The development of ICL after World War II focused on retribution and ensuring perpetrators were punished for their actions. The consideration of victims was limited to their role as witnesses. In terms of reparations, victims were not mentioned within the Nuremberg and Tokyo Charters. There were discussions within the '*travaux préparatoires*' of the UN Convention on the Prevention and Punishment of the Crime of Genocide; however, this was not included in the final version, in which states are obliged to provide effective penalties without mention of victims.[439]

In the 1990s, no right to victim redress or direct reparations was included within the statutes of the ICTY or ICTR. The Rules of Procedure and Evidence (RPE) required that victims claim compensation before national courts 'pursuant to the relevant national legislation'.[440] The statutes provided for restitution, but no reparations nor state responsibility, with states only required to enforce orders between individuals. Cassese asserts that the issue of compensation was compromised during the drafting of the RPEs, as there was no corresponding provision within the Statutes.[441]

The right to reparations for victims was acknowledged by the Prosecutor and President at the ICTY, who commented on the significance of the UN Basic Principles for Victims, recognising that victims under the jurisdiction of the ICTY had the right in law to compensation.[442] The Prosecutor of the ICTY, del Ponte, advocated for the creation of a Claims Commission to compensate victims, acknowledging that 'the Tribunals' statutes ... make only a minimum of provision for compensation and restitution to people whose lives have been destroyed'.[443] The President of the ICTR, Judge Navanethem Pillay, also

[438] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, vol 91 (Cambridge University Press 2012).
[439] Official Comments on Article XIII of the Draft Convention on the Crime of Genocide, p. 48, UN Doc. E/447, prepared 26 June 1947 by the UN Secretary-General upon request by the General Assembly
[440] Stathis N Palassis, 'From The Hague to the Balkans: A Victim-Oriented Reparations Approach to Improved International Criminal Justice' (2014) 14 International Criminal Law Review 1.
[441] Cassese, Gaeta and Jones (n 224).
[442]Letter dated 2 November 2000 from the Secretary-General to the President of the Security Council, UN Doc. S/2000/1063, 3 November 2000.
[443]Press Release JL/P.I.S./542-e. ADDRESS TO THE SECURITY COUNCIL BY CARLA DEL PONTE, PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA, TO THE UN SECURITY COUNCIL

supported the creation of a compensation scheme or trust fund for victims in Rwanda; yet, the Security Council did not adopt this.[444] The tribunals did, nonetheless, set up Victims and Witnesses Support Units, to provide advice, assistance and protection arrangements during the trial period, with limited resources.

3.5 Reparations in the ICC and Hybrid Tribunals

The practice of reparations within ICL, providing the ICC with an opportunity to grant reparations awards directly to victims through its Statute, demonstrates a move away from the state-led approaches witnessed in IHRL.[445] It was a ground-breaking development within ICL to include, within the Rome Statute, the ability for victims to receive reparations directly from the Court. This is perceived as a 'victim-centred approach' and able to be 'empowering and transformative'.[446] Through the principle of complementarity in the ICC, the influence of international reparations can impact upon the domestic situation. For the first time in history, victims should move 'from a passive and marginalised position to an active and central one', with 'reparations to the victims of the most serious international crimes a critical component of the Rome Statute'.[447]

The victim-centric nature of the reparations' regime within ICL includes a number of aspects. Unlike human rights courts, the decisions on reparations would be made against a convicted perpetrator rather than the states.[448] ICL enables reparations to be used as a further retributive tool against a perpetrator, providing restitution for harm done and a further form of reparative justice. A key element of the Lubanga appeals decision is that liability for reparations falls on a convicted perpetrator as a tool to remedy harm caused to victims. The Appeals Chamber followed up concerns raised by victims' representatives and reversed the Trial Chamber decision which did not link reparations orders to the

https://www.icty.org/en/press/address-security-council-carla-del-ponte-prosecutor-international-criminal-tribunals-former

[444] Press Release 31 October 2002 ICTR President calls for compensation for victims
The report specifically expressed concern over the Tribunal's lack of authority to deal with compensation for victims. https://unictr.irmct.org/en/news/ictr-president-calls-compensation-victims

[445] McCarthy (n 429).

[446] ibid

[447] Valentina Spiga, 'No Redress without Justice: Victims and International Criminal Law' (2012) 10 Journal of international criminal justice 1377.

[448] David Donat-Cattin, 'Article 75. Reparations to Victims', *The Rome Statute of the International Criminal Court* (3rd edn, 2015)

perpetration based upon their individual criminal responsibility.[449] The accountability of the offender must be 'expressed' through an order 'against' the convicted person, 'even if reparations are ordered 'through' the Trust Fund in accordance with the second sentence of Article 75(2)'.[450] The Chamber held expressly that the indigence of the convicted person is not an obstacle to the 'imposition of liability for reparations'.[451] The decision enforced the link between criminal conviction and reparation under Article 75. It reinforces the option for both reparative justice to provide redress for victims the punitive justice which arises through reparations, based upon restitution for the harm done.[452]

The Appeals Chamber stressed the need for legal certainty and held that a judicial reparation order must contain at least five 'essential elements', known as the 'Lubanga principles'.[453] The Chamber justified this understanding with two main considerations: '(i) its reliance on offender accountability as 'main' purpose of reparations and (ii) the application of standards of fairness towards the convicted person'.[454] This approach seeks to balance the conflicting rights issues of accountability towards victims and the rights of the convicted persons. The principles set out by the appeals chamber included 'humanity and dignity; equal treatment; inclusiveness; safety, physical and psychological well-being and privacy of victims; and non-discrimination'.[455] The decision at the Appeals Chamber has subsequently been followed and built upon in the Katanga and Al Mahdi cases, including a number of modifications.[456]

[449]Lubanga appeals decision (n 453) para. 184
[450] Lubanga reparations decision (n 461)
[451] Lubanga appeals decision (n 435) para. 212
[452] Carsten Stahn, 'Reparative Justice after Lubanga Appeal Judgment: New Prospects for Expressivism and Participatory Justice or "juridified Victimhood" by Other Means?' (2015) 13 Journal of international criminal justice 801.
[453] Lubanga appeals decision (n 435) para 1
Lubanga Principles it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4)it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.
[454] Ibid
[455] ibid
[456] Prosecutor v Germain Katanga (Public Document Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07 (24 March 2017) (Hereafter Katanga reparations decision)

The nature of reparations awards within the ICC is determined through its jurisprudence, building upon case law and international law standards. This section examines issues surrounding the construction of the awards, including causality, evidentiary standards, types of awards and judicial discretion, and the influence of victim centrality. As set out below, the funds available through the Trust Fund for Victims (TFV) can determine what form of reparations are prioritised. Victims can claim and receive reparations which may take the form of restitution, compensation, rehabilitation and/or symbolic measures, as determined through the reparations' decisions.

3.6 The Centrality of Victims within Reparation Awards

Reparation awards within the ICC are made against an individual based upon the harm caused; if they are indigent, then the TFV will provide reparations. Article 75 of the Rome Statute sets out a framework for reparations and not a definition. Article 79 provides for the creation of a TFV, which will be financed through fines and forfeitures (Article 109) or 'voluntary contributions from governments, international organisations, individuals, corporations and other entities'.[457] As defined in Rule 98 of the Rules of Evidence and Procedure, the ICC may depend on the Trust Fund to order an award against a convicted person, to be paid through the TFV to the individual victim.[458] Additionally, the ICC has discretion to decide whether to order awards for victims, and it may act on its own initiative without a specific request from a victim. The mandate of the TFV is formally independent of the court and holds an assistance mandate for victims independent of on-going investigations, 'as long as its activities are not inconsistent with the rights of the accused to a fair and impartial trial'.[459] In addition to this, the two-fold mandate of the TFV allows for a wider range of victims to benefit from community support programmes, even when no perpetrator has been convicted of crimes by the court.[460] However, this two-fold mandate of the TFV could create conflicting forms of justice when it works in situations

Prosecutor v Ahmad Al Faqi Al Mahdi (Public Reparations Order) ICC-01/12-01/15 (17 August 2017) (Hereafter Al Mahdi reparations decision)

[457] Muttukumaru (n 102).

[458] Rule 98 Rome Statute of the International Criminal Court REP.

[459]Resolution ICC-ASP/4/Res.3 Regulations of the Trust Fund for Victims
Adopted at the 4th plenary meeting on 3 December 2005, by consensus
https://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf

[460] Carla Ferstman, 'The International Criminal Court's Trust Fund for Victims: Challenges and Opportunities' 6 : 2003 Yearbook of international humanitarian law . S.424.

in which no perpetrators are held accountable for their actions, and in which wider communities may benefit from reparative justice programs.[461] Hoyle and Ullrich set out an analysis into the current work of the Trust Fund for Victims and the dual role to which they are assigned under the Rome Statute.[462] They explore the idea that the TFV is aiming to achieve reparative justice and, as a result of this, it is adding a restorative justice function to the traditional retributive justice mandate of the ICC. This increases the justice opportunities for victims; however, if the reparations awards or the forms of community assistance are not in keeping with the needs of victims, they will not experience reparative justice. The mandate and interests of the TFV may not reflect the interests of victims, witnessed through the prioritisation of collective awards discussed below.

3.6.1 Harm and causality in reparation judgements

Reparations are awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court. The main principles guiding the new 'liability to remedy harm' indicate that the determination of reparations is different from that of individual criminal responsibility. For reparations, the causal link between crimes and harm can be based on 'but/for' causation and 'proximate cause', leaving considerable flexibility.[463] This is due to the 'fundamentally different nature of reparation proceedings' and the potential 'difficulty victims may face in obtaining evidence', allowing more relaxed standards of proof than the criminal trial.[464] In evidentiary criteria, claimants shoulder the burden of proof of both their identity and the causal link between the harm inflicted and the crime(s) for which the person was convicted. The Chamber recognised the problems involved in access to evidence after a long period had passed. Seeking to avoid unrealistic evidentiary standards, it found that the standard based upon 'balance of probabilities', rather than the more demanding standard of 'beyond reasonable doubt', is applicable.[465] Additionally, some have suggested that a different standard of proof is utilised within reparations claims for victims. This notion has arisen because of the number of victims who could not easily provide documentation and supporting evidence

[461] Anne Dutton and Fionnuala Ni Aolain, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims under Its Assistance Mandate' (2018) 19 Chicago Journal of International Law 490.
[462] C Hoyle and L Ullrich, 'New Court, New Justice?: The Evolution of "Justice for Victims" at Domestic Courts and at the International Criminal Court' (2014) 12 Journal of International Criminal Justice 681.
[463] Katanga reparations decision (n 482) para 59
[464] Hereafter Lubanga appeals decision (n 452) para. 59
[465] ibid para 22

due to lack of birth registration, and lack of expertise in medical facilities in the procedures required to document evidence of sexual violence. Notably, the submissions of victims recognise the variability in benefits based upon quantifying harm suffered. These included categories of experience (child soldiers who had been raped, those infected with HIV, those injured), the length of time spent as a child soldier and their level of education, among other factors.[466]

In a similar manner to participation, the diverging methods used to calculate liability in practice reveal that a flexible case-by-case approach is being adopted.[467] This provides the opportunity to assimilate 'the case-specific particularities such as the nature of the crimes and ensuing harm; the geographical and temporal scope of the crimes; the number of victims; and, possibly, the legal background and pragmatism of each bench'.[468] However, as with the practice in relation to victim participation set out above, this can lead to uncertainty for victims, both initially, in considering the potential reparations they may receive, and later, in the actual reparation awards. Inconsistent calculation of liability between cases may also undermine the victims' sense of justice having been done.

The issue of who should define victims has led to debates between the Trial Chamber II and TFV in the Lubanga case. Trial Chamber II initially thought that they themselves should oversee the determination of all victims eligible for reparations; however, they conceded mid-proceedings that the victims identified by the TFV were only a 'sample' of a larger pool entitled to reparations.[469] This allows the reparation award to be finalised before all potential victims are known.

Further procedural debates between Trial Chamber II and TFV confirm issues with the balance of rights within criminal trials and the problems of achieving reparative justice in the confines of a criminal trial. Citing concerns for victim safety, the TFV has refused to comply with orders from the Trials Chamber, delaying the reparations payments for victims.[470] The TFV argues that the Trial Chamber could comply with principles in a way 'that would be more appropriately responsive to victim rights and concerns, and that the

[466] Collective reparations are not defined in the Rome Statute or Court regulations but, as explained by the TFV, collective reparations may include measures that are provided to groups.
[467] Necessary as limited description in the RS, should I include this in the conclusion?
[468] Lubanga reparations decision (n 461)
[469] ibid
[470] ibid

Trial Chamber should reconsider its approach'.[471] Once again however, the Trial Chamber must balance the rights of the accused alongside the rights to ensure victim safety. In the case of an indigent perpetrator, in which the TFV will make the payments providing victims the opportunity to remain anonymous or receive reparations even if do not submit applications before the Trial Chamber.

3.6.2 Reparations awards: individual vs. collective

Reparations awards at the ICC may be granted collectively and individually, with the case law to date providing examples of both types of awards. The Appeals Chamber in the Lubanga case set out a focus on collective reparations, with a move to community rebuilding rather than individual reparations.[472] They noted that reparation to a 'community' still requires the 'establishment of a sufficient link between the harm suffered by community members and the crimes committed by the convicted person'.[473] The Chamber recognised that 'certain crimes may have an effect on a community as a whole'.[474] Predominantly, the perpetrators and victims in the Lubanga case were from the same group, ie, the Hema population, and so it was argued that a collective award for reparations was preferable. The potential tension of individual reparations was recognised by the chamber when it noted how these 'could give rise to a risk of resentment on the part of other victims and re-stigmatization of former child soldiers within their communities'.[475] All of this demonstrates that ICC proceedings may create new dividing lines or hierarchies among victims through their selectivity, abstraction and processes of inclusion and exclusion. In the Ruto and Sang case, 47 victims stopped participating in the case over concerns that collective reparations would benefit 'the communities that contributed to their victimisation'.[476] The problems arise through instances in which justice concerns and reparative justice issues follow different paths. The decision to focus on collective reparations rather than the individual reparations

[471] ibid para 330
[472] ibid
[473] ibid para 284
[474] Ibid para 27
[475] Lubanga reparations decision (n4 61) para. 24
Some victim participants felt that they should receive individual awards, in part, because they had assumed a risk to take part in the proceedings
[476] Prosecutor v William Samoei Ruto and Joshua Arap Sang (Public Redacted Version Common Legal Representative for Victims' Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013) ICC-01/09-01/11 (5 September 2013)

awards sought by victims has been criticised, as it does not provide victims with the forms of reparative justice they seek nor for the risk they experienced by participating in trials.[477]

Trial Chamber II in Katanga awarded for the first time both individual and collective reparations, with US$250 compensation paid to victims as a symbolic award.[478] The Chamber based their decision upon case law of the Inter American Court of Human Rights (IACtHR), the African Commission on Human and People's Rights and the Court of Justice of the Economic Community of West African States.[479] The Chamber explained their decision to award both forms of reparations, setting forth that 'collective reparations can help but not substitute individual reparations'.[480] It further explained:

> that collective reparations avoid stigmatisation and are responsive to both common needs and the complexity of harm of different victims as well as promote reconciliation, while individual reparations prevent victims from feeling excluded or being marginalised, individually recognise victims, and enable victims to recover their autonomy and take their own decisions based on their real needs.[481]

The individual symbolic US$250 compensatory amount has caused certain frustration and disappointment among victims. Roth Arriaza argues 'rehabilitation and assistance programmes may be better than compensation, especially when the amount of payment is nominal'.[482] Similarly, Magarrell understands that 'reparation awards should integrate monetary, material and symbolic components rather than rely exclusively on or exclude altogether a specific modality of reparation'.[483] What the Katanga decision explains is the

[477] Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts Incompatible Values?' (2010) 8 Journal of International Criminal Justice 79.
[478] Katanga reparations decision (n 482) para 50
[479] Ibid
[480] ibid.58
[481] Ibid
Trial Chamber II in Katanga ordered awards for reparations to 297 identified victims, comprised of an individual symbolic compensation award of $250 to each victim and of four collective awards to all victims, in the form of (1) housing assistance, (2) education assistance, (3) income generating activities, and (4) psychological rehabilitation
[482] Naomi Roht-Arriaza and Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press 2006)
[483] Lisa Magarrell, 'REPARATIONS: REPARATIONS FOR MASSIVE OR WIDESPREAD HUMAN RIGHTS VIOLATIONS: SORTING OUT CLAIMS FOR REPARATIONS AND THE STRUGGLE FOR SOCIAL JUSTICE' (2003) 22 Windsor Yearbook of Access to Justice 85, 7.

perceived benefits behind the different reparations awards; however, there are also limitations with the forms of reparations awards that need to be carefully balanced by the trial chambers. Magarrell argues, 'When it is feasible, necessary and pertinent, granting both collective and individual awards is advisable to make humbly funded programmes significant in cases of mass atrocities.'[484] The natures of the crimes under the jurisdiction of the ICC address mass victimisation, 'targeting groups or communities'. Bassiouni presents how individual victimisation stems from attacks against the respective community or group. Megret argues in favour of collective reparations, considering that there has been a slight favouring of individual reparations in the ICC regime which he considers to be problematic.[485]

The Al Mahdi order on reparations demonstrated an instance of individual reparations being prioritised over collective ones. The award follows the Court's reparations jurisprudence from the principles set out in Lubanga and Katanga. Importantly, the reparations decision in Al Mahdi has highlighted a number of new developments within the ICC reparations procedures: 'identification of relevant victims; prioritization of reparations for individuals; and the challenges in implementing guarantees of non-repetition'.[486] It requested that the TFV prioritise reparations for individuals, as it acknowledged it to be 'more equitable to use individual reparations to compensate victims on the basis of the extent of the harm suffered or sacrifice made, rather than solely on whether a victim had applied for reparations'.[487] The request to prioritise individual reparations is in contrast to the TFV, presenting its two main tasks as funding the assistance mandate and complementing collective and organizational awards for reparations. The TFV board has set out how it would not pay individual awards if this would mean there would not be sufficient resources for collective awards.[488] This suggests that the TFV perceives collective awards as more in keeping with its assistance mandate.[489]

[484] ibid
[485] Frederic Megret, 'Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes' (2010) 36 Brooklyn Journal of International Law 123.
[486] Al Mahdi reparations decision (n 482) para 140
[487] Ibid para 33
[488] Chapter 11: The case for collective reparations before the International Criminal Court, Mégret 2009.
[489] ibid

While concern has been raised regarding the payment of reparations awards with an indigent perpetrator, Moffet has highlighted that, 'Over €1.5 billion has been spent on investigations and prosecutions at the ICC since its creation, yet funding for reparations has been only a few million, due to the indigence of the convicted persons and limited resources of the TFV.'[490] He is concerned that this gives the impression that the international community is more interested in paying lawyers 'than ensuring effective remedies for those most affected by the worst crimes known to humanity'.[491]

Collective reparations might involve monetary compensation for harm suffered by the community as a whole, or rehabilitation programs that target a group in the broad sense, particularly groups with a symbolic dimension, independently of the group's legal existence. The argument in favour of collective reparations recognises the nature of mass victimisation, the issues of collective victimisation and the opportunity to use reparations to benefit a group that may not have clear legal recognition. A further argument, by Camins, includes the shortcomings of the individual awards being based upon limited resources and the limited impact of the compensation on the lives of the individuals.[492] In this manner, could collective reparation actually have more effect? Could reparations provided for collective therapeutic programmes, for example, allow more victims to utilise this support and benefit from its assistance? Collective awards would allow victims who were unwilling or unable to participate in a trial and subsequent reparations proceedings, and do not wish their identity to be shared with the defence, to benefit from the awards: within having to share, there could still benefit from reparations. Again, these ideas impact upon the centrality of the search for justice for victims, appreciating the myriad arguments favouring collective or individual awards, each of which may be appropriate for different victims.[493] If the victims themselves do not have the opportunity to express the forms of reparations they seek, and the potential reparations awards they may receive are not carefully explained to them at the beginning of the process, this can lead to them feeling let down by the court. Zegveld has challenged this, arguing instead individual reparations being paid in instances in which victims seek them rather than the

[490] Moffett, 'Reparations for Victims at the International Criminal Court' (n 428).
[491] ibid
[492] Emily L Camins, 'Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law' (2016) 10 The international journal of transitional justice 126.
[493] Diana Odier-Contreras Garduno, *Collective Reparations: Tensions and Dilemmas between Collective Reparations and the Individual Right to Receive Reparations*, vol 84. (Intersentia 2018)

TFV providing collective awards instead.[494] Likewise, the different way reparation schemes are determining results has created a situation in which, within the same situation under the court, there may be a different outcome, creating uncertainty for victims.

3.6.3 Reparations following collapse of cases or acquittal

Following the collapse of the Ruto and Sang case, the victims' representatives sought to achieve a reparations award through the ICC in recognition of the desire to seek justice for victims of violence documented by the court.[495] Reparations decisions are issued, once a case is decided, based upon the harm suffered by the victims through a crime within the Court's jurisdiction. In the instance of a collapsed trial, victims will not receive reparations. This goal of ensuring the victims achieve a form of justice through reparations was explained by the legal representative for victims:

> [The Court] bear[s] the burden of reaffirming the international community's faith in the goodness of humankind by administering justice and thereby positively influencing the emotional recovery of the victims, including the many women and children and other vulnerable groups.[496]

However, this was rejected by the majority decision of the judges. Who explained that 'a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty'.[497] The decision to reject the claim for reparations caused the victims to feel let down by the Court.[498] Dissenting this opinion, Judge Eboe-Osuji broke away from the Lubanga case reasoning, linking reparations awards to the harm caused by an individual. In contrast, he stated that, based on other sources of international law, 'there is no general principle of law that requires conviction as a prerequisite to reparation'.[499] In his dissent, he challenged the limitations of only

[494] Zegveld (n 14).
[495] The Prosecutor v. William Samoei Ruto and Joshua Arap Sang (Victims' Views and Concerns on the Issue of Reparation or Assistance in Lieu of Reparation Pursuant to the Trial Chamber Decision of 5 April 2016 on the Defence Motions on 'No Case to Answer) ICC-01/09-01/11-2035 (15 June 2016)
[496]Ibid Opening Statement by the Common Legal Representative for Victims,
[497]Ibid para 7
[498] Ibid Annex Dissenting Opinion of Judge Eboe-Osuji,
[499] ibid

awarding reparations when the individual criminal responsibility of a perpetrator has been proved, as procedural and evidentiary issues can prevent this occurring even when the harm suffered by victims has been demonstrated. He asserted that the ICC process 'establishes victims' victimhood status and reparations should follow from it, rather the finding of guilt of the accused, which is 'beyond the control of the victims''.[500] He continued his dissent explaining, '[w]ith respect, I see no convincing basis in law for the idea that an ICC Trial Chamber may not entertain questions of reparation merely because the accused they tried was not found guilty'.[501] As Judge Eboe-Osuji argued, the reparations decision in the Ruto and Sang case is a missed opportunity to fully encompass the spirit of the basic principles for victims' right to remedy and reparations set out in IL. In summary, the Kenyan trials represent the impotence of victims to influence the court to ensure they receive the justice that has been so widely discussed as the mandate for the ICC.

Additionally, the issue of reparations following the Bemba acquittal has presented new challenges for the Court's jurisprudence, in examining whether victims can receive reparations in the situation in which the defendant was acquitted, but the harm suffered by victims was recognised by the appeals chamber. Following the acquittal decision at the appeals court in the Bemba case, the court examined the question of reparations for victims in the event of an acquittal, with Bemba's lawyers insisting that Trial Chamber III (which originally convicted Bemba) no longer had the ability to make decisions on reparations. The victims' lawyers submitted that the acquittal had disappointed victims and caused them to lose faith in the justice process.[502] This was not upheld by the court, recognising that, unlike some national systems, the Trial Chamber does not have the power to decide on reparations if the accused is acquitted.[503]

The judges have closed the possibility for direct reparations through Bemba; however, they noted, the 'Appeals Chamber's decision was not premised on any doubt about the harm suffered by the victims participating in the case'.[504] Following this, the TFV decided to accelerate the launch of a programme under its assistance mandate. It has highlighted

[500] ibid
[501] ibid
[502] Legal Representative highlighting that victims have lost faith in the justice process following acquittal Joint Submissions, ICC-01/05-01/08-3647, paras 2, 21, 23, 26, 29-30, 38
[503] Prosecutor v. Jean Pierre Bemba Gombo Public (Final decision on the reparations proceedings) ICC-01/05-01/08 (3 August 2018)
[504]Ibid Para 6

the suffering of the victims within the situation in the CAR, recognising the evidence of victims' suffering established through the Bemba case. The TFV Board decided to establish a starting capital of one million Euros for the Trust Fund's assistance programme for the benefit of victims and their families in the CAR I situation. In this manner, the TRV can work under its mandate to provide assistance to victims even in the face of an acquittal.[505]

3.6.4 Hybrid tribunal reparation challenges

As demonstrated above on victim participation, the development of the hybrid courts provides flexibility within ICL to develop international courts that incorporate aspects of relevant domestic law within their statutes. The last chapter of this thesis explores the opportunities for justice for victims arising through a victim-centred *sui generis* hybrid model. However, the current reparations practice of hybrid tribunals demonstrates that they are currently providing limited justice to victims. In the early examples of hybrid tribunals, reparations were not included within the statutes – for example, the STL does not have the power to give reparations to the victims. Instead, following the conclusion of the trial, victims can open proceedings for compensation in the Lebanese civil court using the judgment of the STL[506] According to Article 25 of the STL's Statute, the STL's role is only to identify the victims, and it is the responsibility of the victims to bring an action 'pursuant to the relevant national legislation'.[507]

The Special Court for Sierra Leone (SCSL) has limited provisions for victims, including the forfeiture of property under Article 19(3) retaining a focus on punishment, but in the absence of reparations, the example of indigent defendants makes restitution unlikely. Cohen sets out how the majority of defendants have declared themselves indigent making it almost impossible for victims to receive any form of reparations. In a survey of the Special Court, completed by 200 witnesses who testified to the court, the majority indicated that their expectations had not been met as they had expected some financial support and, in particular, assistance with medical care and education for their

[505] Press Release Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic 13 June 2018 https://www.icc-cpi.int/Pages/item.aspx?name=180613-TFVPR
[506] Hemptinne (n 319).
[507] Article 25 STL Statute (n 344)

children.[508] Christine Evans suggests that the initial provisions for reparations within the statutes of the hybrid courts of the ECCC and Sierra Leone should be perceived as a step backward from the provisions included within the Rome Statute.[509] This has impacted upon the experiences of victims who seek to achieve justice within these courts.

In respect of reparations within the ECCC, victims do not figure in the legislation other than in a vague reference that notes that they are entitled to protection measures. In practice, the ECCC has limited its reparations to only 'collective and moral' measures.[510] There is no basis for restitution to victims, with Article 39 explaining 'confiscated property shall be returned to the State'.[511] Following this, the Internal Rules included reparations, and, along with a Victim Support Section, a number of problems with reparations within the ECCC have arisen; firstly, individuals cannot claim reparations and financial compensation, with only collective reparations provided to civil parties.[512] In any case, the Internal Rules note that reparations are to be borne by convicted persons, which, based on claims of indigence of defendants in other international criminal courts, raises doubts about the viability of successful reparation claims.[513] The reaction to the first reparations order from the ECCC allowed for the printing of the names of the civil parties in the final judgement and the publishing of any apologies made by Duch.[514] In the reparations decision in Duch (case 001 Judgement on Reparations), the Court applied a stringent test to reparation requests that was not contained in the internal rules.[515] The only reparation ordered by the judges was the compilation and publication of their judgement containing names of the civil parties and Duch's apology to his victims.[516] Observers noted that this offered 'nothing of real value to civil parties'.[517] The court

[508] Evans (n 438).
[509] Ibid 110
[510] Suzannah Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' (2001) 12 Criminal Law Forum 185.
[511] ECCC Statute (n 345) Article 39
[512] Ibid ECCC Internal Rules, Rule 23
[513]ibid
[514] ECCC Internal Rules, 5th revised version, February 2010. 106 ECCC Internal Rules, Rule 23; see also ECCC Press Release, 'Historic Achievement in International Criminal Law, Victims of the Khmer Rouge Crimes Fully Involved in Proceedings of the ECCC', 4 February 2008, available at: www.eccc.gov.kh/english.
[515] https://www.law.berkeley.edu/wp-content/uploads/2018/04/Victims-Right-to-Remedy.CJA-Berkeley-Report-1.pdf
Mahdev Mohan & Vinita Ramani, Survivors need a reason to live, TODAY (Jul 31, 2010).
[516] Victims' Right to Remedy: Awarding Meaningful Reparations at the ECCC. Summary of the Report, CJA.org ref
[517] Heather Ryan, What Makes Justice for Cambodia? Open Society Foundations (28 July 2010)

rejected innovative measures, such as education programs, medical and psychosocial support for victims, and the construction of pagodas, instead, developing awards viewed as unimaginative and expedient.[518] In spite of this, many civil parties had believed that they were entitled to individual monetary reparations, leading to distress when the true extent of the reparations was made known, with the court only granting two reparations requests.

Furthermore, the African Union-sponsored EAC, which has been viewed as victim-centric, has presented the myriad complexities in victims seeking reparations and payment of the award once it has been made. [519] Unlike the ECCC, the EAC rejected collective and symbolic reparations and, instead, in the decision against ousted Chadian Dictator Hissen Habré, US$150 million was ordered to be divided among more than 7,000 victims.[520] As none of his assets had been identified, a trust fund was established to provide compensation to victims under the African Union in July 2016. [521] Despite this, the victims did not receive the money and eventually had to apply to the African Court on Human and Peoples' Rights.[522] The victims are currently awaiting the reparations leading some to question if the trial was more concerned with politics rather than justice for victims, with some victims going on hunger strike to highlight the situation.[523] As Evans highlighted '[w]ithout disregarding the crucial role of judicial accountability, it should be recognised that many victims perceive the concept of justice as being alien unless accompanied by reparations.' The need to ensure reparations payments are enforced is thus an important component of victim redress and should be factored into the development of new hybrid tribunals at the initial stages. The practice of reparations decisions by these courts will demonstrate the developing jurisprudence on reparations within a variety of hybrid courts.[524]

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[518] David Cohen, 'Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future' (2007) 43 Stanford Journal of International Law 1.

[519] Birkett, D. J. (2019). Victims' justice? reparations and asset forfeiture at the extraordinary african chambers. *Journal of African Law,* , 1-11

[520]Appeals Judgment, Hissein Habré, Extraordinary African Chambers (EAC), Appeals Chamber, 27 April 2017, available online, in the original French, at http://www.chambresafricaines.org/pdf/Arr%C3%AAt_int%C3%A9gral.pdf

[521]STATUTE OF THE TRUST FUND FOR VICTIMS OF HISSÈNE HABRÉ'S CRIMES https://www.hrw.org/sites/default/files/supporting_resources/statute_trust_fund_victims_english.pdf

[522] Nader Iskandar Diab, 'Challenges in the Implementation of the Reparation Award against Hissein Habré' (2018) 16 Journal of international criminal justice 141.

[523] Diab, N. I. (2018). Challenges in the implementation of the reparation award against Hissein Habré. Journal of International Criminal Justice, 16(1), 141-163.

[524] Discussed further in chapter 8

3.7 Conclusion

This chapter recognises that the objective of 'justice for victims' provides an important rationale in support of the legitimacy of ICL. Furthermore, the enterprise of ICL could be undermined were it to admit that justice for victims can be achieved through processes other than the trial. Indeed, this chapter's examination of the EAC, and the continued lack of reparation payments to victims, exposes these proceedings to the criticism that they were politically motivated, and that the victims have been forgotten following the conviction of Habre.

Judicial decisions strongly impact upon the ability of victims to influence the trial process, both within the ICC and hybrid tribunals. In the instances in which the statutes grant agency for victims, such as the ECCC, such agency is often limited depending upon how the judges interpret it. This finding is in contrast to the common assertion that the 'mandate for the court is justice for victims', and the related assumption of the supposed centrality of victims in ICL. Additionally, a restrictive prosecutorial strategy can prevent both victim participation in a trial and the possibility of reparations. The promise of the victims' regime enshrined in the Rome Statute has not resulted in victims having increased political influence within the trial process.

As the rearticulation presented in Chapter 8 demonstrates, there are very particular steps that can be taken to improve the current system. For example, the application process can be made more efficient. It is important that evaluations of victim participation are carried out utilising a victim-centric perspective, rather than as a cost-cutting exercise or with the view to restrict the interests of victims against the intention of the Rome Statute.

Additionally, the risk of secondary victimisation occurring through a traumatic trial process lessens the potential benefits of victim participation. Chapter 4 presents how incorporating victim-centred restorative justice understandings of participation can enhance the opportunity for victims to feel that they have achieved justice through the trials. Chapter 8 seeks to increase the limited therapeutic benefits which victims currently receive through the trial by incorporating alternative truth and reconciliation processes as part of a wider transitional justice procedure.

4 CHAPTER 4: DECONSTRUCTING THE INTERPLAY OF PEACE AND JUSTICE IN INTERNATIONAL CRIMINAL JUSTICE

> While the ICC's contribution is through justice, not peace-making, its mandate is highly relevant to peace as well. The Rome Statute is based on the recognition that the grave crimes with which it deals threaten the peace, security and well being of the world. The Statute's objective is … laying the foundation for a sustainable peace.[525]

4.1 Introduction

This chapter examines the interplay of justice and peace issues within ICL in light of its claimed central mandate of justice for victims.[526] When new international criminal courts and tribunals are created, their intended influence over the maintenance of peace and security is always declared.[527] Albeit, the legacy of international courts demonstrates that criminal justice does not automatically lead to the lasting, stable peace envisaged in its statutes.

This chapter sets out the range of peace and justice understandings currently within ICrJ and the limitations in achieving either justice for victims or lasting peace. Chapter 6 builds upon this development, presenting the theory of positive peace as a tool to enhance the potential of ICL to provide victims' justice within stable peace.

While ICL seeks to promote peace and security through criminal justice, based upon an understanding of the value of punishment, this provides only limited forms of justice. Additionally, the preventative impact of the ICrJ, while potentially limiting the number of future crimes, does not address the needs of current victims. Victims do not have an exclusively punitive justice aim; the variety of justice goals include reparative, restorative and distributive justice demands.

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[525] Press Release : ICC-CPI-20121211-PR860 ICC President tells World Parliamentary Conference "ICC brings retributive and restorative justice together with the prevention of future crimes" 11 December 2012 (ICC President speech)

[526] As illuminated in chapters 2 and 3 the search to achieve justice for victims provides an important legitimacy claim within ICL

[527] See below 4.3

Values of peace and justice in IL have changed significantly from the time in which war was a tool of justice and peace focused only on interstate relations. Examining the issue of peace and justice under IL, the distinction between negative peace focused on the removal of direct violence, and positive peace including justice issues, is clear. However, while negative peace appears to be the easier goal to achieve, it is often involved in an unjust peace, frequently returning to conflict. In seeking to achieve lasting peace, therefore, questions of justice need to be addressed.

This chapter provides an introduction to the rearticulation later in this thesis, which demonstrates that ICrJ and wider transitional justice procedures, including restorative justice, can work together. The ICC can monitor justice procedures under the complementarity regime, to ensure victim interests are not being overlooked. It is in this manner that the later chapters of the thesis introduce a move towards the goal of positive peace. The case study of the ICC in Uganda, presented at the end of this chapter, demonstrates the negative peace legacy that has followed the ICC's involvement; thus, challenging claims that the ICC is ensuring lasting peace through accountability.

4.2 International Criminal Law and the Connections between Peace and Criminal Justice

This section argues that the aims of ICrJ and the achievement of a stable peace are inherently linked and cannot be separated. In ICL, the potential to influence peace was conceived as arising through the regulation of rights and the deterrence of prosecutions.[528] The rise of individual rights, and the focus on individual criminal responsibility, was recognised as a crucial element for the development of ICL and the jurisdiction to prevent powerful individuals from acting with impunity within a state. The origins of ICL and its connections with peace were influenced by the work of Kelsen and Lauterpacht, who foresaw the role of ICL in bringing forth a lasting peace through law.[529] Kelsen presented a form of pacifism that trusts in penal instruments; it 'assumes with certainty that the exemplary punishment of a few individuals responsible for war crimes by an international court may act as an effective deterrent in relation to possible future

[528] D Zolo, 'Hans Kelsen: International Peace through International Law' (1998) 9 European Journal of International Law 306.
[529] H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 British Year Book of International Law 1.

wars'.[530] In essence, their arguments present ICL as an alternative tool to prevent future violence through the deterrence which arises from the criminal prosecution of perpetrators of international crimes.

Taking into account the importance of the role of law in achieving peace, Lauterpacht claimed that 'peace is predominantly a legal postulate'. [531] Lauterpacht further explained, 'the reign of law, represented by the incorporation of obligatory arbitration, as a rule of positive IL, is not the only means for securing and preserving peace among nations. Nevertheless, it is an essential condition of peace.' [532] Additionally, as the foundational documents of international criminal tribunals demonstrate, ICL was always seen as having an influence over international peace and security.[533] The purpose of ICL was conceived as enhancing the achievement of international peace and security by holding powerful individuals accountable for their actions.[534] The Moscow and Potsdam declarations, the founding documents for the Nuremberg and Tokyo tribunals respectively, conceived the role of the tribunals 'as part of broader efforts to achieve the overarching political aims of ending the war and establishing peace'.[535] The need to ensure trials and punishment for 'German criminals' was highlighted by governments as one of the terms of the armistice.[536] After all, it was deemed that punishing individuals for international crimes would provide an important impact of strengthening international peace and security.

The allies set up these tribunals after WWII had finished. With a view to preventing the establishment of 'show trials', the determination was made to ensure fair trial rights and

[530] Andrea Gattini, 'Kelsen's Contribution to International Criminal Law' (Social Science Research Network 2004) SSRN Scholarly Paper ID 915667
[531] Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) 305
[532] Ibid Juridically it is a metaphor for the postulate of the unity of the legal system', including the unity of the legal system moving beyond traditional separation of domestic and international law.
[533] Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1 The International Law Quarterly 153.
[534] M Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 Law and Contemporary Problems 9.
[535] Joint Four-Nation Declaration Moscow, 30 October 1943 ('Moscow Declaration')
Proclamation by the Heads of Governments United States China and the United Kingdom Terms for Japanese Surrender Berlin 26 July 1945, 3 Bevans 1204. ('Potsdam Declaration')
[536] Arieh J Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (New edition, University of North Carolina Press 2005).

not allow summary executions.[537] Nuremberg prosecutor Robert Jackson explained this approach as 'stay[ing] the hand of vengeance'.[538] Jackson cautioned, 'we must never forget that the record on which we judge these defendants to-day is the record on which history will judge us to-morrow'.[539] These tribunals did not include a role for victims, as the punishment of individual perpetrators was thought to provide the justice for victims.[540] In light of this, and as discussed below, concern has, however, been raised about the impacts of political influence on the trial, especially the famous dissent of Judge Pal.[541] This provided the basis for ICrJ premised upon criminal law standards; it was considered that providing retributive justice would be enough to strengthen international peace and security.

Following a period in the 1970s and 1980s, in which the policy of amnesties was claimed to be conducive to long term peace and stability, there was a shift towards accountability through criminal trials at the end of the Cold War.[542] This policy of amnesties was considered as allowing a transition to peaceful societies; however, the lack of justice provided to victims was recognised as leading to an unjust peace. Additionally, the terms of the amnesties often benefited the previous elites within society, while maintaining the marginalised groups in their repressive situations. The UN has distanced itself from a policy of impunity for international crimes, instead, considering that 'accountability must be recognized as an indispensable component of peace and eventual reconciliation'.[543]

Following the end of the Cold War there was a resurgence in interest for ICrJ. The 1990s witnessed the creation of the *ad hoc* tribunals of the ICTY and ICTR, established to investigate international crimes by the UN Security Council under Chapter VII of the UN Charter, 'relating to threats to peace, breaches of peace and acts of aggression'.[544] The

[537]The prosecution of war criminals continued with the August 1945 Charter of the International Military Tribunal for Nuremberg (IMTN) and the January 1946 International Military Tribunal for the Far East (IMTFE).19
[538] Opening Statement before the International Military Tribunal November 21, 1945, in the Palace of Justice at Nuremberg, Germany, Justice Robert H. Jackson, Chief of Counsel for the United States, (hereafter Opening Statement Jackson)
[539] ibid
[540] Heller (n 6).
[541] Radhabinod Pal, *International Military Tribunal for the Far East: Dissentient Judgment* (Sanyal 1953).
[542] Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2006).
[543] Dinah Shelton, *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Transnational Publishers 2000).
[544] Christian Tomuschat and others, 'Ch.VI Pacific Settlement of Disputes, Article 33', *The Charter of the United Nations* (Oxford University Press 2012)

resolutions setting up the *ad hoc* tribunals note that the 'prosecution of persons responsible for serious violations of international humanitarian law would contribute to the process of national reconciliation and to the restoration and maintenance of peace'.[545] As stated in the *Tadic* case at the ICTY, 'this concern with peace and security has manifested itself in a retributive prioritization of ending impunity for egregious crimes against the peace'.[546] Unlike the Nuremberg and Tokyo tribunals, which were established at the end of the conflict, the ICTY was established in the midst of an ongoing conflict. The decision of the UNSC to establish the ICTY during the conflict recognised the role the ad hoc tribunal could play in ending conflicts.[547] Akhavan has suggested that accountability may contribute to post-conflict peacebuilding and the long-term prevention of mass violence.[548] In 1995, ICTY Chief Prosecutor Richard Goldstone wrote that what brings peace and justice together is decisions to confront the past, which 'may be crucial to the prospects for future peace and prosperity, the stability of an emerging democracy, and perhaps even the outcome of a war that is still being waged'.[549] The creation of the ICTY in the midst of ongoing conflict led to the beginning of an examination over whether the search for justice could be a hindrance to peace and prolong conflicts. Akhavan, the first legal adviser to the ICTY and ICTR office at the Hague, has examined issues of peace versus justice.[550] He argues that the issue of whether the ICTY achieved these aims in practice is the subject of controversy.[551] These tribunals only included a role for victims as witnesses. However, they recognised that justice for victims is important for peace, and that merely investigating and prosecuting perpetrators is insufficient.[552] Indeed, in a letter from the President of the ICTY to the United Nations Security Council (UNSC), it was highlighted that 'the Tribunal cannot, through the rendering of its judgements alone, bring peace and

[545] UN Security Council, *Security Council resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 25 May 1993, S/RES/827 (1993)
UN Security Council, *Security Council resolution 955 (1994) [Establishment of the International Criminal Tribunal for Rwanda]*, 8 November 1994, S/RES/955 (1994),
[546] Prosecutor v Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.
[547] Simon Chesterman, 'No Justice Without Peace? International Criminal Law and the Decision to Prosecute' (Social Science Research Network 2008) SSRN Scholarly Paper ID 1117222
[548] Akhavan (n 52).
[549] Diane F Orentlicher, 'That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia' (Open Society Justice Initiative 2010)
[550] Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 The American Journal of International Law 7.
[551]Ibid 544
[552] Section 3.4

reconciliation to the region: other remedies should complement the criminal trials if lasting peace is to be achieved, and one such remedy should be adequate reparations'.[553] The concern raised by Clarke, that the ICTY contributed to a negative peace, is further discussed in Chapter 6.[554] Additionally, within the ICTY, the lack of opportunity to provide reparations for victims was considered an additional obstacle in bringing forth peace.[555]

The understanding of the ECCC, between the UN and Cambodian government, was that the prosecutions were undertaken 'in the pursuit of justice and national reconciliation, stability, peace and security'.[556] A further hybrid court, the Special Court for Sierra Leone (SCSL), was established through a bilateral agreement between the UN and Sierra Leone.[557] Again, it has been acknowledged that the role of the court is not merely for ending impunity, but also contributing to the 'process of national reconciliation' and to 'the restoration and maintenance of peace'.[558] The SCSL rejected blanket amnesties put in place by the 1999 Lomé Peace Accord, and assured victims who demanded trials that perpetrators would not receive impunity. [559] In *Prosecutor v Morris Kallon and Brima Bazzy Kamara,* the SCSL overturned amnesty laws finding that, 'where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty'. [560] In Sierra Leone, where conflict resumed after the request for a court was made to the UN Security Council, it was suggested that the court would 'send the right signals to the perpetrators of the violations that they will not continue committing atrocities with impunity'.[561] However, it has also been claimed, in relation to Sierra Leone, that 'those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed

[553] ibid
[554] Clark, 'From Negative to Positive Peace' (n 53).
[555] Discussed in chapter3
While the discussion surrounding root causes issues impacting upon peace within Rwanda, hindering the potential of the ICTR is examined in chapter 7.
[556] Lilian A Barria and Steven D Roper, 'Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia' (2005) 7 Human Rights Review 5.
[557] Section 3.2.1
[558] Chandra Lehka Sriram, 'Wrong-Sizing International Justice - The Hybrid Tribunal in Sierra Leone Transnational Legal Theory and Practice: Essay' (2005) 29 Fordham International Law Journal 472.
[559] S Williams, 'Amnesties in International Law: The Experience of the Special Court for Sierra Leone' (2005) 5 Human rights law review 271.
[560] Barria and Roper (n 556).
[561] Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council S/2000/786 10 August 2000

conflict'.[562] The challenge of seeking peace and justice and the debate surrounding this is discussed further below.

4.3 The ICC: Strengthening Stable Peace

The Preamble to the RS of the ICC states the impact of international crimes and the threats upon stable peace.[563] As with previous international criminal tribunals, the practice of the ICC is believed to be one part of the wider framework within international law focused on achieving peace. This normative framework has evolved within ICrJ, recognising its influence over issues of stable peace as well as justice. As one former president of the ICC has explained, 'the International Criminal Court was created to break this vicious cycle of crimes, impunity and conflict. It was set up to contribute to justice and the prevention of crimes, and thereby to peace and security'.[564] Importantly, as Schabas has argued, 'as a result of their inclusion in the preamble, the 'interests of peace' became germane to the Court's activities, and to policy decisions, such as whom to prosecute'.[565]

The United Nations Security Council (UNSC), under its responsibility for the maintenance of peace and security, is provided the opportunity, under Article 13(b) of the RS, to refer a situation to the ICC.[566] In practice, situations deemed to endanger international peace and security, such as Darfur, Sudan and Libya, have been referred to the ICC by the UNSC.[567] Also, Article 16, 'provides that the UN Security Council (UNSC) may, in a resolution adopted under Chapter VII of the Charter, request the Court to defer (not

[562] William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP Oxford 2012) 187 referencing the report by the Sierra Leone Truth and Reconcilliation Commission .
[563] Preamble Rome Statute of the International Criminal Court.
[564] Sang-Hyun Song President of the International Criminal Court. Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/67/L.1, 19 September 2012.
[565] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., University Press 2016) 42–43.
[566] Article 13 (b) Rome Statute of the International Criminal Court.
[567] UN Security Council, *Security Council resolution 1593 (2005) [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan]*, 31 March 2005, S/RES/1593 (2005),
UN Security Council, *Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya]*, 26 February 2011, S/RES/1970 (2011)
UN Security Council, *Security Council resolution 1593 (2005) [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan]*, 31 March 2005, S/RES/1593 (2005)

commence or proceed with) an investigation or prosecution for a renewable period of 12 months'.[568]

Further, under Articles 17 and 53, the ICC can either monitor a situation, while not initiating trials, or it can initiate investigations and trials.[569] In this context, some have viewed the role of the ICC actually to be a bargaining chip or an incentive to encourage reluctant actors to become involved in peace negotiations.[570] The debate surrounding 'interest of justice' has further addressed the issue of peace being codified within the deliberation of the prosecutor surrounding 'interests of peace'.[571] Bensouda, the current Prosecutor of the ICC, has declared that 'the road to peace should be seen as running via justice, and thus peace and justice can be pursued simultaneously'.[572] While she acknowledged that the Court 'was created on the premise that justice is an essential component of a stable peace', a distinction has been made between the remit of the ICC and the interests of peace. These are within the mandate of other institutions, with a broad mandate for international peace and security and not the responsibility of the court.[573] It is correct to recognise that the ICC is not a 'panacea for all international crimes', and that too high expectations for the ICC bringing forth peace will lead to disappointment. [574] As detailed below, the interplay of the ICC with peace and justice can have negative effects. Therefore, when examining whether the ICC serves the interests of justice, influence on peace and the harmful effects on victims, it is important not to overlook if they are forced into a justice process that they do not want.[575]

On a similar note, the aims of peace and justice can be seen to benefit from the deterrence effect of ICL if it can be proven that the existence of ICL is preventing future crimes. The impact of preliminary investigations is believed to have the potential to allow the early

[568] Article 16 Rome Statute of the International Criminal Court.
[569] Examined in detail in sections 7.3 and 7.4 chapter 7 examines a case study on Colombia, in which the ICC actively monitors a peace processes
[570] Ibid
[571] D Vos and M Christian, 'Contested Justice: All Roads Lead to Rome: Implementation and Domestic Politics in Kenya and Uganda' (2015).
[572] Opinion OP-ED CONTRIBUTOR 'International Justice and Diplomacy' Fatou Bensouda March 19, 2013 https://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html?smid=tw-share&_r=5&
[573]See ICC/OTP, 'Interests of Justice' (Policy Paper), September 2007, available at www.icc-cpi.int/about/otp under 'Policies and Strategies' (accessed 10 January 2019). 31 (OTP, 2007, 8),
[574] Errol P Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Edward Elgar Pub 2010).
[575] Section 4.7

stages of peace processes to develop.[576] This can work by discouraging potential perpetrators from carrying out criminal activities for fear of prosecution.[577] The UN Secretary-General, in particular, highlighted the role that it can play: '[p]unishment builds a safer world, deterring further horrors.'[578] The deterrence element of ICrJ has been promoted by the OTP in respect of instances of child soldiers following the Lubanga case, with the prosecutor referring to the reduction in numbers of child soldiers in Nepal.[579] Importantly, we must assume that, as the practice of the court extends, the deterrent impact of ICL grows. Indeed, the importance of accountability for international crimes is highlighted by Luban, setting out the universal principle that 'there is no society in which gratuitous inflection of the great evils is tolerable'. The ad hoc tribunals discussed the impact that deterrence can have on the wider community; by contributing to a 'social engineering function, through punishment, the likelihood of another person perpetrating such atrocities will diminish'.[580]

An alternative argument in favour of ICL is the preventative effect of trials that could potentially impact upon all states, aiding the creation and maintenance of stable peace. Arguments in favour of criminal law punishment being used as deterrence were developed by the classical school of criminology, and especially in the work of Cesare Beccaria.[581] Many see Beccaria as 'one of the first people to suggest that the essence of crime was the harm that it did to society'.[582] He thought that 'it is better to prevent crimes than to punish them'.[583] This informs the basis of fair trial rights in which it is better to let

[576] OTP, Policy Paper on Preliminary Examinations, 1 November 2013, paras. 94–99 (http:// www.legal-tools.org/doc/acb906/).
[577] For a detailed discussion see inter alia David Bosco, 'The International Criminal Court and Crime Prevention: By product or Conscious Goal', Michigan State Journal of International Law 19 (2011), 163–200; 'Part 4, Deterrence: The Prevention Issue' in Contemporary Issues Facing the International Criminal Court, Richard H. Steinberg (ed.) (Leiden-Boston, Brill Nijhoff, 2016), 184–229.
[578] Report of the Secretary-General In larger freedom: towards development, security and human rights for all UN Doc. A/59/2005 (March 21 2005)
[579]. For example, according to a UN official, the ICC convicting Thomas Lubanga for conscripting child soldiers has deterred others.' Prosecutor v Thomas Lubanga Dyilo (Public Judgment pursuant to Article 74 of the Statute) ICC-01/04–01/06 (7 January 2010) paras 9–10.
[580] Mia Stewart, 'Judicial Lawmaking at the Ad Hoc Tribunals: The Creative Use of the Sources of International Law and "Adventurous Interpretation"' (2010) 70 Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 459.
[581] Cesare marchese di Beccaria, *An Essay on Crimes and Punishments* (WC Little 1872).
[582] Lohne (n 285) 150.
[583] Beccaria (n 581).

the guilty go free than punish an innocent man.[584] Extending the argument in favour of the deterrence effect of criminal law, Jeremy Bentham argued that 'the punishment for crimes committed should not be guided by retribution for the act or harm, but rather by the aim of preventing crime which was viewed as an offense detrimental to the entire community'.[585] Ashworth, notes that Jeremy Bentham assumed all punishment to be a necessary evil and it was justified only insofar as it was necessary for crime prevention.[586] For international crimes, finding adequate retribution is a significant challenge; however, through this understanding of the deterrence effect of ICrJ, it plays an important role in achieving peace.

The lack of accountability and the small number of perpetrators being punished in the ICC also calls into question whether the Court truly is being retributive, and therefore actually has any deterrent effect. Some have argued that ICrJ may have increased the chances for heads of state to be caught, but have left the masses unaccountable.[587] This is particularly true of the limited number of convictions for sexual crimes in the ICC.[588] If the court itself cannot be seen to promote and uphold these elements of ICL, then its expressive capacity is dented. Megret disputes the idea that ICrJ can act as a deterrent on the lower-ranking foot soldiers of a conflict; '[i]t beggars belief to suggest that the average crazed nationalist purifier or abused child soldier will be deterred by the prospect of facing trial'.[589] In the same way, Crawford points out that the dissuasive impact of the international trials is unclear. He suggests that 'truth and reconciliation commissions may be a more effective approach to dealing with atrocities'.[590] In Crawford's emphasis on how the international legal system can effectively respond to atrocities, he points out, by 'not limiting itself to the pursuit of the obvious and already ostracised 'enemies of mankind''.[591] These restrictions to deterrence limit the potential of the ICC feeding into a stable peace.

[584] As discussed in the ICTY PROSECUTOR v ANTO FURUNDZIJA (JUDGEMENT) IT-95-17/1-T 10 December 1998 para 290

[585] Jeremy Bentham 1748-1832, *An Introduction to the Principles of Morals and Legislation* (Dover Publications 2007)

[586] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014) 150.

[587] Mark Osiel, *Making Sense of Mass Atrocity* (Cambridge University Press 2009)

[588] Section 4.4

[589] Frederic Megret, 'Milosevic & Hussein on Trial: PANEL 1: Global or Local Justice: Who Should Try Ousted Leaders?: In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005) 38 Cornell International Law Journal 725.

[590] James Crawford, *Brownlie's Principles of Public International Law* (8th Edition, Oxford University Press 2012) 251.

[591] ibid

Additionally, justice for victims is further restricted through the limits to deterrence in the ICC, as they will not experience peace and will be subject to future violence. This chapter examines the interplay of the different form of justice which can arise through ICL and how these feed into peace. As this thesis argues, negative peace arises where there is no justice within the peace. Therefore, the need for justice from ICL forms an important part of a wider positive peace aspect.

4.4 Justice in ICL

The previous section set forth that the connection between peace and ICrJ is of significance in ICJ, and the importance of ICC to develop stable peace. In order to understand the way that the ICC is working, it is important to deconstruct what justice and peace mean within ICL. This section looks at justice in ICL and argues that the evolution of a narrow retributive justice focus provides only a very restrictive form of justice to a limited number of victims. Besides this, it explores the concerns that ICL is being used as a form of victors' justice.

4.4.1 Retributive justice and individual criminal responsibility

As chapter 3 detailed, the founding principles of ICL were the criminal law values of fair trial rights and retributive justice. One of the earliest examples of this was seen during the discussions in the Nuremberg and Tokyo tribunals. This included that punishing individuals who commit international crimes is the mechanism through which to ensure that international laws are enforced. The importance of punitive justice is eloquently expressed in Jackson's famous quote, 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[592] For victims who have no form to pursue justice through their domestic legal system, often because their government is perpetrating the crimes, ICL provides a pathway toward accountability. As David Luban explains, this development demonstrated the importance of 'speaking law to power, [which] is the major point of ICJ [international criminal justice]… The radical goal of ICJ is a moral transformation of how ordinary men and women regard political violence against

[592]Opening Statement Jackson (n565)

civilians.'[593] If we look at the current case law from the ICC, we can see that it understands that retributive justice arises through penal sentences and includes the requirement that the guilty party pays reparations to the victims.[594]

In the evolution of ICL, the principle of individual criminal responsibility facilitated the breach of the long-prized state sovereignty barrier, upheld after the Peace of Westphalia. This devolvement has been hailed as a counter-hegemonic development of IL, in which powerful individuals can no longer act with impunity and heads of state can stand trial for crimes that have occurred within their state. The rise of individual rights queries the understanding that 'states are endowed with a legal understanding which sets them apart from all others'.[595] Prior to this, only the state was recognised as a legal person under international law, and all other entities, such as groups, natural persons and individuals, were objects of the law.

Lauterpacht determined the manner in which IL could move beyond the barrier of state sovereignty, through an international criminal court in which individuals are held responsible for criminal acts. He sets out:

> It is the current personification of the State, which artificially distinguishes between the association and the members comprising it, that has been a contributing factor in suggesting that anarchical principle of legal and moral irresponsibility.[596]

Lauterpacht conceived 'the adoption of the principle of international criminal responsibility of the individuals to whom liability for the criminal act can feasibly be traced'.[597] He recognised the importance of punishing individuals for war crimes; this is in contrast to a state which cannot have criminal intent nor be the object of criminal punishment.[598] However, this form of punishment should act in accordance with IL

[593] Luban (n 27).
[594] See chapter 3
[595] Nouwen (n 112) 328.
[596] M Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law' (2004) 2 Journal of international criminal justice 810, 16.
[597] Hersch Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht : 2 : The Law of Peace : Part I : International Law in General*, vol 2 (University Press 1975) 75.
[598] H LAUTERPACHT, 'THE LAW OF NATIONS AND THE PUNISHMENT OF WAR CRIMES' (1944) 21 British yearbook of international law 58.

standards to ensure it is a just punishment. He perceived the establishment of an international criminal court as providing the requisite guarantee of impartiality.[599] However, he considered that a quasi-international court could provide impartiality and act as an effective substitute. It is through the form of ICrJ that just punishment will be carried out, following standards of due process and fair trial rights. This should, in theory, lessen the risk of victors' justice and provide legitimacy to the ICrJ system, preventing criminal justice from being abused for personal interests.

The need for punishment is demonstrated countless times throughout history and reflected in the idea that the impunity following the Armenian genocide influenced Hitler.[600] Indeed, the theory of retributive punishment, set forth by Kant in the Metaphysics of Morals, viewed the law of punishment to be a categorical imperative for society with a deontological value of punishment.[601] Kant argued that punishment is required to recognise evil regardless of the effects on offenders, victims, communities or societies.[602] Retribution has been understood to be an end to impunity and the punishment of wrongdoing, and, similarly, as an important tool to ensure that justice can be seen to apply to all, even the powerful.[603] Scholars who clarify this achievement in IL, such as Gerhard Werle, argue, 'the collective nature of crimes under international law does not absolve us of the need to determine individual responsibility'.[604] Katharina Peschke explains that the focus on individual criminal responsibility is an asset of ICL, to ensure that even the mighty will experience retributive justice.[605] The first Prosecutor of the ICC underlined the power of retributive justice to influence peace, stating, 'there is no tension between Peace and Justice in Uganda: arrest the sought criminals today, and you will have Peace and Justice tomorrow'.[606] However, while providing accountability is an

[599] ibid.
[600] Vahakn N Dadrian, 'The Historical and Legal Interconnections between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice' (1998) 23 The Yale journal of international law 503.
[601] Immanuel Kant and Roger J Sullivan, *Kant: The Metaphysics of Morals* (Mary J Gregor ed, 2Rev Ed edition, Cambridge University Press 1996) 473.
[602] Immanuel Kant, 'Kant: Idea for a Universal History from a Cosmopolitan Point of View 1784. Translation by Lewis White Beck. From Immanuel Kant, "On History," The Bobbs-Merrill Co., 1963.'
[603] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3 edition, OUP Oxford 2013) 18.
[604] Jeßberger and Werle (n 387) 15.
[605] Katharina Peschke, 'The ICC Investigation into the Conflict in Northern Uganda: Beyond the Dichotomy of Peace versus Justice'.
[606] Moreno-Ocampo, L., 2007. 'Statement at the Eleventh Diplomatic Briefing of the International Criminal Court', The Hague, 10 October

important part of achieving peace, the examination of the ICC involvement in Uganda, discussed below, demonstrates that this may lead to the creation of an unjust peace.[607]

Reference to victims' interests in the search for retribution was made in the ICTY case of *Nicolić* when it was understood as 'recognition of the harm and suffering caused to the victims' and 'a clear statement by the international community that crimes will be punished and impunity will not prevail'.[608] This importance is often highlighted through the statement, 'justice is seen to be done when it is seen in the eyes of the victimized population'.[609] Following this, as discussed in Chapter 2, ensuring victims receive justice is an important tool of legitimacy for ICrJ.[610] Surveys of victims of atrocities indicate that many believe it is important to hold accountable those who commit crimes; however, accountability can occupy a lesser priority than measures to improve the immediate material concerns of victims.[611] Vinck and Pham concluded that 'respondents overwhelmingly cited the need for improvements to economic and social welfare'.[612] As such, wider justice issues including reparative justice and social justice are important issues for victims as well. This will be discussed in the next section below.

4.4.2 Selectivity and victors' justice

As detailed above, retributive justice is a very important element of ICL but the realities of selectivity, limited numbers of trials, accusations of bias and perceived lack of neutrality in the law have led to only a very limited number of victims experiencing any form of retributive justice.

While the basis for retributive justice is premised upon the value of punishment, we have to ask what form of punishment could be judged adequate for international crimes? In determining the adequate response for genocide or crimes against humanity, Henham

[607] See section 4.7
[608] Prosecutor v. Momir Nicolić (Sentencing Judgment) IT-02-60/1-S (2 December 2003)
[609] Alina Balta, Manon Bax and Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations Within the ICC System' (2019) 29 International Criminal Justice Review 221.
[610] See section 2.2
[611] Patrick Vinck and Phuong N Pham, 'Building Peace, Seeking Justice: A Population-Based Survey on Attitudes about Accountability and Social Reconstruction in the Central African Republic'
[612] Ibid
Although the ability of surveys to demonstrate an unbiased picture of the justice demands of victims has been queried

recognises that it is impossible to conceive an appropriate form of retributive punishment for these crimes, as they have no equal. He continues, 'no punishment from an international tribunal or court could appear sufficiently retributive for these forms of mass crimes'.[613] Arendt examines whether there is a form of retributive punishment suitable for perpetrators of international crimes, arguing that 'men are unable to forgive what they cannot punish and are unable to punish what turns out to be unforgivable'.[614] As Arendt details, while the punishments available to ICL may appear insufficient in the face of international crimes, they are the punishments available through ICrJ.[615] Chapter 3 detailed the fact that victims were disappointed by lenient sentences at the ICC; nonetheless, they received some form of retributive justice, alongside the procedural and reparative justice included within the practice of the court.[616] The importance of alternative justice options in the face of limited retributive justice for victims is examined further below.

In a court of last resort, with a limited number of people standing trial, selectivity is required, and prosecutorial strategy will inevitably include only the, potentially, strongest cases. However, fears have been expressed that the ICC has a disproportionate focus on the prosecution of rebels, due to the dependency of the ICC on a working relationship with governments. Similarly, the lack of trials for perpetrators of non-African origin has led to accusations of a pro-Western bias at the ICC. Cryer presents how issues of selectivity occur due to limited resources of the ICC, political influences of State Parties, and the disjointed relationship the court has with the Security Council – damaging legitimacy claims of the court.[617] He understands the impact upon the ICC's ability to take a victim-centric perspective that leaves certain harms 'unrecognised and without redress' which damages the presentation of a victim-centric perspective.[618]

The accusation that ICL is utilised more as a political tool was raised as early as in the Nuremberg Tribunals when the accusation of victors' justice was levelled at the court.

[613] HENHAM (n 417). 94
[614] Hannah Arendt 1906-1975, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Rev and enl, Penguin Books 1994) 76
[615] ibid
[616] See sections 3.4 and 3.5
[617] Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (University Press 2005) 33.
[618] ibid

Indeed, Judge Pal's famous dissent at the Tokyo tribunal challenged the validity of the entire tribunal due to the natural law influence over the elements of international crimes, which he argued did not apply to the Japanese.[619] Kelsen has suggested that the Nuremberg tribunal demonstrated victors' justice, with no Allied state members tried for their actions.[620] Declaring that '[p]unishing war criminals should be an act of justice and not the continuation of hostilities through formally legal instruments aimed in fact at satisfying a thirst for revenge'.[621] In essence, Kelsen meant that it was incompatible with the idea of justice for only the defeated states to be obliged to subject their citizens to the jurisdiction of an international court for the punishment of war crimes. Damaska puts forward that the influence of victors' justice strengthens the argument that only 'weak states' or losers of a conflict are subjected to prosecutions, this extends the criticism of hegemony within the ICrJ system.[622] In much the same way, the ad hoc International Tribunals have been criticised for their political influence, with the suggestion that they have been used to promote one side over another. For example, in the International Criminal Tribunal in Rwanda (ICTR), alleged crimes carried out by the Tutsis were not placed on trial, and the focus was limited to crimes perpetrated by Hutus.[623] At the end of this chapter, the discussion on Uganda highlights how this problem appears to be in line with ICC practice, in that rebel forces have faced investigations into their alleged crimes, while government forces have not experienced the same investigations.

Criticisms against the neutrality of ICL highlight that standard rule of law arguments can, in fact, have the impact of masking the lack of neutrality and bring with it further problems.[624] Its rules, of due process and even-handed treatment of the accused, appear to be governed by impartial proceedings, involving a neutral application of legal rules and judicial principles to adjudicate social conflict, removing the political element from the equation.[625] Judith Shklar questions the assertion that the law is an ultimate recourse for victims of mass atrocity. For her, 'theories of law ... have been devised almost exclusively

[619]Pal, RB (1953) International Military Tribunal for the Far East: Dissentient Judgment. Calcutta: Sanyal and Co.
[620] Kelsen (n 533) 217.
[621] ibid
[622] Damaska (n 114). 361
[623] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Fountain Publ 2001).
[624] Vasuki Nesiah, 'Doing History with Impunity' in DM Davis, Karen Engle and Zinaida Miller (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016)
[625] Tor Krever, 'Ending Impunity? Eliding Political Economy in International Criminal Law'.

by lawyers ... who agree on nothing but in taking the prevalence of legalism and of law for granted'.[626] Nunn alludes that the trial reproduces society's image of itself, expressing 'fundamental notions about justice and injustice, right and wrong, law-abiding and crime'.[627]

Critics argue that this claim of neutrality is an illusion, and that the creation and application of the law cannot be divorced from politics and the agendas of actors. The limitations of the emphasis on individuals have been an issue within ICL on account of the focus of individual criminal responsibility (ICR) for international crimes and the experience of mass numbers of victims of the crimes.[628] Koskenniemi argues that the depoliticisation developed from individualisation is deliberate, narrowing historical inquiry, the role of the state or the culpability of the wider population.[629] As Koskenniemi puts it, 'the meaning of historical events often … can be grasped only by attention to structural causes, such as economic or functional necessities, or a broad institutional logic through which the actions by individuals create social effects'.[630] The ability to label one individual as an 'enemy to all mankind' is similarly a powerful rhetorical device; nonetheless, it fails to recognise the many others involved, carrying out international crime themselves or benefiting from the situation.[631] This belief, which echoes the statements of the prosecutor at the ICC, portrays the complex reality in unrealistically simplistic terms, not recognising the structural causes or state responsibility.[632] Further, as detailed in Chapter 6, holding one individual perpetrator accountable for an international crime does not recognise the issue of collective accountability nor provide accountability for the many other perpetrators who will not stand trial for international crimes.[633]

[626] Judith N. Shklar, *Legalism: Law, Morals and Political Trials* (Harvard University Press 1986).
[627] Kenneth B Nunn, 'The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process - a Critique of the Role of the Public Defender and a Proposal for Reform' (1995) 32 The American criminal law review 743.
[628] Mark A Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2004) 99 Northwestern University Law Review 539.
[629] Martti Koskenniemi, 'Between Impunity and Show Trials' 6 : 2002 Max Planck yearbook of United Nations law S.1.
[630] ibid
[631] M Cherif Bassiouni 1937, *Crimes against Humanity in International Criminal Law* (1992)
[632] Hannah Arendt 1965, Banality of Evil
[633] IBID

Feminist critiques have highlighted that the belief in the neutrality of the law masks that it generally bypasses the interests of women. This was initially witnessed through the Tokyo tribunals, in which the omissions of particular categories of victims in the judgment, such as (for the most part) the 'comfort women', have led to the raising of those issues in other fora, such as the Women's International War Crimes Tribunal on Military Sexual Slavery.[634] Feminist scholarship demonstrates that, in the context of sexual violence in conflict situations, victims are normally not consulted on 'form, scope, and modalities that would be meaningful to them as individual women seeking accountability for harm [that] is done to them'.[635] As such, ICrJ fails to sufficiently consider conflict-related sexual violence by advocating a pro-prosecution 'end impunity' approach.[636] To date, only in the recent Ntaganda case has an individual been convicted of sexual crimes within the ICC.[637] This has raised obvious concerns that the important case law from the ad hoc tribunals, especially the recognition from the ICTR on how sexual violence can be an act of genocide, is not continuing through the practice of the ICC. The Lubanga case illustrates the dark reality of this, when victims have expressed disappointment that these crimes were not investigated and have felt let down by the acquittal of Bemba on appeal.[638]

Justice in ICL is limited because of the nature of ICL, the complexity of international crimes and the mass numbers of victims. Therefore, the goals and aims of traditionally criminal justice cannot fully apply within ICL. The standards of retribution will similarly not have the same impact, because they are limited through selectivity and by the number of perpetrators who will stand trial. Notably, the limited opportunity of victims to seek retributive justice is problematic because it leaves them without redress for the wrongs suffered. Even further, their possibilities are limited because few cases go onto international criminal tribunals, under the principle of complementarity. In addition to this, the retributive element of reparations comes from the payment being made by a convicted perpetrator and the victims receiving awards for the harm they have suffered.

[634] Kelly D Askin, 'Comfort Women - Shifting Shame and Stigma from Victims to Victimizers' (2001) 1 International Criminal Law Review 5.
[635] Tonia St. Germain and Susan Dewey, 'Justice on Whose Terms? A Critique of International Criminal Justice Responses to Conflict-Related Sexual Violence' (2013) 37 Women's studies international forum 36, 340.
[636] ibid
[637] Ntaganda Judgement (n392)
[638] Section 3.3

As Chapter 3 introduced, the issue of indigent perpetrators has meant that thus far reparations payments will often be paid through the TFV based upon donations.

4.5 Justice for Victims

The limited impact of a narrow focus on retributive justice leads to a failure, in practice, to live up to the promise of the RS, providing justice for victims and aiding the achievement of peace. This section argues that a victim-orientated approach is essential to broaden the understanding of justice in ICL and make it a more effective tool for peace.

4.5.1 Justice for victims in the RS of the ICC

While the development of ICL through the growth of the focus on the individual has provided a mechanism to seek accountability for perpetrators of international crimes, it may not provide the best understanding of justice for large numbers of victims. As introduced above, there are limited opportunities for victims to seek retributive justice due to selectivity. For example, the decision not to investigate the government of Uganda for alleged crimes has been criticised as an injustice by victims' groups.[639] In practice, the challenges of achieving justice for victims require an examination of whether retributive justice, based upon individual criminal responsibility, is fit for purpose. While the victims' regime of the RS of the ICC includes the potential for procedural and reparative justice alongside retributive justice, how far is the practice of the court living up to the victim-centred promise of the RS? If reparations judgments are determined in a manner contrary to an individual victim's wishes or are not paid before many years after the award is made, how can they achieve reparative justice through the court? Likewise, the opportunity to experience procedural justice, as discussed in Chapter 3, does not necessarily arise from a criminal trial influenced by adversarial standards. Thus far, participation has not been meaningful, does not give victims a chance to tell the detailed truth of what occurred, and reparations judgements are often collective.

[639] Section 4.7

What justice options are available for victims whose cases are not selected for trial? These victims cannot receive remedy if the court has decided not to investigate alleged crimes or if prosecutorial strategy determined it was not in the interests of justice.

Additionally, not all victims may wish for criminal forms of justice, some may wish to pursue redress through alternative justice procedures. This is especially true for victims who prioritise an accurate historical record or a process of truth-telling, apologies and individual compensation. Still, and as Chapter 3 demonstrates, the current practice of victims' participation and reparations does not meet victims' justice needs.

Meanwhile, the Universalist conceptions of justice developing from ICL can be very different from those sought by victims. Clarke explains that the popular presumption today is that to utter the words 'victims want justice' is the equivalent to assume that 'victims want adjudication' to address their grievances.[640] Clarke illustrates the chasm between ICL practice and the forms of justice sought by victims with the quote 'we asked for justice, you bring us law'.[641] This is especially true for those victims who do not equate justice with law in a similar manner to ICL normative standards.[642] Clarke has presented this through a study on the different conceptions of justice within African countries, which highlights the complexities of legal pluralism.[643] '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'.'[644] Moreover, 'traditional' justice procedures may be sought by victims following cultural practices which they recognise and support, in contrast to ICL. As Allen presents, '[t]here is a balance in the community that cannot be found in the briefcase of the white man'.[645] A wide variety of standards and forms of justice are applicable within the wide range of cultures impacted by international crimes. If justice for victims is, in fact, a mandate for the ICC, then the forms of justice sought by victims need to understood, especially as they may not wish for criminal justice at all.

[640] Clarke, '"We Ask for Justice, You Give Us Law"' (n 29) 195.
[641] ibid

[642]ibid
[643] ibid
[644] ibid
[645] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Zed Books 2006). 87

As Chapters 5 and 6 examine, the individualistic focus of ICL impacts upon the recognition of the structural character of oppression through control and dominion, or through unfair structural practices. This provides the victims of these forms of oppression with a significant hurdle in having their victimhood recognised and creates a barrier in aiding societies to move beyond oppressive peace. Susan Marks argues that critiques of ICL are motivated by the 'sense of injustice, a wish to break down barriers to the enjoyment of social goods'.[646] Critically, they provide important guidelines on what a rearticulation of ICL would need to address to strengthen its claims to seek justice for victims. Later, Chapter 6 will expand upon these theories of distributive justice in which issues of political and economic injustice are included. Sen's *Idea of Justice* seeks a broad theory of justice aiming to enhance justice and remove injustice, concerning policy responses to famine are possible, 'even if we are unable to identify the perfect justice'.[647]

In the same way, a belief in the need to sequence peace before justice does not guarantee that peace will be achieved.[648] In the practice of Amnesties, the traditional process of amnesty involved two groups of men with guns granting amnesty to each other, leaves out a significant group of victims from the process.[649] This creates the risk of an oppressive peace, which does not lead to lasting, stable peace. However, as discussed below, the influence of ICrJ does not automatically lead to lasting peace nor to a significant voice for victims in the process.[650] Chapters 2 and 3 demonstrated that the influence of victims is significantly limited within ICL, through both the jurisprudential practice of the ICC and through the conception of victims. The many groups who claim to speak on behalf of the victims can use this while not presenting the realities of victims' interests. Importantly, then, these complexities should be carefully analysed in each specific situation, with a detailed analysis of the interests of victims on the ground and their search for justice being carried out; and, equally, should the influence of international organisations or top-down perspectives not take priority over the victims' interests. This includes the challenges that have developed through 'traditional justice procedures', in

[646] Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (University Press 2003) 121.
[647] Amartya Sen, *The Idea of Justice* (Allen Lane 2009) 50.
[648] Recognised through the Amnesty discussion above and below.
[649] Kieran McEvoy and Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy' (2012) 39 Journal of law and society 410.
[650] Section 4.7

which community leaders may speak on behalf of victims. Given all this, one should not forget that, in the situations in which men hold the vast majority of positions of influence, the interests of female victims are not at all accurately represented.[651]

4.5.2 Restorative vision of justice

Restorative justice considers the broader nature of crime; it encompasses a variety of practices at different stages of the criminal process, alongside transitional justice approaches, distinct from criminal justice models.[652] According to Menkel-Meadow, restorative justice is the name given to a variety of different practices, including, 'apologies, restitution, and acknowledgments of harm and injury, as well as to other efforts to provide healing and reintegration of offenders into their communities, with or without additional punishment'.[653] Van Ness has presented the elements of accountability, which can arise from restorative justice procedures, taking on different forms from the criminological understanding of accountability; although, these alternatives may be more suited to the needs of specific victims.[654] The *Mato oput* process in Uganda, an *Acholi* justice mechanism, has been suggested as a restorative justice alternative to ICrJ, in which 'healing' is sought after the truth has been revealed.[655] Notably, this has been recognised for its reconciliation capabilities.[656]

As set out in Chapter 2, the growth of victimology also recognised the need for alternative restorative justice procedures which place the victim in a more central position than criminal justice.[657] The influence of restorative justice in the practice of the ICC has been discussed by the president of the court and in the opinions of the judges.[658] Judge Sang-Hyun Song said that the 'Rome Statute and the ICC bring retributive and restorative justice together with the prevention of future crimes'.[659] Paul Roberts examines the idea of

[651] Section 7.6
[652] Kathleen Daly, 'What Is Restorative Justice? Fresh Answers to a Vexed Question' (2016) 11 Victims & Offenders 9.
[653] Carrie Menkel-Meadow, 'Restorative Justice: What Is It and Does It Work?' (2007) 3 Annual review of law and social science 161, 25.
[654] D Van Ness, 'Accountability' in Jennifer J Llewellyn and Daniel Philpott (eds), *Restorative Justice, Reconciliation, and Peacebuilding* (Oxford University Press, Oxford University Press USA - OSO 2014).
[655] Allen (n 645).
[656] ibid
[657] **Section 2.3**
[658] Findlay and Henham (n 18).
[659] ICC President speech (n 552)

restoration, which may be more suited to ICrJ than domestic legal systems as part of the justice picture, by suggesting, 'restorative justice bring[s] a restoration of peace to a community, which has experienced violence'.[660] This may be especially suited to ICrJ and the challenge of mass victims and international crimes.

The discussion surrounding restorative justice, which may not include standard criminal justice procedures, is believed to provide a victim-centred approach where the needs of the victims are included carefully. Restorative justice is not identical to victim-centred justice. This thesis argues that some forms of restorative justice have encouraged victims into a reconciliation procedure when they would rather have followed a more retributive pathway.[661] Nonetheless, restorative justice provides a wider variation of justice options and procedures for victims, and can contribute to reconciliation. Restorative justice is a form of justice based upon restoring victims and their communities or between victims and perpetrators. It includes a wider range of restorative processes seen to provide moral and emotional benefit to victims.[662] Roberts suggests that '[r]estorative justice is an international phenomenon'. This includes aspects of:

> Cultural borrowing, cross-fertilisation of ideas and practices between jurisdictions, and – more recently – explicitly supra-national initiatives are prominent characteristics of the RJ movement ... RJ is invested with the most extravagant hopes for penal (and broader social) transformation.[663]

Restorative justice encompasses a reconciliation aspect in the context of criminal justice systems, in contrast to the retributive or punitive justice traditionally associated with common law.[664] Llewellyn and Phillpott connect restorative justice and reconciliation as relational concepts of justice, seeking a transformation of relationships in a manner potentially better than what had previously existed, to a state of peace or positive relationships.[665] Fattah explains that this focus on strengthening and maintaining severed

[660] Paul Roberts Restoration and Retribution in International Criminal Justice: An Exploratory Analysis In, Andrew Von Hirsch, Julian V Roberts and AE Bottoms, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing 2003). 119
[661] Section 7.9
[662] Wright (n 154).
[663] Von Hirsch, Roberts and Bottoms (n 660) 24.
[664] Janine Natalya Clark, 'The Three Rs: Retributive Justice, Restorative Justice, and Reconciliation' (2008) 11 Contemporary Justice Review 331.
[665] IBID

bonds provides a focus away from notions of vengeance, which victims' rights advocates may prioritise if the victims seek punitive retributive punishments. He continues that 'to both victim and offender it replaces the current policies of exclusion by a policy of inclusion and insists that victims should regain control of their conflicts'.[666]

McCarthy has looked at the aim of restoring the victim in ICL through reparative justice, which is sometimes described as restorative justice, in the manner of remedying the harm.[667] This could also suit the aims of reparative justice, explained in Chapter 3, returning victims to their prior situations or remedying the harm caused and repairing victims to the extent that this is possible. The proposition that the ICC's practices mete out restorative justice to victims has emerged sporadically through the work of the TFV and could, in future, be expanded through reparations jurisprudence from the ICC.[668] Additionally, as discussed by Villa-Vicenio in relation to South Africa, reparations can take on a deeper significance beyond providing restitution for what the victims have lost; also contributing to the restoration of relationships.[669] Restoration addresses the broader nature of crime; it encompasses a variety of practices at different stages of the criminal process. An important restorative justice dimension has been provided within the ICC through the inclusion of participation rights within the victims' regime of RS. Mirroring principles of restorative justice, the ICC allows the possibility of victims having their representatives participate in trials, which presents victims with an opportunity to 'play an active part in proceedings'.[670] The trials can provide an empowering and 'cathartic experience for victims', producing accurate historical records, in which they are no longer passive observers.[671] It has, therefore, been argued that the participation of victims may aid the establishment of the truth, aid the judges to obtain a clearer picture and 'offer a human perspective on the events being described throughout the proceedings'. [672]

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[666] Ezzat Fattah, 'Victimology's Debt to Nils Christie: The Outlasting Legacy of a Free Thinker' (2016) 19 Temida 227.
[667] McCarthy (n 429).
[668] **ibid**
[669] C Villa-Vicencio, 'Pursuing Inclusive Reparations Living between Promise and Non-Delivery.' in Jennifer J Llewellyn and Daniel Philpott (eds), *Restorative Justice, Reconciliation, and Peacebuilding* (Oxford University Press 2014).
[670] Sara Kendall, 'RESTORATIVE JUSTICE AT THE INTERNATIONAL CRIMINAL COURT' (2018) 70 Revista española de derecho internacional 217.
[671] Stahn, Olasolo and Gibson (n 4).
[672] Claire Garbett, 'The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court' (2013) 16 Contemporary Justice Review 193.

It is important to ensure that victims are not forced down a restorative justice path when they would rather seek punitive justice. This was discussed in the South African context and is especially relevant in relation to international crimes. In Ashworth's analysis of domestic criminal proceedings, he expressed concern that an excessive burden is placed upon the victims in the context of restorative justice procedures – in which a power imbalance can arise in the midst of the procedures which do not have the same protections included for victims in trials.[673] These included that, while providing restorative justice processes is an important tool for ICL, they should occur alongside trials and reparations processes. This thesis will analyse the practical implications of this complementarity approach in Chapters 7 and 8.

4.6 Deconstructing Justice within Peace in ICL

In a similar way, the understanding of peace in IL have evolved under a narrow scope which has implications for the ability of the ICC to contribute to stable peace in practice. The term 'peace' is utilised by different people to justify or explain their actions. While it can be presented as an immutable value, this fails to recognise the polemic nature of peace.

4.6.1 'Paradox' of peace: positive or negative

Historically, different understandings of peace have ranged from absolute pacifism, rejecting all forms of violence, to the paradox of perceiving a 'civilising' mission of war, to bring peace to those peoples deemed 'savage or barbarians'.[674] Examining notions of peace throughout history, it is hard not to overlook that peace can be presented in many forms, depending on the aims and intentions of the parties who claim to seek peace.[675] The justice included within peace, similarly, takes on many forms. For example, the just war theory examines the justice of a state's recourse to war based upon *justa causa,*

[673] Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 The British Journal of Criminology 578.
[674] Thomas Hippler and Miloš Vec (eds), *Paradoxes of Peace in Nineteenth Century Europe* (Oxford University Press 2015)
[675] ibid

without examining the justice of the peace.[676] On the other hand, the Roman conquest 'seeking to civilise' other nations imposed a brutal system of justice.[677]

Within the field of peace research, Galtung set out a distinction between negative peace, concerned with the absence of direct violence, and positive peace, a broader understanding of peace including various justice elements such as cultural, social and epistemic.[678] Positive peace recognises the need to examine the root causes of conflict and presents the impact of structural violence embedded within societies. Bassiouni claims that 'peace is not merely the absence of armed conflict; it is the restoration of justice, and the use of law to mediate and resolve intersocial and interpersonal discord'.[679] This recognises the need for justice within peace; without it the form of peace becomes unjust, merely focused on the removal of direct violence, defined as negative peace within Galtung's theory.

Balliet explains the understanding of negative peace in IL:

> The negative peace approach focuses on the prevention of armed conflict; it advocates non-violent dispute resolution and condemns the unlawful use of focus or violence. Traditionally, it has generally applied at the international level referring to interstate relations, but it is now increasingly directed also at intrastate armed conflict and violence… Even in relation to negative peace there is a significant range of approaches, which can be categorized according to their emphasis on pacifism. Principled pacifism is the absolute belief in non-aggression and non-violence with no exceptions permitted whatsoever … Realistic pacifism on the other hand, accepts exceptions, primarily those contained within the UN Charter.[680]

Balliet details that:

> While negative peace refers to the 'absence of' something (namely war and

[676] Gregory M. . Reichberg, 'Just War and Regular War: Competing Paradigms'.
[677] Kenneth Pomeranz, 'Empire & "Civilizing" Missions, Past & Present' (2005) 134 Daedalus (Cambridge, Mass.) 34.
[678] section 6.2
[679] Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (n 534) 9.
[680] Cecilia M Bailliet, 'Introduction: Researching International Law and Peace' [2019] Research Handbook on International Law and Peace 5

violence), positive peace refers to the 'presence of' something. As articulated by Galtung, positive peace calls for the presence of cooperation between people and states and the 'integration of human society'.[681]

Concepts of justice in peace studies, and structural violence as an injustice on a societal level, are distinct from the person-person justice that is usually dealt with in criminal proceedings.

4.6.2 Evolution of concepts of peace within IL

The creation of ICL demonstrated how far the normative framework of peace in IL has moved beyond the focus of inter-state peace and the sovereignty of states, as codified within the Peace of Westphalia in 1649.[682] Following World War II (WWII), a significant shift occurred in the international legal framework of peace. The illegality of war was enshrined in the UN Charter, outlawing the use of force except for in the specific exceptions included under Article 51 and within Chapter VII.[683] This followed the developments post WWI when the Kellog-Braind Pact outlawed the absolute power to resort to war.[684] However, the collective interstate focus on punishment of Versailles and the efforts of the League of Nations, the Permanent Court of Arbitration, was insufficient to prevent the outbreak of WWII. [685] In contrast to the previous interstate 'law of war', the 'laws of peace' focus of IL, post-WWII, has seen an increased focus on civil war and internal armed violence.[686] Historically, these forms of 'civil strife' would not have fallen under the jurisdiction of IL as they were considered an intrastate matter. The IL focus was on interstate peace and not internal peace matters.[687] Additionally, through the anti-impunity focus of ICL seeking accountability for individual criminal responsibility, there

[681] ibid 9
[682] Stephen C Neff, *War and the Law of Nations: A General History* (1 edition, Cambridge University Press 2008) 89.
[683] Malcolm N. . Shaw, *International Law* (7th ed., University Press 2014).
[684] Briand-Kellogg Pact, Treaty Between
the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy (Paris, 1928), which condemned 'recourse to war for the solution of international controversies'. It was ratified by 62 nations
[685] Covenant of the League of Nations (Paris, 29 April 1919).
[686] Yoram Dinstein, *War, Aggression and Self-Defence* (5 edition, Cambridge University Press 2011).
[687] Stephen C Neff (ed), 'War as Law Enforcement (to 1600)', *War and the Law of Nations: A General History* (Cambridge University Press 2005)

has been a move beyond the collective state-led approach to punishment taken at Versailles following WWI.

4.6.3 War as punishment in the Law of Nations

The just war approach to IL, set out by Aquinas and Augustine, saw a clear distinction between peacetime and wartime.[688] In this period, the peace imposed by the victors, who claimed *justa causa,* often resulted in an oppressive form of peace in reality. As Neff explains the just war tradition:

> [It] was notably lacking in any idea of moral equivalence, or equality of rights, between a just and an unjust moral belligerent. The unjust side, by definition, had no right whatsoever to use force against the just side, any more than a criminal has a 'right' to use violence against a magistrate.[689]

This recognised the role of war as punishment by a rightful authority. The noble principles of Just War have been challenged by those who recognise that it was the side that won who successfully claimed *justa causa*. Though, if the losing side had succeeded militarily, they would have equally successfully claimed *justa causa*. On this basis, it appears the issue was not the side with just cause, and justice on their side, but rather superior military might.[690]

Moving away from medieval principles of IL influenced by divine law, the father of modern IL, Vitoria, set out key principles of rights of ownership based on natural law principles.[691] Examining just cause and just war, Vitoria added the rights and obligations arising from *jus gentium* rules.[692] With work concerning the recognition of individual rights, Vitoria examined questions surrounding the conquest of the Americas. This work on the rights of the 'Indians' (a term used to signify the native peoples of the Americas) took into account the existence of natural rights that are equal for all peoples.[693] Vitoria

[688] Neff, *Justice Among Nations* (n 158).
[689] Neff, 'War as Law Enforcement (to 1600)' (n 687).
[690] ibid
[691] David Kennedy, 'Primitive Legal Scholarship' (1986) 27 Harvard international law journal 1.
[692] ibid
[693] José María Beneyto and Justo Corti Varela, *At the Origins of Modernity: Francisco de Vitoria and the Discovery of International Law*, vol 10 (Springer International Publishing AG, Springer International Publishing, Springer 2017).

included the right to travel and trade freely as a just cause that can be defended with force. The connection between just war and the right to trade freely followed the work of Suarez who concluded, 'it has been established by the *jus gentium* that commercial intercourse shall be free, and it would be a violation of that system of law if such intercourse were prohibited without reasonable cause'.[694] Even so, this led to a belief within the international legal system of the justice of the conquest of the Americas, which is analysed further in Chapter 5.

The evolution of IL, developing through the law of nations, thought of war as a tool of justice to be used by states that would lead to international peace. Indeed war was geared to achieving a better peace, some have argued. The Treaty of Westphalia, ending the 30 years' war, prioritised the sovereignty of the nation state, ensuring inter-state peace and maintaining non-interference in internal affairs.[695] This treaty recognised the sovereignty of the United Netherlands state and the Dutch colonial possessions.[696] There was a clear distinction, set out by Grotius, between the 'laws of peace and laws of war'.[697] Jens explained how 'war is widely conceptualised as an act of law enforcement between morally unequal parties through which legitimate authorities could impose law on their subjects and punish evildoers for their transgressions of these laws of war'.[698] As Alex Bellamy explains, Grotius's work led 'to an understanding of international law that attempts to normalize war as a part of the international system'.[699] Howard recognises the extensive nature of the legality of war. He presents how the idea of war as taking the form of a lawsuit can be found in the law of nations 'from Grotius to Smith'.[700] Bellamy sums up this approach:

> Grotius believed that war itself was neither inherently right nor wrong. Correctly used, it could be an instrument used by rational people to preserve society.

[694] Francisco Suárez, *The Classics of International Law: 20 2 : Selections from Three Works of Francisco Suárez The Translations*, vol 20 2 (Clarendon Press 1944) 347.
[695] Neff, Justice Among Nations (n 158). Ch3
[696] China Miéville, 'The Commodity-Form Theory of International Law: An Introduction' (2004) 17 Leiden Journal of International Law 271.
[697] Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations* (Nabu Press 2010).
[698] Jens Bartelson, *War in International Thought* (Cambridge University Press 2018) 58
[699] Alex J. Bellamy, 'The Responsibilities of Victory: Jus Post Bellum and the Just War' 34 : 2008 : 4 Review of international studies (trykt utg.). S.601.
[700] Howard Williams, *Kant and the End of War: A Critique of Just War Theory* (Palgrave Macmillan, Palgrave Macmillan UK 2012).

> International law, Grotius believed, provided a framework for evaluating when and how war could be legitimately used.[701]

Michael Doyle explains how 'Grotius and his followers, deriv[ed] international law from a set of universal principles pertaining to 'the morality of states'. Building on this basis, laws advancing peace through the regulation of the conduct of states are prescribed.' [702]

The notion of war as a tool of punishment was influential in IL until the 18th and 19th centuries when states adopted the policy of 'gunboat diplomacy', in which the threat of force was deployed to ensure that the actions of other states followed the voluntary law of nations.[703] The outbreak of WWI, on the contrary, demonstrated the limitations of this approach in creating lasting peace and the failure of the notion that war was a tool of justice. Rather, the move to outlaw absolute recourse to war under the Kellogg-Briand pact following WWI included that alternative forms of justice must be sought to bring forth peace. This was further developed under the UN Charter, which finally removed the notion that war was considered a tool of justice on the part of states claiming *justa causa*. Instead, the use of force is now only allowed under the strict exceptions enshrined in the Charter.

Alternative forms of justice were therefore required to enhance the 'maintenance of international peace and security'. As the next sections establish, the influence of the concept of individual rights provided an alternative to the exclusive inter-state focus of IL.

4.6.4 The rise of individual rights and their influence on liberal peace

The increasing influence of individual rights in IL developed an understanding of how to achieve peace. The recognition of individual rights began through the work of Vitoria, detailed above. Following this, the work of Grotius sets out how individuals are holders of rights, which limit the power individuals can have over each other and the power a state can have over its people.[704] This includes the rules and limits applying to warfare, the

[701] Alex J. Bellamy (n 699).
[702] Michael W Doyle, 'Liberalism and World Politics' (2012) 80 The American political science review 1151.
[703] Hippler and Vec (n 674).
[704] Grotius (n 697).

pursuit of peace, and other forms of conduct in the international sphere. Enlightenment scholars linked the rights of individuals to laws authorised and erected to create peace.[705] The 'liberal philosophy of peace', described by Liden and Syse, promoted an individual-centred conception of rights; the right to live in a state of ordered liberty and have this secured through stable peace.[706] The opportunity to achieve a lasting peace was, therefore, connected between the individual on one side and the international order on the other. The existence of individual rights was thought to be based upon nature and that individuals choose to defer some of these rights through a 'social contract' with a state or authority, in order to create a more ordered and potentially peaceful society.[707] The decision of the individual, then, is crucial, as they hold the power through their rights initially and could choose what would benefit themselves most; either maintaining all their individual rights, away from ordered society, or granting the state some of this authority.[708]

Hobbes viewed this contract theory pessimistically, defining the state of nature to be a state of war and that an absolute sovereign was required to achieve a rights-based peace.[709] His example was based upon his understanding of the natural state of the American Indians, who, he argued, had no common power to fear, explaining, 'the savage people in many places of America live at this day in the brutish manner I described above, except for the government of small families where the concord depends on natural lust'.[710] It has been argued that this made it possible to locate 'savage' peoples beyond the scope of IL, requiring the aid of Europeans to facilitate the development of a common political authority. The impact of this is examined in Chapter 5.

In contrast, Locke perceived the 'social contract theory' optimistically, to mean conditional acceptance of authority. Locke argues against the view that the right of conquest in a just war is total and lasting. He suggested that this would lead to the full submission of the conquered people - in essence, creating a continued state of war between the two parties; detailing how 'want of a common judge with authority, puts all

[705] Michael Doyle, 'Liberalism and World Politics', American Political Science Review 80 (1986), 1151–69
[706] Kristoffer Lidén and Henrik Syse, 'The Politics of Peace and Law: Realism, Internationalism, and the Cosmopolitan Challenge' [2019] Research Handbook on International Law and Peace
[707] IBID
[708] ibid
[709] IBID
[710] G. A. J. Rogers, 'Thomas Hobbes: Leviathan' (2005) 4 The seventeenth and eighteenth centuries 89.

men in a state of nature: force without right, upon a man's person, makes a state of war, both where there is and is not, a common judge'.[711] Liden and Syse examine the work of Locke and his social contract theory arguing:

> For Locke a right of self-defence against governmental power is much preferable to the concentration of all power in one sovereign, since the need for using armed force will be much reduced once the rule of law actually guarantees individual liberty.[712]

They continue, '[t]he current understanding of negative peace – an absence of physical force or compulsion beyond what is necessary for the defence of liberty and property – is very similar to the liberal peace of Locke'.[713] This understanding is in line with various elements of negative peace, compared with positive peace in ICL within Chapter 6.

Kant departs from the idea of a sovereign as being the preferred option for an arbiter to bring forth peace. Instead, he proposed that the most stable option is a republican state that will bring forth a cosmopolitan/universal, perpetual peace.[714] This, he understands as the ultimate goal of man, to achieve their most enlightened state. He sees the possibility of achieving perpetual peace through republican states as a realistic proposition. Kant set out that legal theory had a place for both natural law and voluntary positivist law, and perceived the freely chosen submission to positivist law, arising from the will of the people. Kant's perpetual peace – ideal for international systems- recognised the wastefulness of war, but also the value of it in developing for man a *priori* reason towards a republican state, in which there would be less risk of states going to war against each other.[715]

The approach to peace in IL following WWII has been alleged as arising from 'cosmopolitan universal ideals', based on the idea of universal reason following Kant's thinking, as leading to perpetual peace, especially favouring republican peace.[716] This has

[711] John Locke, *Second Treatise of Government* (Barnes & Noble Publishing 2004).
[712] Lidén and Syse (n 706).
[713] ibid
[714] Immanuel Kant, *'Toward Perpetual Peace' and Other Writings on Politics, Peace, and History* (Yale University Press 2006).
[715] ibid
[716] ibid

been described as 'liberal internationalism', according to which the combination of democracy, trade and international organisation is seen as a recipe for peaceful relations among nations.[717] Liden has explained how:

> The basic argument of the liberal peace is very simple: if these principles constitute social relations, there will be no need to fight: for peace to be sustainable, a certain degree of liberty and justice is required, and liberalism is a political vision of how these fundamental human values can be realized. Furthermore, political arrangements that reflect and cultivate the ideals of liberalism are regarded as inherently peaceful.[718]

Critics of the UN system argue that IL prioritises liberal forms of peacebuilding and ICrJ over alternative forms developed within non-liberal societies. They argue that this can be clearly seen in the approach of UN operations and in the practice of ICL. [719]

4.7 Justice of Peace in International Law

The limitations of the universalist approach to IL have been recognised by critical, post-liberal peace scholars, such as Richmond, who instead 'emphasized the notions of locality and hybridity against liberal interventionist universalizations of state-building'.[720] This has been backed up by scholars analysing the work of the UN in post-conflict state-building, such as David Roberts, who recognises the limitations of negative peace in achieving lasting peaceful societies.[721] Considering the controversy around approaches to peacebuilding, Newman, Paris and Richmond argue:

> The effectiveness and appropriateness of promoting liberal democracy and market economics in volatile conflict-prone societies are contested. The perceived absence of 'local ownership' and insufficient consultation with local stakeholders have led some observers to question the legitimacy of peacebuilding operations. The apparent emphasis in international peacebuilding on top-down mediation

[717] Hippler and Vec (n 674).
[718] Lidén and Syse (n 706).
[719] Oliver P Richmond, 'The Problem of Peace: Understanding the "Liberal Peace"' in Ashok Swain, Joakim Öjendal and Ramses Amer (eds), *Globalization and Challenges to Building Peace* (Anthem Press 2007)
[720] ibid
[721] David Roberts, 'Post-Conflict Statebuilding and State Legitimacy: From Negative to Positive Peace?' (2008) 39 Development and Change 537.

> amongst power brokers and building state institutions – in contrast to more bottom-up, community-driven peacebuilding – has raised concerns about the sustainability of peacebuilding projects. The attention to reconstruction and stability and the neglect of the underlying sources of conflict suggest, to some, that the nature of the 'peace' that is being built is not entirely inclusive or context sensitive.[722][723]

Furthermore, as Behr has presented, concern has arisen that this focus on universal standards of reason has the impact of seeking to suppress or surmount difference. Rather than bringing forth a lasting peace, it may in fact, 'contribute to, if not cause, conflict and even war fighting in the first place'.[724] Consequently, the argument is that universalistic concepts of peace are actually not peaceful, but rather cause conflict and war.[725]

Fundamental challenges to the potential of IL to create lasting peace have been presented through a number of schools of thought. Counter-enlightenment scholars, such as Schmitt, recognised that war was integral to IL and the development of peace, stating 'the history of international law is a history of the concept of war'.[726] In this understanding, law is contingent on power and violence. Challenges to the claims of IL to be 'about' and 'for' peace and common values of justice have been presented by various critical scholars, including Marxist theorists, such as Melville. He recognised the commercial influence over the development of IL, stating 'colonialism is in the very form, the structure of international law itself, predicated on global trade between inherently unequal politics, with unequal coercive violence implied in the very commodity form. This unequal coercion is what forces particular content into the legal form'.[727] Additionally, post-colonial and decolonial theory argues that the main function of IL has been to impose

[722] Edward Newman, Oliver P Richmond and Roland Paris, *New Perspectives on Liberal Peacebuilding* (United Nations University Press 2009).
[723] The potential for local ownership is examined in chapter 7
[724] Hartmut Behr, *Politics of Difference: Epistemologies of Peace* (1st Edition, Routledge 2015).
[725] .New perspectives on liberal peacebuilding, Newman, Paris and Richmond (eds), United Nations University Press, 2009 pg. 3
Roger Mac Ginty, Indigenous Peace-Making versus the liberal Peace, 43 Cooperation and Conflict: J of the Nordic Intl Studies Assn 139, 144 (2008)
Edward Newman, 'Liberal'Peacebuilding Debates, in Newman, Paris, and Richmond, eds, New Perspectives on Liberal Peacebuilding2 6, 42
[726] Robert Howse, 'Part I Histories, Ch.11 Schmitt, Schmitteanism and Contemporary International Legal Theory' (*Oxford Public International Law*) <
[727] Miéville (n 696).

Western standards upon the world.[728] This challenges the belief in the linear progression of IL through enlightenment ideas, and the potential of IL in creating a just, lasting peace. Instead, it presents how an inherent injustice has been created through IL. This theory argues that alternative subaltern cultures are not valued if they go against liberal ideas.

While this thesis recognises the important achievements which have arisen through liberal peace theory, and especially the development of ICL, the challenges presented by critical schools require further examination. As detailed below, the practice of ICL has not automatically created a situation of positive peace. In fact, it has been argued that it has resulted in a legacy of negative peace, for example, both through the work of the ICTY and within Uganda through the involvement of the ICC, examined below. The next section presents the many examples of how the imperative to maintain peace and security, or influence the development of stable peace, has been fundamental to the development of ICL, and how they were included within the founding documents of international criminal courts and tribunals. However, this thesis argues that when stakeholders involved in the courts are taking judicial or prosecutorial decisions or interpreting the statutes of the courts, issues of peace should be considered based upon ideals of positive peace.

4.7.1 Peace through justice in Northern Uganda

Finally, this section presents the discussions surrounding the Ugandan situation and the resulting negative peace. ICC involvement in Uganda was based upon a self-referral by the Ugandan government in response to attacks carried out by the Lord's Resistance Army (LRA). In Uganda, President Museveni has switched intermittently between the offers of amnesty to members of the LRA and the prosecutions. Following the successful referral of the situation of Northern Uganda to the ICC, the ICC issued arrest warrants against five senior LRA figures. In effect, it has been argued that the President sought to co-opt ICrJ, in an explicitly political fashion, as the 'stick', while amnesties were offered as the carrot to pressurise the LRA to lay down their arms.[729]

The ICC involvement in Uganda demonstrates the complex realities of ICC involvement in situations in which international crimes are ongoing. The evolution of various conflicting

[728] Section 5.2
[729] McEvoy and McGregor (n 32).

political interests is demonstrated surrounding the roles of the Ugandan government and the LRA. The ICC, as an international court, is removed from these politics in theory; despite this, as detailed above, it can examine wider justice interests in pursuing investigations. The argument of this thesis is that, while international crimes are often mired in complex political situations, the important role the court can play is to ensure victims' voices are heard.[730] As is usually the case, the victims of both sides were excluded from deliberations on the 'Juba Accords', the peace talks involving the Ugandan Government and the LRA; yet, the ICC can ensure these voices are heard. There has been significant debate, especially within ICL scholarship, over the extent to which ICC involvement prevented the Juba Accords from succeeding or whether this was equally influenced by external issues. [731]

Accusations of bias have come from many sources, including scholars and victim groups, based upon the interplay between the ICC and the Ugandan Government.[732] It has been claimed that the Ugandan government has been portrayed as allies of the court and that their crimes were not investigated.[733] The appearance of the ICC Prosecutor, Luis Moreno Ocampo, with President Museveni, at the announcement of the state referral in January 2004, has perpetuated a perception of bias in the Court's intervention in Northern Uganda.[734] Some have argued that it fails to recognise the harm suffered by victims, often within displacement camps run by the Government, because of the actions or inactions of the Ugandan Government.[735] Commentators have described how the treatment of the Acholi in Northern Uganda, who were placed into camps, resulted in the 'slow destruction of an entire ethnic group . . . [amounting] to genocide'.[736] Although, there has so far been no investigation made by the ICC. This perceived bias has been strongly voiced by victims as one of the most disappointing parts of the intervention of the ICC.[737] As one member of civil society commented, the prosecution of the LRA represented 'victor's justice'.[738] The ICC's focus on LRA crimes alone highlights the lack of accountability for Government acts

[730] ibid
[731] Lohne (n 285).
[732] ibid
[733] Nouwen (n 112).
[734] Lohne (n 285).
[735] Nouwen (n 112).
[736] Adam Branch, 'Gulu in War … and Peace? The Town as Camp in Northern Uganda' (2013) 50 Urban Studies 3152. 182
[737] ibid
[738] Moffett, *Justice for Victims before the International Criminal Court* (n 7) 67.

and the weakness of the ICC in this context, in failing to remove its alignment with state power.[739] The lack of investigation denied the Acholi victims their access to the court.[740] This undermines the supposed positive impact and legitimacy of the ICC involvement in Uganda.

In addition, the creation of the International Crimes Division (ICD) as part of the Ugandan justice system, permits a court to try international crimes committed by individuals during the conflict.[741] However, in practice, it is only used to try crimes committed by LRA members: no Government forces have stood trial. As the transfer of Ongwen to the ICC demonstrates, the ICD is not being used for all LRA members. At times, the Government still favours the ICC carrying out prosecutions, leading to the perception that the court is being used as a tool for the Government, which alternates between support for, and criticism of the court.[742]

Despite these serious critiques, the assertion that the ICC involvement in Uganda was a success story was made in the 2010 review conference, held in Kampala. It stated that the actions of the ICC demonstrated an approach to peace and justice within ICL that recognised the need to achieve criminal justice as a part of any peace.[743] The Assembly of State Parties emphasised that justice is 'a fundamental building block of sustainable peace'.[744] UN Secretary-General Ban Ki-moon explained peace and justice go 'hand in hand'.[745] While recognising that justice done may mean peace delayed, Ban Ki-moon highlighted that a peace which included amnesties and allowed impunity would be a false peace.[746] Similarly, he presented the argument that victims needed to be educated on the

[739] ibid
[740] Chris Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006* (1st Edition, Berghahn Books 2011).
[741] Stephen Oola, 'In the Shadow of Kwoyelo's Trial' in Carsten Stahn, Christian De Vos and Sara Kendall (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015)
[742] Nicholas Waddell and P Clark (eds), 'Grono N. and O'Brien A., Justice in Conflict? The ICC and Peace Processes,' *N. Waddell and Courting conflict? Justice, peace and the ICC in Africa* (Royal African Society 2008).
[743] Stocktaking of International Criminal Justice (Peace and Justice): Moderator's Summary, Official Records of the Review Conference of the Rome Statute of the International Criminal Court.
[744] Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Part I, at 22–30.
[745] ibid
[746] Ban Ki-Moon, 'Op-Ed: We Must Get Justice', New Vision Online, 28 May 2010.

benefits of criminal justice, rather than seeing that the alternative forms of justice sought by victims could be more appropriate.[747]

The prioritisation of criminal justice by the ICC in Uganda came as a result of calls by some victims for alternative justice procedures to be used. This is the case even though the Acholi leaders challenged both the notion of justice, promoted by the ICC, and the theory of change according to which the Court's punitive justice leads to peace.[748] As Nouwen details, while the establishment of two-way communication is the aim of outreach stated in the ICC website, '[y]et all the aims of that communication are focused on explaining the Court's theories; there is no process for adjusting those theories in light of the popular theories'.[749] Furthermore, Kjersti Lohne has concluded that the influence of international NGO with their headquarters in The Hague held considerably greater influence over the practice of the ICC than the individual victims affected by international crimes.[750]

While the potential of the Juba Accords to achieve peace is unclear, Nouwen highlights how the ICC justified obstructing the peace agreement, arguing that it would lack accountability and the peace would not last.[751] This has raised the question as to what extent the prosecutor is required to examine victims' calls for an amnesty process rather than criminal trials. The current OTP Article 53 policy provides no guidance over the circumstances in which the authority of the ICC might be secondary to an ongoing domestic amnesty process.[752] Following this, Newton has argued that a formal process of consultations should be included in a revised prosecutor's policy; ensuring a mutual understanding, including recognition of varying linguistic interpretations in relation to the meaning of concepts such as 'amnesty', 'forgiveness' and 'reconciliation', in the specific cultural environment in which the ICC investigation is taking place.[753] Indeed, the cultural importance of the practice of amnesties within different groups in Uganda should be examined, alongside the need to achieve accountability for international crimes. This argument highlights exactly the cultural importance of the practice of amnesties in

[747] ibid
[748] Adam Branch, *Displacing Human Rights: War And Intervention In Northern Uganda* (Illustrated Edition, Oxford University Press, Usa 2013).
[749] Nouwen (n 112).
[750] Lohne (n 285).
[751] Nouwen (n 112).
[752] Discussed further 7.3
[753] Michael A Newton, 'A Synthesis of Community-Based Justice and Complementarity' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice* (Cambridge University Press 2015)

Uganda.[754] While the ICC maintains a strong anti-impunity approach within Uganda, Mallinder has argued that amnesties are necessary for some specific contexts, especially if they take the form of restorative amnesties.[755] Even if it is contested that the Juba Peace Accords would actually have provided any form of accountability, their failure to include victims in the process removed this option to grant a form of justice for victims as well.[756]

The ICC involvement in Uganda demonstrates a situation of a negative unfair peace occurring in three forms: accusations of bias by the ICC, failure to adequately consider victim interest and a change in location of the violence rather than a cessation. The LRA is no longer operating in Northern Uganda, and, following an understanding of negative peace as the removal of direct violence, it can be said that this limited form of peace has been achieved. Crucially, victims have not received justice: neither criminal nor alternative, traditional justice. Additionally, rather than the Ugandan Government being investigated for their crimes, they have been portrayed as friends of the court against the LRA. The activities of Kony and the LRA may have moved away from Northern Uganda, but, instead, ended up in Sudan.[757] As long as Kony has never stood trial, victims cannot receive retributive justice.

This case study highlights the weakness of the claims that the ICC prioritises a search for justice for victims. Whilst situations involving international crimes are extremely complex, with many competing aims and voices, the ICC has opened itself to accusations that it follows the influence of the most powerful voices. To ensure that the interests of justice include victims' interests, the voices of the victims on the ground needs to be heard, even if this goes against international actors' or the government's wishes. Additionally, care should be taken to analyse who is speaking on behalf of the victims, ensuring the marginalised victims have their voices heard too.

[754] Ibid
The practice of amnesty in Uganda is deeply rooted in cultural and religious conceptions of forgiveness and reconciliation. Before the complementarity issue was introduced, forgiveness had played an important
[755] Louise Mallinder, 'Amnesties in the Pursuit of Reconciliation, Peacebuilding, and Restorative Justice', *Restorative Justice, Reconciliation, and Peacebuilding* (Oxford University Press 2014)
[756] ibid
[757] Kamari Maxine Clarke, 'Kony 2012, the ICC, and the Problem with the Peace-and-Justice Divide' (2012) 106 Proceedings of the annual meeting - American Society of International Law 309.

4.7.2 Justice of peace through ICL

The current normative framework of ICL recognises the need for justice to bring forth lasting peace. However, it is the challenge of creating a lasting peace which should be examined within an analysis of the contribution of the ICC to peace, and the role of the victims and their search for justice. The importance of removing direct violence remains a crucial goal, especially when looking at justice for victims. Judge Kaul, of the ICC, has discussed the contribution to peace and reconciliation that the ICC system of victims' participation and reparations can make.[758] In developing a victim-centric approach to peace and justice, therefore, the interests of the victims and their aims and understandings should provide an important role in shaping the justice and peace procedures.

The issue of justice without peace has provoked controversial discussions when examining the legacies of international criminal tribunals, such as the ICTY, where criminal justice has been achieved without contributing to a wider peace.[759] Despite this, if peace is delayed due to the threat of criminal prosecution, many victims will suffer because of the continuation of violence/hostilities.

This is an ongoing concern, with different parties prioritising one over the other, 'wherein it is debated whether the pursuit of accountability ultimately helps or hinders the aim of peaceful conflict resolution'.[760] Kofi Annan discussed the futility of this debate:

> Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities.[761]

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[758] Hans-Peter Kaul, 'Victims' Rights and Peace' in Thorsten Bonacker and Christoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (T M C Asser Press 2013)
[759] Akhavan (n 52).
[760] Mark Kersten, 'Targeting Justice: Targets, Non-Targets and the Prospects for Peace with Justice' (2017) 23 Canadian Foreign Policy Journal: Special Issue: Problems Abroad? Revisiting the Intervention Trap in an Era of Global Uncertainty 246.
[761] Press Release SC/8209 SECURITY COUNCIL STRESSES IMPORTANCE, URGENCY OF RESTORING RULE OF LAW IN POST-CONFLICT SOCIETIES 6 OCTOBER 2004 https://www.un.org/press/en/2004/sc8209.doc.htm (hereafter UN SG Restoring RofL)

Others argue that justice can be a stumbling block to peace, and justice should wait until conflicts are finished and peace has been achieved, even if it is a negative, imperfect form of peace.[762] Examples of sequencing peace over justice in Darfur demonstrate that the result can be that neither is achieved, especially when ICC arrest warrants are overlooked by the UNSC.[763] Mendez and Kelley presented the dangers of an uncoordinated approach between peace-making and justice. Using the example of how the Sudanese government played 'different processes against each other', they saw the importance of conceiving the ICC, not in isolation, but 'as part of a dynamic and multi-tracked peace making process.'[764] Moyn has noted that the approach taken by supporters of the ICC seeks to 'ameliorate the tension between peace and justice precisely so as not to have to articulate a choice between the two'.[765] He argues that the Kampala Declaration is an example of this, suggesting that peace and justice are complementary.

In practice, as Chandra Lekha Sriram has set out, the sequencing of peace and justice within societies may not always be a matter of policy but of necessity.[766] Conflicting demands arise between those wishing for accountability and those at risk from accountability processes. Societies have to choose from a range of options for accountability and 'they may choose a variety of these over time, shifting strategies according to the demands of different constituencies'.[767]

With the reality of extremely complex situations in which peace and justice issues arise following international crimes, this thesis builds upon the importance of justice within peace, as applicable for ICL. This is presented in more detail in Chapter 8. In this model, the justice of the peace is achieved through targeted accountability in peace processes, allowing amnesties for less serious crimes, and combining criminal justice with truth and reconciliation mechanisms.[768] The next step of ensuring justice after international crimes

[762] Allen (n 645).
[763] Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (Verso 2009).
[764] Juan E Méndez and Jeremy Kelley, 'Peace Making, Justice and the ICC' in Carsten Stahn, Christian De Vos and Sara Kendall (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015)
[765] Samuel Moyn, 'Anti-Impunity as Deflection of Argument' in DM Davis, Karen Engle and Zinaida Miller (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016)
[766] Chandra Lekha Sriram, 'Conflict Mediation and the ICC: Challenges and Options for Pursuing Peace with Justice at the Regional Level', *Building a Future on Peace and Justice* (Springer Berlin Heidelberg 2009)
[767] ibid
[768] Section 8.5

would involve closer monitoring to ensure that justice steps are taken. As Chapter 7 examines through the case study in Colombia, this can be carried out using transitional justice processes that are monitored by the ICC through the principle of complementarity. It would provide a wider variety of accountability programmes, not simply criminal justice, to ensure appropriate justice steps are taken, to provide the victims with justice and move towards a positive peace, strengthen the barriers to prevent oppressive or unjust peacetime policies from being enacted or accepted.[769]

As introduced above, the suggestions to include some use of amnesties understands the concern that amnesties arising through peace processes often involve only combatants while excluding their victims. In this way, victims do not receive justice and are excluded from the amnesty process. Instead, following Bassiouni's argument, 'it is arguably the place of victims to grant forgiveness, and not the place of governments, a victim-centred approach should be followed when considering the use of limited amnesties ensuring re-victimisation does not occur'.[770] In appropriate circumstances, when the forms of limited amnesties are driven by the justice interests of the victim, amnesties can be utilised so they also provide forms of accountability and have a restorative justice impact.[771] As Chapter 7 presents, the Truth and Reconciliation Commission in South Africa provided an amnesty to those who fully confessed their crimes, implying that this truth-telling was what the country most needed to heal and move forward. However, this pathway to reconciliation was imposed by the government and it did not properly address the interests of the victims.[772] The negative peace legacy of this process highlights the limitations of prioritising top-down interests or political interests over victim interests.

4.8 Conclusion

As the Ugandan example demonstrates, the complexities surrounding the issues of peace and justice means that a simplified analysis, based upon assumptions of immutable values for peace and justice, does not hold up in practice. Questions of justice involve more than merely criminal justice issues, and accountability can take various forms that can be based upon alternative or restorative justice procedures. Only a limited number of individuals

[769] Section 7.4
[770] Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (n 534). 9
[771] Mallinder (n 755).
[772] Section 7.9

will stand trial within the ICC. How can victims receive justice if there is no possibility the people who caused them harm will face any form of accountability? To achieve even a limited form of justice, alternative or traditional procedures may be required, as discussed in Chapter 7. The challenge is how to ensure these are not co-opted by the elites in society excluding victim interests from the process as well. The ICC will only ever be a court of last resort; however, it can ensure victims' interests are heard, especially the marginalised victims, by monitoring justice processes under complementarity through Article 17, and through a careful evaluation of 'interests of justice' under Article 53.[773]

The variety of justice aims, ideas and concepts which have been set forth in this chapter could expand the focus of ICrJ beyond its current narrow focus, to address issues arising from the advent of widespread violence and mass numbers of victims and perpetrators. This would meet the demands for international criminal justice to work in conjunction with the need to address the causes of conflicts. The expanding remit of international criminal justice could also consider the needs of societies trying to rebuild themselves after periods of conflict. This work acknowledges the narrow parameters of a criminal trial and does not suggest that it, alone, could address the complexities of post-conflict societies.

[773] Examined in section 7.3

5 CHAPTER 5: A DECOLONISING REARTICULATION OF PEACE, JUSTICE AND VICTIMS IN INTERNATIONAL CRIMINAL LAW

> The practice of international criminal law is often directed solely at Third World states and nationals, and often preserves or aligns with pre-existing hegemonic power structures in international relations. As a result, the TWAIL sensibility they adopt demands the reconceptualization of international criminal justice.[774]

5.1 Introduction

In examining the challenge of justice for victims and the capacity of ICL to end impunity, this chapter builds upon post-colonial and decolonial theories which expose impunity in ICL for structural crimes affecting many marginalised groups within society; those who will have no recourse for justice, whether domestically or internationally. Building upon the paradigm of war, in which racial hierarchies constructed during war times are maintained into peacetime, these theorists demonstrate how such hierarchies are the origins of an unfair, unjust peace. This chapter presents how the pluralistic practice of ICL has evolved to include IL and domestic criminal law; however, potentially hegemonic legacies, traditionally occurring within these disciplines, have influenced the workings of ICL. It also explains how the selectivity, prosecutorial strategies and gravity determinations within the ICC's practice minimise opportunities for victims to be recognised and achieve justice.

As shown in Chapter 4, the pluralistic origins of ICL, consisting of hegemonic elements of both IL and domestic criminal law, have limited the counter-hegemonic ability of ICL and led to accusations that ICL perpetuates a neo-colonial legacy. A current controversy centres on accusations of an anti-African bias within ICL, and various African states have chosen to leave the ICC. This controversy calls into question the merits of presenting the development of ICL as a linear progression traced through the Nuremberg and Tokyo tribunals while overlooking the impact of European colonialism on ICL's development. This follows the work of critical legal scholars from Chapter 4 who have exposed the fallacy of claims that the law is neutral.[775] Additionally, it highlights the impact upon the

[774] Asad Kiyani, John Reynolds and Sujith Xavier, 'Foreword' (2016) 14 Journal of International Criminal Justice 915.
[775] Section 4.4

many victims who have no pathway to pursue justice, either domestically or internationally. One area of caution which has been highlighted by scholars from these critical schools is that they are not making an argument suggesting that impunity should be provided to African leaders who are suspected of carrying out international crimes; rather, it argues that suspected perpetrators from Western or powerful states should not be allowed to shield themselves from accountability.[776]

The contribution of decolonial critique is to challenge the core construction of modern IL and to argue that an alternative system should be developed; the traditional top-down approach can be countered through an examination of the underside of Western modernity, a tool introduced by Torres in his analysis *Against War*.[777] This bottom-up approach will provide the building blocks of the examination in later chapters which set out the rearticulation of the role of victims in ICL. The decolonial school, as introduced by Anibal Quijano, can be applied to achieve a radical repoliticisation of the epistemic Eurocentrism witnessed within the international legal system and its approach to peace, setting forth a methodology from the underside.[778]

Decolonising ideas on difference and the concept of the 'other' will be integral to the re-examination of the concept of victimhood in the last section of this chapter. This chapter traces the need to reconceptualise victims through the lens of the 'other', rearticulating their political agency and moving away from the image of a suffering victim in need of a saviour. The final section will construct a pluriversal, transmodern approach to the international criminal legal system and explain how the role of victims can be reimagined, to include ideas of difference and the 'other'. This analysis will be built upon in the later chapters of this thesis.[779] Contextualising decolonial critique, in his discussion on the difference between decolonial theory and post-colonial theory, Ramón Grosfoguel explains that the distinction arises through the different historical periods from which their critique is based, with the experience of the Americas from 1492 being critical in decolonial theory.[780] Grosfoguel notes that post-colonial scholars such as Edward W. Said

[776] Mutua (n 95).
[777] Maldonado-Torres and others (n 37).
[778] Aníbal Quijano, 'COLONIALITY AND MODERNITY/RATIONALITY' (2007) 21 Cultural Studies 168.
[779] Section 8.3
[780] Ramón Grosfoguel, 'Decolonizing Western Uni-Versalisms: Decolonial Pluri-Versalism from Aimé Césaire to the Zapatistas' (2012) 1 Transmodernity 88, 95.

and Gayatri Chakravorty Spivak begin their analysis from the mid-18th Century, at which point modernity had already occurred in Europe. The lessons from both these schools of thought provide the basis for the decolonising approach within this chapter. One important distinction between postcolonial and decolonial theory is their different cultural understandings based upon the influences of colonialism at different historical periods.[781]

Decolonial literature also provides the basis of the concept of 'transmodernity' which will be utilised in an evaluation of the pluralistic practice of ICL. Dussel's theory of transmodernity presents an alternative to universal cosmopolitanism based upon a pluriversal, bottom-up, inter-cultural dialogue. This gives an opportunity for alternative subaltern cultures to ensure their voices are heard. Dussel's transmodern analysis presents opportunities to consider peace, victims and the international legal system, removing it from its religious and secular straightjackets and, instead, providing a wider dialogue on the elements that will be examined further in later chapters.[782]

5.2 A Decolonial Critique of Modernity: Oppressive Peace

Rather than considering the nexus between peace and justice frequently invoked within ICL discourse, this chapter presents an alternative through a decolonial critique which instead recognises a paradigm of war within liberal peace theory. This exposes the lack of justice occurring within standard peacebuilding approaches and highlights the continuation of unequal or oppressive wartime structures within the supposed 'peacetime'. Anghie demonstrates the impact of the colonial encounter and the conquest of the Americas on the development of IL through his critique of the development of modern secular IL.[783] He draws on the work of Vitoria, in which rights were granted to the Indians in a move away from previous divine law. Rather than creating a just system of IL, Vitoria's work granted rights to peoples for the purpose of justifying the conquest of their lands.[784] The origins of conquest and colonialism after 1492 mark the beginning of an important trajectory in IL, in which the notions of peace and justice interplayed with the

[781] ibid
[782] Section 8.5
[783] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (1st Pbk. Ed edition, Cambridge University Press 2007). 18
[784] ibid

assertion that the removal of the lands owned by the Indians was just, and was occurring in a peaceful manner. As such, according to Vitoria's logic, the large numbers of peoples who lost their lands could not be considered as victims as they were equal to the conquistador under the international legal system. In this way, the conquest of the Americas was legitimised through the creation of modern IL.

Subsequently, the focus of IL turned towards inter-state peace with the Peace of Westphalia. In this framing, IL did not consider the conquest of the Americas as an issue of inter-state conflict. This resulted in a peace that enshrined and validated conquests of territories in which a minority of elite conquistadors ruled over a large majority of peoples.

The IL regime of global control forcibly applies 'to all states regardless of their specific cultures, belief systems, and political organizations'.[785] However, this is a geographical universalisation of international, not normative, 'as it maintains harmful hierarchies, which need to be revisited and changed'.[786] Anghie contends that Vitoria's focus is the problem of order among societies belonging to two different cultural systems, rather than the problem of order among sovereign states:

> Vitoria resolves this problem by focusing on the cultural practices of each society and assessing them in terms of universal law of *ius gentium*. Once this framework is established, he demonstrates that the Indians are in violation of universal natural law. Indians are included within a system only to be disciplined.[787]

This analysis highlights the limitations of modern IL, showing that hypothetically equal rights do not automatically provide an equal system in which all voices are heard and valued. Some societies are included within the system but not granted liberation or benefits from this system.[788]

The decolonial critique provides an insight into the evolution of a potentially hegemonic approach to Western liberal theories and knowledge. It offers a salient analysis of the

[785] ibid
[786] Ibid 27.
[786] ibid pg. 32
[787] IBID
[788] Section 6.3.1

influence of colonial epistemology in the practice of IL, affecting both the opportunities to create lasting peace through IL and the role of victims within ICL. The critique theorises that the current limitations of modernity arise from a dominance of Western epistemology in which modernity and coloniality interlink, perceiving the conquest of the Americas as an important step in the universality of Western epistemic approaches. Dussel considers that modernity arises from the world-wide implementation of European approaches, although its origins date back to sources from the Egyptian, Babylonian, Semitic and Greek worlds. He sets out how 'it constitutes and reconstitutes itself simultaneously by a dialectical articulation of Europe (as centre) with the peripheral world (as a dominated sub-system) within the first and only 'world system''.[789] This presents an alternative understanding from the historical development of forms of peace, justice and victims within ICL, allowing for a more nuanced evolution of these ideas for the future. Analysing the interplay of peace, justice and victims through the lens of modernity/coloniality reinforces the need to allow subaltern voices, including different victims' groups, an equal role within the future moves towards lasting peace, ensuring justice for victims.

The construction of a decolonial critique was introduced through Quijano's work on the *Coloniality of Power*, perceiving decoloniality as an epistemic and political project, disengaging and delinking from Western epistemology.[790] He argues that conventional European discussion of the nature of present-day Europe tends to look inwardly, and ignores the colonial context in which its cultural, economic and political systems developed; but, that the modern construction of Europe cannot be divorced from the impact of its colonial history. Arturo Escobar explains the tendency of Western epistemology, to view 'modernity' as having arisen out of internal factors within Europe.[791] Similarly, Toulmin explains how the concept of universal cosmopolitanism was complicitous with the formation of European imperial powers, and of European expansion in America, Africa and Asia.[792] Escobar argues for an alternative, counter-

[789] Enrique D Dussel, *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation* (Humanity Books 1996).
[790] Quijano (n 89) 215.
[791] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (With a New preface by the author edition, Princeton University Press 2011).
[792] Stephen Edelston Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (Univ of Chicago PR ed Edition, University of Chicago Press 1992) 16.

hegemonic approach of universal cosmopolitanism; a decolonial cosmopolitan order, 'no longer modelled on the law of nature discovered by science, but from various models of conviviality that Western cosmopolitanism suppressed'.[793]

Dussel highlights that the period of the Enlightenment was the time when 'Eurocentrism's 'imperial eyes' gained an elevated status in the philosophy of history, the 'sacrificial myth of modernity''.[794] As introduced within Chapter 4, this created a belief in which conquest was considered just war and, indeed, a form of justice for nations who were unwilling to trade.[795] However, as detailed further within this chapter, the imposition of foreign legal systems upon newly colonised nations required that forms of criminal law, such as common law in English colonies and civil law in French colonies, provided the definitive criminal law standards and issues of justice. Not only have these legal systems been maintained in newly independent nations, but these standards have also been incorporated into international criminal law and been presented as universal or global, while their origins stem from a limited number of legal systems that were successful in exporting their values across many lands. Examined further below is how this has impacted both upon standards and values of peace, and upon the recognition and conception of victims and victimhood under ICL.[796] This has visited an injustice upon the 'subaltern', who is often ignored within Eurocentric liberal frameworks and who will not easily fit into the individualistic focus of ICL, with its emphasis on individual criminal responsibility that arose through the growth of individual rights.

Decolonial critique challenges critical thinkers to consider the impact of their own bias on their research, criticising the prioritisation of Western critical thought. For Quijano, a decolonising project is one that draws attention to the limiting character of colonial and Eurocentric epistemologies, recognising that the idea of knowledge is interlinked with the colonial matrix of power too. In this view, the legal system becomes a tool of domination, upholding unequal power structures. The injustice embedded in the legal system is recognised, along with the struggle to bring about emancipatory change.[797] Quijano

[793] Escobar (n 791).
[794] Dussel, 'Transmodernity and Interculturality' (n 35) 132.
[795] Section4.6.3
[796] See section 5.3
[797] Balakrishnan Rajagopal, *International Law from below: Development, Social Movements, and Third World Resistance* (University Press 2003).

explains that the distinction of the decolonial critique is that it recognises the fundamental co-constitution of 'modernity' and 'coloniality' in the contemporary production of knowledge about world politics, and the pervasive legacy this has on universal ideals.[798]

The approach of the decolonial school challenges epistemologies of research, demonstrating the hegemony of Western academia originating through the coloniality of knowledge. Recognising that the challenges of unacknowledged bias have previously affected scholars, this work aims to delink from the illusion of zero-point epistemology in which research is presented as arising from a detached and neutral point of observation, as explained by Mignolo and Dussel. This follows Mignolo's work, drawing attention to the need to locate academic knowledge in a position coherent with 'diversality'.[799] In my own locus of enunciation, I recognise the epistemic influences shaping my own narrative, seeking to understand my research from subalternity and not from the colonialism of power. This thesis is constructed through the experiences of a woman who grew up in Northern Ireland during the 'Troubles' or 'Armed Conflict', who has studied in English universities and worked with 'victims/survivors' of various conflicts in the Americas and Northern Ireland.

5.2.1 Liberal peace theory through a decolonial lens

The decolonial critique of liberal peace sets out an alternative history of the development of peace and international law, from 1492, and the work of Vitoria through to the Enlightenment, and on to the modern day. Torres examines the influence of 'master morality' and the centrality of war in the Western experience, and challenges the dominance of Western theories of the individual and the self, examining the opportunities which arise with the role of the 'other'.[800] The decolonial school challenges historical Western narratives, presenting alternatives to the development of IL.

As detailed in Chapter 4's analysis of the evolution of peace within IL, the forms of peace sought within IL have been based upon historical ideas of just peace developed through

[798] Quijano (n 778) 172.
[799] Walter Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2011).
[800] Maldonado-Torres and others (n 37).

just war theory.[801] Toulmin considers the basis of IL following on from the legacy of the Roman Empire; in particular, the moment in which Constantine brought Christianity together with 'imperium'.[802] Additionally, modern IL is built upon the work of Vitoria and the concept of the nation state after the Treaty of Westphalia. Toulmin explains that the reconstruction of European society after the Thirty Years' War was based on two pillars or principles: stability and hierarchy. Stability applied to inter-relations among the European concept of sovereign nations.[803] As Chapter 2 introduced, this focus on state stability caused the position of victims within criminal justice systems to be moved to the periphery.[804] Additionally, this narrow focus on inter-state stability, ignoring drivers of conflict at the national level, provides an explanation for why the move toward lasting inter-state peace did not achieve its goal, and also why a form of negative peace arose which was often oppressive or maintained the status quo, as discussed in Chapter 4. This limitation is explored further in the discussion of the goals of positive peace, presented in Chapter 6.[805]

The decolonial approach details how peace has been used to justify the spread of European civilisation across the globe. In this respect, the idea of peace is as a civilising concept which distinguishes 'modern civilisation' from barbarian societies and cultures.[806] The idea that spreading 'civilisation' across the world is required to ensure that international peace can be achieved can be traced back to the Greek and Roman periods. Aristotle and Plato considered peace between Greek citizens and city states as the natural state; however, the natural state between Greece and the Barbarians was war.[807] The form of peace understood as liberal Western peace is one that arises from so-called universal, cosmopolitan ideas. Behr explains how this approach of liberal peace, built upon a concept of universal reason, may in fact 'contribute to, if not cause, conflict and even war fighting in the first place'.[808] The decolonial critique of liberal peace is constructed upon the works of Mignolo, who recognises that 'it would be a tragic mistake

[801] Section 4.6.3
[802] Toulmin (n 792).
[803] ibid
[804] Section 2.3
[805] S**ection 6.3**
[806] Mignolo, *The Darker Side of Western Modernity* (n 799).
[807] Stefan Kroll, *The Illiberality of Liberal International Law: Religion, Science, and the Peaceful Violence of Civilization* (Oxford University Press)
[808] Behr (n 724).

to pursue peace by dragging in the defunct 'Globe' as a locus for the common world of cosmopolitanism'.[809] This moves beyond post-modern critiques or post-liberal peace, as these critiques 'do not disrupt the overall claims to the hegemony of 'social, scientific or legal knowledge''.[810] A radical critique of liberal peace incorporates a more profound disruption of its Eurocentric epistemic underpinnings, as well as a 'repoliticisation of that sensibility of Western distinctiveness that is taken as an ontological 'given''.[811]

In order to 'delink' from Western epistemology, Quijano recommends utilising epistemological decolonisation, as it is the first step in clearing the way 'for new intercultural communication, for an interchange of experiences and meanings, as the basis of another rationality which may legitimately pretend to some universality'.[812] He highlights the limitation of utilising one hegemonic approach which leads to imposing provincialism as universalism. Walter Mignolo also explains the need to include a wide range of cultures, knowledge and languages, leading to 'philosophical practices that cannot be dependent from (sic) Greek canonical dictums in matters of thoughts'.[813] This approach is examined further in relation to peace and the role of the 'other', together with a reconsideration of the concept of victimhood later in this chapter. Dussel acknowledges this recognition of the importance of intercultural dialogue in his understanding of transmodernity discussed below, and it is recognised by Grosfoguel in his conceptualisation of a radical form of 'universal decolonial anti-systemic diversity'.[814] The requirement to consider diversity, in relation to peace, recognises that difference no longer needs to play a divisive role and demonstrates how the construction of the 'other' feeds into a reconsideration of the concept of victimhood.

[809] Walter D Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton University Press 2000)
[810] ibid
[811] ibid
[812] Quijano (n 778).
[813] Walter D Mignolo, 'The Geopolitics of Knowledge and the Colonial Difference' (2002) 101 South Atlantic Quarterly 57.
[814] Grosfoguel, 'World-Systems Analysis in the Context of Transmodernity, Border Thinking, and Global Coloniality' (n 90).

5.2.2 The paradigm of war: small wars

The 'paradigm of war' arises throughout IL, which cannot be viewed as a purely European phenomenon, but one which has been exploited by European colonial states to support their political and economic aspirations.[815] Anghie presents the idea that the character of the sovereignty doctrine was achieved through the colonial encounter.[816] He explains that the traditional view of the doctrine of sovereignty, which was developed in the West and then transferred to the non-European world, is misleading. He believes that this 'is the darker history of sovereignty, which cannot be understood by any account of the doctrine that assumes the existence of sovereign states'.[817] Anghie points toward the conclusion that a radical epistemic shift is necessary to decolonise the inherited view of Euro-centred modernity:

> International relations based on the concept of sovereignty emerged in Europe, after the Peace of Westphalia, to regulate an emerging inter-state system, within which European states were considered sovereign. This is the local and regional situation in which Kant was thinking of cosmopolitanism.[818]

Recognising positive elements to modernity, Dussel and Mignolo also draw attention to ambiguous elements that can arise, such as an epistemology of superiority and the need to rescue others through a 'civilising mission'.[819] Dussel considers the myth of modernity, evident in Kant's definition of the Enlightenment. This myth constructs the idea of the 'innocence' of enlightened Europeans, and the intrinsic culpability of non-enlightened peoples. It is the legacy of this perception of the innocence versus culpability that feeds into structural and cultural violence, examined within Chapter 6.[820] In standard peacebuilding approaches, this myth is not challenged but instead maintained through the lack of consideration of root causes of the conflict. The decolonial critique provides a clear understanding of the background to the unequal power structures, which, this thesis

[815] Maldonado-Torres and others (n 37).
[816] Anghie (n 783).
[817] ibid 26
[818] Ibid 28
[819] Walter D Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, & Colonization* (2nd Revised edition edition, The University of Michigan Press 2003).
[820] Section 6.3

argues, arises within the context of the structural violence element of positive peace theory.

Consequently, the argument detailed by Torres is that universalistic concepts of peace, based on the construction of the coloniality of power, are actually not peaceful, but rather cause conflict and war. These cosmopolitan universal ideals can be seen in the United Nations Charter 1945 and in many peace treaties, both historical and present-day.[821] Far from conceiving that the universal ideals in IL will create a state of peace throughout inter-state relations, Torres contends that European modernity is inextricably linked to the experience of the warrior and conqueror; this 'master morality' of dominion at the heart of Western modernity, inspires and legitimises racial policies, imperial projects and wars of invasion. Torres argues that war is inextricably tied up with European Modernity, and that 'a paradigm of war' exists in which humanity, knowledge and social relations are conceived in a form which privileges conflict or 'polemos'.[822] Torres sets out how, in a paradigm of war, the horrors of war become normalised into peacetime. The paradigm of war is evident 'through colonialism, race, and dehumanising ways of differentiating genders. War, in turn, is no longer solely found in extraordinary moments of conflict but rather becomes a central feature in modern life-worlds.'[823]

Anibal Quijano recognises a connection between the coloniality of power and race in Eurocentric ideas.[824] Quijano demonstrates that the interconnection of these forms of exploitation and domination were a result of structures of power being put into place in the Americas. He determines that the different biological structures were utilised to place some groups of peoples as inferior to others, explaining, 'the conquistadors assumed this idea as the constitutive, founding element of the relations of domination that the conquest imposed'.[825] It is these forms of racial groups that Torres understands as transferring the reality of war into peace times, continuing the negative legacies of wartimes long after the direct violence has ended.[826] For example, the tensions between racial groupings that were fostered and exploited during the Belgian administration provided the background

[821] Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005)
[822] Maldonado-Torres and others (n 37).
[823] ibid
[824] Quijano (n 89).
[825] ibid
[826] Maldonado-Torres and others (n 37).

to the breakout of the Rwandan genocide.[827] As discussed in Chapter 6 of this thesis, ICL currently does not include the creation and continuation of these unequal power structures within the elements of international crimes.

Extracting a lasting peace from this paradigm of war necessitates overcoming the coloniality of power; a procedure that Dussel suggests could be achieved through transmodernity. As such, the tool of the transmodernity methodology provides a means of overcoming hegemonic colonial legacies and highlights the manner in which peoples currently suffer under them; providing insight into uneven or unjust power structures that can be easily recognised, discussed further below.[828]

The decolonial critique challenges the traditional western conceptualisation of war and peace, recognising that racial, gender and colonial constructs, developed within the horrors of war, are then incorporated into peacetime structures. The concern of decolonial scholars regarding peace theory arising from Western schools, as explained by Hull, is that it maintains a clear distinction between peace and war, without recognising how the norms of war have been integrated into the structure of peacetime societies. Instead, she presents a picture in which aspects of the war paradigm have remained a near-permanent state, maintained within peace times, as well as explaining that 'Imperialism was war'.[829] This argument involved 'critiquing the main building blocks of Eurocentric war studies, that is, war studies based on categories derived from Western experience'.[830] From this, occurs the war/peace binary: 'an international system of sovereign and national states; and the consequent categorization of war into international and civil war, with residual categories involving 'nonstate actors''.[831] In the western view, real war is inter-state war between nation-states, fought between regular armed forces. All other conflicts are relegated to derivative categories. They are small wars, insurgencies, emergencies, 'Interventions, uprisings, police actions, or something other than war proper'.[832] Rather than considering that there is a strong distinction between peacetime and wartime, she recognises the argument that, following the initial period of

[827] Mamdani, *When Victims Become Killers* (n 623).
[828] Section 5.4
[829] Isabel V Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Cornell University Press 2005) 332
[830] ibid
[831] ibid
[832] ibid

colonialism from 1492, there has remained a near-permanent situation of war, including ideas of small wars, both within western nations and within their colonies, and more recently in former colonies taking on the form of proxy wars. She explains the construction of this through the idea that 'the colonial situation itself was identical to war'.[833]

5.3 Legal Pluralism in ICL: Positive Flexibility or Hegemonic Uncertainty?

ICL is legally plural in that it does not take the form of a 'single unified body of norms' but rather combines elements of it combines IL, domestic law, and the hybrid court's individual amalgamations of the two.[834] Legal pluralism as it arises through hybrid legal spaces, contains more than one legal, or quasi-legal, regime within the same social field.[835] Considering the strengths of global legal pluralism, Berman observed that the very existence of multiple systems can, at times, create openings for contestation, resistance and creative adaptation.[836] Legal pluralism is useful for ICL as it provides for different legal regimes – such as international and domestic criminal law standards – to co-exist.[837] In the wider ICrJ system, legal pluralism is witnessed through a complex interplay between domestic and international law in which international crimes, such as genocide, crimes against humanity and war crimes, are prosecuted in both international and domestic courts. The pluralistic normative practice of ICL creates a *sui generis* system, providing flexibility and respect for domestic practice which a universalist standard would remove. However, there have been concerns about fragmentation occurring within ICL, leading to uncertainty.[838] This concern has been addressed by Simma, detailing the role of judges in the creation of a coherent construction of international law.[839] Indeed, in determining answers to questions of law, on which there is ambiguity in the statute, judges have sought guidance through surveys of national criminal law 'to ascertain the

[833] ibid
[834] Elies van Sliedregt Serge Vasiliev *Pluralism: A New Framework for International Criminal Justice* (Oxford University Press)
[835] Merry (n 42).
[836] Paul Schiff. Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press 2012).
[837] ibid
[838] ibid
Griffths, What is legal pluralism? (1986) 24 Journal of legal pluralism. 3
[839] Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 European Journal of International Law 265.

scope of customary international law and guide hermeneutics'.[840] Koskenniemi and Leino downplay concerns over heterogeneity, explaining given that 'international lawyers have always had to cope with the absence of a single source of normative validity, it may seem paradoxical that they should now feel anxiety about competing normative orders'.[841]

Some scholars, such as Stewart and Kiyani, have raised the concern that the unexamined pluralistic origins of ICL could lead to hegemonic practice.[842] The genealogy of ICL, developed through an interplay between international law and domestic criminal law, has not been fully examined to overcome hegemonic legacies.[843] The unexamined pluralistic origins of ICL limit its potential counter-hegemonic role, leading to dominant Western epistemologies being maintained into the modern-day and labelled 'Universal'.[844] The potential damage arising from the pluralistic origins of IL is especially relevant in relation to ICL, as, historically, domestic criminal law transported to the colonies was utilised as a tool of subjugation and to maintain power for the ruling elite, at the expense of indigenous cultures whose own laws were often outlawed.[845] In exploring the history of legal pluralism in ICL, James Stewart and Asad Kiyani concur with concerns raised by De Sousa Santos, that 'there is nothing inherently good, progressive, or emancipatory about legal pluralism'.[846] As presented by Stewart and Kiyani, 'it risks honouring laws that are born of force, that may not enjoy any meaningful degree of popular support, or that symbolize a painful history of subjugation to be overcome'.[847] The challenge of this is explored by Maxine Clarke who writes that 'global legal pluralism ... must move beyond legal pluralism to attend to the complexities of power at play and the ways that force and power cut through even pluralist constellations'.[848] To ensure a counter-hegemonic role for ICL,

[840] ibid
[841] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553. 558
[842] Stewart and Kiyani (n 38).
[843] ibid
[844]ibid
[845] Lauren A Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge University Press 2002)
[846] Stewart and Kiyani (n 38).
[847] ibid
[848] Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press 2009) 118.

safeguards are required to prevent pluralistic practice simply perpetrating the will of historically dominant forces.[849]

The question has arisen in scholarship of whether doctrinal diversity is desirable for ICL, with the strengths and weaknesses of a universalist approach to international standards examined in contrast to the diversity of a pluralistic system. Berman, however, recognizes objections to universality, arguing 'there are reasons to question both the desirability and – more importantly – the feasibility of universalism, at least in some contexts'.[850] Chief among his objections is that 'universalism inevitably erases diversity', and that 'the presumed universal may also be the hegemonic'.[851] Parekh, who argues 'the liberal principle of individuation and other liberal ideas are culturally and historically specific, further recognises this. As such, a political system based on them cannot claim universal validity.'[852] In relation to ICL, the liberal influence is evident in the focus on ICR, bringing into question the notion that ICL is, in practice, universal.

5.3.1 Coloniality of power in international criminal law

In the pluralistic genealogy of ICL, the coloniality of power arises two-fold: through both IL and domestic criminal law. Within the international legal system, De Sousa Santos recognises that the current 'counter-hegemonic' furthers the neo-liberal agenda of 'prioritization, marketization and liberalization, and does not address the exclusion of subaltern peoples'.[853] Additionally, the international criminal legal system has only achieved a counter-hegemonic role in relation to breaching the post-Westphalian state sovereignty barrier.[854] However, in practice, it has not moved beyond its top-down approach to recognise the role of the marginalised; the victims of neoliberalism, who maintain this position.

As expressed by Burgis-Kasthala, 'historically, the Third World has generally viewed international law as a regime and discourse of domination and subordination, not

[849] BALAKRISHNAN RAJAGOPAL, 'The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India' (2005) 18 Leiden journal of international law 345, 27.
[850] Paul Schiff. Berman (n 836) 131.
[851] ibid
[852] Bhikhu Parekh, 'The Cultural Peculiarity of Liberal Democracy' (1992) 40 Political studies 160, 160.
[853] de Sousa Santos and Rodríguez-Garavito (n 821).
[854] Section 4.6

resistance and liberation.'[855] The decolonial approach is especially relevant for ICL as a tool to address the concerns regarding bias in the focus of selective prosecutions. Considerable criticism has arisen due to the focus of the ICC and its prosecutions have been targeted at Africa.

De Sousa Santos argues that there are two forms of globalisation: neoliberal globalisation, and counter-hegemonic globalisation that has been challenging the former for some time.[856] He defines counter-hegemonic globalisation as the vast set of 'networks initiatives organisations and movements that fight against the economic social and political outcomes of hegemonic globalisation, challenging the conceptions of world development underlying the latter and propose alternative conceptions'. His volume gives examples of bottom-up approaches in which communities play a key decision-making role.[857] Santos recognises the role of the legal system as part of the process of neoliberal legal globalisation:

> Replacing the highly politicized tension between social regulation and social emancipation with a depoliticized conception of social change whose sole criterion is the rule of law and judicial adjudication by an honest, independent, predictable and efficient judiciary.[858]

While recognising the need for the ICC to aggressively pursue all perpetrators, Makau Mutua argues that this should not be used to 'sabotage the cry of victims for justice'.[859] He forcefully argues that there is a role for the ICC, and that critique of it needs to be constructive rather than tearing it down to benefit political elites.[860]

Rather than the criticism that ICL only applies to 'weak states', instead, all individuals who carry out international crimes should face accountability. Only once the ICC is applied equally to all states can the counter-impunity claims of ICL ring true, and there can be a

[855] Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14 Journal of international criminal justice mqw044.
[856] Boaventura de Sousa Santos and César A Rodríguez-Garavito, 'Law, Politics, and the Subaltern in Counter-Hegemonic Globalization' in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005)
[857] ibid
[858] ibid
[858] ibid
[859] Mutua (n 95).
[860] ibid.

more comprehensive search for justice for victims, including those who have been traditionally oppressed by criminal justice systems.

Pureza builds upon the work of De Sousa Santos, identifying that the approach of ICL fuels hegemonic globalisation through key liberal concepts, such as the rule of law, rather than working as a counter-hegemonic tool.[861] He considers how the 'Nuremberg paradigm' adopts a deontological view of IL, focused on ensuring retribution for individual criminal responsibility without considering wider political factors or root causes.[862] As Pureza argues, ICL finds a method to prevent itself from addressing the colonial issue by creating a progressive and objective narrative, thereby obscuring the problems of a colonial legacy and removing the opportunity for these to be coherently and systematically addressed within the practice of ICrJ.

Quijano considers that this critique is a more radical repoliticisation of epistemic Eurocentrism, recognising the fundamental co-constitution of 'modernity' and 'coloniality' in the contemporary production of knowledge about world politics. It presents the pervasive legacy that this has on universal ideals, perceiving a colonial matrix of power through four interrelated domains: 'control of the economy, of authority, of gender and sexuality, and of knowledge and subjectivity'.[863] The 'other', is a negated subaltered alterity who is marginalised, whose cultures or practice will not hold value within the society, and their epistemological understanding of peace and justice is not included within ICrJ discourse.[864]

The pluralistic origins of ICL incorporate not only the challenges of the international legal system but also the potential colonial legacy arising from the practice of domestic criminal law. However, as explained by Benton, 'there is no scientific consensus on the colonial legacy and its contribution to international criminal law history'.[865] Benton argues that 'the need for colonial legal pluralism quickly appeared essential', in which the criminal

[861] José Manuel Pureza, 'Defensive and Oppositional Counter-Hegemonic Uses of International Law: From the International Criminal Court to the Common Heritage of Humankind' in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005)
[862] ibid
[863] Quijano (n 778).
[864] ibid
[865] LAUREN BENTON, 'Made in Empire: Finding the History of International Law in Imperial Locations: Introduction' (2018) 31 Leiden journal of international law 473.

law of the colonial power could be utilised within the colonialised nation, in contrast to the pre-existing criminal law within the colonies. He presents the need for an understanding of 'the peculiar relationships between former colonies and any international criminal regulation would allow a better understanding of the relationships between the African States and the ICC'.[866]

The absence of trials for colonial crimes was exposed by TWAIL authors who were, however, conscious of the potential political, economic or ethnic instrumental attitudes towards any justice initiative; although, Aime Cesaire did observe that at Nuremberg, the 'prosecution of Nazi crimes entailed the first if incomplete, and perhaps unwitting prosecution of colonialist crimes'.[867] At the Tokyo tribunal, Justice Pal's famous dissent presented an alternative Third World viewpoint on the development of international criminal law based upon 'universal' natural law standards, which he argued were not applicable to the Japanese.[868] Pal thought the Allies' motives for creating the new charge were highly suspect – especially considering their own history of violence towards the non-Western nations.[869] Pal considered that the Allies' approach risked the criminalisation of the struggle against colonialism, and believed that this was too high a price to pay for security, arguing that the dominated nations 'cannot be made to submit to eternal domination only in the name of peace'.[870] He considered that this could create a pax *injusta*, because a considerable part of humanity faced 'not only the menace of totalitarianism but the actual plague of imperialism'.[871]

The forms of justice which occur through ICL are criticised as including 'artificial constructions of 'otherness', disparities of knowledge, logics of imitation and structural dependencies'.[872] They perpetrate a civilising aspect to international criminal justice, in which universalised standards of global justice do not challenge unequal power relations or epistemic violence.[873] Examining contemporary accounts of global justice, Iris Marion

[866] ibid
[867] Aimé Césaire 1913 and Robin DG Kelley, *Discourse on Colonialism* (Monthly Review Press 2000) 15
[868] Judith N. Shklar (n 626) 161.
[869] Pal (n 541).
[870] ibid
[871] ibid
[872] ibid
[873] ibid

Young claims that they restrict 'the meaning of social justices to the morally proper distribution of benefits and burdens among society's members'.[874]

The issue of justice within this chapter follows after the decolonial and postcolonial critiques of justice within IL, and the justice which arose out of the colonial criminal justice systems in which a foreign criminal justice system was imposed upon a majority in order to maintain order. Such justice systems recognised a distinction between the ruling elites and the 'others' who were required to uphold the newly introduced criminal standards. This development created a large number of subaltered people whose entire epistemology, including culture, language, science, medicine, agriculture and systems of justice, was determined as inferior.[875]

Martineau's postcolonial reading of international criminal jurisprudence considers colonial criminal law to be based on exclusion 'through the implementation of a differentiated legal regime for indigenous criminals and inclusion, through the will to civilise colonies and their criminal justice system'.[876] Martineau explains that this characteristic of colonial criminal justice was widespread: 'The need to associate Western law to local actors and practices was indeed common to the different (e.g. French or British) colonial experiences despite their singularities.'[877]

The legacy of ICrJ can also be traced through to the colonial practice of establishing governments and legal systems in newly colonialised lands.[878] In this process, the ruling power creates a system foreign to the indigenous population, who therefore become an exteriority or an 'other'.[879] This acknowledges the fact that, within the current system, a legacy remains, stemming from the creation of an 'other', an exteriority to a ruling elite who seeks to subdue the different, the indigenous populations. This builds upon the

[874] Anna Millan and Ali Can Yildirim, 'Decolonizing Theories of Global Justice' in Nikita Dhawan (ed), *Decolonizing Enlightenment* (1st edn, Verlag Barbara Budrich 2014).
[875] Sourav Kargupta, 'Feminist Justice Beyond Law': in Nikita Dhawan (ed), *Decolonizing Enlightenment* (1st edn, Verlag Barbara Budrich 2014).
[876] AC Martineau, 'Overcoming Eurocentrism? Global History and the Oxford Handbook of the History of International Law' (2014) 25 European journal of international law 329.
[877] ibid
[878] Biko Agozino, *Counter-Colonial Criminology: A Critique of Imperialist Reason* (Pluto Press 2003).
[879] IBID

legacy of the influence of the 'other' set out by Walsh, and the impact this has on the practice of ICL which integrates the other while maintaining their otherness.[880]

The creation of the 'other' in ICL is recognized by these scholars to have arisen through an 'imperialist influence'. ICL, viewing African conflict through an occidental lens, is one example of this 'othering' in action.[881] This arises through the lack of acknowledgement of the ongoing impact of colonialism on Western legal frameworks and procedural rules, including through the assumption that colonisation and related abuses are not criminal, but 'address victimization of a community with traditional or indigenous notions of time and property'.[882]

Post-colonial theorist Homi Bhabha has detailed how the approach to imperial power was ambivalent, 'seeking both to remake the colonized but also to maintain its difference'.[883] This stemmed from a 'desire for a reformed, recognizable Other, as a subject of a difference that is almost the same, but not quite'.[884] R. Fitzpatrick develops this, explaining that in the imperial context, 'law was pre-eminent amongst the 'gifts' of an expansive civilization, one which could extend in its abounding generosity to the entire globe'.[885][886]

Tauri examines how the construction of ICL is part of the wider retributive justice system that has been restricted due to its entire construction being based upon coloniality, together with its constituent ideas of power, race and knowledge, including criminology.[887] He argues that that 'the continued success of criminal justice as a (neo)colonial project, stems from its parasitic relationship with the discipline of criminology'.[888] 'The focus of retributive justice is therefore considered not to be in keeping with indigenous justice systems, because it favours individualistic western criminal justice which has led to a lack of accountability for colonial crimes.'[889] This

[880] Catherine Walsh, 'Shifting the Geopolitics of Critical Knowledge' (2007) 21 Cultural Studies 224.
[881] Biko Agozino and Igbo, 'Indigenous European Justice and Other Indigenous Justices' (2014) 8 African Journal of Criminology and Justice Studies 1.
[882] Agozino (n 878).
[883] Homi K Bhabha, *The Location of Culture* (Routledge 1994) 103
[884] ibid
[885] Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge 1992).
[886] Fanon use in this chapter
[887] Juan Marcellus Tauri and Ngati Porou, 'Criminal Justice as a Colonial Project in Contemporary Settler Colonialism' (2014) 8 African Journal Of Criminology & Justice Studies, 20, 20.
[888] ibid
[889] ibid

individualist focus on ICR, and the lack of colonial crimes recognised within the elements of crimes against humanity, prevents collectives (ie, colonising states) from being held to account.

Additionally, by failing to recognize injustices that are less tangible than atrocity crimes, international criminal law can actively contribute to their marginalisation and validate dominating practices.[890] Rather than conceptualising international crimes as context-specific outbursts of criminality, it might be helpful to view them as part of a continuum of different spectrums of violence that is inherently connected to everyday life.[891] It tends to marginalise the connection of crimes to broader 'non-exceptional' injustices that might implicate a wider range of actors.[892] It might also inadvertently contribute to the normalisation of 'ordinary' violations.[893] Mutau considers that the origins of ICL follow on from traditional ideas of the colonial periods rather than deterrence in the Hague's courtrooms: 'morality comes from the West as a civilizing agent against lower forms of civilization'.[894]

On the other hand, international criminal tribunals still attempt to take into account some African realities. This has been demonstrated through examples in hybrid tribunals considering 'the impact of beliefs in magic in its case law'.[895] It is the legacy of an excluded 'other' that pluriversal approaches are seeking to address, ensuring a role for the 'other' in the midst of a system rather than maintaining their exteriority.

The situations under investigation demonstrate selectivity at the ICC, and the operational selectivity of existing crimes prosecuted has been challenged by TWAIL scholars.[896] Kiyani raised the concerns that 'ICL affects the position of Third World peoples through its interaction with local power structures that target the weakest communities and

[890] Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Routledge, Taylor & Francis Group 2016)
[891] Anders G., 2011, Testifying About 'Uncivilized Events': Problematic Representations of Africa in the Trial Against Charles Taylor, Leiden Journal of International Law, 24, 4, 937-959.
[892] ibid
[893] ibid
[894] Mutua (n 297) 17.
[895] David M Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords; Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts' (2005) 37 Case Western Reserve journal of international law 1.
[896] Asad G Kiyani, 'Third World Approaches to International Criminal Law' (2015) 109 AJIL unbound 255.

enable systematic local repression'.[897] A serious concern for ICL is the practice of selectivity, in which states, who are wary of trying their own officials, include non-state actors under ICC investigations while deflecting focus away from the actions of the state.[898] To counteract this, the argument can be made that the ICC should prioritise investigations of state actors accused of crimes, to actively combat the 'classic impunity paradigm' in which state actors are not held accountable. This is discussed in Chapter 6 through the slow violence carried out by the Ugandan government which has not been investigated.[899] Selectivity within ICL occurred within the Nuremberg trials following WWII, which was designed in a manner in which the allies would not stand trial.[900] Procedural selectivity arises in ICL, in which the challenges of trying to balance civil and common law traditions within the practice of the courts, can lead to secondary victimisation for those unaccustomed to adversarial systems.[901] Finally, operational selectivity, occurs after a court is already in operation. In this, the cases which are prioritised by the prosecutor or law enforcement officers will influence the practice of the court.[902]

Reynolds and Xavier explain how the practice of international criminal law mimics colonial regulation in two ways.[903] They also advocate for parallel resistance to the surrounding international legal system that administers structural violence against the very people who turn to international law for support.[904] As discussed above, critics have shown concern that crimes committed by powerful 'Western' states, or their allies in the global south, have not been investigated to the same extent as other 'weaker' states. One particular concern has been the use of referral and deferral by the UNSC, as introduced in Chapter 4, in which permanent members of the UNSC can shield their allies while referring other states to investigation under the court. The UNSC, under its responsibility for the maintenance of peace and security, is provided, under Article 13(b) of the RS, with

[897] Asad Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity' [2016] Journal of International Criminal Justice mqw052.
[898] ibid
[899] ibid
[900] ibid
[901]. ibid
[902] ibid
[903] John Reynolds and Sujith Xavier, ''The Dark Corners of the World'TWAIL and International Criminal Justice' (2016) 14 Journal of International Criminal Justice 959.
[904] ibid

the opportunity to refer a situation to the ICC.[905] Article 16 'provides that the UN Security Council (UNSC) may, in a resolution adopted under Chapter VII of the Charter, request the Court to defer (not commence or proceed with) an investigation or prosecution for a renewable period of 12 months'.[906] While the UNSC recognises a preventive effect through ICC referrals, concerns have been raised over the political influences on the ICC's activities. Mamdani, referencing the discussion by the Indian delegates, has argued that the use of deferrals creates a shield for members of the UNSC while providing a tool for non-signatory states to be referred to the ICC.[907] Mamdani has argued how this interplay between the ICC and the UNSC has provided a 'legal normalisation' for types of violence, such as in Iraq, while criminalising violence in Darfur.[908] As Mamdani explains, these actions can politicise the work of the court. Examining the role of the UNSC and its potential to shield permanent members from jurisdictions of the court, Immi Tallgren asked, 'are we not just writing yet another chapter to the stale story of the Strong and the Weak in international law?'.[909] Political selectivity weakens both the opportunities for victims to seek justice and the legitimacy of a supposedly neutral international criminal court.

A further aspect is the existing crimes prosecuted at the ICC. This chapter, and Chapter 6, examines the limitations which arise from a focus on atrocity crimes at the exclusion of ones involving a more structural aspect. However, there are currently options to address the legacies of historic settler colonialism links under the Rome Statute. As Reynold and Xavier note:

> Three parts of the normative content of international criminal law do speak to more systemic elements of colonial projects. Forcible population transfer and apartheid are marked out as crimes against humanity under Article 7 of the Rome Statute. Article 8(2) (b) (viii) of the Statute also prohibits the settlement of

[905] Article 13 (b) Rome Statute of the International Criminal Court.
[906] Article 16 ibid.
[907] Mahmood Mamdani, 'Responsibility to Protect or Right to Punish?' (2010) 4 Journal of Intervention and Statebuilding 53.
[908] ibid.
[909] Immi Tallgren, 'We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court' (1999) 12 Leiden Journal of International Law 683, 695.

> occupied territory by an occupying power. As such, the very structure of settler-colonialism in a context of occupation is rendered criminal.[910]

They argue that a form of settler colonialism could potentially be prosecuted in Palestine or Sri Lanka if the ICC was to exercise jurisdiction. They continue that:

> Between a narrow individual accountability mandate and a desire to go with the flow of global geopolitics, the institutions of international criminal justice have been unable or unwilling to offer antidotes to the symptoms of imperial relations, whether in Kosovo or Sierra Leone, Libya or Afghanistan.[911]

The rearticulation in Chapter 8 addresses these concerns and presents a way in which to overcome them, or at least to limit their negative affect within the search for justice for victims.

5.3.2 Reconsidering victimhood and the 'other' in ICL

The rhetoric about victims within ICL has highlighted their position at the centre of the system; however, current practice challenges this claim. Critiques within ICL recognise problems in trying to seek justice for victims, including the need for retributive limitations arising from selectivity within ICL, and whether the adversarial trial processes are fit for purpose. The argument of this thesis builds upon Spivak's idea of the conception of victims in IL, in which she argues that victims are portrayed as helpless and in need of saviours, and challenges the term 'victim' as an evocative term with which people may not associate. Spivak's framing of 'white men saving brown women from brown men' is recognisable within the positioning of victims within ICL, as seen through the way that victims are treated at the ICC.[912] Spivak argues that the 'subaltern voice' cannot be comprehended within hegemonic communication processes. The suffering voice is not considered as the voice of theory; rather, the suffering is a problem to be solved by a theorist. As Nayar presents, at best, 'those that suffer are invited to await the trickle-down of whatever benign 'solution' theorists may purport to offer'.[913] Nayar explains the

[910] Reynolds and Xavier (n 903) 959.
[911] ibid
[912] Spivak (n 88).
[913] Jayan Nayar, 'The Politics of Hope and the Other-in-the-World: Thinking Exteriority' (2012) 24 Law and critique 63.

creation and subsequent power dynamics of a 'suffering-Other' and those working to deliver them from their suffering.[914] She determines that although it might be agreed that the days of the 'Noble Savage' are gone and that those 'Other-ed' do not need a go-between in their struggles, it can be difficult to accept the implications of this.[915] Hence, the search continues for 'a way to bring them out of their wretchedness or darkness and into our Enlightenment'.[916] Spivak identified a similar imbalance in the 'manifest destiny', claimed by particular groups in the global North, to dispense justice and to right wrongs that 'proliferate with unsurprising regularity' among the 'notorious receivers of justice' in the global South.[917]

This issue is analysed throughout this thesis to prevent harmful legacies arising through good intentions. It examines the lessons set forth by the Third World Approaches to International Law (TWAIL) critiques, 'addressing the way ICrJ and the Global South states, in subtle conjunction, may perpetuate a pattern of symbolic confiscation of the aspirations of peoples (and not just victims)'.[918]

Within ICL, similar challenges have been raised; the use of dominant, supposedly 'universal practices' impose an unfamiliar criminal justice system upon subaltern groups who have experienced serious harms, in which the needs and interests of these groups are not, in practice, valued at a similar level to those within the court, or by supporters of the court, such as donor states. Trial proceedings by Western standards of criminal justice, may not be culturally appropriate for the peoples who have suffered the harm. The move toward reparations provides awards, determined by Judges but often not in keeping with the needs of victims. Victims are required to unite together under one legal representative, even within an instance in which the large group of victims may have conflicting goals/needs. As presented within Chapter 2, the actors who claim to speak on behalf of victims often use an abstraction of 'The Victims' to justify their work; this may bear very little relation to what individual victims actually seek within the ICL system.[919]

[914] ibid
[915] ibid
[916] **ibid**
[917] Kargupta (n 875).
[918] Mutua (n 297) 201.
[919] **See section 2.5**

Based upon these origins, the issue of seeking justice for victims within ICL is currently restricted through a lack of recognition of the colonial legacy occurring within both IL and domestic criminal law. The power structure, which placed the elites in their position has contained within peace time, and has furthered, the marginalisation of the subaltern groups. The challenge, therefore, is how to provide recognisable forms of justice for victims who remain within this subaltered setting. Their long-standing lack of political voice or influence within criminal justice procedures have limited their search for justice, and this pattern has been maintained within modern-day ICrJ.

The modernity/coloniality analysis in this chapter provides an epistemological explanation of the 'accusations of a neo-colonial legacy within' ICL, presenting how it has created exteriority in which cultures and practices are perceived as inferior to the international system. Building upon the goal expressed in the RS, to place victims at the centre of the ICC, an examination of the epistemology of victimhood presents additional questions and limitations, setting out the manner in which the construction of victims within the ICC can remove their agency.

Reynold and Xavier detail, regarding the first prosecutor of the Special Court for Sierra Leone, that 'in a moment of profound introspection, he asks whether 'the international justice we seek to impose' is the same justice that of a victims of 'third world conflicts'.'[920] Additionally, they detail how he conceded some hard truths:

> We simply don't think about or factor in the justice the victims seek. ...We approach the insertion of international justice paternalistically. I would even say with a self-righteous attitude that borders on the ethnocentric. We consider our justice as the only justice ... We don't contemplate why the tribunal is being set up, and for whom it is being established ... After set up, we don't create mechanisms by which we can consider the cultural and customary approaches to justice within the region.[921]

[920] Reynolds and Xavier (n 903).
[921] Ibid referencing D. Crane,

Also, an overlooked area of justice arises from the exploitation of gendered subalterns, such as female factory workers, within a new international division of labour that 'produces the wealth and possibility of the 'First World''.[922]

Spivak was careful to avoid representational 'ventriloquism', recognising the limitations which arise if knowledge of the lived experiences of 'subaltern women is mediated by experts and academics'.[923] While these groups or organisations can provide useful information this is very different from actually receiving a clear knowledge of the experiences and everyday realities of the subalterned women. From this, an international feminism based upon 'universal sisterhood' that seeks to ameliorate the plight of 'Third World women' can be as detrimental as patriarchal structures.[924] In her analysis of epistemic violence, Spivak highlights that mechanisms of global domination and exploitation structurally prevent the representation of subaltern voices. They are not provided with a system in which they can, in practice, seek justice by themselves; the design of the system prevents this. As Chapter 3 of this thesis presents, notwithstanding the development of the victims' regime at the ICC, the opportunity for victims to seek justice is restricted by the rules and procedures of the court, even if they manage to have their victimhood recognised.[925] This compounds the critique, explained by Spivak, of the helpless suffering victims portrayed as in need of a saviour throughout the trial process, presenting a story of victims that the victims themselves do not recognise. It removes the agency of victims by suppressing their individual voices and experiences, presenting these in an idealised form. This limits the potential of victim participation and reparations, and provides justification for the judges to easily decide to exclude victims at various points of the trial.

Makau has presented the colonial interplay of victims, savages and saviours which maintains the civilising justification used to legalise and justify the colonial period; showing that colonial powers perceived themselves to be playing a saviour role through the desire to civilise savage cultures.[926] Building upon Makau's analysis of saviours and victims and savages within the human rights field, the saviours in this context include

[922] Kargupta (n 875) 200.
[923] Spivak (n 88).
[924] *ibid*
[925] ibid
[926] Mutua (n 297).

international lawyers within ICL seeking to save innocent/helpless victims who would not be able to find another avenue for justice without them.[927] This recognises that the classification of victims is differentiated. Those who have suffered torture at the hands of the state are recognised as victims, whilst individuals who have died of starvation due to government policy are not recognised in a similar category of victim.[928]

5.4 Transmodernity evolving international criminal law

Considering ICL from the perspective of transmodernity requires firstly re-examining ICL from the underside. Additionally considering victims from a transmodern lens involves a move away from the traditional suffering victim image and instead provides a forum for the voice of victims who do not fit the traditional mould within ICL. Finally it brings the normally divisive issues of difference and instead reconsiders it as a positive in which different victim groups can be brought together.

5.4.1 Re-examining international criminal law from the underside

In working to overcome the limitations of the international system, a form of intercultural dialogue has been suggested by both post-liberal and decolonial scholars. Lundy and McGoven present an opportunity to approach international systems from their underside, allowing the grassroots a voice and agency.[929] Moving away from the top-down universalist legacy, this provides the opportunity to reconsider existing systems, recognising their limitations and taking a step forward through a bottom-up approach. This treats the colonial legacy as something to be exposed and countered, rather than something required to be covered over or denied. In bringing the colonial legacy to the surface, the voices of those traditionally excluded from the ruling classes of a state are heard. The decolonial scholars suggest an approach which utilises the concepts proposed by post-liberal theorists, while also addressing the limitations of modernity/coloniality.

Dussel introduced the idea of 'transmodernity' as an alternative to modernity, building upon the understanding of the 'coloniality of knowledge and power'.[930] Transmodernity

[927] ibid
[928] Section 4.7
[929] Lundy and McGovern (n 26).
[930] Dussel, 'Transmodernity and Interculturality' (n 35).

represents a system in which all forms of knowledge, rooted in their particular experiences, are in dialogue. Dussel envisages a concept of transmodernity which 'seeks to subsume the best of 'globalized European and North American modernity' as judged from the perspective of the ones seeking liberation' from coloniality/the other/the subaltern.[931] Torres builds upon this concept of transmodernity adding, on the other hand, 'the critical affirmation of the liberating aspects of the cultures and knowledge excluded from or occluded by modernity'.[932]

In considering the practice of transmodernity, which includes the positive elements of modernity alongside other cultures, Dussel sets out that it is time for us to imagine, conceive, formulate and begin to create an alternative historical project to modernity, one in which liberation, 'not merely emancipation, and radical diversity, not abstract universality, define our goals'.[933] Transmodernity involves recognition of not only cultural but also epistemic differences too. Transmodernity is, among other things, Dussel's response to Eurocentrism and the formation of an 'epistemic community of masters'.[934] It posits that theory does not travel exclusively from Europe to the world but is rather found in different sites and travels in different directions. This approach of transmodernity is in keeping with Quijano's epistemological decolonization, opening up new opportunities for intercultural dialogue, moving away from the dynamic in which Eurocentric knowledge systems and voices are privileged and determined to be universally relevant.[935] This provides a strategy through which alterity and difference have an equal voice within a structure that recognises the need to ensure subaltern voices are heard. Locating the alterity (or exteriority) within those excluded from the prevailing political system is a tool that this thesis suggests could be utilised to provide victims with a stronger political voice. This could provide marginalised victims' groups a reformulation of their opportunity to express their interests and desires for justice, within a system which recognises the importance of including a role for those voices to be influential, clearly expressing their aims, rather than being utilised by other groups speaking for them. Recognising the political element of this voice and the influence it requires creates a radical rearticulation

[931] Ibid 43
[932] Maldonado-Torres and others (n 37).
[933] Dussel, 'Transmodernity and Interculturality' (n 35).
[934] ibid
[935] ibid

of the suffering 'other' approach, set out below in the construction of a victim through an ICL lens.

5.4.2 Transmodernity and victims

Dussel moves away from this approach towards victims and instead conceptualises them as 'negated alterity in modernity'. Dussel explained the elevated position of the conquistador in the newly discovered lands, who exerted his power by denying the 'Other' his dignity: 'The conquest practically affirms the conquering ego and negates the Other as Other'.[936] This presents an idea of the formation of the concept of the 'Other' in modernity and helps to guide the approach that should be taken to address this creation. Taking a bottom-up approach to this alterity, Dussel argues that ''the oppressed or popular classes of dependent nations' possess 'the maximum exteriority', and it is through this 'metaphysical alterity' that they alone 'can project a real and new alternative for future humanity''.[937] In moving away from a traditional situation in which the marginalised remain as a subaltern in society, instead, this would shape their position into the centre of society, recognising that they can be easily overlooked from the margins.[938] Dussel explains the need to accept the excluded to ensure the world can move on from the 'rationality of domination', perceiving this as the origin of the movement of 'negation of the negation'. He considers that praxis of liberation will arise with the inclusion of the alterity and foresees the opportunity of this occurring through the theory of transmodernity.[939]

The approach of transmodernity is a principle of liberation for the negated 'Other' and is defined by Dussel as a project for overcoming modernity, not simply by negating it but by thinking about it from its underside, from the perspective of the excluded 'Other'. Transmodernity is a future-oriented project that seeks the liberation of all humanity, 'a worldwide ethical liberation project in which alterity, which was part and parcel of modernity, would be able to fulfil itself', and 'in which both modernity and its negated alterity (the victims) co-realize themselves in a process of mutual fertilization'.[940] This

[936] Dussel, *The Invention of the Americas* (n 41).
[937] ibid
[938] ibid
[939] ibid
[940] ibid

critical approach moves to utilise non-hegemonic, subaltern and silenced counter-discourses of alterity from which the role of victims can be rearticulated. Through this rearticulation, the idea of victims can take on a new focus which emphasises the importance of their voice being heard in the development of the form of ICrJ, culturally suitable for their specific post-conflict situation, and critically recognising the importance of the 'Other'.[941]

The work of Grosfoguel also provides a tool to extend the challenge of the victims in ICL. The concept of 'diverse ethnic-political projects in which real horizontal dialogue and communication could exist between all peoples of the world' provides guidance that the aim is to provide victims a horizontal dialogue with other stakeholders in the court process.[942] This is similar to the discussion, in Chapter 2, of Christie's work on the 'theft of conflicts' discussion.[943] In considering this idea within the sphere of ICL, it will require a role for those traditionally marginalized groups to have the value of their knowledge and ideas recognised, especially in political terms. Through this, the marginalised groups will have the opportunity to share in equal dialogue with the traditionally dominant groups within societies. Combining the elements of dialogue and the 'Other' together, a fundamental change in the practice of ICL could arise, signalling a transition away from traditional top-down models of justice. Dussel argues that 'dialogue, which involves grassroots and stems from different epistemologies and experiences, provides an opportunity to address global challenges from a different perspective'.[944]

5.4.3 Victims, the 'other' and difference

As detailed earlier in this chapter, Torres explains that the 'paradigm of war' and the ongoing legacy of empire mean that difference is perceived as threatening and a cause of conflict. It is the approach to difference through transmodernity which provides an opportunity to reconsider methods for achieving peace. Transmodernity posits that difference is no longer something that needs to be overcome; it is not necessary to subsume everyone into a similar epistemology. Transmodernity identifies the positive aspects of European Modernity as well as features of alternative societies. Importantly,

[941] **ibid**
[942] Ramón Grosfoguel, 'THE EPISTEMIC DECOLONIAL TURN' (2007) 21 Cultural Studies 211.
[943] ibid
[944] Dussel, *The Invention of the Americas* (n 41).

pluriversal transmodernity reconsiders modernity from the underside, the perspective of the excluded Other, the objects of 'modernity's constitutive violence embedded in, among other features, the developmentalist fallacy'.[945] In this fallacy, the development goals presented within modernity are challenged, as discussed in section 7.3 by Eslava and his analysis on the 'from below' role within IL and development.[946] The work of Dussel on transmodernity sets forth the requirement for the 'reactivation' of subaltern knowledge, 'including those subalternized by the secular discourse of the imperial West and modern nation-states in the periphery'.[947] Transmodernity is neither Christian nor secular. It rather 'opens the space for the articulation of different forms of knowledge and conceptions of reality'. It goes in line with other efforts to take religious thought 'beyond the secular prejudices of enlightened modernity and, in a different way, from strict confessional adherence to religious creeds'.[948]

The pluriversal approaches set out in this section provide an opportunity to re-examine the construction of ICL, in which the voices of those traditionally excluded could be heard and the influence of a colonial legacy be reduced. The experiences of these subaltered voices can provide a 'methodology list' to be incorporated within ICL, including agency of victims, ensuring they have influence over the forms of investigations and the crimes included.

An alternative conceptualisation for victims and the 'other' is recognised through critical scholar, Behr's work on difference. In this, he presents a mechanism to conceive of difference in a manner that connects to the decolonial ideas on the 'other' and which could be utilised to develop the role of victims. In his critique of epistemologies of peace, Behr considers the 'politics of difference in the epistemology of peace ideology'.[949] Behr analyses the role of the self in Western peace narrative, arguing it does not place adequate importance on the role of difference and the role that the 'other' must play in achieving a lasting peace. He presents the important role which the recognition of difference, and the historical divisions which have arisen through it, can play in overcoming historical

[945] Walter D Mignolo and Arturo Escobar, *Globalization and the Decolonial Option* (Taylor and Francis 2013) 187
[946] Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge University Press 2015) <https://www.cambridge.org/core/books/local-space-global-
[947] Dussel, *The Underside of Modernity* (n 789).
[948] ibid
[949] Behr (n 724) s 4.4.

divisions between peoples or states, to instead achieve a lasting peace. He contrasts the role of difference with the traditional approach of liberal peace, which he considers as 'Imperial peace', a universal approach determining one principle as superior to the conflicting parties and 'under which they are supposed to unite and henceforward live in peace'.[950] In contrast to the idea, Behr celebrates the existence of difference and recognises that the aim should be finding ways to work together in the midst of this. The work of David Richards considers that the 'other' is a search for, 'alternative vision[s] to that hegemonic cycle of accumulation, structuration and narration: a new construction outside the history of misrepresentations'.[951]

Providing a mechanism in which difference or the 'other' could play a role within the grassroots approaches, detailed in Chapter 7, allows the opportunity for the voices of those normally considered as the 'other' to be heard and utilised, to achieve a lasting form of positive peace. Behr presents his role of difference as a 'rearticulation' of the standard peace processes utilised by imperial peace, which aim for the rationalisation and nullification of difference. He considers that the engagement with 'an' or the 'Other' plays a key role, as this is the 'person with whom one will be at peace'.[952] Rather than fearing difference, the universalisation of difference betters all peoples and can be used as a strength. It is not trying to make people more like us but recognising we can coexist and work with those who, while different to us, are in fact our neighbours, or simply fellow human beings. Instead of forcing people to accept the same form of civilisation that we are used to, we accept the method through which they carry out their lives. The difference of structures of government will be profound and compound all our beliefs of a useful form of government, but in fact can provide lessons to each other about how to improve the system, providing opportunities to learn and share common ground.

[950] IBID
[951] David Richards and Richards David, *Masks of Difference: Cultural Representations in Literature, Anthropology and Art* (Cambridge University Press 1994) 21.
[952] Behr (n 752) s 4.4

5.5 Conclusion

The decolonial critique provides a radical approach to Western theory, challenging liberal and post-liberal theories and understanding. Ultimately, it redefines the traditional historical narrative of ICL, demonstrating why this is fundamental to understanding its current practices. A re-evaluation of Western epistemology should be developed for the examination of peace and the role of victims. Stemming from this recognition, the approach of transmodernity provides an opportunity to address the limitations of the traditional approach to peace in IL, interlinked with a paradigm of war. Critically, the pluriversal intercultural approach, set out in this chapter, could provide a way to overcome the coloniality of power and race that has limited the achievement of lasting peace. In recognising a role for difference, that grants those in the exteriority agency rather than seeking to assimilate their cultures within one banner, the formation of the international legal system can be reconsidered from its underside. This approach can create a reimagining of ICL, working with the positive elements of the current system, while also seeking to overcome elements of epistemic violence that remain unexamined in current practice. The re-evaluation of the conceptualization of victims provides an opportunity to bring forth cultural relevancy within ICL and ensure the victims can maintain their agency. This critique is not designed to create a solution to the many challenges arising today, but rather to ensure that the need to address ICL from its underside is part of the discussion.

This approach of transmodernity, and the focus on the removal of epistemic violence, provides guidance for the discussion both of positive peace and on the interplay between peace and ICJ, along with the role of bottom-up approaches to criminal justice systems. The impact of transmodernity on approaches to ICJ, and the challenges of considering a form of criminal justice which can be seen as culturally relevant and include consideration of the impact of root causes, will be examined further in Chapter 7, followed by rearticulation of victimhood through a pluriversal approach in Chapter 8.

6 CHAPTER 6: POSITIVE PEACE, INTERNATIONAL CRIMINAL LAW AND THE ROLE OF VICTIMS

> A violence structure leaves marks not only on the human body but also on the mind and spirit.[953]

6.1 Introduction

Stable peace has always been a goal for ICL, and this is reflected in the statutes of the various international criminal courts and tribunals. However, as Chapter 4 introduces, while the maintenance of peace has been a crucial motivation for ICL, the nature of the peace constructed in post-conflict societies often takes the form of negative peace. This chapter builds upon the distinction between negative peace, which is focused on the removal of direct violence, and on positive peace as set out by Galtung. This distinction contrasts peace with violence rather than with war, suggesting that a conceptualisation of war and peace as binary states presents an incomplete picture of reality. Galtung explained his theory of positive peace, arguing that addressing the existence of structural violence within societies will require social, cultural and epistemic justice.

This chapter argues that the peace sought within ICL should be positive peace. This would mean that when the Rome Statute is being interpreted, justice issues should include the wider social justice aspects of positive peace, and should recognise that the structural violence inbuilt within societies has harmful impacts upon victims, especially marginalised groups.

Traditionally, as explored in Chapter 4, the idea of peace has been closely tied with the concept of war. Out of these approaches arises the conclusion that if there is no war, then there is peace. The positive peace theory recognises that this is not the end of the story; even in the absence of war, an unfair society can be maintained in which the rights of many peoples or groups are overlooked or suppressed. This theory argues that a negative definition of peace, concerned with the absence of conflict as is often favoured in peace research, is inadequate. Instead, peace and justice are considered to work together as

[953] Galtung, 'Cultural Violence' (n 47) 294.

mutual aims: one cannot fully exist without the other. Merely the absence of war does not equate to a situation of a fair and just peace.

As introduced in Chapter 4, the absence of direct violence could provide the setting for an unfair peace in which justice is non-existent for large parts of the population. The goal of positive peace also provides the basis for a methodology in which there is a role for ICL to ensure social, epistemic and cultural justice are sought within the international stage. It dictates a method of peace in keeping with the current development of the post-conflict landscape, as recommended by transitional justice and peacebuilding scholars.[954] Positive peace approaches can also overcome the limitations, introduced in Chapter 4, in which widespread amnesties were granted and a majority of victims did not have a voice in the development of a peace process. A fuller understanding of justice for victims is imagined, arising through the aftermath of social and cultural violence, alongside retributive justice, punitive justice, reparative justice, distributive justice and restorative justice.[955] It considers that these all play a part in a wider picture to ensure that victims do receive justice in a way that is culturally relevant to them, and which provides them ownership over the system that is designed to achieve justice. This is a systemic approach, tying together elements of international criminal law, victims, peace and justice in an innovative procedure to challenge negative peace and hegemonic legacies, and working towards a rearticulation of both the understanding of victims and the concepts of peace and justice in ICL. Aiming for positive peace strengthens the options for the rights of victims, ensuring their search for justice is part of transitional justice mechanisms and a peace process, moving beyond violence. Utilising the theory of positive peace aims to shape evolution within the ICrJ system on the role courts should or could play, alongside transitional justice mechanisms, in the midst of wider peace processes.

Positive peace, while providing a contrast to negative peace's dominance, remains a theory from a western school, criticised as having a Marxist influence. This chapter includes critiques presented by Third World Approaches to International Law (TWAIL) scholars, feminist scholars and peace research scholars, to highlight potential limitations to positive peace theory, and proposing ways to overcome hegemonic Western or patriarchal influences upon the theory. The approach of positive peace, a standard

[954] Section 7.7
[955] Section 4.5

critique for ICL, is utilised in conjunction with the TWAIL critiques of peace, which were presented in Chapter 5. Through this combined approach, issues of colonial structural violence can be more clearly represented. Additionally, bringing these two theories together provides a more comprehensive critique of the limitations for victims who suffer under colonial structures, being developed in wartime and then maintained within peacetime societies. This highlights the realities for the many unrecognised victims, who are excluded from criminal justice processes.

6.2 Negative Peace and how it is reflected within ICL

As introduced in Chapter 4, a negative peace approach is focused on the removal of direct violence, without examining any of the root causes leading to the conflict in the first instance. The law of peace within the UN takes a 'realistic pacifism' approach to peace in that it recognises exceptions, permitting the use of force 'with respect to threats to the peace, breaches of peace and acts of aggression'.[956] Martin Luther King, expressing his disagreement with negative peace proponents, raised an example of a person 'who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice'.[957]

The practice of ICrJ, explained in earlier chapters, does not easily provide a means through which to achieve negative peace.[958] In practice, the impact of criminal justice in bringing forth peace has been challenged through an analysis of the practice within the international criminal legal system, especially in relation to situations in which the courts intervene while a conflict is on-going. The evidence presented in this thesis has highlighted the limitations placed upon the role of victims, impeding their search for justice. However, as this chapter also demonstrates, the forms of justice sought within ICrJ can have both positive and negative impacts upon peace. Analysing the influence of the ICTY and its expressed mandate of restoring peace and reconciliation, Clark considers that the situation within Bosnia Herzegovina is currently negative peace, in which there is no immediate conflict but also there is 'no real reconciliation in the sense of a repair and restoration of relationships'.[959] Clark continues explaining how the concept of justice is

[956] Section 4.6
[957] 'LETTER FROM THE BIRMINGHAM JAIL' (2004).
[958] section 4.7
[959] Clark, 'From Negative to Positive Peace' (n 53).

one that is not limited to a purely retributive focus, and that 'the ICC can potentially contribute to peace but only as part of a comprehensive approach to justice that is deeper and thicker than criminal trials alone'.[960] The focus on negative peace standards for IL narrows the focus upon justice within peace. Chapter 4 details the negative peace approach shaped the development of ICL, in which retributive justice was the focus. However, although the RS of the ICC has provided a greater avenue for justice for victims, as Chapter 3 explains in practice this remains limited.[961]

Limitations of approaches based purely on negative peace can be witnessed through the current occurrences in Uganda.[962] This highlights how the achievement of negative peace in one state can occur merely because the direct violence is transferred to a neighbouring state.[963] This does not, in fact, mean that the conflict has finished or that a lasting peace will be achieved in either state. As such this chapter argues that when stakeholders within the court, including the Prosecutor and the Judges, are considering stable peace issues, as set out in the preamble of the Rome Statute, these should be guided by positive peace theory, including justice for victims.

The impact of negative peace is reflected in the situations in which the justice requirements included within transitional justice procedures have been delayed in favour of short-term peace. The violence that can arise from a situation of negative peace has been part of the current ICC investigation into Burundi.[964] Burundi was previously celebrated for its successful peace agreement, bringing together opposition parties within the government to achieve a peaceful functioning society.[965] However, the justice requirements included within the peace agreement were not enforced and there was no move towards positive peace.[966] The ICC investigation uncovered that the government carried out oppressive policies, leading to direct violence once again, against the political

[960] ibid
[961] Section 3.3 & 3.4
[962] Section 4.7
[963] Ref Uganda and DRC example with Kony and the LRA
[964] SITUATION IN THE REPUBLIC OF BURUNDI (Public Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017) para. 90
[965] Richard Caplan and Anke Hoeffler, 'Why Peace Endures: An Analysis of Post-Conflict Stabilisation' (2017) 2 European Journal of International Security 133.
[966] ibid

opposition and civil society opponents.[967] This chapter argues that the justice elements within society are crucial to ensure a just form of positive peace, which will be lasting. In this approach, ICL plays an important role to provide criminal justice and accountability, while also monitoring if the search for justice for victims is occurring.

A focus on negative peace also challenges claims that the central mandate of ICL is justice for victims. In contrast, the 'embeddedness of liberal, colonialist or gendered legal paradigms', prevents it from addressing structural problems, preventing these victims from receiving recognition.[968] Additionally within ICL the focus of 'atrocity crimes' has 'monopolised the determination of injustice', excluding the investigation of crimes taking a more structural approach.[969] This results in the exclusion of harmful structural wrongs, which have not been criminalised. Calculating the gravity of the harm created by these types of violence will require a different formulation from the traditional approach following direct violence, however as the case study on Canada demonstrates, the gravity of the impacts on victims can be extremely serious and certainly comparable to the gravity determinations required for ICC investigations.[970] As Osiel and Drumbl recognise, the reductionism of ICL is unsatisfactory in face of the collective international crimes which go 'beyond ordinary criminal law'.[971] Instead, these require examination of root causes and socio-economic influences.[972]

Additionally, the legacy of negative peace is visible in the oppressive forms of peace that were developed through colonialism. Here negative peace has created significant marginalisation for specific groups in society, in contrast to a narrow group of elites who have retained control in a manner that greatly benefits the elites. In one of Galtung's most influential articles, he explored imperialism as one of the major examples of structural violence.[973] This is an important consideration for the ICC which has recently been accused of being a hegemonic Western court, with a lack of investigation into alleged

[967] As the ICC investigation has demonstrated, the government began to carry out oppressive policies
[968] Pádraig Mcauliffe and Christine Schwöbel, 'Disciplinary Matchmaking : Critics of International Criminal Law Meet Critics of Liberal Peacebuilding'
[969] ibid
[970] Section 6.3.3
[971] Osiel (n 587).
[972] Mark A Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' NORTHWESTERN UNIVERSITY LAW REVIEW 74.
[973] Johan Galtung, 'A Structural Theory of Imperialism' (1971) 8 Journal of Peace Research 81.

crimes carried out by Western member states.[974] The dominant script of peacebuilding, discussed in Chapter 5, does not acknowledge the merits of alternative/subaltern cultures. Given that these peace processes are not concerned with root cause problems within societies, instances of inequality or structural violence remain. Simpson has considered that, 'at its most basic, this is a distinction between peace processes that prioritise ending violence in the shorter term, as opposed to building more durable peace through addressing the underlying causes of violence'.[975]

It is unrealistic to think that a form of negative peace through the removal of direct violence can be achieved solely through a criminal trial. In contrast to Clark's understanding of negative peace arising through the influence of ICL in Bosnia and the discussion of negative peace in Uganda in Chapter 4, the approach of positive peace provides a greater opportunity for the justice for victims' mandate of ICL to be achieved. While a simplified understanding of positive peace recognises the need to include a greater range of justice, such as cultural, social and epistemic justice, the next section provides greater clarity on the elements which make up positive peace theory, including the removal of structural violence, and the distinction from negative peace.

6.3 Theory of Positive Peace

Galtung's theory of positive peace is a structural theory, recognising the importance of both direct and structural violence within societies. Rather than prioritising one form over another, it seeks the removal of both forms of violence together, and over a period of time. It is crucial that one form of violence is not overlooked or forgotten. This is an important point to raise in response to the many sceptics who argue for prioritisation of the removal of direct violence, 'to stop the killings' while underestimating the harm arising from structural violence, and its damaging legacy.[976] The theory of positive peace recognises the reality of the harmful structural violence that remains within societies following the removal of direct violence.[977] Positive peace refers to the conditions wherein people choose to actively work together to generate conditions free of violence.

[974] **ibid**
[975] Gerry J Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (1 edition, Polity Press 2007).
[976] Galtung, 'Violence, Peace, and Peace Research' (n 9).
[977] ibid

Peace conceived in this manner is not simply a matter of control and reduction of overt use of violence, but of 'vertical development', connecting therefore to development issues as well.[978] This is recognised in Galtung's realisation of structural violence, concerned with issues of social and cultural justice, which he conceives as a positively defined condition, and 'egalitarian distribution of resources'.[979] In his structural theory of aggression, Galtung considers the social context of aggression, which emerges at the roots of society.[980] In that sense, Galtung's theory of peace is a structural theory. The conceptualisation of structural violence begins with the idea that 'violence is present when human beings are being influenced so that their actual somatic and mental realisations are below their potential realisations'.[981] With this conception, Galtung has rejected the narrow concept of violence 'according to which violence is somatic incapacitation, or deprivation of health, alone (with killing as the extreme form), at the hands of an actor who intends this to be the consequence'.[982] Galtung perceives personal violence as stemming from a 'Judaeo-Christian Roman tradition in what we today would regard as essentially static social orders'.[983]

Furthermore, the definition, set out by Galtung, distinguishes between the potential and the actual, between what could have been and what is: 'Violence is that which increases the distance between the potential and actual and that which impedes the decrease of this distance.'[984] By this definition, structural violence is far broader and more systemic than the personal or direct violence that is more easily accepted as violence, and that forms the basis of the elements of crimes under international law. Galtung explains how 'the potential level of realisation is that which is possible with a given level of insight and resources'.[985] These ideas present the impact that somewhat hidden forms of structural violence can have on people's wellbeing and life chances. Within the very root of society, systems can be in place limiting the potential of certain groups of people, for example by

[978] Ibid 183
[979] ibid
[980] Johan Galtung, 'A Structural Theory of Aggression' (1964) 1 Journal of Peace Research 95.
[981] ibid
[982] ibid
[983] ibid
[984] Galtung, 'Violence, Peace, and Peace Research' (n 9).
[985] ibid

restricting access to housing, jobs or education. The risk of conflict increases following the inhibition of human potential.

Importantly, as Galtung sets out, if people are starving when this is objectively avoidable, then violence is committed.[986] The structural violence notion addresses issues of social injustice and structures, institutions, ideologies and histories, and equates to a denial of rights because of the nature of social structures, cultural traditions and customs, including high levels of unemployment, lack of health and sanitation systems. Structural violence is recognised as a root cause of conflict in a wide variety of situations, such as the troubles in Northern Ireland.[987] Recent scholarship has detailed the connection between 'institutional discriminatory practice', poverty and threats to peace.[988]

Galtung considered the attainment of both social justice (removal of structural violence) and the removal of personal violence as equally significant. This is based upon an assessment that it is impossible to compare the amount of suffering and harm that has been caused by personal or structural violence: '[m]oreover they seem often to be coupled in such a way that it is very difficult to get rid of both evils'.[989]

A further aspect of violence set out by Galtung is that of cultural violence, defined as any aspect of a culture that can be used to legitimise violence in its direct or structural form.[990] 'Violence can be expressed structurally, culturally or socially. In these three domains, violence is understood as the use of force or power over another party to coerce a particular outcome from a conflict situation.'[991] 'Symbolic violence built into a culture does not kill or maim like direct violence or the violence built into the structure. However, it is used to legitimize either or both, as for instance in the theory of a *Herrenvolk,* or a superior race.'[992] In this manner, cultural violence occurs in situations in which violence becomes socially acceptable. This may occur through the law or cultural practices that dismiss violence and human suffering as a societal norm. The practice of this in societies

[986] ibid
[987] Elazar Barkan, 'Memories of Violence: Micro and Macro History and the Challenges to Peacebuilding in Colombia and Northern Ireland' (2016) 31 Irish political studies 6.
[988] IBID
[989] Galtung, 'Violence, Peace, and Peace Research' (n 9).
[990] Galtung, 'Cultural Violence' (n 47).
[991] ibid
[992] ibid

can result in instances of serious disease, death, starvation, violence or suffering arising as a result of government programmes or societal procedures. These may be so widely accepted by populations that they have normalised structural violence, so they no longer recognise any violence within it, instead considering violent institutional behaviours to be correct practice.[993]

This idea is very useful in considering the dynamics of societies experiencing international crimes, in understanding the 'hidden' violence which can prevent a sustainable peace from being achieved. Cultural violence may be an obvious aspect, or it could be hidden within the societies and its existence has the potential to prevent a lasting peace. Taking the example of the justifying notion of the existence of a superior race – an example of cultural violence – this can be understood in a dominant language or a preferred epistemic or religious form, utilised by ruling powers who benefit from it and reduce the rest of society. This connects with the ideas set forth by decolonial scholars, in Chapter 5, who perceive the Western ideology is viewed as 'superior' and has a dominance over other different cultural ideas and identities, rather than being a universal epistemic belief.

6.3.1 Positive peace: understandings of structural violence

Galtung sought to clarify the understanding of positive peace by explaining the details of 'structural violence'.[994] This sought to ensure that there would be a clear and concise understanding of positive peace.[995] Structural violence includes psychological and physical forms along with cultural violence; cultural tools that legitimise different forms of violence including imperialism.[996] As Galtung highlights, the origins of structural violence are linked with personal violence in their pre-history.[997] The aspects of structural violence become so ingrained with the structure and order of a society that it can be

[993] **ibid**
[994] Galtung, 'Violence, Peace, and Peace Research' (n 9).
[995] ibid
[996] ibid
[997] **ibid**

maintained without those who are involved in maintaining it recognising that they are a part of this.[998]

The approach to structural violence from a Marxist perspective considers that 'structural violence is the opposite of human emancipation'.[999] As Fanon argues, 'it is exploitation in Marx's sense of the extraction of surplus value from a workforce with no choice but to subject itself to the wage labour system, the unfreedom inherent in the structural determination'.[1000] While Fanon recognises that this can occur as direct violence, it is more common as everyday economic violence; creating 'the wretched of the earth.'[1001] Baars considers that structural violence, in contrast to direct violence, forms the 'myriad other forms of coercion found in today's global capitalism'.[1002]

In a similar understanding to that of the definition of structural violence presented by Galtung, Krever highlights how systemic social violence, such as economic exploitation, is implicitly approved in the social order in ICL: 'The international trials take serious social conflict and instead transform it into an isolated case focused on the agency of an individual.'[1003] He argues that ICL is solely concerned with; 'the conduct which has been criminalized through international trials, namely: 'acts of individuals that threaten violence to persons or property' and yet 'other systemic forms of social violence – economic exploitation, say – and the social order in which they are rooted are implicitly approved'.[1004]

Complex social issues and the historical basis of the problems are therefore simplified into a demonstration of legal justice, with precise rules and procedures, to ensure that courts would be neutral. Limiting the focus of the courts to the crimes committed by individuals ignores the wider implications, such as the root causes of the conflicts and the social-

[998] Ref the ICL scholars examining this also is this discussed in more detail in chapter 5 or later in this chapter? Reference this
[999] Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy*, vol 188 (Brill 2019)
[1000] Ibid citing Fanon The Wretched of the Earth
[1001] ibid
[1002] **ibid**
[1003] Krever (n 67).
[1004] ibid

economic conditions, which need to be considered as they will impact on the future stability of a country.

Positive peace theory recognises unfair forms of peace or unjust peace as an unfinished aspect of conflict transformation, or moving societies beyond international crimes occurring in 'peacetime'.[1005] In bringing together ideas of peace and justice, and calling for the removal of structural violence, positive peace surpasses the peace/justice controversy debated within ICL. The interplay between positive peace and the ICrJ system requires an exploration of how the structural aspects of positive peace are relevant to the individualistic focus of ICrJ. This is developed through an examination of the structural component of state policies, such as the recent Canadian cultural colonial genocide report, examined later in this chapter.[1006]

Susan Marks details how limiting the focus of the court to the crimes committed by individuals ignores the wider implications: 'the root causes of the conflicts and also the social-economic conditions'.[1007] Marks also points to the fact that there has been little mention of the beneficiaries of structural violence and that those who (directly or indirectly) live on the practices and processes that victimise others have been allowed to remain comfortably out of sight. Susan Marks highlights an area of concern when examining root causes as attention is directed at certain instances of violence, such as human rights abuses, but does not look to the 'larger framework within which those conditions are systematically reproduced'.[1008] Referencing a study carried out by Kelly on human rights monitoring of torture, Marks posits how the 'political nature of violence' within modernity depoliticises the causes and consequences of torture:

> Kelly stresses that this is not a 'deliberate strategy or philosophy' on the part of monitoring bodies; it is simply a function of the nature of the tasks allocated to them and of the conditions in which they work.[1009]

[1005] 'peacetime' is used to query the peacefulness of societies experiencing international crimes.
[1006] Paul Farmer, 'On Suffering and Structural Violence: A View from Below' (1996) 125 Daedalus (Cambridge, Mass.) 261.
[1007] Susan Marks, 'Human Rights and Root Causes' (2011) 74 The Modern Law Review 57.
[1008] ibid
[1009] ibid

Alternative approaches to structural violence address limitations of Galtung's theory, presenting in contrast 'slow violence', in which a more comprehensive understanding of structural violence is constructed. Rob Nixon presents the concept of 'slow violence' in response to the 'static connotations' arising through Galtung's concept of structural violence, which do not fully factor in the impact of time in separating the violence from its original causes.[1010] Nixon explains how slow violence can include structural violence, 'but has a wider descriptive range in calling attention, not simply to questions of agency, but to broader, more complex descriptive categories of violence enacted slowly over time'.[1011] Nixon explains how structural violence can be included within the scope of slow violence where it has been created over a long time in a complicated manner. The incremental development of slow violence over time means that it can be hard to recognise. The example of the impact of the use of Agent Orange by U.S. forces upon the population of Vietnam demonstrates a form of slow violence. After more than 30 years the Agent Orange continues to 'wreak havoc as, through biomagnification' a build-up of toxins occurs within the tissues of animals, which, once consumed, is passed up to future human generations, increasing the 'likelihood of developing Parkinson's disease and ischemic heart disease'.[1012] Determining individual criminal responsibility for slow violence can be difficult to distinguish as it involves many generations of structural practice. Additionally, it challenges our traditional understanding of violence's effects. This requires an alternative calculation of causation and agency, developed in an intergenerational manner.[1013]

These critiques of structural violence are necessary tools to utilise alongside positive peace theory when considering ICrJ and the challenges of colonial legacy and the pervasive though the often unrecognised impact of slow violence. This chapter argues that the idea of small wars provides further explanation of the need to utilise positive peace theories when considering positive peace in contrast to negative peace and recognising the potential Western influence arising from this theory as well. Structural violence crimes are linked to the suppression of indigenous epistemic cultures, through the outlawing and repression of indigenous cultures, which have remained in independent

[1010] Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011) 11
[1011] ibid 11
[1012] Ibid 14
[1013] ibid

nations after formal decolonialisation.[1014] As introduced in Chapter 5, Hull has suggested, however, that the conceptualisation of positive peace and structural violence could maintain one of the tenets of Western thinking within the theory, preventing the liberation sought by decolonial scholars from occurring. Taking this critique into account, this thesis presents how the theory of positive peace could potentially be utilised as a tool to address the epistemic challenges highlighted by decolonial scholars, following the enlightenment and the development of modernity. Rather than challenging Hull's presentation of the Small Wars conceptualisation of modern war and violence, detailed in Chapter 5, this thesis proposes that Galtung's theory – particularly the concept of structural violence and the assertion that the removal of direct violence merely leads to negative peace – could instead provide an opportunity to address the challenges of Small Wars and epistemic violence.[1015] Imperial structural violence can be examined building upon Galtung's theory of imperialism alongside wider decolonial understandings. Structural violence crimes could be conceived as arising from the outlawing and suppression of non-Western, indigenous epistemic cultures, which have been maintained within decolonised nations after formal independence.

6.3.2 Positive peace, root cause issues and ICL

The theory of positive peace sets forth the need to address the root causes of international crimes. Recognising the importance of considering the root causes of violence is a fundamental issue in seeking to achieve the justice aspects of positive peace. This section examines the manner in which wider root cause aspects can overcome their marginalisation within ICL, facilitating the possibility of achieving positive peace.[1016] The importance of addressing victims' needs includes not only issues of direct violence but also the wider justice issues. Waldorf highlights how 'everyday injustices rooted in historical inequalities may be as important, if not more important, for many survivors than the extraordinary injustices' of severe violations of civil and political rights.[1017]

[1014] Galtung, 'Cultural Violence' (n 47).
[1015] Section 52.2
[1016] Larissa van den Herik, 'Economic, Social, and Cultural Rights - International Criminal Law's Blind Spot?' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2274653 34
[1017] Russell Buchan, 'International Law and the Construction of the Liberal Peace' (2013) 64 International & Comparative Law Quarterly 491. Referencing Waldorf 2012

As explained above, a focus on achieving merely the removal of direct violence, defined as negative peace, can achieve a form of oppressive peace and merely maintain the status quo of root causes which existed previously. Galtung presents that there is also 'indirect violence in so far as insight and resources are channelled away from constructive efforts to bring the actual closer to the potential'.[1018] This does not discount the fact that aiming to address root causes is difficult and complex; however, this is required as part of a peace process that will last beyond the length of a trial. It recognises that 'a political process in which conflicts are resolved by peaceful means' is needed, and founded upon a 'mixture of politics, diplomacy, changing relationships, negotiation, mediation, and dialogue in both official and unofficial arenas'.[1019]

Recognising the limitations of peacebuilding practice within the UN, scholars have challenged the lack of focus on root causes of conflict and recommended following a positive peace methodology.[1020] Paul Collier reinforces the importance of this in detailing the frequency in which civil wars are perpetuated by these root cause issues.[1021] This has been backed up by scholars analysing the work of the UN in post-conflict state-building, such as David Roberts, who recognises the limitations of negative peace in achieving lasting peaceful societies. Newman's critiques of attempts by the peacebuilding community to ''de-politicize' peacebuilding, presenting it as a technical task', risk overlooking political elements by presenting a practical challenge to be addressed by a problem-solving approach.[1022] As elucidated by post-liberal critical scholars this move to:

> Homogenize concepts or approaches may be counter-productive by masking power relations embedded in complex historical relations and undermining local understandings of how participants might cultivate their sense of transformative agency.[1023]

In contrast to simplifying root causes, the UN Peacebuilding Support Office highlights how sustainable peace is achieved through seeking to end violence and address root causes to

[1018] Galtung, 'A Structural Theory of Imperialism' (n 973).
[1019] Oliver P Richmond, 'The Dilemmas of a Hybrid Peace: Negative or Positive?' (2015) 50 Cooperation and Conflict 50.
[1020] IBID
[1021] P Collier, 'Greed and Grievance in Civil War' (2004) 56 Oxford economic papers 563.
[1022] Roberts (n 721).
[1023] ibid

prevent a return to conflict.[1024] UN Secretary-General Antonio Guterres explains that; 'only by addressing the root causes of crisis, including inequality, exclusion and discrimination, will we build peaceful societies resilient to terrorism and violent extremism.'[1025] There are some concerns that too much focus on root causes is not always helpful, as Susan Woodward pointed out, 'There are some very good reasons and some not so good why the 'root causes' do not matter in successfully ending a civil war'.[1026] While this may in practice be correct at times, it does not lead to the creation of a lasting just peace.

In considering issues of lasting peace, the need to address structural violence has been examined both on its own and as a root cause to direct and personal violence. While there remains a limit as to what ICL can achieve in terms of addressing entrenched structural systems through the focus on individual criminal responsibility, transitional justice scholars have considered the importance of achieving positive peace as forming part of the mechanisms seeking to create lasting peace in societies.[1027] This thesis argues that there is a need for ICL and transitional justice systems to work together more coherently with a shared aim of positive peace, allowing the potential for greater justice opportunities for victims.[1028]

While addressing structural violence in societies requires a greater range of processes that extend beyond ICL, there is the opportunity that it can strengthen the realisation of the search for justice for victims within its current structures. As the previous chapters of this thesis have discussed, the selectivity of ICL means that only a limited number of cases will be heard. A development in the focus of the jurisdiction of the ICC was recognised with the announcement by the OTP, in 2016, of the new policy for selecting and prioritising cases.[1029] 'The Prosecution will now treat as priority crimes within its jurisdiction that were 'committed by or result in the destruction of the environment, the

[1024] Richmond (n 719).
[1025] IBID
[1026] ROLAND PARIS, 'Saving Liberal Peacebuilding' (2010) 36 Review of international studies 337. Referencing Woodward
[1027] Natasha Price, 'Integrating "Return" with "Recovery": Utilising the Return Process in the Transition to Positive Peace: A Case Study of Sri Lanka' (2010) 99 The Round Table 529.
[1028] Section 7.7
[1029] OTP Policy paper on case selection and prioritisation 15 September 2016 (https://www.icc-cpi.int/Pages/item.aspx?name=policy-paper-on-case-selection-and-prioritisation) (hereafter OTP policy paper on case selection)

illegal exploitation of natural resources, or the illegal dispossession of land''.[1030] This did not create new environmental crimes, rather it recognised the importance of these crimes alongside wartime atrocities.

Additionally, structural violence will include a wider range of aspects that go beyond the standard range of economic, social and cultural rights. The abuses of these rights will overlap with positive peace issues and there is a recognition that they have been traditionally overlooked as aspirational when compared with the focus on civil and political rights.[1031] Sharp has also argued that the limitation of the influence of socio-economic rights is due to a lack of focus in these areas within domestic human rights considerations, which then progressed onto the international level. [1032] He argues that a positive peace paradigm should be incorporated into transitional justice situations to examine root causes, especially in relation to economic violence, overcoming:

> The approach from a relatively narrow and legalistic one focused on physical violence and civil and political rights to one that would also grapple, where appropriate, with the socioeconomic underpinnings of conflict, including various forms of structural and economic violence.[1033]

Evelyne Schmid has argued that rather than ICL having to expand to include economic, social and cultural rights (ESCR), these violations already fall within the scope of international crimes.[1034] Trial Chamber II of the International Criminal Court, for instance, recently recognised that the theft of household items, food or livestock can have extremely serious consequences for the daily life of survivors and can be captured by the war crime of pillage.[1035] Forced population movements also frequently go hand in hand with ESCR violations, particularly forced evictions or deliberately imposed discriminatory measures in the realm of people's access to jobs and livelihoods.[1036]

[1030] Ibid

[1031] Schmid (n 51).

[1032] Dustin N Sharp, 'Addressing Economic Violence in Times of Transition: Toward Positive-Peace Paradigm for Transitional Justice' (2012) 35 Fordham international law journal 780.

[1033] ibid

[1034] Schmid (n 51).

[1035] Katanga Trial Judgment (n 169) para. 953

[1036] ibid

Thomas Poggee has highlighted how the:

> Present global institutional order is foreseeably associated with such massive incidence of avoidable severe poverty, its (uncompensated) imposition manifests an ongoing human rights violation – arguably the largest such violation ever committed in human history.[1037]

It is highlighted that this is not carried out by people who intend it to occur, due to indifference or deceiving themselves. The poverty which arises through structural violence occurs both as one of the root causes of conflict and a result of conflict, for example, violent competition over natural resources.

Structural policies that result in limiting 'somatic realisations' cause significant harm to victims. The reality of attaining positive peace includes the need to achieve social, cultural and epistemic justice as well.[1038] If issues which can lead to starvation over a long period of time, following the 'slow violence' discussed above, are not recognised with the same understanding of gravity accorded to other actions, then the result can be a form of 'genocide'. For example, this slow violence has been documented within the displacement camps within the Acholi population within Northern Uganda as a result of government policy.[1039] Which placed them into the camps, preventing their opportunity to creating a livelihood as they forced people into unsafe camps without adequate housing or healthcare.[1040] The ICC investigation did not include these alleged crimes, providing the victims no potential for justice through the court, and, instead, leading to accusations of bias in favour of states. As argued throughout this thesis victims of state violence, especially state policies, have significant hurdles in seeking accountability or justice. As Skogly has worryingly presented:

> 'If malicious state leaders know that they may be brought to trial for massacring people, they may choose to starve them to death, or inflict illness on them instead.

[1037] Thomas W. Pogge, *Politics as Usual: What Lies behind the pro-Poor Rhetoric* (Polity Press 2010).
[1038] Lisa J Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 The International Journal of Transitional Justice 331.
[1039] Section 4.7
[1040] Dolan (n 740).

> If the concern is the kind of suffering, and the result of the actions, then a limitation to civil rights does not seem logical.'[1041]

An aspect of this, currently under consideration, is the use of starvation within non-international armed conflicts (not currently included within the RS), which if successful could provide an expansion of the elements of crimes that are more in keeping with the Geneva conventions.[1042]

Burgis-Kasthala explains the 'slow violence' approach in relation to ICL involvement in the Democratic Republic of Congo (DRC) in which the colonial history is not simply an 'artefact of the past, but as an ongoing aspect of the present and the future'.[1043] Rather than the standard ICL approach viewing the 'trial as effecting rupture and repair', in contrast 'TWAIL scholars seek to highlight colonial continuities that have produced these episodes of violence'.[1044] As detailed by Mutua in Chapter 5, the construction of victims in IL maintains a focus on individuals from countries in the 'global south,' and acts of extreme violence.[1045] This results in structural violence not being included within the elements of the crimes or perceived as lacking sufficient gravity to fall within the jurisdiction of the ICC.

The recognition of the impact of slow violence on both the present and the future is important in considering generational justice issues. This is a complex challenge for ICL. However, address these varied justice issues are important to the potential for lasting just peace. Including the impact of slow violence as part of the approach to positive peace theory strengthens the understanding of violence in society that is difficult to recognize through traditional methods of analysis. As Torres discusses in Chapter 5, it brings the 'paradigm of war into peacetime'.[1046] Additionally, this strengthens the understanding of structural violence and its current and future impact for those who have not suffered and may in fact have benefited from the societal system without being aware of it.

[1041] Sigrun Skogly Crimes against Humanity (2001) 5 The International Journal of Human Rights 58.
[1042] Laplante (n 1038).
[1043] Burgis-Kasthala (n 855).
[1044] ibid
[1045] Section 5.4
[1046] Section 5.2

6.3.3 Structural violence: Canadian case study

The issue of structural violence and international crimes, and the impact upon minorities within 'peacetime' has arisen especially in the recent legal analysis of genocide in the supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.[1047] The Canadian report addresses issues of structural violence and the legacy of colonialism within peacetime violence in societies – representing a greater call to consider the root cause aspects to structural violence within society and demonstrating how structural violence can be manifested and perpetrated within IL when hegemonic legacies are not fully acknowledged.[1048] The authors of the legal guidance present within their analysis how this 'particular form of atrocity falls within the definitions of genocide'. However, the use of the term 'colonial genocide' is challenged by some legal scholars, who argue that the legal reasoning has 'fallen short of establishing Canada's international responsibility'.[1049]

The inquiry has highlighted how, within the drafting process of the genocide convention's negotiations, especially in the area of cultural genocide, indigenous perspectives were completely ignored or excluded from the discussion, an omission they highlight that was more than an oversight, with colonial states actively pushing for 'cultural genocide' to be excluded.[1050] The classification of the treatment of indigenous women and girls by government actions, as 'genocide' has been controversially received. However, in the legal analysis, it is detailed how the Polish Jurist, Raphel Lembik, who coined the term 'genocide' wanted colonial or cultural genocide to be included within the definition.[1051] Colonial state interests however resulted in a modification of Lemkin's original conception. [1052]

The definition of genocide utilised in the report combines international standards and the domestic statute to state that an omission on behalf of the state can constitute a genocidal

[1047] The National Inquiry into Missing and Murdered Indigenous Women and Girls
Supplementary Report of the NATIONAL INQUIRY INTO MISSING AND MURDERED
INDIGENOUS WOMEN AND GIRLS A Legal Analysis of Genocide June 3, 2019, (hereafter MMWIG report)
[1048] Ibid 96
[1049]ibid
[1050] ibid
[1051] Alexander Hinton (ed), *Genocide: An Anthropological Reader* (1st Edition, Wiley-Blackwell 2002) 15.
[1052] Ibid 79

conduct in domestic practice.[1053] Additionally, they argue that the domestic definition allows for a 'living interpretation of the crime consistent with customary international law'.[1054] The flaw in the international definition of international criminal responsibility is that it does not fully recognise, as highlighted by the genocide report, the root cause aspects of structural policies carried out by the state. [1055] ICL only currently recognises individuals as possible perpetrators of crimes like genocide and does not prosecute states as a whole. However, in the case of slow/structural violence, it is not usually possible to isolate a single individual who is responsible. Instead, it is a process that involves many public officials, perhaps over generations. [1056] This report examines the state policies to determine the equivalent ICR of intent for genocide applicable by state organs. They highlight that 'There is little precedent in international law for situations where the state is the perpetrator of genocide through structural violence, such as colonialism'.[1057] Additionally, they detail that states do not have a specific intent in criminal responsibility in a similar manner to individual perpetrators. Instead, referencing William Schabas, States have policy.[1058] It is therefore the policy of the state which is examined in light of the nature of colonial genocide, established over a long period of time, implying a pattern of 'domination and dehumanization', enabling genocidal acts to occur.[1059]

This form of colonial genocide is contrasted with the more traditional understandings of genocide, such as the Holocaust. Colonial genocide is recognised as a slow-moving process. Acknowledging the controversial nature of the use of the term 'genocide' the distinct forms of genocide are highlighted. While the lack of a 'totalitarian mastermind' differentiates colonial genocide from the more transitional understandings, they argue this does not negate the impact of colonial genocide. Rather these factors 'allowed the Canadian consciousness to dismiss Canada's colonial policies as racist and misconceived, rather than acknowledge them as explicitly genocidal and, even, ongoing'.[1060]

[1053] MMWIG report (n 1073)
[1054] ibid
[1055] Ibid
[1056] Ibid
[1057] ibid
[1058] ibid
[1059] ibid
[1060] Ibid See also Tamara Starblanket, Suffer the Little Children: Genocide, Indigenous Nations and the Canadian State (Gardena, CA: SCB Distributors, 2018) at 66

One widely accepted example of the structural violence against indigenous peoples in Canada has been the structural aspect of the violence directed at indigenous women. The national inquiry has sought to 'access the root causes of the violence against indigenous women and girls'.[1061] It determines that 'colonial structures and policies are persistent in Canada and constitute a root cause of the violence experienced by Indigenous women, girls, and 2SLGBTQQIA people'.[1062]

The issue of colonial genocide follows up on the arguments, set out in Chapter 5, from the decolonial school, recognising the lasting impact of the colonial encounter on many cultures.[1063] As detailed in Chapter 7, Park argues that transitional justice processes should provide procedures to address settler colonialism.[1064] Terms such as internal colonialism and settler colonialism recognise the influence of structural violence upon 'peacetime' societies often recognised as leading democracies under international law.[1065] As Paul Farmer argues, gross human rights violations are 'not random in distribution' but 'symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer abuse and who will be shielded from harm'.[1066]

6.4 Deconstructing Positive Peace

It is important to examine the Western influences behind Galtung's theory, developed in the face of the critiques and the limitations that have been presented in Chapter 5, of hegemonic Western epistemologies and influences. However, the flexibility of the concept of positive peace, working in conjunction with transmodernity, could be a useful tool. Including socio-economic issues within peace theory, especially when bringing this together with justice elements in criminal law, opens up an important dimension in examining the root causes of international crimes. The critiques of positive peace provide

[1061] ibid
[1062] **'Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual' (2SLGBTQQIA)**
[1063] Section 5.2
[1064] Augustine SJ Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice' (2020) 14 The international journal of transitional justice 260.
[1065] Burgis-Kasthala (n 855).
[1066] Farmer (n 1006).

useful lessons to ensure that the potential limitations and pitfalls of the goals of positive peace can be avoided.

Galtung acknowledged that Gandhi and Arne Næss were influential to his theory. [1067] Peace approaches within IL, including ICL, following the UN Charter, have been recognised as maintaining a negative peace approach.[1068] This negative peace approach stands in contrast to positive peace theory, with its origins in absolute pacifism following the teachings of early Christianity, along with Tolstoy and Gandhi, for whom social justice was crucial. The development of the theory of non-violence set forward by Gandhi, and his challenges of structural limitations within society ring very clear in the theory of positive peace, set out by Galtung, including elements of cultural violence. Galtung recognises that, for Gandhi, a sharp distinction had to be drawn between conflict and its manifestations, summed up in Gandhi's 'injunctions to fight the sin and not the sinner'.[1069] In examining the influence of Gandhi in Galtung's work, Lawler notes that pacifism 'remained the raison d'être of peace research for Galtung' because without it 'what was the point?'[1070] Galtung's task was to 'explore the nature of violence and develop nonviolent strategies for change'.[1071] However, commitment to pacifism did not provide justification for inaction in the face of social conflict, in case this was perceived as advocating direct violence.

Positive peace theory evolved following the two world wars, and in the midst of heightened tension due to the Cold War. Also, it is often suggested that there has been a Marxist influence on the peace research movement.[1072] This has led to critiques that suggest there are a number of problematic epistemic orientations. Galtung recognised patriarchy as a form of structural violence.[1073] However, in presenting a feminist critique of positive peace, Catia Confortini has argued that Galtung 'fails to recognize the many forms patriarchy assumes; and he does not acknowledge the ways in which different forms of patriarchy work to regulate relationships between men and between

[1067] Johan Galtung, 'Arne Naess, Peace and Gandhi' (2001) 54 Inquiry: An Interdisciplinary Journal of Philosophy 31.
[1068] Section 4.6
[1069] Galtung, 'Arne Naess, Peace and Gandhi' (n 1067).
[1070] Peter Lawler, *A Question of Values: Johan Galtung's Peace Research* (Lynne Rienner Publ 1995) 35.
[1071] IBIUD
[1072] Nils Petter Gleditsch, Jonas Nordkvelle and Håvard Strand, 'Peace Research – Just the Study of War?' (2014) 51 Journal of Peace Research 145.
[1073] Galtung, 'A Structural Theory of Imperialism' (n 973).

women'.[1074] By considering the role of power relations which stem from the social construction of gender, Confortini argues, would provide an understanding of how this influence on the production and reproduction of violence at all levels.[1075]

Scholars within the peace research field have also quarrelled with the theory set forward by Galtung considering that it is 'unclear or undefined'. Indeed, following criticism from Herman Schmit, who criticised the lack of precise nature of Galtung's initial definition of positive peace, Galtung clarified a prescriptive nature of structural violence.[1076] Gleditsch details how, within the field of peace research, positive peace is no longer frequently used; however, it has common usage within the fields of criminology and anthropology.[1077] Webber argues how, in this view, the different elements of peace research are divided between 'the Gandhi inspired work of Galtung in contrast to the empirical streams of American peace research'.[1078]

Boulding considers that Galtung's term 'positive peace', 'seems to mean any state of affairs which gets high marks on his scale of goodness, … It is not in any sense the opposite of negative peace. In fact, it may have very little to do with peace'.[1079] Boulding disagrees with Galtung over the 'latter's overly normative approach', 'his lack of understanding of the needs for hierarchy in modern complex societies,' for 'underestimating the costs of inequality' and what he conceives as misleading 'metaphors of negative peace and structural violence'.[1080] Boulding details how others have, 'unkindly', pointed out that Galtung's concept of violence seems to be any ill within society or culture that Galtung does not like, suggesting that, 'in its kindest formulation, the contention here is that Galtung wants to include every social problem under the rubric of peace research, thus diluting its focus'.[1081] Gleditsch has referred to Rummel's critique, as going further than

[1074] Catia Confortini, 'Galtung, Violence, and Gender: The Case for a Peace Studies/Feminism Alliance' (2006) 31 Peace & Change 333, 340.
[1075] ibid 335
[1076] Galtung, 'Violence, Peace, and Peace Research' (n 9) referenced in a footnote, highlighted by Gleditsch.
[1077] Gleditsch, Nordkvelle and Strand (n 1072).
[1078] Twelve friendly quarrels Boulding check this criticism further and analyse it better
[1079] Kenneth E Boulding, 'Twelve Friendly Quarrels with Johan Galtung' (1977) 14 Journal of Peace Research 75, 78.
[1080] Ibid 79
[1081] Ibid 80

the arguments of Boulding.[1082] This critique 'saw Galtung's view as 'a socialist theory of peace' and positive peace as 'a construct within a neo-Marxist theory of exploitation''.[1083]

The peace research critiques are based upon a different understating of peace and the elements which should be relevant to peace research. However, while they are useful in highlighting the concerns that positive peace can lead to unrealistic expectations for peace and peace research, this thesis disagrees that the issues of structural violence and the search for cultural, social and epistemic justice are an unrealistic expectation. Alternatively, f they are considered as such then this significantly limits the opportunities for victims to receive justice. If these issues are not carefully considered within peace then the result is that negative peace occurs, a harmful peace which allows massive inequality. It is too simplistic to argue that positive peace should be the opposite of negative peace, because the nuances of this will be lost by the many actors who wish to utilise peace discussions to promote their own agency at the expense of the marginalised in societies, who have no protection under their own criminal justice system. Even a basic analysis of the make-up of police forces in countries which have experienced conflicts can demonstrate the impact of a one-sided police force.[1084] Such police forces can be constructed with the policy to benefit one side at the expense of the other, who suffer significant harms at the hands of the police.[1085]

Tuba Turan examines the role that positive peace theory can play in building lasting peace, especially in relation to conflict prevention.[1086] He suggests moving away from the focus on structural violence and, instead, looking to the elements making up or leading to 'Fundamental Conflicts' as the tools for achieving peace. He utilises positive peace theory as an initial building block, through mechanisms such as dialogue and conflict transformation, to then move to his alternative approach, examining fundamental conflicts. He sets forth an explanation of his theory:

[1082] Gleditsch, Nordkvelle and Strand (n 1072) 155.
[1083] ibid
[1084] Roger Ginty, Orla Muldoon and Neil Ferguson, 'No War, No Peace: Northern Ireland after the Agreement' (2007) 28 Political Psychology 1.
[1085] ibid
[1086] Tuba Turan, *Positive Peace in Theory and Practice: Strengthening the United Nations's Pre-Conflict Prevention Role* (Brill Nijhoff 2015)

> The absence of Fundamental Conflicts is conceptualised as referring to a situation entailing harmonious social relations, a democratic and inclusive culture, horizontal equalities in pursuit of dignified lives, and resilient political structures capable of conflict transformation and prevention.

However, in contrast to Galtung's notion of fault lines within societies, Turan proposes that the fundamental conflicts within societies are based on gender, generation, race and class (political, economic, military, cultural), with these 'Stemming from power relation ie the dichotomy of dominance and subordination'.[1087] Turan's approach does not refer to a comprehensive understanding of social justice based on vertical equality or class/gender/generation-based equality, which is utilised by Galtung. He explains, 'this study employs social justice narrowly as amounting to horizontal equality, specifically comparative equality and non-discrimination across existing identity groups in pursuit of a life in dignity'.[1088] He continues, 'this conception excludes injustices that individuals may experience sporadically, and for which a causal link to armed conflict cannot reasonably be established, from the purview of the suggested positive peace approach'.[1089] However, in this thesis, the recognition of the injustice which occurs within peace time is presented as an important factor in ensuring marginalised victims have the opportunity to seek justice. Such peace-time injustices will occur in many instances which are not considered to be linked to armed conflict, but which amount to significant harm for victims.

While these critiques can highlight challenges in the understandings of Galtung, they do not address the issues of structural violence based upon colonial constructs detailed below and in Chapter 5.[1090] Galtung's approach of structural violence, with the approach of slow violence included, provides a coherent understanding of these societal structures. Following colonial structures, containing harmful social structure oppressing specific groups within society, was previously carried out deliberately, while it may now continue unknowingly. The paradigm of war in peace, which leads to unfair peace containing harmful social structures oppressing specific groups within society. However, the 'paradigm of war in peace' represents an issue which has been under-researched, either

[1087] ibid 50
[1088] ibid 67
[1089] ibid
[1090] Section 5.3

by mistake because researchers have not been fully aware of its impact.[1091] Or as Anibal Quijano argues, the failure to examine colonial legacies in societal institutions is by design, to prevent exposure of unequal power structures by those who benefit from them.[1092]

6.5 Positive Peace Elements Already in ICL

While the connection between peace and ICL was detailed in Chapter 4, the specific relevance of positive peace theory is not a new concept. Indeed, Judge Röling, famous for his dissent the Tokyo tribunal, argued for 'that international lawyers, more than describing the existing legal institutions, should strive to propose changes and improvements in the legal system, so as to promote peace and the development of third world countries.'[1093] In later writings, Röling increasingly insisted on the need for the 'jurist to step outside the limits of his own discipline and apply the methods and ideas of other sciences'. He especially built upon the elements of positive peace theory to demonstrate the issues of peace which should be examined by international criminal lawyers.[1094]

International crimes occur within peace times and the investigations of the Office of the Prosecutor recognise the potential of its expanded focus to include environmental crimes within its jurisdiction, demonstrating a more socio-economic aspect of ICrJ.[1095] As explained in earlier chapters, the preamble of the RS connects serious crimes and threats to international peace and security.[1096] Within ICrJ, the cry of 'no peace without justice' has been part of the justification for the development of international criminal tribunals, especially in the face of historical examples of impunity for serious crimes occurring to the detriment of peoples and societies. A tool to consider how the belief of 'no peace without justice' can be achieved is to utilise a peace theory including justice as a fundamental element to guide decision making and practice, in an effort to prevent an

[1091] Roger Mac Ginty, *Routledge Handbook of Peacebuilding* (Taylor and Francis 2013) 50 Ryan discussing the lack of identity relations aspects in Galtung's theory .
[1092] Quijano (n 778).
[1093] BVA Roling and Antonio Cassese, *The Tokyo Trial and beyond : Reflections of a Peacemonger / B.V.A. Roling ; Edited and with an Introduction by Antonio Casssese* (1993)
[1094] IBID
[1095] OTP policy paper on case selection (n 1055)
[1096] Preamble Rome Statute of the International Criminal Court.

unjust peace from occurring. Thus, the concept of positive peace, with its definitive role for justice as part of the peace theory, could play a useful role within ICL.

The limitation of Galtung's theory has been set forward by a number of scholars who analyse it through the lens of international criminal law. Mark Kersten argues that positive peace may indeed be a goal in which the ultimate aim is unclear and potentially unachievable, particularly in relation to the interplay between it and international criminal law. Kersten argues that 'it isn't clear how the ICC, as a judicial institution, could or should contribute to a society's pursuit of social justice or the eradication structural violence'.[1097] Kersten also argues that the theory of positive peace neglects the fact that 'peace is often a product of a peace process' too, in which distinct factors and facets critical to a peace process are subsumed under the banner of 'peace'.[1098] Criticism of positive peace theory in relation to ICL includes that levelled at ICL itself, discussed in Chapter 4. The mandate of justice for victims and the role of individual criminal responsibility in the face of serious international crimes has been challenged, by Drumbl and Osiel, questioning whether criminal law is fit for purpose.[1099] However, in considering these concepts as steps within the development of international law, the future evolution of ICL could and should include the wider structural issues arising in the context of international crimes.

Sarah Nouwen has argued that ICL is being utilised to portray the idea that legal procedures have achieved victory over the chaos of war.[1100] As explained by Nouwen, the idea of positive peace includes the notion that 'a lack of accountability is presumed to be one of the causes of the violence'.[1101] The assumption is that without addressing this cause, negative peace will never turn into a positive peace.[1102] Increasingly, scholars are recognising the importance of examining and devising ways to empirically test the impact of criminal tribunals on peace.[1103] The limited influence of the search for justice for victims within the ICTY has been explained as limiting the potential for peace, and formed part of the justification for the inclusion of the victim regime within the RS. The

[1097] Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford University Press).
[1098] ibid
[1099] Section 4.4
[1100] Nouwen (n 112) 27.
[1101] ibid
[1102] ibid
[1103] ibid

opportunity for reparative justice, as explored in Chapter 3, has a wider impact than a traditional ICrJ standard.[1104] Following the consideration of slow violence set out above, Nouwen cautions the emphasis on ICL detracts from the attention paid to slow violence as a cause of conflict:

> The problem, however, lies in the monopolizing tendencies of a fashionable topic: the foregrounding of international criminal justice backgrounds something else [...]. The sharper this focus, the more blurred becomes the perspective of slow violence.[1105]

The overexposure of international criminal law blinds the world to slow violence and other injustices.[1106]

The concerns raised by scholars within ICL, such as Nouwen and Kersten, provide important challenges which this chapter seeks to address. As set out above in the positive peace sections, this theory has been specifically chosen due to its focus on justice within peace. It recognizes the importance of achieving social, epistemic and cultural justice within peace. This has a significant value in the context of peace processes which historically overlook issues of victims' justice within the transition of societies into 'peacetime', as discussed in Chapter 7. Ensuring victims have an opportunity to receive justice requires these justice issues to be recognised as crucial within the development of lasting peace. As such, ICL should recognize the importance of the justice goals and seek to strengthen them where possible through the practice of the courts and the move to ensure the search for justice for victims is realised. Additionally, positive peace theory calls attention to the serious harms which arise from the maintenance of structural violence within societies, as occurs within negative peace. Examining the impact of structural violence on victims, Paul Famer argues that:

[1104] Section 3.4
[1105] Nouwen (n 112).
[1106] ibid

> It constricts the agency of its victims. It tightens a physical noose around their necks, and this garroting determines the way in which resources — food, medicine, even affection — are allocated and experienced.[1107]

The recognition of the harms developing from structural violence, such as 'slow violence', draws attention to harms which arise through government policy. While this can be deliberate policy initiated by a government against a group or groups within society, it can also be something that has developed over many years and is engrained into the structure of society and not widely acknowledged in the everyday lives of people. This can be true even of the people who suffer under structural violence when they have come to accept a harmful reality. The production of the Canadian genocide report, discussed above, demonstrates that within states themselves this form of harm can be recognised after a long period of time.[1108] However, this is an uncommon occurrence and it is usually very difficult for victims to seek justice for this form of violence. Recognition within ICL is in keeping within the mandate of seeking justice for victims, especially recognising that victims of structural violence can be significantly marginalised within society due to these harmful structures. The next section details the importance of the interplay between justice for victims and positive peace.

6.6 Victims' Justice and Positive Peace as Mutually Reinforcing Principles

The search for justice for victims is a crucial part of positive peace as it ensures the victims can view any process toward peace as legitimate, not as a tool of impunity or maintaining the privileged position of the elites in society. Considering a role for positive peace theory within ICL would strengthen the possibility of the expansive focus of victims' rights, conceived within the RS, to be realised through the practice of ICL. In this manner, victims can play an important role in providing guidance on the international crimes within a situation before the court. This is especially true in light of the many victims of structural or slow violence whose victimhood is not recognized either within their own state or by the international community. As Chapter 2 explained, victims of international crimes are required to 'sell their victimhood to the international community' in a way domestic crime

[1107] Farmer (n 1006).
[1108] See section 6.3

victims are not.[1109] In the search for justice for victims, it is important that ICL recognises the many victims who do not have an opportunity for a justice process in a society in which these practices have been occurring over many generations and the national justice system is not designed to recognise them. The challenges of structural violence and the harm experienced by victims through these elements of violence should form a part of the Article 53 or Article 17 examination by the OTP of the ICC.[1110]

The evolution of victims' rights as a part of the wider transitional justice discussion has opened up a new way to talk about justice and peace. Jemima Garcia-Godos argues that 'transitional justice and victims' rights present the opportunity to discuss peace on a basis where impunity is no longer an option', providing a forum for dialogue and potential for change within society in relation to both physical violence and structural violence.[1111] The evolution of the position of victims to the heart and centre of the ICrJ system within the RS demonstrates an opportunity to enhance the interplay of positive peace and ICrJ. The victim-oriented UN Basic Principles, introduced in Chapter 2 and influential on ICL, accord with the issues of structural and cultural violence fundamental in the theory of positive peace. As detailed in Chapter 2, these have been influential on ICL in recognising the need for justice for victims, seeking to provide remedies for them including non-repetition through reparations.[1112]

The role of positive peace provides, in particular, an opportunity to ensure that the goal of victims receiving justice through international criminal law can be achieved, as argued in the midst of 'radical-critical' victimology, detailed in Chapter 2.[1113] With the negative peace approach, often a *status quo* is maintained, in which the voices of victims are commonly excluded from any peace process, and so it is the views of the dominant actors who determine the format of the post-conflict society. This can be seen in the criminal justice system, as explained by Andrew Karmen, through 'institutional wrong-doing that violates human rights'.[1114] In positive peace, however, there is 'recognition that poverty,

[1109] van Wijk (n 19).
[1110] Section 7.3
[1111] Jemima García-Godos, 'Building Trust through Accountability: Transitional Justice in the Search for Peace' [2019] Research Handbook on International Law and Peace
[1112] Section 2.4
[1113] Mawby and Walklate (n 131).
[1114] Andrew Karmen, *Crime Victims: An Introduction to Victimology* (8th, International edn, Wadsworth/Cengage Learning 2013)

malnutrition, inadequate health care and unemployment are all just as socially harmful as, if not more harmful than, most of the behaviours and incidents that currently make up the official 'crime problem''.[1115] This is also an important interplay with seeking the removal of structural violence or Galtung's 'somatic limitation of potential', explained above. The need to ensure that structural violence is removed from society will also open up the possibilities of victims achieving justice and enhance the possibility of a lasting peace.

The complexities surrounding the definition of victims are set out in Chapters 2, 5 and 8, and this topic is salient in relation to the role of victims within positive peace. In seeking to achieve positive peace, victims do not need to conceive of themselves in the manner understood through international criminal law; rather, the understanding of 'victims' can be based upon the limitation of their somatic realisations, as Galtung explains when describing structural violence and cultural violence. Within this framing of 'victims', the opportunity arises for the decolonial concept of the 'Other' and the recognition of difference to play a part in processes that seek to achieve lasting sustainable peace. Combining the concept of the 'Other' and difference, on the one hand, with the elements of structural and cultural violence set out at the beginning of this chapter, on the other, provides a clearer picture of the role that can be played by even those victims who do not associate with the standard conceptualisation of 'victimhood' in ICrJ. This is examined and developed further within Chapter 8.

Positive peace theory can benefit the victims' mandate of ICL seeking justice alongside a lasting peace. As highlighted throughout this thesis, a significant limitation of ICL is that it seeks to achieve justice merely on the level of individual criminal responsibility, while not acknowledging the question of the root causes of conflict, thus overlooking a crucial area in seeking justice and peace. The search for justice for victims should also include issues of social justice and the challenges arising through structural or cultural violence. If victims are merely required to continue struggling under societal injustices, which could have been exacerbated by the elements of the international crime, then it challenges the legitimacy of the claim that they have received justice.

[1115] Galtung, 'Violence, Peace, and Peace Research' (n 9).

Victims play a key role in any conception of positive peace. They can clarify the elements which create structural violence within societies and present the elements of cultural and symbolic violence which often existed prior to any conflict. This aids the development of justice procedures, both judicial and non-judicial, as there is a deeper understanding of root causes of conflicts and pre-existing societal tension, which ICL should take care not to exacerbate. Justice for victims must play a crucial role in any lasting peace, calling attention to aspects in which the *status quo* of negative peace is being maintained for the benefit of political elites. This requires a strong and clear voice from those, who are often marginalised, to be present. These will also be the voices that provide clarity on inequalities within societies and the steps required to develop new forms of social justice. While negative peace may be a first step in a process, a unifying goal-seeking justice for victims within positive peace ensures that negative peace will not be the final step. Positive peace theory provides clarity, demonstrating the changes that need to occur within societies, providing a benchmark that victims recognise as a tool to hold accountable any governments or political groups who are content to accept a situation of negative peace.

6.7 Conclusion

The role of positive peace provides an understanding of peace that is more suited to the mandate of protecting/ensuring victims' rights and the search for justice, arising from the RS, than a narrow negative peace approach. The potential overlap between transitional justice and ICrJ was examined further within Chapter 4, which also recognised the challenges arising from the narrow individual criminal responsibility focus of ICrJ. In this manner, positive peace has a key role to play in uniting the disparate elements of ICrJ, transitional justice and peace processes, facilitating their working in conjunction, rather than at odds with each other. The role of victims is also key within positive peace and, as detailed in Chapter 7, a grassroots approach provides the opportunity for their voices to be heard, and not subsumed, to promote another group or organisation's agenda.

In the theory of positive peace, combining issues of social, cultural and epistemic justice alongside each other, as key elements of lasting peace, can provide an avenue in which the more expansive focus of victims' rights within international criminal law can play an important role in facilitating a goal of positive peace. Positive peace provides a paradigm

through which those affected by both direct violence and structural violence are provided with the tools to work against a repressive form of peace, or a negative peace; it ensures that these questions are addressed through holistic post-conflict mechanisms and not merely those concerned with ending the conflict. If the form of peace experienced by victims of conflict is repressive, then this will not be a sustainable peace that gives all people a chance to thrive and to experience their life to the fullest. To remove the fear of violence, the peace must move beyond the level of merely an absence of violence to address the root causes of the violence. It is through this connection, between root causes and the achievement of a lasting, sustainable peace, that the idea of positive peace provides an avenue to address structural violence and root causes of violence.

The theory of positive peace sets forth a methodology through which to achieve lasting peace, moving away from hegemonic practices in reconstructing post-conflict societies, for example, in transitional justice and peacebuilding. The next chapter examines some of the criticisms of transitional justice and peacebuilding, which are said to perpetuate hegemonic practices through a top-down approach and dedication to liberal state-building. To counteract these hegemonic tendencies, the theory of positive peace can be adopted as a procedure for international criminal law, as well as in transitional justice and peacebuilding initiatives; thus, providing common ground to ensure the holistic and organic interplay of post-conflict systems.

7 CHAPTER 7: GRASSROOTS METHODOLOGY OVERCOMING TOP-DOWN PRACTICE IN ICL AND TRANSITIONAL JUSTICE PROCEDURES

> Active, collaborative engagement can ensure the indigenous knowledge of affected communities and their needs are recognised as a fundamental element of transitional justice processes.[1116]

7.1 Introduction

The earlier chapters of this thesis have noted that the objective of providing justice for victims within ICL is limited by the relatively small number of individuals who will stand trial. This chapter takes a deeper look into the role ICL can play, in conjunction with transitional justice procedures, in order to achieve justice for a greater number of victims. Such an approach would increase the availability of procedures for victims to utilise in their search for justice. Victims who will never have the opportunity to experience international criminal justice for the harm they have suffered, can, as a result, instead, receive an alternative form of accountability and reparations. This can be carried out at the local level and include justice processes which are culturally relevant to the victims' own societies.

Within TJ mechanisms, there is a legacy of excluding victims through top-down approaches. TJ mechanisms may provide victims with a more limited role than is available in ICL, through a lack of procedural rights and a desire to disguise impunity through the TJ process. The examples of alternative justice procedures in this chapter highlight the manner in which victim interests have been overlooked, mirroring the concern that powerful interests dominate the procedures, raised in Chapter 2.[1117] Nevertheless, as the case study on Colombia below demonstrates, the ICC can monitor transitional justice procedures through Article 17 on complementarity, and through the 'interests of justice' deliberations under Article 53. This monitoring provides a means of integrating local and international justice processes, promoting improvements in victim centrality throughout. Therefore, the ICC can monitor alternative justice procedures to ensure the justice needs for victims are included within the procedures. This provides a pathway for localised

[1116] Simon Robins and Erik Wilson, 'Participatory Methodologies with Victims: An Emancipatory Approach to Transitional Justice Research' (2015) 30 Canadian journal of law and society 219.
[1117] Section 2.3

justice processes while ensuring monitoring is carried out at the international level, to prevent it from being taken over by elite, top-down interests, which deliberately exclude victim interests.

The grassroots approach to ICL, argued for in this thesis, is conceived as a tool to move beyond oppressive elements of legal practice and the current limitations in its practice; rather, it harnesses the potential recognised in the RS of the ICC to provide justice for victims and prevent impunity. In this way, the ICC is positioned in conjunction with wider TJ procedures. As explained previously, ICL is limited in what it can achieve. A trial can never resolve all the ills of the world and it is misleading to present this as a possibility. The differing roles and methodologies of ICL and TJ do not have to exclude the possibility for a complementary working dynamic if they are seen as different parts of an over-arching framework of positive peace and restorative justice. These lessons from TJ bottom-up approaches will be utilised within Chapter 8, conceiving how they can present opportunities for ICL to include a role for local people to shape a culturally relevant process, in keeping with social justice and removal of structural violence. This could encourage diverse forms of justice, including the form of reparations decisions, and enhance opportunities towards lasting peace.

The final section of this chapter examines the political influences of previous transitional justice processes which limited the justice experienced by victims, including the TRC in South Africa and the Gacaca trials in Rwanda.

7.2 Accountability and Peace: Evaluating the ICrJ and TJ Interplay

Transitional justice is understood as the period within societies in which there is a transition from conflict or human rights abuses into a peaceful state.[1118] This includes a wide range of procedures and operations to achieve transition.[1119] The different mechanisms that are used to aid the transition from conflict to peace are based on a variety of understandings of the concept of justice, which go beyond a narrow focus on

[1118] Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (University Press 2004).
[1119] Christine Bell, *Transitional Justice: Images and Memories* (Taylor and Francis, Taylor & Francis Group, Routledge, Ashgate 2016).

criminal justice.[1120] Secondly, they understand TJ as including the procedures and operations involved within a society which is seeking to transition from conflict into a peaceful state. The rise of TJ can be witnessed as a 'set of inter-related principles and processes' centred on the imagined role of law and law-making, 'in constituting transition' toward a range of goals and ends'.[1121] An example of the rise of TJ within the UN is the report of the Secretary-General to the Security Council in 2004, detailing the increased focus of the UN's involvement in post-conflict societies.[1122] This involvement has included a wider range of TJ mechanisms and procedures in many different countries.[1123]

However, within TJ processes, a wide range of judicial and non-judicial processes are used to aid societies moving on from a 'legacy of large scale past abuses'.[1124] TJ mechanisms can cover a wide range of operations 'designed to deal with the past and build peace for the future', including procedures for remembering, mourning and recovering.[1125] These can include 'individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof'.[1126] Teitel sets out how, while sometimes complementary, these goals can often be in tension with each other. Furthermore, the various means employed to pursue them (whether in terms of war crimes trials, truth commissions or some form of reparation) may prioritise some at the expense of others.[1127] This tension between the different processes is witnessed through the anti-impunity focus of ICL and its interplay with TJ.

The evolution in the focus of TJ procedures has been shaped by developments within ICL and the shift by the international community between accountability and amnesties as the correct method to deal with large-scale past abuses. This is set out by Teitel, detailing the genealogy of TJ, which charts the influence of ICL through three distinct phases,

[1120] Doak, 'Enriching Trial Justice for Crime Victims in Common Law Systems: Lessons from Transitional Environments' (n 188).
[1121]Report of the Secretary-General S/2004/616 The rule of law and transitional justice in conflict and post-conflict societies 23 August 2004
[1122] ibid
[1123] See section 7.9 on truth commissions
[1124] Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 Third world quarterly 275.
[1125] Alexandra Barahona de Brito, Carmen Gonzalez Enriquez and Paloma Aguilar, *The Politics of Memory: Transitional Justice in Democratizing Societies* (University Press, Incorporated, Oxford University Press 2001).
[1126] United Nations Report UN Doc S/2011/634 Report of the Secretary General on Transitional Justice and Rule of Law in Conflict and Post Conflict Societies 2011
[1127] Ruti G. Teitel, *Transitional Justice* (University Press 2000).

moving from accountability, to amnesty and back to accountability. She describes the Nuremberg and Tokyo Tribunals, which emphasised accountability for international crimes, as Phase I.[1128] This phase highlighted the central importance of law, and represented a move away from 'prior nationalist transitional responses and toward an internationalist policy'.[1129]

In Phase II, the notion of accountability held limited influence due to the Cold War, and TJ included a greater intra-state focus, in which amnesties were often prioritised.[1130] Rather than a focus on holding predecessor regimes accountable, instead, there was an examination on how to heal society and incorporate 'peace and reconciliation' which had not previously been part of the TJ project.[1131] The TJ campaigns of the 70s and 80s included recognition that the 'tension between punishment and amnesty was complicated by the recognition of dilemmas inherent in periods of political flux'.[1132] The origins of TJ campaigns by victims, especially in Latin America, followed this period, with important groups including the influential *Las Abuelas De Plasa de Mayo* seeking accountability, beyond the amnesties which had been granted during the TJ mechanisms.[1133] This concept has now evolved into a global discourse which is seen as a preferred response to the needs of societies emerging from conflict or political violence, recognising the limited potential of blanket amnesties in achieving lasting peace.[1134] Additionally, there has been increased awareness of the need to provide redress for victims and accountability for international crimes.[1135] This has been highlighted through the case law of the IACtHR, which successfully argued that Peru's amnesty law violated the American Convention on Human Rights in 2000.[1136]

[1128] Ruti G Teitel, 'Transitional Justice Genealogy'.
[1129] ibid
[1130] **ibid**
[1131] Ibid 77
[1132] ibid
[1133] Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 The Yale law journal 2537.
[1134] ibid
[1135] Velasquez Rodriguez v Honduras (Judgment) July 29 1988 Inter-Am. Ct. H.R para 174
The IACtHR notes that states have 'a legal duty to take reasonable steps to prevent human rights violation and to use the means at its disposal to carryout serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose appropriate punishment and to ensure the victims adequate compensations
[1136] Barrios Altos v. Peru Merits (Judgment) 14 March 2001 Inter-Am. Court H.R., Series C, No. 75.

Finally, Phase III saw the resurgence of the Nuremberg model and an anti-impunity focus recognised through the creation of the ICTY, ICTR and the ICC. As Nagy details, this has resulted in a fairly settled consensus 'that there can be no lasting peace without some kind of accounting and that truth and justice are complementary approaches to dealing with the past'.[1137] The developments within IL have resulted in greater concern about the use of 'conditional amnesties' if this covers war crimes, crimes against humanity or torture.[1138] Signifying the move away from amnesties and towards accountability was highlighted by Kofi Annan, who remarked, 'the question, then, can never be whether to pursue justice and accountability, but rather when and how?'[1139] As such, criminal trials are recognised as an important component of transitional justice procedures, preventing widespread impunity which occurred previously.

The ICC, as an international criminal court developed through the Rome Statute, has a very specific mandate, focused upon issues of international criminal justice, as a court of last resort. However, its development has demonstrated the commitment of the international community to accountability through criminal justice as a key mechanism for dealing with international crimes. As Philippe Sands details, while there are other mechanisms to deal with international crimes, such as amnesties or truth and reconciliation commissions, 'criminal courts ... are to be a principal means for the enforcement of international criminal law'.[1140] However, he recognises that 'Criminal law in general – and international law in particular – will never be a panacea for the ills of the world'.[1141]

The interplay between ICrJ and TJ has developed in recent times through the growing recognition of the role hybrid courts play as a tool of accountability, to run alongside other

[1137] Nagy (n 1124).
[1138] Eilish Rooney, Fionnuala Ní Aoláin; Transitional Justice from the Margins: Intersections of Identities, Power and Human Rights, International Journal of Transitional Justice, Volume 12, Issue 1, 1 March 2018, Pages 1–8, https://doi.org/10.1093/ijtj/ijy001
By the International Centre for Transitional Justice and the Advocacy Forum, March 2008, Journal of Human Rights Practice, Volume 1, Issue 2, 1 June 2009, Pages 320–331,
[1139] UN SG Restoring RofL (n 789)

[1140] Philippe Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice* (University Press 2003) 71.
[1141] ibid

TJ procedures such as Truth Commissions or Trust Funds.[1142] Within wider ICrJ, the growth of the use of hybrid courts as a key component of TJ procedures is demonstrated by the actions of regional organisations, such as the African Union, or internationally through the United Nations Security Council.[1143] This is currently under discussion in consultations to establish a hybrid court within South Sudan, although it has recently been met with resistance within the state while there is greater support for the Truth and Reconciliation and Reparations authority.[1144] There is concern by some parties in South Sudan regarding criminal accountability which would occur through the hybrid tribunal.[1145] The growing recognition within the UN is that ICrJ, in particular through the hybrid courts, can play a role in conjunction with transitional justice and peacebuilding.[1146]

Doak argues that ICrJ demonstrates how:

> Cross-fertilization between criminal justice and transitional justice is already de facto reality, in that criminal processes are frequently adopted as tools of transitional justice: the considerable range of international and hybridized courts and tribunals that have evolved in recent decades bear testament to this.[1147]

This chapter acknowledges limitations of the potential achievements of the trial model of justice and does not suggest that it could solely address the complexities of post-conflict societies. However, trials could work more productively if their approach takes into account their unique role within a wider restorative peace process, focusing on justice for victims. As discussed below, the influence of the ICC could provide a form of 'positive complementarity', encouraging domestic prosecutions within TJ societies.

[1142] Laura A Dickinson, 'The Promise of Hybrid Courts' (2003) 97 The American journal of international law 295.
[1143] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES Maximizing the legacy of hybrid courts UNITED NATIONS New York and Geneva, 2008
[1144] INTERGOVERNMENTAL AUTHORITY ON DEVELOPMENT Agreement on the Resolution of the Conflict in the Republic of South Sudan 17 AUGUST 2015
provides for the creation of a Hybrid Court for South Sudan under the auspices of the African Union
[1145] statement by Commission on Human Rights in South Sudan, 20 February 2020, available at https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25582
[1146] Christalla Yakinthou and Paige Arthur (eds), 'Conceptualizing the Connections', *Transitional Justice, International Assistance, and Civil Society: Missed Connections* (Cambridge University Press 2018)
[1147] Doak, 'Enriching Trial Justice for Crime Victims in Common Law Systems: Lessons from Transitional Environments' (n 188) 145.

7.3 Complementarity and Transitional Justice Procedures: The Oversight of the ICC

As detailed above, within TJ situations there is a wide range of potential mechanisms, both judicial and non-judicial, which are utilised to achieve transition within societies. Additionally, if domestic criminal trials occur, these need to be monitored, examining who is standing trial and what the outcome of the trial is to ensure it is not shielding perpetrators. The case study of Colombia, below, will show how the ICC holds an important monitoring role over TJ processes, seeking to prevent impunity and strengthening the opportunities for justice for victims.[1148]

7.3.1 Victims' rights within TJ procedures: Articles 17 and 53

Chapter 4 illustrated how the ICC can only achieve limited forms of justice for victims because only a small number of perpetrators will stand trial. The ICC was designed as a court of last resort; it does not impose its dominance over national prosecutors, and prioritises domestic prosecution.[1149] Under Article 17's complementarity criteria, the ICC and its ICrJ standards will defer to domestic criminal law standards and procedures.[1150] The OTP will monitor the interests of victims as part of their deliberation on the TJ process. Indeed, the OTP has stated that victim participation in domestic accountability mechanisms is of 'central importance' as it 'helps ensure that policies for combating impunity effectively respond to victims' actual needs'.[1151]

Unfortunately, many TJ mechanisms, however, may not provide justice for victims and can, instead, be utilised as a tool of impunity. Therefore, this section argues that a victim-orientated approach to complementarity should be taken, in keeping with the argument made throughout this thesis. Domestic accountability procedures should be carefully analysed by the OTP to see if victims hold a central participatory role, if they receive reparations or compensations and, finally, if required forms of accountability are met.

[1148] Section 7.4
[1149] William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 Harvard International Law Journal 53.
[1150] Frederic Megret and Marika Giles Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11 Journal of international criminal justice 571, 11.
[1151] OTP 'Policy Paper on the Interests of Justice', 17 September 2007

When examining the TJ process occurring within an ICC situation country, there are a number of relevant factors under the Rome Statute. Issues of case admissibility have been set out under Article 17 of the Rome Statute.[1152] Under article 17(b), a case is inadmissible 'where it has been investigated by a state which has jurisdiction over it, and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to genuinely prosecute'.[1153] This seeks to limit the use of domestic investigations which can in effect shield the perpetrators; for example, if there was no intention to prosecute.[1154] However, as there can be a large number of perpetrators of international crimes, the national prosecutor is still provided with the opportunity to exercise selectivity. Following the aims of the RS of the ICC, the intention is to ensure the most responsible are held accountable, and only those less responsible should be granted a form of amnesty. Stahn has argued that 'blanket or unconditional amnesties will hardly ever lead to the inadmissibility of proceeding before the court'.[1155] However, it is more complicated when some form of investigation has been carried out, as it is not required that this be a criminal investigation. Following Article 17, (1) and (2), there may be deference to an investigation if there was a potential for criminal prosecution following the investigation. If forms of transitional justice, such as TRCs or other non-prosecutorial justice procedures are occurring, then a case might still be admissible under Article 17. It can be said that a national amnesty would render a case inadmissible as the perpetrator has been tried according to Articles 17(1)(c) and 20(3); however, it has been argued that the trials in this instance relate to criminal trials, and, having to provide information before a truth commission which would not result in punishment of the guilty, would not meet the standards of criminal responsibility.[1156]

The objective is to ensure effective prosecutions are carried out, and there is no mention of victims and their interests. Article 17(2), however, also states that, in its consideration, the Court should have 'regard to the principles of due process as recognized by

[1152] Article 17 Rome Statute of the International Criminal Court.
[1153] ibid
[1154] Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 Criminal Law Forum 255, 257.
[1155] Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 Journal of international criminal justice 695, 152.
[1156] Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (BRILL 2008) 452.

international law' including both defence and victims' justice considerations, taken in accordance with Article 21(3), discussed below.[1157]

If the state has failed to prosecute anyone, then this will have failed to meet the criteria in Article 17; any amnesty procedures must be assessed under Article 53 and the prosecutorial discretion. The current role of the OTP, in determining whether to continue investigations or leave it to the domestic legal system to try perpetrators of international crimes, is based upon an examination of the 'Interests of Justice', included within the RS. Under article Article 53(2) (c) of the RS, the OTP will examine whether, 'A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims'.[1158] This provides the OTP with flexibility to examine varying aspects of TJ processes including a review of the interests of victims. It also ensures that instances in which the victims would be in danger if a prosecution were to occur, would be grounds not to proceed.[1159]

It has been argued by the Prosecutor of the ICC that there is a presumption in favour of an investigation, and that the decision not to investigate in the 'interests of justice' is an exceptional one.[1160] Under article 53, the prosecutor must assess amnesties or alternative justice processes to see if it will be in the 'interests of justice' to prosecute in a given situation.[1161] The concept of justice under article 53 is considered to be wider than merely criminal justice.[1162] Specific components need to be addressed in order to determine if an alternative non-prosecutorial mechanism might provide justice.[1163] Taking a victim-orientated approach would ensure careful examination of whether the elements would fall within the 'interests of victims'. In keeping with the victims' regime of the Rome Statute, these standards of justice for victims should include procedural and reparative justice issues along with retributive justice and accountability. As discussed previously, the expressive influence of ICrJ in upholding victim-orientated standards can then influence domestic practice. This relates both to criminal justice and alternative justice

[1157] Ibid 453
[1158] Article 53 (2) (c) Rome Statute of the International Criminal Court.
[1159] Stigen (n 1156) 364.
[1160] OTP 'Policy Paper on the Interests of Justice', 17 September 2007
[1161] ibid
[1162] ibid
[1163] Thomas Hethe Clark, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice": Striking a Delicate Balance' (2005) 4 Washington University global studies law review 389.

procedures, which have been criticised for the lack of compensation provided to victims.[1164] Factors to be considered would therefore include determining if the mechanisms provide some accountability, compensations, truth and significant procedural rights, ideally greater than those arising from a criminal trial. As the examples below demonstrate, the practice of TJ mechanisms often overlooks these important victim interests. However, the impact of positive complementarity could result in these issues providing forms of justice to victims being implemented to a greater degree.

A key aspect of this determination is to maintain the value of criminal justice and the role it can play to enhance peace processes and security. Article 53(1)(c) permits the OTP to determine whether or not to initiate a prosecution on the basis that the state under scrutiny has deployed a transitional justice mechanism, and that to insist on prosecution would adversely affect the transitional justice mechanism's ability to foster peace and reconciliation.[1165] Important questions that have been asked in relation to the interests of justice are, 'whose justice is this based upon and how should the OTP determine this?'[1166] Further, Article 53 provides the OTP with the discretion to evaluate a TJ mechanism, asking is it 'likely to be effective in securing demobilization of armed groups?'[1167] The OTP has flexibility, in terms of the investigations of the court in the interests of justice, and is able to decide whether the court should intervene within TJ processes or if the domestic prosecutions and/or distribution of compensation can provide adequate justice for victims. Potentially, an expansive interpretation of Article 53 would allow the OTP to venture further into the domestic political arena and evaluate whether, in the 'prevailing circumstances, it should be permissible to allow those suspected of committing international crimes to benefit from transitional justice arrangements'.[1168]

It has been further argued that the OTP should take a restrictive approach when examining questions surrounding the interests of justice. However, this places the position of investigations and the potential for justice above peace or reconciliation. Such a view would restrict the OTP's ability to take a holistic approach and prevent the

[1164] Newton (n 753).
[1165] Article 53 (2) (c) Rome Statute of the International Criminal Court.
[1166] OTP 'Policy Paper on the Interests of Justice', 17 September 2007
[1167] ibid
[1168] Diego Acosta Arcarazo, Russell Buchan and Rene Ureña, 'Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law' (2015) 26 Criminal Law Forum 291, 301.

consideration of wider peace and reconciliation factors. However, the Prosecutor in this instance stressed the exceptional nature of Article 53 and the interests of justice questions, providing only a limited opportunity for interpretation that these matters would prevent investigation and cases at the ICC.[1169] As Schabas details, under Article 53(3)(b), opening an investigation is not mandatory, only discretionary.[1170] Although, in the context of a self-referral, for example by the Ugandan government, what is the extent of the deliberation by the OTP to determine if the investigation should be opened?[1171] While states may request a review if the prosecutor declines to investigate or prosecute based upon the interests of justice, victims have no basis for seeking a review. Additionally, as Stahn recognises, 'the text of Article 53 is silent regarding a duty to consult with victims, domestic officials, religious leaders or prosecutors in a situation state'.[1172]

The Ugandan situation, discussed in Chapter 4, has raised concerns over how victims' demands for alternative forms of justice held little influence over the examination of 'interests of justice', carried out under Article 53 by the OTP. [1173] Article 53 instructs the Prosecutor to consider statements by victims that the ICC interference would go against their wishes; one argument is that this could be based upon their desire to seek other restorative forms of justice.[1174] This, especially, was argued in Uganda, in which culturally restorative justice holds significant influence with victim groups.[1175] However, this is a complex determination, and arguments and evaluations have been carried out which argue for both sides of this debate. One crucial aspect from a victim-orientated approach is that significant outreach should occur with individual victims to understand their wishes and the reasoning behind these. This should then be carefully considered by the Prosecutor.

Despite the debates over which factors the OTP should recognise when determining the Interests of Justice, it is clear that the involvement of the ICC within TJ processes, even if simply to monitor the situation, was conceived within the RS. This thesis will continue to

[1169] OTP 'Policy Paper on the Interests of Justice', 17 September 2007
[1170] William A. Schabas (n 565) 659.
[1171] ibid
[1172] Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice' (n 1155).
[1173] Section 4.7
[1174] Newton (n 753).
[1175] Alexander KA Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) 50 Virginia journal of international law 107.

argue that the ICC should consider a range of options in its monitoring of TJ procedures. This would ensure that different groups, cultures and affected individuals, especially those traditionally marginalised, have an opportunity to share their experiences and influence the decision of the OTP, with their justice interests recognised by the court as well.[1176]

7.4 Case Study of Colombia

Colombia provides an important example demonstrating complementarity in practice. Since 2004, the ICC has monitored the peace processes and TJ procedures which have been put in place following peace agreements.[1177] While this system has had some success in promoting the need for victims to achieve justice, there remain many instances in which victims' access to justice has been restricted, either through lack of meaningful participation in criminal trials or with top-down interests dominating the practice of TJ processes. In particular, the disarmament process in Colombia has been accused of overlooking the interests of victims, and especially marginalised groups, in favour of 'legitimising impunity'.[1178] As this case study details, the monitoring by the ICC has brought a greater element of justice for victims, although, this could be strengthened through a victim-orientated approach to complementarity.

7.4.1 Peace-making and prosecution in Colombia

The Colombian situation has been under preliminary examination by the ICC since 2004, monitoring the outworking of transitional justice (TJ) and peace processes.[1179] Initially, they oversaw the 2005 Justice and Peace Law, aimed at the demobilisation of the various paramilitary armies operating outside of the law.[1180] Secondly, the ICC inspected the 'Legal Framework for Peace' that was established in 2012, and introduced TJ into the Constitution of Colombia.[1181] Lastly, the 'Final Peace Agreement' between the Colombian

[1176] include issues surrounding TJ, RJ and victims' rights when considering whether to continue
[1177] OTP Situation in Colombia Interim Report November 2012
[1178] Catalina Diaz, 'Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia', *Transitional Justice from Below* (Bloomsbury Publishing (UK) 2008)
[1179] ICC, Preliminary Examination: Colombia, at https://www.icc-cpi.int/colombia.
[1180] Justice and Peace Law of Colombia or Law 975 of 2005
[1181] 'Legal Framework for Peace', approved by Legislative Act Number 01 of 2012 (Legislative Act 01), which amended the Constitution of Colombia to introduce Transitory Article 66 and Transitory Article 67 Legislative Act No. 01 (2012).

Government and the opposition, *Fuerzas Armadas Revolucionarias de Colombia - Ejército del Pueblo* (FARC-EP), which has established the current TJ procedures included within the Special Jurisdiction for Peace.[1182]

The transitional justice processes are seeking to create peace in a society following over 40 years of complex internal armed conflict in Colombia. While a simplistic portrayal of this conflict as a war on drugs or against left-wing guerrillas has, at times, been presented, this belies the actual reality. Rather, it includes 'guerrillas with diverse forms of Marxist allegiances, paramilitary groups with different origins, drug lords as well as smaller and medium-sized traffickers, and an array of different state actors'.[1183] These groups cover a wider range of cultural groupings, with differing histories, acting within diverse geographical settings.[1184] Therefore, the complexity of achieving peace involves addressing a broad spectrum of interests including many different victims and perpetrators.

This situation is being monitored by the Office of the Prosecutor (OTP) of the ICC to ensure it meets international standards of justice.[1185] What the case of Colombia so aptly demonstrates is the role of complementarity and the influence of the ICC over matters of justice and transitional justice. This has included ensuring immunity is not granted to perpetrators and that domestic courts do not shield perpetrators through imposing short sentences.[1186]

To strengthen the victim-orientated approach of ICL, this thesis proposes that debates surrounding Article 17, and additionally Article 53, should include detailed examination

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[1182] Jurisdicción Especial para la Paz (Special Jurisdiction for Peace)
Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace (Agreement), dated 24 November 2016, The Agreement provides for a third system of transitional justice, entitled the 'Integrated System of Truth, Justice, Reparation and Non-Repetition' (Integrated System)
Government of Colombia and FARC, Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, signed on 24 November 2016,

[1183] Diaz (n 1178).

[1184] ibid

[1185] Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia,
http://www.icccpi.int/en_menus/icc/press%20and%20media/press%20releaes/Pages/otp_stat_24-09-2015.aspx
Following a preliminary investigation carried out by the ICC, the ICC's work has been placed on hold to provide the Colombian Government the opportunity to carry out criminal trials

[1186] ibid

on issues of justice for victims and peace within the deliberations by the Office of the Prosecutor (OTP).[1187] The illustration presents how Articles 17 and 53 of the RS can influence the domestic progress of peace processes and debates between peace-making and prosecution. As introduced earlier in this chapter, Article 17 of the RS, on issues of admissibility, contains the principle of complementarity, with domestic prosecutions having priority.

7.4.2 Evolution of TJ in Colombia since 2004

An important aspect of the peace versus justice debate, raised in Chapter 4, is the need to ensure justice is carried out in the form of prosecutions to prevent impunity. The traditional approach of granting amnesties as an aspect of peace-making, especially in South America's post-conflict societies, is recognised as a form of impunity, and contrary to the role of ICL.[1188] Peace-making, in which widespread amnesties are granted, often creates an unfair peace where powerful perpetrators receive immunity while victims are denied justice. Rene Urueña has examined the influence of the ICC on prosecutions within Colombia, looking at how the threat of the ICC investigation and the jurisprudence of the IACtHR shaped the movement towards TJ, the approach to domestic prosecutions and the potential of amnesties or sentencing flexibility.[1189] It is, ultimately, the possibility of ICC involvement that provides leverage to press the Government to provide better guarantees to victims, or to deal with perpetrators more severely.

Urueña has suggested that:

> In addition to discharging its investigatory function, the ICC prosecutor has actively influenced the negotiation of two peace processes: first, the 2005 peace process with the paramilitaries; and more recently, the tumultuous negotiations with the FARC.[1190]

[1187] Heller (n 1154).
[1188] Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German law journal 1203.
[1189] Rene Uruena, 'Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003-2017 Notes and Comments' (2017) 111 American Journal of International Law 104.
[1190] ibid

It has been highlighted that, since the initiation of peace negotiations in 2012, the OTP has sought to ensure the final agreement is compatible with the RS framework, constituting a 'positive and effective approach to complementarity'.[1191] While the actions of the ICC show deference to domestic peace processes, the OTP continues to monitor, to ensure domestic processes do not result in impunity. For example, the OTP was clear in warning the Colombian Government of any negotiations with the FARC that could result in a sentence that is grossly or manifestly inadequate. This was seen in light of the gravity of the crimes and the form of participation of the accused, which would vitiate the genuineness of a national proceeding, even if all previous stages of the proceeding had been deemed genuine.[1192] Following the peace agreement in 2016, the OTP praised this historical development, stating that it marked the beginning of a long-term process for genuine accountability.[1193] Additionally, the OTP included the importance of the search for justice for victims within the statement:

> The peace agreement acknowledges the central place of victims in the process and their legitimate aspirations for justice. These aspirations must be fully addressed, including by ensuring that the perpetrators of serious crimes are genuinely brought to justice. The Special Jurisdiction for Peace to be established in Colombia is expected to perform this role and to focus on those most responsible for the most serious crimes committed during the armed conflict. The promise of such accountability must become a reality, if the people of Colombia are to reap the full dividends of peace.[1194]

The 2016 Colombian Peace Deal created the 'Integral System of Truth, Justice, Reparation and Non-repetition'.[1195] This *El Sistema* consists of three elements: the Truth Commission, the Unit for Missing Persons and the Special Jurisdiction for Peace (SJP), which is a transitional justice measure representing an uneasy compromise among different parties

[1191] ICC-OTP Strategic Plan June 2012-2015 (Oct. 11, 2013) paras. 64-67 https:Iwww.icccpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf

[1192] ICC-OTP Strategic Plan June 2012-2015 (Oct. 11, 2013) paras. 64-67 https:Iwww.icccpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf

[1193] ICC Prosecutor issued a statement welcoming the conclusion of the peace negotiations between the Government of Colombia and the FARC (1 September 2016) https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia

[1194] ibid

[1195] El Sistema n (1210)

to the conflict. The purpose of the Special Jurisdiction for Peace is to assume primary jurisdiction over crimes committed during the civil war – crimes against humanity, war crimes and genocide. Three chambers in the Special Jurisdiction for Peace act in sequence, an Investigation Unit, an Indictment Unit, and the Tribunal for Peace.[1196] As the OTP has noted in the reports on Colombia, the Special Jurisdiction for Peace can choose between ordinary and alternative penalties, which provide 5-8 years for persons to reside in designated demobilisation zones, restriction of liberty, plus reparations for victims, as long as the individual confesses; otherwise, the sentence would be 15-20 years without confessions.[1197] This issue of alternative sentencing arrangements is in keeping with the Justice and Peace Law of 2005, designed to encourage paramilitary armed groups to demobilise and confess their crimes, to receive reduced sentences.[1198] The OTP has recognised that this system has provided some deterrence, observing that paramilitary activities are diminishing.[1199] However, the OTP has detailed areas of concern in the Special Jurisdiction for Peace which would 'raise issues of consistency or compatibility with customary international law and the Rome Statute'.[1200] The issue of false positives, in which the person investigated is not the most responsible for the crime, and the ability of the Special Jurisdiction for Peace to fulfil its mission to bring accountability to those responsible for alleged crimes on both sides, require further monitoring and investigations.[1201]

Additionally, it is important that victims experience procedural justice throughout the process. However, there have been concerns about the illegal military surveillance of human rights lawyers and members of victims' movements advocating in front of the

[1196] Ibid The Chambers are tasked with the acknowledgement of truth and responsibility, granting amnesties and determining the legal status of parties submitting themselves to the system
These flaws may lead to the future intervention of the ICC.
[1197] OTP Report on Preliminary Examination Activities 2017 (4 December 2017)
[1198] ibid
[1199] ibid
[1200] ibid
[1201]OTP Report on Preliminary Examination Activities 2019 (5 December 2019)
https://www.icc-cpi.int/Pages/item.aspx?name=pr1510

SJP.[1202] The Peace Deal also included a Victims Unit, which is responsible for reparations to nearly 9 million victims and will provide an important component of redress.[1203]

The case of Colombia also demonstrates the influence of regional and international courts on the criminal justice aspects of TJ/peace processes. This includes the impact of human rights issues and the challenges for victims receiving justice following the US extradition of criminal suspects away from the TJ process. As the influence of legal pluralism is clearly on display, investigation of the interplay of the ICC and IACtHR demonstrates, in particular, how the complexities of legal pluralism are influencing transitional justice mechanisms.[1204] Further challenges arose with the IACtHR being pressed by victims' groups to investigate the JPL and whether it breached the American Convention of Human Rights. However, the IACtHR declined to do so, considering that the victims were requesting that the Court exercise quasi-criminal jurisdiction. [1205]

An added layer of complexity in this example arises through the extradition of perpetrators to the USA on drug charges, by the Colombian Government. This prevented victims from achieving the truth-telling which should have arisen as part of a TJ process.[1206] For the OTP, the extraditions meant the loss of both leverage and the prospect of prosecution. In the OTP's 2012 Interim Report, the OTP finally gave up on pursuing cases against the extradited paramilitaries.[1207] Recently, a similar issue has emerged in relation to perpetrators who fall under the jurisdiction of the Special Jurisdiction for Peace, in which Article 150 gives the SJP exclusive competence to decide upon the legal protection of the person to be extradited; a provision to which President Duque has objected.[1208] Though, if the President's objections are followed through, it is likely to

[1202]Peace Brigades International Defending human rights in Colombia: a high risk activity https://www.peacebrigades.org/fileadmin/user_files/projects/colombia/files/colomPBIa/100706boletin15.english.web.pdf

[1203] El Sistema n (1210)

[1204]In the Shadow of the ICC Colombia and International Criminal Justice Report of the expert conference examining the nature and dynamics of the role of the International Criminal Court in the ongoing investigation and prosecution of atrocious crimes committed in Colombia. Convened by the Human Rights Consortium, the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study, University of London University of London London, 26–27 May 2011

[1205] Uruena (n 1189) 37.

[1206] Situation in Colombia Interim Report November 2012

[1207] ibid

[1208] IBID

result in a further restriction to the victims' rights to truth and justice.[1209] There could be further extraditions occurring that would remove the possibility of embarking on the TJ process and providing victims with truth or reparations which they did not receive following previous extraditions. This is especially difficult if a perpetrator is granted the right to remain in the USA once their prison sentences are complete.

7.4.3 Evaluating the TJ process in Colombia through victim-orientated lenses

As detailed above, Articles 17 and 53 of the RS of the ICC provide flexibility to examine varying aspects of TJ processes to ensure they meet international criminal standards, prevent impunity and include a consideration of the interests of victims. Previous peace processes demonstrate, nonetheless, that it should not automatically be left to national TJ mechanisms to address all relevant criminal justice aspects and ensure that impunity is not overlooked.[1210] The present case study on Colombia demonstrates that the OTP has to evaluate the domestic criminal justice procedures under Articles 17 and 53 to ensure they are not simply a method to shield perpetrators.[1211] Importantly, Article 17(2) specifies that 'unwillingness' can be demonstrated by proceedings undertaken with the intent to shield the person concerned from criminal responsibility, unjustified delays, or a failure to conduct said proceedings independently or impartially; all in a manner inconsistent with an intent to bring the person concerned to justice.[1212]

Earlier in this chapter, it was suggested that the move away from blanket amnesties was included within the RS of the ICC, which prioritises the need for accountability within both domestic and international criminal justice systems. This, in many ways, supports the concerns for victims that were raised within the IACtHR's analysis of amnesty laws in Peru, which barred the investigation and prosecution of members of the Peruvian Army.[1213] The Court stated, 'Self-Amnesty laws lead to the defencelessness of victims and

[1209] (Art. 150 SJP Statutory Law).
https://www.ejiltalk.org/colombia-time-for-the-icc-prosecutor-to-act/
[1210] Carsten Stahn and Mohamed M El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (University Press 2011).
[1211] OTP Report on Preliminary Examination Activities 2019 (5 December 2019)
https://www.icc-cpi.int/Pages/item.aspx?name=pr1510
[1212] Article 17 Rome Statute of the International Criminal Court. It is moreover important to note that the Chamber largely based its findings on the object and purpose of Article 17 to allow the Court to act in situations ''which would lead to a suspect evading justice'' (paras. 214-218).
[1213] Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru), 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, paras 43–44 (14 March 2001)

perpetuate impunity.'[1214] As Chapter 4 outlines, this was perceived to provide justice for victims, in the form of retributive justice, and prevent powerful individuals from acting with impunity.

The Special Jurisdiction for Peace (also known as JEP through the Spanish translation) plays an important role in the search for justice for victims. However, it is not the entirety of the TJ processes available in the search for justice for victims. The 'Agreement on Victims' details the goals of the Integrated System with respect to victims and Colombian society as a whole.[1215] These include a Truth, Reconciliation and Non-Repetition Commission; a Special Search Unit for Conflict-Related Disappeared Persons; the Special Jurisdiction for Peace; and a range of specific measures on reparations.[1216] A balance between retributive and restorative justice is provided throughout these TJ processes. The restorative element includes bringing the victims and perpetrators together to acknowledge the crimes committed, and, by finding appropriate responses to the crimes, through community service and symbolic reparations.

Through the Special Jurisdiction for Peace, perpetrators can provide symbolic and collective reparations, such as acknowledgements of responsibility and apologies that speak to redressing the moral harm to victims.[1217] However, concern has been raised that the alternative sentencing benefits are being awarded without adequate evaluation of the person's commitment to truth-telling.[1218] The practice of the Special Jurisdiction for Peace has, additionally, provided limited procedural justice for victims. In February 2020, the first voluntary statement, rendered by Colombian army general Mario Montoya Uribe before the country's Special Jurisdiction for Peace, did not meet the victims' expectations for truth, regarding the 2000 extrajudicial executions of civilians during his time as Commander, or justice. Instead, it led to frustration and disappointment among victims, especially following the denial of participation for victims in previous Special Jurisdiction for Peace proceedings.[1219] An important matter related to victims of state crimes and their

[1214] ibid
[1215] El Sistema n (1210)
[1216] ibid
[1217] ibid
[1218] Caroline D Kelly, 'CONTEXTUAL COMPLEMENTARITY: ASSESSING UNWILLINGNESS AND "GENUINE" PROSECUTIONS IN COLOMBIA'S SPECIAL JURISDICTION FOR PEACE' (2017) 48 Georgetown journal of international law 807.
[1219] We ask the JEP to adopt urgent measures against Gr (r) Mario Montoya's refusal to contribute truth to transitional justice February 13, 2020

opportunity of receiving justice, or that allies of the government are receiving defacto impunity, through a legitimatisation occurring as a result of the DDR process discussed below, without any corresponding accountability aspects.

Article 53(1)(c) permits the OTP to determine whether or not to initiate a prosecution on the basis that the state under scrutiny has deployed a transitional justice mechanism. To insist on prosecution would then adversely affect the transitional justice mechanism's ability to foster peace and reconciliation.[1220] In relation to the interests of justice, we have to question 'whose justice is this based upon and how should the OTP determine this?'[1221] Article 53 provides the OTP with the discretion to evaluate a TJ mechanism, asking is it 'likely to be effective in securing demobilization of armed groups?'[1222]

The Deputy Prosecutor highlighted, in the overview of the role of the OTP in 2018 that TJ is an integral feature of the implementation of a peace agreement in Colombia, and that TJ is of critical importance for redress, accountability, security and stability. Victims and society as a whole will ultimately judge the success of the measures. Additionally, he recognises that TJ embraces a range of processes and while the ICC mandate is criminal justice, other aspects of TJ have relevance to ICC, while not being the main focus. Holistic assessment of criminal justice is made in light of broader TJ mechanisms, examining whether the proceedings are genuine. Finally, the Deputy Prosecutor recognised that, whilst payment of reparations could be considered as part of a holistic evaluation of the seriousness of national efforts to transition out of conflict, they do not override the need for criminal proceedings.[1223]

Meanwhile, the OTP has been monitoring the development and practice of the SJP and the cases since its establishment. The OTP's mission to Colombia, in 2020, assessed the Special Jurisdiction for Peace, as well as proceedings carried out under the ordinary

https://www.colectivodeabogados.org/?Pedimos-a-la-JEP-adoptar-medidas-urgentes-frente-a-la-negativa-del-Gr-r-Mario

[1220] Jo Stigen, '11. The Prosecutorial Discretion'. 427

[1221] ibid

[1222] Arcarazo, Buchan and Ureña (n 1168) two options present themselves: an expansive or a restrictive reading of Article 53 .

[1223] Deputy Prosecutor of the International Criminal Court Mr. James Stewart THE ROLE OF THE ICC IN THE TRANSITIONAL JUSTICE PROCESS IN COLOMBIA 30 - 31 May 2018

justice and the Justice and Peace Law systems.[1224] The OTP carried out a mission to Colombia, in January 2020, to assess the progress of national proceedings, meeting with the government and representatives from International Organisations and Civil society members on impacts arising from Rome Statute Crimes. Additionally, they held consultations relating to development of indicators and benchmarks, which will assess national accountability for RS crimes, including the Special Jurisdiction for Peace.[1225] As detailed below, the benchmarks should recognise standards for justice for victims. Additionally, following the wider arguments presented throughout this thesis, the questions of justice for victims should ensure that the voices of marginalised victims are included within ICC deliberations. The Colombian example demonstrates the complexities of TJ procedures in the midst of conflict; peace agreements can have limited success in preventing returns to violence and the peace process is fragile. It also highlights the risks of TJ procedures being monopolised by top-down interests, restricting the search for justice by victims.

Diaz provides an example of a narrow form of transitional justice, exploring the paramilitary demobilisation process in Colombia.[1226] Diaz argues that the Uribe Government utilised top-down transitional justice processes to secure 'de facto impunity for their erstwhile allies and proxy agents amongst the right-wing paramilitaries (in return for their demobilisation) as a 'transitional justice' measure, while the conflict was (and is) on going'.[1227] This allowed some to claim the transitional process has been completed in Colombia. Diaz details how 'the national government, political elites aligned with the government and the paramilitary leadership have not consistently employed terms such as 'transition' or 'transitional justice'', as they consistently refer to the right to truth, justice and reparations. However, this has not led to other sites of political transformation, such as: 'constituent assembly, institutional reform, *ad hoc* commissions (police, military, executive, human rights, women issues and land-tenure, among others) or new local or regional governance structures.'[1228] Diaz argues that the 'the paramilitary

[1224] Press Release ICC-OTP-20200123-PR1510 The Office of the Prosecutor concludes mission to Colombia 23 January 2020
[1225] ibid
[1226] Diaz (n 1178).
[1227]ibid
[1228] ibid

'peace process' has arguably not been about the widening, deepening or strengthening of democracy in the country.'[1229]

This thin transition does not fully address fundamental areas of conflict and, as such, maintains a status quo under the guise of transitional justice. In contrast, Diaz examines grassroots approaches and programmes arguing that a 'genuine transitional justice arrangement' should address the recognition of victims of State crime and the participation of the State in the creation of the paramilitary project. These, therefore, include collective and moral reparations – not only financial compensation but the reconstruction of political projects, collective organisational structures and world-views, the return of property and territories, and environmental damage to African-Colombian and Indigenous communities.[1230]

These are issues that should be included within a victim-orientated complementarity focus, as the Prosecutor should examine these elements carefully and detail the need for justice for all victims. When alternative forms of reparations are also sought by victims groups, in contrast to those provided by top-down structures, the ICC should record these interests in their reports and ensure this is included in their discussions with governmental actors.

In Colombia, there are a range of groups, often marginalised within society, who would be included under the 'from below actors'.[1231] The people range includes peasant, indigenous, African-Colombian and urban peripheral organised groups; community-based organisations and their networks; grassroots initiatives; victims' organisations; local non-governmental organisations (NGOs); and trade-unions.[1232] Many of these groups claim that the paramilitary demobilisation process legitimises de facto authoritarian regimes operating in several regions of the country.[1233] Largely, these from below actors have a very different idea of how forms of transitional justice should be

[1229] ibid
[1230] Ibid Diaz utilised a case study arising from the City of Medellin based upon a 'Recognition of Victims, Truth-Telling and Property Restitution: the Experience of the Government of the City of Medellín.'This case study addresses the issue of grassroots resistance efforts in Colombia to mobilise against a de facto impunity for right-wing paramilitary groups and parallel efforts to establish local methods of community truth-telling.
[1231] ibid
[1232] ibid
[1233] ibid

carried out and the extent to which they should make changes within the structure of society. In this example, they play a crucial role in highlighting instances in which thin transitions are occurring.

The role of the ICC in Colombia provides insight into the influence of ICL over TJ situations and evolving peace processes, which can be both positive and negative, and the careful consideration which should be given by the court when determining factors to examine in relation to Article 53 and Article 17. The ICC is not required to ensure the development of domestic criminal justice systems when it is determining whether to pursue trials. However, the strengthening of domestic justice systems is recognised as an impact of the court, as stated by the first Prosecutor of the ICC.[1234]

In Colombia, the ICC has strengthened the TJ process and the focus upon accountability and victims' justice. The OTP has only been one of several international actors on justice, enhancing media coverage of national proceeding and strengthening the call for accountability. However, domestic civil society organisations have been able to utilise the reporting on underlying crimes in their own advocacy.[1235] Additionally, the potential of ICC arrest warrants has been considered as a motivating tool to bring various groups to the negotiating table of a peace process.[1236] Further, within the scope of its monitoring activities, the ICC can examine if amnesties or impunity are occurring within a transitional justice process.

Limitations that still remain demonstrate a lack of influence by the court on domestic TJ processes. As this case study establishes, the influence of the ICC within a state can be restricted by the actions of the government. The realities of TJ mechanisms and peacebuilding processes are that they include strong political influences and, often, the hegemonic interests of those who previously held power, aiming to shape any transition to ensure they can maintain these interests. The influence of this is always going to be compromised. Additionally, the long-term interaction with the ICC has provided domestic actors with a better understanding of the terminology which fits the objectives set out in the Rome Statute while potentially reflecting the situation on the ground. An important

[1234] Justine Tillier, 'The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?' (2013) 13 International Criminal Law Review 507.
[1235] Uruena (n 1189).
[1236] ibid.

point raised by Urueña is how the domestic parties, such as civil society in Colombia and the Colombian Government, have become more skilled in utilising the appropriate language to prevent ICC investigations. While still providing them with the required flexibility to ensure the trials progress in the manner they wish; this presents the effect of the ICC as limited once governments understand how to present the words to allow them to carry on with their own agenda.[1237]

The influence of positive complementarity could further strengthen its victim-orientated approach of TJ procedures through the new indicators, due to be published by the OTP; similarly, the policy of publishing activities of the court which could bolster the influence of the court. The ICC has an opportunity to give a more central role to victims' rights in the truth, participation, reparations and protective measures in its complementarity oversight. In its 2019 Report on Preliminary Examination Activities, as well as when concluding its recent visit to Colombia in January 2020, the Office announced that, in the course of 2020 it would seek to develop 'indicators and benchmarks' to assess the country's efforts towards accountability for Rome Statute crimes.[1238] This could encourage specific steps for the SJP to guarantee the victims' rights to participation and evaluation of a person's contribution to the truth.

The potentially counter-hegemonic role of the ICC, and the central mandate of ensuring victims receive justice, provides a tool to prevent an unfair old order from maintaining the *status quo*: the from below movements could strengthen the resistance to this unfair status quo being maintained. The monitoring work of the OTP thus provides reports on the TJ processes which highlight the victims' right to remedy and the importance of their search for justice.[1239] However, strategies of the court which take a more assertive approach could strengthen its influence; a tool which is currently being developed in the process of the ICC outreach with domestic judges, providing guidance on the role of the ICC, and the importance of accountability and justice for victims of international crimes.

[1237] Uruena (n 1189).

[1238] Press Release ICC-OTP-20200123-PR1510 The Office of the Prosecutor concludes mission to Colombia 23 January 2020

[1239] ibid

7.5 Marginalised Victims Supressed: Maintaining Previously Powerful Elites

The search for justice for victims can face challenges when top-down interests are allowed to dominate transitional justice procedures and mechanisms. The influence of top-down interests is seen within TJ situations in a number of forms: wide-ranging amnesties, which prevent victims receiving justice; following universalist ideas of justice in which international standards are imposed upon a local population; or when dominant interests of international organisations or NGOs override local interests.[1240]

If a top-down approach to justice is taken, it will often promote one dominant form of justice to the exclusion of all others and, as Rama Mani highlights, this can lead to severe negative consequences. Mani sets forth the limitation of a top-down universalist approach: 'if ideas and institutions about as fundamental and personal a value as justice are imposed from outside without an internal resonance, they may flounder, notwithstanding their assertion of universality'.[1241] Robins and Wilson argue that the traditional hegemonic top-down approaches occurring in peacebuilding, and in TJ practice towards liberal state-building, are 'dominated by the collection, processing, and dissemination of information concerning past violations'.[1242] To tackle this, they set out the need for victims to play an active role in any TJ process, and the need to enable victim agency through empowerment and challenging 'exclusionary societal power relations' by prioritising participation, accountability, inclusion and empowerment.

Top-down processes can maintain the economic and political agendas of government officials while not addressing the interests of victims – an outcome that stands in contrast to the common objective of TJ mechanisms. This continuation of impunity within TJ processes, consequently, excludes groups of the population from seeking justice and does not result in a real transition for the society. Instead, it maintains the marginalised and vulnerable situation of the previously suppressed or excluded population. These TJ 'from above' initiatives have fundamentally failed to bring serious human rights violators to account.[1243]

[1240] Nagy (n 1124).
[1241] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (1st Edition, Polity 2002).
[1242] Robins and Wilson (n 1116).
[1243] ibid

Stanley details how the 'hybrid' serious crimes process developed in Timor-Leste maintained top-down interests and provided political cover or immunity for officials condemned for being implemented without 'sufficient or meaningful consultation with the East Timorese people', within the main TJ mechanisms.[1244] She highlights that they failed to challenge the power and structural relations which underpinned violations and often engaged in exclusion and 'othering', minimisation of state involvement in human rights violations, prioritising political agendas and downgrading the interests of victims.[1245]

The Office of the United Nations High Commissioner for Human Right has raised concerns that transitional justice procedures for post-conflict situations allow wide-ranging amnesties in the search for peace.[1246] Amnesties can have the added effect of maintaining the power of previous rulers or members of the political elite, which can prevent justice for victims and also meaningful societal transformation.

The dominance of top-down, donor-driven approaches excludes, and moves money away from grassroots projects. This mirrors criticism that the practice of the ICC is donor-driven rather than responsive to the needs or wants of people themselves.[1247] The influence of large NGOs in wide-ranging discussions can create a form of transitional justice which has neither ownership nor relevance to the local communities affected by conflicts. This presents an inaccurate portrayal of the realities on the ground.[1248] The conflict that can arise between local communities and large NGOs has also been highlighted by Haniffa, who explains how 'Human rights activists in Sri Lanka have referred disparagingly to such NGOs as 'grant eaters' and suggest that they represent a highly professionalized 'peace industry' that responds to donor agendas'.[1249] Now, this raises fundamental questions about potential hegemonic power relations and the legitimation of dominant interests within post-conflict societies. Other critical research

[1244] Elizabeth Stanley, 'Truth Commissions and the Recognition of State Crime' (2005) 45 The British Journal of Criminology 582.
[1245] ibid Ruth Jamieson and Kieran McEvoy, 'STATE CRIME BY PROXY AND JURIDICAL OTHERING' (2005) 45 British journal of criminology 504.
[1246]RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES Amnesties OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS HR/PUB/09/1 2009
[1247] KENDALL (n 301).
[1248] R. Mani, Beyond Retribution: Seeking Justice in the Shadow of War (2002);
[1249] Farzana Haniffa, *In the Pursuit of Democracy in Post-Colonial Sri Lanka: Local Human Rights Approaches to Transitional Justice* (International Center for Transitional Justice 2006) 20.

questions similar roles of elite NGOs in transitional justice processes, revealing how resources are diverted away from home-grown, bottom-up projects which local organisations deem as important.[1250]

A further concern is the neo-colonial influence on transitional justice and the risk of this being maintained in the traditional top-down approaches.[1251] Mani has expressed that poorer countries may have no choice but to agree to traditional top-down approaches. This can result in a form of imposed conditionality with positive political outcomes, although through processes that have experienced considerable criticism. The imposition of top-down TJ processes, by countries in the Global North on those in the Global South, has been likened to a new form of neo-colonialism, 'resting ultimately on a theory and system of subjugation underwritten by a romanticized vision of the West, held by the West itself, who then also constitute 'an other''.[1252] Similar concerns regarding colonial legacies within ICL have been presented earlier in this thesis.

Maintaining the top-down approaches within both ICL and TJ mechanisms continues the injustice experienced by victims within supposedly neutral laws and supposedly universal values and systems. In Guatemala, the male voice dominated, for example when stories of violence against women were relayed by male informants.[1253] Yadav has detailed how, in Nepal, when the state took over the TJ processes it had the unfortunate impact of 'instrumentalising an otherwise successful women's movement in these mechanisms'.[1254] The result was a narrow TJ process which appeared focused more on appeasing the international community rather than providing meaningful transition.[1255] Dewey and St Germain similarly highlight that services and funds allocated to assist victim-survivors of conflict-related sexual violence remain insufficient, and it remains fundamentally unclear whether all of this attention has actually served to diminish instances of conflict-related

[1250] Nicola Banks, David Hulme and Michael Edwards, 'NGOs, States, and Donors Revisited: Still Too Close for Comfort?' (2015) 66 World development 707.
[1251] G. Knaus and F. Martin, ```Travails of the European Raj'' Lessons from Bosnia Herzegovina' (2003) 14(3) J. of Democracy 60-74; Oomen id.; W. Robinson, Promoting Polyarchy: Globalisation, US Intervention, and Hegemony (1996); Mani, op. cit., n. 19;
[1252] Mani (n 1241).
[1253] Shackel, R., & Fiske, L. (2019;2018;). *Rethinking transitional gender justice: Transformative approaches in post-conflict settings*. Cham: Palgrave Macmillan.
[1254] Punam Yadav Rita Shackel and Lucy Fiske, *Rethinking Transitional Gender Justice: Transformative Approaches in Post-Conflict Settings* (Springer International Publishing AG, Springer International Publishing 2018) ch 11.
[1255] ibid.

sexual violence or to provide a form of justice that victim-survivors might find meaningful.[1256]

7.6 Overcoming Top-Down Limitations of Transitional Justice

The grassroots bottom-up approach for transitional justice, including 'from below' actors who are traditionally marginalised, has occurred in many contexts worldwide. The nature of this means that the practice of each varies in accordance with cultural practices and traditional influences.[1257] The methodology developing from such a perspective, therefore, requires a flexible nature, which allows for the cultural differences to be included. In a bottom-up methodology, the 'from below' actors who are traditionally overlooked/marginalised would be key stakeholders in the process, alongside traditional top-down actors, such as governments or international organisations. They provide an antidote to official formulas that advocate the sacrificing of the interests of victims and communities, which instead require that the marginalised are placed at the heart of knowledge production.[1258]

7.6.1 From below understandings: the need for localised approaches

'Transitional justice from below' gave actors a language and framework to challenge a state-sponsored attempt to use transitional justice as a cover for a more 'base political accommodation'.[1259] Recognising the strengths of bottom-up approaches, the Colombian experience additionally suggests that 'transitional justice discourses may be used as a strategy of resistance by civil society and communities affected by violence'.[1260] In particular, 'the deployment of the truth, justice and reparations rights discourse has proved a powerful tool for such 'players from below' in their struggle against impunity, utilising alliances with international human rights networks'.[1261]

[1256] Susan Dewey and Tonia St. Germain, 'Between Global Fears and Local Bodies: Toward a Transnational Feminist Analysis of Conflict-Related Sexual Violence' (2012) 13 Journal of international women's studies 49.
[1257] McEvoy and McGregor (n 32).
[1258] Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339.
[1259] Diaz (n 1178).
[1260] ibid
[1261] Ibid referencing United Nations Department of Peacekeeping Operations (DPKO), Integrated Disarmament, Demobilisation and Reintegration Standards (IDDRS), § 2.10 (DPKO 2006).

The 'from below' processes have the potential to evolve the mechanisms of transitional justice and allow a comprehensive transition, away from the conflict and the root causes which led to it initially, by providing agency for those overlooked. This upholds the concerns regarding the prioritisation of Western liberal knowledge construction, raised within earlier chapters of this thesis. It promotes an alternative, in which the understanding of transitional justice processes is created through a wider range of alternative stories and experiences, ensuring agency for those who have been often overlooked.

These bottom-up approaches are designed to provide a voice to the marginalised groups, including those who suffer under the structural violence detailed within the positive peace theory. Emancipatory approaches can be witnessed through locally-driven peacebuilding initiatives that combine both bottom-up and top-down elements (hybrid style). However, the need to include further victim participation remains.[1262]

The bottom-up understanding works, in many ways, as the antithesis to a top-down approach. Rather than procedures being determined by a small group at an international or governmental level, bottom-up works at the level of the 'underside' in which a broad community consensus determines a course of action. McEvoy and McGregor explain that the incorporation of the term 'from below' consists of a 'mobilising' character of opposition by community, civil society or non-state actors to hegemonic political, social or economic forces.[1263] They further reference the approach of 'globalisation from below' detailed by Brecher, Costello and Smyth stemming from grassroots resistance to 'neo-liberal capitalist encroachments on environmental justice, labour, developing world debt and related issues'.[1264] This concept provides that a combination of 'from below movements can work to address limitations emerging as a result of the top-down procedures.'[1265] This works to ensure the voice of the local is heard, rather than simply the top-down ideas from the national or international.

[1262] ibid
[1263] McEvoy and McGregor (n 32) 10.
[1264] Jeremy Brecher, Tim Costello and Brendan Smith, *Globalization from Below: The Power of Solidarity* (South End Press 2000).
[1265] Richard Falk, 'Globalization-from-below: An Innovative Politics of Resistance', *Humanitarian Intervention and Legitimacy Wars* (Routledge 2015)

The localised example of transition from below, submitted by Diaz, follows on from the approach of Santos and Rodríguez-Garavito and the 'sociology of emergence', seeking to 'render visible and credible the potential that lies implicit or remains embryonic' in these experiences.[1266] Identifying the need for localised sites of transition provides genuine inclusion of the marginalised or subaltern groups, allowing them agency within societies in which they have been oppressed for long periods of time, for bottom-up transitional justice projects have been described as 'transforming violent and oppressive dynamics within communities and can be perceived as emerging sites of transition'.[1267] Diaz advocates identifying and exploring emerging themes or activities that might otherwise be dismissed as 'idealistic, hopeless or past-oriented'.[1268] Incorporating a broader ownership into transitional processes, through outreach, education, or storytelling, can provide a space for grassroots democratic participation.[1269]

The need for localised voices to be heard has been recognised within the field of TJ, restorative justice and peacebuilding.[1270] As the 2004 UN report on TJ highlighted, evaluating local priorities is an important approach to overcome the previous problems of peace operations. This includes that a 'shared peace, or a peace in which international actors, as well as civil society and ordinary people have a stake in developing and sustaining, will outlast a peace that only a few members of the global elite have an interest in maintaining'.[1271] MacGinty and Richmond have presented how a renaissance has occurred surrounding ideas of 'the local' in peacebuilding, in which local actors show increased assertiveness in combination with a perceived loss of confidence by major international actors.[1272]

Local approaches are incorporated within TJ procedures as a means of including traditional practices, including those with a restorative element, bringing together localised peacebuilding understanding and TJ mechanisms. Often overlooked lessons

[1266] Santos and Rodríguez-Garavito (n 856).
[1267] Diaz (n 1178) 198.
[1268] ibid
[1269] Falk (n 1265).
[1270] Shaw, Waldorf and Hazan (n 24).
[1271] Waldorf, R. Shaw, and P. Hazan (eds.), Localizing Transitional Justice: Interventions and Priorities After Mass Violence (Stanford: Stanford University Press, 2010
[1272] Roger Mac Ginty and Oliver P Richmond, 'The Local Turn in Peace Building: A Critical Agenda for Peace' (2013) 34 Third world quarterly 763.

include varieties of community initiatives that address local impacts, without the recognition at the governmental or international level. Additionally, the limits to localism in transitional justice appear to be set by approaches that prioritize institutional change and, often, 'instrumentalize local conflict resolution to serve national, state agendas, preventing transformative change'.[1273]

However, in his work on IL and development, Eslava details the contradictions surrounding the move beyond nation-states and the promotion of the grassroots focus. The international turn towards the local is more open to bottom-up forces, but still connected indirectly to international governance and 'expansion of local mechanisms of economic, political, spatial and social control'.[1274] Eslava studied the manner in which IL influences the local and everyday life. While it has been detailed by international actors that the global and the local are more entwined than ever, Eslava called it a 'political decision to dethrone the nation-state'.[1275] The interplay of IL and the development project, have, as well, created a significant amount of truth production about the world, especially concerning the relationship between the North and South.[1276]

As Chapter 5 explained, historic policies of colonialism have left a legacy of subaltern groups being on the periphery of legal systems.[1277] Building upon decolonial critique, Eslava details the impact of this on the Third World, where legacies of colonial occupation and struggles for independence and modernity have created 'human and spatial geographies that are internally unequal and unfairly exposed to the global economic system'.[1278] Indeed, the turn to the local requires action to address problems that go beyond the capacity of local administrations, concerning structural conditions, 'reiteration and deepening of development's long genealogy of experimentation and

[1273] Shaw, Waldorf and Hazan (n 24).
[1274] Eslava (n 946). 21
[1275] Ibid 59 While the move towards the local, recognised as the preferred option rather than the nation state following the 1980s
[1276]ibid highlighting Arturo Escobar, Encountering Development: The Making and Unmaking of the Third World (Princeton University Press, 1995).
[1276] Ibid 26-28
[1277] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 Harvard international law journal 1.
[1278] Eslava (n 946). 295

shortcomings'.[1279] The concern that the move towards the local through IL and development, which Eslava calls global ordering,

> 'is at best predicated on a troublesome distribution of rights, obligations and forms of authority. At worst it is responsible for perpetuating an ongoing cycle of disempowerment, whose most destructive effects are experienced by the most peripheral members of our world'.[1280]

Building upon the work of Knox, he argues that 'one of the first steps on our list of tactical and strategic engagements with international law should be to understand the ground and everyday mechanics of the field'.[1281] As such, these authors recognise the need to strategically engage with IL and how it shapes its interaction within the local, through the dominance of global international legal norms, and how they shape interactions at all levels: international, national and local.[1282] Engagement between the local and ICL can ensure that the subaltern have an opportunity to seek justice, which is especially important as they may struggle to receive equitable treatment within existing domestic criminal legal systems.

Importantly, Spivak's argument from Chapter 5 highlights how the subaltered cannot engage fully with a hegemonic system and how the language of rights in TJ societies can disempower victims.[1283] This reinforces the need to examine the structures which are being developed and ensuring they provide equal opportunities for the subaltered to engage with the process, without including unexplored barriers. This legacy has often remained the same in societies, even following independence. In such cases, an elite within society, who maintains dominance within the workings of legal systems, can utilise transitional justice procedures to maintain their interests.[1284] One of the challenges within transitional justice, and indeed within ICrJ, is that legal discourses, based upon a language of rights, can 'empower elites and outsiders at the expense of victims,

[1279] Ibid 295
[1280] Ibid 305
[1281] ibid 303 referencing Robert Knox, 'Strategy and Tactics', *Finnish Yearbook of International Law* (Bloomsbury Publishing (UK) 2013).
[1282] Eslava (n 946) Eslava related this to development and IL however structural violence issues impact upon victims both within TJ and ICL procedures. .
[1283] Section 5.3
[1284] Rajagopal (n 797).

particularly the most disempowered, who have both the greatest needs and the least access to the languages of rights'.[1285] This can lead to the continuation of cycles of violence, which may have previously been driven by the attempt to address grievances and seek the needs of victims.

The most vital thing is to ensure, therefore, how the voice of victims, especially those from local, marginalised communities, can actually have agency within transitional processes.[1286] Locals are either perceived as victims to be rescued or perpetrators to be prosecuted, which renders them 'incapable or morally unworthy of positive contribution to peace-building'.[1287] Bottom-up approaches can break down this hegemony of IL in a manner in which it creates a flexible system incorporating the experiences of local victims and communities. Applying a bottom-up approach provides for the creation of a flexible system in which victims and the local community can positively contribute to TJ and peace processes.

One of the challenges which stem from a top-down approach is that it leads to a thin transition within societies, focused on a narrow form of change. This prevents the wider range of abuses or marginalisation from being included as part of the TJ procedures. Additionally, it provides the government with the opportunity to claim the transition is finished, although only minimal changes have been made within society. Diaz presents the need to incorporate localised approaches to provide a pathway to move beyond thin transitions into thicker TJ understandings.[1288] The distinction between thick and thin has been set out by McEvoy, who details the limitations which arise from a legalistic 'thin' approach. He explains 'within legal scholarship, 'thin' writings on law tend to emphasize the formal or instrumental aspects of a legal system. They are inclined to assume the self-evident 'rightness' of the rule of law', adding:

> It is broadly less likely to reflect critically on the actions, motivations, consequences, philosophical assumptions or power relations which inform legal

[1285] Gready and Robins (n 1258) 35.
[1286] Paul Schiff Berman, 'Seeing Beyond the Limits of International Law' (2006) 84 1265, 1280.
[1287] Shackel and Fiske (n 1254) 347.
[1288] Diaz (n 1178).

actors and shape legal institutions. A thicker understanding of transitional justice is therefore intended to counteract at least some of these tendencies.[1289]

This approach is in keeping with ideas presented by De Sousa Santos, in Chapter 5 of this thesis, who recognises that 'legal theorists tend to confine themselves to a very narrow terrain'.[1290]

7.7 Positive Peace Theory and Transitional Justice

The field of TJ has had limited investigations into the structural inequalities which can provide the root causes of conflicts.[1291] A 'dominant script' of TJ is understood to focus on individual civil and political rights, rather than issues of social justice, economic and social rights, and economic crimes and corruption.[1292] Nı´ Aola´in and Turner argue that top-down TJ mechanisms witnessed through the truth commission in Chile and El Salvador excluded socio-economic crimes and followed 'male conceptions of conflict', failing to address the forms of harm and violence 'experienced'.[1293] Chapter 6 introduced how a failure to tackle root cause issues, including structural violence, will lead to negative peace and a lack of social justice. This includes the continual marginalisation of victims who suffered from these structural harms, prior to the period of conflict, or abuses falling within the TJ mandates.[1294]

The mandates of TJ mechanisms, such as truth commissions or international courts, are limited in their focus and practice and their final reports. They exclude an examination of structural violence within societies and, instead, address the most recent period of physical direct violence.[1295] Zinaida Miller argued that the field of TJ has historically excluded 'issues of economic inequality, structural violence, redistribution and

[1289] Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 Journal of Law and Society 411.
[1290] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (3rd edn, Cambridge University Press 2020).
[1291] Kenneth Roth, 'Defending Economic, Social, and Cultural Rights: Practical Issues Faced by an International Human Rights Organization,' Human Rights Quarterly 26(1) (2004) : 68.
[1292] The Lost Agenda: Economic Crimes and Truth Commissions in Latin American and Beyond, Jame L Cavallaro and Sebastian Albuja
[1293] Fionnuala Ni Aolain & Catherine Turner, 'GENDER, TRUTH & TRANSITION' (2007) 16 UCLA Women's Law Journal 229.
[1294] Roger Mac Ginty, Indigenous Peace-Making versus the Liberal Peace, 43 Cooperation and Conflict: J of the Nordic Intl Studies Assn 139, 144 (2008)
[1295] Magarrell (n 483) 91.

development'.[1296] This results in economic issues being pushed to the periphery, proving a context to TJ issues were 'a distorted and one-dimensional narrative of conflict in which economics and conflict can be neatly separated'.[1297] The argument presents three costs of 'economic invisibility: (1) an incomplete understanding of the origins of conflict; (2) an inability to imagine structural change due to a focus on reparations; and (3) the possibility of renewed violence due to a failure to address the role of inequality in conflict'.[1298] Miller highlights the example of the South African Truth and Reconciliation Commission in which, although its statute provided for a contractual examination, the inquiry was narrower.[1299] Cavallero and Albuja argue that, due to the reliance of TRCs on mainstream human rights discourse, they have focused on gross violation of civil and political rights and failed to prioritise economic social and cultural rights which were marginalised from mainstream human rights.[1300] They detail the importance of community-based initiatives to broaden the focus of truth commissions, to include economic crimes and corruption that have 'hitherto largely been absent from the deliberations'.[1301] Significantly, Stanley details the potential pitfalls of TJ procedures 'from below', which are unable to challenge structural disparities. Indeed, the 'bottom-up' inspired Truth and Reconciliation Commission (CAVR), in Timor-Leste, failed to address the continuing violence of poverty, 'perpetuate[s] injustices and potentially create[s] further conflict in the future'.[1302] This resulted in some groups experiencing less justice than others, creating a situation of negative peace.

National and international 'peace-builders' maintain an overriding focus on redressing direct injustices against individuals (in the form of human rights abuses, war crimes, and crimes against humanity), which tends to leave the injustices that caused the conflict untouched. This is in stark contrast to the relevance of root cause issues in achieving

[1296] Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 International Journal of Transitional Justice 266.
[1297] ibid
[1298] ibid
[1299] Ibid Discussed further below
[1300] James Cavallaro and Sebastián Albuja, 'The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Bloomsbury Publishing Plc 2008) 126.
[1301] ibid
[1302] Elizabeth Stanley, 'The Political Economy of Transitional Justice in Timor-Leste' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Bloomsbury Publishing Plc 2008).

positive peace which precisely addresses the multi-faceted dimensions of justice in post-conflict societies. Richmond discusses the tendency toward top-down institutions, building in a variety of 'liberal' interventions. Particularly, a move beyond a one-size-fits-all approach to peacebuilding, transitional justice and international criminal law is set forth as important.[1303] Mac Ginty observes the 'existence of 'set templates' and a 'formulaic path' in internationally sponsored peacebuilding'.[1304] However, the overarching framework of individual rights discourse, the pressure to establish the rule of law and the frequency of transition to a market economy accompanying political transition make the separation between transitional justice and liberalism difficult to prove. The constraints imposed by the liberal and top-down framing of transitional justice prevents the development of a broader practice.[1305] In addition to the transitional justice agenda being externally driven in many contexts, the state-centric focus it brings to examining violent pasts discourages the engagement of affected populations. TJ procedures following top-down state policy can provide the opportunity for the State to portray itself as a neutral third party in an 'inter-ethnic', 'religious' or 'political' conflict. This can exclude or distort the experience of traditionally disenfranchised groups in which the state maintains a narrow focus on civil or political rights.[1306]

While TJ is standardly focused on a transition from a period of conflict or mass atrocity, a legacy of inequality can underpin generational grievances which, if left unexamined, can create a negative peace and prevent the development of a lasting sustainable peace. Similarly, if a legacy of social or economic imbalance remains unrecognised, with no form or remedy or accountability or redress provided, then this can maintain a historical structural construction within society, ensuring that those previously oppressed and marginalised will remain in these situations.[1307]

[1303] Richmond (n 719).
[1304] Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (Palgrave Macmillan UK, Palgrave Macmillan 2011).
[1305] Roland Paris, 'International Peacebuilding and the "Mission Civilisatrice"' (2002) 28 Review of international studies 637.
[1306] Chrisje Brants and Susanne Karstedt, *Transitional Justice and the Public Sphere: Engagement, Legitimacy and Contestation* (Hart Publishing 2017).
[1307] RL Nagy, 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission' (2012) 7 The international journal of transitional justice 52.

7.8 Justice for Victims within TJ Procedures: Analysis of Localised Processes

As discussed within the previous chapters, providing a victim-orientated approach involves ensuring that victims have ownership over procedures and mechanisms. Within TJ, this is especially important due to the history of victims being excluded from TJ mechanisms.

7.8.1 Grassroots methodology: hearing the voice of marginalised victims

In South America during the 1970s and 1980s, the policy of amnesties prevented many victims from receiving any form of justice. Within TJ procedures, justice can involve discovering where the bodies of family members have been buried, along with the therapeutic support this form of long term trauma can require.[1308] It might also take the form of a historical record of the harm suffered and the truth of actions of either government forces or paramilitary groups, as in Peru and Chile.[1309] These procedures do not fall under the category of criminal justice; however, the form of justice they provide can be extremely important to victims. Justice for victims can easily be overlooked if only top-down interests are considered during the transition. The victims themselves can explain the forms of justice they seek, but only if they are provided with an avenue to actually express this in a way which can influence the forms of TJ procedures that are being created.

As detailed in Chapter 2, the exclusion of victims' wishes results in an abstraction of victimhood by those who speak on their behalf, while not granting the victims themselves agency.[1310] In a similar manner to the silencing of victims occurring within ICL and domestic criminal law, introduced earlier, 'a grave disservice is done to victims by those who seek to speak on their behalf, whether in the name of justice or reconciliation'.[1311] The term 'victim-centred' has been used to describe many transitional justice processes, most often in an attempt to suggest that the processes place the victim at their centre, in reference to one of the principles of restorative justice. However, as Madlingozi presents

[1308] Simon Robins, 'Addressing the Needs of Families of the Missing: A Critique of Current Practice in Transition', *Families of the Missing* (Routledge 2013).
[1309] McEvoy and Bryson (n 92).
[1310] Section 2.4
[1311] Linda Alcoff, 'The Problem of Speaking for Others' [1991] Cultural critique 5.

the practice of speaking for and about victims to further perpetuate their disempowerment and marginalisation.

> In seeking to receive the 'story' from victims, the aspects of the story should be collected in such a manner as to remove the interpretation of the international 'expert' from the narrative, whether this be in an attempt to be nice to the victim or to adhere to scientific standards.[1312]

This argument is further developed through the work of Alcoff who questions if 'it is ever valid to speak for others who are unlike me, or who are less privileged than me?'.[1313] Instead of representing victims, or speaking about or for victims, instead, the victims themselves need to be provided a process through which to share their story in a manner that is beneficial to them. This will not be required to conform to outside expectations, nor to the will of donors who may require a certain standard to be met. Rather than seeing the victim in need of an 'expert' to tell their story, the knowledge of the victim should be valued. Their ability to express their needs, and the manner of procedures they wish to see developed, should be acknowledged as occurring from a position of understanding and wisdom. As detailed by McGregor, the 'process of how the model established can have as much determinative impact on its eventual success as substantive outcomes'.[1314] However, to prevent top down influences dominating, the initial stages of TJ processes should involve victims to shape the design and procedure in which their interests hold a central role.

Attention to, and the focus on the role of the victims has the potential to drive grassroots movements forward, demonstrating issues that need to be addressed and presenting mechanisms to deal with them. It can provide both an insight and alternatives, as shown by the complex victim, which raises questions of conflicting justice goals and conflicting approaches to reparations, differing from the dominant donor-led approaches or the ideas and influences of international NGOs. Countering the top-down limitations, a victim-

[1312] T Madlingozi, 'On Transitional Justice Entrepreneurs and the Production of Victims' (2010) 2 Journal of human rights practice 208.
[1313] Alcoff (n 1311).
[1314] Lorna McGregor, 'International Law as a "Tiered Process": Transitional Justice at the Local, National and International Level' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Bloomsbury Publishing Plc 2008).

centred approach 'optimizes the addressing of victims needs'.[1315] For this to occur, a broad consultation is required, providing engagement at all levels of planning and implementation. 'The effectiveness of a victim-centred transitional justice process can then be measured in terms of its ability to address victims' needs.'[1316] Local understandings of justice must influence the processes, with the needs of victims set forth to be satisfied. This moves beyond the potentially limiting language if victimhood and, instead, provides terminology familiar to victims, ensuring they can express themselves clearly, and in a manner which is contextually appropriate.[1317]

7.8.2 Grassroots enunciation: lessons from the transitional justice field

The field of TJ contains a wide variety of examples in which bottom-up processes have been utilised and where the voice of those from below has influenced the nature of the proceedings. While recognising that international tribunals and TRCs struggle to support therapeutic or restorative goals, Mohan mentions that these formal procedures should be 'more receptive to strategies that commemorate victims in the non-legal arena using pre-existing traditions that are communicated in a language that resonates amongst victims'.[1318]

Traditional approaches vary within different cultural settings and environments, and have specific practices in keeping with the wishes of the society. Wendy Lambourne calls for a 'revalorisation of local and cultural approaches to justice and reconciliation'.[1319] Additionally, Indigenous Dispute Settlement provides examples of procedures in which the community seeks to achieve a settlement, which brings forth harmony within the community.[1320] Grassroot processes can provide an enhanced forum for marginalised victims to embark on localised justice processes, which provide greater cultural relevance.[1321]

[1315] Kirk Simpson, *Unionist Voices and the Politics of Remembering the Past in Northern Ireland* (Palgrave Macmillan UK, Palgrave Macmillan 2009).
[1316] ibid
[1317] Patrick Vinck and others, 'Living With Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of the Congo'.
[1318] Mohan (n 413).
[1319] Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3 International Journal of Transitional Justice 28, 32.
[1320] Agozino and Igbo (n 881).
[1321] Adam Branch, 'International Justice, Local Injustice' (2004) 51 Dissent (New York) 22.

The importance of traditional practice within the TJ processes is recognised within the examples of Timor-Leste in the midst of criminal justice systems that have been 'devastated due to occupation and conflict'.[1322] In this 'community reconciliation process of *nahe biti bo'ot mediation* a 3-month pre-negotiation would occur to reach agreement'.[1323] The traditional practices seek to move beyond issues of conflict, such as the Acholi within Northern Uganda, which has been highlighted by various scholars within ICL due to the focus on the court in this region.[1324] In Afghanistan, an important dispute settlement practice follows *Nyouo tong gwen inko cogo* (reburial of the bones).[1325] It has been recognised that, in Afghanistan, the coexistence of traditional and formal processes provides Afghans with the choice in 'which forum to resolve their disputes'.[1326]

Taking a pluriversal approach, the lessons from indigenous conflict mechanisms can be applied to connect the tools occurring within criminal trials with wider conflict resolution and reinforcing a peace/justice nexus. The case of the Bawku conflict in Ghana identifies the impact of the colonial encounter which, as *Awedoba* explains, has 'destroyed the roots of traditional structures'.[1327] Bukari presents how 'the restoration of peace, its maintenance and social harmony' are primes for the welfare of 'the entire society' with the process involving rituals: 'wealth exchanges, prayers and sacrificing to the gods/ancestors.'[1328] Indigenous methods can be holistic and consensus-based, and often involve the participation of all parties as well as the entire community. The idea of transmodernity, presented in Chapter 5, recognises the need to seriously consider traditional procedures, which seek to create peaceful societies by addressing the root causes of conflict. Although, as the Gacaca trials in Rwanda described below demonstrate, traditional practices may work differently within modern societies; and, in situations of

[1322] John Braithwaite, Hilary Charlesworth and Adérito Soares, *Networked Governance of Freedom and Tyranny: Peace in Timor-Leste* (ANU E Press, ANU Press 2012). 206
[1323] ibid
[1324] Nouwen (n 112).
[1325] Anna K Jarstad and Louise Olsson, 'Hybrid Peace Ownership in Afghanistan: International Perspectives of Who Owns What and When' (2012) 18 Global Governance: A Review of Multilateralism and International Organizations 105.
[1326] ibid
[1327] Kaderi Noagah Bukari, 'Exploring Indigenous Approaches to Conflict Resolution: The Case of the Bawku Conflict in Ghana' (2013) 4 Journal of sociological research (Las Vegas, Nev.) 86.
[1328] ibid

international crimes, the large numbers of perpetrators and a lack of criminal justice system may necessitate the use of traditional procedures.[1329]

Feminist scholars have provided approaches to achieving justice for women and girls. St Germain presents examples of projects working to address gender imbalance within IL. Firstly, highlighting the work of the Grassroots Organizations Operating Together in Sisterhood (GROOTS), she utilises the Kenyan examples to demonstrate how this could be applied within ICL:

> The work of GROOTS Kenya demonstrates that this could also be possible for less-privileged women through some amount of loose network affiliation with information-sharing potential. Conflict-related sexual violence could be addressed in much the same way that land rights have been contested, with justice initiatives arrived at through dialogue and engagement with authorities on the terms of victim-survivors. [1330]

Secondly, she presents the South African example, 'Sonke Gender Justice', which utilises the international human rights framework to engage with governments, civil society and individuals to prevent violence against women. Post-conflict zones can also be spaces of transformation, and alternative initiatives to address conflict-related sexual violence might directly draw upon the strengths and goals of community rebuilding efforts: 'They consider that the strengths of local communities should be recognised, rather than following a Euro-American model.'[1331]

An alternative model of tribunal, which utilises the voice of marginalised people in instances in which traditional anti-impunity mechanisms, such as criminal trials, have either not arisen or have excluded important justice issues is the model of people's tribunals. [1332] People's tribunals have occurred in situations in which formal political and

[1329] Section 7.9
[1330] St. Germain and Dewey (n 635) 24.
[1331] ibid
[1332] Dianne Otto, 'Impunity in a Different Register: People's Tribunals and Questions of Judgment, Law, and Responsibility'.

legal institutions have failed in providing appropriate justice and can have the support of international lawyers.[1333]

Any local or regional justice procedure should include measures to prevent it from becoming a tool for impunity or for powerful actors to override the views of the victims. A concern, in relation to alternative justice procedures is that, rather than providing grassroots justice mechanisms, they will, instead, be monopolised by top-down players and will maintain a hegemonic situation. This limits the potential for marginalised individuals to achieve justice and can rather provide an alternative path to impunity.[1334] The risk of power imbalances or the limited voice for women, girls and marginalised individuals has been highlighted through traditional restorative justice procedures.[1335] Allen has highlighted that research has presented concerns about whether the practice of traditional methods is really as effective as is often claimed. Within communities, the dominating interests of the community leaders, who are often men, can result in alternative voices, such as those of women or young people, not being included within the discussions.[1336] Additionally, the root cause question follows the challenge set forth by Lundy and McGowen, who ask how does a 'locally empowering process overcome hierarchal differences (for example, of gender) within a local community that can otherwise preclude giving agency to the most marginalised?'.[1337] Care should be taken in determining which traditional procedures are appropriate to any given situation; some are only relevant to specific communities while excluding other affected communities. Governments should not incorporate traditional procedures as a tool of impunity to prevent their alleged crimes being investigated. Alternatively, the procedures may not have the effect of accountability or forgiveness that was imagined by international actors, and may be taking place more because of external funding than to provide an effective justice pathway for communities. The legitimacy of those who perform the rituals as leaders can have their claims to authority challenged.[1338] Within traditional justice practice, the victimhood of specific members of society may be prioritised, causing others

[1333] International War Crimes Tribunal, *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal, Stockholm, Copenhagen* (Bertrand Russell Peace Foundation 1968).
[1334] Letschert (n 134).
[1335] Ibid 179
[1336] Allen (n 645).
[1337] Lundy and McGovern (n 26).
[1338] Allen (n 645).

to be excluded. Additionally, traditional justice practices may not provide official acknowledgement of responsibility or harm.

7.9 Truth and Reconciliation Commissions: Justice for victims

Truth commissions are a key transitional justice mechanism and have appeared in many contexts since the 1970s.[1339] Their aims include historical accounts of past abuses and prevention of future abuses; however, they are often understood as having a particular focus on victims – providing truth to victims, allowing them to tell their stories and providing acknowledgement of their suffering. Advocates of TRC argue that there is a therapeutic aspect and that such commissions aid victims with their recovery. Additionally, they can strengthen the opportunity for truth and remedy, through recommendations for reparations. In TRCs, victims play a crucial role. They feed into a narrative, inform and instruct wider society, confront perpetrators and are recipients of apologies. Victim participation is considered an important characteristic of TRCs. for this to occur, though, it is necessary for participants to be provided with the opportunity to express truths without being suppressed by those overseeing the programme. The focus of reconciliation aspects attempts to bring together victims, perpetrators and societies. However, evaluating the justice for victims which follows TRCs necessitates asking the question whether these commissions actually have aided the victims healing, or have they been harmful? Have they satisfied victims' needs or, in fact, engendered expectations which are not met?[1340] Many concerns have been raised as to whether they reopen 'old wounds and may generate further polarization. As 'the truth' delivered is often partial and limited, and their 'top-down' nature can marginalise resulting in the exclusion of a range of socio-economic injustices', preventing opportunities for retributive justice and limiting the potential accountability for victims.[1341]

As detailed above, the dominant script of TJ procedures is witnessed within TRCs, in which there remains a focus on civil and political rights, while overlooking structural violence issues or root causes of conflict.[1342] Recently, however, a number of truth

[1339] Brito, Enriquez and Aguilar (n 1125).
[1340] Janine Natalya Clark, 'Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship' (2011) 11 International Criminal Law Review 241.
[1341] ibid
[1342] James Cavallaro and Sebastián Albuja, 'The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond', *Transitional Justice from Below* (Bloomsbury Publishing (UK) 2008).

commissions have begun to investigate issues surrounding economic crimes. Whilst earlier TRCs, such as that of Chile, focused on serious violations consisting of physical violence under human rights norms, some recent commissions have begun to look beyond the narrow focus of previous truth commissions and examine gender-based violence (Sierra Leone), racism and socioeconomic inequality (Guatemala).[1343] The Canadian TRC engaged with questions surrounding structural violence and provides 'social accountability', bringing together grassroots lessons by recognising the justice needs of the victims.[1344] In this instance, how 'Indigenous healing is intrinsically connected to structural transformation and reconciliation depends upon remedying colonial violence in the present.'[1345] Finally, within the Peruvian TRC, six Quechan women 'subverted their 'victim status' to challenge the standard hegemonic history presented on the Shining Path conflict and instead shared their experiences, which detailed a reality experienced by many indigenous women, whose narrative was usually overlooked'.[1346]

The South African Truth Commission has widely been considered a successful alternative to retributive justice, in which localised justice procedures, prioritising reconciliation, followed cultural understandings based upon the Ubunta philosophy.[1347] In the South African example, the truth commission encouraged perpetrators to share information on crimes they had committed, and the reconciliation aspect followed.[1348] In its final report, the South African TRC argued that it had provided justice.[1349] Chairperson Bishop Tutu said that the Commission had promoted 'another kind of justice', a restorative justice, 'which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships … with healing, harmony and reconciliation'.[1350] The Commission acknowledged the need to promote reconciliation in South Africa, demanded a different response, and argued that large-scale prosecution was not the route the

[1343] Gearoid Millar, 'Local Evaluations of Justice through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice' (2011) 12 Human Rights Review 515.
[1344] Nagy (n 1307).
[1345] On genocide, see, Andrew Woolford, 'Ontological Destruction: Genocide and Canadian Aboriginal Peoples,' Genocide Studies and Prevention 4(1) (2009): 81–97
[1346] Shackel and Fiske (n 1254) 167.
[1347] Alex Boraine, 'Truth and Reconciliation Commission in South Africa Amnesty: The Price of Peace' in Jon Elster (ed), *Retribution and Reparation in the Transition to Democracy* (Cambridge University Press 2006).
[1348] ibid
[1349] Final report of the truth and reconciliation commission Cape Town TRC 1998 Vol 5 CH8 para 114
[1350] ibid

country had chosen. As Alex Boraine has argued, 'It was justice, attempted at the very heart of the commission, but certainly could not be interpreted in a very narrow framework of retribution, but rather in the wider context of restorative justice.'[1351] Richard Goldstone has noted that, in South African Truth and Reconciliation Commission (SATRC,) 'the perpetrators suffered a very real punishment – the public confession of the worst atrocities with the permanent stigma and prejudice that it carries'.[1352]

However, alternative reports have highlighted the limitations experienced by victims and their search for justice within the South African TRC. Wilson, Moon and Cole have each explained how the voices of victims were utilised by those in charge of the TRC, process to ensure reconciliatory or 'forgiving' accounts were presented, in contrast to the victims who wished for a retributive story to be told.[1353]

A lack of examination of root cause issues has also challenged the legacy of the TRC; an issue which affects both international trials and truth and reconciliation procedures, as arose within South Africa. The criticism of the SATRC concerns the fact that:

> It didn't get to the root causes of violence and it didn't exercise its powers to lay the buck where it needed to be laid. I mean their political testimonies were pathetic, absolutely pathetic. They didn't take on business, local and international – these are the culprits actually.[1354]

While the final report did acknowledge the history of colonialism as background to apartheid, and the role of business in apartheid, and the opening volume touches upon its own limitations, noting that:

> the consequences of human rights violations [due to separate development] … cannot be measured only in the human lives lost through deaths, detentions, dirty

[1351] Boraine (n 1347).
[1352] **ibid**
[1353] Charles Villa-Vicencio, *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (University of Cape Town Press 2000).
[1354] Miller (n 1296).

> tricks and disappearances, but in the human lives withered away through enforced poverty and other kinds of deprivation.[1355]

One criticism of the legacy of the South African TRC is that it focused on perpetrators of apartheid, while ignoring the large population of beneficiaries; allowing those who were not labelled as perpetrators to remain oblivious to the structural benefits they received, such as housing, jobs or schools.[1356] Meanwhile, the recommendation of the Commission in regard to monetary reparations was largely ignored by the new government, for whom the legitimacy from the TRC was no longer necessary.[1357] Instead of facilitating transition, these actions may have 'frozen the hierarchies of apartheid by preserving the social and economic status quo'.[1358] Mamdani argues that the dominant story of apartheid, of individuals committing gross human rights violations, requires further nuance than providing it with a Latin American analogy, which, he suggests, 'obscured the colonial nature of the South African context: the link between conquest and dispossession, between racialized power and racialized privilege'.[1359] 'An analysis of the choices of 'truth' and narrative at the TRC might easily implicate the questions of which issues were considered paramount, what became background and what was central to the national narrative of truth and reconciliation.'[1360] In this manner, victims can lose their opportunity of justice, especially if they suffer from violence which does not fit into the dominant narrative of the TRC.

7.9.1 Gacaca trials in Rwanda: localised justice and international crimes

A question that arose within Rwanda, following the Genocide, was recognising the limited number of perpetrators who would be tried in the ICTR, leading to the creation of the Gacaca tribunals.[1361] In contrast to the implementation of a TRC, such as the one developed within South Africa, the government sought to implement a traditional dispute

[1355] Mahmood Mamdani, 'Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa' in DM Davis, Karen Engle and Zinaida Miller (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016).
[1356] ibid
[1357] Miller (n 1296).
[1358] ibid
[1359] Mamdani, 'Beyond Nuremberg' (n 1355).
[1360] ibid
[1361] Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge University Press 2010).

resolution procedure (Gacaca) originating from pre-colonial Rwanda, previously mainly used for property disputes. Its role in trying genocide crimes is unprecedented and was borne out of necessity.[1362] It applies the same criminal law as national courts, although does not follow due process standards such as ensuring that defendants have lawyers.[1363] Gacaca sentences are geared toward the reintegration of offenders, with half of their sentences involving community work, including renovating or rebuilding homes for survivors, as forms of reparations or restitution. International groups/human rights organisations have expressed concerns about the lack of conformity with Rule of Law principles, including lack of defence counsel and limited appeal rights, potential partiality of decision-makers (judges from the same community) and lack of training in law. Drumbl presents further concerns that sentences are too lenient: defendants do not demonstrate remorse directly to victims' families, and the fact that these traditional communities do not exist anymore following a change in society arising after the genocide, limits the influence of traditional community resolution procedures. He also considers that international influence has caused the Gacaca system to work in accordance with more formal legal procedures following a top-down state-controlled model, removing the bottom-up nature of the original.[1364] The limitations of this traditional practice, however, are complex, requiring key issues of criminal law, such as fair trial rights, to be overlooked, potentially creating a greater aspect of victor's justice.[1365]

The criticism by victims' groups of the Gacaca trials highlights that traditional procedures did not focus on victims' justice issues; potentially retraumatising victims by requiring them to engage with perpetrators for the sake of reintegration, rather than considering the needs of the victims.[1366] Accusations of international crimes carried out by Tutsis were not investigated, so the victims of these crimes have no option for accountability for the harm they suffered.[1367] Additionally, victims groups have criticised the approach to reparations in which a fund has been set up by the government but only makes limited

[1362] ibid
[1363] ibid
[1364] Mark A Drumbl, 'Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda' (2000) 75 New York University Law Review 1221.
[1365] ibid
[1366] Mahmood Mamdani *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda.* (Princeton University Press 2014).
[1367] ibid

forms of reparations.[1368] As introduced in Chapter 2, the record of the ICTR in relation to victims demonstrated the limitations of ICrJ. Haslam has explained how local Rwandan victim and survivor groups 'were primarily deemed to be objects; for example, groups to whom the tribunal imparted information as part of its 'outreach' programme'.[1369] By comparison, international NGOs were treated as 'subjects' with influence over policy and procedure.[1370]

As Mamdani highlights, 'the genocide entrenched Hutu and Tutsi as salient political identities'.[1371] The dilemma of post-genocidal Rwanda lies in the chasm that divides Hutu as a political majority from Tutsi, a political minority.[1372] The legacy of labelling a large group of the population as *genocidaires* has political impact upon the society, which has been maintained since the genocide.[1373] As Mamdani highlights, the attempt to underscore that the majority of Hutus in Rwanda are guilty of genocide, by those currently in power, can have the impact of strengthening claims that this guilty majority be deprived of political rights. In this, the dilemma arises of how to build a democracy with a guilty majority and a fearful minority.[1374]

In contrast to the standard narrative of ethnic division within Rwanda, Miller details how 'many scholars have cited the egregious structural violence of Rwandan society as an enabling environment for genocide, even if it was not as an instigating factor for the atrocities'; continuing how 'decades-long grievances over land and resource distribution combined with other social and political factors to allow the government to manipulate the ethnicity discourse and plan mass atrocity'.[1375]

The issues of structural violence and economic inequality have not been addressed within Rwanda; through the ICTR, Gacaca or national trials. The transitional justice discourse maintains a focus on the past conflict without finding a way to transcend it. If the genocide

[1368] Zinaida Miller, 'Anti-Impunity Politics in Post-Genocide Rwanda' in DM Davis, Karen Engle and Zinaida Miller (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016).
[1369] Haslam (n 227).
[1370] Ibid Within the context of the ICTR, international non-governmental organisations (NGOs) 'interacting with the ICTR were constituted as 'subjects' (important players who could influence policy and procedure)',
[1371] Mamdani and Mamdani (n 1366) 266.
[1372] ibid
[1373]Ibid 250
[1374]Ibid 264
[1375] Miller (n 1368).

is seen through a lens of ethnicity, then structural inequality remains invisible and the post-conflict mechanisms will not be granted an opportunity to address it.[1376] Mohan presents how the focus of political energy on prosecutions can distract attention from the 'root causes of humanitarian violence'.[1377]

The Gacaca courts in Rwanda demonstrate how a traditional legal system has been utilised for international crimes, allowing potentially greater relevant justice options than an international criminal procedure. This presents an alternative model for ICL in which more traditional approaches are applied within the trial context, including criminal justice ideas which move beyond Western concepts. Forms of retribution from these courts could include rebuilding as part of community work. The Rwandan case does, however, demonstrate that traditional justice mechanisms need to be treated with caution. The main impediment in Rwanda arose out of necessity to create a system to deal with the large number of perpetrators; this has resulted in the accusations of victors' justice and fair trial rights being overlooked, demonstrating that justice mechanisms should ensure they are not perpetuating hegemony in another guise.

7.10 Conclusion

As set out in this chapter, the potential flexibility of legal pluralism and the recognition by scholars of the importance of the influence of domestic criminal law systems on the approach of international criminal law – not least through the principle of complementarity – provide a mechanism to reflect local needs within the international system, while preventing state-led impunity. The need for a bottom-up enunciation of ICL has been argued alongside the need for bottom-up approaches to all post-conflict societies to work towards a lasting peace. In their work on transitional justice from below, scholars have highlighted the limitations of 'off-the-shelf' models of justice, and, instead, advocate for diversity in the approach. The key element of legitimacy within this concept of the local is that it incorporates local victim communities within these procedures.

The aim of positive peace could provide united goals and standards for both ICL and TJ in questions of justice, and moving beyond an unfair peace towards lasting, sustainable

[1376] ibid
[1377] Mohan (n 413) 9.

peace. ICL could investigate further instances of structural violence affecting marginalised victims – especially within countries recognised internationally as 'peaceful' – understanding that the gravity determination would take on different forms from that applied for crimes concerning direct violence. Overlooking such root cause issues – which often stem from violations of economic, social and cultural rights – undermines attempts to build lasting peace. Within the holistic approach taken by the ICC in its monitoring of the situation in Colombia, these wider issues of victims' justice should also be included. As a starting point, it would require facilitating mechanisms that include the voice of a victim constituency speaking on behalf of actual victims. This provides ICL with a procedure to move beyond the accusations that the search for justice is based upon universal justice standards or representation practices that speak on behalf of victims, obscuring their authentic voice.

8 CHAPTER 8: REARTICULATING THE ROLE OF VICTIMS WITHIN ICL

> Along with accountability to a victim constituency lies the pragmatic persuasion that with heightened victim buy-in to international criminal justice will flow greater legitimacy for this process across a wider range of the communities it is said to serve.[1378]

8.1 Introduction

One of the criticisms faced by international tribunals and courts is the concern that they are promising too much, which they cannot deliver. This thesis has discussed both the challenge of living up to the victim-centric claims made by practitioners of ICL and the role of international criminal justice (ICrJ) within peace and security. As detailed in Chapter 2, the RS of the ICC created a victim-centric focus for ICL, by including a victims' regime for the ICC. This chapter explains how an expanded role for victims can enhance the opportunity to achieve the social and cultural justice set out in positive peace theory. Such an expanded role addresses the limitations of both the experience of victims within ICrJ procedures and the terminology of victimhood. It recognises the challenges, for ICL, of what can be achieved within the courts, arguing that this question can be answered by conceiving a role for ICL alongside TJ procedures, with a variety of justice opportunities.

This chapter brings together the tests described throughout this thesis, with potential mechanisms to move beyond the ICC's present limitations through a three-layer rearticulation of the role and concept of victims. The three sections will analyse a number of different questions. Firstly, this chapter examines the conceptualisation of victims, the prioritisations and value placed upon the helpless 'ideal' victim and the abstraction of victimhood. As the binary classification of victim/perpetrator is insufficient in the face of child soldiers and complex victimhood, this section argues that taking a complex view of the definition of 'victim' could enhance the voice that victims have in the midst of wider searches for justice.

Secondly, the limitations of ICL practice on the role of victims, as set out in Chapter 3, are addressed. While the RS of the ICC has strong objectives to provide justice for victims, this

[1378] Findlay (n 69) 185.

has been limited within ICC practice. This chapter proposes procedures through which to overcome current limitations of victims' practice within ICL, and provides a more victim-centric approach to the ICC within the current system. In doing so, it seeks to provide a standard for victims' rights which are recognised as fundamental to ICL, in a similar manner to which fair trial rights have triumphed as a cornerstone of ICL. It develops the argument that where there are lacunae within the RS of the ICC, the gaps should be interpreted through a victim-centric focus.[1379] The discussion builds upon questions of procedural justice, through victim participation, alongside reparative justice, including the work of the TFV.[1380]

Finally, a model for a hybrid tribunal is utilised as a method to strengthen the voice of victims and enhance legitimacy, incorporating lessons from some existing bottom-up procedures. This proposal builds upon lessons from the grassroots initiatives presented in Chapter 7, and utilises from below approaches, strengthening the clarity of individual victims' voices and their complex search for justice.

8.2 A Three-Layered Approach to Rearticulating the Role of Victims

The need to reconceptualise the victim follows on from the limitations of the traditional understandings of victims presented in previous chapters.[1381] If only an idealised or abstract image of victims is valued in ICL, then everyone who does not fit this narrow picture is excluded and their voices are suppressed.[1382] However, the role of the victim in ICL does not translate into influence over justice procedures, and in practice leads to their marginalisation within mass atrocity contexts. Chapter 2 highlighted the additional challenges for individual victims' voices to be heard within ICL, in a different manner to challenges within domestic proceedings, with Dembour and Haslam arguing 'that war crimes trials effectively silence rather than hear victims'.[1383] In seeking to overcome

[1379] Section 2.2
[1380] McGonigle Leyh (n 57).
[1381] See especially Section 2.5 and 5.4
[1382] McEvoy and McConnachie (n 260).
[1383] Dembour (n 282).

hegemonic power relations, a 'thicker' understanding of victim visibility within ICL and TJ mechanisms is required, including legitimising more complex categories of victims.[1384]

8.3 1st Layer: Reconceptualising the Victim

The reality of the complex classification of victim and perpetrator, as demonstrated through the example of child soldiers, provides more complex justice issues for ICL which cannot be fully addressed through retributive justice procedures. This issue of complex victimhood is examined below, considering the suitability of restorative justice procedures and then within the international criminal trial context, currently discussed within the Ongwen case before the ICC.

This section deliberately does not present one specific definition of victim, but rather a number of alternatives. The aim is that the affected parties could determine their own terminology, one which they can identify with, and which could also provide empowerment or their clear political agency. Cultivating a rearticulation of the concept of victimhood in which supports their agency begins with questions of the victim/perpetrator relationship, the influence of culpability and the role this should play. A flexible approach is necessary for dealing with a rearticulated concept of victimhood in which the agency of victims is paramount and distinct from the traditional idea of suffering helpless victims. Out of this, the grassroots role for victims can be recognised and the search for a term which surpasses the limitations of 'The Victims' can be sought. The definition of 'victim' must move beyond the simple notions of victim/perpetrator and instead acknowledge complex victimhood which can involve many facets of complexity, including culpability, political agency, conflicting notions of justice, lack of recognition of the Western style of criminal proceedings and the more fundamental root cause aspects of conflict and international crime.[1385]

Building upon lessons from victimology, this approach seeks to guarantee recognition of the voice and agency for those who have suffered, ensuring this is 'valued and granted political agency to make their own decisions, rather than being told the methodology from

[1384] Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 Journal of Law and Society 411.
[1385] Section 2.5

those who consider themselves in a dominant or superior position'.[1386] This would acknowledge the political nature of victimhood and the influence of the construction of the victims on the possibility of achieving meaningful justice.

While the harm suffered through an international crime could remain the legal criteria within ICL to determine who is a victim of international crimes, the terminology used to refer to those who suffer such crimes could evolve. Alternatives, such as victim/survivor, have been used within the wider UN system, especially in relation to sexual crimes, facilitating a move away from the hierarchy of the 'ideal victim', and the legacies of victim precipitation which privilege innocent helpless victims.[1387] The term survivor is widely used within TJ procedures; it provides a direct contrast to the helpless victim and, instead, presents an image full of agency, perceiving the harm as something the victims have overcome or are working to overcome. While a victim's whole life is defined by the harm; a survivor suggests that the harm was only one event in the person's life that does not define them, and of one who has ideas on how best to witness justice being done. It places the harm they suffered in the past and the present as connected to the image of a survivor. This moves away from the accusation that the ICC model 'tries to reduce the survivor of violence to a victim'.[1388]

As not all victims have survived international crimes, 'survivor' may not be an appropriate term for all, especially family members of deceased victims. In this matter, the crucial factor is ensuring victims are referred to in the manner of their choosing, following bottom-up methodology in contrast to top-down definitions or descriptions.[1389] This moves outside of the traditional victimological approach of only recognising the victim through the crime and perpetrator.

Contrasting the idea of 'the Victims' with the idea of 'the Other', set forth in Chapter 5, forges an alternative approach, moving away from an abstraction, instead, providing recognition of the voice of the subaltern.[1390] The Victims/Other approach, which can be explored through the decolonial school, also presents an approach in which the people

[1386] Schwöbel-Patel (n 265).
[1387] McEvoy and McConnachie (n 58).
[1388] Branch, *Displacing Human Rights* (n 748).
[1389] Spivak (n 88).
[1390] ibid

who have suffered harms are not easily recognised as victims; rather they are considered as outsiders or different from mainstream society, a 'negated alterity' detailed by Dussel in Chapter 5.[1391] Such an understanding of these groups engenders a more political dynamic than the traditional conceptualisation of the victim within ICL. Additionally, the Victims/Other may not fit into the 'ideal' victim classification. As Spivak detailed in Chapter 5, this requires the development of procedures in which the subaltern can speak for themselves, rather than others speaking on their behalf or a requirement in which they must engage with a justice process which is structurally designed to work against their interests. Balakrishnan Rajagopal writes of the ethical and legal duties 'to listen and respond to the voices of the subalterns', as well as 'to know the limits of cosmopolitanism as a cure-all'.[1392] However, this merely highlights the need to move beyond a limited notion of 'ideal' victims and recognise the complex realities which can co-exist simultaneously with a victim experiencing harm – a fundamental component of the entire victim construction.[1393]

Alternative constructions of victimhood could include combining the use of claimant terminology used within tort law proceedings. A victim/claimant conceptualisation would provide an opportunity of a last resort for those victims to seek redress, particularly for those who have suffered crimes for which no perpetrator will stand trial.[1394] The need for such last-resort opportunities of redress is demonstrated by, for example, the acquittal in the Bemba case and the very limited and selective number of perpetrators who stand trial for international crimes.[1395] Within common law jurisdictions, tort law does not require a guilty verdict to provide an avenue for victims to be able to pursue civil claims against a perpetrator. Currently, civil tort action is a tool utilised in relation to international human rights violations by corporations, as witnessed in the case of Kiobel and the use of the Alien Tort Statute within the US.[1396]

[1391] Section 5.3
[1392] Rajagopal (n 797) 294.
[1393] Erin Baines, 'Complex Political Victims, Erica Bouris' (2008) 2 The International Journal of Transitional Justice 432.
[1394] *Redressing Injustices through Mass Claims Processes : Innovative Responses to Unique Challenges* (n 211).
[1395] Section 3.3
[1396] K Gallagher, 'Civil Litigation and Transnational Business: An Alien Tort Statute Primer' (2010) 8 Journal of international criminal justice 745.

Providing a coherent voice to the role of victims within ICL could create a situation in which the victim, as a political person, may not fit with the courtroom process or even ICL in general. Victims, as political persons, may even oppose the use of ICL in response to the harms they have suffered, preferring other solutions to conflicts and alternate avenues of redress, especially if they fear being silenced as a result of courtroom procedures. Providing victims a voice to shape the process may, in effect, be an important tool for ICL, providing a method through which to overcome accusations of political bias influencing the court.[1397] Alternative avenues for complex victims, such as child soldiers, provides the option of utilising a variety of restorative justice procedures rather than a traditional criminal (juvenile) trial as has been considered for the issue of child soldiers.

Incorporating the victim-orientated approach is developed in the next two layers. The use of the term victim in these discussions should be viewed with the alternative terminology detailed in this layer. Reconceptualising the victim combats the traditional powerless/helpless victim idea by recognising their political agency, the need for their centrality in justice processes and the importance of victim redress.

8.3.1 Complex victimhood and child soldiers: interplay of retributive and restorative justice

Complex victims provide a challenge to ICrJ as they do not easily fit the standard mould of innocent victim/evil perpetrator. This section examines the question of accountability for child soldiers, who fall within the complex victim classification within ICL, examining domestic practice, restorative justice procedures and the issue of child soldiers within the Ongwen case at the ICC. There is a need for an integrated approach to address the complexities victimhood of child soldiering who will not always fit easily into the innocent 'ideal' victim classification. Additionally, the search for accountability or reintegration needs to move past the victim/perpetrator nexus.[1398] A tool to move beyond the limitations of legalistic trials is presented by a restorative justice approach which could enhance the opportunity to provide justice for complex victims. The issue of child soldiers

[1397] SMH Nouwen and WG Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 European journal of international law 941.
[1398] Jean Chrysostome K. Kiyala, *Child Soldiers and Restorative Justice: Participatory Action Research in the Eastern Democratic Republic of Congo* (1st ed. 2019., Springer International Publishing : Imprint: Springer 2019).

and the role of restorative justice provides a nuanced response to those complex victims, who have both committed atrocities themselves and been affected by atrocities.[1399]

The nature of complex victimhood recognises the challenges of supporting the victimisation of an individual, such as a child soldier, and the stigma which may be attached to their status. It also understands the gravity and impact of their actions and the need to provide accountability for these alongside a pathway to allow them to re-enter community life.[1400]

The range of reasons children become soldiers includes issues such as abduction, poverty or protection.[1401] They do not fit easily into either of the victim/perpetrator categories, especially if they remain children through the time of their criminal activity.[1402] Additionally, it has been contended that 'there are also shades of grey between 'volunteering' to join armed groups or being physically or economically forced to do so'.[1403] If accountability for child soldiers is not properly developed, then they will struggle to return to their communities. Subsequently, it could have a knock-on effect of increasing the use of child soldiers. As Popovski and Arts have highlighted there is a danger that impunity for child soldiers, 'may encourage military commanders to delegate the 'dirtiest' orders to child soldiers. In that way, a decision not to seek accountability for child perpetrators would indirectly expose child soldiers to more risks rather than protecting them'.[1404] Furthermore, within ICL children under the age of 15 are not within the jurisdiction of the courts and there are limited options for accountability, and reintegration to communities, through its criminal justice practice. Restorative justice and social justice, in the context of transnational justice processes, can be utilised to hold child soldiers accountable, while encouraging their integration into communities and halting the use of child soldiers. The issues of social justice, which follow on from positive peace

[1399] Mark A Drumbl, 'Transcending Victimhood: Child Soldiers and Restorative Justice' in Thorsten Bonacker and Christoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (T M C Asser Press 2013)
[1400] ibid
[1401] Mark A Drumbl, *Reimagining Child Soldiers in International Law and Policy* (1 edition, OUP Oxford 2012).
[1402] Kirsten Fisher, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict Contexts* (Palgrave Macmillan, Palgrave Macmillan UK 2013).
[1403] Luisa Maria Dietrich Ortega, Transitional Justice and Female Ex-Combatants: lessons learned from International Experience, in Patel, de Greiff, Waldorf, eds, Disarming the Past 158, 169
[1404] Karin Arts and Vesselin Popovski (eds), *International Criminal Accountability and the Rights of Children* (Hague Academic Press 2006).

theory, recognise the impact of structural factors which can lead to a greater use of child soldiers, such as poverty, limited health, housing or education.[1405] Following the argument in Chapter 6, to prevent the use of child soldiers therefore these wider social justice issues should be included, recognising how they form part of the elements which lead to this crime.

The issue of juvenile justice in domestic procedures has provided alternatives to a criminal justice trial, in recognition of the need to incorporate other justice procedures. A number of domestic examples demonstrate an increased restorative justice focus within criminal cases for juvenile systems, such as the incorporation of alternative dispute resolution (ADR) procedures for minors as part of the Italian criminal system, in contrast to previous adversarial approaches based upon principles of the legality of prosecution.[1406] This approach allows for a trial to be suspended and the juvenile be given the opportunity to participate in projects promoting his or her rehabilitation; if successful this could have a positive influence on the eventual sentence. The possibility of victim-offender mediation also opens up alternative ideas of justice and can be judged in the midst of criminal procedures. There are further domestic examples in which aspects of RJ are being incorporated into juvenile justice systems, such as Child Hearings in Scotland.[1407] Skelton has also presented countries that have included restorative justice in the transformation of their juvenile systems: Uganda, South Africa, Namibia, Ghana and Lesotho, along with discussions at the UN.[1408]

Similarly, lessons from restorative justice models should be examined within ICL to address the current challenges in relation to those who the Lord's Resistance Army (LRA) has abducted, causing them to be both victims and perpetrators.[1409] As has been accepted, 'restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through cooperative processes

[1405] Drumbl, 'Transcending Victimhood' (n 1399).
[1406] Giuliana Romualdi, 'Problem-Solving Justice and Alternative Dispute Resolution in the Italian Legal Context' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3334442 52
[1407] Janice McGhee and Lorraine Waterhouse, 'Family Support and the Scottish Children's Hearings System' (2002) 7 Child & Family Social Work 273.
[1408] Ann Skelton, 'International Children's Rights Law: Complaints and Remedies', *International Human Rights of Children* (Springer Singapore 2018)
[1409] Leonie Steinl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes under International Law*, vol Volume 14 (Asser Press : Springer 2017).

that include all stakeholders.'[1410] The complex experience of abductees causes them to suffer stigmatisation upon returning to their communities and restorative justice provides a process through which the stigma can be overcome within the entire community. This can be seen through the experiences of girls and women who have suffered sexual abuse or forced marriage and who are then ostracised upon returning home.[1411] Drumbl has challenged the approach within IL which treats 'children-at-arms' as passive victims, resolving them of responsibility.[1412] He argues that this approach, 'increases suffering of both these soldiers and their victims' as child soldiers are prevented from participating in truth and reconciliation processes or indigenous cleansing ceremonies.[1413] For child soldiers who have remained minors throughout the time they carried out criminal acts, it has been suggested that an RJ approach be used, in which there can be resolution between the victims of child soldiers and the individual child soldier. As discussed within a study on RJ practice in relation to child soldiers in the Democratic Republic of Congo (DRC), this can allow the community to move forward while providing child soldiers a pathway to return to their homes.[1414] Additionally, there are instances of restorative justice in transitional justice processes. For example, in Colombia, where ex-combatants and abductees seeking to return to their communities embark on a justice process in which they are allowed to return home once they have completed the required community actions; in this way, they are not completely absolved of wrongdoing on the basis that they, too, are victims.[1415]

Alternatively, the Ongwen trial at the ICC demonstrates, in practice, the issues surrounding complex victimhood in which the perpetrator is being tried for a crime to which he was originally subjected, and subsequently, as an adult, carried out against others.[1416] It is now widely recognised that 'Ongwen is the first person to be charged with crimes against humanity and war crimes while also being a victim of these crimes as

[1410] ibid
[1411] Leonie Steinl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes under International Law*, vol Volume 14 (Asser Press : Springer 2017).
[1412] Drumbl, *Reimagining Child Soldiers in International Law and Policy* (n 1401).
[1413] ibid
[1414] Jean Chrysostome K. Kiyala (n 1398).
[1415] Seema Shekhawat (ed), *Female Combatants in Conflict and Peace: Challenging Gender in Violence and Post-Conflict Reintegration* (Palgrave Macmillan UK 2015).
[1416] Prosecutor v Dominic Ongwen (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15 (23 March 2016) (hereafter Ongwen charges)

well'.[1417] Dominic Ongwen was abducted at the age of ten on his way to school and suffered the same initiation as other LRA abductees: a brutal initiation in which they are emotionally (as well as physically) removed from their homes, families and communities.[1418] To achieve this, abductees are often required to commit atrocities against their communities to remove the possibility of returning at any stage.[1419] Children who do not carry out these crimes are severely punished, often by other children who risk the same punishment. Ongwen proved to be a skilled fighter and rose through the ranks of the LRA, continuing into adulthood.

This case deviates from the dominant narrative of ICL, in which victims are innocent and helpless, suffering through the actions of a perpetrator who is deemed an 'enemy of mankind'. The complexity of Ongwen's case is that his victim/perpetrator status challenges the simplistic binary coding of international criminal law, which, as Drumbl has argued, 'derives its energy from, and in turn disseminates polarities of guilt/or innocence, capacity/or incapacity, adult/or child, and victim/or perpetrator'.[1420] This case poses other questions, such as how the victims of Ongwen's actions envisage justice to look like.[1421] Would they consider the trial context to be appropriate or would they prefer a different forum?

It raises the question, to what extent should complex victimhood impact on the trials of accused perpetrators? The defence has been able to introduce Ongwen's complex status and experiences as mitigation for his actions, raising questions as to whether the trial is the most appropriate mechanism for individuals with a similar background to Ongwen.[1422] Also, within ICL, the partial defences available in other jurisdictions do not arise.[1423] In the confirmation of the charges, the defence has argued that Ongwen's background should lead to the case being dismissed. As a former child soldier, Ongwen pleaded not guilty and blamed Kony and the LRA for the crimes.[1424] The defence argues

[1417] Erin K Baines, 'Complex Political Perpetrators: Reflections on Dominic Ongwen' (2009) 47 The Journal of modern African studies 163.
[1418] ibid
[1419] ibid
[1420] Ongwen charges (n 1503)
[1421] ibid
[1422] ibid
[1423] Such as diminished responsibility defence within English Law
[1424] Ongwen charges (n 1503) para 36-49

that 'circumstances exist that exclude Dominic Ongwen's individual criminal responsibility for the crimes that he may otherwise have committed', considering that as a child soldier he should benefit from international legal protection until he left the LRA 30 years after his abduction.[1425] The PTC determined that this argument is without legal basis.[1426] In their consideration of the defence argument of duress excluding Ongwen's criminal responsibility, under article 31(1) (d) of the Statute, the PTC rejected this argument, explaining that 'there exists no evidence indicating a threat of imminent death or continuing or imminent serious bodily harm against Dominic Ongwen (or another person) at the time of his conduct with respect to the particular crimes charged'.[1427] Additionally, the PTC contend that it was the conduct of Ongwen in rising through the ranks of the LRA which exposed him to higher responsibility to implement LRA policies, also explaining that escapes from the LRA were not rare.[1428] Finally, the PTC challenged the defence argument that Ongwen could not have avoided accepting forced wives, 'he could have reduced the brutality of the sexual abuse' and punishment for failure to perform domestic duties.[1429]

The academic community has argued on different sides of the victim/perpetrator debate. Boher has contended on the lasting effects of coercive indoctrination into military service: 'The underlying rationale for this defence is that it would be unreasonable to hold such individuals criminally responsible for their conduct given the strong sociopsychological coercion to which they have been exposed.'[1430] In contrast, challenging this defence, Seyfarth has maintained that it is still reasonable to hold such individuals criminally responsible for their conduct; it being sufficient to reflect the impact of their traumatic childhood through the mitigation of their sentence.[1431] In responding to the arguments put forward by the defence, the question of the agency of victims is a crucial element.[1432] Are child soldiers devoid of agency? The concern of the Ongwen trial, as raised by Moffett,

[1425] ibid
[1426] ibid para 151
[1427] Ibid para 153
[1428] ibid para 154
[1429] ibid para 155
[1430] Ziv Bohrer, 'Is the Prosecution of War Crimes Just and Effective? Rethinking the Lessons from Sociology and Psychology' (2012) 33 Michigan journal of international law 749.
[1431] Lucia Seyfarth, 'Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation' (Social Science Research Network 2013) SSRN Scholarly Paper ID 2320203
[1432] Baines (n 1417).

is that the ICC may be perceiving child soldiers who continued in the LRA as adults, as simply perpetrators, without taking into account the fact they were victims of abduction as children.[1433] Could or should the violence that an individual has experienced in their life lead to them being excused for any violent conduct they carry out as adults? This builds upon the question of the portrayal of an innocent blameless victim in contrast to the completely evil perpetrator.

For international crimes, a careful balance needs to be forged to ensure victims are not forced down a restorative pathway as a tool for impunity or prioritising peace over justice, especially in situations in which the ordinary justice system is inadequate. An alternative approach and methodology can be established in relation to the aim of achieving restoration and retribution together. This section seeks to move away from simplistic understandings of victimhood, and perceive that complex victims are still victims even if they do not meet the traditional 'innocent victim' classification. However, this does not absolve them of their agency nor mean it is appropriate to automatically provide blanket immunity for their actions. Bearing this in mind, this thesis contends that victims should be provided an active role in trials, transitional justice and peacebuilding mechanisms.

8.4 2nd Layer: Victim-Orientated Participation and Reparation Procedures

As introduced in Chapter 2, the ICC was a ground-breaking development, with the RS of the ICC supposed to be based on a 'victim-centric perspective', and 'hailed as the first international criminal tribunal to give serious consideration to the role of victims'.[1434] As such, the improvements suggested in this section are designed to enhance to promise of the court and ensure it can move closer to achieving its mandate of justice for victims.

The options presented in this section seek to provide greater victim-orientated procedures, while recognising the crucial importance of defence rights for the ICrJ project. These suggestions however recognise the challenges for victims to receive justice as presented in the earlier chapters of this thesis.[1435] Additionally, the importance of victim agency should be factored into any changes, allowing all victims, including marginalised groups, to be consulted on proposals, areas they have felt were positive and beneficial to

[1433] Moffett, 'Reparations for "Guilty Victims"' (n 263).
[1434] Section 2.3
[1435] Section 3.3 and 3.4

their search for justice, which could be strengthened, while others which caused them to feel let down or to not receive justice should be changed. Care should be taken to ensure any new system can be adapted to the specific needs of different cultures to ensure the most appropriate manner of working is carried out.

Of paramount importance throughout all the discussions surrounding victim-orientated approaches is the need to ensure the safety of victims. [1436] As Chapter 3 details, victims who participated in the Kenya trials at the ICC disappeared causing the case to collapse.[1437] In Lubanga, victims feared repercussions if they received individual reparations.[1438] The risk to victims who are participating in trials involving crimes by state actors can impact on their family even if the victim has managed to leave the state. In all situations, including all types of participation and reparations, caution should be taken, and a careful investigation should be carried out into what specific measures need to be put into place to ensure victim safety at all stages.

8.4.1 Victim participation in the ICC: improvements within the current system

As detailed in Chapter 3, victim participation has been evolving upon a case by case basis, and there is concern that this has undermined the victims' regime as set out in the RS. Building upon the limitations presented in Chapter 3 and their impact upon victim participation detailed in the various reports, this chapter presents a rearticulation of victim participation covering a number of key areas in which there has been significant criticism: victims' voice in pre-situation and pre-trial stage; victim agency in choosing legal representatives; updating application processes; and collective claims/representation.

The analysis, in Chapter 3, details participation practice within ICL which is not living up to its victim-centred promise.[1439] In the RS of the ICC, a number of avenues exist which could provide enhanced victim agency within the practice of the court. A number of reports have been authored since 2012, both through the 'ReVision' of the ICC project and by NGOs and commentators, presenting avenues to enhance the procedures for victim

[1436] Section 3.3
[1437] Ibid
[1438] Section 3.4
[1439] Trumbull (n 56) 777.

participation at a number of stages.[1440] However, concern has been raised that the 2012 ReVision project of the ICC did not adequately consult victims. [1441] Indeed, one ReVision proposal, to create one new victims' office in place of the VPRS and OPCV has been shelved due to concerns from judges and NGOs about the impact it would have on victim participation.[1442] Adrian Fulford, an ICC judge, challenged the efficiency-driven nature of the project, stating that '[t]he managerial and financial problems that accompany significant victim participation in individual trials should not be an excuse for partially or substantively abandoning the whole project'.[1443] Additionally, Clements argues that ReVision relegated concerns about victims' needs and accused's rights in favour of the more pressing state-based concerns for efficient management of resources.[1444] Philipp Ambach, in contrast, has presented how the aim was to improve the work of the Registry and increase 'the institution's inner legitimacy'.[1445] He understands that victim communities are an important element in the legitimacy of the VPRS.[1446] This highlights the need to ensure victims are carefully consulted on any proposals to alter procedures within the ICC. If this does not occur then any changes may actually lessen the opportunity of victims to receive justice.

While large victim numbers create hurdles in how best to manage the system efficiently, this should not be a justification to simply reduce the role or influence of victims through rules on participation.[1447] The issue of the cost of participation was raised in Chapter 3, as it has been questioned whether or not it provides value for money.[1448] Rather, potential solutions presented by victims groups should be carefully considered, evaluating what has worked and what could be improved to create a more effective victim-orientated

[1440] Independent Panel of experts report on victim participation at the International Criminal Court http://www.iccnow.org/documents/Independent_Panel_of_Experts_Report_on_Victim_Participation_at_the_ICC.pdf 24-27 April 2013 (Hereafter expert report)
[1441] IBID
[1442] REDRESS, Comments to the Registrar in Relation to the ReVision Project as it Relates to Victims' Rights Before the ICC, February 2015, available online at https://redress.org/wp-content/uploads/2017/12/February-Comments-to-the-Registrar-in-relation-to-the-ReVision-project-as-itrelates-to-victims%E2%80%99-rights-before-the-ICC.pdf
[1443] J. Rozenberg,'UK's First ICC Judge Attacks Proposed Restructuring of International Court',The Guardian, 4 November 2014, available online at https://www.theguardian.com/law/2014/ nov/04/uks-first-icc-judge-attacks-reforms-court-adrian-fulford (visited1May 2019).
[1444] Richard Clements, 'ReVisiting the ICC Registry's ReVision Project' (2019) 17 Journal of international criminal justice 259, 263.
[1445] Philipp Ambach, 'The International Criminal Court'.
[1446] ibid pg 105
[1447]This chapter recognises that it is crucial for the legitimacy of ICC, as argued in chapter 2
[1448] Section 3.3

system.[1449] This however does not discount the need to enhance outreach by the ICC within victim communities at all stages. This would include greater use of translation services to ensure victims have access to relevant information in their native languages.[1450] The Court, Registry and VPRS should seek to improve outreach and field offices, and enhance databases and support to intermediaries and inform more victims and wider communities.[1451] Additionally, there should be sufficient time for early outreach, allowing enough time for victims to apply or formulate views.

In particular, the concern that a greater role for victims will delay trials is a problem both for fair trial rights and for the opportunities for victims to receive justice. However, an expedient trial is important to ensure justice for victims as well. This ensures they do not spend 10 years of anticipation involved in a trial only for it to collapse or the defendant to be acquitted.[1452] Additionally, victims are concerned that they will die either before trials are completed or before they can experience justice.[1453]

8.4.2 Pre-situation and pre-trial

The benefit of victim involvement within the pre-situation stage has been deemed as aiding positive complementarity, strengthening the opportunity to encourage states to carry out genuine national investigations and prosecutions.[1454] Victim-oriented practice recognises the potential of a broad understanding of the notion of victims within the pre-situation stage.[1455] The pre-investigation and pre-trial involvement of victims could provide some forms of justice for victims, such as the opportunity to provide a historical record or ensure evidence is collected which would meet the standards of a criminal trial, potentially through a hybrid court at a later stage.

[1449] Expert report (n 1487)

[1450] The Participation of Victims in International Criminal Court Proceedings A Review of the Practice and Consideration of Options for the Future October 2012 http://www.redress.org/downloads/publications/121030participation_report.pdf part 4

[1451] ibid

[1452] ibid

[1453] Conclusions and Recommendations by Berkley HR centre report https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf

[1454] de Hemptinne and Rindi (n 343).

[1455] Héctor Olásolo, *The Triggering Procedure of the International Criminal Court*, vol 43 (MNijhoff Publishers 2005) 109.

The example of the Rohingya situation presents the manner in which victims can be involved prior to OTP investigations or to facilitate a future investigation.[1456] This is especially relevant during the preliminary examination phase where the Prosecutor's (investigative) powers are significantly curtailed.[1457] The FIDH report details how the experience of Shanti Mohila (Rohingya) can lead to the legal articulation of victim/survivor voices that can bring 'new arguments to the debate, proving a novel basis for any final legal or factual assessment necessary for the advancement of law and the search for the truth'.[1458] The impact of this situation has moved beyond the ICC investigations. The use of UN fact finding reports, upon which these proceeding have been based, opens up wider opportunities for justice for victims, though not exclusively criminal justice, especially if no perpetrator stands trial at the ICC.[1459] This includes the current case between The Gambia and Myanmar, on preliminary measures at the International Court of Justice, although this maintains an interstate focus, with one of the demands being redress for victims.[1460] Another example is the expansion of the search from ICrJ and through the Universal Jurisdiction case currently underway in Argentina, against Myanmar.[1461] Additionally, any future UN fact-finding report, such as the one which detailed the experience of the Rohingya, should follow standards of criminal evidence, so they can be used in a trial context. This approach would provide an important precedent on how pre-investigation stages could allow for victims to share their experiences in an international report, even before any arrest warrants have even been issued by the ICC. Victims could then facilitate evidence gathering which could be relevant in future universal jurisdiction cases or could assist the prosecutor in convincing relevant local authorities to 'initiate and conduct proceedings against the perpetrator'.[1462]

At the pre-trial stage, the Court's case law has confirmed that victims may request to participate in an interlocutory appeal, but may not themselves request leave to appeal.[1463]

[1456] Jordash and others (n 371) 21.
[1457] ibid
[1458] Ibid 21
[1459] Cecilie Hellestveit, 'Quasi-Judicial Mechanisms: International Fact-Finding' [2019] Research Handbook on International Law and Peace.
[1460]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) INTERNATIONAL COURT OF JUSTICE 11 November 2019
[1461] https://www.theguardian.com/world/2019/nov/14/myanmars-aung-san-suu-kyi-faces-first-legal-action-over-rohingya-crisis
[1462] ibid
[1463]**Article 82 of the Rome Statute only refers to '[e]ither party'.**

However, the different understandings of the judicial decisions on the modalities of participation were highlighted in the Afghanistan case. Pre-Trial Chamber II granted the Prosecution leave to appeal its decision, while rejecting the requests for leave to appeal filed by the various groups of victims.[1464] The decisions surrounding the standing of victims and their rights as a party to an appeal within the pre-investigation stage has provided important dissents, in which the role of the RS in providing victim-centred justice has been highlighted. [1465] Judge Mindua issued a partially dissenting opinion, examining whether victims are a 'party' under the RS. He assessed that 'in specific circumstances, victims – and even 'potential victims' – ought to be permitted to appeal such a decision, especially in cases in which the Prosecution would not seek leave to appeal'. Judge Mindua, argued that 'at this stage of the proceedings victims do have the standing to appeal' providing a more victim-orientated interpretation of the RS than the other judges in the Pre-Trial Chamber.[1466]

In her dissent on the Afghanistan Appeals' decisions, with the majority's oral ruling denying victims' standing to appeal, Judge Ibáñez, in reference to Article 21, has insisted on these to include victims' rights to truth, access to justice and reparations.[1467] Judge Ibanez disagreed with the majority decision, recognised the need to include consideration of Article 21 (3) and the victims' human rights to remedy.[1468] The dissenting opinion specifically highlighted that the provision under Article 21 (3) is a mandatory provision, imposing an obligation upon Judges to be aware of 'all internationally recognised human rights and to apply and interpret the law in all levels of Article 21(1) consistently with such rights.'[1469] Judge Ibanez argued that 'there are clear norms in the Statute… in a way that grants victims standing – in accordance with article 21(3) – in a decision rejecting a

[1464] SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN (Decision on the Prosecutor and Victims' Requests for Leave to Appeal) ICC-02/17 (17 September 2019) Annex Partially Dissenting Opinion of Judge Antoine Kesia-MBE Minda

[1465] ibid

[1466] ibid

[1467] SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN (Public document Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal) ICC-02/17 (5 December 2019) para 37

[1468] ibid

[1469] ibid

request for authorisation to investigate'.[1470] This recognises that some judicial opinions within the court and interpreting the RS through a more victim-orientated perspective.

Secondly, FIDH presents the important role that victims could play within the pre-trial stage in an examination of the situation in Palestine. Their report explains why early outreach and information activities are important:

> The decision is unique in that it compels, for the first time, the ICC Registry to engage with victims during the preliminary examination stage. At this stage, the ICC Prosecutor has not yet decided to open an investigation nor has she identified cases to be pursued and individuals to be prosecuted. As such, the decision challenges preconceived notions on the role that victims can or should play throughout the ICC process, and beyond judicial proceedings.[1471]

However, this particular example has been controversial due to concern over political influences. FIDH has highlighted that the:

> Decision on 'early outreach and information activities' in Palestine is a first but it must not be a last. The judiciary must ensure a consistent practice, across situations, and entrench what could potentially become the new practice on victim involvement at the court.[1472]

As set out in Chapter 3, the OTP has flexibility in terms of the investigations of the court in the interests of justice. Additionally the OTP can decide whether the court should intervene within TJ processes or if the domestic prosecutions and distribution of compensation can provide adequate justice for victims.[1473] Judge Ibáñez recognises the need to ensure prosecutorial discretion should be monitored. Judge Ibáñez explains that, 'principles of transparency and accountability of the international rules of law requires that any decision, be it from the Prosecutor or first instance Chambers must be subject to judicial review'.[1474] This opinion is important in considering instances in which the

[1470] ibid para 2
[1471] Jordash and others (n 371) 50.
[1472] ibid 47
[1473] Section 3.3
[1474] SITUATION IN THE ISLAMIC REPUBLIC OF Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan ICC 02/17 (6 March 2020) para 7

Prosecutor would make a negative determination regarding the 'interests of justice', highlighting the need to ensure the reviewability by the Pre-Trial Chamber, especially if it went against the wishes of the victims.[1475] It ensures that the decision for the OTP should be in keeping with the justice for victims' mandate of the ICC. Following a victim oriented approach would ensure the interests of victims are carefully considered and prioritised, which could follow the judicial arguments arguing for the influence of Article 21(3) and the victims' right to an effective remedy.

8.4.3 Application processes

A number of options could be introduced to lessen the time and expense while maintaining a victim-orientated approach to participatory rights.[1476] The search for justice for victims can be improved through more expedient trial proceedings, through speeding up the application processes. Firstly, Redress suggests that gains could be achieved through streamlining the assessment of victims' applications by chambers, including reviewing the need for trial chambers to consider new victims' applications to be accepted at the pre-trial stage.[1477] It is also suggested that there be automatic eligibility for victims to participate in situation proceedings once they have been granted participatory status in a given case in the same situation.[1478]

Questioning whether it is required that a judge process every victim application, Cody has explored if, in fact, acknowledgement of their victim status from the court, even if only by a member of the registry, would be sufficient for victims to seek the recognition they require.[1479] This would thereby speed up the application processes preventing the need for judges to further limit victim participation to ensure expeditious trials. In his research, Cody writes that one Ugandan victim said about victims, 'The most important thing is that we want somebody from the Court to come here so that we can interact with them.'[1480]

[1475] para. 2.
[1476] Situation in the State of Palestine, ICC-01/18, Decision on Information and outreach for the victims of the situation, 13 July 2018.
[1477] Expert report (n 1487).
[1478] ibid
[1479] Cody and others (n 391).
[1480] ibid

A victim-orientated approach to the application process recognises the importance of providing a system in which all victims are able to participate in trials, appreciating the value of participation. Additionally, recognition of the harm and their status as victims can be an important justice component. Ensuring harm is recognised provides an important component of justice for victims, one that needs to be balanced alongside fair trial rights. Creating a more efficient application system will additionally speed up trial processes, which aids the victim in their search for justice by preventing the uncertainty which arises through delays.

8.4.4 Legal representatives and collective claims

As introduced in Chapter 3, the Ongwen case has raised concerns regarding the opportunity for victims to appoint their own counsel.[1481] A best practice model for the interaction of victims with the legal representative of victims (LRV), ensures they can choose their own LRV, whom they trust, with whom they can regularly interact and who can maintain their safety. An LRV chosen by victims can provide a meaningful participation process in which the needs and wishes of the victims can shape the format and structure of meetings with the communities, including general information meetings alongside small group meetings. They work to ensure all victims have the opportunity to participate within a small group setting prioritising confidentiality, prior experience working with victims, and the selection of focal points informed by existing victim leadership structures to achieve better participation. Following this example, an important aspect to take into account is how intermediaries play an important part in extending the reach and capacity of the ICC in engaging with victims, but the 'ICC is usually unwilling to pay them for their time over concerns of impartiality'.[1482] Similarly, LVRs should have access to application forms and information translated into widely spoken local languages.

To minimise the potential that different or marginalised voices are silenced, areas of commonality should exist within victims' groups, such as similar harm suffered or a similar strategy for trial/reparations, to prevent marginalised voices being subdued or

[1481] Section 3.3

[1482] Rachel Killean and Luke Moffett, 'Victim Legal Representation before the ICC and ECCC' (2017) 15 Journal of international criminal justice 713.

excluded. 'Victims may prefer to form a group in relation, for example, to affinities, family units, geographical location.'[1483] However, as the report highlights, 'groupings by affinities can lead to some victims' voices and interests not being fully represented inside the 'group''.[1484] Victims with some collective affinities may have different goals and aims through their participation within a trial process. Instead, WIGJ proposed that victim representation should be organised according to the nature of the crimes committed against them so as to reduce conflicting interests.

8.4.5 Reparations: improvements within the current system

Chapter 3 introduced the evolution of reparations within IL and highlighted some of the current jurisprudence of the ICC, which has led to both celebration and criticism. The reparations awards at the ICC are understood to have a 'transformative justice' element, ensuring they can facilitate redress for victims, including non-repetition. The ICC is the first of its kind within ICL to provide an opportunity for victims to receive reparations through the Court, although the challenge lies in ensuring it lives up to its promise. This section presents some opportunities to strengthen the victim-centric justice element of reparations practice, firstly within the ICC, but with relevant examples from wider ICL.

As the limited case law on reparations within the ICC demonstrates, it remains a newly emerging area of law, and further case law will provide clarification on reparations jurisprudence. However, a solution to this would be to revise and strengthen the Lubanga Principles from a victim oriented approach, in which the needs of victims have greater influence, making them applicable to all chambers, addressing the lack of clarity in the jurisprudence of the Court. [1485] Additionally, improvement can be made regarding the procedure for enabling victims to access reparation, included the management and oversight and the ability of the TFV to effectively implement reparation awards.[1486]

[1483] Prosecutor v Laurent Gbagbo (Public Document REDRESS TRUST OBSERVATIONS TO PRE-TRIAL CHAMBER I OF THE INTERNATIONAL CRIMINAL COURT PURSUANT TO RULE 103 OF THE RULES OF PROCEDURE AND EVIDENCE) ICC--02/11-01/11 (16 March 2012) (hereafter Redress document)
[1484] ibid
[1485] Section 3.4
[1486]Redress document (n 1531)

The ICC could incorporate lessons from other jurisdictions on prioritising payments to vulnerable victims, such as the treatment of elderly victims in Peru.[1487] This is especially important within the ICC context as the debates over reparations awards have caused a long delay in victims receiving reparations payments in the Lubanga case, resulting in the child soldiers becoming adults before they receive reparative justice.[1488] Additionally, Moffet highlights the importance of ensuring that prompt reparations payments are made. Delays in the reparation payments can mean victims die before receiving any payments, as occurred with the reparations payment which was supposed to be made to Japanese-American internees following WWII. Every month before the payments were made two hundred internees on average reportedly died still waiting.[1489] Additionally, interim payments were also made to the most vulnerable victims by the Special Court for Sierra Leone.[1490] Finally, the Tunisian Transitional Justice Law provides for 'immediate care and temporary compensation' for all victims, in particular, 'the elderly, the women, the children, the disabled and individuals with special needs, the sick and vulnerable groups'.[1491]

In a different approach, Megret has examined the use of symbolic reparations, such as satisfaction and non-repetition, and asks why the ICC does not explicitly mention this form of reparation?[1492] He proposes that symbolic reparations can restore victims' dignity by acknowledging the harm done, and, as such, can be transformative rather than punitive. He suggests that the ICC should want to engage in more symbolic forms of reparation – not instead of monetary forms of reparation but in addition to them.[1493] Contreras-Garduño writes that collective reparations should be complemented with

[1487] Prosecutor v Germain Katanga (Public Document Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute) ICC-01/04-01/07 (14/05/2015)
[1488] ibid
[1489] ibid
[1490] Cohen (n 518).
[1491] ibid
[1492] Frederic Megret, 'Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice' (2010) 16 Buffalo human rights law review 1.
[1493] ibid

symbolic measures, such as apologies and memorials, to more clearly associate such reparations as a measure of justice.[1494]

8.4.6 Determining reparations awards: role of judges and trust fund for victims

As Chapter 3 detailed, the determination of reparations awards at the ICC and ECCC has been criticised as they have rejected many victims' requests for reparations. In search of reparative justice, victim requests should not be overlooked by judges merely for the sake of an expedient trial.[1495] There is controversy over the judicial determination of the eligibility of victims and the apportionment of the reparations which they will receive.[1496] It has been questioned whether judges have the required expertise to determine reparations claims or if this should include experts with mass claims experience? As Judge Wyngaert detailed, there are concerns that the drafters of the RS were vague regarding reparations and left it for the judges to determine rules of tort liability following the victims' requests.[1497]

In their submission to the ICC, the non-governmental organisation Redress has argued for the need for judges to utilise local justice standards when calculating the reparations awards, on the basis that this would better meet victims' expectations and reparative justice understandings. They suggest following the case law from the LRVs in Katanga, relying on a combination of laws that were adapted for the specific context to determine a fixed amount of compensation for each category of harm, which could then be multiplied by the number of claimants.[1498]

Further, Dixon recognises that the ICC could adopt a 'participatory and consultative approach to the reparations process'.[1499] He conceives how community reparations could utilise the form of community-driven reconstruction, which he argues increases programme legitimacy, empowers disadvantaged groups, and provides greater

[1494] Diana Contreras-Garduño, 'Defining Beneficiaries of Collective Reparations: The Experience of the IACtHR' (2012) 4 Amsterdam law forum 40, 48.
[1495] Section 3.4
[1496] Section 3.4
[1497] Van den Wyngaert (n 366).
[1498] Redress document (n 1531)
[1499] Peter J Dixon, 'Reparations and the Politics of Recognition' in Carsten Stahn, Christian De Vos and Sara Kendall (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015).

community accountability, less social tension and greater acceptance of vulnerable groups.[1500] There are useful lessons from 'working with CAAF and SGBV victims – which utilise participatory approaches to targeting by incorporating local definitions of need and deprivation into programme design'.[1501] It can also lead to the traditionally marginalised groups being better informed and more actively involved in reconstruction activities.[1502]

Redress suggests creating more efficient procedures for each phase of the proceedings with a two-step reparations process including 'clearly delineated responsibilities and built-in oversight, with detailed procedural steps for each phase, as appropriate'.[1503] They suggest that individual scrutiny of victim eligibility for collective reparation programme would be left to the TFV and not the chamber.[1504]

In contrast, Dixon considers that the chambers could 'play a more active role in beneficiary identification and verification', impacting upon the meaning recipients attach to reparations and helping to distinguish from the assistance programmes carried out by the TFV.[1505] This approach would ensure the reparative value of recognition remains and is distinct from TFV assistance mandates.[1506] He argues that, 'In an ideal world, Trial Chamber I or even a separately constituted reparations chamber, could hold hearings to oversee this 'implementation' phase, which will be fundamental to the very design of the award itself'.[1507]

Bringing together these options could incorporate the idea of a separately constituted reparations procedure which would occur within the TFV. This would be clearly distinguished from the assistance programmes carried out by the TFV and recognise the importance of reparative justice in providing a remedy for the harm suffered by victims. This has a very different aim from the assistance programme within the TFV, which can

[1500] ibid
[1501] ibid referencing J.D. Fearon, M. Humphreys, and J.M. Weinstein, *Evaluating Community-Driven Reconstruction Lessons from Post-Conflict Liberia* (Washington, DC: The World Bank Institute, 2009).
[1502] ibid Dixon referencing J.D. Fearon, M. Humphreys, and J.M. Weinstein, 'Can Development Aid Contribute to Social Cohesion after Civil War? Evidence from a Field Experiment in Post-Conflict Liberia', *The American Economic Review*, 99 (2009), 287–291
[1503] Redress document (n 1531)
[1504] ibid
[1505] Dixon (n 1499).
[1506] ibid
[1507] ibid

take on a more development-oriented role. Within the TFV the interests and views of victims should be carefully considered. This would address the criticism that it is carrying out its own mandate without regard for the victims' needs.

8.4.7 Reparations in the case of an acquittal

Following the Bemba acquittal, concerns have been raised regarding the impact of the acquittal on victims.[1508] The judges acknowledged this in their decision recognising that:

> An acquittal may mean that hundreds or perhaps thousands of potential victims see their claims for reparation evaporate. We recognise that this will generate disappointment and frustration. We are not blind to the human drama. Yet, this may not be a factor in the decision whether or not to convict an accused.[1509]

One tool to address this was suggested by the victims' legal representatives in the Bemba case, in which it was argued that victims could receive reparations regardless of the guilt of an individual, arguing that the spirit of the RS in which a joint reading of paragraphs 1 and 6 or Article 75.[1510] The LRVs add that this order would allow the victims to seek guidance and assistance from other authorities, continuing on from the 10 years they were involved with the case.[1511] Redress argued that as victims can file applications at any point in proceedings, such applications are not contingent on a conviction of the accused.[1512] It is contended that this principle has already been recognised through the Ruto and Sang case.[1513]The harm suffered by victims who participated in the Bemba case was recognised by the court.[1514] To provide the opportunity for these victims to receive justice includes reparative justice.

[1508] Prosecutor v Jean Pierre Bemba Gombo (Public document Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08 8 June 2018 (hereafter Bemba Judgement)

[1509] Ibid Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison https://www.icc-cpi.int/RelatedRecords/CR2018_02989.PDF para 75

[1510] Prosecutor v Jean Pierre Bemba ('Joint Submissions by the Legal Representatives of Victims on the Consequences of the Appeals Chamber's Judgment of 8 June 2018') ICC-01 / 05-01 (6 July 2018) para 45

[1511] ibid

[1512] Redress document (n 1531)

[1513] Section 3.3 detailing Judge Eboe-Osuji arguement, 'there is no general principle of law that requires conviction as a prerequisite to reparation'

[1514] Bemba Judgement (n 1556)

One update to the reparations procedure within the ICC would be to develop a civil claims chamber or procedure to facilitate victims seeking civil actions. This would be especially relevant in situations in which the victims will not receive reparations, although this chamber could be comprised of experts from mass claims proceedings and could guide the TFV in determining the reparations awards as well.[1515] Following on from the impact of the Bemba acquittal, FIDH has suggested that a victim-centred innovation, based upon this restorative aspect, could potentially take the shape of civil proceedings before the Trial Chamber at the end of a criminal case, even after an acquittal.[1516] This would extend the restorative elements of the court, affirmed by the judges in the final decision in Bemba, that 'the Court was created with both a punitive and restorative function'.[1517] Conceding that currently, victims appear more to be objects of the court than subjects, Zegveld considers that the need to alter this, 'may lead us to think beyond the current organisation of the ICC and force us to start thinking about setting up a victims' claims chamber at the ICC with specialized judges'.[1518]

An example of this would be a recognition of the lower standard of proof required by reparations proceedings, as occurred within the Lubanga case, and the consideration that the court gave to the challenges faced by victims in obtaining evidence.[1519] This criterion could be standardised throughout all reparations proceedings and could involve the drawing-up of a new principle on the relevant mass claim techniques, and how these would work with a large number of beneficiaries.[1520] Recognising the challenges experienced by victims, mass claims processes such as the UN Compensation Commission (UNCC) have played an active role in gathering evidence for complex claims.[1521]

[1515] *Redressing Injustices through Mass Claims Processes : Innovative Responses to Unique Challenges* (n 211).
[1516] Jordash and others (n 371) 78.
[1517] ibid.
[1518] Zegveld (n 14) 344.
[1519] Lubanga Reparations (n 159)
[1520] *Redressing Injustices through Mass Claims Processes : Innovative Responses to Unique Challenges* (n 211).
[1521] ibid.

8.4.8 State responsibility for reparations:

The lack of reference to state responsibility in Article 75 creates limitations for the ICC when dealing with reparations. This could be overcome by revisiting the issue of state responsibility. Bitti and Gonzales Rivas contend that following Article 75, para 1 of the RS:

> The court could conceivably establish reparations principles that are applicable to states or other legal entities – especially those on behalf of which the convicted person was acting – such as the duty to enact applicable legislation or to provide access to appropriate public services.[1522]

In the preparatory stages of the RS, there were debates regarding reparations and state liability, with states wary of potential inclusion of state responsibility. This ultimately was not included under Art 75 of the RS. Robertson argues:

> This omission reflects one of the key weaknesses in the current philosophy behind the international justice movement, which denies the existence of collective responsibility in order to fasten upon the blameworthy individual. Where crimes against humanity are concerned, the two are not mutually exclusive.[1523]

In a previous version (ex-Article 73 para 2(c)) 31, the Court would have had the power to 'recommend that States grant an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'.[1524] Article 25(4) of the Statute affirms that 'no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'.[1525] Evans argues that:

> Given the likely coincidence between state and individual responsibility for the crimes within the jurisdiction of the ICC, which is 'limited to the most serious crimes of concern to the international community', it is inevitable that the debate

[1522].ibid 310
[1523] Geoffrey Robertson, *Crimes Against Humanity: The Struggle For Global Justice* (Penguin 2012).
[1524] ibid.
[1525] Muttukumaru (n 102) 268.

> on state responsibility in relation to the ICC will continue and gain increased importance.[1526]

Continuing with this theme, Evans acknowledges that:

> Reparation awards against convicted individuals are unlikely to be effectively implemented without a degree of recognition of state responsibility, which may be concurrent for those carrying the greatest responsibility for the crimes committed. As demonstrated by human rights mechanisms, state responsibility may also result from failure to show due diligence and prevent violations.[1527]

The focus on individual criminal responsibility and the exclusion of state responsibility for reparations was a compromise to ensure state support for Article 75. The evolution of state responsibility for reparations would mark an important step for ICL away from the current limitations of the RS. It could also prove necessary to ensure victims are provided the opportunity for redress.

8.4.9 Reparations and positive complementarity

Positive complementarity could be a useful tool in which the work of the court supports the ability of victims to pursue reparative justice through other pathways.[1528] Donat-Cattin presents a potential in which the ICC could elaborate principles on compensation that refer to available domestic mechanisms through which individual victims may file compensation claims.[1529] Greater engagement with national reparations programmes or links to relevant international organisations could strengthen the effectiveness of reparations.[1530] Indeed, the current practice of the ICC in Côte d'Ivoire, in which the TFV is providing legal assistance so victims can apply to the domestic compensation programme – is a positive form of reparative complementarity.[1531] It could influence the practice of reparations awards for international crimes from domestic courts.[1532] This has

[1526] Evans (n 438) 116.
[1527] ibid
[1528] See chapter 7 for detail on complementarity
The complementarity regime at the ICC is designed to function only as a court of last resort and has jurisdiction only when a state is 'unwilling or unable' to try international crimes.
[1529] Donat-Cattin (n 448).
[1530] ibid
[1531] ibid
[1532] Tillier (n 1234).

the potential to allow more victims to experience reparative justice if it functions effectively. However, in the IACtHR, it was recognised that 'the State [should] … collaborate with them in order to, through its agencies and registries, be able to gather the missing information', due to the remote location of some victims.[1533] Additionally, steps should be taken to overcome the lack of evidence that occurred directly through the harm they suffered.[1534]

In previous practice, however, states have not always demonstrated a strong commitment to reparations for international crimes, as evidenced by the example of the ICTY and the lack of successful reparations claims in the domestic situations based upon the evidence from the international tribunals.[1535] Moffet argues that there has been little engagement on reparations, by institutions complementing the work of the ICC.[1536] He suggests that:

> In narrow terms, reparative complementarity can ensure that State Parties fulfil their obligations to cooperate with the ICC in terms of identification, tracing and freezing of assets, or the exhumation of grave sites in returning bodies of those disappeared to families.[1537]

A more expansive approach could result in 'overburdening the ICC with a super judicial function that its jurisprudence has political weight that can override domestic democratic processes'.[1538] As the case study in Chapter 7 demonstrates, the ICC can oversee the development of transitional justice processes within a situation, ensuring justice for victims is included. This highlighted the need for reparations for all victims within the domestic context. In this manner, the ICC should continue to support and strengthen the opportunities for victims to receive reparations through positive complementarity wherever possible. Additionally, the focus of the OTP on preventing impunity through the complementarity regime should monitor the practice of trust funds or compensation schemes set up for victims to prevent the fund from being misused.

[1533] Case of the "Las Dos Erres" Massacre v. Guatemala, Inter-American Court of Human Rights (IACrtHR), 24 November 2009,
[1534] ibid
[1535] Donat-Cattin (n 448) 1405.
[1536] Moffett, 'Reparations for Victims at the International Criminal Court' (n 428) 11.
[1537] ibid
[1538] ibid

The procedures presented in layer 2 demonstrates how a victim-orientated practice could be enhanced within the ICC. This potential is possible within the existing form of the RS of the ICC, and it requires questions over the interpretation of the RS, where there is a lacuna, to be interpreted with a victim-orientated focus, balanced alongside fair trial rights. This approach recognises the importance of seeking justice for victims as a key tool of legitimacy for the court. As the dissenting opinions set out within this section demonstrate, some of the members of the ICC judiciary have recognised the importance of seeking justice for victims as a fundamental element of the RS. Their arguments build both upon the aims of the drafters and the influence of human rights standards within the RS. Chapter 2 presented how the development of the victims' regime within the RS changed the normative foundations of ICL, which had previously relegated victims to the constrictions included within adversarial proceedings, including in a witness-only role. Instead, new recognition of the great opportunities for procedural and reparative justice was key to the ground-breaking development within ICL. To ensure this is carried out in practice, victim-orientated procedural justice should not be restricted merely due to financial concerns. Instead, procedures should be made more efficient while maintaining the opportunity for victims to fully experience the procedural, reparative, retributive and restorative justice provided for within the RS.

8.5 3rd Layer: Rearticulating the Role of Victim in Hybrid Courts: Bottom-up Practice

This rearticulation draws on the theories discussed in the earlier chapters of this thesis, seeking ways in which to shape the evolution of victim-orientated procedures within ICL, whilst striving to augment systems already in place rather than to do away with them. A grassroots hybrid court model recognising the flexibility which arises through their sui generis nature provides greater flexibility than the ICC. It includes greater opportunities to ensure local legitimacy, facilitate effective outreach, include the bottom-up input of victims at the initial stages, and work with wider justice procedures towards a lasting peace. Internationalised trials, taking place in a foreign country, can have limited effect on reconciliation, accountability and rule of law.[1539]

[1539] Simpson, *Law, War and Crime* (n 975).

This model utilises a transmodern approach, as explained in Chapter 5, not to disdain all elements of modernity, but rather to 'collectively identify the positive elements, as well as those from other cultures'.[1540] Bringing together grassroots mechanisms alongside a victim-centric focus can provide a template for a hybrid tribunal to work in conjunction with non-judicial measures arising through the TJ field. Following the arguments set out in Chapters 5 to 7 of this thesis and the concerns of hegemony within ICL, a grassroots approach underpins procedures presented in this layer. As previously explained, this works to enhance the opportunities for marginalised victims to seek justice, limiting the potential that the 'voice of the local' will merely maintain top-down power structures. Additionally, within the practice of the hybrid court, local justice aspects should be included where possible, 'recognising the role of law in colonialism'.[1541] Finally, this approach works to prevent the maintenance of negative peace situations where the continuation of an unjust status quo restricts the potential that many vulnerable groups of victims will receive justice.

A grassroots enunciation of international criminal law can combine the heterogeneous, pluriversal methodology, suggested in Chapter 5, by decolonial scholars in conjunction with bottom-up approaches. These seek to address limitations arising from dominant top-down mechanisms and place ICL in a holistic relationship with TJ procedures and peacebuilding, in which each separate component is working towards the collective goal and vision of positive peace. Grassroots methodologies present a ground-level approach to addressing the origins of a conflict and building up the solution. Crucial within the grassroots approach is that all parties are involved and provided with the opportunity to influence the development of any potential solution, or to influence the form of positive peace.

The discussion surrounding localised justice has facilitated the current growth of hybrid tribunals in which the balance between ICrJ and domestic criminal law ensures that local criminal justice standards are balanced alongside international standards. Hybrid courts have become an important part of transitional justice processes.[1542] The idea of hybrid forms of peace has also been recognised; understanding the role of hybrid tribunals in

[1540] Dussel, 'Transmodernity and Interculturality' (n 35).
[1541] Fitzpatrick (n 885) 108.
[1542] Hobbs (n 70).

bringing together the local with the international, in which justice and sustainable peace are concurrent aims, set out in the respective statutes of various tribunals.[1543] Sharp notes the emergence of 'more hybridized forms of peacebuilding and transitional justice', using 'a mixture of conventional and local practices and models'.[1544] The connection with ICL, through the development of a hybrid court and TJ, has been considered in a number of contexts, such as Sudan, and was recognised in the 2015 peace agreement within South Sudan with the UNDP explaining the need to have a:

> People-driven and victim-centred transitional justice process that recognizes the aspirations of the citizens of South Sudan in securing lasting peace and reconciliation. This is anchored in the need to provide the greatest voice to survivors and ensure that local communities both feel and perceive that justice has been achieved. Having in place the rule of law and human rights is crucial to the attainment of sustainable peace.[1545]

This model positions a hybrid court as an important part of wider transitional justice practices, while maintaining the victim-orientated approach. Developing a victim-centric approach to court processes follows the work of Christie, seeking to address previous exclusion through four stages, to prevent the 'theft of conflict' described in Chapter 2.[1546] The 'theft of the conflict' from the victims' viewpoint, discussed by Christie, has particular significance in the face of mass victims, who are required to use one legal representative and have no influence around who or what to prosecute. In this manner, the theft by the legal profession occurs on a large scale.[1547] Overcoming this would follow victim-orientated approaches to ICL, requiring avenues to be open to allow the voice of victims to be clearly heard and their justice aims to be met.

Finally, this section also recognises the potential problems arising from a rearticulation of the role of the victim, including the fact that victims have conflicting desires for justice,

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[1543] Oliver P Richmond and Audra Mitchell, *Hybrid Forms of Peace: From Everyday Agency to Post-Liberalism* (Palgrave Macmillan 2011).
[1544] Dustin N Sharp, 'Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique' (2013) 14 Chicago journal of international law 165, 130.
[1545]Eugene Owusu Deputy Special Representative of the Secretary General & UNDP Resident Representative New Beginnings A Way Forward for Transitional Justice in South Sudan Conference Report and Analysis Transitional Justice Working Group (February 2016)
[1546] Christie, 'Conflicts as Property' (n 15).
[1547] ibid

and what one group counts as justice another may consider as being excessively punitive.[1548] The earlier chapters presented the move to prevent impunity through accountability as one important aspect of justice for victims. Alongside this wider justice, procedures such as truth commissions or compensation schemes can provide alternative justice forms, however as Chapter 7 details, these procedures need to maintain the victim-orientated focus alongside the hybrid court. Lasting peace however requires all victim communities to experience justice. The limitations of previous peace-making practice demonstrate how 'communities not at war but victimized through war are excluded from constructive justice outcomes'.[1549]

8.5.1 Constructing bottom-up practice: lessons from the Ardoyne Commemoration Project

This section focuses on the practice of the Ardoyne Commemoration Project (ACP), as an example of from below, actor-orientated procedures within TJ including marginalised victims of state violence. These victims often face significant hurdles in seeking justice, additionally, as is the case within Northern Ireland, they do not meet the 'innocent victim' classification in the eyes of many within the population.[1550] The Ardoyne project is a bottom-up example of 'truth-telling' or truth recovery in Northern Ireland.[1551] This project uses local initiatives as a tool to counteract attempts to 'influence the rules of the game'; a useful component within bottom-up methodologies that could counteract accusations of bias within ICL, ICrJ and TJ, presented by critical scholars.[1552] Lundy and McGovern highlight the tendency to exclude local communities as active participants in TJ measures as a primary flaw, raising questions over the legitimacy, local ownership and participatory nature of the projects.[1553] Their bottom-up approach requires victims to take part in every stage in the process, including conception, design, decision making and management, ensuring a fully participatory mechanism.[1554] Lundy and McGovern

[1548] Etelle R Higonnet, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2006) 23 Arizona journal of international and comparative law 347.
[1549] Morgan Brigg and others, 'Gununa Peacemaking: Informalism, Cultural Difference and Contemporary Indigenous Conflict Management' (2018) 27 Social & Legal Studies 345.
[1550] McEvoy and McConnachie (n 58).
[1551] Lundy and McGovern (n 26).
[1552] ibid
[1553] ibid
[1554]ibid

recommend an interdisciplinary approach to TJ in order to provide agency, depth and longevity to the processes adopted.[1555]

Firstly, the project seeks to provide an appropriate context for grieving, in which victims of state violence are granted the opportunity to create a shared story around violent events that had previously been silenced.[1556] Lundy and McGovern explain how this approach has been accepted within 'wider 'truth-telling' initiatives (such as the Church-sponsored REHMI Report and the subsequent state-sponsored Guatemalan Historical Clarification Commission) and other forms of *testimonio* work'.[1557] In this method, answers are sought to the questions, who and what is the 'truth-telling' primarily for? Similarly, victims of state violence often have a greater hurdle in seeking to achieve justice, a challenge both within domestic contexts and acknowledged through the practice of the ICC.[1558]

Secondly, in the Ardoyne project, the stress on participation promoted an explicitly victim-centred agenda. This approach challenges the possible relegation of the interests of victims and participants to such wider social goals as nation-building and reconciliation, especially with a forced approach to reconciliation leading to a negative peace.[1559] Instead, this utilises ''community-based truth-telling', by 'giving voice' and aiding the 'restoration of dignity' to advance real progressive social change'.[1560] In the community-based approach, the philosophy is designed to embed the project in community ideals as the community has taken ownership and control of it. Lundy and McGovern have explained that, 'in practical terms, the grassroots nature of the project was crucial in order to gain trust, enable access, and establish an empathetic relationship with the interviewees'.[1561] They set out that grassroots methodologies have the potential to stimulate society-wide dialogue.[1562] A key approach is the use of local knowledge and experience, foundations upon which these projects are built, moving away from the

[1555] ibid
[1556] **ibid**
[1557] ibid
[1558] Detailed in chapters 3, 4, 5, 6 and 7
[1559] Roberts (n 721).
[1560] Lundy and McGovern (n 26).
[1561] ibid
[1562] IBID

agenda-setting of donor-justice, discussed in Chapter 7.[1563] In this project, similar to other bottom-up approaches, it was recognised that including discussions on truth-telling from all victims, would highlight divisions within the society.[1564] However, this is necessary to ensure all participants have a voice. Prior to the initiation of a project, a pathway to follow should be included to ensure there is a procedure in place to address disagreements in an appropriate manner.

Thirdly, Lundy and McGovern understand the importance of generating local agency as a means of empowering participants, while they highlight the 'potential of political manipulation and abuse masking marginalization and exclusion'.[1565] The use of local agency provides a voice for the marginalised voices who are traditionally oppressed. There are difficult challenges in attempting to promote and establish locally-owned approaches, considering 'who the locals are, who speaks for whom, and what exactly does local ownership and participation mean?'[1566] The authors also explain, 'nor is the wholesale valorisation of `insiders' to the exclusion of `outsiders' either a sustainable or desirable approach'.[1567]

The three lessons included within this example provide useful guidance to include within a model of victim-centric procedures, strengthening the voice of victims who have been traditionally overlooked or excluded. In the following hybrid tribunal model, the search for justice recognises the need to provide avenues for different forms of justice sought.

8.5.2 A Model for a victim-centric hybrid tribunal: incorporating from the Ardoyne Commemoration Project

Providing ownership for all victims, including the marginalised, allows them the opportunity to be involved at all stages, including the inception stage in which they can influence how the nature of the TJ programmes will develop. Overcoming the limits of what an isolated court can achieve by managing a clear structure, including trials, truth-telling and alternative justice procedures, such as peace circles, and incorporating

[1563] BM Oomen, 'Donor-Driven Justice and Its Discontents: The Case of Rwanda' (2005) 36 Development and change 887.
[1564] Stanley (n 1244).
[1565] Lundy and McGovern (n 26).
[1566] ibid
[1567] ibid

restorative justice alongside punitive justice. The model positions hybrid courts holistically alongside wider justice procedures. This provides a greater range of justice options for victims, in which the trials work while continuing to monitor impunity, discussed further below.[1568] Importantly, it expands the numbers of victims who receive some justice, addressing the current challenges within ICL that only a very limited number of victims receive any form of justice due to selectivity and, as with the ICC, acquittals or trials collapsing.[1569] Additionally, the balance of local and international justice standards can incorporate a victim-orientated focus, which has been recognised within ICL and TJ procedures as providing crucial elements of legitimacy and additionally a move towards positive peace.

Victim-orientated approaches can evolve the practice of the hybrid trials, including the voice of victims throughout the entire trial process, by shaping decisions on the crimes to be investigated, continuing to the sentencing/punishment stage of the trial and on to the forms of reparations, balanced alongside fair trial rights for the accused. As argued by Finlay, a victim-orientated approach is important for the legitimacy of ICL and a transformed criminal trial should deepen the inclusion and 'productive integration of victim aspirations through a greater variety of resolution opportunities'.[1570] Additionally, the local ownership could provide an avenue through which the hybrid tribunals can 'help promote national ownership of post-conflict accountability processes'.[1571] As recognised by Cohen, strengths of hybrid tribunals include:

> Location in the country where the crimes occurred is advantageous for investigations, witness production, community outreach, public accessibility, legacy creation, and capacity-building. There must, however, be adequate resources to develop adequate programs in these areas.[1572]

The balance of local legal norms alongside international criminal standards should be examined, with the local law utilised if it customarily provides a greater victim-centric

[1568] Section 7.4 This holistic approach is discussed in relation to the ICC and their monitoring of the TJ situation in Colombia,
[1569] Recognising the many victims who will not receive any form of justice through the ICC and seeks to provide victims with some justice
[1570] Findlay (n 69). 17
[1571] Ciorciari and Heindel (n 80).
[1572] Cohen (n 518).

focus; however, if the opposite occurs the victim-oriented standards from international criminal law should be included.[1573] A minimum standard should be set to ensure victims have an opportunity to achieve justice.

A further opportunity that the plural normative ICL practice offers occurs through the jurisdictional flexibility provided for hybrid courts to incorporate domestic law precedents to their specific context, for example, the recognition of the crime of forced marriage by the ECCC.[1574] These tribunals can make decisions varying from previous ICL precedents, allowing the evolution of case law. Due to the nature of *sui generis* tribunals, with the amalgamation of domestic and international law providing for cultural differences, decisions in law can be made uniquely in the context of one specific tribunal which would not be applicable to any other.[1575] Hybrid court statutes create *sui generis* international tribunals, in which the domestic legal context will be represented alongside international criminal standards, with their practice rooted in cooperation between international and domestic authorities.[1576]

The range of hybrid trials demonstrates their *sui generis* nature, with different models bringing together domestic and international legal systems in unique ways.[1577] This ensures that victims and the accused have greater familiarity with the justice process, including the working language of the court.[1578] The use of translation services to ensure careful translation, especially of usual legal concepts, should be put into place at the earliest stage possible.[1579] This is in contrast with previous practice within internationalised tribunals in which English was the language of the court.[1580] Not only does this make the trials appear as a form of internationalised justice, but it also places the translator in a very powerful position, with suggestions that the role is often 'assumed

[1573] This recognises the challenges victim have in receiving justice in domestic contexts for a wider variety of reasons, from political aims, corruption, structural violence inherent within the legal processes.
[1574] Cohen (n 518).
[1575] Clarke, *Fictions of Justice* (n 848).
[1576] M Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law' (2003) 1 Journal of international criminal justice 13.
[1577].Secdtion 3.2.1
[1578] Flexibility arises in the midst of hybrid tribunals that can develop trials which hold greater cultural relevancy to the victims involved.
[1579] Leigh Swigart, 'Unseen and Unsung: Language Services at the International Criminal Court and Their Impact on Institutional Legitimacy'.
[1580] **Such as the ICTY**

by those who can enforce their way'.[1581] Bruch details how Hutnyk notes that translation is another common metaphor to describe relations across various cultural and other boundaries; 'the hybridizing moment is a communication across incommensurable polarities'.[1582] While identifying the potential of hybrid tribunals to overcomes the limitations of national or international tribunals, which have suffered from a lack of funding. Additionally, the hybrid nature has been analysed by post-colonial scholars, such as Young, who 'suggests that hybridity itself may have a double nature 'that both brings together, fuses, but also maintains separation'.[1583] However, addressing this through a transmodern approach seeks to bring together different points of view in a manner which overcomes previous hegemony and provides forums for the excluded within societies to be included within justice procedures. Rather than using hybridity to obscure 'histories of inequality and relations of dependency and imperialism', this model aims to recognise the legacies as a step in changing their influence.[1584]

As the Office of the United Nations High Commissioner for Human Rights (OHCHR) explains:

> Hybrid courts should not be seen as isolated engagements, nor should they constitute a quick fix in tackling the immense challenges of building or restoring justice systems in the post-conflict context. They should instead be viewed as part of a multifaceted intervention, with the allocated resources being proportionally spent on each element.[1585]

As such, the resources for hybrid tribunals should consider the legacy of the tribunal in its planning.[1586] Cohen highlights the need for outreach to ensure a legacy can be achieved and acknowledges that without adequate fundraising legacy goals will fail.[1587]

[1581] Elizabeth M Bruch, 'Hybrid Courts: Examining Hybridity through a Post-Colonial Lens' (2010) 28 Boston University international law journal 1.
[1582] ibid
[1583] Robert Young, *Colonial Desire: Hybridity in Theory, Culture and Race* (Routledge 1995).
[1584]ibid
[1585] *Maximizing the Legacy of Hybrid Courts* and *Reparations Programmes,* the Office of the United Nations High Commissioner for Human Rights (OHCHR), HR/PUB/08/1 2008
[1586] *ibid*
[1587] Cohen (n 518).

There is a need to clarify the relationship of the new tribunal within wider TJ mechanisms recognising the distinct role the hybrid tribunal will have from others, such as truth commissions, especially where it holds primary jurisdiction over international crimes.

The hybrid court model detailed in this layer provides a key accountability component, to prevent impunity, while working holistically alongside a range of transitional justice and restorative justice procedures. As detailed in the Colombian case study in Chapter 7, the Special Jurisdiction for Peace (SJP) provides a form of punitive justice for international crimes, through trials, which is balanced alongside restorative justice aims by providing the opportunity for victims to receive apologies from perpetrators in return for reduced sentences.[1588] These practices also offer the perpetrator an opportunity to express sorrow and regret, and the victim an opportunity to forgive, which can reduce the victim's desire for punishment and retribution.

The lessons from the Ardoyne project above, recognise the need to include a range of transitional processes that could apply alongside the hybrid court, providing a multifaceted approach to justice.[1589] This ensures victims are not simply forced down a justice practice, such as reconciliation through TRC in the South African examples, or retributive justice in the Gacaca examples, either as a tool of impunity or for political aim, which will not adequately provide a form of justice for them.[1590] Within the creation of the justice processes, the standard of providing justice for all victims should be included, along with procedural protection for victims. These justice processes recognise the important elements which each of the processes brings in moving toward positive peace while also maintaining the victim-centric focus.

This topic has been examined by Ainley in Cambodia, considering the role of international criminal tribunals in modelling local actors' behaviours.[1591] While the ECCC incorporated domestic Cambodian standards, which follows the civil law regime, in practice the role of victims was more restrictive. In the examination of victim testimonies, Mohan and Sathisan have proposed that non-judicial initiatives of restorative justice should have run parallel to the ECCC's trials. This could have taken on a variety of forms, such as 'a spiritual

[1588] Section 7.4
[1589] Section 8.5.2
[1590] Section 7.8
[1591] Kirsten Ainley, 'Transitional Justice in Cambodia: The Coincidence of Power and Principle' 145

ceremony or ritual, through testimonial therapy, on a dramatic stage or through the arts'.[1592] These ideas are based upon local and communal approaches of TJ that are culturally significant within Cambodia, operating customs and procedures already recognised by the groups affected by the conflict. A specific form of this has been suggested, incorporating the ritual of Pchum Ben, a procedure of 'rebuilding and regathering'.[1593] A further idea presented is the Kraing Meas ('Guestbook') that could be utilised as a form of victims register:

> This should be re-created by the ECCC and Cambodian civil society that will include the names, birth years and narrative accounts of victims, in written form, and recorded in audio-visual format that can be digitized for preservation and access.[1594]

This approach recognises the importance of employing societal methods for justice and reconciliation, to facilitate restorative justice by applying mechanisms appropriate to the culture or society concerned.

8.5.3 A model for a victim-centric hybrid tribunal: participation

The move towards a more meaningful victim-centric participation model recognises that the variety of justice aims should be met and catered for, including providing a pathway for victims to move past the international crime which initially created their victimhood. If victims are not granted an opportunity to properly experience justice, then the legitimacy of the entire ICL exercise is weakened. As examined earlier, providing justice for victims is recognised as an important tool in creating sustainable peaceful societies.[1595]

However, it is important to recognise Hannah Arendt's call that a war crimes tribunal like the ECCC should never promise more than it can deliver.[1596] The Director of the Documentation Centre of Cambodia (DC-CAM), and Cambodian genocide survivor, Youk

[1592] Mahdev Mohan and Vani Sathisan, 'ERASING THE NON-JUDICIAL NARRATIVE: VICTIM TESTIMONIES AT THE KHMER ROUGE TRIBUNAL' Jindal Global Law Review 28.
[1593] ibid
[1594] Ibid
[1595] Jemima García-Godos, *It's About Trust: Transitional Justice and Accountability in the Search for Peace* (Oxford University Press) 325.
[1596] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press 1965) 26.

Chhang notes, 'even if the word justice is defined in different ways, from human rights groups to the government, for the victims ... I think the issue is how do we move on? The tribunal, to me, is the last solution to Cambodia's genocide.'[1597] Victim centric participation would require that they are provided the opportunity to share their experiences in a manner therapeutic to them, ensuring they are not re-victimised.

As has been recorded, not all victims can benefit from participation in the same way; therefore, the grassroots lessons employed in this section aim to overcome some of the challenges experienced by victims. At the initial planning stages, victims should provide guidance on the procedures they wish to occur alongside a trial process, managing expectations of what can be achieved within the trial, including its limitations.[1598] Cody has detailed how victims who have benefited most from participation are those within city environments, who are often more familiar with criminal justice procedures utilised within ICL. The needs of those who traditionally have not benefited from a trial need to be considered at an earlier stage, with greater guidance provided to strengthen their understanding arising from forms of procedural justice. Additionally, the involvement of the standardly marginalised victims could ensure that a rearticulate trial and justice procedure that include 'culturally meaningful moral values, norms and actions regarding the purposes and significance of international punishment'.[1599] It is important to understand the justice sought by different groups and to identify how society can move on towards a lasting peace.

Experts who are experienced in dealing with victims of mass atrocity crimes should record the experiences of all victims in a sensitive and culturally appropriate manner, at the earliest stage. If required, care should be taken to provide translators who are also experienced with trauma victims.[1600] This should take the form of a specialist unit within the registry of the court, experienced in working with trauma victims, who can honestly explain the justice opportunities and not unduly inflate victims' expectations about reparations and assistance.

[1597] Isabelle Chan, *Rethinking Transitional Justice: Cambodia, Genocide, and a Victim-Centered Model* (VDM Verlag 2009).
[1598] Building upon Spivak's critique section 5.3.1. As Spivak said the system developed need to provide a forum relevant for addressing the victims needs in a manner they can fully engage with
[1599] Agozino and Igbo (n 881).
[1600] Herman (n 406).

Examples of the developments towards victim-centric practice for victims of sexual crimes have occurred in both domestic and international law, providing useful models which could be incorporated into ICL practice. In 2009, through the Security Council Resolution 1888, the UN addressed the issue of sexual violence and armed conflict and underlined the importance of access to health care, psychosocial support, legal assistance and socio-economic reintegration for victims.[1601] The 2007 Nairobi Declaration on the Rights of Women and Girls to a Remedy and Reparation is another example; however, lack of victim-centric redress measures means that the challenge of gender-sensitive reparations and rehabilitation remains.[1602] A tool from domestic criminal law to enhance a victim-centric approach for victims of sexual abuse has arisen with the development of the Lighthouse organisations within English common law, based on a Nordic model that itself developed out of victims' advocacy movements from the USA.[1603] These work to provide victims a central and safe space, granting them greater procedural rights, potentially better suited to the nature of international criminal cases and the risk of secondary victimisation.[1604] An alternative example arises within the approach of the *målsägande*, from Finland. Fjóla Antonsdóttir explains that this:

> Literally means the one who owns the case, or more specifically, the owner of the word/speech, who has the right to speak and be heard. The concept, therefore, implies a position of power and refers to someone who is demanding her or his right.[1605]

This position of power provides the *målsägande* with a voice in proceedings and the option to present alternative charges and evidence if she or he does not agree with the way the prosecutor presents the case.[1606] The common element in these approaches recognises the victim as being able to shape their experiences of the trial process, seeking to lessen the risk of secondary victimisation.[1607] The United Nations Security Council

[1601] UN Security Council resolution 1888 On Women, Peace and Security (2009) 30 September 2009
[1602] Valérie Couillard, 'The Nairobi Declaration: Redefining Reparation for Women Victims of Sexual Violence' (2007) 1 International Journal of Transitional Justice 444.
[1603] Kieran McCartan and others, 'Bridging the Gap - An Evaluation of the Lighthouse Integrated Victim Witness Care Program' (2016).
[1604] ibid
[1605] Antonsdóttir (n 255) 18.
[1606] ibid
[1607] ibid

(UNSC), or relevant regional bodies, should ensure that all new hybrid tribunals include this victim-centric practice as standard.

The hybrid statutes should include a culturally relevant mechanism for truth-telling, either occurring within the trial proceedings or separately, running as part of wider TJ procedures, as appropriate. The practice of civil law could also facilitate developments towards meaningful participation practice within ICL, following the '*partie civile*' procedure in French-speaking countries or the '*Nebenklage*' in German-speaking countries, to provide a stronger voice for victims, especially if they disagree with the prosecutor's strategy.[1608] This inquisitorial stage could be implemented in a manner to prevent victims from being required to participate in the trial if they do not wish to, and would ensure they receive less adversarial questioning on the witness stand.[1609] Lessons from the pre-trial investigation and interrogation should be included, in which there is an official inquiry to move to 'shed light on the case and reveal the substantive truth'.[1610] Finally, options could include truth-telling in a closed proceeding that would not influence the outcome of the trial but would be recorded for public records.

The move to provide victims a stronger voice to guide their experience of procedural justice, which can arise through hybrid tribunals by expanding their justice options, can strengthen the cultural relevancy of the tribunal. The inclusion of victim impact statements would provide an important opportunity for the voice of victims to be heard directly and potentially allow the experiences of victims to be included within the deliberations of the judges at the sentencing stage.[1611] Erez presents how the 'VIS is intended to ensure that the court is aware of important information concerning the effect of the crime on the victim'.[1612]

A further development could be facilitated through the use of private prosecutors, providing victims the opportunity to shape prosecutions. This is provided for in Islamic

[1608] Spencer and Delmas-Marty (n 165) Articles 52 and 706–742 of the French Criminal Code and Sections 397 and 403–406 of the Strafprozessordnung of the German Criminal Code.
[1609] ibid
[1610] Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (n 28).
[1611] E Erez and L Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes. The Perspectives of Legal Professionals' (1999) 39 The British Journal of Criminology 216.
[1612] ibid

law and Common Law countries, such as the UK.[1613] Doak presents how there are no international instruments with a free-standing right to private prosecutions, arguing that this has not developed due to the influences of inquisitorial systems in which it is absent.[1614] In examining how individual victims can bring claims in international law, Rudolf Dolzer suggests that:

> A third position equates the status of war-related claims with human rights claims in general … It is only under the third view, identifying war claims with human rights claims, that the affected individual himself would arguably have standing to raise a claim before a national court in a country other than that of the defendant government.[1615]

Collins has argued that the use of private prosecutions in Chile has strengthened post-conflict accountability and moved on from the previous impunity for human rights abuses. This has broken the widespread impunity for torture within South America, even if it was delayed by up to a generation in many cases.[1616] These examples demonstrate that private prosecutions can be successful and provide more victims the option of experiencing punitive justice, even in instances in which the prosecutor may not think they will be successful.[1617] Hybrid tribunals could open up avenues to allow victims to have enhanced powers to initiate prosecutors for international crimes, building upon the example of active pre-situation work of the Rohingya at the ICC, discussed above.[1618] This could additionally strengthen the legitimacy of international courts as it would strongly recognise the voice and aims of victims. Indeed, within the history of the development of the EAC and the Habre trial, the influence of victims stemmed from the earliest stages, in which they initially began seeking a domestic prosecution in Chad. Their continued involvement in pushing for a trial, which eventually led to the creation of hybrid courts in Senegal, ensured they maintained influence over the trial process.[1619] Expanding this

[1613] Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (n 185) United Kingdom, Section 6 of the Prosecution of Offences Act 1985.
[1614] Ibid 124
[1615] Rudolf Dolzer, 'The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945' (2002) 20 Berkeley journal of international law 296.
[1616] Collins (n 203). 10
[1617] ibid
[1618] Section 8.4
[1619] Christoph Sperfeldt, 'The Trial against Hissène Habré: Networked Justice and Reparations at the Extraordinary African Chambers' (2017) 21 The international journal of human rights 1243.

concept of active and engaged victim participation, to include a pathway for private prosecutions within hybrid tribunals, could encourage greater investigations at an earlier stage, allowing more up to date evidence to be utilised.

The recording of victims' experiences should seek to understand their particular desire for justice and the aims of the victims; for example, do they desire punitive justice, and are they seeking reparations? Do any issues of complex victimisation apply? Do they wish to embark on TJ procedures? What outcome are they hoping to achieve from the trial procedures? What are the appropriate punishments or remedies? Would intercultural dialogue or conflict dispute settlement procedures be useful to provide the forms of justice they seek? Victims who do not wish to take part in an adversarial process, based for example upon the fear of secondary victimisation within the trial, would instead have an opportunity to take part in the truth and reconciliation procedures. This alternative should recognise the legacy, within ICL, of the voice of victims being silenced and the restriction of the ability to fully narrate a historical record.[1620] However, it should not be suggested as a replacement for more formal processes, following the example in Northern Ireland where some victims felt that, 'the Acknowledgement Forum, a more informal space where victims could tell their story, while helpful, made some victims feel that they were being infantilised instead of having their rights satisfied'.[1621]

On this basis, the structure of the hybrid trial in relation to victims can be developed flexibly, in a manner in which the validity of the views and wishes of victims is influential. This moves away from the problem where 'justice is divorced from local realities'; instead, granting victims agency and enhanced participation. This can aid the goal Hobbes describes as 'legitimacy and functional relevance', in a manner where the central priority of victims is recognised in practice and not merely as an ideal. [1622] Within this, the fair trial rights of the accused and the victims should be balanced; however, the ECCC examples demonstrate that, in domestic civil law within Cambodia, these rights are balanced in a slightly different manner than in international criminal norms, influenced by the common law adversarial system. In the domestic Cambodian context, this is an effective approach;

[1620] Koskenniemi, 'Between Impunity and Show Trials' (n 629).
[1621] Luke Moffett and others, 'Alternative Sanctions Before The Special Jurisdiction For Peace: Reflections on International Law and Transitional Justice' 72.
[1622] Hobbs (n 378) 49.

as such, the cultural realities of the trials should also demonstrate these cultural sensitivities.[1623]

At this stage, it will also be important for the hybrid tribunal to engage with alternative non-judicial measures outside the court-room to provide victims alternative justice options. Some victims may feel that these processes, such as truth-telling, are a better environment for the form of justice they are seeking; however, the participation motivations of victims are not currently recorded in the jurisprudence of the ICC. This is especially relevant following the experiences of victims in the context of international tribunals or the ICC in which the victims are often required to limit the information they share on the stand as witnesses, due to procedural rules of adversarial criminal systems. Victims may be seeking a historical record that will tell others around the world and future generations what occurred. This may be a tool to work for a change in society, highlighting injustices that may be going unacknowledged. Individual victims may also wish to see many perpetrators held accountable for international crimes and, as such, the selectivity limitations should be explained.

Victim participation may not be beneficial for victims, especially if it is retraumatising or causes them to be let down by the justice process. This refutes the notion that in relation to victim participation anything is better than nothing.[1624] If participation is not carried out with a victim-orientated approach then it can be a harmful experience for victims leading to secondary victimisation or further trauma.

8.5.4 A model for a victim-centric hybrid tribunal: reparations

Following the lessons presented in the Ardoyne project discussed above, this section considers how to develop victim-centric reparations procedures, through both the decisions at the hybrid court and with additional measures provided for through judgements of truth commissions or the development of trust funds or compensation schemes for victims.[1625] Ensuring these are victim-centric involves allowing all victims the

[1623] ibid
[1624] A Pemberton and others, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 352.
[1625] Cristián Correa, Julie Guillerot and Lisa Magarrell, 'Reparations And Victim Participation: A Look At The Truth Commission Experience'.

opportunity to be included at the initial stages, and involving victims in designing what the reparation procedures should include and the nature of the reparations awards, including managing expectations so victims are fully informed at the initial stage what nature of reparations may be possible.

Lessons from domestic or hybrid examples demonstrate the beneficial impact upon victims which follows the use of participatory approaches to reparations.[1626] Positive examples include the consultations processes on reparations held in Peru and Morocco.[1627] These seek to strengthen grassroots procedures, engagement with victims and outreach within victim communities.[1628] This format also leads to greater victim ownership of reparations policy which can have a healing effect, as it helps victims and communities to move forward and be 'treated as right holders whose dignity is respected'.[1629] Reparations could also be reconsidered to include its more therapeutic functions, helping victims to heal and to cope with the past as well as the future.[1630] Rombouts and Parmentier argue that the issue of reparations is not about going back to the way things were before, as victims are generally unable to return to their original condition and they are often changed by their experience.[1631] Reparations are also not about restoring victims to where they might have been had the victimisation never taken place. They consider that this creates different classes of victims and runs the risk of denying the victimisation experience. Instead, they propose a process-orientated approach to reparations, in which victims and organisations would be involved in determining the content of the reparations for the harm inflicted upon them.[1632] To allow grassroots involvement of victims within reparation discussions it is necessary to ensure

[1626] Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2008).
[1627] Christopher Gibson, 'Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges' (2009) 103 193, 196.
[1628] **ibid**
[1629] Therefore, targeted measures are required to involve women and girls in the reparations process. This may include cultural and gender-sensitive strategies for gathering information about victims' reparation needs and securing female victims' participation in consultations about reparations34.
[1630] Heidy Rombouts and Stephan Parmentier, 'The International Criminal Court and Its Trust Fund Are Coming of Age: Towards a Process Approach for the Reparation of Victims' (2009) 16 International Review of Victimology 149, 165.
[1631] ibid
[1632] ibid

that victim's groups actually represent the views of potential beneficiaries. Those groups based in a capital city may have a distorted view of victims' needs.[1633]

Additionally, a participatory process is especially important for those victims who have been marginalised or ostracised by their own communities, otherwise, their voices and needs will be excluded from reparation procedures. There are further examples demonstrating the flexibility of reparations awards arising within the TJ fields which can accommodate victims' needs, such as the desire to prioritise education for children, along with healthcare and housing in East Timor.[1634] Alternative protocols have been utilised in Chile, with awards for family members such as payments for education and university or pensions determined by victims as the most appropriate form of reparations. These awards have been provided to indirect victims: next-of-kin or dependents.[1635]

Alternative examples, designed to enhance reparative justice, have been demonstrated through practice at the Inter-American Court of Human Rights. Governments have been ordered to ensure civil parties receive judgements in the native languages and publish their judgements in widely-read newspapers or in a country where the victim has relocated.[1636] This approach within international human rights law can provide useful guidance to international criminal tribunals, to ensure that the reparations decisions can meet the forms of justice for which victims are searching. Mark Drumbl highlights that the '*de jure* and *de facto* primacy of criminal courts may not reflect what societies under reconstruction actually want'.[1637] Victims seek diverse remedies, reflecting upon the diverse views of justice that they hold. The opportunity provided by reparations can open up avenues for wider restorative justice aspects to be provided by courts that go beyond punitive retributive judgements. In the search for victims' rights within the trial process, listening to the views of victims is crucial to develop the best form of justice. This moves away from narrow ideas on reparations by international lawyers and judges, and instead, can provide greater cultural relevancy to the entire reparations regime. Reparations can aid both the economic challenges faced by victims and also, at a collective level, can

[1633] ibid
[1634] Cohen (n 518).
[1635] Collins (n 203).
[1636] "White Van" (Paniagua-Morales et al.) v Guatemala (Judgment) Inter-American Court of Human Rights March 8 1998
[1637] Drumbl, 'The Future of International Criminal Law and Transitional Justice' (n 33) 205.

develop memorials contributing to the discourse on social memory and aid in a post-conflict healing process.[1638]

Reparations can also provide a form of accountability and reintegration for child soldiers within restorative justice procedures. As detailed in the by Kiyala through research on the DRC, community-based transitional models, in the case the *Baraza* structure, provide informal accountability procedures with the aim of building peace and re-integrating ex-belligerents.[1639] This can provide young mothers a pathway to return to their societies. The reparations suggested will involve mediation procedures and can include monetary payments, often made by the wider family, or symbolic forms of reparation.[1640]

A challenge to overcome within this model has been the battle for victims to actually receive reparations. This problem has occurred both within hybrid courts and following recommendations of truth commissions.[1641] The failure to properly implement reparations programmes significantly disappoints the victims, especially if this has followed victim consultation, raising expectations.[1642] As detailed in Chapter 3, within the EAC context victims have faced a wide variety of hurdles to actually receive the payments ordered by a court.[1643] Following this, there is a need to consider a proactive approach to reparations at an early stage. In recognition of the limited number of victims who can benefit from court-ordered reparations, a discussion surrounding the development of a truth, justice, reparation and reconciliation commission, or a national trust fund for the compensation of victims, presents an opportunity for a wider number of victims to receive reparative justice. However, the degree of implementation remains an issue, there are challenges in ensuring the money from the trust fund actually progresses to the victims.[1644] This could be addressed through the establishment of a specialised reparations chamber, or a similar tort procedure which would distribute resources from a Trust Fund, to ensure it is paid to the correct victims.[1645] This should be situated locally to ensure accessibility for victims, in particular elderly or disabled victims, and any

[1638] ibid
[1639] Jean Chrysostome K. Kiyala (n 1398) 344.
[1640] ibid 354
[1641] Correa, Guillerot and Magarrell (n 1625).
[1642] Section 3.6.4
[1643] Should this be a C? check with Michelle
[1644] Carla Ferstman, Mariana Goetz and Alan Stephens, *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (BRILL 2009).
[1645] ibid

additional costs which are required to seek reparations, such as travel, should be minimised.[1646]

Additionally, the use of civil claims has arisen within the domestic context, sought by families based upon collective responsibilities in situations in which no individual criminal responsibility for perpetrators has been determined. This occurred in Northern Ireland, where the Belfast High Court upheld a civil claim against representatives of the RIRA Army Council following the Omagh bombing atrocity.[1647]

In other contexts, armed groups have agreed to provide reparations as part of a peace agreement and transitional justice processes.[1648] This could potentially provide an avenue for victims to experience a form of justice when no perpetrator can be held accountable for the crimes committed through the trial process.

8.6 Conclusion

This chapter sets out a three-layered approach to address the limitations of ICL, as it is practiced at the ICC. It utilises a victim-orientated approach to update the various restrictions, which this thesis has set out, that limit the opportunity for victims to receive justice, and which will strengthen the legitimacy of the ICL system. This chapter explores the conceptualisation of victims which restricts victims who do not identify with this term, especially those who fall within complex victims' categories. As set out in earlier chapter, restricting many victims in their search for justice will lead to a situation of negative peace. Therefore this chapter presents a victim-orientated approach to updating procedures within the practice of the ICC. As set out above, there are a growing number of judicial dissents who recognise the jurisprudence within the court of restricting the victims' rights to remedy and redress. However, as only a limited number of victims will receive justice through the court, the third layer of this rearticulation positions hybrid tribunals in a victim-orientated approach, within the midst of wider justice processes. In this manner, the hybrid courts are positioned in conjunction with wider aims for positive peace, providing justice for a greater number of victims.

[1646] ibid
[1647] Moffett and others (n 1621) 57.
[1648] ibid

9 CHAPTER 9: CONCLUSION

This thesis sets out procedures to move away from hegemonic top-down approaches, developing pluriversal forms of international criminal practice and addressing issues of justice in conjunction with peace. In providing victims with increased agency and a clear voice, they can achieve the mandate for victim centrality, discussed in relation to the ICC. Seeking justice for victims, and considering the need to move away from negative peace to a peace that includes many forms of justice, allows ICL to work alongside TJ, overlapping with grassroots procedures. This approach can be a first step in seeking lasting peace and addressing root causes, while limiting the impunity, to prevent a renewed outbreak of conflict or an unfair peace.

This work acknowledges the challenges faced, firstly, in ensuring that minority voices are heard and then, in overcoming traditional barriers to victims receiving justice. However, more work needs to be done to ensure the counter hegemonic role of ICL can function effectively in the face of powerful actors or political pressures seeking to reduce this role. Additionally, there is an awareness that criminal justice, while a crucial element in achieving justice for victims, is only one form of justice which may not be suitable to all, and it can play only a limited role in achieving stable peace. The alternative justice understandings and practices set out in this thesis should be valued and respected as, potentially, more culturally appropriate, and as playing a key role in moving societies towards positive peace. The important factor for ICL is finding a process in which it can work in partnership with alternative justice procedures, while also strengthening the voice of victims and enhancing their search for justice

Chapter 2 argues that there is a need for a victim-oriented approach to ICL in order to strengthen the legitimacy of the system. Unlike community-based justice, which can provide victims with an influential role in shaping the justice process and outcomes, the practices of domestic criminal justice, on which ICrJ is based, does not grant victims agency. The RS recognises that victims have the right to remedy and redress, and this has resulted in a more central position for victims within the ICC compared with ICrJ more generally. However, this has not resulted in victims receiving justice, despite this being the claimed mandate of the court. This chapter has set out how the theoretical underpinnings of the concept of victims in ICL significantly reduce the influence of

individual victims in practice, through the abstraction of victimhood and the prioritisation of 'Ideal' victims. Furthermore, it sets out how victims do not have agency to shape the justice they receive through ICrJ processes.

Through an analysis of jurisprudence of both the ICC and the hybrid courts, Chapter 3 developed the argument, introduced in chapter 2, that victims hold limited agency within ICL. This analysis demonstrates the manner in which power and influence is retained in the hands of the judiciary and the prosecutor within ICrJ. Their decisions hold significant influence in determining if the practice of the courts provides victim-oriented approaches to participation and reparations. However, the case law detailed in this chapter demonstrates the limitations of the justice opportunities which arise through the practice of ICL and how little benefit victims receive.

Chapter 4 presented the manner in which peace and justice have been interlinked since the inception of ICL. Deconstructing the pluralistic nature of concepts of justice and peace reveals the complexity of these terms and the influence one has over the other. The different justice aims within ICL are an important element in achieving stable peace, however there is an important distinction between negative and positive peace. Tracing the conceptualisation of peace throughout the history of IL demonstrates the lack of justice and how many oppressive forms of peace where accepted. Following this, the case study of Uganda details the manner in which ICC involvement can lead to a negative peace which restricts the opportunity for victims to receive justice.

Chapter 5 sets out a decolonising critique of peace and victims within ICL. It exposes how the counter hegemonic aims of ICL are impeded due to its hegemonic origins. Additionally, Chapter 5 argues that the standard Western understandings of peace maintain a 'paradigm of war' within peacetimes. Additionally it further explains the limitations experienced by marginalised victims within ICL, who are part of a subaltern. Marginalised victims face a greater degree of struggle to initiate and experience justice in the midst of a system designed to maintain their 'Other' status. Finally, transmodernity offers an opportunity to bring together conflicting epistemologies, providing a voice for oppressed cultures and justice aims.

Chapter 6 presents the theory of positive peace as a method in which structural violence, such as that detailed in chapter 5, could be overcome. When adopted as an aim for ICL, positive peace provides a focus in which the search for justice for victims includes social and cultural justice. This is important in preventing acceptance of negative peace and brings together ICL and wider TJ processes that are also seeking to achieve peace. The case study of the Canadian genocide report demonstrates the recognition of structural violence within 'peacetime' environments and the considerable impact this can have on communities.

Chapter 7 considered the manner in which ICL and TJ processes interplay, using the Colombian peace process as a case study. This demonstrates the limitations of top down processes in which elites in society maintain their position following international crimes while the marginalised remain oppressed. In contrast, the localised approach may be more effective in granting 'from below' actors an influential voice and can be part of a justice system in which they hold equal agency to other stakeholders. Ensuring that victims receive justice in the midst of TJ processes is part of the monitoring carried out by the OTP under Article 53. This thesis has argued that the ICC should take an expansive approach in performing this monitoring role, so that its work goes beyond a simple examination of whether retributive justice is being granted to victims. The other justice goals of the ICC - reparative and procedural justice - should be included, especially in jurisdictions in which trials are utilised for political ends and victims only receive limited forms of justice as a result. .

Chapter 8 brings together the lessons and limitations presented in all the earlier chapters to set out a rearticulation of victims in ICL that would aid the achievement of positive peace. Firstly, this addresses the limitations which arise through the terminology of victimhood and the challenge of complex victims. Secondly, it sets out how a more victim-orientated approach could be achieved within the practice of the ICC. Finally, it details how to incorporate the transmodern grass roots lessons set out in the earlier chapters of this thesis to develop new hybrid tribunals while ensuring there is a voice for the marginalised or subaltern in a system they have helped to develop.

As a next step, an empirical project could be carried out to examine how the interests of justice considerations within Article 53 enhance the search for justice for victims. This

would need to examine grass roots justice processes alongside domestic or hybrid criminal court procedures. As Chapter 7 set out, the OTP's 'indicators and benchmarks' for assessing the country's efforts towards accountability for Rome Statute crimes should be evaluated, to ensure they are victim-orientated. An investigation would explore whether the OTP standards enhance the opportunity for victims to experience justice and the forms of justice which arise. Further examinations should explore whether victims are beginning to experience justice in respect of forms of structural violence within peace, set out in Chapters 5 and 6 of this thesis. These lessons can then inform the involvement of the ICC in any situation country, recognising the importance of wide consultations with victims, including those 'from below' to ensure the ICC standards are guided by the interests of individual victims, not abstractions.

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