

Restorative Justice and the International Criminal Court

John Kiess

FOR THOSE FAMILIAR WITH THE TERMS of the longstanding debate between proponents of retributive and restorative justice, the language recently emanating out of the International Criminal Court (ICC) will be somewhat hard to place. On the one hand, the ICC, established by the Rome Statute in 1998, embodies many features commonly associated with retributive justice: it issues indictments and arrest warrants, subjects suspects to judicial trial, delivers judgments, issues sentences, and administers punishment. Yet unlike its predecessor institutions, the ad hoc tribunals for the conflicts in the former Yugoslavia (ICTY) and Rwanda (ICTR), the ICC also extends an unprecedented set of rights to victims. Victims may participate in proceedings, are entitled to protection, and can receive reparation awards. This is intended to expand the scope of international criminal justice beyond punishing offenders to address harms suffered by victims. As the ICC Assembly of State Parties observes, “A key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a *restorative* function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims.”¹

That an international criminal tribunal would frame part of its mission in terms of restorative justice is a testament to just how much ground has shifted over the past two decades. For years, advocates of restorative justice criticized tribunals for embodying the very worst of retributivism, contending that they narrowly focused on punishing offenders to the neglect of the needs of victims and their wider communities.² It was against the “Nuremberg option” that Archbishop Desmond Tutu defended the South African Truth and Reconciliation Commission (TRC), arguing that criminal trials would have prevented a peace settlement, denied victims opportunities to tell their stories,

¹ ICC Assembly of State Parties, *Report of the Court on the Strategy in Relation to Victims*, ICC-ASP/8/45 (November 10, 2009), para. 3.

² For a helpful review of this debate, see Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press, 2011), esp. 58-90.

and enabled perpetrators to avoid real accountability for their crimes.³ The TRC represented, in his words, “another kind of justice,” one which focused on “the healing of breaches, the redressing of imbalances, the restoration of broken relationships, [and the attempt] to rehabilitate both the victim and the perpetrator.”⁴ That Tutu couched his case for a truth commission in the grammar of forgiveness and reconciliation lent his case an added layer of theological credibility, furthering an already widespread sense among theological proponents of restorative justice that the Christian gospel’s call to love one’s enemies was best honored through strategies pursued outside the courtroom.⁵

For their part, defenders of judicial punishment dug in their heels, contending that restorative justice unfairly demanded that victims sacrifice their needs in the interest of national healing.⁶ Yet when a formidable victims’ rights movement emerged within international law itself, exposing the field’s own marginalization of victims, champions of trials found themselves facing many of restorative justice’s concerns on their home turf.⁷ As a result, reform-minded international lawyers began to explore ways that the judicial process might better promote victim participation and redress, with many adopting the language of restorative justice in advancing their efforts.⁸

³ Desmond Tutu, *No Future Without Forgiveness* (New York: Doubleday, 1999), 19-27.

⁴ Tutu, *No Future Without Forgiveness*, 54-5. See also Charles Villa-Vicencio, “A Different Kind of Justice: The South African Truth and Reconciliation Commission,” *Contemporary Justice Review* 1 (1999): 407-28.

⁵ See Howard Zehr, *Changing Lenses: Restorative Justice for Our Times* (Harrisonburg, VA: Herald Press, 2015 [1st ed 1990]), 129-77.

⁶ Amy Gutmann and Dennis Thompson write, “Proponents of restorative justice should recognize that for many victims of apartheid, restoration is incompatible with amnesty, and perhaps unachievable in any case.... If ‘the healing of the nation’ is taken to mean forgiveness by the victims and repentance by the perpetrators of apartheid crimes, it is a utopian aim, and not even a positive one” (“The Moral Foundations of Truth Commissions,” in *Truth v. Justice: The Morality of Truth Commissions*, ed. Dennis Thompson and Robert Rotberg [Princeton: Princeton University Press, 2000], 32). For a similar perspective, see Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001).

⁷ For a comprehensive overview of the movement, see M. Cherif Bassiouni, “International Recognition of Victims’ Rights,” *Human Rights Law Review* 6, no. 2 (2006): 203-79. See also Valentina Spiga, “No Redress without Justice: Victims and International Criminal Law,” *Journal of International Criminal Justice* 10 (2012): 1377-94; and James Dignan, *Understanding Victims and Restorative Justice* (Berkshire, UK: Open University Press, 2005).

⁸ Bassiouni writes, “The provision of a remedy and reparations for victims of serious violations of international human rights and humanitarian law is a fundamental component of the process of restorative justice” (Bassiouni, “International Recognition of Victims’ Rights,” 231). Brianne McGonigle provides another instance: “restorative justice calls on international courts to focus attention on the interests of victims rather

As for restorative justice advocates, criticism of truth commissions and amnesties has led many to reconsider the wisdom of framing restorative justice as an alternative to trials. Some thinkers are now entertaining a more restorative role for judicial punishment.⁹ To date, such efforts have focused on the potential complementarity of international tribunals and other restorative options,¹⁰ but there has been little engagement with international law's attempt to incorporate restorative principles within tribunals themselves. This article attempts to fill that gap. It provides a comprehensive assessment of the prospects for restorative justice at the International Criminal Court.

I begin by reviewing one influential recent restorative account of judicial punishment. Daniel Philpott argues persuasively that trials can address a number of the harms suffered by victims, and he provides a particularly helpful analytical framework for assessing their restorative impact.¹¹ He also identifies several compelling theological warrants for restorative punishment, which I develop in conversation with the work of Nigel Biggar and William Danaher. In his discussion of the way that judicial punishment defeats what he calls "the standing victory of injustice," Philpott describes the importance of combining strong legal authority (a historic strength of international tribunals) with victim participation (a historic weakness). He concludes that community courts such as Rwanda's *gacaca* courts and Timor-Leste's Community Reconciliation Panels carry more restorative promise and focuses his proposed reforms there. I pick up where Philpott leaves off, considering the possibility of reform at the international level. I review the Rome Statute's incorporation of three restorative principles: victim participation, protection, and reparations. I then trace how the Court has implemented and developed these measures in early jurisprudence, before providing an assessment of their restorative impact. I conclude with a set of recommendations for how the ICC might go about strengthening this impact. As I intend to show, incorporating

than strictly on the prosecution and punishment of the accused" (McGonigle, "Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court," *Florida Journal of International Law* 21 [2009], 96). For a helpful discussion of different appeals to restorative justice across multiple disciplines, see James Dignan and Michael Cavadino, "Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from a Victim's Perspective," *International Review of Victimology* 4 (1996): 153-82.

⁹ See Daniel W. Van Ness, "Accountability," in *Restorative Justice, Reconciliation, and Peacebuilding*, ed. Jennifer J. Llewellyn and Daniel Philpott (Oxford: Oxford University Press, 2014), 118-37.

¹⁰ See Donald W. Shriver, Jr., "Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice," *Journal of Law and Religion* 16, no. 1 (2001): 1-33.

¹¹ Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (Oxford: Oxford University Press, 2012).

restorative principles into the practice of international tribunals is a worthy form of restorative justice advocacy, but much work remains to be done if the ICC is to fulfill its restorative mandate.

RESTORATIVE PUNISHMENT

Daniel Philpott is one of several recent thinkers who have sought to defend judicial punishment on restorative grounds. While critical of what he calls the “theology” of international prosecution—the reigning orthodoxy among international lawyers and human rights organizations that overestimates the effect of trials relative to other, arguably more important peacebuilding strategies—Philpott nonetheless sees an important restorative role for trials.¹² The mistake that most restorative justice advocates make is that they confuse judicial punishment (which can take many forms, not only international tribunals, but also hybrid national/international courts, trials conducted under universal jurisdiction, or more traditional community courts) with the various justifications that are offered in their defense. Like other restorative justice advocates, Philpott remains unconvinced that trials play a major role in deterring future wrongdoing, and he opposes the notion that punishment balances some abstract moral scale of harms.¹³ But he does not reject trials. Instead, he attempts to provide a different justification for them, referring to what he calls “restorative punishment.”¹⁴

“Restorative punishment,” Philpott observes, “holds that the purpose of punishment is the repair of persons, relationships, and communities with respect to the harms that crime, or in this context, political injustice, inflicts on them.”¹⁵ Here Philpott appeals to one of the

¹² In “Peace after Genocide,” Philpott writes, “In what sense is the liberal peace like a theology, even though it is decidedly and professedly secular? In its aspiration to satisfy the global demands of justice in response to gargantuan evil. In the centrality, the universality, and the completeness that it claims for its preferred laws and institutions. In the grandness with which its advocates speak about its aspirations” (“Peace after Genocide,” *First Things* [June/July 2012], 40). Drawing upon the work of Judith Shklar, Leebaw makes a similar point, referring to what she calls “human rights legalism.” She explains, “With Nuremberg as a major source of inspiration, human rights legalism not only insists upon the promotion of *law* and courts in general, but on the centrality of *criminal law* in the aftermath of atrocities and political violence” (Leebaw, *Judging State-Sponsored Violence*, 6). “Less obviously,” she goes on to say, “human rights legalism has narrowed the scope of inquiry associated with transitional justice policy and practice. These institutions have tended to focus on violations of civil and political rights, which are amenable to a legalistic response, while avoiding economic and social injustices, which are held to require broader political solutions” (7-8).

¹³ Philpott, *Just and Unjust Peace*, 213-19.

¹⁴ Philpott borrows the term from Christopher Marshall, who employs it in *Beyond Retribution: A New Testament Vision for Justice, Crimes, and Punishment* (Grand Rapids, MI: Eerdmans, 2001), 131-40.

¹⁵ Philpott, *Just and Unjust Peace*, 219.

central aims of restorative justice: to expand the focus of criminal justice to include all of the relevant parties who are harmed by crime, including the offender him or herself. Within a framework that understands justice as the righting of those harms, punishment receives a new mandate: not to repay harm for harm, but to repair harm.

To understand how punishment can repair harms, we first need to understand what those harms are. In the specific context of political injustice, involving systematic or widespread crimes, Philpott distinguishes between what he calls “primary wounds” and “secondary wounds.”¹⁶ Primary wounds are those directly caused by violence and include the following: harms to a victim’s person, violation of a victim’s human rights, victims’ ignorance of the source and circumstances of political injustices, lack of acknowledgement of the suffering of victims, the standing victory of the wrongdoer’s political injustice, and harm to the person of the wrongdoer. Harms to a victim’s person may be the most obvious of these wounds; they include death and physical injury, psychological trauma, grief or humiliation, as well as the loss or destruction of property. The violation of one’s human rights represents an additional wound in that it fails to confer the respect that individuals are owed by virtue of being human. Ignorance of the sources and circumstances of a political injustice stems from the culture of secrecy and uncertainty that often surrounds systematic violence. The lack of acknowledgment of suffering is a further consequence of this culture, constituting a wound upon a wound.¹⁷

By “standing victory of political injustice,” Philpott means “the ongoing triumph of the perpetrator’s evil deed,” which “persists even if just political institutions are restored.”¹⁸ Here Philpott seeks to draw attention to the communicative dimension of injustice, the way it advances specific claims that, until contradicted, continue to carry normative or disciplinary force. A torturer walking freely in a society, for example, makes the claim that torture is permissible. Philpott explains, “Wrongful words and deeds create realities to which other people must respond.... The injustice that the perpetrator has committed stands and must now be dealt with in some way by victims, the government, members of the community, and the perpetrator.”¹⁹ This, Philpott notes, is what human rights activists have in mind when they speak of

¹⁶ Philpott, *Just and Unjust Peace*, 30-47.

¹⁷ Philpott quotes André du Toit, “For the victims, this actually is a redoubling of the basic violation: the literal violation consists of the actual pain, suffering and trauma visited on them; the political violation consists in the refusal (publicly) to acknowledge it” (Philpott, *Just and Unjust Peace*, 37). The original source is du Toit, “The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition,” in *Truth v. Justice*, 133.

¹⁸ Philpott, *Just and Unjust Peace*, 38.

¹⁹ Philpott, *Just and Unjust Peace*, 38-9.

combatting “cultures of impunity;” they are referring to the importance of rejecting the destructive claims advanced through wrongful acts that continue to parade as truth.²⁰ Until such claims are contradicted, victims continue to experience them as wounds.

That perpetrators can convince themselves that such lies are true connects to a final wound, the wound to the perpetrator. We are rightly hesitant to extend a discussion of political wounds to perpetrators, wary of relativizing the vast chasm that separates the experience of the victim and offender. But we need only consult our own experience of wrongdoing to know how it diminishes our character and ability to flourish. “Evil,” Philpott observes, “is disintegrative. It separates the wrongdoer’s actions and commitments from his true moral self and is thereby destructive.”²¹ In drawing attention to the wound of the perpetrator, restorative justice seeks to acknowledge how wrongdoing damages wrongdoers themselves, in addition to those around them.

All of these represent primary wounds. Secondary wounds represent the long afterlife of primary wounds, felt in a person’s memory, emotions, judgments, or actions. If a massacre goes unacknowledged, it will affect how survivors remember the attack; this in turn will deepen their anger, which will influence their judgments about future courses of action, which will eventually determine the actions they undertake. So long as secondary wounds go unaddressed, they threaten to boil over in a fresh round of primary wounds, renewing the cycle of violence all over again.

On Philpott’s restorative account, the purpose of punishment is to help repair both kinds of wounds.²² The wound that punishment most directly addresses is the standing victory of injustice. “Judicial punishment is a communication of censure whose purpose is to defeat, or bring down, decisively the standing injustice.”²³ Like injustice itself, punishment is communicative.²⁴ “The physical aspect of punishment is not something added to the communication but is itself a part of it.”²⁵ By actually depriving a wrongdoer of something, be it time,

²⁰ Philpott, *Just and Unjust Peace*, 39.

²¹ Philpott, *Just and Unjust Peace*, 40.

²² Judicial punishment is not, to be clear, the only way to repair these wounds. Most of Philpott’s attention focuses on other reparative strategies, including the building of socially just institutions, acknowledgment of wrongdoing (through such mechanisms as truth commissions), formal apologies, reparations, and expressions of forgiveness.

²³ Philpott, *Just and Unjust Peace*, 223.

²⁴ Nicholas Wolterstorff defends a similar conception of punishment, which he calls the “reprobative theory of punishment.” On this account, “Punishment conveys to those who have ears to hear that society does not condone what was done.... When reprobative punishment is exercised properly, it’s an intrinsic good in the life of punisher and wrongdoer, and an important instrumental good for society in general, perhaps also for the wrongdoer” (Wolterstorff, *Justice in Love* [Grand Rapids, MI: Eerdmans, 2011], 197).

²⁵ Philpott, *Just and Unjust Peace*, 223.

money, political office, or some other good, we convey both the wrong of the action and the gravity of that wrong. Such a communication is directed first and foremost at the offender, as a rejection of the claim embodied in his or her injustice, but it is also directed at victims (vindicating them against the false claims of the unjust) as well as the community at large (vindicating their laws against the criminal activity of the unlawful).²⁶ The aim is that the wrongdoer eventually receives the communication as his or her own truth, which would turn the deprivation into a vehicle of restoration, a good. The overall effectiveness of the communication, however, is not ultimately contingent upon his or her acceptance. The defeat of political injustice hinges upon two other factors: the legal authority of those who judge and the participation of the affected population.

Regarding the first, Philpot writes, “Since a communication that defeats injustice is also one that delivers a victory to just laws, it must be delivered by an authority who speaks for the law and who determines guilt and punishment in a way that reflects the law’s justice—namely, a court.”²⁷ One could carry out a private mediation, as many restorative justice advocates do, but crucially, it would lack public authority, and thus would not represent the censure of the community as a whole. When critics of truth commissions say they want justice, part of what they are demanding is censure at this level. Philpot notes that it is here that particularly compelling arguments can be made in favor of international tribunals. Representing the international community as a whole, they have the capacity to deliver public censure at a transnational level. As Philpot observes, “International tribunals are especially promising for their authority when human rights violations are involved, for they can claim best a warrant to speak for humanity and convict perpetrators of crimes that are recognized as crimes by all of humanity.”²⁸ International tribunals also typically observe high legal standards, adding additional weight to their authority. The comparatively poor record of the *gacaca* courts in Rwanda and the Community Reconciliation Panels (CRPs) in Timor-Leste shows how the effectiveness of a communication can be diminished when due process is not observed. A society, or a significant portion of a society, will be less inclined to receive a communication if the process that produced it was unfair.

²⁶ Philpott, *Just and Unjust Peace*, 224.

²⁷ Philpott, *Just and Unjust Peace*, 224-5.

²⁸ Philpott, *Just and Unjust Peace*, 225. Hannah Arendt makes a similar point in *Eichmann in Jerusalem*, suggesting that we minimize the monstrousness of genocide and crimes against humanity when we try them before courts that represent one nation only; such crimes offend against the international community as a whole, and should be tried before courts that issue judgments in the name of that community. See Arendt, *Eichmann in Jerusalem* (London: Penguin, 1963), 270.

But what such community courts lose in legal authority they tend to gain in popular participation, the second quality that Philpott attributes to punishment that effectively defeats a standing injustice. “By participation,” Philpott writes, “I mean the active involvement in the judicial process of those drawn into the web of the crime’s effect” which “adds dimension and depth to punishment’s communication.”²⁹ “In telling their story before the perpetrator and the community, victims gain acknowledgment, contribute to the formulation of a fitting punishment, and are more receptive to this punishment when it is delivered.”³⁰ All of this contributes to a more restorative impact of punishment, especially for victims and local communities. In some cases, it may even lead participants to lessen the punishment, or explore alternative, more meaningful sentences, such as offenders rebuilding the homes of victims.³¹

In addition to defeating the standing victory of injustice, punishment also addresses the other wounds mentioned above. First, in bringing specific charges against offenders, judicial punishment provides a public language for naming the suffering that victims have endured, granting them the acknowledgment that regimes have denied them. In the process, punishment reconfirms victims as bearers of rights and restores the dignity that offenders violated, repairing the violation of their human rights. Moreover, judicial punishment “often yields information on the source and circumstances of the suffering of victims as well,” giving to victims a measure of the truth that they have sought.³² While offenders may be more forthcoming in the setting of a truth commission or a community court, “trials have the ability to seize and subpoena information and elicit the testimony of witnesses and defendants,” providing an authoritative record of fact backed by high evidentiary standards.³³ With regard to harms to a victim’s person, trials have less to offer, but those that require defendants to pay damages or reparations may help redress specific bodily or property losses. Philpott reports that the Community Reconciliation Panels of Timor-Leste, for example, “included reparations and the repair of houses, buildings, and roads as part of their reconciliation agreements.”³⁴

Trials may also help repair harms to the perpetrator, but this is contested. Philpott notes that most apologies do not occur in the context of judicial punishment, which confirms the restorative suspicion that

²⁹ Philpott, *Just and Unjust Peace*, 227.

³⁰ Philpott, *Just and Unjust Peace*, 227.

³¹ Philpott, *Just and Unjust Peace*, 228.

³² Philpott, *Just and Unjust Peace*, 236.

³³ Philpott, *Just and Unjust Peace*, 237.

³⁴ Philpott, *Just and Unjust Peace*, 237.

the adversarial nature of court proceedings tends not to encourage accountability. Yet Philpott argues that it depends again on the forum. "Among 941 *gacaca* court defendants observed by Avocats Sans Frontières between October 2005 and December 2007, 352 confessed to crimes of which they had been accused."³⁵ If many doubted the sincerity of such confessions because of their connection to reduced sentencing, the CRPs of Timor-Leste may inspire more confidence, where confession was not tied to the scale of punishment.³⁶ Finally, with regard to secondary wounds, Philpott notes that trials can have a modest role in transforming the emotions and judgments of affected populations, but suggests this is an area where other restorative practices may be more effective.

THEOLOGICAL WARRANTS FOR RESTORATIVE PUNISHMENT

While Philpott writes primarily as a political scientist, he appreciates the role that religious traditions have played in generating restorative conceptions of justice and punishment. Recognizing that the Hebrew Scriptures are often cited in defense of retributive justice, Philpott argues that it is God's broader covenant purposes and the overall *telos* of *shalom* that should guide our interpretation of the *lex talionis* and other similar passages. Drawing upon the work of Abraham Heschel, he observes:

The two words in the Jewish Bible that are most often translated into English as justice—*sedeq* (or its feminine form, *sedeqah*) and *mishpat*—are also frequently translated as 'righteousness'.... In the Jewish scriptures, righteousness is a matter of right relationship between parents and children, priest and worshippers, merchants and buyers, kings and subjects, judge and disputants, members of a community and the widows, orphans, poor, and resident aliens among them, and between each person and God, each living up to the demands of a particular relationship, all of these relationships aggregated into a comprehensive right relationship within an entire community and between an entire community and God.³⁷

Punishment derives its specific rationale from this comprehensive vision: it is a means of restoring right relationship. This explains the particular prominence of restitution as a judicial response to wrongdoing. "*Shillem*," Philpott explains, "the Hebrew word for 'restitution', is a close variant of *shalom*, connoting restoration and the act of making full."³⁸ He adds, "Though restitution for theft sometimes amounts

³⁵ Philpott, *Just and Unjust Peace*, 234.

³⁶ Philpott, *Just and Unjust Peace*, 234.

³⁷ Philpott, *Just and Unjust Peace*, 122-3. Philpott is drawing from Heschel's *The Prophets* (New York: Harper and Row, 1962), 200.

³⁸ Philpott, *Just and Unjust Peace*, 221.

to several times the value of what was stolen, the added amount was designed to communicate the seriousness of the offense.”³⁹ From this vantage point, the point of the *lex talionis* becomes clear: it “was mainly to limit retribution by keeping it proportionate and equitable, thus constraining the blood revenge typical of local tribal practice.”⁴⁰

When Jesus enjoins the disciples to turn the other cheek, give away their cloaks, and go the extra mile with their enemies, Philpott does not take him to be abandoning this view of punishment (“I came not to abolish the law”) but to extend it (“to fulfill it”). In effect, Philpott takes Jesus to be saying, “Do not just limit retribution, rather do not seek it at all. If one—an individual, a disciple—is wronged, then he ought to love his enemy and do good to him.”⁴¹ Doesn’t this rule out punishment altogether? Not according to Paul. In speaking of public authorities as agents of God’s “*orgē*,” or anger, Paul clearly reserves a role for punishment, but it is punishment in the expressivist or communicative mode mentioned above, rather than retribution. Punishment communicates censure for wrongdoing, an obvious expression of love for innocent victims, but it can also be seen as expression of love for the enemy when it raises the gravity of the offense to his or her attention and invites the offender to repent.

The idea of punishment as an expression of love for enemies has a long lineage in Christian theology, going back at least as far as Augustine. In his letter to Marcellinus, Augustine speaks of punishment as “a sort of kind harshness” that ultimately seeks to reintegrate the offender back into the community.⁴² Such a notion can easily degenerate into paternalism (in Augustine’s case, a violent paternalism—think of the Donatist controversy). Yet for Nigel Biggar, such a notion remains a fruitful way for navigating many of the various oppositions that often polarize Christian discussions of justice and forgiveness.⁴³ In building his case for punishment, Biggar emphasizes the importance to distinguishing two moments of forgiveness. The first moment, what he calls “forgiveness-as-compassion,” is the initial gesture of good will that the victim extends to the offender; it is the decision to forego vengeance and keep open the possibility of a future reconciliation.⁴⁴ Foreswearing vengeance, however, is not the same as granting absolution. Absolution represents the concluding gesture of forgiveness, “the moment when, paradigmatically, the victim ad-

³⁹ Philpott, *Just and Unjust Peace*, 221.

⁴⁰ Philpott, *Just and Unjust Peace*, 221.

⁴¹ Philpott, *Just and Unjust Peace*, 222.

⁴² “Letter 138: Augustine to Marcellinus,” in *Augustine Political Writings*, ed. E. M. Atkins and R.J. Dodaro, (Cambridge: Cambridge University Press, 2001), 38.

⁴³ Biggar, “Forgiving Enemies in Ireland,” *Journal of Religious Ethics* 36, no. 4 (2008): 559-79.

⁴⁴ Biggar, “Forgiving Enemies in Ireland,” 561.

dresses the perpetrator and says, 'I forgive you. The trust that was broken is now restored. Our future will no longer be haunted by our past'.⁴⁵ The gesture of absolution waits for signs of meaningful change on the part of the perpetrator, and this is where Biggar sees a restorative role for punishment. In terms that strongly resonate with Philpott's understanding, Biggar argues that when moderated by compassion, punishment can become a medium of "communication intended to persuade the wrongdoer of the wrong he has done, to elicit his repentance, and so to enable forgiveness-as-absolution and consequent reconciliation."⁴⁶ This is what allows us to entertain the initially counterintuitive possibility that punishment might itself be seen as a form of forgiveness, or at least a form of mercy that keeps the door open to forgiveness-as-absolution.

Philpott goes on to note that it is "not just the teachings of Jesus and Paul" but "the death and resurrection of Jesus Christ that inform Christian views on punishment."⁴⁷ "Views of the atonement," he explains, "beget views of reconciliation, which in turn beget views of punishment. The Calvinist notion of penal substitution readily supports balance retributivism; the holistic reconciliation of Athanasius and of several twentieth-century theologians supports restorative punishment."⁴⁸ Of course, not all theological advocates of restorative justice begin from the same theological premises. In his survey of recent theological defenses of restorative justice, William Danaher notes how many take their cues from Christ's death.⁴⁹ Representing an unconditional, forgiving love that transcends all sacrificial logics, Christ's death for these theologians is a triumph over retributive justice and a universal call to Christians to extend the same forgiving love to others. In terms that recall Biggar's worry about conflating the two moments of forgiveness, Danaher suggests the problem with such theologies is that they leave little room to accommodate the victim's cry for redress. Such a cry, he observes, "does not derive—as some of these theologians sometimes allege—from a purely human need for vengeance, but from the victim's sense that her rights, which derive from her status as a child of God, have been violated."⁵⁰ "A truly restorative theory of

⁴⁵ Biggar, "Forgiving Enemies in Ireland," 563.

⁴⁶ Biggar, "Forgiving Enemies in Ireland," 563-4.

⁴⁷ Philpott, *Just and Unjust Peace*, 222.

⁴⁸ Philpott, *Just and Unjust Peace*, 222.

⁴⁹ William Danaher, "Towards a Paschal Theology of Restorative Justice," *Anglican Theological Review* 89, no. 3 (2007): 359-73. He has in mind John de Gruchy, *Reconciliation: Restoring Justice* (Minneapolis: Fortress Press, 2002), Miroslav Volf, *Exclusion and Embrace: A Theological Exploration of Identity, Otherness, and Reconciliation* (Nashville: Abingdon, 1996), and Timothy Gorringer, *God's Just Vengeance: Crime, Violence, and the Rhetoric of Salvation* (Cambridge: Cambridge University Press, 1996).

⁵⁰ Danaher, "Towards a Paschal Theology of Restorative Justice," 367.

atonement would need to show how these claims are honored, and this order maintained, in an account that moves beyond retribution.”⁵¹

We do better, Danaher argues, to begin with the resurrection. Drawing upon the work of Rowan Williams,⁵² Danaher argues that when the disciples confront the resurrected Christ, they confront the wounded Christ, Christ “the victim of the violence that pervades earthly existence, a violence in which they have colluded. The disciples are, as it were, offenders who need to seek their own redemption through meeting their victim and acknowledging their crimes.”⁵³ Reconciliation that begins with the resurrected Christ begins with the claims of the victim. “But instead of placing the victims over the oppressors, which only changes the roles but not the script, Jesus’ reconciliation presents an invitation to live an entirely new life, one in which the past is not forgotten, but loses its power to control us.”⁵⁴ This means we can accommodate certain “retributive intuitions” within an outlook that ultimately aims at restoration. As he puts it:

In such an account, retributive intuitions [such as punishment] do not mandate the infliction of pain, but a proportionate response to the imbalance that results from wrongdoing. As such, these intuitions protect the moral ground on which the claims of the victim stand, and they inform the practical responsibility Christians have in political contexts to render judgments that determine innocence and guilt, that vindicate the innocent, and that determine a measured response of punishment, reparation, or mercy.⁵⁵

For Danaher, there is thus a role for judicial punishment within a restorative justice outlook, one whereby offenders are awakened to their victims and find in that encounter a basis of their transformation.

To return to Philpott, some judicial settings advance restorative punishment better than others. As we have seen, international tribunals boast strong legal authority and their judgments carry the potential weight of the entire international community. But Philpott finds them especially weak on participation. “In the case of some courts [such as the ICTR], the communicative value of punishment is undermined by the courts’ remoteness from the community in which the crimes took place.”⁵⁶ Philpott accepts there is a necessary tradeoff between legal authority and participation at international tribunals, but he is more

⁵¹ Danaher, “Towards a Paschal Theology of Restorative Justice,” 367.

⁵² Rowan Williams, *Resurrection: Interpreting the Easter Gospel* (Cleveland: Pilgrim Press, 2002).

⁵³ Danaher, “Towards a Paschal Theology of Restorative Justice,” 369.

⁵⁴ Danaher, “Towards a Paschal Theology of Restorative Justice,” 370.

⁵⁵ William J. Danaher, Jr., “Music That Will Bring Back the Dead? Resurrection, Reconciliation, and Restorative Justice in Post-Apartheid South Africa,” *Journal of Religious Ethics* 38, no. 1 (January 2010): 126.

⁵⁶ Philpott, *Just and Unjust Peace*, 229.

hopeful that a balance can be struck at the level of community courts. Geographically proximate to those most affected by conflict, open to the contributions of victims, families, and community members, the judgments arising out of these forums reflect more voices and have the potential to transform the way that victims and offenders actually relate to one another in the communities in which they live. "Such restorative processes of judicial punishment are difficult to achieve in a conventional trial, which is not conducive to a full, fluid, or empathetic hearing of victims' and perpetrators' stories."⁵⁷

But could they be? This is the question that a number of reform-minded human rights advocates and international lawyers began asking in the lead-up to the establishment of the International Criminal Court. It is their efforts to make international criminal justice more participatory, and more restorative, to which I now want to turn.

INCORPORATING RESTORATIVE JUSTICE AT THE ICC

The ad hoc international tribunals for the conflicts in the former Yugoslavia and Rwanda renewed the practice of judicial punishment begun at the Nuremberg Tribunals nearly a half-century before, but were roundly criticized for failing to account for the perspective of victims.⁵⁸ According to the War Crimes Research Office, "While the ad hoc criminal tribunals [did] benefit from the participation of victims as witnesses, victims [had] no opportunity to participate in their own right, nor [were] victims able to request compensation in proceedings before the tribunals."⁵⁹ "Furthermore, although the judges of both the ICTY and the ICTR considered the possibility that their statutes might be amended to authorize the award of reparations to victims, each tribunal ultimately rejected such an amendment."⁶⁰ In advance of the Rome Conference, which eventually drafted the statute for the International Criminal Court, a number of NGOs formed the Victims' Rights Working Group and lobbied for the inclusion of more restorative measures for victims. The drafters eventually included three restorative principles: participation, protection, and reparations.⁶¹

⁵⁷ Philpott, *Just and Unjust Peace*, 229.

⁵⁸ See John L. Washburn, "What Lessons Can Be Learned from the Ad Hoc Criminal Tribunals?," *U.C. Davis Journal of International Law and Policy* 9, no. 1 (2002): 23-30.

⁵⁹ War Crimes Research Office, *Victim Participation before the International Criminal Court* (Washington, DC: Washington College of Law, 2007): 12.

⁶⁰ War Crimes Research Office, *Victim Participation*, 12.

⁶¹ For more background on the negotiations, see Fanny Benedetti, Karine Bonneau, and John Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Leiden: Martinus Nijhoff, 2013), and M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court," *Cornell International Law Journal* 32, no. 3 (1999): 443-69.

Let me begin with participation.⁶² The right of victims to participate in proceedings is enshrined in Article 68:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.⁶³

Here we see how the drafters attempted to navigate the tension between legal authority and victim participation noted above.⁶⁴ During the negotiations, many of the delegates from common law countries, including the United States and Britain, expressed doubt that such a balance could be struck.⁶⁵ As Markus Funk explains, “Their concern was, in part, that victim participation could threaten the accused’s due process rights by lowering the prosecution’s burden of proof, shifting the burden to the defense, [and] undermining the presumption of innocence.”⁶⁶ Such rights would also potentially “interfer[e] with the Prosecutor’s strategic decisions” and “imped[e] the Chamber’s ability

⁶² On victim participation at the ICC, see Emily Haslam, “Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?” in *The Permanent International Criminal Court: Legal and Policy Issues*, ed. Dominic McGoldrick, Peter Rowe, and Eric Donnelly (Portland, OR: Hart Publishing, 2004), 315-36; T. Markus Funk, *Victims’ Rights and Advocacy at the International Criminal Court* (Oxford: Oxford University Press, 2010); War Crimes Research Office, *Victim Participation Before the International Court*; and Carsten Stahn, Héctor Olásolo, and Kate Gibson, “Participation of Victims in Pre-trial Proceedings of the ICC,” *Journal of International Criminal Justice* 4, no. 2 (2006): 219-38.

⁶³ UN General Assembly, *Rome Statute of the International Criminal Court* (17 July 1998), Article 68(3). Hereafter, *Rome Statute*. This language is borrowed from the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, a crucial framework for the victim participation scheme at the ICC, available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>.

⁶⁴ On how the ICC attempts to strike this balance, see Mugambi Jouet, “Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court,” *Saint Louis University Public Law Review* 26 (2007): 249-308, and Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused,” *Journal of International Criminal Justice* 8 (2010): 137-64.

⁶⁵ Human Rights Center, *The Victims’ Court? A Study of 622 Victim Participants at the International Criminal Court* (Berkeley, CA: Human Rights Center, 2015), 18.

⁶⁶ Funk, *Victims’ Rights and Advocacy at the International Criminal Court*, 86.

to effectively manage the proceedings.”⁶⁷ There was a need for “a system that would provide a meaningful yet manageable scheme for victim participation.”⁶⁸

Article 68 attempts to achieve such a scheme through the establishment of legal representatives for victims. Such representatives ensure that victims receive the legal assistance necessary to navigate the maze of judicial proceedings, while also providing a way to consolidate the views of victims, thus addressing concerns about efficiency.⁶⁹ Through such representatives, victims are empowered to participate at multiple stages of the proceedings. During the pre-trial stage, when the prosecutor submits requests for authorizing an investigation, victims “may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.”⁷⁰ This recognizes that the victim’s most basic personal interest is seeing the Court launch thorough investigations into their cases. Recognizing that victims would also be affected by any jurisdictional challenges preventing a trial from advancing, the Statute permits them to make observations during these proceedings as well.⁷¹ Likewise, Article 53(c) requires the prosecutor to take into account the interest of victims when weighing a decision not to prosecute.

During the trial, victims may provide additional evidence or petition to receive more information, pursuant to Article 65(4), which states, “Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interest of justice, in particular the interests of victims, the Trial Chamber may request the Prosecutor to present additional evidence, including the testimony of witnesses.” Rule 92(5) of the Rules of Procedure and Evidence adds that victims must be apprised of the dates of hearings,

⁶⁷ Funk, *Victims’ Rights and Advocacy at the International Criminal Court*, 86. For more on some of these hesitations, see Christine Van den Wyngaert, “Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge,” *Case Western Reserve Journal of International Law* 44 (2011): 475-96, and Natalie von Wistinghausen, “Victims as Witnesses: Views from the Defence,” in *Victims of International Crimes: An Interdisciplinary Discourse*, ed. Thorsten Bonacker and Christoph Safferling (The Hague: Springer, 2013), 165-74.

⁶⁸ War Crimes Research Office, *Victim Participation*, 28.

⁶⁹ REDRESS, a leading victims’ rights organization, explains the importance of such representation this way: “Victims’ interests will be multiple and diverse, despite their shared association to a particular situation or case before the Court. However, it will be impossible for all or even most victims to participate in Court proceedings individually. Therefore, the organization of victims into groups that adequately reflect their interests is a necessary precondition to their effective participation” (quoted in War Crimes Research Office, *Victim Participation*, 70).

⁷⁰ *Rome Statute*, Article 15(3).

⁷¹ *Rome Statute*, Article 19(3).

requests, submissions, and decisions. In some cases, legal representatives may question witnesses,⁷² and where deemed appropriate, victims may themselves offer testimony in court. Finally, the Rome Statute charges the Court with creating offices for the enforcement of these rights, including the Victims Participation and Reparations Section (VPRS), which receives and processes victim applications, and the Office of Public Counsel, which provides legal support and representation.⁷³

So constructed, victim participants are not to be confused with witnesses called by the prosecution or defense. Victims' rights advocates have long charged international tribunals with adopting an instrumental approach to victims, viewing them as a mere means to the establishment of legal facts and ignoring parts of their story that do not speak to the specific charges before the court.⁷⁴ This, the critics argue, is a loss for truth, as the court never considers how its construction of the case might be challenged or enhanced by victim participation. It is also a loss for victims, as they are denied an opportunity to shape the public record. As the Principal Counsel for Victims, Paolina Massidda, observes in her opening statement in the Lubanga case:

The victims are independent actors in the proceedings before this Court. They have different concerns than the Office of the Prosecutor. Their position is to contribute to the establishment of the truth. If the issue of guilt or innocence of persons prosecuted before this Court is essential for victims, it is so from the angle of establishing the truth.... [T]hey have acquired the right to share with the Judges... [and have] the right to know the truth about the facts experienced.⁷⁵

In short, if international tribunals have traditionally approached victims as objects, the Rome Statute approaches them as agents.

At the same time, victim participants are not official parties to the trial, like the defense or prosecution. As the War Crimes Research Office explains, "victims' representatives must apply for leave from the Court in order to examine witnesses, experts and the accused, and representatives may be restricted to making written observations only."⁷⁶ "Furthermore," they add, "by contrast to certain civil law jurisdictions, victims participating before the ICC do not have an automatic right to

⁷² UN General Assembly, *Rules of Procedure and Evidence*, 91(3a).

⁷³ See Fiona McKay, "Victim Participation in Proceedings before the International Criminal Court," *Human Rights Brief* 15, no. 3 (2008): 2.

⁷⁴ Claire Garbett, "The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court," *Contemporary Justice Review* 16, no. 2 (2013): 196-8.

⁷⁵ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Trial Proceedings (26 January 2009), 41. Hereafter, *Lubanga*.

⁷⁶ War Crimes Research Office, *Victim Participation*, 31.

access Prosecution or Defense evidence or to call their own witnesses.”⁷⁷ Such restrictions are a further effort to protect the accused’s right to a fair trial and keep the proceedings efficient.

Victims participate in criminal investigations at great risk both to themselves and their families. In recognition of this, the Rome Statute also incorporates the restorative principle of protection. Article 68(1) states:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender... and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.⁷⁸

Here again the drafters were attempting to respond to the shortcomings of the ad hoc tribunals, particularly in cases where women reported feeling traumatized by the adversarial and restrictive nature of questioning.⁷⁹ There were also concerns about victims being stigmatized for their association with particular crimes, to say nothing of reluctance of witnesses to testify at all, for fear of retaliation. Victim participants and witnesses at the ICC are thus entitled to “protective measures and security arrangements,”⁸⁰ including the right to testify *in camera*⁸¹ and halt the disclosure of evidence where it “may lead to the grave endangerment of the security of a witness or his or her family.”⁸² Article 43 establishes a Victims and Witnesses Unit, charged with overseeing these protective measures and providing “counseling and other appropriate assistance,” including “staff with expertise in trauma, including trauma related to crimes of sexual violence.”⁸³

The third restorative principle that the ICC incorporates is reparations. The practice of reparations is not new in itself. Germany

⁷⁷ War Crimes Research Office, *Victim Participation*, 31.

⁷⁸ *Rome Statute*, Article 68(1).

⁷⁹ See Julie Mertus, “Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women’s Agency,” *International Feminist Journal of Politics* 6, no. 1 (March 2004): 110-28. See also Susan F. Hirsch, “Promises of Justice: Uganda, Democratic Republic of Congo, and Sudan,” in *Women Waging War and Peace: International Perspectives of Women’s Roles in Conflict and Post-Conflict Reconstruction*, ed. Sandra I. Cheldelin and Maneshka Eliatamby (New York: Continuum, 2011), 197-221.

⁸⁰ *Rome Statute*, Article 43(6).

⁸¹ *Rome Statute*, Article 68(2).

⁸² *Rome Statute*, Article 68(5).

⁸³ *Rome Statute*, Article 43(6).

awarded reparations to victims of the Holocaust, and restorative justice proponents championed their use in South Africa.⁸⁴ But reparations are rarely part of domestic criminal justice proceedings, and they have never been awarded in international criminal settings.⁸⁵ The drafters of the Rome Statute sought to change that. Article 75 of the Statute reads:

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.⁸⁶

The same article also establishes the important principle that liability for reparations attaches to criminal guilt, which is to say, those convicted of crimes are themselves responsible for paying reparations. Article 75 of the Statute states, “The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”⁸⁷ The Statute also establishes the Trust Fund for Victims, which is charged with administering reparations awards in the event that offenders are declared indigent, as well as general assistance to victims, their families, and communities.⁸⁸ As is the case with other proceedings, victims have the right to make representations at reparations hearings, and any testimony offered by victims can be used in assessing various harms and potential reparation awards.⁸⁹

It is one thing to establish such rights, quite another to implement them.⁹⁰ Naturally, the determination of their nature and scope has

⁸⁴ Bassiouni, “International Recognition of Victims’ Rights,” 218-21.

⁸⁵ Valentina Spiga notes, “The Tribunals did not provide any mechanism for victims to seek reparation for the harms they had suffered,” adding that a later “proposal of entrusting the [ICTY] Tribunal with the mandate of awarding compensation to victims was ultimately rejected” (Spiga, “No Redress without Justice,” 1379).

⁸⁶ *Rome Statute*, Article 75(1).

⁸⁷ *Rome Statute*, Article 75(2).

⁸⁸ Article 79 states that the Trust Fund is intended “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims” (79[1]) and that “money and other property collected through fines or forfeiture” may be transferred to the Fund (79[2]).

⁸⁹ “Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.” (75[3]).

⁹⁰ On the implementation of victim participation, see McKay, “Victim Participation in Proceedings before the International Criminal Court;” Elisabeth Baumgartner, “Aspects of victim participation in the proceedings of the International Criminal Court,” *International Review of the Red Cross* 90, no.870 (June 2008): 409-40; Human Rights

fallen to judges, legal parties, and victim representatives to work out in case law. To date, the ICC has opened investigations in ten situations, indicted thirty-nine individuals, convicted three defendants, acquitted one, and dismissed the charges against three others.⁹¹ Four cases are in the pre-trial phase and seven are at trial.⁹² Multiple individuals remain at large. In the cases that have gone to trial, the number of victim participants has varied greatly. In the case of Thomas Lubanga, a Congolese warlord who was convicted of enlisting and recruiting child soldiers, the Court authorized 129 victims to participate in proceedings. Most were former child soldiers, along with family members and a school (under Rule 85, victims “may include organizations or institutions that have sustained direct harm to any of their property”).⁹³ In the case of Germain Katanga and Mathieu Ngudjolo Chui, two warlords on trial for a 2003 attack on a village in Congo, 366 victims were granted victim status, most of whom were individuals displaced during the attack. The number of victims has greatly increased in subsequent cases: there were 628 authorized victim participants in a case dealing with post-election violence in Kenya;⁹⁴ 1,120 victims in the case of Congolese warlord Bosco Ntaganda,⁹⁵ and 5,229 victims in the case of Jean-Pierre Bemba, a former Congolese vice-president who was convicted of murder, rape, and pillaging in the Central African Republic.⁹⁶

Very few victims actually attend the hearings in the Hague. The vast majority register as victims in their home countries and participate through their legal representative. On average, two to three victims have formally testified during the proceedings, usually after the prosecution rests and before the defense begins.⁹⁷ Among several notable decisions on participation, Pre-Trial Chamber I confirmed the right of victims to participate in the investigative stage of situations,⁹⁸

Center, *The Victim's Court?*; Stahn et al, “Participation of Victims in Pre-Trial Proceedings of the ICC.”

⁹¹ ICC, “Situations and Cases,” <https://www.icc-cpi.int/pages/situations.aspx>.

⁹² ICC, “Situations and Cases.”

⁹³ ICC, “Case Information Sheet: The Prosecutor v. Thomas Lubanga Dyilo” (February 10, 2016).

⁹⁴ ICC, “Case Information Sheet: The Prosecutor v. William Samoei Ruto and Joshua Arap Sang” (September 18, 2013).

⁹⁵ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda*, Decision on Victims’ Participation in Trial Proceedings (Trial Chamber VI, 6 February 2015), para. 1.

⁹⁶ ICC, “Case Information Sheet: The Prosecutor v. Jean-Pierre Bemba Gombo (21 March 2016).

⁹⁷ Three former child soldiers testified in the Lubanga case; two victims of the attack on Bogoro testified during the Katanga/Chui case, and a total of five victims testified in the Bemba case, three via satellite, two in person. See the case updates provided by International Justice Monitor, <http://www.ijmonitor.org>.

⁹⁸ *Lubanga*, Decision on the Applications for Participation, ICC-01/04 (Pre-Trial Chamber I, 17 January 2006), para. 50. The Chamber states, “The interpretation of

and Trial Chamber I ruled that victims could gain access to confidential filings, tender and examine evidence, and ask questions of witnesses during the trial proceedings.⁹⁹ Victims' representatives have posed questions to witnesses,¹⁰⁰ participated in the successful appeal of the early release of a defendant,¹⁰¹ and unsuccessfully sought to reclassify charges in an ongoing case.¹⁰²

Progress on the matter of reparations has been much slower. The first set of reparations awards is expected in the Lubanga case in the coming year. Given that the Rome Statute did not provide the actual principles for awarding reparations, it fell to the Trial Chamber in the Lubanga case to develop this initial framework. It passed on much of the decision-making responsibility to the Trust Fund for Victims.¹⁰³ The Appeals Chamber came back with a more detailed framework, enumerating five specific principles.¹⁰⁴ One clarified the matter of who is ultimately responsible for paying reparations, which had been blurred when Lubanga had been declared indigent. Even in cases of

article 68(3) as being applicable to the investigative stage is... consistent with the object and purpose of the victims participation regime established by the drafters of the Statute, which ensued from a debate that took place in the context of the growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law.”

⁹⁹ *Lubanga*, Decision on Victims' Participation, ICC-01/04-01/06 (Trial Chamber I, 18 January 2008), paras. 106, 108-9. The Chamber states, “if the confidential filings are of material relevance to the personal interest of participating victims, consideration shall be given to providing this information to the relevant victim or victims, so long as it will not breach other protective measures that need to remain in place” (para. 106). It goes on to observe, “Rule 91(3) of the Rules enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant)... It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist in the determination of the truth, and if in this sense the Court has ‘requested’ the evidence” (para. 108).

¹⁰⁰ McKay reports, “During the confirmation of charges hearing in the Lubanga case, a legal representative of a victim was permitted to put a question to a witness” (“Victim Participation in Proceedings before the International Criminal Court,” 4).

¹⁰¹ *Lubanga*, Decision on the Participation of Victims in the Appeal against Trial Chamber I's Oral Decision of 15 July 2010 to Release Thomas Lubanga Dyilo, ICC 01/04-01/06 (The Appeals Chamber, 17 August 2010), para. 18.

¹⁰² *Lubanga*, Judgment on the Appeals of Mr. Lubanga and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, ICC-01/04-01/06 (The Appeals Chamber, 8 December 2009).

¹⁰³ *Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparation, ICC-01/04-01/06 (Trial Chamber I, 7 August 2012), para. 266. The passage reads: “The Chamber is of the view that the TFV is well placed to determine the appropriate forms of reparations and to implement them.”

¹⁰⁴ *Lubanga*, Judgment on the Appeals against the “Decision Establishing the Principles and Procedures to be Applied to Reparation,” of 7 August 2012, ICC-01/04-01/06 (The Appeals Chamber, 3 March 2015).

indigence, when the Trust Fund administers the award, the Court affirmed that the defendant remains criminally responsible for the harms caused.

The Trust Fund is a mediator that ensures victims receive the reparations awarded to them, but it is not, of course, responsible for the harms that reparations redress. That responsibility rests with the convicted, and where they can pay, they must pay. In the words of the decision:

The Appeals Chamber recalls the principle established in the Impugned Decision that reparations “ensure that offenders account for their acts.” The Appeals Chamber considers that this principle properly reflects the system of reparations at the Court. In other words, reparations, and more specifically orders for reparations, must reflect the context from which they arise, which, at the Court, is a legal system of establishing *individual* criminal liability for crimes under the Statute. In the view of the Appeals Chamber, this context strongly suggests that reparation orders are intrinsically linked to the *individual* whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence.¹⁰⁵

At the same time, a person who has not been convicted of certain crimes cannot be expected to pay reparations for them. Germain Katanga was found guilty of murder and destroying property during a 2003 attack on a Congolese village, but was acquitted of rape and sexual slavery; accordingly, a forthcoming reparations decision will only deal with harms suffered by victims of the former.

As for the other principles that guide reparations, the Appeals Chamber went on to stipulate that the order of reparations “must specify the type of reparations, either individual, collective or both.”¹⁰⁶ Given the scarce resources of defendants and the Trust Fund, the reality is that any reparation awards are likely to be modest. In light of this, the Appeals Chamber echoed the Trial Chamber’s judgment that in general, “a community-based approach... would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures.”¹⁰⁷ Potential collective awards could include public memorials, community centers, and various social projects.

¹⁰⁵ *Lubanga*, Judgment on the Appeals, para. 65, original italics.

¹⁰⁶ *Lubanga*, Judgment on the Appeals, para. 130.

¹⁰⁷ *Lubanga*, Judgment on the Appeals, para. 133.

ASSESSING THE ICC'S RESTORATIVE MANDATE

We can assess the ICC's restorative mandate by returning to Philpott's framework of primary and secondary wounds discussed above. Recall that for Philpott, a successful defeat of the standing victory of injustice is a function of two factors: legal authority and the participation of victims. As we have seen, one major concern of the drafters of the Rome Statute was whether victim participation could be incorporated without compromising the legal authority of the Court. On the whole, the Court's ability to guarantee the due process rights of the accused has not been affected by increased participation. Defendants have continued to enjoy their rights while raising few objections to various motions from victims' representatives.¹⁰⁸ One can point to the acquittal of Mathieu Ngudjolo Chui and the partial acquittal of Germain Katanga as further indication that the participation of victims has not biased the Court against defendants. The process of registering victims in early cases did, however, prove time intensive, leading to considerable frustration among victims, which prompted the Court to explore ways to streamline the process. In the situations in Uganda and the Côte d'Ivoire, for example, judges have recommended a collective application form for victims.¹⁰⁹ Various decisions on the parameters of victim participation have also come down slowly, but with such frameworks now in place, trials appear to be moving more quickly. As it turns out, any diminishment of authority that the ICC has suffered has been unrelated to participation; it has had more to do with prosecutorial missteps, such as when the Chief Prosecutor failed to disclose potentially exculpatory evidence in the Lubanga case. The ICC's authority as an impartial, international tribunal has not been helped by its practice of pursuing cases almost exclusively on the continent of Africa. The authority of its decisions will hinge not so much on its capacity to manage participation, which it is doing fairly well, but its willingness to pursue cases in other parts of the world.

As for the quality of participation, the ICC obviously does not offer the kind of direct participation that is common in truth commissions and community courts. As mentioned above, only a small number of registered victims actually attend hearings, and even fewer testify. Victims who remain in their villages thousands of miles away struggle to connect meaningfully with the proceedings in the Hague. The Human Rights Center at the UC Berkeley School of Law conducted a survey of victim participants in their home countries and found that many did not have an accurate understanding of the ICC or the status

¹⁰⁸ For example, the defense did not object to the right of victims to participate in the appeal of Lubanga's release. See *Lubanga*, Decision on the Participation of Victims in the Appeal against Trial Chamber I's Oral Decision of 15 July 2010, para. 8.

¹⁰⁹ Spiga, "No Redress without Justice," 1392.

of their specific cases, reviving concerns first raised at the ad hoc tribunals about victim disconnect.¹¹⁰ At the same time, “few said that they wanted to participate in person in trial” and the “overwhelming majority reported that they were pleased to participate through intermediaries or their legal representatives who could convey their stories to the court.”¹¹¹ Strengthening the ICC’s presence in home countries represents one obvious and immediate way to capitalize on this interest while addressing the broader issue of disconnection. Specifically, the Human Rights Center recommends increasing the number of legal representatives in the field and the frequency of their consultations with victims.¹¹² Coordination with the Trust Fund for Victims, which is active in assistance projects in home countries, as well as local non-profits, will be essential.

With this said, the ICC’s participation scheme still represents an impressive achievement. Through its introduction of legal representatives, the ICC has devised an entirely new way for victims to shape the course of proceedings. From participating in investigations and determining charges to questioning witnesses and providing evidence, victims now have a role to play in defeating injustice. The most tangible illustration of this is when victims participated in the successful appeal of Lubanga’s early release, which ensured that the accused would be judged for his crimes. In Philpott’s terms, the defeat of Lubanga’s injustice was effective because victims were able to see this victory as their own, as something they helped to bring about. Because this defeat happened at an international tribunal, before the eyes of a watching world, under conditions that respected the due process rights of the accused, its effectiveness was deepened, helping to redress one of the victims’ primary political wounds.

What is particularly striking about the ICC’s participation scheme is the way it enables victims to address a range of other political wounds through the trial process itself. In granting victims the right to request additional information and question witnesses, for example, the Court empowers them to overcome ignorance of the sources and circumstances of injustice. Here the point is not simply that, by participating, victims can listen to information provided by the prosecution or defense, but also that victims are given an opportunity to request information that the prosecution or the defense might not seek out on their own. In this way, victims can expand the parameters of the official record of truth beyond the strategic interests of the parties to the

¹¹⁰ Human Rights Center, *The Victims’ Court?*, 3.

¹¹¹ Human Rights Center, *The Victims’ Court?*, 72.

¹¹² Human Rights Center, *The Victims’ Court?*, 73.

case.¹¹³ A similar point applies to victim-participant testimony. Although not currently a widespread practice, Chief Counsel for Victims, Paolina Massidda, explains its significance:

It is always important for a victim to have the opportunity to tell the story as he or she has lived it. If you appear as a witness, then you are... confined in a role, someone is guiding you, and you are questioned on certain events. The fact that a victim can appear simply telling the story means that he or she [can] speak freely about the events he or she has suffered from, in the way he or she perceives the consequences of what happened to him or her.¹¹⁴

When a victim is given the opportunity to testify, the Court communicates that her story is not just a means to an end. It is an end in itself. Hearing it, we acknowledge her harm and her voice. We acknowledge *her*. That acknowledgment is itself a rendering of justice, a small but crucial redress of the harm she has suffered.

This, and the more basic conferral of victim status to individuals addresses the lack of acknowledgment of their suffering, but does so in a way that reaffirms their dignity as human beings capable of voice and agency. If violence threatens to turn victims into objects, participation in the trial enables them to become agents again. Whether through testimony or their representatives, victims are empowered to search for justice themselves, taking an active role in reversing the harms they have suffered. While they may act in their own personal interest, the gain is everyone's, as it yields a truth more reflective of the actual experiences of those who lived through the events.

The ICC's protective measures provide the kind of support necessary to facilitate this agency, and its particular provisions around trauma-support help reverse some of the psychological harms to the victim's person. Yet while participants report feeling generally safe in the Hague, the ICC's failure to connect with local communities has done little to quell fear of reprisals. As the HRC reports:

Some participants, in Kenya and DRC especially, feared that they could be targeted for violence because of their association with the ICC and its representatives. In Kenya, instances of intimidation and witness disappearances led victim participants to fear that the accused could use the apparatus of the state to target them. They pointed to the intimidation and disappearance of witnesses as evidence of risk....

¹¹³ While appreciative of the ICC's gains on this score, Garbett argues that the Court could do a better job incorporating the views of victims into its actual judgments. See Garbett, "The Truth and the Trial," 205-7.

¹¹⁴ International Justice Monitor, "Q&A with Paolina Massidda, Principal Counsel of the Office of the Public Counsel for Victims at ICC," <http://www.ijmonitor.org/2012/09/qa-with-paolina-massidda-principal-counsel-of-the-office-of-the-public-counsel-for-victims-at-icc>.

Ongoing violence and shifting political alliances continue to make partnership with the ICC a potential liability in both countries. In contrast, victims in Uganda and Côte d'Ivoire, where violence had subsided and perpetrators lacked political power, expressed fewer concerns about reprisals.¹¹⁵

The ICC has been criticized for intervening in ongoing conflicts, and the added danger such intervention presents to victims only seems to confirm the wisdom of waiting until conflicts calm down. But where intervention has the potential to stop further abuses, the protections of the Court could be of assistance to victims, provided they know what these protections entail. This only underscores the need for a more extensive ICC field presence to dispel rumors and ensure victims have accurate information and access to protection.

If physical or psychological protection, including counseling services, represent one way that the Court stands to redress harm to the victim's person, reparations represents another. Given that no awards have been granted, it remains unclear how much of a difference reparations will actually make for the affected victims. As mentioned above, the awards will be modest and will likely disappoint victims expecting, rightly or wrongly, more substantial awards. Nonetheless, even modest reparations serve several important reparative purposes. Individual reparations may be able to help a family begin to recover their livelihood, and collective reparations may enable a community to reweave the torn fabric of their relationships, including, in the case of memorials, their relationship to the dead. But as Peter Dixon argues, the monetary amount will not matter as much as the recognition that reparations confer:

Morally, reparations are given to a recipient because she has been *wronged*, not because she is in need or is vulnerable. Politically, reparations are awarded because a recipient's *rights* have been violated.... In theory, the intended symbolism of a reparations award is thus potentially far more valuable than the particular good or service actually being distributed.¹¹⁶

This brings us back to the wound of unacknowledged suffering, and the way that even a modest reparation, as a formal punishment, can convey a powerful form of vindication and recognition.

That reparations are not humanitarian aid, but a punishment, is important in assessing their role in redressing a final primary wound, that

¹¹⁵ Human Rights Center, *The Victims' Court?*, 72.

¹¹⁶ Peter J. Dixon, "Reparations and the Politics of Recognition," in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, ed. Christian De Vos, Sara Kendall, and Carsten Stahn (Cambridge: Cambridge University Press, 2015), 332-3.

of the perpetrator. Restorative justice proponents have traditionally critiqued trials for maintaining a low bar of accountability. Perpetrators can hide behind their legal representatives and continue to deny their guilt long after they have been found guilty. In attaching reparations to criminal guilt, the ICC is attempting to raise the bar. In both the Rome Statute and the Appeals Chamber's principles on reparations, the ICC has insisted that criminals are liable for material and psychological harm, even, as we have seen, when they are declared indigent. We may again only be dealing in symbolic currency, but as a form of punishment, reparations communicate reprobation while also clarifying that the circle of harm extends beyond the state to include victims and their communities. In Biggar's terms, reparations demand that offenders inhabit the space between forgiveness-as-compassion and forgiveness-as-absolution and reckon with their wrongdoing. The hope is that when combined with the daily discipline of hearing representations from victims in the courtroom, perpetrators will at least be awakened to the harms they have caused, and possibly experience a change. That Germain Katanga accepted his conviction without appealing and issued a public apology to victims is one encouraging sign that such change is possible.¹¹⁷

With regard to secondary wounds, many victim participants report a sense of release when a verdict has been reached, diminishing the anger or resentment that they previously felt.¹¹⁸ Others have reported feeling a sense of fulfillment and pride upon being recognized by the Court.¹¹⁹ This points to the way that the ICC can facilitate repair at the level of emotions, memories, and actions. But the Court's innovative procedures also raise the possibility of opening up new wounds. Dixon reminds us that as an institution that inevitably frames conflict in certain ways, it can subject "already vulnerable groups to forms of interpretation that are foreign or even hostile."¹²⁰ In recognizing some victims but not others, it can also exacerbate local power struggles.¹²¹

¹¹⁷ Not everyone is convinced that Katanga's apology was genuine. By accepting his sentence, it meant that his acquittal of rape and sexual slavery could not be appealed; as a result, victims would not be able to receive reparations for them. See Allan Ngari, "Hope Deferred: Abrupt End to the Katanga Case Fails Victims," Institute for Security Studies, <https://www.issafrica.org/iss-today/hope-deferred-abrupt-end-to-the-katanga-case-fails-victims>. Katanga remains liable for reparations to victims of the crimes for which he was convicted, so the suspicion of his remorse may be unwarranted.

¹¹⁸ See Olivia Beuno, "Lubanga Found Guilty: Opinion Divided in Congo," International Justice Monitor, <http://www.ijmonitor.org/2012/03/lubanga-found-guilty-opinion-divided-in-congo>.

¹¹⁹ HRC, *The Victims' Court?*, 42.

¹²⁰ Dixon, "Reparations and the Politics of Recognition," 327.

¹²¹ Dixon, "Reparations and the Politics of Recognition," 327.

Those who are included as victims face the additional risk of stigmatization and re-traumatization.¹²² For these reasons, comprehensive investigations that involve widespread participation of victims are essential to the accurate representation of harms suffered by victims. The aim of minimizing secondary wounds may also warrant common application processes for victims, which are more permissive and inclusive than the cumbersome and often exclusionary individual applications. In Dixon's view, minimizing harm also provides an additional argument in favor of collective reparations. "Such inclusive measures," he writes, "could do much to ameliorate the distributive tensions that any reparations reward will cause," allowing the Court to "more fully embrace its restorative potential."¹²³

CONCLUSION

The International Criminal Court's incorporation of restorative principles represents a laudable attempt to make a predominantly retributive institution more responsive to the needs of victims. The ICC may never be able to channel the rich personalism of victim-offender mediations, family circles, and truth commissions for which the restorative justice movement is best known. But as Philpott argues, criminal trials retain an important restorative role, helping to defeat the standing victory of injustice, overcome ignorance of the circumstances of injustice, confer acknowledgment upon victim suffering and dignity, and repair harm to the person of the victim and perpetrator. As I have argued, the ICC's incorporation of victim participation, protection, and reparations deepens the capacity of international tribunals to advance these aims, transforming the trial process into a powerful mode of repair. Much work remains to be done, especially in connecting the Court more meaningfully to local populations. Even if the Court adopts the recommendations offered above, transformed international tribunals will remain only one part of what must be a broader, more comprehensive restorative strategy. As Luke Moffett argues, the role of the ICC is not to serve as a substitute for national or local forms of justice; its role is to complement them.¹²⁴ Its exemplary, although still partial and incomplete attention to victims testifies in its very incompleteness to the need for more victim-oriented processes closer to the situations in which these cases arise. This means the Court's own daring re-imagination of criminal justice requires nothing less than a similar transformation of trial processes in our own communities. **M**

¹²² Dixon, "Reparations and the Politics of Recognition," 340.

¹²³ Dixon, "Reparations and the Politics of Recognition," 348, 351.

¹²⁴ Luke Moffett, "Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and the Hague," *Journal of International Criminal Justice* 13 (2015): 281-311.