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Justice for Victims before the International Criminal Court

Luke Moffett

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Justice for Victims before the International Criminal Court

Many prosecutors and commentators have praised the victim provisions at the International Criminal Court (ICC) as 'justice for victims', which for the first time include participation, protection, and reparations. This book critically examines the role of victims in international criminal justice, drawing from human rights, victimology, and best practices in transitional justice.

Drawing on field research in Northern Uganda, Luke Moffett explores the nature of international crimes and assesses the role of victims in the proceedings of the ICC, paying particular attention to their recognition, participation, reparations, and protection. The book argues that because of the criminal nature and structural limitations of the ICC, justice for victims is symbolic, requiring State Parties to complement the work of the Court to address victims' needs.

In advancing an innovative theory of justice for victims, and in offering solutions to current challenges, the book will be of great interest and use to academics, practitioners, and students engaged in victimology, the ICC, transitional justice, or reparations.

Luke Moffett is a lecturer at the School of Law, Queen's University Belfast. His interests are in victimology, international criminal justice, transitional justice, and reparations and responsibility.

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Abbreviations

ARLPI	Acholi Religious Leaders Peace Initiative
ASP	Assembly of State Parties
CAR	Central African Republic
CDVR	Ivorian Dialogue, Truth and Reconciliation Commission
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
HRW	Human Rights Watch
ICC	International Criminal Court
ICD	International Crimes Division
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IDP	Internally Displaced Person
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IWPR	Institute for War and Peace Reporting
LRA	Lord's Resistance Army
MLC	Mouvement de libération du Congo
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organisation
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PTC-I	Pre-Trial Chamber I
PTC-II	Pre-Trial Chamber II
PTC-III	Pre-Trial Chamber III
RPE	Rules of Procedure and Evidence
PEV	Post-election violence
RSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
TC	Trial Chamber
TFV	Trust Fund for Victims

TJRC	Kenyan Truth, Justice and Reconciliation Commission
UNBPG	United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victim of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
UPDF	Uganda Peoples' Defence Force
UVF	Uganda Victims Foundation
VLR	Victims' Legal Representative
VPRS	Victims Participation and Reparation Section
VWS	Victims and Witnesses Section (ICTY)
VWU	Victims and Witnesses Unit
WIGJ	Women's Initiatives for Gender Justice
WVSS	Witnesses and Victims Support Section (ICTR)

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Introduction

Around 6pm in the evening when the sun was going to set, the rebels came.... We had just been from our village. My mother was peeling potatoes under the veranda; my wife was sitting beside her. I was out making bricks with the intention of making another hut. I heard a gunshot. People started running. We ran into the house. When the government soldiers ran away, my baby inside the house got wounded from the bullets. When I saw the injured leg of my son I shouted at my family members that we should run away.... I opened the door so we could run together with the soldiers. My mum was getting stressed and said we should lie down and not run away. I took off and left them inside thinking they were going to follow me.

Unfortunately, my mum closed the door. When I took off at a distance I heard gunshots at my homestead. My mother was shot in the hand; my wife got wounded in the stomach, but she did not die in that very moment. Even my daughter and infant son were burnt alive when they set fire to the huts.... When I came back in the morning I found my mum was unconscious. Although she could speak, she was very weak and passed away in the government hospital. All my family were killed as a result of that attack.

Testimony of James¹

Mass atrocities cause massive suffering and harm to individuals and groups. The horrendous damage noted above was part of a conflict which resulted in immense anguish to tens of thousands of other Northern Ugandans over decades in hundreds of attacks. How do we respond to such crimes? Usually the reaction to international crimes has been to do nothing. Yet such apathy causes further suffering to victims by denying them recognition and support to hold those responsible to account, to remedy their harm, and to prevent its recurrence. Since the Second World War there has been an impetus to prosecute international crimes through international criminal justice mechanisms. International criminal

¹ Interviewed by the author in Northern Uganda, July 2011; identifying details are removed and a pseudonym is used to protect the identity of this individual.

tribunals and courts have often declared their purpose as delivering justice to victims. But to what extent does international criminal justice really achieve this?

Traditionally international criminal justice mechanisms have not been sensitive to the needs of victims, as their focus was to prosecute and punish perpetrators of international crimes. However, the inclusion of several victim provisions within the Rome Statute of the International Criminal Court (ICC), such as those regarding protection, participation, and reparations,² reflects a growing recognition of victims' interests in judicial mechanisms.³ Some commentators envisage the victim provisions within the ICC as a shift in international criminal justice from a punitive approach to a more restorative 'victim-orientated justice'.⁴ But does the incorporation of these provisions provide justice to victims or a more 'victim-orientated justice'? In brief, this book seeks to explore the extent to which the ICC can deliver justice to victims.

A Aim and approach

It is hoped that this book can contribute new insights into victims in international criminal justice and expand the discussion on their role in the ICC and domestic processes to deal with collective violence. This is evidenced in three areas: (1) the development of the theory of justice for victims; (2) a comprehensive approach to victims within the ICC; and (3) the use of qualitative research. First in developing a theory of justice for victims, research on victims of international crimes and their impressions of judicial mechanisms is an emerging field, particularly in light of the large amount of research conducted on domestic crimes. The most notable collection of research has been by Letschert *et al.*, who take an inter-disciplinary approach in examining victimisation as the result of international crimes;⁵ and Kiza *et al.* who collate empirical data from a quantitative survey of 991 victims of international crimes in 11 different conflicts on their victimisation and perspectives of justice.⁶ There have also been compilations of research based on analysis of international humanitarian law and human rights law on specific issues, such as

2 Articles 68, 75, and 79, Rome Statute.

3 The ICC is referred to as 'the Court' throughout the rest of this book.

4 Sergey Vasiliev, Article 68(3) and Personal Interests of Victims in the Emerging Practice of the ICC, in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 635–690, p. 677.

5 R. Letschert, R. Haveman, A.M. de Brouwer, and A. Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011).

6 Ernesto Kiza, Corene Rathgeber, and Holger Rohne, *Victims of War: War-Victimization and Victims' Attitudes towards Addressing Atrocities* (Hamburger Edition 2006).

reparations.⁷ However, these studies and numerous articles on the ICC have alluded to, but have not systematically defined, what a theory of justice for victims comprises.⁸ This book elaborates a theory of justice for victims of international crimes, so as to enhance the understanding of the ICC and the role of victims therein.

Second, with regards to the International Criminal Court the academic literature has focused on victim provisions in the Rome Statute and the Court's interpretation of these. Some proponents view the provisions as improving victims' access to justice and the legitimacy of the Court.⁹ These writers draw their arguments from developments in other fields such as human rights, victimology, and transitional justice. These fields offer a greater inclusion of victims and a wider conception of justice that goes beyond punishment. Conversely, other commentators consider the Rome Statute's victim provisions as a hindrance, preventing the Court from carrying out its primary task of prosecuting those most responsible or threatening to undermine the rights of the defendant.¹⁰ Thus the current academic debate represents a struggle between trying to find a role for victims while ensuring a fair trial and upholding the rights of the defendant. This debate demonstrates a lack of consensus on what justice means to victims and how this can be incorporated into international criminal justice.

7 See C. Ferstman, M. Goetz, and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff 2009).

8 A.H. Guhr, Victim Participation During the Pre-Trial Stage at the International Criminal Court, *International Criminal Law Review* 8(1–2) (2008) 109–142; T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press 2010); Anne-Marie de Brouwer and Marc Groenhuijsen, The Role of Victims in International Criminal Proceedings, in G. Sluiter and S. Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009) 149–204; Carsten Stahn, Hector Olásolo, and Kate Gibson, Participating of Victims in Pre-trial Proceedings of the ICC, *Journal of International Criminal Justice* 4(2) (2006) 219–238; Mikaela Heikkilä, *International Criminal Tribunals and Victims of Crime* (Åbo Akademi University Press 2004); Claude Jorda and Jérôme de Hemptinne, The Status and Role of the Victim, in A. Cassese, P. Gaeta, and R.W. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 1387–1419.

9 See Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart 2008); Håkan Friman, The International Criminal Court and Participation of Victims: A Third Party to the Proceedings? *Leiden Journal of International Law* 22 (2009) 485–500; Susana SáCouto and Katherine Cleary, Victims' Participation in the Investigation of the International Criminal Court, *Transnational Law and Contemporary Problems* 17 (2008) 73–105.

10 See Charles P. Trumbull IV, The Rights of Victim Participation in International Criminal Proceedings, *Michigan Journal of International Law* 29 (2008) 777–826; Mugambi Jouet, Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court, *Saint Louis University Public Law Review* 26 (2007) 249–308.

Extensive research conducted by McGonigle, Dwertmann, and McCarthy has studied specific aspects of the victim regime in the ICC.¹¹ McGonigle examines whether victims can be afforded a role within the proceedings of the Court by analysing victim participation through the theory of procedural justice. She also engages in a comparative analysis of other international and hybrid criminal tribunals, particularly the Extraordinary Chambers in the Courts of Cambodia. Dwertmann researches the reparation regime of the ICC drawing from national, international, and human rights law to guide her interpretation of it. McCarthy similarly explores the Court's reparations regime and its place within national and international mechanisms of redress.

This book, in contrast, takes a more comprehensive approach by examining victims within the proceedings of the ICC including their recognition, participation, and protection as well as reparations. Within these areas new interpretations of the Rome Statute are developed in light of a theory of justice for victims. These are supported by jurisprudence in international law and human rights law, as well as principles advanced by victimology. Although this book supports the role of victims in proceedings of the Court, it also calls for the judges to reach a balance with other interests before it. Furthermore, it appraises the Ugandan and other situations before the ICC to provide an external examination of the Court's work. This work also adds to the research in this area by taking a victim-orientated approach to the principle of complementarity, where the ICC and State Parties cooperate in achieving accountability, which includes justice for victims or 'victim-orientated complementarity', discussed in Chapter 6. Consequently, it is hoped that this book will contribute to informing and furthering the debate on victims in the ICC.

Third, qualitative research was conducted in Northern Uganda as part of this book. Numerous articles written on victims at the ICC are based on desktop research and second-hand information from NGO reports.¹² As this book is on victims it was important to meet with individuals and communities who had suffered from international crimes within the jurisdiction of the ICC, so as to understand their views on and concerns about the Court. Northern Ugandan was chosen as a case study in Chapter 5, as it was the first state referral to the ICC and the initial case before the Court.

11 Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011); Eva Dwertmann, *The Reparation System of the International Criminal Court* (Martinus Nijhoff 2010); Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press 2012).

12 Christine Chung, Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise? *Northwestern Journal of International Human Rights* 6(3) (Spring 2008) 459–545; Linda M. Keller, Seeking Justice at the International Criminal Court: Victims' Reparations, *Thomas Jefferson Law Review* 29(2) (2007) 189–217; authors cited in Notes 10–11.

Qualitative research was conducted in Uganda in June/July 2011 in Kampala and Northern Uganda and involved interviews, focus groups, and informal conversations with key stakeholders.¹³ Research was conducted with victims and other key stakeholders to gain first-hand information and to provide local insight into views on the ICC and domestic developments.

Ethical approval was gained beforehand. Respondents were informed of the researcher, the purpose of his research, and the use of interview material, with consent being obtained before beginning the interview or focus group discussion. To protect interviewees, all reference to them is anonymous due to the sensitive issues discussed. The author was also fortunate to be able to attend the trial of LRA commander Thomas Kwoyelo in Gulu, who was charged with a number of conflict-related crimes. As already mentioned, qualitative research conducted in Uganda is not meant to be representative, but to provide a general sentiment on the Court and national developments in Uganda. This is substantiated with reference to quantitative research conducted by other researchers using larger representative samples, though these studies are not conclusive, they do evince certain public perceptions. This case study offers practical analysis of the ICC from Ugandan victims' perspective, with the lessons learnt being possibly applied to other situations before the ICC explored in Chapter 6.

Although this book aims to be as comprehensive as possible, there are some limitations. In order to assess more accurately the perceptions of a larger group of victims on the responsiveness of ICC to their needs, a quantitative research of their expectations, views, and needs could be carried out, particularly among those who have applied and participated before the ICC. However, this was beyond the capacity of this book and is a more general concern of transitional justice commentators.¹⁴ In addition, this book only evaluates the first ten years of the practice of the ICC with regards to victims; it is still a relatively new and emerging Court which in the future has the potential to evolve and improve.

B Book structure

This book consists of seven chapters. Chapter 1 examines the theoretical issues involved in identifying what is meant by the terms 'victim', 'justice', 'justice for victims', and their interaction with international criminal justice. The chapter begins by exploring the nature of international crimes

13 Including the government, civil society, LRA, and civilians, such as men, women, elders, young people, religious, cultural, and community leaders, and victims of abductions, massacres, pillaging, displacement, torture, and sexual violence.

14 Hugo van der Merwe, Delivering Justice during Transition: Research Challenges, in H. Merwe, V. Baxter, and A.R. Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (USIP 2009) 115–142, pp. 137–138.

and criminal justice theories which underlie international criminal justice, before discussing who is a victim in international criminal justice. It then turns to considering what justice for victims involves, and whether the victim provisions of the International Criminal Court reflect this. The theory of justice for victims developed in Chapter 1 will be used in subsequent chapters to evaluate the extent to which the ICC fulfils this theory in practice. Although there are hybrid criminal tribunals and courts, this book focuses on the ICC due to its prominence, wide jurisdiction, and growing jurisprudence on victims.

Chapter 2 looks at the role of victims in previous international criminal courts and tribunals from the Second World War to the ad hoc tribunals of the 1990s. The account is sub-divided into three parts looking at the recognition of victims, procedural justice, and substantive outcomes. Victim recognition is considered by examining the definition of victims and crimes that were prosecuted. The proceedings of the Tribunals are evaluated as to whether they provided procedural justice to victims. This chapter also considers the outcomes of these trials and the extent to which they satisfied victims' substantive rights. The information gathered from this chapter highlights the challenges involved in incorporating victims of international crimes into international criminal justice as well as the lessons that can be learnt for the ICC.

Chapter 3 assesses the role of victims in the proceedings of the ICC, paying particular attention to their recognition, participation, and protection. It begins by discussing briefly the *travaux préparatoires* of the ICC and the drafters' intentions behind the victim provisions. The chapter then analyses the ICC judges' interpretation of the provisions in recognition, participation, and protection, and whether this is consistent with the theory of justice for victims set out in Chapter 1. The chapter finds that victims' role in proceedings is limited by the rights and interests of other parties, with victims' interests not being fully considered in the determination of outcomes.

Chapter 4 appraises the Rome Statute's provisions on reparations. The inclusion of reparations at the ICC is an innovation, as it had never been utilised in previous tribunals and focuses on remedying victims' harm. Reparations have the potential to satisfy a number of victims' needs and deliver them a broader sense of justice than just the punishment of the perpetrators. This chapter outlines the jurisprudence concerning reparations in delivering victims an effective remedy established in international and human rights law. This jurisprudence is used to interpret the Rome Statute's provisions on reparations. Linked to providing justice for victims, this chapter argues that there is a need to broaden reparations beyond individual convicted persons, by engaging state responsibility in complementing the Court's regime.

Chapter 5 is a case study on Northern Uganda which evaluates the impact of the International Criminal Court on victims at the domestic