DELINEATING THE RHETORIC? THE INTERSECTION OF RETRIBUTIVE AND RESTORATIVE JUSTICE IN INTERNATIONAL SENTENCING

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Abstract: A large and growing body of literature has investigated victim participation at the International Criminal Court. Hence, an increasing body of published studies describes victims' role during victim participation and its evolution. However, literature is scarce on managing victims' rights and interests during sentencing and the impact of victims' involvement on sentencing decisions. For example, victims have interests in reparations, justice, truth and sentencing. The knowledge of restorative justice in criminal sentencing is important for an understanding of how victims navigate criminal trials, especially regarding their perceptions of the sentencing. Using a case analysis, this article critically examines the interaction of retributive and restorative justice vis-à-vis victims position during sentence hearings and reviews.

Keywords: International Sentencing, Conviction, Reintegration, Victims, Sentence Reduction, Restorative Justice.

Abstrak: Sejumlah besar literatur telah menyelidiki partisipasi korban di Pengadilan Kriminal Internasional. Oleh karena itu, semakin banyak penelitian yang diterbitkan menggambarkan peran korban selama partisipasi korban dan evolusinya. Namun, literatur tentang pengelolaan hak dan kepentingan korban selama hukuman dan dampak keterlibatan korban pada keputusan hukuman masih terbatas. Misalnya, korban memiliki kepentingan dalam reparasi, keadilan, kebenaran dan hukuman. Pengetahuan tentang keadilan restoratif dalam pemidanaan penting untuk memahami bagaimana korban menjalani persidangan pidana, terutama mengenai persepsi mereka tentang hukuman. Dengan menggunakan analisis kasus, artikel ini secara kritis mengkaji interaksi keadilan retributif dan restoratif vis-à-vis posisi korban selama pemeriksaan dan peninjauan hukuman.

Kata Kunci: Hukuman Internasional, Pemidanaan, Reintegrasi, Korban, Pengurangan Hukuman, Keadilan Restoratif.

1.1 Introduction
The Victims Dilemma: Clearing the Pathway to Justice?
"the fairness of any criminal justice system must be judged by acquittals and not by convictions.....acquittal does not necessarily follow from any inadequacies in the office of the prosecutor."1

Baumgartner draws our attention to how victim participation may influence sentencing and punishment.2 However, when she conducted her research, none of the cases before the ICC had reached the sentencing stage. Her research corroborates the need to examine victims status and expectations during international sentencing. Ashworth notes that victims do not have special interests in the disposition of the offender. He explains: "it would be wrong to suggest that the victim has no legitimate interest in the disposition

1 Richard Goldstone, ‘Acquittals by the International Criminal Court’ (2019) European Journal of International Law accessible at <https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/> last accessed 21 November 2019.
2 Elisabeth Baumgartner, ‘Aspects of victim participation in the proceedings of the International Criminal Court’ (2009)90(870) International Review of the Red Cross, 409-440.
of the offender in their case, but the victim's interest is surely no greater than yours or mine."  

Here he compared the victims' interests to 'one of many citizens' who is part of the community. Ashworth's assertion fails to sufficiently note that victims' interest emerges from the personal harm they have suffered because of the perpetrator. The community interest is classified into the category of 'general public interest'. This means that ordinary citizens are remotely affected as opposed to victims. Therefore, the reference of Ashworth to the social contract reasoning limits the situating the consequences of the perpetrator's acts for the victims. Perhaps, the analysis was limited within the ambit of restorative justice. Nevertheless, it is no gainsaying that most victims look forward to the determination of the punishment. Moreover, Henham suggests that international tribunals and courts should attempt to articulate substantive justifications for sentencing. He also argues that these courts do not clearly distinguish between the general grounds for punishment and the specific aims of punishment in concrete cases. In his opinion, there exists fluidity between objectives, purposes, principles, function or policy.  

In the same vein, Van Zyl Smith points our attention to the limitations of sentencing provisions in the International Criminal Court (ICC) Statute. He posits that challenges that flow from establishing reliable processes through international agreement reflect the confined nature of the punitive rationale for international sentencing, given that the maximum penalty is 30 years or life imprisonment. Justice may become relative. Therefore, Justice could be the discharge of the accused where there are doubts as to his guilt. Many a time, conviction is misconstrued as the symbol of fairness. The conviction with the miscarriage of justice questions the criminal procedure's effectiveness and strikes at the legitimacy of criminal trials. The excerpts bring to light the fact that the Prosecutor is not obligated to always secure convictions, especially where the rights of the accused to a fair trial are at stake. The presumption of innocence precludes an unwarranted conviction where the Prosecutor cannot prove beyond a reasonable doubt.  

In Henham's words, sentencing represents "the point in the trial where the aims of punishment are given concrete and public expression in a specific case". Hence, the sentencing decision could be considered as the legitimacy of the punishment. This legitimacy goes to the root of effective governance of criminal justice. Strang, Sherman and Moffett highlight the need for the criminal justice system to be victim-oriented. A victim-oriented criminal justice system is achievable through procedural rights, especially the right to information, participation, protection and compensation. Thus, procedural justice plays a vital role in shaping the perception of how victims feel the court have treated them.  

However, the release of information depends on their testimonies' value to the prosecution or defence. Similarly, the same study found that victims' satisfaction started to decline most times at the investigation stage due to the lack of information about their case's progress. Hence one may assert that the availability of information about the development of their case, updates and requirements is essential to giving victims a sense of belonging. Principle 6(a) lends credence to

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3 Andrew Ashworth, "Responsibilities, Rights and Restorative justice" (2002) 42 British Journal of Criminology p.585.  
4 Ralph Henham, 'Philosophical Issues in International Sentencing' in Mark Findlay & Ralph Henham (eds) Punishment and Process in International Criminal Trials, International and Comparative Criminal Justice (Ashgate 2005) 129; Prosecutor v Kunarac (Case No.IT-96-23-/1-4), Judgment, 22 February 2001, para.836; Herbert Hart Punishment and Responsibility: Essays in Philosophy of Law (Oxford University Press 1968)  
5 Van Zyl Smith, 'Punishment and Human Rights in International Criminal Justice'. Inaugural lecture as Professor of Comparative and Penal Law, University of Nottingham, 30 January 2002.  
6 Ralph Henham, Sentencing and the Legitimacy of Trial Justice (First Edition, Routledge 2012) 351  
7 Supra, Henham,6 n 351  
8 Heather Strang and Lawrence Sherman, 'Repairing the Harm: Victims and Restorative justice', 15 Utah Law Review (2003) 1; Luke Moffett, 'Elaborating justice for victims at the International Criminal Court' (2015) 13(2) Journal of International Criminal Law.  
9 Supra Strang and Sherman: Supra, Moffett.  
10 Heather Strang and Lawrence Sherman, 'Repairing the harm: Victims and Restorative justice', 15 Utah Law Review (2003) 15,20
this finding. According to this provision, the need to inform victims of their role, scope, timing, and progress may facilitate how the judicial and administrative authorities respond to their needs. Consequently, victims are under the impression that the courts and criminal justice professionals do not have sufficient information to handle their case in such a way that would reflect any outcome produced. This outcome has to take into account what happened to the victims.

In 2014, Zehr, 'the father of restorative justice', classified information as a type of victims' need. His studies reveal victims' need for accurate information about why the offence happened as well as updates after the commission of the crime. Interestingly, this information should go beyond 'speculation' and 'legally constrained' details, emanating from trial proceedings or plea bargaining. Instead, this information should be substantive and clear out speculations. It is noteworthy that Zehr's analysis restricts victims' information on why the offence was committed and what happened after the crime; he termed this as 'real information.' From his findings, little is known about the informational needs of victims during the trial process. Victims' needs are not adequately met in the international criminal justice system. Moffett also recommends that more consideration be given to procedural and substantive justice to enhance victims' needs. This submission highlights the importance of victims' contribution to criminal proceedings, sentencing and decision-making.

Victims need to obtain information about the kinds of services available to them before, during and after the criminal investigation and criminal proceedings. For example, they need to know the availability of victim protection programs, what it entails and medical services. Similarly, victims also need to understand how the police and criminal justice processes operate. The information will enable them to know the structure and content of the investigation or trial. Inadequate intake may frustrate victims or lead to secondary victimisation.

However, the conferment of procedural rights on victims may undermine the accused's process rights. By implication, if rights are granted to victims to fill the gap between the victims and the defence, this may increase victims' access to justice. Still, caution must be taken so that such rights do not impede the accused's fair trial rights.

Victimology and human rights play a central part in the development of victims' rights. Nonetheless, this development is still in process because most victims' rights struggle to find stability in the criminal justice system. Some of these rights are still very much contentious. One reasonable explanation is that victims' procedural rights are required to balance against the accused's rights. It begs the question of whether balancing the gap genuinely benefits the victims. The debate over the rights of victims has now become central to the discussions of international criminal justice. Commentators like Spiga, Hoyle and Ullrich observe that victims' rights in international criminal justice have become a focal point. Moreover, as mentioned earlier, this is partly due to the argument that victims' involvement in international criminal justice is essential to

11 Principle 6(a), The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985
12 Howard Zehr, The Little Book of Restorative Justice: Revised and Updated(1st Edition, Good Books 2014)5.
13 Zehr, Supra 12 n 5.
14 Zehr Supra, 12 n 13.
15 Luke Moffett, 'Meaningful and effective? Considering victims interests at the International Criminal Court'(2015) 26Criminal Law Forum 255-289.
16 Waller Irvin, Rebalancing Justice: Rights for Victims of Crime (Rowan & Littlefield Publishers 2011)38.
17 Jonathan Doak, Ralph Henham and Barry Mitchell, "Victims and the sentencing process: developing participatory rights? (2009) 29(4) Legal Studies, p.651-677.
18 Luke Moffett, Justice for Victims before the International Criminal Court(First Edition, Routledge 2014)17.
19 Ibid.
20 Valentina Spiga, 'No Redress Without Justice : Victims and International Criminal Law' (2012) 10(5) Journal of International Criminal Justice, 1377-1394; Carolyn Hoyle and Leila Ullrich, 'New Court, New Justice? The Evolution of Justice for Victims' at Domestic Courts and at the International Criminal Court,(2014) 12(4) Journal of International Criminal Justice ,681-703; Claire Garbett, 'From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim identities at the Victim Identities at the ICTY and ICC,(2015) 15(1) Journal of Human Rights, 40-59.
international criminal proceedings' legitimacy and effectiveness. Therefore, it has been argued that victims' perceptions of the proceedings confirm the criminal justice system's legitimacy. As such, one may conclude that victims are gradually becoming more significant in the criminal justice system. The victims' involvement in criminal investigations, judicial processes, and legal decision-making can enhance the quality of criminal trials and victims' willingness to accept and abide by the decisions.

The more contact, the higher the satisfaction. Maquire reiterates that the process is more important than the actual outcome of the case. Arguably, victims might perceive both process and outcome essential routes to justice—a reasonable utilisation. Principle VII of the Basic Principles and guidelines on the right to remedies and reparations allow victims to access relevant information concerning violations and reparation mechanisms. Principle VIII also provides that states should publicise information about available remedies on gross violations through private and public mechanisms.

Set against this background, this paper will explore the impact of victims' rights and interests on sentencing at the International Criminal Court.

1.2 Retributive justice and Restorative justice: Two Sides of a Coin?

It is now necessary to explain if there is any relationship between these theories. This part would compare the two approaches to assess their compatibility within the context of sentencing. In Zehr's observation, retributive justice is not the opposite of restorative justice. They are not irreconcilable. Instead, their approaches address the imbalance caused by the wrongdoing. Similarly, Zehr also submits that restorative justice is not a replacement for the legal system or an alternative to prison. It is believed that restorative justice runs parallel to retributive justice. It seems the elements of these theories are opposites. However, these theories can be applied to complement each other because they recognise the wrong and harm suffered by the victims. The focus of retributive justice is criminal punishment. Most advocates of restorative justice agree that crime has both a public dimension and a private dimension. Zehr opines that crime has a societal dimension, as well as a more local and personal aspect. The legal system focuses on the public dimension vis-à-vis society's interests and obligations as represented by the State. Nevertheless, the emphasis on the collective dimension relegates the personal and interpersonal aspects of crime. Sentencing as an integral part of the criminal justice system is situated within the standard facet of addressing crime and its consequences.

Although, it appears the restorative justice method is more holistic when compared to retributive justice. Nevertheless, both theories do not have to be alternatives in criminal trials. Instead, Findlay and Henham argue that both paradigms of justice share common qualities despite 'distinct
differences. As such, both paradigms can be used within the context of criminal trials without relegating the status of restorative justice to an option or using it for symbolic function. However, in the context of criminal trials, it might become challenging to strike a balance between the operations of both theories; as a matter of expediency, retributive justice dominates while restorative justice fills the vacuum.

There are doubts about the ability of trials and punishment to obtain restorative functions in conflict resolution. Retributive expectations from trials are mainly just deserts and punitive outcomes. Shapland et al. also argue that it is almost not certain if restorative justice can co-exist with retributive justice in the criminal justice system. These commentators believe that restorative justice cannot have a predominant role within the criminal justice system. They submit that it may operate in the shadow of criminal justice. Nevertheless, restorative justice may perform a background function. From their studies, it appears that restorative justice cannot have a direct impact on criminal justice. However, there is a possibility that some elements of restorative justice would be beneficial in criminal justice.

The criminal justice system’s foundation is retributive justice. Empirical study finds that criminal prosecution does not deter crime. However, it could foster compliance and ensure the international rule of law. Primarily, retribution is the rationale behind sentencing. Deterrent, rehabilitation, and some restorative justice elements might be found in the ICC’s sentencing decision. Some aspects of restorative justice within the criminal justice system (ICC) mirror a holistic approach towards victims’ position at the ICC.

The absence of expressive justifications for penalties in the Rome Statute, Rules and Regulations reveals the ambiguity in interpreting the ICC rationale for sentencing. From the declared sentence of the convicted person, it appears that the justification for international sentencing is not mainly centred on retribution. Instead, general deterrence, rehabilitation, and some restorative justice elements are all involved. One could also argue that the sentencing of the ICC is lenient and influenced by western ideas. Studies suggest that in some third world countries, the more severe the offence is, the harsher the punishment. That is why some third-world countries reward such punishment with harsher punishment like a death sentence and a longer-term of imprisonment.

Furthermore, restorative justice process may provide a context for forgiveness and reconciliation, especially in community settings. Admittedly, there is no pure model for restorative justice process. However, it is clear from the sentencing process that the Rome Statute and the Rules of Evidence and Procedure infused some elements of restorative justice. Nonetheless, the effectiveness of restorative justice might be subverted in the absence of a guilty plea by the offender and refusal to participate in such activity.

34 Mark Findlay and Ralph Henham, Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process (Willan Publishing 2005) 274.
35 Ibid.
36 Emelios Christodoulidis, 'Truth and Reconciliation as Risk's(2000) 9 Social and legal Studies 179.
37 Mark Findlay and Ralph Henham, Transforming International Criminal Justice System: Retributive and Restorative Justice in the Trial Process (Willan Publishing 2005) 306.
38 Joana Shapland, Anne Atkinson Helen Atkinson, Emily Colledge, James Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, 'Situating restorative Justice within criminal justice' (2006) 10(4) Theoretical Criminology 505-532.
39 Ibid, 523-524.
40 Ibid.
41 Brianne McGonigle Leyh, 'Two for the Price of One: Attempt by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles' (2009) 22(1) Leiden Journal of International Law, 127-149.
42 Criminal justice system of United States of America; Oliver Lungwe Fataki, World Coalition Against Death Penalty, Africa Towards the Abolition of the death Penalty in DRC: Advances to be confirmed, published on 13 December, 2016. Accessible at <www.worldcoalition.org/Towards-the-abolition-of-the-death-penalty-in-DRC-advances-to-be-confirmed.html> last accessed 07 July 2019.
43 Howard Zehr and Ali Gohar, The Little Book of Restorative Justice (Good Books 2002) 10,11.
44 Howard Zehr and Ali Gohar, The Little Book of Restorative Justice (Good Books 2002) 10,11.
This section has evaluated the relationship between the theories of retributive and restorative justice. Let us now consider the role of victims in sentencing. This assessment shall be made based on the decided cases approach, an analysis of Prosecutors v Katanga case transcripts. This approach is required to evaluate the impact of victims on sentencing.

1.3 Victims’ role in sentencing: The Prosecutor v. Germain Katanga.
The following is an examination of the role of victims in Prosecutors v Katanga. The section below shall address victims’ position during sentence hearings and if victim participation affects the sentencing decision.

On 20 March 2014, the majority found Germain Katanga (herein Katanga) guilty on one count (murder) of war crime and four counts (pillaging, killing, an attack against civilian population and destruction of property) of crimes against humanity. But, sadly, The Chamber acquitted Katanga of rape and sexual slavery as war crimes and crimes against humanity. One implication of this is the effect on substantive justice. Judge Bruno Cotte summarised the implication of Katanga’s acquittal on the alleged crimes of sexual violence and the use of child soldiers.

In Judge Bruno Cotte’s words: “If an allegation has not been proven beyond a reasonable doubt, this does not necessarily mean that the alleged act did not occur. Declaring a person not guilty does not mean the Chamber is convinced of the person’s innocence; just that they are not convinced of the person’s guilt as charged.”

The Chamber sentenced Katanga to twelve years imprisonment. However, since the convicted person has been in ICC detention since 18 September 2007, he would serve six years imprisonment. In response to this, the Prosecution made an application for appeal because the sentencing decision was deemed erroneous and not proportionate to the crimes committed. The Prosecution requested for the sentence to be revised to twenty-two years imprisonment. Katanga’s defence notified the Chamber of discontinuation of appeal and submitted Katanga’s apology statement to the victims. An appeal could have given the victims some thread of hope. Some victims relayed their disappointment in the sentencing order of twelve years, which they felt was not proportionate to the crime committed. They opined that he could have incurred a more substantial punishment if the local courts had tried him. Katanga’s apology also calls into question the role of apology in retributive and restorative justice for victims. While the LRVs contested the authenticity of Katanga’s apology, they averred that Katanga’s apology was a ploy to avoid the appeal and subsequent increment of a harsher sentence.

The dissenting opinion of Judge Christine Wyngaernt questioned the impartiality of the majority in the Katanga case. She acknowledged that while judges may exercise their truth-seeking roles, it is reasonable that they do not overstretch their boundaries by recklessly reshaping the case. She challenged the modification of Katanga’s liability vis-à-vis Regulation 55. In her opinion, the change in Katanga’s liability mode was a deliberate effort to ensure his conviction, which violated the fair trial principle. This argument is further exemplified by McGonigle, who notes that Katanga’s judgement illustrates the ‘impartiality deficit’ of the criminal institution. McGonigle contends that the conviction of Katanga was in a bid to suppress the rights of the accused in order to ‘fulfil its mandate of ending impunity and providing justice for victims.’

The majority decision and the dissenting opinion of Judge Wyngaernt suggest that there is a lack of consensus amongst the judges in addressing justice for victims and closing the accountability gap.

45 Situation in the Democratic Republic of Congo, Prosecutors v Katanga, Judgment in Pursuant to Article 74, Trial Chamber II, ICC-01/04-01/07-3436, 20 March 2014.
46 Presiding Judge Bruno Cotte’ words, The Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12
47 Situation in the Democratic Republic of Congo, Prosecutors v Katanga, Judgment in Pursuant to Article 74, Trial Chamber II, ICC-01/04-01/07-3436, 20 March 2014
48 Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436 (Katanga Judgment).
49 Judge Christine Wyngaernt, Dissenting Opinion.
50 Brianne McGonigle Leyh, ‘Procedural Justice? Victim Participation in International Criminal Proceedings 348, (Intersentia 2011).
While some judges are pro victims rights and access to justice for victims, some judges are pro defendants’ rights. Bearing this in mind, ICC is a criminal court founded on criminal law principles and norms. However, incorporating victims’ rights as a subset of human rights law remains challenging within its jurisprudence. Given that Article 21 provides that its interpretation should conform to the human rights standard, the ICC is not a human rights court.

The Chamber examined the cruelty of the crimes against the inhabitants of Bogoro, including the defenceless children, the discriminatory intent behind the attack and the accused’s abuse of victims in an official capacity. The Chamber specified that the sentence’s determination depended on factors like the gravity of the crimes committed, individual circumstances of the convicted person, mitigating circumstances and aggravating circumstances.

The gravity of the acts committed by the convicted person is necessary for the determination of sentencing. The gravity threshold is a determinant of the severity of punishment. The accused person must be aware that the crime he was convicted of is the most severe crime of concern to the international community. It is noteworthy that these crimes are not of similar gravity. The particular circumstances and the degree of participation of the convicted person in the crime commission must be taken into account.

The Chamber noted that not all crimes are equally severe. It differentiated between crimes against people and crimes against property. The Chamber observed that the crimes committed during the attack in Bogoro on the 24th of February 2003 were of questionable magnitude. It pointed out that the episode reflected explicit discrimination against a particular tribe and intended to wipe out the Hema population. The Chamber stated that Katanga was convicted of contribution ‘in any other way.’

The Chamber highlighted the implications of the attack on the Bogoro community and the victims. Finally, the Chamber submitted that the degree of participation of Katanga must not be underestimated and must be included in the gravity of the crimes committed. The Chamber recognised that the accused exercised his authority to make decisions regarding the distribution of weapons. However, he did not exceed the authority nor abuse it. The Chamber was not convinced that Katanga abused his power position or used his power to "promote the commission of crimes." Therefore, the Chamber found no aggravating factor in this.

1.3.1 Mitigating circumstances and aggravating circumstances

Regarding mitigating circumstances, the Chamber referred to the Prosecution and the LRVs submissions, which advanced that Germain Katanga must not benefit from the application of mitigating factors to his sentence. However, the Chamber considered the factors presented by the Defence to determine the mitigating circumstances. The Chamber considered age, family and character (good moral standing) as mitigating factors. Perhaps, the most severe disadvantage of the rule on mitigating circumstances is that it requires proof- a balance of probabilities. It does not require a piece of overwhelming evidence—a reflection of what is applicable in the jurisprudence of the ICTY. Hence, the threshold is lower for the balance of probabilities. One implication of the Katanga case is that it resulted in a lenient sentence of twelve years imprisonment for the convict.

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51 Katanga Sentencing Judgment, ICC-01-04-01/07-3484-t-ENG, 23 May 2014, para.75
52 Rome Statute, Preamble, para.7.
53 Mark Jennings, “Article 78-Determination of the sentence” in OttoTrifferer (Ed), Commentary on the Rome Statute of the International Criminal Court (Beck Hart 2008) 1436.
54 Katanga sentencing.
55 Katanga sentencing.
56 Ibid.
57 Ibid.
58 Second Prosecution Observations, paras.3 and 32; Second Observations of the Legal Representative, paras.49-54 and 59.
59 Prosecutor v. Kumarac, Case No IT -96-23-T&IT-96-23/1-T, 22 February 2001, para.847; Stuart Beresford, "Unshackling the Paper Tiger-the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda (2001) 1 International Criminal Law Review, 55
Moreover, the Chamber also considered peace and reconciliation efforts and remorse by the accused towards the victims, the accused's conduct during proceedings. However, the Chamber did not find the violation of Mr Katanga’s rights as a mitigating factor because there was no violation of his rights while he was in Court’s authorised detention.

In addressing the court, the LRVs reported:

“They had lost everything during the attack. Many people were injured and were the victims of cruel attacks. Some still bear the scars of bullets or matches. Mr Byaruhanga also explained to us that the suffering is continuing for some victims. They still have not been able to obtain adequate care.....”

“The victims are having a very difficult time going back to their older way of life because, you see, they lost everything...........On 24 February, the attackers wiped Bogoro off the map...we are not talking about minor looting or one or two buildings destroyed here and there. In this case, an entire village was struck.It cannot be denied that Germain Katanga played a key role in the commission of the crimes.”

To emphasise the seriousness of the crimes, the victims persuaded the Court to consider three aggravating circumstances. These are; ‘the particular vulnerability of the victims. It is noted that some vulnerable individuals(epecially civilians) like many women, children, older adults and newborns became targets during the attack. They were either killed or injured despite their vulnerability. The LRV argued that the second aggravating circumstance was the cruelty of the crimes. In her submissions, the combatants stripped some victims of their clothing. Some corpses were dismembered, and some victims were treated without dignity. They begged to be spared. The third aggravating circumstance was the attackers’ discriminatory acts against a particular ethnic group, the Hema. It was reported that every person deemed to be Hema was initially detained and killed. The LRV found no mitigating circumstances and discountenanced any potential mitigating circumstances.

Furthermore, the LRV stressed the culpability of Katanga, notably how he contributed to the wiping out of an entire village. She posited that Katanga's moves during the trial had been a 'strategic choice' to defend himself and that he(Katanga ) never for once expressed any remorse or regret for the victims. He was also elusive about acknowledging that civilians were targeted and killed. The victims reiterated that there were no extenuating circumstances that could affect the sentencing of the accused. The LRV states:

“We are not here to represent the international community...we are here to ensure that the victims’ voices are heard...the seriousness of these crimes cannot be reduced to just a number of casualties. We must take into account the long-term effects on the victims. The harm that has been done has hit an entire community. People will be victimised for generations.”

Furthermore, the LRV expressed the victims’ quest for justice.

“I have met with people who are thirsty, who have a thirst for justice. They only wish for justice, taking into account the key role played by Germain Katanga in the commission of the crimes of the attack on Bogoro on 24 February 2003.”

In Defence’s observations, he listed Katanga’s personal history and his low degree of participation, his passive role in the hostilities, which was limited to weapons distribution. He also observed that Mr Katanga lacked the intent, but he was aware of the crimes' commission. Finally, he
reminded the court about the rule against double counting, i.e. no factor taken as an aspect of the crime's gravity might be considered a separate aggravating circumstance. In the same vein, Defence listed factors that could be considered as mitigating factors. These factors included the role of Katanga in the demobilisation process, the time he had spent in detention in the DRC and the need for the amount of time spent to be taken into consideration, Katanga’s moral standing and Katanga's behaviour within his community.

In its closing statement, the Defence stressed the statement made by the accused before the Court and pointed out that Mr Katanga acknowledged the victims’ suffering and the killing of civilians. The Defence’s statement was contrary to the assertion of the Prosecution. Additionally, Defence restated its sympathy and compassion for the victims on behalf of the convicted person. He emphasised that Katanga had always been remorseful throughout the proceedings. The Chamber observed that a statement of remorse could be considered as a mitigating circumstance. However, for a declaration of remorse to qualify as a mitigating circumstance, it must be genuine/sincere. Afterwards, the Chamber distinguished between a statement of remorse and the expression of sympathy or genuine compassion for the victims. The Chamber stated that the expression of sympathy and genuine compassion might be considered in determining the sentence; nonetheless, it cannot be compared to a statement of remorse because a statement of guilt carries a higher value than an expression of sympathy and compassion for victims. Hence, an expression of sympathy and compassion for victims had lesser weight.

Moreover, the Chamber recalled the legal representatives’ observations for victims and the prosecutor’s closing statement that none of Mr Katanga’s statements could be interpreted as an expression of deep and genuine remorse. Nevertheless, the Chamber observed that Mr Katanga made some statements “attesting to his compassion for the victims and his desire for justice.” In the Chamber’s observation, it was noted that at the end of the hearing for the determination of the sentence, Mr Katanga’s statement per article 67(1)(h) expressed his compassion in general for victims of “that war.” The term “that war” referred to the ongoing war in Ituri and victims from his community.

The defence argued that Katanga expressed his genuine sympathies for the victims, which should not be dismissed. The defence submission was contrary to the LRVs submission that Katanga never sympathised with the victims. He also reiterated that Katanga never denied the civilians’ suffering nor failed to acknowledge these civilians’ death. He cited Katanga’s words: “Today, my thoughts go out to all victims of the conflicts in Ituri in general and particularly the conflict in Bogoro. My thoughts go out to all those who have lost loved ones, who have lost their prosperity and their wealth, for all those whose pride and dignity have suffered. I extend to them my compassion in regard to all the suffering that they have suffered because of the foolishness and wickedness of human nature.”

The Chamber opined that Mr Katanga’s statements were not an acknowledgement of the crimes he committed. Instead, the statements were considered as a ‘mere convention.’ In support, the Registry submitted that it had ‘no reliable information’ on any measure that Mr Katanga must have

70 Second Defence Observations, paras.53-126.
71 Second Defence Observations, paras 156-160.
72 Situation in the Democratic Republic of the Congo, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3404-Teng-Corr 23 May 2014,Para.116.
73 Ibid.
74 Ibid.
75 Ibid.
76 Ibid.P.48,Para 117.
77 Ibid 140,p.48,para 118,line 5.
78 T.345,pp49-50.
79 Ibid , p.14,lines 4-9.
80 D02-300,T.325,PP.58-60
81 D02-300,T.340,PP.54-59.
taken to ensure the victims’ compensation.\footnote{82} Furthermore, in the Registry’s report, the village chief revealed that he was unaware of any action/measure by the convicted person in the victim’s interest.\footnote{83} Based on the above reasons, the Chamber rejected Katanga’s statements because it did not qualify as an expression of compassion or genuine remorse for the victims of Bogoro. Accordingly, it also concluded that it was not sufficient to be considered as a mitigating circumstance.\footnote{84}

The Chamber sentenced the convicted person, Katanga, to twelve years imprisonment.\footnote{85} However, after a few years, the convicted person, Katanga, applied for sentence review. The sentence review shall be discussed below.

1.4 Review on sentence reduction-Katanga case

Sentence review is not an automatic right. It is regulated by the Rome Statute and the ICC Rules, subject to the condition that a sentence may be reviewed if two-thirds of that sentence has been served.\footnote{86} According to Article 110(4) of the Statute, whether to reduce a sentence is discretionary. It is evident in the use of the phrase ‘may reduce.’ The presence of one factor is sufficient to decrease a sentence. However, we should bear in mind that the presence of one factor does not guarantee a reduction. Furthermore, the presence of a factor against modification of a sentence does not hinder the exercise of this discretion. The factors against the modification of a sentence must be weighed against factors in favour of review in order to determine whether a reduction of punishment is justified.\footnote{87}

Mr Germain Katanga withdrew his appeal against the conviction decision and submitted his ‘expression of sincere regret.’\footnote{88} The prosecutor also withdrew her appeal against the conviction decision. Katanga filed a video recording and transcripts of filmed apology, where he publicly apologised to the victims of the crimes for which he was convicted.\footnote{89} It was observed that once a decision of sentence reduction is made, it is final and irreversible.\footnote{90}

Schabas suggests that early release’s primary justification is to decide if the prisoner is suitable for social rehabilitation after the sentence.\footnote{91} The Defence cited this point. Nonetheless, it should be noted that early release may likely sabotage the deterrent and retributive function of sentencing. Perhaps, an early release may affect victims’ perspective of justice or how victims perceive the ICC. The rationale behind sentencing is classical theories of retributive justice; reduction of sentencing could potentially unsettle the purpose of such punishment provided there was no rehabilitation. The excerpts from victims’ submissions are in the quote below:

“...we deplore the 12-year sentence imposed on Germain Katanga by the International Criminal Court ...[......]The victims of the February 2003 attack on Bogoro consider that this sentence is not proportionate to the crimes committed and that any reduction would merely exacerbate the feeling of injustice shared by all victims.”\footnote{92}
“With respect to the victims’ submissions and the observations of the DRC authorities regarding the victims’ continuing negatives feelings regarding the length of Mr Katanga’s original sentence, the panel concurs.”93

It is necessary to state here that the above excerpts demonstrate the disappointment of victims in the declared sentence and sentence review. It seems the victims expected a higher sentence because of the gravity of the convict’s crime. Both the victims and the DRC authorities expressed dissatisfaction with the Court’s declared sentence. The discontent is not unconnected to the applicable laws and the jurisprudence in DRC. They believed the convict would have received a harsher sentence in Congo.

Similarly, the DRC authorities expressed their reservations regarding the declared sentence for Katanga. They reported that Katanga’s sentence of 12 years came as a rude shock to the affected population of Ituri, “who, the DRC authorities submit, expected a higher sentence, given the nature of the crimes committed.”94

The panel considered the presence of five factors listed in Katanga sentencing. In as much as the panel finds information that supports one of the factors in rule 223, or article 110, it is left to the discretion of the Court to make a sentence reduction. According to the panel, the reduction is mainly dependent on the information taken into account to establish the presence of the factors in rule 223(a)-(e)

On the early release, the Panel found that the early release of Mr Katanga would not give rise to “significant” social instability. However, it had been found that his early release would give rise to a degree of social unrest.

In addressing this point, Mr Katanga submitted he took action for the benefit of the victims. These actions include; withdrawal of his appeal, expression of regret, actions towards bringing the two communities together, supporting victims in their applications for individual reparations and expressing public apologies.95

According to the Prosecutor, the sentenced person has not taken any significant action to benefit the victims because the victims rejected Mr Katanga’s apology. In addition, the Prosecutor recalled that in the victims’ submissions, they averred that Mr Katanga’s early release to Ituri would trigger their trauma. She also noted that it was too early to decide if any of the potential actions that Mr Katanga promised to take during reparations would benefit the victims.96 Mr Katanga argued that his withdrawal of appeal against the conviction decision constituted ‘a significant action’ that would benefit the victims.

Turning now to the final three actions identified by Katanga: that he has offered support for the victims’ individual reparations,97 that he has released an apology video and; that he offered to apologise personally to the victims, the Panel noted that the victims’ opposition was based on the fact that the reparations proceedings were ongoing. Thus, there was a time constraint between completing the proceedings against Mr Katanga and the sentence review proceedings (two years and a half months).98 The victims rejected Mr Katanga’s offer to apologise. They averred that accepting his apology is inconsistent with a fundamental principle in Hema culture, articulating that an offender must make amends before they tender an apology.99 The principle of this culture believes that reparations precede an apology. The Panel acknowledged the Prosecutor’s argument that it was too early in the reparations proceedings to deduce whether Mr Katanga’s actions

93 Ibid.
94 Observations of the DRC authorities.p.4,ICC-01/04-01/07 p.27para 72.
95 ICC-01/04-01-07-3615, 13 November 2015, p.31,para 82.
96 Transcript of Sentence Review Hearing, p.18, lines 21-24.
97 Mr Katanga’s Reparations Response, para 97.
98 Prosecutor v Germain Katanga, 30 June 2014, ICC-01/04-01/07-3501-Anx; Observation of Victims on the Withdrawal of Appeal, 26 June 2014, ICC-01/04-01/07-3499.
99 Victims Submissions, para 54-55.
benefitted the victims.\textsuperscript{100} The Panel reasoned that it should analyse this factor on a ‘case by case basis’.\textsuperscript{101} Mr Katanga showed the filmed apology to members of the broader community. The Panel also referred to the observations of the HRC/TJI: “[t]hus far, it appears that Mr Katanga’s apology has been found inadequate for victims.”\textsuperscript{102} Consequently, this triggered ‘negative reaction’ from the actual victims to the video. As such, the Panel found the victims’ rejection of the filmed apology as reasonable. The Panel conceded that the filmed apology was beneficial to the broader community affected in the DRC. Despite that, the benefit to the victim was ‘indirect’ and ‘minimal’. Within this context, for that reason, it does not qualify as a significant action’ taken by Mr Katanga for the benefit of the Victims.

Concerning Mr Katanga’s offer to meet personally with victims to apologise\textsuperscript{103} (last identified action), the Panel reasoned that a more personal form of apologies such as a face to face meeting between the sentenced person and victims might constitute ‘significant action’ that would benefit victims. However, the Panel observed that in this instance, it remained uncertain if the victim wishes to have a face to face encounter with Mr Katanga or whether this action might also cause further upset. The Panel recognised that Mr Katanga’s offer to meet with victims to apologise was an action that could potentially benefit the victims. However, it was not sufficient as a significant action to help the victims. Besides, the Panel mentioned that the second clause, “any impact on the victims and their families as a result of the early release” recognised the trauma it could cause the victims and their families.

Based on the information received, the Panel concluded that from the actions taken by Mr Katanga, there was a ‘limited benefit’ to the victims. Hence, all the actions undertaken by Mr Katanga did not constitute a ‘significant action’ for victims’ benefit within the meaning of rule 223(d) of the Rules of Procedure and Evidence. However, the Panel also found that the early release of Mr Katanga could negatively affect victims and their families. Flowing from this, the Panel submitted that the factor under Rule 223(d) of the RPE was not present to determine whether it would be appropriate to reduce Mr Katanga’s sentence.

The Panel considered Mr Katanga’s cooperation with the court in its investigations; a genuine dissociation from his crimes, the prospect of resocialisation and change in Mr Katanga’s circumstances. The Court admitted Katanga’s expression of regret. It should be noted that although victims were allowed by the Panel to submit observations about the benefit they had derived from Katanga’s ‘significant action.’ This factor was considered but had limited influence on the outcome of the sentence review. In conclusion, three judges considered it appropriate to reduce Mr Katanga’s sentence by three years and eight months.\textsuperscript{104} This section has reviewed the sentence reduction, the section that follows moves on to discuss findings.

1.5 Discussing findings.
This section summarises and discusses the main findings of the Katanga sentencing decision and sentence review. The results represent purely data obtained from transcripts of the decided case. Not in-person observations.

By carefully examining the data, it is found that victims were allowed to participate during the sentencing hearing and sentence review. From the data obtained on sentence review reduction, as well as evidential provisions of article 110(4)(b) of the Statute and Rule 223(d) of the RPE, it is shown that victims participated through written and oral observations/submissions. The judges

\textsuperscript{100} Ibid.
\textsuperscript{101} Ibid.
\textsuperscript{102} HRC/TJI Observations on Reparations, para B6.
\textsuperscript{103} International Criminal Court, Germain Katanga’s sentence reduced and to be completed on 18 January 2016, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1174> accessed on 20 January 2020; Prosecutor v. Katanga, Decision on the review concerning reduction of sentence of Mr Germain Katanga, Appeals Chamber, ICC-01/04-01/07-3615, 13 November 2015.
and panel had to balance between defendants, prosecutor, and LRVs' observations and verbal and written submissions. Perhaps this rationale is to give victims a platform to influence the sentencing decision and the sentence review. Nonetheless, their participation seems to illustrate a restriction on their ability to influence sentencing. Even though the chamber weighed LRVs' submissions against other parties involved, the sentencing decision and review were not made based on strictly victims' requests. The control resides within the decision-makers, the judges. Therefore, regardless of the extent of victims' participation, the sentencing decision is primarily dependent on judicial discretion, especially through aggravating circumstances and mitigating circumstances. This finding is consistent with Henham's study, which suggests that judicial discretion suppresses victims' ability to influence the sentencing decision effectively.\(^ {104}\) This reasoning underlines the role of judicial discretion in sentencing. One could say that the sentencing decision filters the views and observations of the victims. Therefore, the impact of victims' participation on the sentencing outcome could be described as partly symbolic—an impact made by representation through a few victims, a means to an end.

Similarly, the outcome of both the sentencing decision and sentence review suggests that judges were very cautious not to lose objectivity based on the victims' emotional stories. Some instances show Mr Katanga's inadequacy in addressing the victims' concerns; most of these came from the victims' hurtful emotions. The judges exercised caution in making a decision. Victims' submissions, especially at sentencing, might be subjective. Perhaps, such emotions from victims could affect how the judicial role is performed by triggering judges' sentiments. In making a fair sentencing decision or sentence review, the judges' reasoning should be objective to a large extent rather than the victims' reaction.\(^ {105}\) In Gibson's words: judicial role theory is "a means of moving beyond an exclusive focus on individuals to consider the influence of institutional constraints on decision-making. Contexts are always associated with the expectations emanating from others who share the context."\(^ {106}\) Judicial restraint takes precedent over sentiments, as sentiments could derail the purpose of sentencing.

Some commentators have argued that most victims' representations are beclouded with emotions rather than objectivity.\(^ {107}\) Thus, it may be difficult for the Chamber to consider their observations in the determination of sentencing.\(^ {108}\) According to the classical theories of punishment, Sentencing is mostly devoid of emotions,\(^ {109}\) ensuring that sentiments do not compromise the court's integrity. Nevertheless, in the realm of restorative justice, emotions from victims and remorse from the offender could impact the sentence and repair relationships.\(^ {110}\)

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\(^ {104}\) Ralph Henham, “Sentencing as Social Reality” Ralph Henham and Mark Findlay (eds) in Punishment and Process in International Criminal Trials(Ashgate 2005)p.98; Ralph Henham, “Reconceptualising International Penalty” in Ralph Henham and Mark Findlay (eds) in Punishment and Process in international Criminal Trials (Ashgate 2005)p.218-219

\(^ {105}\) John Scheb, Thomas Unger and Allison Hayes, “Judicial Role Orientations, Attitudes and Decision Making: A Research Note”(1989)42(3)The Western Political Quarterly,427-435.

\(^ {106}\) James Gibson, “From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behaviour”(1983) 5(1)Political Behaviour,7-49 ; James Gibson, "Judges Role Orientations, Attitudes and Decisions: An Interactive Model"(1978)72(1) American Political Science Review,911-924.

\(^ {107}\) Woodford Howard, "Role Perceptions and Behaviour in Three U.S Courts of Appeal"(1977) 39 Journal of Politics,916-938.

\(^ {108}\) Neal Feigenson 'Emotional Influences on judgments of legal blame. How they happen , whether they should, and what to do about it.' In Brian Bornstein & Richard Weiner (Eds), Emotion and the law:Psychological perspectives(New York Springer 2010) 45-96.

\(^ {109}\) Jeffrey Murphy, Remorse, Apology and Mercy in Punishment and the Moral Emotions(Oxford University Press 2012)129-180; Samuel Pillsbury , "Emotion and Criminal Punishment ;In Principle and in Practice" available at <https://emotionresearcher.com/emotion-and-criminal-punishment-in-principle-and-in-practice/> last accessed 13 January 2020;

\(^ {110}\) Jonathan Doak and Louise Taylor, "Hearing the voices of victims and offenders: the role of emotions in criminal sentencing"(2013) 64(1)Northern Ireland Legal Quarterly,22-46.
It is worthy of mention that western liberal rules and human rights influence international sentencing at the ICC. The conclusion on penalties during the Rome negotiations highlights a more humane approach to punishments. A shift from a purely vengeful notion of 'an eye for an eye or a tooth for a tooth' to a liberal approach to punishment. Seemingly, the ICC hesitates to utilise the ordinal proportionality instead of applying retributive justice’s principle of ordinal proportionality in some national jurisdictions.\(^{111}\)

Given this, most victims of international crimes participated in the proceedings with higher expectations of sentencing. Still, they felt disappointed when the Chambers sentenced Katanga to 12 years imprisonment - which was considered a lesser punishment - in contrast to their applicable national jurisdictions. The DRC authorities and victims' submissions\(^{112}\) demonstrated they expected severe punishment. Hence, they lamented on the supposed disproportionality between Katanga's declared sentence and the crime's gravity. The Rome Statute and RPE are silent on the determinant of proportionality. These victims felt that their national court would have meted a harsher punishment than what the ICC gave Katanga. This reinforces the general belief that cultural differences exist between sentencing in some domestic jurisdictions and the ICC's jurisprudence. Their expectation could be due to the corresponding punishment in Congo's laws. One reasonable explanation for this is not unconnected to the fact that the convict, Katanga, was acquitted of some crimes such as the use of child soldiers to participate actively in hostilities and the charges of sexual violence. One of the victims' submissions also expressed their disappointment about the request for Katanga's sentence reduction. From their perspectives, it is inferred that the early release potentially lessens the penalty, which may, in turn, decrease the gravity of the crime. The victims' complaint about reducing the sentence reinforces their conception of sentencing as mainly retributive justice.

Given that in their domestic jurisdiction, sentencing options span from the death penalty, terms of imprisonment to life imprisonment. The DRC maintains the death penalty in its legislation.\(^{113}\) In DRC, the death penalty is regarded as the highest form of punishment and capital punishment for grave and heinous crimes. The nearest to this capital punishment is life imprisonment. It is possible that that the victims expected 'capital punishment' of the death penalty or at least life imprisonment. Thus, for this particular case point, plausibly, the ICC could not fulfil or manage the victims' expectations. The Rome Statute's provision on sentencing states a three-step process to determine what law is applicable. These are the provision of the Statute, elements of the crime and the RPE.\(^{114}\) Where this is not applicable, then the court shall refer to relevant treaties and the principles and rules of international law. Where this does not suffice, the court should resort to general principles of law derived from national jurisdictions.\(^{115}\) In addition, the victims did not accede to having benefited from any significant actions taken by Mr Katanga. They acknowledged the reception of Mr Katanga's filmed apology. Nonetheless, the victims averred that apologies at this stage were incompatible with a "fundamental principle in Hema culture, according to which a person who has done someone wrong must make amends before he or she makes an apology."\(^{116}\) This development highlights the intersection between law and culture. The clash between the Hema cultural precedent and the dictates of the law reminds us

\(^{111}\) Some States in United States of America gives higher sentence for grave crimes. Congo also has a higher sentence or death penalty for serious crimes.

\(^{112}\) Victims’ submissions para 47; ICC-01/04-01/07-3615,13 November 2015.p.27para71; Observations of the DRC authorities p.4 ICC-01/04-01/07 p.27para 72.

\(^{113}\) Oliver Lungwe Fataki, World Coalition Against Death Penalty, Africa Towards the Abolition of the death Penalty in DRC: Advances to be confirmed, published on 13 December, 2016. Accessible at www.worldcoalition.org/Towards-the-abolition-of-capital-punishment-in-DRC-advances-to-be-confirmed.html

\(^{114}\) Last accessed 12 November 2019.

\(^{115}\) Rome Statute Article 21.

\(^{116}\) Robert Cryer, ‘Royalism and the King Article 21 of the Rome Statute and the Politics of Sources (2009) 12 New Criminal Law Review 390,391; David Hunt, The International Criminal Court: High Hopes, Creative Ambiguity “and the Unfortunate Mistrust in international Judges; (2004) 2 Journal of Criminal Justice 56.

\(^{117}\) Victims Submission, para .54.
of the connection between law and culture. At this stage, the affected jurisdiction context cannot be entirely detached from prosecution, sentencing and review. Therefore, the ICC's challenge to meet victims’ expectations is attributed to the ICC's restrictive/liberal approach to sentencing. Basset and Drumbl opine that international sentencing is primarily influenced by objective universalism. From the universalist approach, consistent rules that preclude subjectivism and moral relativism are appropriate for determining the sentence. The observed difference between the imposed sentence and the victims' projections in this study reveals a transformative approach towards sentencing. One could infer that the ICC was lenient about this sentencing. It strengthens the place of rehabilitation of convicts within a purely retributive goal. While the ICC aims to work towards rehabilitative justifications for sentencing, the victims expected a strictly punitive sentencing approach. This finding accords with Schabas argument that international sentencing should be guided by human rights principles that enhance rehabilitation objectives rather than purely retribution goals.

Suppose the ICC's justification for sentencing is rehabilitation. The approach connotes that it prioritises the offender's needs over the victims or balances the difference between offender and victims. With this, the support of the communities is usually required. However, the sentence does not preclude general deterrence and the 'expressive notions of punishment'. Sloane, in his study, posits that international punishment should have the value of expressing punishment. Sloane's argument does not reference proportionality, but there must be a value of expressing a sentence, which could be incapacitation or other objectives. Perhaps, because the international crimes committed within this context are large and regarded as a mass atrocity, the victims had expected a 'severe' penalty for Katanga. It is suggested that the court strike a balance between considering the victims' concerns and interests and the integrity of the sentencing process.

Sentencing is the pinnacle of the criminal process. It unravels the punishment and its justifications, the most public face of the criminal trial. Plausibly, procedural justice and restorative justice are pathways to enhance victims’ experiences during the sentencing process. Furthermore, some restorative justice elements are portrayed in the sentencing hearing, and sentence review of both cases. The crucial factors are the process, the parties, the stake, the crime, the agreement, the aftermath, and the violation's consequences. The sentencing hearing is the process; the victims and the offender (convicted person) as “stakeholders” are the directly affected participants. However, both parties indirectly participate in the sentencing process through their legal representatives; a restriction is absent within informal settings of restorative practices. In this instance, the scenario reinforces the analogy that Christie property has been stolen from the original owner and taken over by the prosecutor and legal representatives of the directly affected.

Arguably, aside from the formal settings, presumably, victims' indirect participation through their LRVs may sabotage restorative practices during the sentencing hearing. The use of narratives via victims’ observations and submissions is restricted in the criminal trial but mostly

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117 Mark Drumbl, *Atrocity Punishment, and International Law* (Cambridge University Press, 2007) p.56-57; Marissa Basset, “Defending International Sentencing: Past Criticism to the Promise of the ICC” (2009) 16(2) *Human Rights Brief* 22,23

118 Ibid.

119 Williams Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach (1997) 7*Duke Journal of Comparative and International Law*, 461,481.

120 Von Birxh and Andrew Ashworth, *Principled Sentencing :Readings on Theory and Policy* Oxford (Hart Publishing 1998).

121 Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford Journal of International Law*, 39,44.

122 Ibid.

123 Ralph Henham, *Sentencing and the Legitimacy of Trial Justice* Routledge 2012) 1

124 Ibid.

125 Carolyn Hoyle, "Victims, the criminal process and restorative justice." In Mike Maguire , Rod Morgan and Robert Reiner[eds], *The Oxford Handbook of Criminology* (Oxford University Press, Fifth Edition, 2012) 398-425.

126 Nils Christie, “Conflicts of Property” (1977)17(1) *British Journal of Criminology*, 1-15

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accommodated in TRCs. Hence, during sentencing hearing, an encounter modelled after the first pillar of restorative justice by Van Ness and Heetderks Strong is unworkable.

Be that as it may, for a successful process and outcome of restorative justice, both parties must exhibit willingness and voluntariness to participate actively in the process. One of the parties does not participate voluntarily or hesitates to carry out any activity necessary for the procedure’s progress, which would impact the outcome and victims’ satisfaction. Van Camp and Wemmers’ study explains that victims satisfaction with restorative justice exceeds the procedural justice model. While procedural justice is partly responsible for victims’ satisfaction with restorative practices, they found that flexibility, care, central dialogue, and pro-social motives (helping, sharing and comforting) partly contribute towards victims satisfaction with restorative justice.

Unfortunately, it appears these factors are absent at the sentencing hearing of the ICC. As mentioned earlier, the ICC setting is strictly conventional. It is challenging for these elements to be factored in-a a limitation to the practicability and outcome of applying the restorative justice approach. Therefore, the Rome Statute compromises some indispensable retributive features and legitimate restorative practices, making the process predominantly retributive. Victims lamented about the lack of remorse and insincere apologies from the sentenced person, Katanga. The reluctance of the convicted person to show remorse and offer genuine apologies demonstrates the limitations of the court's role in the process of restorative justice. The unwillingness may impede rehabilitation. If the convicted person, refuses to acknowledge his crimes; his lack of remorse and sincere apology reveals an unrepentant offender’s implications on the restorative justice process. The offender is required to make amends voluntarily. Coercion may be unworkable in practice as it may sabotage both process and outcome. We should bear in mind that at this point, an apology from the convict should be voluntary. Coercion is not an effective strategy to receive an apology from the convicted person. It becomes challenging to persuade the offender; even imprisonment, could not induce him to apologise to the victims.

Victims’ reactions to the convicted person’s apathetic attitude indicate they value remorse and sincere apology from the perpetrators. It is hard for an offender who had persistently denied the charges to accept responsibility and tender an apology. Katanga was reluctant in accepting the responsibility for the crime committed. It is interesting to note that the Chamber and the panel (sentence reduction) established their obligations in this respect. The Chamber’s assessment of whether the offenders’ apologies were genuine and remorse is of utmost importance. This is inferred from the conditions set out in Rule 145.

Victims may obtain closure from apologies because it validates the offender’s acknowledgement of the crimes committed. Apology increases solidarity between the stakeholders and reasserts the identities of the parties involved. One could classify an apology as making amends-a component of restorative justice. It is commendable that the Chamber considered the absence of admission from the sentenced person and the ingenuity of the convicted person’s apology to reduce the sentence. It reveals that remorse and sincere apology are significant in mending a broken

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127 Katherine Doolin, 'But what does it mean ?Seeking definitional clarity in restorative justice, Journal of Criminal Law(2007) , The Journal of Criminal Law accessible at <https://journals.sagepub.com/doi/pdf/10.1350/jcla.2007.71.5.427> last accessed 16 January 2020.
128 Tinneke Van Camp and Jo-Anne Wemmers, “Victim satisfaction with restorative justice: More than simply procedural justice” (2013) International Review of Victimology, 1
129 Ibid.
130 Defence Submission of a Video Recording of Mr Germain Katanga’ ICC-01/04-01/07-3606 (RW) with Annex 1, ICC-01/04-01/07-3606-Conf-Anx (rw), and Transcript Translation of Video Recording’; Rule 145(2) of the RPE
131 Defence Notice of Discontinuance of Appeal against the judgement rendered in pursuant to article 74, Trial Chamber II on 7 April 2014, 25 June 2014, ICC-01/04-01/07-3497-AnxA
132 Lawrance Sherman, Heather Strang , Caroline Angel, Daniel Woods, Geoffrey Branes, Sarah Bennet and Nova Inkpen, 'Effects of face-to-face restorative justice on victims of crime in four randomised, controlled trial’ (2005) Journal of Experimental Criminology,36:7:395,368.
relationship between the victims and the sentenced persons (perpetrators). An acknowledgement of the convicted person’s crimes indicates accountability by the perpetrator and validates the victims’ harm. Acknowledgement which usually comes before an apology, contributes largely to making amends. The Perpetrators’ reluctance to take responsibility for the crimes is typically connected to the guilty plea. One of the conditions for a successful restorative justice process is that the offender accepts responsibility and makes a guilty plea at any point in the proceedings.\textsuperscript{133} In criminal trials, the accused (now convicted person) mostly contest their guilt. The acceptance of responsibility contributes towards the establishment of truth. Therefore, the absence of a guilty plea could potentially affect a successful restoration. The hesitation of the sentenced persons to tender, sincere apologies to the victims supposes a lack of willingness to rectify the damage. Unfortunately, the Court cannot coerce the perpetrators to make amends. All parties must participate voluntarily. However, it can facilitate an encounter between the victims and convicts to facilitate reconciliation. Perhaps, suppose the ICC can arrange a pre or post-sentence restorative justice process for victims.

In that case, it is commendable that the ICC provided victims to participate directly and indirectly during the criminal justice process, which gives an accent of the restorative justice activity. However, this is fettered with the use of LRVs and the restraints of criminal justice procedures. The few victims who participate directly may not represent the interests of the more significant percentage of victims. One implication of this is the promotion of tokenism for victims participation.

While restorative justice is not a substitute or the opposite of retributive justice,\textsuperscript{134} the court can simultaneously use both to address the wrong and harm. Inevitably, in a criminal trial, retributive justice may overshadow the interaction between the stakeholders.

Truth commissions and reparations schemes are mechanisms that advance restorative interests because of the absence of prosecutions. Truth-telling, narratives, and symbolic reparations like public apologies and monuments formally acknowledge victims’ ordeal and offender responsibility.\textsuperscript{135} It is noteworthy that criminal prosecution may sabotage the accomplishment of a restorative approach because the defendant/accused often denies the charges by entering a non-guilty plea. Subsequently, both parties contest the non-admission of guilt in the proceedings. Even post-conviction, convicts like Lubanga denied the crimes he committed. These elements of prosecution are impediments to the successful incorporation of restorative justice in criminal trials.

Reintegration also includes rehabilitation of the offender and rebuilding the offender’s relationship with their communities.\textsuperscript{136} Supposedly, restoration of the offender commences in the correctional facilities. However, rehabilitation can occur during sentence execution and after the offender has been released. After the release, the reintegration of the offender begins. Then, the state can continue rehabilitation. Braithwaite notes that asides from offenders and victims, communities also need to be restored.\textsuperscript{137}

The role of the community in re-integration is indispensable; it is necessary as a third party.\textsuperscript{138} Rule 233(a)-(c) are requirements of resocialisation and re-integration, which are mandatory to support sentence reduction.\textsuperscript{139} For the practical outcome, the community must have a working knowledge of the criminal justice system as well as the rationale behind sentencing. It follows that the ICC
could foster re-integration through the implementation of positive complementarity. The ICC's collaborating with the community by disseminating information and enlightening the participants on the criminal justice system's purposes would suffice. In this instance, the ICC might recourse to the domestic jurisdiction's principles, rules, laws, norms, and values rather than its (ICC) laws. It is also worthy of mentioning that the ICC rules on the reintegration of the offender and victims are limited. The Rome Conference negotiations show the Rome Statute's intention to implement more humane values and less lengthy sentences in compliance with limitations obtained from human rights standards. One could argue that the leniency of punishment does not preclude retribution or deterrent function; rather, the rationale behind this liberal approach is to encourage offenders' rehabilitation.

1.6. Conclusion
The paper has also shown that victims' role in sentencing is very restricted; thus, they have a relatively low impact on the sentencing decision. The extent of the applicability of their participation is subject to judicial discretion. Understandably, the Court must take caution when considering the impact of LRVs observations and submissions in sentencing. The court's sentence mostly requires objectivity because emotions and vengeance may obscure most victims' expectations. The chamber compromises the victims' expectations and the convicted person's rights, which results in a liberal approach. The Rome Statute envisages the humane treatment of a convicted person as opposed to strict punitive measures. Concerning the central question in this paper, it is also shown that victims can participate, however, in a restrictive means through written submissions and observations. Victims' complaints about the lack of proportionality between the gravity of the crime and severity of punishment reveal the disparity between the norms, rules and principles in their jurisdiction and the ICC's approach to the declared sentence. The Katanga case is a perfect illustration of the victims' dissatisfaction with the declared sentence. They complained that the punishment was not proportionate to the gravity of the offence. Some of the victims were disappointed at the sentencing outcome. This result connotes victims' interests in sentencing as opposed to Ashworth's assertion that victims have no interests in sentencing. Victims may perceive sentencing outcome and their participation in sentencing as an exercise of their right to justice. Unfortunately, the ICC sentence may not always meet victims' expectations. There is a thin line between justice, and vengeance. The opposition of victims against the declared sentence reveals ICC's challenges in managing victims' expectations. A reasonable approach to tackle this issue is to strike a balance between victims' interests in sentencing and the justification of sentencing by the court. Additionally, the court may also need to enhance victim participation during sentencing by increasing the restorative function of dialogue. One explanation for this is the absence of statutory provision and arrangements for the sentenced person's reintegration into society. In a similar vein, the sentence decisions show the disparity between law and cultural norms. Presumably, the victims' displeasure with the declared sentence illustrates a discrepancy between the Congo's criminal justice system and the ICC. In most domestic jurisdictions, law overlaps with their culture. Thus, the law cannot be entirely detached from their norms and culture. One of the reasons the victims rejected Mr Katanga's apology is that the standard of Hema culture dictates that an offender must make amends (apology) before reparations. The culture of the affected national jurisdiction filters into the sentence review. The absence of expressive justifications for penalties in the Rome Statute, Rules and Regulations reveals the ambiguity in interpreting the ICC rationale for sentencing. From the declared sentence

140 Rold Einar Fife, ‘Applicable Penalties’ in Otto Triffrere and Kia Ambos (eds) Rome Statute of the International Criminal Court: A Commentary (Third Edition Beck and Hart 2016) 1879; UN Standard minimum rules for the treatment of prisoners, ESC Resolution 663 C XXIV 31 July 1957; United Nations Covenant on Civil and Political Rights 1966, Article 7.

141 Katanga sentencing decision.

142 Andrew Ashworth, Sentencing and Criminal Justice (6th Edition Cambridge University Press 2015).
of the convicted person, it appears that the justification for international sentencing is not mainly centred on retribution. Instead, general deterrence, rehabilitation, and some restorative justice elements are all involved. One could also argue that the sentencing of the ICC is lenient and influenced by western ideas. Studies suggest that in some third world countries, the more severe the offence is, the harsher the punishment. That is why some third-world countries reward such punishment with harsher punishment like a death sentence and a longer-term of imprisonment.

It is commendable that the court recognised the importance of the convicted person’s apology to the victims and the offender’s expression of regret and remorse, which enables the restorative function. Moreover, since the judges are usually from different jurisdictions, civil and common law jurisdictions, we should bear in mind that while some judges may be pro-defendant rights, some may be pro-victims rights. The implication of this is that such differences may lead to division in reaching consensus. For example, the pro-victims judges may be more interested in the emancipation of victims’ rights in trials, while the pro-defendant judges may be inflexible in considering victims’ rights.

Furthermore, restorative justice process may provide a context for forgiveness and reconciliation, especially in community settings. Admittedly, there is no pure model for restorative justice process. However, it is clear from the sentencing process that the Rome Statute and the Rules of Evidence and Procedure infused some elements of restorative justice. Nonetheless, the effectiveness of restorative justice might be subverted in the absence of a guilty plea by the offender and refusal to participate in such activity. Doubts remain as to the extent of ICC’s role in the rehabilitation and reintegration of convicts. Rehabilitation is preventive-reduces recidivism-at the same time ensuring the reintegration of the offender into society. In a similar vein, offender rehabilitation is a form of punishment and a condition for early release. It is an offender-centred treatment mechanism and intervention. However, the absence of an individualised programme for the restoration of international prisoners and post-sentence strategy questions its effectiveness. Seemingly, there is a disconnect between offender’s rehabilitation, incarceration and the post-sentence phase.

Hela, in her research titled “When justice is done” describes the offender rehabilitation program as “poorly.” She submitted that the system could not support the restoration and reintegation of convicts. From her interview, she observed that the prison officers are not ‘sufficiently trained’ to promote offender rehabilitation in these facilities. Thus, one would conclude that the deficiency in the reformation and reintegation of these perpetrators would community. Presumably, this idea is a strategic pathway of actively involving them in resettlements.

143 Criminal justice system of United States of America; Oliver Lungwe Fataki, World Coalition Against Death Penalty, Africa Towards the Abolition of the death Penalty in DRC: Advances to be confirmed, published on 13 December, 2016. Accessible at <www.worldcoalition.org/Towards-the-abolition-of-the-death-penalty-in-DRC-advances-to-be-confirmed.html>; last accessed 07 July 2019

144 Howard Zehr and Ali Gohar, The Little Book of Restorative Justice (Good Books 2002) 10,11.

145 Howard Zehr and Ali Gohar, The Little Book of Restorative Justice (Good Books 2002) 10,11.

146 Ibid 374,377; Jessica Kelder, Barbora Hola and Joris van Wijk, ‘Rehabilitation and early Release of Perpetrators of International Crimes:Case Study of ICTY and ICTR(2014)14(14)International Criminal Law Review,1177-1203.

147 Ibid.

148 Justice Huh, ‘Expert Rehabilitation of those convicted by international criminal tribunals is woefully inadequate’ accessible at https://justicehub.org/article/expert-rehabilitation-of-those-convicted-by-international-criminal-tribunals-is-woefully-inadequate/; last accessed 17 November 2020; Barbora Hola and Jessica Kelder ‘Life after conviction at the international criminal Tribunals: An Empirical Overview’ (2014) 12International Criminal Justice, 109-132; Barbora Hola, Jessica Kelder and Joris van Wijk,’Effectiveness of International criminal tribunals :Empirical assessment of rehabilitation as sentencing goal’ in Nobio Hayashi and Cecilia Bailliet, The legitimacy of international criminal tribunals (Cambridge University Press 2017) 351-375.

149 Said.

150 International Justice Monitor,"Katanga’s Release ‘Aimed to Promote Reconciliation in Ituri’” March 23, 2020<https://www.ijmonitor.org/2020/03/katangas-release-aimed-to-promote-reconciliation-in-ituri/> last accessed
To conclude this section, it has been shown that their participation in sentence decision is minimal despite victims’ empowerment at the sentencing hearing phase. Their participation is not absolute; the influence of such participation is subject to judicial discretion. The sentence review seems to embrace emoting and resolving the damaged relationship between the offender and victims rather than a more punitive approach. It also incorporates rehabilitation and reintegration of the convicted person; however, there seems to be a gap in the offender’s restoration because the ICC does not monitor correctional facilities’ role in transforming the victims. The convict might feign adherence to the conditions and factors (Article 110(4) and Rule 223) of good behaviour, prospects, reflections, individual characteristics and acknowledgement of responsibility for early release.

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