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Revisiting the Potential for Restorative Justice at the International Criminal Court: A Search for Theoretical Justifications of the Practice of ICC

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I. Introduction

The International Criminal Court (ICC) is the only treaty-based, permanent international judicial body that determines individual criminal responsibility for the four international core crimes: genocide, war crimes, crimes against humanity, and the crime of aggression. The United Nations Security Council (UNSC), the Prosecutor of the ICC (Prosecutor) and State Parties to the Rome Statute (State Parties) may trigger the jurisdiction of the ICC with respect to the aforementioned crimes. However, since commencing its judicial functions in 2002, the Court has struggled to establish its legitimacy and credibility as an international system of criminal justice that can hold perpetrators accountable, while also respecting the sovereignty of states, rights of the Accused and adequately rehabilitating victims of such heinous crimes.

During its initial years, an overwhelming majority of situations before the ICC were from the African continent. However, gone are the days when the Court's 'international' relevance and character were questioned. The Court is already conducting investigations into crimes against humanity and war crimes in Eurasia, including Georgia and Afghanistan.[1] Further, a few of the world's most restive situations have been referred to the Court, awaiting the Pre-Trial

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[1] International Criminal Court, 'Afghanistan: Situation in the Islamic Republic of Afghanistan' <https://www.icc-cpi.int/afghanistan> (accessed 17 April 2020).

Chamber's authorisation for investigation. These include the situation of political unrest in Venezuela,[2] investigations into potential war crimes by nationals of the United Kingdom in Iraq, during her occupation of the latter between 2003-08,[3] and the crimes committed in the occupied territories of Palestine, including East Jerusalem.[4] Most recently, in November 2019, the Prosecutor of the ICC's request to investigate into the deportation and persecution (among others) of Rohingyas in Bangladesh/Myanmar, was approved.

As the Court transitions into a body that will decide culpability for heinous crimes in conflict zones around the world, its procedures and justice delivery system will rightly become the subject of international scrutiny. Its criminal justice model will not only determine the course and outcome of trials before the Court, but also set precedents for international criminal and humanitarian law. Sensing the pertinence of the same, this paper probes into the criminal justice traditions and models followed by the ICC. It establishes the imperative of following a restorative justice model, and proceeds to examine the feasibility of the same at the ICC. Pursuantly, this article is divided into five parts. Part II provides a background of the ICC and its criminal process, examining features of the Rome Statute that arguably resemble a restorative justice model. Part III inquires into the theoretical tenets of restorative justice and analyses claims that the ICC represents a sui-generis combination of retributive and restorative justice. Part IV makes a case for revisiting some of the foundational principles of the ICC, and suggests ways for the ICC to transition towards a more restorative paradigm. Part V concludes that the justice model of the ICC is better understood from the non-conventional 'punitive victims' rights' model advanced by Professor Roach in 1999, and examines the implications of such a theoretical anchor.

II. A Background of the ICC Criminal Process

The Rome Statute of the International Criminal Court (Rome Statute) was ratified in 1998, and came into force in 2002.[5] It established the International Criminal Court, which is the only permanent adjudicatory body for trying international core crimes.[6] The permanent nature of the ICC distinguishes it

[2] International Criminal Court, 'Preliminary Examination: Venezuela I' <https://www.icc-cpi.int/venezuela accessed> (accessed 17 April 2020).

[3] International Criminal Court, 'Preliminary Examination: Iraq/UK' <https://www.icc-cpi.int/iraq> (accessed 17 April 2020).

[4] International Criminal Court, 'Preliminary Examination: State of Palestine' <https://www.icc-cpi.int/palestine> (accessed 17 April 2020).

[5] The Rome Statute was adopted on July 17, 1998, and entered into force on July 1, 2002.

[6] There are four such international core crimes provided under the Rome Statute, namely, Genocide (Article 6), Crimes against humanity (Article 7), War crimes (Article 8), and the Crime of Aggression (Article 8*bis*).

from its predecessor international criminal tribunals, established over the course of history to deal with particular instances of international atrocities.[7] These include the International Military Tribunal, the Nuremberg Military Tribunal (both of which dealt with the crimes committed by officials of Nazi Germany), the International Military Tribunal of the Far East (to prosecute war criminals from Japan), and more recently, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

While these ad-hoc institutions were either created by the UN (such as the ICTY or the ICTR) or other global alliances (in the case of the IMT and the NMT), the ICC was conceptualised as a trans-national body which would deal with all future incidents of international core crimes across the world.[8] Thus, as an institution, the ICC significantly differs from other international criminal tribunals. For example, the Court has the jurisdiction to take suo-motu cognisance over international crimes. It also emphatically claims to focus on ensuring justice to victims (as opposed to merely punishing offenders).[9] Additionally, it has a complex regime of evidence collection and presentation.

The unique nature of international crimes is reflected in their scale, impact on victim communities, the greater requirement of deterrence, as well as the heightened difficulties in enforcement, among others.[10] Being the result of a long and meticulous drafting process, the Rome Statute came to imbibe several innovative and unprecedented provisions to deal with the multiple repercussions of the commission of an international crime, which are starkly differentiated from an ordinary crime committed in domestic criminal systems.

Among the most important innovations brought about by the Rome Statute, is its inclusion of several victim-centred provisions. This was largely alien to most domestic and international criminal justice systems.[11] Predecessors of the ICC, such as the ICTY and the ICTR, often focused on other apparent goals of the criminal process, such as ensuring a speedy trial, respecting the rights of the

7 International Criminal Court, 'Understanding the International Criminal Court' (2002) <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (accessed 17 August 2020).

8 Mark Klamberg, *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher 2017) 5.

9 Richard Goldstone, 'International Criminal Court and Ad-hoc Tribunals' in Sam Daws and Thomas G. Weiss (eds), The Oxford Handbook on the United Nations (Oxford University Press 2008).

10 Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A commentary* (3rd edn, Hart Publishing 2016) 4–5.

11 Gioia Greco, 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis' (2007) 7 International Criminal Law Review 531, 533.

Accused, or facilitating peace and reconciliation, to the exclusion or subordination of the rights of victims.[12]

However, the ICC regime is a remarkable volte face from its predecessors. The Rome Statute designates 'victims' as a specific class and considers them 'participants' to the trial.[13] Thus, various rights are envisaged for victims, including the right to plead before the Court,[14] and the right to submit their observations on an investigation before the Pre-Trial Chamber.[15] Moreover, the ICC is empowered to order the Accused to make reparations (including restitution, compensation and rehabilitation) to victims.[16] Similarly, the Court provides institutional support to victims through the Registry of the Court (Registry). The Registry established the Victims' Trust Fund,[17] which manages and directs reparations towards the victims, and is also the source of all finances pertaining to victim participation.[18] Additionally, the Registry includes the Victims and Witnesses Unit.[19] This Unit facilitates victim participation inter alia by arranging legal representation for victims, ensuring protection of victims as they testify, and managing the Trust fund.[20] These features of the ICC system consolidate the involvement of victims, and ensure the practicability of the various victim-centred provisions of the Rome Statute.

Based on these provisions, the ICC has widely been regarded as an institution that metes out restorative justice. Claims that it brings together retributive and restorative justice in a unique manner have been advanced from within the ICC, as well as by various academicians. According to the former President of the ICC, Judge Sang-Hyun-Song, "ICC is much more than just about punishing the perpetrators. The Rome Statute and the ICC brings retributive and restorative justice together with the prevention of future crimes."[21] Similar statements have

[12] Mariana Pena and Gaelle Carayon, 'Is the ICC Making the most of Victim Participation' (2013) 7(3) International Journal of Transnational Justice 518, 519–520.

[13] The Rome Statute, Article 68. See Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) British Journal of Criminology 967, 972–977.

[14] The Rome Statute, Article 68(3).

[15] The Rome Statute, Article 15(3): "… Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence", read with International Criminal Court, Rules of Procedure and Evidence, Rule 50(3): "… victims may make representations in writing to the Pre-Trial Chamber within such time limit as set forth in the Regulations".

[16] The Rome Statute, Article 75.

[17] The Rome Statute, Article 79.

[18] Anne Dutton and Fionnuala D Ni Aolain, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate' (2019) 19(2) Chicago Journal of International Law 490, 493.

[19] The Rome Statute, Article 44(3).

[20] International Criminal Court, Rules of Procedure and Evidence, Rule 17 (Functions of the Unit).

[21] Judge Sang-Hyun-Song's address to the 7th Consultative Assembly of Parliamentarians for the ICC, at Rome; see Press Release, 'ICC President tells World Parliamentary Conference "ICC brings retributive and restorative justice together with the prevention of future crimes"' (*International Criminal Court*, 11 December 2012) <https://www.icc-cpi.int/Pages/item.aspx?name=pr860> (accessed 2 November 2020).

been made by other ICC officials in press releases, as well as by judges in the course of their verdicts. For instance, in his dissenting opinion in the case Prosecutor v Uhuru Kenyatta, it was observed by Judge Eboe-Osuji that "…the Rome Statute in its principles is in step with developments in the relevant spheres of international law that now lay a great store in ensuring that restorative justice (to the victims) is given just as much scope as punitive justice."[22] From the observation of Judge Eboe-Osuji and Judge Sang-Hyung Song, it emerges that as a court, the ICC certainly desires a restorative justice model, to benefit the victims of crimes tried before it. Ensuring the latter has often been highlighted as the primary mandate of the ICC.[23]

III. Unifying Restorative and Retributive Justice: A *Sui-Generis* Model?

This section explores such claims about the practice of the ICC in light of established conceptions of restorative justice models. It seeks to examine whether, in light of its adversarial procedures, trials at the ICC can be said to effect restorative justice, or at least a unique combination of retributive and restorative justice.

A. Theorising restorative justice

While the term 'restorative justice' was arguably coined by the English scholar Albert Eglash in 1959,[24] there is ample historical evidence of the existence of practices that are today encapsulated by the term.[25] It is believed by several scholars that in dealing with crimes, ancient communities focused much more on reparation than on punishing the offender.[26] Over time, however, the Westphalian State began to play a much more important role in conflict resolution: crimes began to be seen as a violation of the order of the State, rather than harms caused

[22] Opinion of the current president Judge Eboe Osuji, in *Prosecutor v Uhuru Mugai Kenyatta* (Trial Chamber) (Dissenting Opinion of Judge Eboe-Osuji) [2013] ICC-01/09-02/11-863-Anx-Corr [61].

[23] The first prosecutor of the ICC Luis Moreno-Ocampo once famously declared, "I am a prosecutor. My mandate is justice; justice for the victims"; see International Criminal Court, 'ICC Prosecutor visits Egypt and Saudi Arabia' ICC-CPI-20080509-MA13 (9 May 2008) <https://www.icc-cpi.int/Pages/item.aspx?name=press+release+media+advisory+icc+prosecutor+vists+-Egypt+and+Saudi+arabia> (accessed 2 November 2020); Claire Garbett, 'From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim Identifies at the ICTY and ICC' (2016) 15(1) Journal of Human Rights 40, 44.

[24] Albert Eglash, 'Creative Restitution: Its Roots in Psychiatry, Religion and Law' (1959) 10(2) British Journal of Delinquency 114, 117–118.

[25] ibid.

[26] Daniel W Van Ness and Karen Heetderks Strong, *Restoring Justice: An Introduction to Restorative Justice* (4th edn, Anderson Publishing 2010) 6–9; A reason for this could be the necessity of such communities to stick together and avoid outcasts, given their minimal numbers and the constant threat of inter-community conflicts.

to the victims.[27] Thus, the primary mode of dealing with crime was the imposition of punishment, as opposed to alleviating the harms suffered by victims.

It was only in the 1970s that the concept of restorative justice evolved as an alternative model to the conventional retributive models of criminal justice. This was significantly due to the rise of victim's rights movements across the western world, which primarily advocated for greater recognition of victims in the criminal process.[28] Soon, several scholars began to articulate the concept of restorative justice with far greater precision (than in the early 1960s) as a potential solution to the concerns flagged by various victims' movements.[29]

There is no single accepted definition of 'restorative justice', and various proponents have emphasised on different features they consider essential to this concept. Howard Zehr is considered one of its most influential pioneers. In his book Changing Lenses published in 1990, he defined restorative justice as "one that views crime as a violation of people and relationships, which in turn leads to obligations to remedy the harm and views justice as a process in which all parties search for reparative, reconciling, and reassuring solutions."[30] Other scholars who have offered notable definitions of restorative justice are Daniel Van Ness & Karen Heetderks Strong,[31] John Braithwaite,[32] and perhaps most importantly, Lode Walgrave.

Walgrave's conceptualisation of restorative justice has been regarded as foundational and relied upon by scholars such as Zehr, and Van Ness and Strong in evaluating various criminal justice systems.[33] Walgrave defines restorative justice as an "option on doing justice after the occurrence of an offense that is primarily oriented towards repairing the individual, relational and social harm

[27] Lode Walgrave, 'Restorative Justice: An Alternative for Responding to Crime' in Shlomo Giora Shoham, Ori Beck, and Martin Kett (eds), *International Handbook of Criminology and Penal Justice* (Taylor & Francis Group 2008) 613–689.

[28] Van Ness and Strong (n 26) 124.

[29] See John Braithwaite, 'Restorative Justice' in Michael Torny (ed) *The Handbook of Crime and Punishment* (Oxford University Press 1998); Howard Zehr, 'Justice Paradigm Shift? Values and Visions in the Reform Process' (1994) 12(3) Mediation Quarterly 207, 210.

[30] Howard Zehr, *Changing Lenses: A new Focus for Crime and Justice* (Herald Press 1990) 63–82.

[31] Van Ness and Strong (n 26) 42; also see Gerry Johnstone and Daniel W. Van Ness, 'The Meaning of Restorative Justice', in Gerry Johnstone and Daniel W. Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing 2006) 9–15. Gerry Johnstone and Van Ness suggest that while restorative justice is a complex idea whose meaning continues to evolve with new discoveries, any definition of the phrase must incorporate three concepts: *first*, the 'encounter' conception, that allows the stakeholders (victims, offender and other interested parties) to freely speak and decide what to do in a relatively informal environment; *second*, the 'reparative' principle, which seeks to address the harm caused by the crime, and provide redressal to victims, and perhaps, communities and offenders as well, and *third*, the 'transformation' conception, which is a broad concept, that seeks to address not only harm caused to individual, but also structural issues of injustice such as racism, sexism, etc, since each of these affect an individual's ability to participate in the society in whole.

[32] Braithwaite (n 29).

[33] Howard Zehr (n 30); Van Ness and Heetderks Strong (n 26). See also Braithwaite (n 29).

that is caused by that offence."[34] Therefore, the most important features of restorative justice comprise a focus on the harm suffered, centrality of the victim as a stakeholder, acceptance of (and emphasis on) factual guilt (as opposed to legal guilt), involvement of communities, and the absence of punishments as the ends of the justice process.[35]

B. Anchoring the ICC justice model

This section seeks to examine the conventions of the ICC to understand its criminal justice model. Two essential characteristics of the ICC justice system come in conflict with the requirements of a restorative justice model. First, the nature of proceedings at the ICC is strictly adversarial, and emphasises on 'legal guilt', i.e., establishing guilt through a lawful trial, as opposed to factual admissions of guilt. Second, the imposition of adequate punishment is one of the foundational objectives of the ICC. The Preamble of the Rome Statute reads, "[The State Parties are] determined to put an end to impunity for the perpetrators of these crimes and thus, to contribute to the prevention of such crimes," referring to the international core crimes.[36] Thus understood, the fact that perpetrators of the highest degree of crimes get away without any sanctions, is arguably the raison d'ètre of the ICC.

The deviance between the restorative justice model and the objectives of the ICC conclusively establishes that practices at the ICC are not exclusively aligned with the restorative justice model. This invites inquiry into more nuanced claims of comprehending the ICC system as a model that uniquely consolidates retributive and restorative justice models.[37] The next section examines whether such claims accurately capture the ICC model or represent a more superficial 'commodification' of the idea of restorative justice.

C. Commodification of restorative justice

Commodification is the process whereby a particular thing or an idea is only seen as a commodity which can be transacted in the market.[38] Thus commodified, the 'object' loses all other characteristics of itself, except the ones required in a particular transaction. The revolutionary work on this phenomenon carried out by

[34] Walgrave (n 27) 621.
[35] Walgrave (n 27) 620–624.
[36] The Rome Statute, Preamble; Triffterer and Ambos (n 10) 10.
[37] (n 21–23). See also Sara Kendall, 'Restorative Justice at the International Criminal Court' (2018) 70(2) Revista Española de Derecho Internacional 217, 219.
[38] The concept was first applied in a legal sense by Prof Taft in Lee Taft, 'Apology Subverted: The Commodification of Apology' (2000) 109(5) Yale Law Journal 1135, 1147.

Lee Taft was published in a paper in 2000 in the Yale Law Journal.[39] Therein, he dealt with the relevance of an 'apology' in the criminal process. He contended that the immense healing power of an apology would be greatly diminished if it were to become a matter of course in criminal trials. This is because as soon as an apology assumes the character of a legal imposition, it loses its 'moral force'. He considered this as commodification of apologies, limiting their purpose to placating victims or redeeming oneself in the public eye.[40]

The idea of commodification in relation to restorative justice was popularised by Jac Armstrong.[41] He condemned efforts to reconcile retributive and restorative justice paradigms, which he referred to as 'retributive-restorative justice'. Such an idea of justice, he contended, would be a superficial amalgamation of arbitrarily chosen values of both the models, owing to the fundamentally irreconcilable objectives of the two models. For example, one of the fundamental features of restorative justice is that the severity of sanctions must depend on victim satisfaction.[42] Whereas, aimed to restore the primacy of rules and norms, retributivism's central premise is that punishment must depend on the gravity of the offence.[43] Thus, he theorised that a 'retributive-restorative justice' is in essence a commodification of the latter, where conflicting values of restorative justice are discarded to achieve a reconciliation. The following paragraphs will contextualise this fallacy of retributive-restorative justice at the ICC.

D. Deprioritised victim-centrism

At the outset, it must be noted that although the Rome Statute attempts to ensure victim satisfaction,[44] its justice model, as noted above, explicitly recognises ending impunity of perpetrators as a fundamental goal. However, even attempts at victim satisfaction, through participation and reparation, do not truly effect the values and goals of restorative justice. This is due to three reasons.

First, victims of crimes being tried by the ICC are considered 'participants', and not 'parties' to the trial, the latter being a designation reserved for the

[39] ibid.

[40] Taft (n 38) 1157: "When the performer of apology is protected from the consequences of the performance through carefully crafted statements and legislative directives, the moral thrust of apology is lost. The potential for meaningful healing through apologetic discourse is lost when the moral component of the syllogistic process in which apology is situated is erased for strategic reasons."

[41] Jac Armstrong, 'Rethinking the restorative–retributive dichotomy: is reconciliation possible?' (2014) 17(3) Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice 362, 367–372.

[42] ibid 363, 371.

[43] Armstrong (n 41) 371.

[44] (n 13–20).

Prosecutor and the Accused. This has a significant bearing on the rights of the victims within the trial. For example, the victims have no locus standi to institute proceedings at the ICC.[45] They are involved in the process only once an Accused has been charged with a specific crime,[46] and the Prosecutor recognises them as participants.[47] Similarly, even during the trial, the Court has the discretion to determine the manner of victim participation.[48] To illustrate, in the case of Prosecutor v Lubanga,[49] while the child soldiers who were recruited by the Accused were legally represented as victims, none of the numerous persons who suffered harm at the hands of the child soldiers were recognised as victims.[50] Thus, the involvement of victims is subordinated to the requirements of the trial, the actions of the Prosecutor, and the discretion of the court itself. This lack of agency with the victims undermines the ethos of restorative justice.

Second, victims do not participate directly in the proceedings or come face to face with the Accused.[51] Rather, their participation is representational in nature, wherein a counsel for the victims is appointed by the Court, and only a few victims actually manage to present evidence. For example, in the case of Prosecutor v

[45] Article 13 of the Rome Statute (Exercise of Jurisdiction) provides the ways by which the ICC's jurisdiction may be triggered: "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15".

[46] Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013) 76(3&4) Law and Contemporary Problems 235, 256.

[47] ibid 244.

[48] The Rome Statute, Article 68(3): "*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" (emphasis added); Thus, the *locus standi* for the victims' participation is established upon a finding by the Court to the effect that their personal interests are affected.

[49] *Prosecutor v Thomas Lubanga Dyilo* (Pre-Trial Chamber I) (Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v Thomas Lubanga Dyilo) [2006] ICC-01/04-01/06.

[50] *Prosecutor v Lubanga* (Appeals Chamber) (Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) [2008] ICC-01/04-01/06-1432 [40]–[66].

[51] Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, participation, and the processes of Justice' (2017) 5(2) Restorative Justice 198, 213.

Jean-Pierre Bemba Gombo[52] (Bemba), from a total of 5,229 participating victims, only two were allowed to present evidence before the Court.[53] Thus, it is inevitable that a large number of victims and a diversity of interests get excluded as a result of the lack of adequate representation. To further this point, consider the very first situation addressed by the ICC: that of Northern Uganda. Not only did the Court recognise very few persons as victims, it also completely disregarded the views of several victims who were against proceedings at the ICC.[54] These victims believed it would come in the way of peace and reconciliation proceedings. However, unfortunately, and in abject disregard of restorative principles, only the victims in favour of the ICC proceedings were recognised as participants.[55]

Finally, apart from the possibility of compensation orders,[56] there exist no other means for the Court to effect restorative justice. There is no direct engagement, formal or informal, between the Accused and the victims, and community engagement in trials at the ICC is conspicuous by its absence. Most importantly, the trial concludes with the pronouncement of the punishment and there are no provisions for securing rehabilitation of the Accused.[57] This conflicts with a significant goal of restorative justice, that is, repairing social bonds,[58] and ensuring reintegration of offenders in the society, as whole, contributing, and productive members.[59]

Hence, in-spite of the numerous provisions to facilitate victim participation, victims do not occupy a central position in the ICC justice system. Viewed in the backdrop of several other features of the ICC that are antithetical to the restorative justice system, it is inaccurate to call the ICC system a restorative justice system. In fact, such claims,[60] premised solely on certain victim-centric provisions critiqued above, would clearly amount to 'commodification' of restorative justice. Nonetheless, such superficial claims aimed at distinguishing the ICC as a body that truly effects complete justice and victim satisfaction continue to be advanced

[52] *Prosecutor v Jean-Pierre Bemba Gombo* (Trial Chamber III) (Judgment pursuant to Article 74 of the Statute) [2016] ICC-01/05-01/08-3343.

[53] *Prosecutor v Jean-Pierre Bemba Gombo* (n 52) [24].

[54] Kendall and Nouwen (n 46) 242.

[55] See *Prosecutor v Kony, Otti, Odhiambo & Ongwen* (Pre-Trial Chamber II) (Observations on Behalf of Victims Pursuant to Article 19(1) of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes) [2008] ICC-02/04-01/05.

[56] The Rome Statute, Article 75.

[57] Garbett (n 51) 210–212.

[58] Armstrong (n 41) 371.

[59] Van Ness and Strong (n 26) 103.

[60] Claims referred to in the text earlier, such as the statements of Judge Sang-Hyun Song, and Judge Eboe-Osuji, among others (n 21–23).

by various personnel related to the ICC, perhaps to increase the legitimacy of the institution.[61]

IV. Restorative Justice for International Crimes: desirability and practicability

The concept of restorative justice began gaining foothold in domestic jurisdictions as a model to deal with minor or less serious offences.[62] It did not gain prominence as an appropriate jurisprudential concept for international crimes, as it was considered inadequate to address the gravity of such crimes. This section claims that restorative justice is normatively aligned with the goals of all criminal justice systems, especially those dealing with serious crimes. However, it notes the limitations of the ICC in achieving absolute and unqualified restorative justice. Thus, it suggests realignment of existing practices and infrastructure of the ICC to realise restorative traditions as far as possible.

A. Revisiting non-impunity

Crime prevention through deterrence, lowering offender recidivism, accounting for victims' interests and enhancing their faith in the process, and punishment for violation of the law, are some of the most important goals of the criminal justice process.[63] Through various studies conducted on the effects of restorative justice, it is well-established that this form of justice can better serve each of these goals.[64] As a matter of fact, recidivism reduces with community reintegration,[65] and victims who participate in supervised 'encounters' with the offenders feel an enhanced sense of satisfaction from the system.[66] Thus, except for considering punishment as an end, which is conceptually misplaced within restorative justice,[67] such a model is significantly more desirable for the achievement of the different goals of the criminal process.

However, it is worth questioning our assumptions on the utility of punishment in the criminal process. Lack of adequate rehabilitation, and the

61 Luke Moffett, *Justice for Victims Before the International Criminal Court* (Routledge 2014) 41.

62 Jim Dignan, 'Restorative Justice and the law: The case for an Integrated, Systemic Approach' in Lode Walgrave (ed) *Restorative Justice and the Law* (Willan Publishing 2002) 175–176.

63 See Zvi D Gabbay, 'Justification for Restorative Justice: A Theoretical Justification for the use of Restorative Justice Practices' (2005) 2005(2) Journal of Dispute Resolution 349.

64 See Ministry of Justice (United Kingdom) 'Restorative Justice Action plan for the Criminal Justice System for the Period to March 2018: Report on Progress' (February 2017) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/596354/rj-action-plan-to-march-2018.pdf> (accessed 17 August 2020). See Gabbay (n 63) 359–371. See also Van Ness and Strong (n 26) 5354.

65 Van Ness and Strong (n 26) 112.

66 Van Ness and Strong (n 26) 78.

67 See text accompanying (n 33–36).

ostracisation of perpetrators undermine important goals of the criminal justice system, such as crime prevention and reducing recidivism.[68] Additionally, a harsh punishment does not necessarily result in victim satisfaction or increase victim confidence.[69] It is now widely accepted that there is a greater need to account for the interests of victims of serious international crimes, particularly because of the extraordinary psychological damage suffered by them.[70] Due to its victim-centrism, restorative justice is the most appropriate jurisprudential approach to remedy these harms. Thus, as a Court trying the most serious crimes of international concern, rooting its mandate in restorative justice will greatly improve the impact of outcomes of the ICC, and arguably realise complete justice. However, there are procedural, infrastructural, and legislative barriers to effecting restorative justice at an international scale, particularly, at the ICC.

B. Scale, spatial and principled constraints

Restorative justice requires that the peculiar interests of each victim group be considered. This tailor-made approach is particularly difficult for the ICC due to three reasons. First, large number of victims are involved in the cases before the ICC (which crossed 5,000 in the Bemba case[71]). However, as a judicial body, the Court is required to follow a consistent approach to the cases and remedies before it.[72] Clearly, in such circumstances, it would be near impossible for the ICC to actually account for individual concerns and provide individualised remedies. Second, the ICC is based in the Hague, in Netherlands, spatially distant from the situations adjudicated before the Court. For example, most of the cases before the Court concerned situations from the African continent. This spatial distance, accompanied with the lack of experts from the conflict situations, ensures that localised justice focusing on community engagement remains an impossibility for the ICC.[73] Third, so long as the ICC considers ending the impunity of perpetrators one of its primary objectives, there will be a principled divergence between the ICC's model and the restorative model of justice. The principled divergence assumes importance since it manifests in the absence certain procedures that are

[68] Gwen Robinson and Joanna Shapland, 'Reducing Recidivism: A Task for Restorative Justice' (2007) 48(3) British Journal of Criminology 337, 339; Walgrave (n 27) 635; Van Ness and Strong (n 26) 101.

[69] Gabbay (n 63); Walgrave (n 27) 624.

[70] Moffet (n 61) 41.

[71] *Prosecutor v Jean-Pierre Bemba Gombo* (Trial Chamber III) (Judgment pursuant to Article 74 of the Statute) [2016] ICC-01/05-01/08-3343.

[72] Dragana Radosavljevic, 'Restorative Justice under the ICC Penalty Regime' (2008) 7(2) The Law and Practice of International Courts and Tribunals 235, 235, 247.

[73] Monica Adami, 'International Judicial Bodies: Is Restorative Justice the means to end the Peace v. Justice Dilemma' (*LSE International Development*, 15 December 2017) < https://blogs.lse.ac.uk/internationaldevelopment/2017/12/15/international-judicial-bodies-is-restorative-justice-the-means-to-end-the-peace-v-justice-dilemma/> (accessed 12 August 2020).

crucial to restorative justice, including acceptance of guilt, voluntary participation of the accused, and rehabilitation of convicts.

C. Reimagining justice at the ICC

Having examined the shortfalls and contradictions per restorative justice in the ICC's current paradigm, what is the way forward for the Court? At the outset, it must be realised that given the numerous adversarial features of the ICC, a shift towards restorative justice can only be achieved to a limited extent. However, the ICC must consciously refrain from certain practices that risk commodifying restorative justice at the Court.

First, being an institution based in the Hague and having little direct exposure to the situations it seeks to remedy, the ICC must be more cognisant of its limits. As outlined by Phil Clark in his book Distant Justice, the ICC has often sought to monopolise situations of mass atrocities without considering the ramifications of the same.[74] For example, in the case of war crimes in Uganda involving child soldiers, national amnesty proceedings were underway in an attempt to fix responsibility and aid the transition process. However, the issuance of arrest warrants against major actors in the atrocities (who were issued amnesty) significantly complicated the situation, and precluded various remedial options at the national level.[75] The ICC must realise that proceedings before national administrative and fact-finding bodies may be much more effective at ensuring peace and justice. To that end, the ICC must only seek to complement, and not substitute, these processes.[76] The success of the Truth and Reconciliation Commissions (TRCs) in South Africa and Sierra Leone testifies to the effectiveness of decentralised measures in ensuring justice.[77]

Second, following the precedent of the TRCs, the ICC must reimagine its role. Currently, the Court is oriented towards ascertaining guilt. However, the ends of justice would be far better served if it sought to bring out the truth, and ascertain the causes of mass atrocities.[78] For this, the ICC will have to contemplate victim-centric alternative structures to its current punitive adversarial system. Further, the ICC must seek to use its victim-oriented features towards facilitating

[74] Phil Clark, Distant Justice: The Impact of the International Criminal Court on African Politics (Cambridge University Press 2018) 230–267.

[75] ibid.

[76] This is partly captured in Article 17 of the Rome Statute, which states the principle of complementarity, that is, the ICC's jurisdiction must complement proceedings in national courts.

[77] Clark (n 74).

[78] Westen K. Shilaho, 'The International Criminal Court and the African Union: Is the ICC a Bulwark against Impunity or an Imperial Trojan Horse?' (2018) 18(1) African Journal on Conflict Resolution 119, 142; Clark (n 74) 230–267.

greater dialogue and mediation between the victims and perpetrators. Towards this end, the Court can potentially institutionalise another stage in the proceedings, between Investigation and Pre-Trial proceedings.[79] At this stage, the Court should undertake judicially-supervised negotiations between the victims' counsels and the Accused. In this facilitative role, the ICC will not only accommodate genuine victim-centrism, but also open up the Court's human and material infrastructure to the possibility of innovative remedies that may be arrived at by the principal stakeholders in international crimes - the victims and the perpetrators. However, the ICC's role as an international judicial institution, bound by the various provisions of the Rome Statute that are geared to the adversarial system, will prove an obstacle in this regard.

Finally, the ICC must significantly develop and bolster the 'Assistance Mandate' of the Victims' Trust Fund (Mandate).[80] This is a unique feature of the ICC wherein victims of mass atrocities are accorded physical and psychological rehabilitation, as well as material support.[81] As opposed to reparations which arise only after convictions, this mechanism involves extending help to victims of mass atrocities in any situation under consideration of the ICC. The funds are sourced from donations, and the programmes envisaged go far beyond mere monetary compensation.[82] This is a stand-out programme of the ICC and helps in truly effecting the goals of restorative justice. Therefore, the ICC must expand the operations of the Mandate and make it more accessible to victims across the globe. However, financial limitations may hinder the realisation of such an expansion.[83]

Being the only institution that assesses individual criminal liability at a trans-national level, the ICC is uniquely suited to adapt to and inculcate various rehabilitative and restorative functions. The aforementioned procedures are not exhaustive, but if adopted and reasonably implemented, would go a long way to make the ICC more relevant to her victims. However, ultimately, it is the mandate

[79] See the Rome Statute, Articles 17, 53–76: Once the ICC establishes its jurisdiction under Article 17, a situation is (except where the Prosecutor initiates investigation under Article 15) first, investigated, thereafter, charges are framed and confirmed in the Pre-Trial Chambers, and finally, it proceeds to trial where evidence is appreciated. The trial ends with the pronouncement of the judgment.

[80] Dutton and Aolain (n 18).

[81] International Criminal Court, Rules of Procedure and Evidence, Rule 98.

[82] Dutton and Aolain (n 18) 2, 18.

[83] David Scheffer, 'The Rising Challenge of Funding Victims' Needs at the International Criminal Court' (*Just Security*, 3 December 2018) <https://www.justsecurity.org/61701/rising-challenge-funding-victims-international-criminal-court/> (accessed 13 August 2020).

of the Assembly of State Parties (Assembly)[84] to introduce procedural and infrastructural changes that will facilitate the Court's transition towards restorative justice. Thus, as the legislative body of the ICC, the Assembly must reimagine the role and the manner of ICC's international criminal justice delivery.

V. Theorising the ICC Justice Model: Way Forward

This paper examined the functioning of the ICC to conclude that the Court's justice model is not aligned with principles of restorative justice. However, the Court's practices do not entirely fall under the ambit of retributive justice either. This is evidenced by two phenomena. First, ICC's several victim-based features recognise victims as important stakeholders in the process, in a position to influence the outcome of the trial.[85] Second, ICC's objectives include trying to ensure peace in conflict-hit areas and to mete out complete justice, which goes beyond mere retributive models.[86] This renders the ICC in a theoretical flux and raises certain questions. Which theory of justice does the ICC subscribe to? How can its criminal process be most suitably explained? This paper contends that Professor Kent Roach's punitive victims' rights model most appropriately explains the theoretical orientation of the ICC's practice. Prior to addressing the same, it is necessary to point out the significance of this exercise.

A. Alternative theoretical basis for the ICC's justice model

The practice of the ICC is inundated with theoretical assumptions, pertaining to punishment, the role of victims (as participants as opposed to mere witnesses), and the relationship between international criminal justice and peace.[87] However, as the preceding section highlights, there is a striking lack of a valid theoretical basis that can comprehensively account for the ICC system, while

[84] The Assembly of State Parties, established under Article 112 of the Rome Statute, comprises representatives of States that have ratified the Rome Statute; it is the legislative and management oversight body of the ICC.

[85] The Retributive theory of justice does not generally envisage reparations or compensation as an end to the criminal process, especially not in a manner that involves participation from victims, such as in the case of the ICC (The Rome Statute, Article 75(3)). See Michael Wenzel and others, 'Retributive and Restorative Justice' (2008) 32(5) Law and Human Behaviour 375, 383.

[86] The Rome Statute, Preamble.

[87] Sarah Nouwen, 'International Criminal law: Theory all over the Place' in Anne Orford and Florian Hoffman (eds) *The Oxford Handbook of the Theory of International law* (Oxford University Press 2016).

maintaining its legitimacy. It is this theoretical gap that is sought to be remedied by the application of Roach's punitive victims' rights model.

For long, the criminal process was mostly understood in terms of two dichotomous models, set out by Herbert Packer in 1964.[88] These were the 'crime-control' model and the 'due process' model, both of which are entrenched in criminology theories even today. Over time however, victims' movements began to influence the criminal process significantly and there were numerous criticisms of Packer's two models. It was only in 1999 that alternatives to these two models were offered, through the seminal work published by Kent Roach.[89] He offered two completely novel models of understanding the criminal process in terms of the 'punitive victims' rights model' and the 'non-punitive victims' rights model'. It must be noted that most criminal systems cannot be completely explained or encapsulated within a single model alone. Rather, all systems will be a combination of the abovementioned four models (Roach's victims' rights models and Packer's conventional models), with certain features predominantly resembling one model or the other. The following paragraphs seek to explain the alignment of the ICC criminal justice system to the essential features and values of the 'punitive victims' rights model'.

B. Punitive victims' rights model

According to Professor Roach, the punitive victims' rights model brings together the conventional crime control and due process models,[90] but reinvigorates their premises through a conception based on victims' rights.[91] This system focuses on controlling crime, increasing conviction rates, enacting stricter laws and regimes, and imposing punishments. However, the justification for all of these motivations is not that the law of the State has been broken (unlike in the crime-control model), but that victims and their interests have been affected.[92] In this regard, it was observed by Roach that "the punitive model of victims' rights thus features the new political case in which the rights of victims and potential victims are pitted against the accused's due process rights."[93] Thus, the first essential feature of this model is that the criminal process is seen as one where the victims' rights and interests are asserted against the due process rights of the Accused. This implies a fundamental

[88] See Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113(1) University of Pennsylvania Law Review 1.

[89] Kent Roach, 'Four Models of the Criminal Process' (1999) 89(2) Journal of Criminal law and Criminology 671, 699–713.

[90] Packer (n 88).

[91] Roach (n 89) 700.

[92] Roach (n 89) 701.

[93] Roach (n 89) 700.

shift in the perception of criminal trials, which are no longer envisaged as a contest involving the State and the Accused. Rather, victims displace the State as the primary (and newly prioritised) stakeholders of the trial.

Second, the punitive victims' rights model considers strict penal sanctions as the most adequate response to crimes.[94] This stems out of a belief that punishments are the most effective means to control crime and enhance victim satisfaction. The centrality of punishments in the punitive victims' rights model is self-explanatory: it is termed as a 'punitive' model, in contrast to Roach's 'non-punitive victims' rights model'. Another important feature of the model is that plea-bargaining, and other arrangements (even those involving the victim), are discouraged, since penal law and criminal sanctions are considered the most appropriate responses to crime.[95]

Finally, the punitive victims' rights model envisages that the victims engage and assert their rights within the adversarial system.[96] Thus, while victims are considered the primary stakeholders, they are not attributed a significant degree of agency, especially in determining the response to a crime. It is true that victims' rights are prioritised in this model, and that the criminal system is put under constant scrutiny to make it more viable for victims. However, there is no special accommodation for the peculiar interests of a victim (or for victim satisfaction subsequently), as this model strictly places its faith in the adversarial system by focusing on securing convictions.[97]

C. Placing the ICC justice system within the punitive victims' rights model

As a preliminary point, it may be noted that in-spite of operating within a retributive system with non-impunity as one of its goals, the Rome Statute makes room to account for victims' rights and interests, as addressed in the previous sections. This clearly indicates the importance of victims in the ICC process. However, three traditions of the ICC squarely place its justice system within Professor Roach's punitive victims' rights model.

First, the ICC pits victims' rights against the rights of the Accused. This is done through participation of victims in the trial, wherein they can adduce evidence and make submissions against the Accused. In most trials at the ICC,

[94] Roach (n 89) 706: "In the punitive model of victims' rights, the criminal sanction is the primary response to the widespread suffering and subordination recorded by victimisation studies."

[95] Roach (n 89) 701–702.

[96] See Douglas Evan Beloof, 'The Third Model of Criminal Process: The Victim Participation Model' (1999) 1999 Utah Law Review 289; Roach (n 89) 700.

[97] Beloof (n 96) 313–317; Roach (n 89) 701–706.

victims and the prosecution are on the same page, against the Accused.[98] Thus, the trial resembles Roach's framework of the punitive victims' rights model, where trials are understood as a contest between the victims and the Accused, as opposed the State and the Accused. Moreover, there are numerous provisions in the Rome Statute (highlighted in the previous sections) where a particular course of action is to be undertaken by balancing the interests of victims with the fair-trial rights of the Accused.[99]

Second, punishments are a central feature of the ICC and are believed to ensure justice to victims. Guilty verdicts by the ICC necessarily invite a strict penal sanction. With regard to punishments in his punitive victims' rights model, Roach observed as follows, "[i]n the punitive model of victims' rights, the criminal sanction is the primary response to the widespread suffering and subordination recorded by victimisation studies."[100] Clearly, the centrality of punishments within the ICC resembles Roach's emphasis on punishments in his model.[101] An equally important resemblance with Roach's model lies in the justification for the centrality of punishments. Unlike domestic systems, the imposition of punishments is not premised on the violation of a legal order (international norm, in this case). Rather, as it emerges from the Preamble to the Rome Statute, punishments seek to act as a deterrence against such heinous crimes (thus, prioritising the victims and justifying punishments on the basis of their interests).[102] Additionally, similar to Roach's

[98] This is the position emerging from various trials of the ICC. See *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) (Judgment pursuant to Article 74 of the Statute) [2012] ICC-01/04-01/06 [27]–[30] and [54]–[59]; *Prosecutor v Callixte Mbarushimana* (Pre-Trial Chamber I) (Decision on the confirmation of charges) [2011] ICC-01/04-01/10 [6]–[8] and [11]–[12]; Prosecutor v Germain Katanga (Trial Chamber II) (Judgment pursuant to Article 74 of the Statute) [2014] ICC-01/04-01/07 [1032]–[1034] and [1036]–[1037].

[99] For example, Article 75(3) of the Rome Statute empowers the ICC to specify reparations to victims, including restitution, compensation and rehabilitation. Similarly, Article 53(2)(c) of the Rome Statute allows the Prosecutor to recommend not proceeding with a situation if prosecuting it is *inter alia* against the interests of the victims.

[100] Roach (n 89) 706.

[101] While it may be argued that the ICC does order reparations as well, it is subsequent to the pronouncement of a guilty verdict. Coupled with the lack of possibility of any form of reparation other than a monetary payment to certain victims, it only resembles an additional punishment that may be imposed on the Accused. See Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in John Braithwaite and Heather Kristian Strang (eds) *Restorative Justice: Philosophy to Practice* (Ashgate 2000), 33–54, where she argues that retributive punishment can be employed within a restorative justice model. This perspective is evidenced, she claims, through the use of compensation orders within the criminal justice system, consequently eroding the distinction between reparation and punishment. See also Armstrong (n 41) 365.

[102] The Rome Statute, Preamble; Ilaria Bottigliero, 'Victims and the International Criminal Court' in David Weisburd and Gerben Bruinsma (eds) *Encyclopedia of Criminology and Criminal Justice* (Springer, New York 2014) 5461–5469.

punitive victims' rights model, there is no possibility of plea bargaining before the ICC. This is possibly because plea bargaining ignores the interests of the victims and is antithetical to the purposes believed to be served by strict criminal sanctions.

Finally, at the ICC, there is no possibility of any engagement, dialogue or an alternate arrangement between the Accused and the victims. As observed in relation to the punitive victims' rights model, there is a characteristic lack of agency afforded to victims; their rights and interests are to be realised within the existing practices and systems of the criminal process. Further, based on the presumption that a strict punishment best serves their interests, no special consideration is given to peculiar needs of the victims. Similarly, in trials before the ICC, the participation of victims is necessarily through the institutionalised adversarial form. Essentially, even if a victim desires otherwise (for example, a settlement, or that the ICC does not involve itself in the matter[103]), it is believed that the ends of justice (for the victim) are best served through a criminal sanction. Therefore, although victims participate in the trial, their participation is not accompanied with requisite agency, resembling an unsaid premise of the punitive victims' rights model.

Hence, the central aspects of the ICC's justice model can largely be explained by Professor Roach's conception of the punitive victims' rights model. Such a theoretical grounding of the ICC is helpful in ascertaining the precise nature of the Court's practices and its considerations for justice. It is also a helpful starting point to consider how the ICC will further its objectives and realise its goals: does the ICC wants to transition to a more restorative paradigm? Or is the current adversarial model sufficient to meet its varied objectives? More importantly, the application of Roach's punitive victims' rights model provides an alternative source of legitimacy for the ICC. Needless (and fallacious) claims about the ICC's alignment with restorative justice aimed at legitimising the Court's stature as the permanent sequitur of international criminal justice can be avoided. Rather, the punitive victims' rights model can sufficiently stake the ICC's legitimacy. This is because, similar to the ICC's objectives, as a system of justice, the punitive victims' rights model prioritises victims' rights, and enforces them through reparations and

[103] See text accompanying (n 54–55), with respect to the ICC Situation in Uganda; Clark (n 74) 230–267.

strict criminal sanctions (which continue to be advocated as the most appropriate way of dealing with egregious crimes and offenders[104]).

VI. Conclusion

The claims that the ICC's justice model is in line with principles of restorative justice are largely based on the provisions of the Rome Statute that focus on victim participation and reparation. However, a closer analysis of the Rome Statute and the practices at the ICC reveal a model quite dissimilar to a restorative paradigm. Due to features such as the centrality of punishments and the adversarial nature of trials, institutionally and procedurally, the ICC resembles a retributive paradigm to a far greater extent. Further, the superficial nature of the victim-based provisions (relative to what is required in a restorative justice system) suggest that the ICC's approach is characteristic of a 'commodified' restorative justice.

However, despite the constraints posed by the scale of international crimes, and the spatial distance between the ICC and the situations before it, the ICC can potentially transition into a more restorative paradigm. Pursuantly, this paper suggests that first, the ICC must adhere to the principles of complementarity and not seek to monopolise over situations of mass atrocities. Regional and national efforts are better-equipped to re-establish stability and realise justice. Second, the ICC should contemplate instituting a judicially-supervised negotiation between the victims and the Accused, before the Pre-Trial proceedings. This will facilitate an indirect encounter between the primary stakeholders of the trial, and make the Court's human and material infrastructure accessible to them. Third, the Registry must bolster the 'Assistance Mandate' of the Victims' Trust Fund, to strengthen the physical, psychological, and material support available to victims of mass atrocities. However, these victim-centric adaptions will require the ICC, as well as the Assembly, to re-imagine some of the most basic features and values of the ICC.

In the meanwhile, this paper seeks to resolve the theoretical flux of the ICC's justice system. It recognises that the unique victim-based features of the Rome Statute fall short of a restorative justice model. However, they certainly bolster the role and position of victims to a far greater extent than retributive

[104] One only needs to look at various domestic jurisdictions and the manner in which restorative justice is applied. Except for a few countries such as Japan and Canada, strict criminal punishments continue to be the most frequent response to crime. Restorative justice and alternatives to punishment are usually employed for juvenile offences or minor crimes. See Gerry Johnstone, 'Restorative Justice for Victims: Inherent Limits?' (2017) 5(3) Restorative Justice 382, 392–393; Donald HJ Hermann, 'Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the search for Justice' (2017) 16(1) Seattle Journal for Social Justice 71, 98; Kent Roach, 'Changing Punishment at the turn of the Century: Restorative Justice on the Rise' (2000) 42(3) Canadian Journal of Criminology 249, 276.

paradigms. Thus, ICC's traditions are best anchored in Professor Roach's punitive victims' rights model. Going forward, this theoretical model can better inform stakeholders of the ICC's philosophy of justice, and smoothen efforts to transition to a more restorative paradigm.