

‘Justice for Victims’ at the International Criminal Court: Making Sense of the Difference between the Domestic and the International Context

Abstract

The International Criminal Court (ICC) is the first international criminal justice (ICJ) institution that explicitly promises to deliver ‘justice for victims’ by providing for victims’ rights to participation and reparation in criminal proceedings. Over a decade after its establishment, the time is right to consider how this new idea of ‘justice for victims’ has developed at the Court. While analysis of the ICC has benefited from international law, as well as other academic disciplines such as International Relations and Politics, there has been too little attention paid to ICJ by mainstream criminologists and victimologists. To fill this gap, this article will reflect more systematically on the similarities and differences in how the idea of ‘justice for victims’ has evolved at domestic criminal courts and the ICC from a criminological and victimological perspective. Overall, the comparison suggests that while the idea of justice for victims has been mainly understood in terms of the benefits and problems of incorporating victims’ rights into criminal law procedure in the domestic context, it has led to broader contestations and redefinitions of the very meaning of justice at the ICC. These justice contestations have to be understood in the institutional context of what is still a young and sui generis court that is unsure of the kind of justice it can and should deliver.

1. Introduction

Recent decades have seen a gradual shift in international criminal law towards greater victim recognition and centrality, which in many respects parallels the rise of victims’ rights and restorative justice (RJ) in Western national criminal justice systems (Hoyle and Zedner 2007; Erez and Roberts 2007). From the late 1980s mounting criticism within the academia and victim support organisations of the marginalisation of victims within the criminal process made victims the focus of intense policy interest on both the national and international stage. Over a quarter of a century ago, this triggered various

international measures, starting with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, although it took most countries a long time to implement the principles within the Declaration in national legislation and policies. Since the start of the twenty-first century, restorative principles, have been developing on the national stage, particularly in Europe, but also in Australia and New Zealand, and have also featured in further UN documents. The UN issued *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* in 2002¹ and, in 2006, published the *UN Handbook on Restorative Justice*. We have witnessed the appearance of RJ-styled objectives - whether implicitly or explicitly - in a number of UN resolutions and international instruments (e.g., the 2006 *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*² (the 2006 Basic Principles³) and the *Rome Statute of the International Criminal Court*⁴ (the Rome Statute)). There has also been an increasing focus on RJ in academic and jurisprudential discourse surrounding international criminal tribunals, courts and transitional justice⁵ more generally. The growing prominence of RJ within this context flows, to some extent, from the perceived failure of the Anglo-American common law model to incorporate victims' interests and the recognition that in response to crimes against humanity 'justice for victims' must embrace notions such as truth, reconciliation, and reparation. It must aim not only at punishing offenders, but at healing victims and repairing communities in which the social fabric, as well as the economic and physical infrastructure has been torn apart.

To a large extent, the increasingly prominent role of victims in contemporary international criminal law (Schabas 2007: 323) is the product of the interface between the

¹ Economic and Social Council E/2002/INF/2/Add.2, July 2002.

² General Assembly Resolution 147, A/RES/60/147, 21 March 2006.

³ 'The Basic Principles recognise that victims should be treated with compassion and respect for their dignity, that they should have their right to access to justice and redress mechanisms fully respected, and that national funds for compensation to victims should be encouraged together with the expeditious development of appropriate rights and remedies.' (Schabas 2007: 326)

⁴ U.N. Doc. A/CONF.183/9 of 17 July 1998, and corrected by procès-verbaux, 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

⁵ 'Transitional justice' is used herein as an umbrella concept to denote the range of judicial and non-judicial mechanisms, practices and concerns that arise and are focused on confronting and addressing large scale human rights abuses (Roht-Arriaza 2006: 2; Kerr and Mobekk 2007: 3).

large scale mass atrocities and gross violations of human rights (which were all too common in the late 20th century and have continued into the early 21st century⁶) and the concomitant responses of the international community (in its myriad forms; including States, NGOs, the UN, victim groups) in its attempts to pursue justice and redress for victims.⁷ As Bassiouni (2006: 211) notes, throughout the 1980s and 1990s the cause of victims' rights were furthered as a result, *inter alia*, of the establishment of *ad hoc* and hybrid tribunals, the International Criminal Court (ICC) and the growth of the 'burgeoning truth commission industry'. Generally speaking, the greater 'place' of victims in the context of international criminal proceedings includes expanded rights of participation (before, during and after proceedings), disclosure, and protection (as victims and witnesses); symbolic recognition as victims; and increased access to reparations (in various forms) (Schabas 2007: 328-329; Bassiouni 2006: 205; Keller 2006-2007: 189), with the latter reflecting the growing international consensus⁸ that victims of human rights abuses are entitled to reparations and that reparations play an important role in achieving justice for victims (de Greiff 2006: 455; Wierda and de Greiff 2004: 1).⁹ The International Criminal Court (ICC) stands out in this new trend towards achieving justice for victims as the first ICJ institution that provides for extensive victims' rights to participation and reparations in international criminal proceedings.¹⁰

On the face of it, the introduction of the idea of justice for victims in criminal proceedings has produced similar debates at domestic and international criminal justice

⁶ Green and Ward (2004: 1) estimate that modern political states have been responsible for the murder of over 169 million people between 1900 and 1987. As Bauman (1989) puts it, genocide and modernity have gone hand in hand.

⁷ See the measures recommended in the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (A/RES 40/34) to improve access to justice and fair treatment, restitution, compensation, and necessary material, medical, psychological, and social assistance and support for victims. Bassiouni (2006) provides a thorough overview of the evolution and recognition of victims' rights under international law.

⁸ Although it is fair to say that continental Europeans, used to greater victim participation in their civil law system, led the way in this respect: Morten Bergsmo, 'Can International Courts do Justice? Conceptions of Justice in Responding to Conflict', St Hugh's College, Oxford, 28th January 2009.

⁹ The right to reparations in international law is provided for by the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UN 1987); the *Vienna Declaration* (1993) and in the *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 2005), known as the 'Bassiouni Principles'.

¹⁰ F. McKay, 'Are Reparations Appropriately Addressed in the ICC Statute?', in D. Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley, NY: Transnational Publishers, 2000) 163-174, at 166.

institutions. In both settings, the notion that justice for victims does not only mean to bring the perpetrator to justice but also to provide victims with rights to participation and reparations has become a matter of controversy. Many legal practitioners and scholars argue that these victims' rights not only pose practical challenges as they take up scarce resources and slow down judicial proceedings; they also strike at the normative heart of criminal justice by threatening to undermine the defendant's rights to a fair and impartial trial. Yet, closer analysis reveals that the idea of justice for victims has had more far-reaching implications for the justice concepts and practices of the ICC and the Trust Fund. Indeed, we argue that the opening up of the ICC's traditional, retributive justice discourse to the idea of justice for victims has led to a proliferation of different justice concepts in a contested justice-making process at the Court. We will illustrate this by tracing how the TFV has developed new concepts of transformative justice and gender justice that would not conventionally be considered as part of ICJ. Curiously, these unusual concepts have also travelled from the institutions on the periphery of the Rome Statute system such as the Trust Fund to the judicial core of the system: the Chambers.¹¹ It appears from this discussion that the concept of justice can take on very different meanings once the traditional, retributive justice paradigm is unsettled. Finally, we situate our analysis in the broader question of why these justice contestations happen at the ICC, but not so profoundly at domestic courts.

2. Justice for Victims in Domestic Criminal Courts: Criminological and Victimological Debates

In the UK, the US and indeed other common law jurisdictions, until the changes brought about in recent decades, the role of victims had been relegated to that of witnesses, excluded from meaningful participation and decision-making. Marginalisation and

¹¹ The term 'Rome Statute system' is widely used to refer to the institutions set up by the Rome Statute, the Court's founding document, which are primarily the ICC and the TFV. Our interviews suggest that the term can also refer to all actors who work to realize the system set up by the Rome Statute including the Court's local intermediaries and partners, and ICC-focused NGOs. This is how the term will be used here. See *Court's Revised Strategy in Relation to Victims*, ICC-ASP/11/38, 5 November 2012, §4, at Footnote 5 and 6.

‘secondary victimisation’ within the courtroom¹² left victims increasingly dissatisfied and reluctant to cooperate with the criminal justice process. From the late 1980s both scholars and practitioners working in the area of victim support services have been increasingly criticizing the treatment of victims by all criminal justice agencies and by the state in general. While some of this criticism concerned the lack of victim support services and inadequate compensation or restitution mechanisms, much of it focused on the failures of the justice system to keep victims informed about the progress of their case and, in particular, to allow them to participate in a meaningful way in the state response to the crimes committed against them.¹³ Acknowledgement of the victim as a party to the dispute (Christie 1977) and as an actor without whose cooperation in reporting crime, furnishing evidence, and acting as a witness in court, most crime would remain unknown and unpunished, have been powerful drivers of reform. There was clear recognition that for victims, justice was not achieved solely by the prosecution and conviction of offenders, but by their ability to participate in the criminal process and to receive reparations. Victims became the focus of intense policy interest on both the national and international stage. While it took most countries a long time to incorporate the principles of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power into national legislation and policies, these principles supplied a language of victims’ rights.

To the extent it is possible to speak of rights for victims, they can be categorized under two headings. ‘Service rights’ refer to services that do not affect procedure, such as information provided about case progress. ‘Procedural rights’ such as victims’ rights to participation give victims a voice in the criminal process but may be detrimental to the defendant (Ashworth 2000; Cape 2004). The typical mechanism of victim participation in domestic criminal courts is the Victim Impact Statement that details the emotional, financial and practical impact of the offence on the victim beyond the effects described in

¹² Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 *J. of Traumatic Stress* 182, 182 (2010); U. Orth (2002) ‘Secondary Victimization of Crime Victims by Criminal Proceedings’, *Social Justice Research*, Vol. 15, No. 4, December 2002; I. Wolhuter et al *Victimology: Victimisation and Victims Rights*, Abingdon: Routledge, 2009).

¹³ C Hoyle, (2012) ‘Victims, Victimisation and Restorative Justice’ in M. Maguire, R. Morgan and R. Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press).

the evidential statement. While in most jurisdictions they are supposed to help sentencers to better understand the harms caused by the offence, they are not supposed to directly influence the sentence (although some US states do allow this in their 'victim statements of opinion' which record what the victim feels to be the appropriate sentence).¹⁴ Although the distinction between service and procedural rights is analytically useful, and will be adopted here in order to explore how rights for victims might generate controversy for those who wish to protect the enforceable due process rights of defendants, it is not entirely robust. It breaks down in respect of those service rights that have procedural implications; for example, the screening of vulnerable victims in court may have an adverse impact on defendants' rights to a fair trial.

While few argue against service rights in principle as they do not force us to consider a compromise to defendants' safeguards against injustice, procedural rights are contentious. Advocates of victim input argue that it promotes more informed, accurate and democratic decisions by sentencers in particular; recognizes the victim's status as the person harmed by the offence and helps victims to recover, thus reducing secondary victimization and increasing their satisfaction and cooperation with the criminal justice system. Beyond the positive effects on victims, it is argued that such statements of impact can promote rehabilitation by confronting the offender with the impact of his crime (Tobolowsky 1999; Cassell 2009; Bandes 2009; Roberts and Erez 2010).

Critics of this procedural right have argued that the intrusion of victims' subjective views into what should be state decision-making can limit prosecutorial discretion, undermine the court's objectivity, and by shifting the focus of decision makers away from legitimate sentencing factors, may produce indefensible disparity in sentencing of similar cases according to the resilience, generosity or punitiveness of the victim, thus producing disproportionate sentences (Ashworth 1993). It is not only legal academics that have expressed concern. Those responsible for providing services to victims have expressed concern that increasing their involvement could further burden victims while raising their expectations unrealistically (Reeves and Dunn 2010) or further

¹⁴ C Hoyle, 'Empowerment through Emotion: The use and abuse of victim impact evidence' in E Erez, M Kilchling, and J Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Press 2011)

traumatize victims by creating a sense of obligation to participate in the sentencing process against their wishes (Ashworth 1993; Tobolowsky 1999).

The debates in the domestic context on the fairness or otherwise of victims participating directly in the court process have tended to divide criminologists and victimologists according to which sentencing philosophy they adhere to. Those who feel strongly about the importance of safeguarding due process rights and sentencing according to ‘just deserts’ theory or retributive justice theory have been highly critical of attempts to integrate victims into justice responses, while those who are influenced by restorative justice theories are keen to support initiatives aimed at victim restoration and reparation and see the victim’s role in the criminal process as crucial to achieving these ends.¹⁵ Yet, the victim’s role in the court process is more limited than restorative justice theorists would wish: victims, or their representatives, tell the court how they have experienced the offences, and then later receive information, as well as restitution mediated by court officials. Indeed, while the introduction of such victim-focused measures into domestic and international courts has been described as ‘restorative’, it is arguably a conceptual stretch to use the concept of restorative justice to describe measures such as victim impact statements in criminal proceedings. Hoyle noted that ‘restorative justice...is a relatively narrow concept that requires dialogue between the offender and the victim...’¹⁶ Victim participation in criminal proceedings, on the other hand, makes the victim a participant in an adversarial judicial process that is ultimately aimed at proving the guilt of the defendant rather than at reconciliation between the victim and the defendant.

These debates between ‘rival champions’ of restoration and retribution prompted some in the academy to contemplate this emergence of apparently polarized positions and

¹⁵ As proponents of a desert-based justification for sentencing, Andrew Ashworth and Andrew von Hirsch have consistently expressed concerns about restorative justice, especially the potential for disproportionate outcomes. At times this has taken the form of an academic debate between them and John Braithwaite and Philip Pettit, in response to a book published in 1990 by Braithwaite and Pettit called ‘Not Just Deserts: A Republican Theory of Criminal Justice (Oxford, Clarendon Press) (see A von Hirsch and A Ashworth, ‘Not Just Deserts: A Response to Braithwaite and Pettit’ (1992) 12(1) Oxford Journal of Legal Studies 83; and P Pettit and J Braithwaite, ‘Not Just Deserts, Even in Sentencing’ (1992) 4(3) Current Issues in Criminal Justice 225).

¹⁶ C. Hoyle, ‘Can International Justice be Restorative Justice? The Role of Reparations’, in N. Palmer, P. Clark and D. Granville (eds), *Critical Perspectives in Transitional Justice* (Cambridge, U.K.; Portland, Or: Intersentia, 2012) 189-209, at 192-193.

argue that reparation is in fact reconcilable with retribution.¹⁷ And while some proponents of the antithetical view of restorative and retributive justice remain entrenched in their respective positions, more recently there have been further efforts to bridge the gap, and in some cases to see restoration and retribution as integrally linked. Indeed Antony Duff has argued persuasively for ‘restoration through retribution’: ‘offenders should suffer retribution, punishment, for their crimes: but the essential purpose of such punishment should be to achieve restoration.’¹⁸ While there is by no means consensus on the compatibility of restorative and retributive justice, it is clear that restorative justice (on the whole) does not reject all punitive measures associated with retributive justice and the court system does not need to be devoid of all restorative elements. There is more common ground between the two forms of justice than is often recognised and academics studying the domestic courts have now acknowledged this.¹⁹

Yet, these theoretical advances have not always influenced how policy makers and legal practitioners make sense of these new victims’ reforms. Criminal courts are still offender focused: they punish for the purposes of retribution, deterrence, incapacitation or rehabilitation, not to make the victim feel better. It thus remains to be seen whether and how retributive and restorative justice can be reconciled in the practice of domestic criminal courts.

3. Justice for Victims at the ICC: Victimological Debates and Justice Contestations

By integrating victims’ rights to participation and reparation into the Court’s mandate, the Rome Statute adds a restorative justice function to the traditional, retributive justice mandate of international criminal courts.²⁰ Victims can participate in criminal proceedings at the ICC through their legal representatives. They can make opening and closing statements, have access to the full case index, examine witnesses, challenge the

¹⁷ L Zedner, ‘Reparation and Retribution: Are They Reconcilable?’, (1994) *Modern Law Review*, 57, 228.

¹⁸ RA Duff, ‘Restorative Punishment and Punitive Restoration’, in L Walgrave (ed), *Restorative Justice and the Law* (Cullompton, Willan Publishing, 2002) 82.

¹⁹ R Young and C Hoyle, ‘Restorative Justice and Punishment’, in S McConville (ed) *The Use of Punishment* (Cullompton, Willan, 2003).

²⁰ *Report of the Court on the Revised Strategy in Relation to Victims: Past, Present and Future*, ICC ASP/11/40, 5 November 2012, § 34.

admissibility of evidence and submit evidence at the ICC.²¹ However, these rights are subject to the decision of the competent Chamber. The Court can also order reparations against convicted perpetrators and the Rome Statute has for this purpose established the Trust Fund for Victims (TFV) which is endowed with two mandates: victim reparations and assistance.²² Under its reparation mandate, the Trust Fund implements ‘court-ordered reparations awards against a convicted person when directed by the Court to do so’.²³ Under its assistance mandate, the Trust Fund uses the voluntary contributions it receives from donors such as states and private actors to ‘provide victims and their families in situations where the Court is active with physical rehabilitation, material support, and/or psychological rehabilitation’ independent of criminal convictions or even the existence of trials.²⁴

The introduction of the restorative idea of justice for victims has produced similar debates at the ICC as in the domestic setting. While victims’ activists endorse the Court’s new focus on victims, many legal scholars and practitioners have challenged the very idea of combining retributive and restorative justice logics, arguing that such a *justice experiment* can disrupt proper justice-making at ICJ institutions.²⁵ In light of the ICC’s first decade of operation, these scholars and practitioners argue that this combination has not only created uncertainty and inconsistency in the Court’s judicial interpretations and policy implementation²⁶, but also threatens to undermine the key norms of ICJ: neutrality

²¹ Redress, *The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future* (2012), available online at http://www.redress.org/downloads/publications/121030participation_report.pdf (visited 31 August 2013), at 49-51; See also Art. 68 (3) ICCSt.

²² See Art. 79 ICC St; Rule 98 ICC RPE; *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res.3, 3 December 2005.

²³ Trust Fund for Victims, ‘The Two Roles of the TFV’, Website available online at <http://www.trustfundforvictims.org/two-roles-tfv> (visited 26 August 2013).

²⁴ *Ibid*

²⁵ B. McGonigle Leyh, ‘Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls’, 12 *International Criminal Law Review* (2012) 375-408, at 407; C.H. Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?’, 6 *Northwestern Journal of International Human Rights* (2008) 459-545, at 542; M. Damaska, ‘What Is the Point of International Criminal Justice?’, 83 *Chicago-Kent Law Review* (2008) 329-368, at 342-343.

²⁶ M.C. Bassiouni, ‘International Recognition of Victims’ Rights’, 6 *Human Rights Law Review* (2006) 203-279, at 245/246; International Bar Association, *Balancing Rights: The International Criminal Court at a Procedural Crossroads* (2008), available online at http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx (visited 27 August 2013), at 10; War Crimes Research Office, *Victim Participation at the Case Stage of Proceedings* (2009), available online at

and impartiality. Indeed, they fear that by pursuing both retributive and restorative justice in the face of a limited mandate and scarce resources, the ICC may fail in its primary mandate of retributive, efficient and impartial justice. Judge Van den Wyngaert, for example, recalls the ‘countless hours spent on determining the victim status of hundreds - and in the future perhaps thousands - of applicants...’ and purports that the Court’s victims’ engagement has considerably lengthened its judicial proceedings.²⁷ On the normative plane, victims’ rights to participation threaten to undercut the defendant’s rights to a fair trial.²⁸ On this basis, many argue for the re-separation of retributive and restorative justice processes, for example, by conducting trials on the one hand and channeling justice for victims through separate, restorative institutions such as Truth and Reconciliation Commissions (TRCs) on the other hand.²⁹

Yet, the introduction of the idea of justice for victims has had more far-reaching implications for the very meaning of justice at the ICC. Indeed, the speeches and statements by various ICC stakeholders about the kind of justice the Court aims to deliver make for a curious reading.³⁰ On the one hand, many officials emphasize that the core justice business of the Court is ‘to investigate, arrest and try alleged criminals’.³¹ On the other hand, broader concepts of justice including ideas of ‘transformative justice’, ‘gender justice’, and ‘social justice’ are circulating at the institutions on the periphery of the Rome Statute system, for example, at the Trust Fund for Victims (TFV), ICC-focused NGOs and among local intermediaries and partners of the Court in its situation

<http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonVictimParticipationattheCaseStageofProceedingsFebruary2009.pdf> (visited 27 August 2013), at 1.

²⁷ C. Van den Wyngaert, ‘Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’, 44 *Case Western Reserve Journal of International Law* (2012) 475-496, at 493.

²⁸ M. Jouet, ‘Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court’, 26 *Saint Louis University Public Law Review* (2007) 249-308.

²⁹ Damaska, *supra* note 18, at 343; Jouet, *supra* note 21, at 251; M. Rauschenbach and D. Scalia, ‘Victims and International Criminal Justice: A Vexed Question?’, 90 *International Review of the Red Cross* (2008) 441-459, at 441.

³⁰ See also J. Wemmers, ‘Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims’, 16 *International Review of Victimology* (2009) 211-227; Idem, ‘Victims’ Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims’ Right to Participate’, 23 *Leiden Journal of International Law* (2010) 629-643.

³¹ J.S.A. Fulford, ‘The Reflections of a Trial Judge’, 22 *Criminal Law Forum* (2011) 215-223, at 216; Chung, *supra* note 18, at 522; International Criminal Court, *Understanding the International Criminal Court*, available online at <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (visited 27 August 2013), at 1.

countries.³² The TFV, for example, aims at ‘transformative justice’, ‘by placing [women] in a better position to break with historic patterns of subordination and social exclusion’.³³ In a similar vein, the President of the ICC purports that ‘the Trust Fund will play a key role in developing and realising a holistic vision of justice within the Rome Statute system’.³⁴ Other justice stakeholders have very complex understandings of justice. A legal officer from the Coalition for the International Criminal Court (CICC), for instance, states that ‘there can’t really be a single definition because justice for victims will depend on the individual victim: on his or her cultural background, gender, what he or she has been a victim of, the when, the how, where the victim is at the moment, what his or her expectations are’ (Interview with Vuillemin Grendel, 3 July 2013). These diverse and conflicting ideas about justice raise the question of how justice for victims is actually understood and practiced at the ICC.

Our research suggests that the opening of the ICC’s retributive justice discourse to the idea of ‘justice for victims’ has led to broader contestations and redefinitions of the very concept of justice in ICJ. The research is based on the conceptual idea that justice-making at ICJ institutions is an inter-subjective and interactional process: the meaning of justice is also produced outside the court room in the countless interactions and contestations between ICC lawyers, bureaucrats, NGOs, local intermediaries and partners, and victims. These contestations about the kind of justice the ICC can and should deliver have led to a proliferation of different meanings of justice which have brought to the fore new justice concepts that would conventionally not have been seen as part of ICJ. While the ICC’s judicial staff tends to adhere to conventional understandings of justice, especially retributive justice, the Trust Fund and other institutions embrace more holistic understandings of justice including ideas of transformative justice and gender justice. The

³² Intermediaries are the ‘individuals and organizations that connect the work of the ICC with those on the ground, including victims and witnesses’. See E. Haslam and R. Edmunds, ‘Managing a New Partnership: Professionalization, Intermediaries and the International Criminal Court’, 24 *Criminal Law Forum* (2013) 49-85, at 50.

³³ Trust Fund for Victims’ First Report on Reparations, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 1 September 2011, §34.

³⁴ S-H. Song, ‘The President of the International Criminal Court- Remarks at the Opening of the Tenth Meeting of the Board of Directors of the Trust Fund for Victims’ (2013), available online at <http://www.icc-cpi.int/iccdocs/presidency/130319-ICC-President-Remarks-at-TFV-Board-of-Directors-Meeting.pdf> (visited 27 August 2013), at 2.

development of these rather unusual justice concepts in the ICC's discourse and practice suggests that the concept of justice can take on very different meanings once the conventional justice paradigm of retributive justice has been unsettled. This can be further illustrated by tracing the conflicting ways in which the concept of justice for victims is understood and used in the debates about reparations at the ICC.

4. The Different Meanings of Reparative Justice at the ICC

The Trust Fund has developed two new understandings of 'reparative justice' in the ICC's contested justice-making process: transformative justice and gender justice. On 16 March 2011, Trial Chamber I asked the Trust Fund and the Registry to write a joint report on reparations to help the Chamber in devising the principles and procedures of reparations. Yet, after a period of consultations, the Registry and the Trust Fund decided to submit separate reports due to differences in their views.³⁵ Indeed, a closer reading of the two documents suggests that they embrace different ideas of 'reparative justice'. Citing the UN Women's Progress of the World's Women report, the Trust Fund notes in its separate submission that 'reparations that support women's economic empowerment can contribute to transformative justice by placing them in a better position to break with historic patterns of subordination and social exclusion'.³⁶ In a latter report to Trial Chamber I, the TFV elaborates on the concept of transformative justice and explains why it should be part of the Court's reparation principles. The TFV notes that 'in the aftermath of war crimes, crimes against humanity and genocide, it will often not be appropriate to restore the *status quo ante* that gave rise to such crimes, in particular because the majority of victims of such crimes will likely have been the powerless and dispossessed at the time when the conflict erupted'.³⁷ The TFV therefore suggests that the Chamber explicitly

³⁵ They especially differed on whether the Trust Fund is obliged to complement reparation awards with its voluntary contributions for its assistance mandate. See Second Report of the Registry on Reparations, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 1 September 2011, §2.

³⁶ Trust Fund for Victims' First Report on Reparations, *supra* note 35, §34; UN Women, *Progress of the World's Women: In Pursuit of Justice* (2011), available online at <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf> (visited 4 September 2013), at 98.

³⁷ Observations on Reparations in Response to the Scheduling Order of 14 March 2012, , *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 25 April 2012, §73.

addresses ‘transformative reparations’ in its reparation principles ‘with a view to eliminating the pre-existing structural inequalities that have led to or encouraged the violence’.³⁸ In its summer 2012 progress report titled ‘Empowering victims and communities towards social change’, the TFV emphasizes that ‘beyond the empowerment, there is also the complex issue of social change, as an ultimate goal of the TFV programme...’³⁹

It is noteworthy that by developing this concept of transformative justice, the Trust Fund challenges the conventional understanding of reparations, namely the idea that reparations aim at restoring the status quo ante, the conditions the victim found herself in before the crime was committed.⁴⁰ Indeed, in its separate report to Trial Chamber I, the Registry appears to endorse this conventional understanding. Rather than seeing the structural conditions of inequality and social exclusion of the status quo ante as what gave rise to the crime and should therefore be addressed by reparations, the Registry distinguishes between the social ills predating the crime and the social ills that were caused by the crime. As the Registry states:

many of the reasons for the neediness of groups of victims often predate entirely the crime they suffered and, indeed, may be entirely unrelated to it. Since the purpose of reparations is to address the effects of crimes within the jurisdiction of the Court it is important that reparations do not merely seek to redress pre-existing societal ills unconnected with the crime of which individuals have become victims.⁴¹

These reports suggest that different stakeholders within the Rome Statute system have different ideas of what reparative justice means.

³⁸ Ibid, §77.

³⁹ Trust Fund for Victims, *Empowering Victims and Communities Towards Social Change. Programme Progress Report Summer 2012* (2012), available online at http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20PPR%20Summer%202012%20ENG%20Final_.pdf (visited 26 August 2013), at 27.

⁴⁰ The traditional understanding of reparations was established by the Permanent Court of International Justice (PCIJ) in the *Chorzow Factory* case: ‘reparation must, 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.’ See *Factory at Chorzow (Germ. v. Pol.)*, 1928 PCIJ Series A, No.13 (Sept. 13), §125.

⁴¹ Second Report of the Registry on Reparations, *supra* note 37, §42.

Yet, the Trust Fund's idea of transformative justice does not exist in a conceptual vacuum. On the contrary, it draws heavily on the reparation principles developed in civil society and UN documents. It also has to be contextualized in the broader literature on transitional justice and peacebuilding. Most importantly, the Trust Fund draws on the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, a civil society document that was devised by women's rights advocates and activists in 2007.⁴² The Nairobi Declaration claims 'that reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls'.⁴³ Furthermore, the UN Special Rapporteur on violence against women stresses that 'since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation'.⁴⁴ In the scholarly literature, Lambourne develops a model of 'transformative justice' as a way of integrating the fields of transitional justice and peacebuilding. She suggests that legal justice, psychosocial justice, socioeconomic justice and political justice are all part of transformative justice.⁴⁵ In her advocacy for transformative justice, Daly claims that 'if the public was involved in some way in the original oppression, then the culture that allowed the oppression to take place or actively pursued it must be changed'.⁴⁶ In the context of reparations, Saris and Lofts have embraced a transformative understanding of reparative justice. They argue that reparations should 'seek to repair past rights violations, while at the same time looking toward the future, aiming to promote peace and the protection of rights through the linked goals of reconciliation, redistribution, and development'.⁴⁷

⁴² V. Couillard, 'The Nairobi Declaration: Redefining Reparation for Women Victims of Sexual Violence', 1 *The International Journal of Transitional Justice* (2007) 444-453.

⁴³ FIDH, *Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation* (2007), available online at http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf (visited 4 September 2013), at 2.

⁴⁴ *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, Rashida Manjoo, A/HRC/14/22, 19 April 2010, §24.

⁴⁵ W. Lambourne, 'Transitional justice and Peacebuilding after Mass Violence', 3 *International Journal of Transitional Justice* (2009) 28-48, at 46.

⁴⁶ E. Daly, 'Transformative Justice: Charting a Path to Reconciliation', 12 *International Legal Perspectives* (2001) 73-183, at 74.

⁴⁷ A. S. Saris and K. Lofts, 'Reparation Programmes: A Gendered Perspective', in C. Ferstman, C. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*:

The Trust Fund appeals to the idea of transformative justice particularly in relation to gender crimes. In this context the concept of ‘gender justice’ has also been introduced. At a side event titled ‘Achieving Gender Justice: The Case for Reparations’ on 7 March, 2013 during the 57th session of the Commission on the Status of Women (CSW), Elisabeth Rehn, the Chair of the Board of Directors of the Trust Fund had the following to say about gender justice:

The Trust Fund for Victims is aware that a root cause of violence against women, particularly sexualized violence, is based on the historically unequal power relations between men and women, which have led to domination over, and discrimination against women by men...Therefore, our approach is to pay high and critical attention to **avoid restoring** societal inequalities between women and men. Rather, we aim to encourage and empower women and girls to overcome their situation of being victims...⁴⁸

It thus appears that gender justice aims at transforming gender relationships in the Court’s situation countries in order to create more gender-just societies and thereby to prevent future victimization of women and girls.

It is important to note that the goals of transformative and gender justice are not merely rhetorical; rather they are very much reflected in how the TFV understands and implements its mandates of victim assistance and reparations. Under its assistance mandate, the Trust Fund has supported initiatives such as the ‘peace school’, the ‘peace caravans’ and the ‘system of mutual solidarity’ that may not have been traditionally understood as part of the ‘necessary’ victim assistance the Trust Fund was mandated to provide.⁴⁹ The peace caravans are platforms for community dialogue and reconciliation, while the system of mutual solidarity, a village savings and loan scheme, is designed ‘to

Systems in Place and Systems in the Making (Leiden Biggleswade: Martinus Nijhoff; Extenza Turpin distributor, 2009) 79-100, at 87.

⁴⁸ E. Rehn, ‘Achieving Gender Justice: The Case for Reparations 57th Session of the Commission on the Status of Women (CSW) on the Elimination and Prevention of all Forms of Violence against Women and Girls’ (2013), available online at <http://www.trustfundforvictims.org/library> (visited 6 September 2013), at 3.

⁴⁹ Trust Fund for Victims, *supra* note 41, at 6, 23-27; Article 50 (a) (i) of the Regulations of the Trust Fund for Victims states ‘that the Trust Fund shall be considered to be seized when the Board of Directors considers it *necessary* to provide physical or psychological rehabilitation or material support for the benefit of victims and their families’ (my emphasis).

creat[e] strong social ties among the members, as well as, rebuild trust’.⁵⁰ The Trust Fund explains the rationale of the peace school as follows:

L’école de la Paix” implemented by the Missionnaires d’Afrique is a good example of *shifting the mindset of young people*. Actually, formal and non-formal education remains a cornerstone for empowerment and *behaviour change*. Through their activities outside and inside the formal education system, thousands of teenagers have received training dealing with everyday matters regarding peace, passive cohabitation, social cohesion, accepting differences and diversities. *Transforming the culture of those young people could have a long term positive effect*.⁵¹

What emerges from this quote is that the Trust Fund’s understanding of reparative justice goes beyond what criminal justice institutions would usually understand as their ‘business. Indeed, reparative justice goals such as ‘transforming the culture of those young people...’ conflict with the idea that ICJ institutions are neutral and non-political. Indeed, the Trust Fund’s rather extensive understanding of its assistance mandate has been criticized by NGOs that usually advocate for more victims’ engagement of the Court rather than less. The CICC, for example, has argued that the Trust Fund’s adoption of ‘reconciliation’ as one of its goals goes beyond its mandate.⁵²

Both the Trust Fund’s reparation and assistance mandate are part of reparative justice at the ICC. To begin with, even though the Trust Fund is in theory an independent institution within the Rome Statute system, in practice it is part of the ICC. The Trust Fund can only operate in situations in which the Court is active and only for the benefit of victims of crimes that fall under the ICC’s jurisdiction. More importantly, victims on the ground usually perceive the Court and the Trust Fund as part of one institution. (Interview Adrawa, 2013). As Wemmers observes ‘although the TFV is formally independent of the Court, people see it as part of the Court and thus, whatever it does will

⁵⁰ Trust Fund for Victims, *supra* note 18, at 9.

⁵¹ Trust Fund for Victims, *supra* note 41, at 24 (my emphasis).

⁵² CICC, *Comments on the Trust Fund for Victims’ Global Strategic Plan for 2009-2011* (2009), available online at http://www.iccnw.org/documents/CICC_TFV_Team_Comments_on_TFV_Strategic_Plan_2009-2011_March_2009.pdf (visited 30 June 2013), at 2.

impact victims' attitudes towards the ICC'.⁵³ Moreover, while it has been argued that the Trust Fund's reparation mandate is its 'justice component', while its assistance mandate is its 'humanitarian component', this distinction is artificial for two reasons.⁵⁴ First, the Trust Fund understands both its reparation and assistance mandate as part of its efforts to deliver 'reparative justice' and thereby blurs the distinction.⁵⁵ Second, it is unlikely that victims will make a distinction between reparation and assistance, given that they will presumably take the same form (collective awards) and will likely both be administered by the TFV.⁵⁶

The concepts of transformative justice and gender justice have also gained traction in the ICC's discourse beyond the documents of the Trust Fund and of NGOs such as the Women's Initiatives for Gender Justice - institutions that are after all rather peripheral within the Rome Statute system.⁵⁷ They have travelled from the periphery of the Rome Statute system to its judicial core, the Chambers. In its 'Decision establishing the principles and procedures to be applied to reparations' of 7th August 2012, Trial Chamber I observes that reparations with transformative objectives may be appropriate and 'can help prevent future victimization...'.⁵⁸ The Chamber also lists the Nairobi declaration as one of the documents that guided its thinking in devising the reparation principles and underpins this claim by extensively referencing the Nairobi declaration in its decision.⁵⁹

Yet, the meaning of reparative justice is not exhausted by the conventional understanding of reparations on the one hand and transformative and gender justice on

⁵³ J. Wemmers, 'Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims', 16 *International Review of Victimology* (2009) 211-227, at 225.

⁵⁴ E. Kristjánsdóttir, 'International Mass Claims Processes and The ICC Trust Fund For Victims', in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Leiden Biggleswade: Martinus Nijhoff; Extenza Turpin distributor, 2009) 167-196, at 168, 174-175.

⁵⁵ The Trust Fund for example states that 'both mandates [assistance and reparation] include implicitly a reparative justice aspect which aims at creating a true right to victims' reparation'. See Trust Fund for Victims, *supra* note 41, at 28.

⁵⁶ Decision Establishing the Principles and Procedures to be Applied to Reparations, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 7 August 2012, § 219, 261.

⁵⁷ Observations of the Women's Initiatives for Gender Justice on Reparations, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 10 May 2012, §12, 13, 17.

⁵⁸ Decision Establishing the Principles and Procedures to be Applied to Reparations, *supra* note 59, §222, 236.

⁵⁹ *Ibid*, §185, 192, 202, 209.

the other hand. Even when justice stakeholders use the same justice concept, for example gender justice, they often mean very different things. Apart from the Trust Fund's 'transformative' concept of gender justice, a more narrow understanding of gender justice also circulates in the Court's discourse. As a legal officer of Redress expresses, 'you do have lots of definitions out there as to what [gender justice] means and the way I would understand it is making sure that the gender elements are taking into account in the justice and the reparation process. For example, if you are trying to address the harm to decide on reparations it means to go beyond the obvious and look at the consequences on that person because of that person's position in society as a man or a woman...'. (Carayon, 2013). This concept of gender justice appears to be more specific to the ICC's reparation process; the ICC should be gender-sensitive in assessing the harms experienced by women and their reparation needs. We can make sense of these two understandings as part of a continuum that spans from the principle of non-discrimination on the basis of gender at one end to affirmative action to change gender relationships at the other end. The understanding expressed by the legal officer of Redress is closer to the non-discrimination end of the continuum, while the Trust Fund's understanding is closer to the affirmative action end of the continuum.

The meaning of reparative justice has even been turned upside down in the ICC's discourse. Indeed, in the same document in which Trial Chamber I cautiously endorses the idea of transformative justice, it also states that 'the conviction and the sentence of the Court are examples of reparations, given that they are likely to have significance for the victims, their families and communities'.⁶⁰ Spiga interprets this statement as evidence that 'punishment is considered as a form of reparation for victims of international crimes'.⁶¹ This would mean that retributive justice is a form of reparative justice. During the Rome negotiations, on the other hand, exactly the reverse was suggested, namely that reparation should also be understood as a form of punishment for the perpetrator.⁶² Under this interpretation, reparative justice is a form of retributive justice. This suggests that the meaning of reparative justice is very fluid in the Court's justice discourse and practice;

⁶⁰ Decision Establishing the Principles and Procedures to be Applied to Reparations, *supra* note 59, §237.

⁶¹ V. Spiga, 'No Redress without Justice Victims and International Criminal Law', 10 *Journal of International Criminal Justice* (2012) 1377-1394, at 1393-1394.

⁶² F. McKay, *supra* note 11, at 168-169.

different ICC justice stakeholders promote different meanings; some draw on and appropriate justice concepts developed by civil society and the scholarly literature, while others hold on to more conventional ideas in these justice contestations.

It is thus not clear to what extent the Trust Fund and the Court aim to transform the societies in which the ICC operates. There are also substantial limitations to the extent they can, given their limited resources and their dependence on the national authorities of the ICC's situation countries for their operations. It is also true that the TFV mainly works through its local partners and makes local ownership and participation important principles of its operations.⁶³ Nevertheless, it is arguably problematic that an institution so closely tied to a court that claims to be a neutral and non-political body should pursue transformative justice. Indeed, it appears that by promoting transformative justice, the Trust Fund blurs the distinction between development and reparation programmes.⁶⁴ Many scholars and practitioners have warned that reparations may fail to make victims feel acknowledged, if efforts at reparation and development are conflated.⁶⁵ De Greiff, for example, argues that 'development programs have a very low reparative capacity, for they do not target victims specifically' and that reparations should not be turned 'into the means of solving structural problems of poverty and inequality'.⁶⁶ Even if we accept that development and reparation can be integrated without depriving victims of recognition, as Saris and Lofts argue, it is questionable whether international judicial and administrative institutions such as the Court and the Trust Fund should undertake these complex efforts.⁶⁷ After all, both the civil society and UN documents that pioneered the concept of transformative justice and the transitional justice and peacebuilding literature see the realization of transformative justice as primarily the responsibility of the domestic

⁶³ Trust Fund for Victims, *supra* note 17, at 4.

⁶⁴ The Trust Fund itself though has states that 'it will be important to communicate the difference between reparations and development or humanitarian aid' to victims. See Observations on Reparations in Response to the Scheduling Order of 14 March 2012, *supra* note 36, §210.

⁶⁵ Redress, *Comments to the Trust Fund for Victims in Light of the Court's First Reparations Decision*, available online at <http://www.redress.org/downloads/publications/CommentsTrustFundFirstReparationDecision.pdf> (visited 18 September 2013), at 4.

⁶⁶ P. De Greiff, 'Justice and Reparations', in De Greiff and International Center for Transitional Justice (eds), *The Handbook of Reparations* (Oxford: Oxford University Press, 2006) 451-472, at 470.

⁶⁷ Saris and Lofts, *supra* note 49, at 81.

state.⁶⁸ In fact, societal transformations are presumably more legitimate and effective if they are part of a domestic, political and ideally deliberative decision-making process rather than the product of the judicial and administrative decisions of international institutions.

5. Justice for Victims in the Domestic and International Criminal Context: Making Sense of the Difference

To understand why we find these justice contestations at the ICC, but arguably less at domestic criminal courts, we have to appreciate the difference in legitimacy and institutional composition between domestic and international criminal courts. According to Weber, legal institutions derive their legitimacy from their rationality. Two ways of understanding legal rationality can be distinguished: substantive rationality and formal rationality.⁶⁹ Legal institutions such as criminal courts are substantively rational because they aim to achieve substantive ideas of justice such as retribution and prevention and they are formally rational as they operate according to procedural criteria such as due process and impartiality. When a justice system is unchallenged, as is often the case in domestic criminal courts with established justice procedures, formal rationality is the main standard to which the practice of these institutions is held. Even if there are different substantive justice ideas among justice stakeholders, they usually do not have much influence on established justice procedures. However, as a new and *sui generis* institution, the ICC lacks the legitimacy and the established justice procedures of domestic criminal courts. When justice procedures are new and ambiguous as it is the case with the Court's victims' rights regime, these substantive justice ideas of different justice stakeholders are presumably much more important in shaping justice concepts and practices in an interactive justice-making process. Indeed, the Court's victims' rights regime is not only characterized by a mixture of common and civil law procedures but also by 'constructive ambiguity', a concept which describes the drafting strategy of

⁶⁸ FIDH, *supra* note 45, at 2; UN Women, *supra* note 38, at 97.

⁶⁹ M. E. Spencer, 'Weber on Legitimate Norms and Authority', 21 *The British Journal of Sociology* (1970)123-134, at 128; D.L. D'Avray, *Rationalities in History: a Weberian Essay in Comparison* (Cambridge; New York, Cambridge University Press, 2010).

settling for vague treaty principles as a way of reaching agreement between negotiators at the Rome conference.⁷⁰ This strategy essentially left it to the Chambers of the Court to hammer out the Court's victims' rights principles and procedures, an ongoing task after ten years of operations.⁷¹ Indeed, the ICC still lacks established procedures and this appears to have pushed the court to focus more on its promise of substantive justice as a way of establishing the Court's legitimacy in the international community.

Working out what kind of justice an international criminal court should and can deliver is difficult in its own right. Yet, it is even more difficult for the ICC given that the Court is not only a new and sui generis institution but also much more than a normal court. As the new Registrar of the ICC pointed out, '...the ICC is a jurisdiction on its own. In a national legal system you have a police department, you have the justice department, you have the judiciary, you have the detention facilities, and these types of things. Over here [at the ICC], everything is part of one organization...'⁷² Indeed, the Court and its adjunct institutions such as the Court's field offices, the Trust Fund and local intermediaries and partners engage in a much broader range of activities than their domestic counterparts including trials and detention but also field engagement, community outreach, witness protection, victim participation, victim reparation and victim assistance; these different activities have prompted some of the Court's justice stakeholders to adopt more holistic and complex visions of justice. Yet, the ICC's broad and diverse institutional make-up also means that a common vision of justice within the Rome Statute system is difficult to reach.

In this situation of legal and normative uncertainty and diversity of a new ICJ institution, the Chambers have been reluctant to establish Court-wide principles especially with regard to the ICC's victims' mandate. Indeed, it is fair to say that the ICC has become a case-by-case Court. The ICC Chambers decide on the principles and

⁷⁰ C. Van den Wyngaert, *supra* note 29, at 478.

⁷¹ War Crimes Research Office, *supra* note 28, at 30; Jouet, *supra* note 30, at 268; E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?', in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart, 2004) 315-334, at 323.

⁷² T. Stevenson, 'Q & A with International Criminal Court Registrar Herman von Hebel: Part I', The Lubanga Trial at the International Criminal Court. Blog of the Open Society Justice Initiative, 21 August 2013, available at <http://www.lubangatrial.org/2013/08/21/q-a-with-international-criminal-court-registrar-herman-von-hebel-part-i/> (last visited 28 September 2012).

procedures of victim participation anew for each case which means that victims in some cases enjoy more and different rights than victims in other cases.⁷³ The judges also decided to apply this case-specific approach to the stipulation of the Court's reparation principles, thereby again failing to create predictability and consistency for victims. Ferstman, for example, argues that this case-specific approach is contrary to the spirit and text of Article 75 (1) of the Rome Statute which envisaged general principles of reparations.⁷⁴

6. Conclusion

The engagement with criminology and victimology can help researchers to think more systematically about the similarities and differences in how the idea of 'justice for victims' has evolved in domestic and international criminal justice institutions. In both settings, the incorporation of victims' rights has generated controversy because many legal scholars and practitioners argue that victims' rights to reparation and especially participation in criminal proceedings threaten to undermine the principles of a fair trial, while failing to offer a meaningful role for victims. At the ICC, however, the introduction of this idea has had more far-reaching implications. Indeed, the opening up of the conventional, retributive justice discourse to the idea of justice for victims has led to more profound contestations and reflections about the very meaning of justice in ICJ. In this context, the Trust Fund has adopted a more holistic vision of justice reflected in its concepts of transformative justice and gender justice. The development of these rather unconventional justice ideas in ICJ suggests that the concept of justice can take on very different meanings once the traditional paradigm of retributive justice is opened up to new ideas. Indeed, the concepts of transformative justice and gender justice have increasingly gained traction in the Court's discourse, for example, they have become part of the Court's first decision on reparation principles. This paper suggested that the Court's justice contestations have to be understood in the institutional context of what is

⁷³ War Crimes Research Office, *supra* note 28, at 1.

⁷⁴ British Institute of International and Comparative Law, *Reparations to Victims: The Recent International Criminal Court Decision and Beyond* (2012), available online at http://www.biicl.org/files/6103_icc_7_august_2012_decision_-_rapid_response_seminar_report.pdf (visited 18 August 2013), at 2.

after ten years still a young ICJ institution. The lack of established procedures and the pressures from the international community push the ICC, in its quest for legitimacy, to focus on its main currency, the promotion of a substantive vision of justice. However, its broad and diverse institutional framework means that a common vision of justice within the Rome Statute system is unlikely at least in the short run. Justice contestations can be problematic for the Court as they undermine consistency and predictability for victims, for example, regarding their rights to participation and reparations. At its most extreme, justice contestations can lead to a disintegration of the Court's vision of justice, resulting in multiple and contradictory justice understandings and practices at the Court. In general, however, we should welcome these justice contestations in the early years of the Court as they lead to more reflection on what type of justice the Court should and can deliver.

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