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'We ask for justice, you give us law'

The rule of law, economic markets and the reconfiguration of victimhood

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> I cannot and will not forget the innocent Kenyans who are no longer alive to tell their story. I will not forget those who did live to tell their stories of survival—and who have waited too long for justice. These survivors are crying out for more justice, not less. I will continue to fight for the justice they deserve.
>
> Fatou Bensouda, ICC prosecutor

Introduction

These words of the prosecutor of the International Criminal Court (ICC) resound with conviction. They describe the way that the rule of law, in this case the Rome Statute for the ICC, has become a proxy for the defence of victims. But not all agree and some, like a prominent grass-roots Latin American group, have pushed back with the observation, 'we ask for justice, you give us law' as a way to critique the contemporary conflation of justice with law. Similarly, among one of the most colourful controversies at the ICC was the counter-claim by deputy president of Kenya, William Ruto, during his pre-trial hearing for crimes against humanity in which he attempted to broaden the bid for justice through the broadening of the terms of victimhood. In a conciliatory, reflexive and assertive tone he argued that there were two types of victims following Kenya's post-election violence, and he was one of them. According to Ruto, there are 'the post-election violence victims, whose lives and property were destroyed and deserve justice and truth; and another set of victims which I belong to, victims of a syndicate of falsehood and a conspiracy of lies choreographed by networks that are obviously against

https://doi.org/10.1017/CBO9781139924528.014 Published online by Cambridge University Press

truth and justice'.[1] Ultimately, he claimed, he was a victim of structural violence at the hands of the ICC.

Some people received Ruto's remarks with affirmation and appreciation of his plight. To others, his claims to victimhood were laughable and defiled the very nature of suffering. The executive director of the NGO-led Coalition for the International Criminal Court responded to Ruto's invocation of victimhood by insisting, 'States should not be distracted by the efforts of certain leaders to portray themselves as victims when the Court guarantees fair trial rights. The Assembly should stay focused on strengthening the Court's work and impact so that the actual victims of ICC crimes receive redress.'[2] A year earlier, the then deputy prosecutor Bensouda had responded to a similar sentiment in which members of the African elite claimed an impartial ICC had victimised them:

> What offends me most when I hear criticisms about the so-called African bias is how quick we are to focus on the words and propaganda of a few powerful, influential individuals and to forget about the millions of anonymous people that suffer from these crimes . . . because all the victims are African victims. Indeed, the greatest affront to victims of these brutal and unimaginable crimes . . . women and young girls raped, families brutalised, robbed of everything, entire communities terrorised and shattered . . . is to see those powerful individuals responsible for their sufferings trying to portray themselves as the victims of a pro-western, anti-African court.[3]

The language Bensouda uses in these statements reflects a *juridified*[4] notion of justice in which agents of the court equate justice with the exercise of law, with moral responsibility as its motivation. In this case, the narrative construction of justice-as-law invokes the mission of protecting victims against powerful perpetrators who have abused their impunity for too long.

The ICC's legal mission presumes that, in order to protect victims, justice must be understood as the objective manifestation of law. Bensouda's remarks also privilege those victimised according to popular definitions of suffering. For her, victims of 'brutal and unimaginable

[1] William Ruto, Transcript of ICC Status Conference, *The Prosecutor* v. *William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Trial Chamber V, ICC, 14 May 2013, 46–47.
[2] W. Pace, 'Assembly of State Parties Address', November 2013.
[3] F. Bensouda, deputy prosecutor of the ICC, *The Guardian*, 23 May 2012.
[4] S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: the Gap Between Juridified and Abstract Victimhood', *Law and Contemporary Problems*, 76 (2014), 235.

crimes' represent a category of persons whom the law must protect. This sacred space of victimhood must not be open to expansion. But Ruto's statement, validity aside, offers a way of rethinking how the notion of the victim in Kenya's post-election context has become popularised to refer specifically to those subjected to violent attacks, economic loss or psychological harm. While ideas of structural, political and economic violence once had a place in progressive politics, today Ruto's remarks are a reminder of the narrowing of definitional spaces within which judicial processes are playing out. This delimitation of who is a 'victim' and what constitutes 'victimhood' came of age with the popularisation of a recently emergent victim-protection discourse.

The popular presumption today is that to utter the words 'victims want justice' is to assume that 'victims want adjudication' to address their grievances. This played out at a February 2014 status conference in the ICC case against Uhuru Kenyatta, now president of Kenya, whose charges were subsequently dropped in late 2014. Fergal Gaynor, the victims' case representative, told the following story about the victims he represents:

> I referred earlier to a woman I met who was gang-raped by Mungiki attackers and then doused in paraffin and set alight. She was lucky to be rescued. Nine-months later she gave birth to a little boy. His biological father is a Mungiki rapist. The woman explained all of this to her husband – who, as you will recall, was himself hacked repeatedly by the Mungiki and left for dead that same day. He understood his wife's hellish predicament. And today they are raising together that little boy. Conceived through rape he is being raised in love. What does he (the husband) want – taking into account the horrors that he and his wife were subjected to? His answer is Justice. With justice, he told me, 'there can be reconciliation'. But if there is no justice he won't be able to find it in his heart to forgive.[5]

Gaynor concluded with the following:

> For there to be *true* reconciliation there must be truth. For there to be truth, there must be evidence – all the evidence that is necessary to uncover the truth. For there to be evidence, there must be state cooperation and for that, the accused must give the order . . . Justice ultimately is truth. It is the whole truth in all its measures. It is the rejection of those who try to create obstacles for reaching those truths . . . They say in Kiswahili, '*haki huinua taifa*.' In English, 'Justice elevates a nation.'

[5] Fergal Gaynor, Transcript of ICC Status Conference, *The Prosecutor* v. *Uhuru Muigai Kenyatta*, ICC-01/09-02/11, Trial Chamber V(b), ICC, 5 February 2014, 38.

Here Gaynor attempts to connect the notion of *true reconciliation* with justice – fundamentally achieved through legal measures – and uncovering the *truth of violence* through juridical deliberations. This conception of justice, he argues, will produce the conditions for an elevated nation. This reduces 'justice' to 'law' as the precondition for reconciliation. Underlying this veneer of 'justice-as-law' is the narrowing of a particular language of justice, what I call 'legal encapsulation', that erases political and economic realities of violence and judicialises them.[6] This is especially the case where poverty has contributed to vulnerabilities related to violence, such as Kenya, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR), all countries where the ICC has intervened.[7]

The form of sentimentality that we see in Gaynor's and Bensouda's rhetoric has its roots in the humanitarian ethos of 'giving', 'holding accountable', 'protecting' and 'saving', but it is tied to a profound form of judicialisation that was developed to build institutions, safeguard property and protect foreign investments. As the practice of justice has become aligned with both adjudicatory processes and humanitarian giving, it has propelled the support of state intervention, military action, economic assistance and health aid.[8] Through this development, both the individualisation of criminal responsibility – meaning holding a figurehead like William Ruto responsible for mass crimes under his watch and possibly at his behest – and defence of a certain category of victim – the focus of this chapter – have become central to justice discourses in the contemporary period.

However, like many victims, Kiamu, a Kenyan victim of post-election violence, questioned the ability of the ICC to work on behalf of victims:

> One of the biggest weaknesses of Kenyan criminal law, we do not have a scheme for compensating victims of crime and the idea that these people of the 2007 violence are the only victims of crime, they're not the only victims of crime, I'm also a victim of crime I lost ten teeth, I nearly died; the state isn't compensating me. The best the state will do if they find the guys who beat me they might even hang them but they'll never pay me a coin for the injuries I've suffered. We've had victims in this country since the colonial times so if you're going to address the system of victims of

[6] K.M. Clarke, 2015 (unpublished manuscript).

[7] N. Waddell and P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008), 11.

[8] U. Baxi, 'What May the "Third World" Expect from International Law?', *Third World Quarterly: Reshaping Justice: International Law and the Third World*, 27 (2006), 713.

> political violence in Kenya we do it holistically. We begin with the day the British landed here, the evictions that the settlers did – today the biggest land owners are settlers. All of these issues need to be addressed. We're not going to just come here and create a situation and it becomes an industry for everyone to make money and the reference point becomes 2007. My reference point is in the eighteenth century, and I think something needs to happen. If we're going to address the question of criminal politics of domination, exploitation and impoverishment and eviction then my reference point is not 2007 it goes much [further] back. And the ICC has no capacity to address that, so I'll not waste time on it.

Here we see not only a strong conviction about the limits of culpability in domestic and international criminal law, but also a critique concerning the inability of international law to adequately protect victims.[9]

In an attempt to understand how a particular narrative encapsulation of justice-as-law has gained influence in the definition and protection of victims, this chapter explores the judicialisation of politics in the late twentieth century to early twenty-first century. I detail the narrowing of a particular type of 'victim' subjectivity that has become increasingly aligned with the rise of the rule of law in order to demonstrate that a certain epistemology of victimhood has formed at the juncture of a new economic and political order: contemporary neoliberalism and the rise of 'good governance' indicators. By evaluating the impact of the World Bank structural adjustment policies of the 1990s and the institutionalisation of new strategies focused on liberalisation and privatisation, I examine how the rule of law has merged with a contemporary development theory focused on stabilising markets and argue that the post-Cold War political reorganisation of sovereignty, democracy and various neoliberal forms of economic expansionism is central to contemporary notions of justice, with the defence of the victim via liberal legality at its base. This construction represents a particular alliance between economics, politics and the law and reflects the link between justice and markets in post-Cold War processes of neoliberal globalisation. Through the use of statistical indicators to predict various outcomes ranging from state stability, state fragility and the probability of violence, such measures helped to propel new rule-of-law discourses around the protection of the victim through the encapsulation of the language of *justice*. As the justice discourse progressed as part of the rule of law directives, 'the victim' was

[9] A. Franceschet, 'The Rule of Law, Inequality, and the International Criminal Court', *Alternatives: Global, Local, Political*, 29 (2004), 23.

invoked not only as the subject to be saved by new judicial mechanisms, but also as the basis for the moral responsibility to protect.

Today, victims are popularly defined as those we have a responsibility to protect, justice is narrowly tailored in relation to legal processes, and law has increasingly become the domain for vetting socio-political issues. Both the figure of the victim and that of the perpetrator are central to the merger of humanitarianism with foreign-policy-making and international law mechanisms. The language of individualism rose in significance, while the focus on the individual criminal responsibility of commanders became central. The individual victim was, in turn, reduced to someone who suffered physical violence against his/her individual body, not structural forms of victimhood caused by the very conditions of economic or political disenfranchisement at the heart of the new justice discourse.

The discourses at the heart of this situation reflect a new international order in which the desire to manage violence and the need to mobilise extra state support for the defence of particular victims became part of a critical narrative triangulation – victims, justice and the law – deployed through the language of the law. Ultimately, this chapter seeks to show how the rule-of-law discourse of justice and individual criminal responsibility have actually narrowed the category of victim. This narrowing has resulted in a substantive disjuncture in which the new conception of victimhood is being propelled by various judicially driven institutions for victims – such as the Victim's Trust Fund – that, on one hand, claim to work on behalf of victims, but on the other hand are unable to provide victims with the basic necessities for addressing their suffering. By rethinking the unproblematised notion of the victim, the goal is to map a particular genealogy of victimhood through which to make sense of the contemporary alliance between the category of the victim and the workings of contemporary justice discourses.

Neoliberalism, the Washington Consensus and the rule of law

By the 1960s, as increasing numbers of African states had begun to gain independence and negotiate new terms for their independent states, a new trend had emerged in the West in which the market economy became the basis for state governance. So even as new African independent states attempted to establish social market principles carried over from earlier imperial governments, a new mechanism for economic reform involving the deregulation and the reduction of state influence,

the elimination of price controls and the diminishing of trade barriers promoted the concept of market freedom. This new theory of neoliberal reform had consequences in African contexts.

Following African independence, the end of the Cold War period signalled a victory for democracy and neoliberal capitalism. To promote economic liberalisation, open markets and free trade, a particular type of liberal economic organisation arose to advocate for deregulation, privatisation and the enhancement of private-sector development. In 1981 the World Bank published what became known as the 'Berg Report' (named after its author) on Sub-Saharan Africa. Amongst the key recommendations were market-oriented policies and reductions in government expenditures. These recommendations were soon reflected in World Bank and International Monetary Fund (IMF) lending practices; loans were granted in exchange for commitments to neoliberal, market-stimulating reforms, such as structural adjustment policies.

In 1989, English economist John Williamson coined the term 'Washington Consensus' to refer to a strongly market-based approach to development. It highlights ten relatively specific economic policy prescriptions considered central to the 'standard' reforms for the economic and political crises in the South promoted by the IMF, the US Treasury Department and the World Bank. The prescriptions encompassed policies in such areas as macroeconomic stabilisation, economic opening with respect to both trade and investment and the expansion of market forces within the domestic economy. Themes such as 'stabilise, privatise, and liberalise' became the mantra of a generation of technocrats who came of age travelling to meet with political leaders in southern countries to offer economic development advice.[10] The advice of many of these technocrats inspired a wave of reforms in Latin America and Sub-Saharan Africa that fundamentally transformed the policy landscape in these regions towards privatisation, deregulation and trade liberalisation.[11]

However, the market-oriented reforms proved to be ill-suited to deal with public-health emergencies, poverty and social inequality.[12] This resulted in cycles of underdevelopment in which the most attractive avenues for profit were those involving extractive industries such

[10] D. Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion?', *Journal of Economic Literature*, 44 (2006), 973.

[11] J.L. Mueller, 'The IMF, Neoliberalism and Hegemony', *Global Society*, 25 (2011), 377.

[12] T. Krever, 'The Legal Turn in Late Development Theory: The "Rule of Law" and the World Bank's Development Model', *Harvard International Law Journal*, 52 (2011), 287.

as oil, mining or plantation agriculture, which often involved violent and exploitative labour conditions. Newly independent African states and poorly functioning state institutions were increasingly incorporated into the international economy as they negotiated terms of extraction and compensation with former colonial powers. International organisations helping to facilitate transitional governments and corporations hoping to sustain extraction agreements negotiated with former military governments. But these extractive activities unfolded in contexts in which the armies and police were underpaid, educational and health institutions were dismally underfunded and courts and electoral politics were driven by economic opportunism.

Violence emerged as a response to social unrest and perceptions of inequality, with 12 civil wars in the last 25 years contributing to untold numbers of deaths, rapes and destruction on the African continent. Post-independence states attempted to control their capital cities and rural regions through takeovers and the autocratic suppression of opposition movements and democratic constitutionalism. This was enabled by successive military coups such as those in Nigeria, where ten successive coups ensued after the discovery of oil in 1966.[13]

The race for political control in Africa has led to the unfolding of electoral violence, and in some cases the development of rebel groups or ethnic patronage networks vying for political influence and/or the control of various extraction industries. The recent histories of the DRC, Somalia, Liberia, Nigeria, Kenya, Uganda, Sierra Leone and Congo-Brazzaville all followed this trajectory. Each country has various elite networks, international companies, rebel groups and governments deeply embattled in controlling resource extraction and political decision-making. This has led to a postcolonial condition in which political settlements and new and effective economic strategies are desperately needed. But, as noted above, neoliberal policies failed to result in economic development. Rather, social scientists have documented the extent to which they have actually exacerbated inequality in the Global South.[14]

[13] K. Clarke, 'Treat Greed as a War Crime', *New York Times*, January 2013.

[14] B. Chalfin, *Neoliberal Frontiers: An Ethnography of Sovereignty in West Africa* (Chicago: University of Chicago Press, 2010); J. Ferguson, *Global Shadows: Africa in the Neoliberal World Order* (Durham: Duke University Press, 2006); J. Comaroff and J. Comaroff (eds.), *Millennial Capitalism and the Culture of Neoliberalism* (Durham: Duke University Press, 2001).

In evaluating the failures of the 'stabilise, privatise, and liberalise' dictates, the World Bank turned its focus towards institutions. What resulted was the merger of a mainstream development theory with the rule of law. Technocrats recognised that economic growth also required the institutional transformation of property rights, legal institutions and the judiciary. The World Bank became central to the new rule-of-law discourse in which 'good governance' and the consolidation of democracy, human rights, reduction of corruption and secure economic growth became part of the new policy strategies.[15] A range of scholars described the merger as the manifestation of a transformation from a focus on efficient markets as the path to growth and prosperity, to the new orthodoxy of good governance.[16]

Thus, good governance through legal predictability and property-rights protections became part of the 2004 World Bank rule-of-law definition as outlined in the unveiling of its twenty-first-century development policies.[17] The assumption was that if neoliberal policies had failed, it was because of the absence of a secure institutional environment, not the policies themselves. The law and various legal institutions were considered central to this new discourse. What was being signalled was that the rule of law required transparent legislation, fair laws, predictable enforcement and accountable governments to maintain order, promote private-sector growth, fight poverty and have legitimacy.[18] Ultimately, ensuring predictable market conditions was key. The challenge was to measure governance and commitment through the development of predictive indicators.

The World Bank developed a Worldwide Governance Indicators ranking system in which it categorised countries in relation to six aspects of good governance: voice and accountability, political stability and violence, government effectiveness, rule of law, regulatory quality, and control of corruption.[19] These indicators were used by foreign-aid

[15] Krever, 'The Legal Turn'; A. Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006); I. Shihata, *The World Bank in a Changing World* (Leiden: Brill Publishing, 1991).

[16] Krever, 'The Legal Turn'; Santos, 'The World Bank's Uses of the 'Rule of Law; Promise in Economic Development', 253–300; Shihata, *The World Bank in a Changing World*.

[17] Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development'.

[18] Krever, 'The Legal Turn'.

[19] D. Kaufmann, A. Kraay and M. Mastruzzi, 'The Worldwide Governance Indicators: Methodology and Analytical Issues', World Bank Policy Research Working Paper No. 5430 (2010).

donor agencies to allocate funding according to various predictions of compliance.[20] As Sally Merry and others have described, 'An indicator is a named, rank-ordered representation of past or projected performance by different units that uses numerical data to simplify a more complex social phenomenon, drawing on scientific expertise and methodology. The representation is capable of being used to compare particular units of analysis (such as countries or persons), and to evaluate their performance by reference to one or more standards.'[21] The indicators are said to produce systems of knowledge in which various phenomena are measured and ranked, while particular claims are made according to legal, moral and scientific measures.[22]

Indicators have thus become part of the new democracy of the twenty-first century. They reflect the development of measures of compliance as well as predictions of volatility, risk and economic viability. The shift to the rule of law and the support for its principles became part of the way that the notion of international justice was operationalised by the UN Security Council in the establishment of various ad hoc tribunals and, subsequently, the ICC. Accordingly, the World Justice Project Rule of Law Index is said to measure how the rule of law is experienced in daily life in a cross section of households. Based on data collected from over 100,000 households and 2,400 expert surveys in 99 countries worldwide, it highlights 47 indicators that are said to index the following themes: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement and civil and criminal justice.[23] It also produces data for analysing various challenges, regional strengths and best and worst practices.

In addition to serving as a measure for various state conditions and a predictor of a range of outcomes, including state stability, state fragility and the probability of violence, an important part of the new rule-of-law discourse was the development of a space for victims to be "protected" and encapsulated by the new provisions. As the discourse progressed, the figure of the victim was invoked as the subject to be saved by new judicial

[20] G. Safarty, 'Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting', *Virginia Journal of International Law*, 54 (2013), 575.

[21] K. Davis, B. Kingsbury, and S. Engle Merry, 'Introduction: Global Governance by Indicators', in K. Davis, A. Fisher, and S. Engle Merry (eds.), *Governance by Indicators: Global Power Through Classification and Rankings* (Oxford: Oxford University Press, 2012), 3–28.

[22] M. Serban, 'Rule of Law Indicators as a Political Technology of Power in Romania' (unpublished manuscript).

[23] 'WJP Rule of Law Index', World Justice Project (Washington, DC, 2014).

mechanisms, and as the basis for the moral responsibility to protect. Significantly, the moral register became critically relevant for African states following the Rwandan genocide, the long history of anti-apartheid struggle in South Africa, and Liberia and Sierra Leone's civil wars in which international intervention was late and marginal. And in that regard, African states signed on to the Rome Statute regime with the expectation that judicial mechanisms would ensure that the international community would never again just stand by and watch such violence on the African continent.

Yet, a more incipient reality was at play that connected the moral impetus for rule-of-law interventions with a pragmatic, expressive one: the new rule-of-law indexes mattered in post-colonial Africa because they ultimately played a critical role in the renewal of IMF and World Bank loans, as well as in ensuring the ongoing support of international donors.[24] With the combined expressive and instrumental impetus behind Africa's participation in the Rome Statute system as well as the adoption of a range of other international treaties, African states inserted themselves and mobilised to build new institutions. These new institutions wed traditional approaches to domestic state action with the expansion of human rights and international criminal law that shifted the focus from states and state protection to the protection of persons and peoples.[25] With the shift to individuals, the idea of the 'victim' to be protected emerged. This shift was accompanied by a new judicial discourse that expanded beyond that which was used with victims from African states. It was based on a parallel humanitarian regime guided by the law of war[26] that incorporated dimensions of democratisation and political and social transformations.

These changes in legal and moral discourses were propelled by the pressures of laissez faire globalisation and affected the ways that state sovereignty and state borders were being reconfigured. They also had implications for the way that domestic laws were being reformulated through the incorporation of international treaties, and national laws

[24] B. Oomen, 'Donor-Driven Justice and Its Discontents: The Case of Rwanda', *Development and Change*, 36 (2005), 887; J. Parsons et al., 'Developing Indicators to Measure the Rule of Law: A Global Approach. A Report to the World Justice Project', Vera Institute of Justice (July 2008).

[25] R. Teitel, *Transitional Justice* (New York: Oxford University Press, 2002).

[26] C. Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine', *Journal of Conflict & Security Law*, 13 (2008), 191.

reworked with the introduction of bilateral agreements and new regional conventions and formations.

Alongside the earlier forms of economic neoliberal reconfigurations, pro-democracy developments, and World Bank-driven policy reformulations came the adoption of new humanitarian principles such as those embedded in various UN resolutions and international treaties. These shifts included the ICC Rome Statute, which reconfigured the reach of law and located the individual at the centre of foreign affairs. This figure of the individual was articulated through a discourse surrounding both the high-level 'perpetrator', criminally responsible for mass atrocities, and the 'victim' to be saved from the perpetrator's violence. Both figures – the perpetrator and the victim – were central to the merger of humanitarianism with foreign-policy-making and international law mechanisms. However, with the focus on the individual criminal responsibility of commanders, the space of the victim was reduced to someone who suffered physical violence against his/her individual body, not the larger structural forms of victimhood caused by conditions of economic or political marginalisation. With this focus on the individual victim to be protected from mass violence against an individual perpetrator, those at risk of what was seen as the worst forms of violence were entitled to legal protection through a new emergent discourse concerning the 'responsibility to protect'.

Protecting (certain) victims: a core responsibility of the 'international community'

In September 1999 in The Hague, on the centennial of the first International Peace Conference, Kofi Annan, the then secretary-general of the United Nations, delivered a critical speech in which he challenged states to address 'two equally compelling interests'[27] at once. Entitled 'The Effectiveness of the International Rule of Law in Maintaining International Peace and Security', Annan called for the production of an effective response to human rights abuses. The other interest was concerned with the development of a mechanism through which states could act with universal legitimacy.[28] From this challenge, the Canadian

[27] K. Annan, 'The Secretary-General Address to the United Nations General Assembly' (1999).

[28] S.J. Koulen, 'The Responsibility to Protect: A Critique of Motherhood and Apple Pie' (unpublished manuscript, 2009).

government established the International Commission on Intervention and State Sovereignty (ICISS).

ICISS was set up to reconcile the relationship between state sovereignty and the responsibility of the international community 'to act in the face of mass violations of humanitarian norms'.[29] From this task, it published a final report in December 2001 entitled 'The Responsibility to Protect',[30] which served as a critical doctrine for the development of the key principles of legality related to the protection of victims. The notion of the *Responsibility to Protect* (R2P or RtoP) emerged thereafter as a moral and political norm promoting the protection of life regardless of state citizenship or national identity. This notion led to the production of the terms for the expansion of global executive action[31] in which the developing rule-of-law project led to the further institutionalisation of core principles that obligate persons in positions of power to act in particular ways.

In 2001, following the failure of the international community to act to prevent or stop the Rwandan genocide, the African Union (AU) reinforced the idea that the international community had a responsibility to protect its population in crisis situations.[32] Article 4 of the AU's constitutive Act asserts 'The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'. Some four years later, the UN General Assembly produced a declaration clarifying the 'Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'. This declaration articulated a universal set of guidelines for victims. By 2005, the AU had adopted the Ezulwini Consensus, which provided African states with an African regional tool to address mass atrocities.

The foundational pillars of RtoP involve the idea that a state has a responsibility to protect its population from gross human rights violations. These include crimes against humanity, war crimes, genocide and

[29] 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (Ottawa: The International Commission on Intervention and State Sovereignty, 2001), 18.

[30] *Ibid.*, 10.

[31] A. Orford, 'On International Legal Method', *London Review of International Law*, 1 (2013), 166; A. Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', *Harvard International Law Journal*, 38 (1997), 443.

[32] B. Kioko, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention', *IRRC*, 85 (2003), 807.

ethnic cleansing. The second component involves the assumption that the international community has a responsibility to assist states in fulfilling that primary responsibility to protect its population. And finally, if a state fails to protect its citizens from the four crimes of concern, and if it has failed to maintain peaceful measures, the international community has a responsibility to intervene using the most effective and appropriate means, ranging from coercive measures to economic sanctions, with military intervention as a last resort.[33]

The RtoP discourse is not simply a moral architecture of the contemporary period. The notion of an obligation to protect the victim was driven by a force of law deployed across sovereign borders with expanded jurisdictional reach. This expansion of activity reflected a fundamental shift from the regulated affairs of the state to the expansion of global governance mechanisms known to operate from the north to the south, particularly in Africa and Latin America. These regions reflect the continuity of economic dependencies, and hence the need to manage political compliance with legal protections. The establishment of new ad hoc tribunals, international treaties, decrees and charters promoted the legal frameworks that made this possible. And the notion of the 'individual to be protected' joined with new international humanitarian and judicial mechanisms that provided the vocabulary for popularising these radically new and fundamentally transformative formations.[34] Key to the development of these mechanisms was a deeply retributive justice system to punish the guilty, but with minimal restorative possibilities for the victims.

As we enter the second decade of this century, the plight of victims in post-violence conflict situations remains within the realm of retributive-justice approaches, such as criminal tribunals. International discourses about the victim began playing a critical role in establishing a profoundly astute justice discourse. But the formation of judicial mechanisms to protect victims was only part of the story. In shifting from development

[33] 'A more secure world: Our shared responsibility', Report of the Secretary-General's High-level Panel on Threats, Challenges and Change (2004), 56–57, paras. 201–203; C. Stahn, 'Notes and Comments. Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *American Journal of International Law*, 101 (2007), 99.

[34] Stahn, 'Notes and Comments. Responsibility to Protect'; C. Focarelli, 'The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine', *Journal of Conflict & Security Law*, 13 (2008), 191; N. Schimmel, 'The Moral Case for Restorative Justice as a Corollary of the Responsibility to Protect: A Rwandan Case Study of the Insufficiency of Impact of Retributive Justice on the Rights and Well-Being of Genocide Survivors', *Journal of Human Rights*, 11 (2012), 161.

priorities to judicial measures, the popular definition of justice became narrower and far more restrictive and, with it, who counts as a 'victim' deserving of that justice.

Retributive and restorative justice in the world of tribunals

At both the Nuremberg and Tokyo tribunals, and the ad hoc tribunals for the former Yugoslavia and Rwanda, the interests of victims were to a large extent overlooked; their role was generally restricted to that of witnesses. However, as a result of the shift of the new governance architecture there has been a growing movement, supported by a range of non-governmental organisations as well as some states, to recognise the role of international justice in providing not only retributive justice but also restorative justice, by permitting victims to participate in proceedings and receive reparations for the harm they have suffered.

In 1985, the UN General Assembly first adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Victims' Declaration), which revolutionised the ordinary usage of the term 'victim'. This declaration has been the 'cornerstone' of legal rights for victims under international law. It established victims' rights in the criminal justice process, including the right to access justice, to be treated with basic respect and dignity, to protection and assistance and to reparation. The restorative dimension came further into play in 1991, when a compensation system for victims of a war was created. And in the aftermath of the Gulf War, the Security Council set up a commission to deal with the requests originated by the occupation of Kuwait and to decide on the compensation.

The Victims' Declaration, alongside these developments, laid the foundation for the negotiations on how victim was to be defined in the ICC texts during the Preparatory Committee discussions, leading to the signing of the Rome Statute in 1998. Interestingly, after extensive debates on whether or not legal entities could also be included in the definition of the term 'victim', a compromise was reached in the Rules of Procedure and Evidence, which establishes that victims may include organisations or institutions.[35] Despite this, the definition popularised by the ICC represents the consolidation of the notions of victims, justice and law.

After this period, international criminal law heralded a discourse driven by the Rome Statute's preambular conviction that 'all peoples

[35] Rule 85 (b).

are united by common bonds' that could be shattered at any time through violence, and that millions of children, women and men have been 'victims of unimaginable atrocities that deeply shock the conscience of humanity'.[36] During the negotiations on the Statute, emphasis was placed on ensuring that the core values of the Court – to promote greater peace and security through accountability for crimes, as well as the rights and the dignity of the victims – were to be respected.[37] This issue was crucial, given the clear recognition by states that the ICC should not only be retributive, but also restorative.

In keeping with the rule of law momentum, the Rome Statute provides for the possibility of granting reparations to victims. In the negotiations that led to the formation of the Rome Statute for the ICC, two principal institutions were conceptualised: the International Criminal Court and the Trust Fund for Victims (TFV). The TFV was established in September 2002 by the Assembly of States Parties and complements the reparations functions of the Court. Its mission involves providing the advocacy and mechanisms for mobilising physical, material or psychological resources for individuals victimised by violence. It is administered by the registry but is independent from the ICC and is supervised by a board of directors. Articles 75 and 79 of the Rome Statute lay the foundation for this restorative, victim-centred element.[38]

The Trust Fund, funded through Court-ordered forfeitures and fines as well as voluntary contributions by states parties, has a two-pronged mandate. The first aspect of the mandate is the provision of general assistance to victims or communities of victims in ICC-situation countries. The second aspect involves the management and implementation of reparations to victims. Furthermore, in a novel phenomenon in international criminal proceedings, Article 68 (3) of the Rome Statute grants that victims of crimes under the jurisdiction of the Court may also make their views and concerns heard during a trial. Accordingly, the Office of Public Counsel for Victims was established in 2005. Since its inception, the office had, as of July 2010, represented approximately 2,000 victims and

[36] Preamble, Rome Statute.

[37] W. Schabas, *An Introduction to the International Criminal Court, 4th Ed.* (Cambridge: Cambridge University Press, 2011).

[38] Articles 75 and 79, Rome Statute. Article 75 establishes that the Court 'may order reparations against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. Article 79 establishes the Trust Fund 'for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims'.

submitted approximately 300 submissions in the various proceedings before the Court. The office has also assisted 30 external legal representatives in all situations and cases, and provided close to 600 legal advisors to them.

The Victims' Rights Working Group was also created in 1997 under the auspices of the NGO Coalition for the International Criminal Court in order to work with various victims' representatives to help them participate in the proceedings or to inform them of judicial developments as they relate to their case. The Victims Participation and Reparations Section (VPRS) of the ICC's Registry conducts regular assessments and evaluations of its work, and sees itself as committed to a reflective learning process as its staff implement the Court's mandate in situation countries. The mission is communicated in a prevailing discourse of defending victims and ending impunity through the rule of law. The centrality of victims at the centre of the Trust Fund's work is enabled through the mobilisation of ICC judicial proceedings. It is an example of the way that the law is actually a by-product of a changing world of neoliberal governance and the resulting forms of executive governance in the Global South, and Africa in particular.

Despite the initial revolutionary presumptions about the formation of the Trust Fund, various stakeholders on the ground have been rigorously debating whether international criminal trials should be subordinated to other justice-producing mechanisms available on the African continent. The arguments are broad, and concern the viability of the ICC and its ability to achieve justice, especially if driven by retributive motivations. The reality is that, in addition to the essentially punitive institution of the ICC, the drafters of the Rome Statute and a significant civil society lobby sought to include elements of restorative justice, focused on social repair and reconciliation.[39] Yet various victims of violence, once enthusiastic about ICC adjudication, are now ambivalent about the work of the Court and its ability to achieve the type of justice that victims imagine.[40] Two of the larger questions are how to define those on whose behalf the Court

[39] 'Victim Participation before the International Criminal Court', War Crimes Research Office (2007); Judge Sang-Hyun Song, President of the International Criminal Court, Opening Remarks at the 7th Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law & World Parliamentary Conference of Human Rights, International Human Rights Day (10 December 2012).

[40] 'Kenyans set benchmarks for implementation of Jubilee Manifesto', prepared by *Ipsos Synovate* (13 July 2013).

works, and has the Court been able to deliver on the many expectations of justice for victims?[41]

As a discourse, the provision of victim inclusion as a key component of international trials has become one of the key organising principles underlying the definition for international criminal justice. Though much has been achieved, the limitations and tensions of the system in practice have also become apparent. Allowing for the participation of victims of extreme forms of physical, sexual and psychological violence through the structure of the proceedings in the trials and for reparations through the Trust Fund were heralded as significant achievements, yet victims' applications to participate in a trial have at times been so voluminous that the VPRS data-management and registration systems have struggled to cope with these realities. And though the Court's promise has been articulated in the name of victims, the reality is that many victims complain of the lack of proportionality between its institutional force and its ability to produce substantive and tangible reparative justice for those in need.

ICC judge Christine van den Wyngaert has described the lengthy and cumbersome process of victim registration at the ICC.[42] She concluded that the 'number of victims is becoming overwhelming ... The Court may soon reach the point where this individual case-by-case approach becomes unsustainable. It may well have to consider replacing individual applications with collective applications.'[43] ICC Judges have, since the start of trials, been grappling with a way to balance considerations of restorative justice for victims with expeditious and fair retributive justice. Indeed, a ruling by the judges of Trial Chamber V has led to the overhauling of victims' participation and representation in the case against Uhuru Kenyatta, and is an example of the need for rethinking the Court's restorative mandate.[44]

The very nature of the retributively driven judicial proceedings may at times deliver undesirable or incomprehensible results where victims are concerned. Due to a re-characterisation of charges, or a change in the temporal scope of cases, it is possible that from one day to the next,

[41] Trust Fund for Victims, 'Mobilising Resources and Supporting the Most Vulnerable Victims through Ear-marked Funding', Programme Progress Report (Winter 2012).

[42] C. Van den Wyngaert, 'Victims before International Criminal Courts: Some Views of an ICC Trial Judge', *Case Western Reserve Journal of International Law*, 44 (2011), 482.

[43] *Ibid.*, 483.

[44] Decision on Victims' Representation and Participation, *The Prosecutor* v. *William Samoi Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Trial Chamber V, ICC, 3 October 2012.

victims may find themselves ineligible for participation or even reparations. Despite this, ICC organs working with victims or the legal representatives of victims must deal with the challenges of communicating changing judicial decisions over who is selected as 'victim' and/or whose changing status has caused new forms of exclusion.

These competing demands continue to highlight the challenges as they relate to maintaining the equilibrium between the restorative mandate and the retributive, criminal justice mandate of the ICC. In this light, the following section demonstrates how, in Kenya, the DRC and CAR, the basis for justice for victims has remained in the judicial realm. Sara Kendall and Sarah Nouwen have called this *juridified victimhood*, in which justice exists with legality at its core.[45] The chapter concludes by demonstrating how retributive justice has come to form the contemporary answer to various sites in which violence against individual victims came to be understood as the basis for defining victimhood. Through that definition, a new form of international judicialisation has been developed to build institutions dedicated to ensuring the protection of victims. However, this individualised focus has left mundane forms of structural suffering unattended.

The delimited space of victimhood

> When you consider that the victims of the conflict did not have reparations and for me . . . we talk and talk and talk about the accountability process but it will never be complete until we implement the recommendations of the TRC . . . of the TRC reports . . . We provide [legal] help to the perpetrators, why are we failing the victims? We have a lot of victims in Sierra Leone who are beggars today.

A front-line worker uttered the above words as he reflected on Sierra Leone's post-violence plight and anticipated the challenges of Kenya's post-election violence victims. Shortly after he shared his reflections, Kenya became an ICC situation country in 2012. Kenya is by far one of the most polarised countries as far as ICC activity is concerned. Today the cases are beset with controversies and complexities in which a portion of the population seems opposed to the Court's engagement, while the other part supports it.

According to the Kenyan Truth, Justice and Reconciliation Commission, the 2007 presidential elections were 'conducted in a volatile

[45] Kendall and Nouwen, 'Representational Practices', 235–262.

environment in which violence had been normalized and ethnic relations had become poisoned'.[46] The groundwork had been laid for the eruption of violence such as delayed election results, reports of electoral vote rigging and ethnic incitements which ultimately led to a two-month period of violence, leaving more than one thousand dead, hundreds of thousands displaced, and large amounts of property destroyed.

Both the Party of National Unity led by sitting president Mwai Kibaki and the Orange Democratic Movement led by Raila Odinga claimed victory.[47] Violence was seen in all but two regions of Kenya, with a heavy concentration in pro-Odinga areas, the slums of Nairobi, the Rift Valley (Eldoret), Nyanza (Kisumu) and the Coast Province (Mombasa).[48] Patterns of violence included rioting, excessive use of force by members of the police and the security forces, the burning and looting of property, sexual violence and (ethnically motivated) murder.[49] In November 2009, the ICC prosecutor requested authorisation from Pre-Trial Chamber II to open an investigation, submitting that there were reasonable grounds to believe that crimes against humanity had been committed, 'in particular crimes of murder, rape and other forms of sexual violence, deportation or forcible transfer of population and other inhumane acts'.[50] The Pre-Trial Chamber granted the prosecutor's request to open an investigation on 31 March 2010.

In the Kenyan situation, at the time of writing, 233 victims had been authorised to participate in the case against Uhuru Kenyatta, which has since been dropped, with a further 327 included in the Ruto and Sang case.[51] Common legal representatives Fergal Gaynor and William Nderitu represented these groups of victims, respectively. The Kenya situation raises compelling questions with regard to victim participation and levels of support for the ICC. Reports of witness and victim intimidation in Kenya abound. On 5 June 2013, a letter began circulating in which ninety-three victims sought to withdraw from the ICC process, claiming they had lost faith in it, that they were no longer convinced that

[46] Report of the Truth, Justice and Reconciliation Commission (TJRC), Vol. I (2013), x.

[47] 'The General Elections in Kenya, 2007', Les Cahier d'Afrique de l'Est no. 38, Institut Français de recherché en Afrique (IFRA) (2008), 12; 'High Stakes: Political Violence and the 2013 Elections in Kenya', Human Rights Watch (HRW) (2013).

[48] IFRA, *Ibid.*, 12; HRW, *Ibid.*

[49] HRW, *Ibid.*

[50] Request for authorisation of an investigation pursuant to Article 15, *Situation in the Republic of Kenya*, ICC-01/09, Pre-Trial Chamber II, ICC (26 November 2009), 3.

[51] '*Kenyan Victims withdraw from ICC Proceedings*', Institute for War and Peace Reporting (7 June 2013).

it would be beneficial to their interests and that they could not identify with the manner their interests had been represented in Court.[52]

When we interviewed one of the human rights workers for victims in Kenya we asked her if she thought that the ICC had done a good job with victims. She responded,

> What's disheartening is that victims don't want to be a part of this anymore, this is like the latest that has not even gone to the media. It's like hush hush because who is going to say that Kenyan victims are saying they don't want to be part of ICC process ... In the cases of sexual violence what we know is that at some point when some of the field officers were having a conversation with me and saying please could you help, some women had disappeared. Some people were found dead, some people died from HIV which they acquired because you know ... it's 4–5 years down the line, with no medication and no proper food.

The above comment points to the ongoing decline of enthusiasm over the ICC process. Not only has the narrowing of the indictments led to the dropping of those eligible to be 'case victims', but the Trust Fund has yet to begin to implement projects in Kenya under its general assistance mandate. This has caused controversy and disappointment among victims and non-victims alike who are concerned with the absence of an ICC presence in the delivery of what they see as justice.

The Democratic Republic of the Congo

The history of violence in the DRC is long and complex. It is claimed that the Congolese civil wars caused the highest amount of deaths since World War II, with death tolls exceeding 5 million (3 million in conservative estimates).[53] More than 2.4 million internally displaced persons have been reported.[54] After two wars in the country in 1996 and 2003, and the government's failure to establish control and authority, the DRC has seen the proliferation of various armed groups, both local and foreign. These groups clash regularly with the Congolese army for power, in defence of their communities, and for the control of natural resources.[55] All parties to the conflict have been implicated in committing human rights abuses, including torture, sexual violence and the

[52] 'Kenya: Victims want Uhuru's ICC Trial Hurried', *allAfrica.com*, 4 April 2013.
[53] See 'US Congo Policy: Matching Deeds to Words to End the World's Deadliest War', Enough Project (2011); 'DR Congo war deaths "exaggerated"', *BBC*, 2010.
[54] '10 facts you should know about the crisis in the DRC', Amnesty International (2013).
[55] *Ibid.*

recruitment of child soldiers.[56] The DRC has been called the 'rape capital of the world', with various NGO reports commenting on what appears to be sexual violence committed on an unparalleled scale.[57]

In September 2003, the prosecutor informed states parties of his intention to open an investigation into the situation in the DRC using his *proprio motu* powers, but that a referral and the active participation of the authorities in the DRC would assist his office's work. In November 2003, the government of the DRC welcomed the Court's involvement in a letter, officially referring the situation to the Court in March 2004.[58] One month later, the Office of the Prosecutor (OTP) announced a decision to open an investigation.[59] As the first case to come before the ICC, in many ways Thomas Lubanga was a test case for victim participation. The Rome Statute defines 'victims' as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.[60] In determining whether to grant victims status and to allow them to participate at trial (albeit through a common legal representative), judges must examine the link between the harm suffered, the victim's personal interests and the charges against the accused. The Appeals Chamber later used a slightly broader definition to include harm experienced collectively.[61]

In *Lubanga*, 129 victims participated in the proceedings through a large team of representatives. The majority claimed that the harms they had suffered resulted from the enlistment and conscription and use of children under the age of fifteen to participate actively in hostilities, as well as other crimes such as sexual violence and torture.[62] Most of those who were classified as victims in the trial were former child soldiers. Notably, those who claimed to have suffered harm at the hands of these former child soldiers were not considered victims themselves for purposes of the trial.[63] The Trial Chamber held that those who suffered harm due to the conduct of the direct victims (those who had been enlisted, conscripted and used in hostilities) were excluded and could not be

[56] *Ibid.* [57] TFV Programme Progress Report (Winter 2012), 16.
[58] 'The Office of the Prosecutor opens its first investigation', ICC Press Release (23 June 2004).
[59] *Ibid.* [60] Rule 85 (a), International Criminal Court, Rules of Procedure and Evidence.
[61] Judgment pursuant to Article 74 of the Statute, *The Prosecutor* v. *Thomas Lubanga Dyilo* (*Lubanga*), ICC-01/04-01/06, Trial Chamber I, ICC, 14 March 2012, para. 14.
[62] *Ibid.*
[63] M. Pena, 'The Lubanga Case and Reparations for Victims of Sexual Violence', *ijcentral*, 2012.

considered indirect victims, as only victims of the charged crimes may qualify for participation.[64]

Whether the ICC will adhere to this same division in its approach to reparations remains to be seen, although a landmark decision on reparations, issued in 2012, once again stated that they could only be granted to those who had suffered harm as a result of the crimes for which Lubanga had been convicted.[65] A significant challenge for the Court to navigate will be the implementation of reparations and redress for victims while not contributing to further societal divisions or tension in the region. Child soldiers have been classified as the direct victims in the ICC's case, while locally, they may be perceived as perpetrators due to the often-heinous acts they committed on the civilian population under duress, and certainly not deserving of what may be perceived as a reward from the international community.[66]

To date the TFV's projects involve northern Uganda[67] and the DRC. The Court has approved 34 projects for both situations and some have either been phased out or completed.[68] These projects are described as providing support for over 110,000 victims of crimes 'through integrated physical and psychological rehabilitation and/or material support at both the individual and community levels'.[69] TFV programming in DRC targets eastern DRC and victims of such crimes between 2002 and the present day in North and South Kivu, and through 2005 in the Ituri region. The TFV supports victims through activities focused on psychological rehabilitation and material support.

Following an assessment in 2007, the TFV submitted a filing to the Pre-Trial Chamber for 16 assistance projects in the DRC to focus on

[64] Redacted Version of 'Decision on Indirect Victims', *Lubanga*, ICC-01/04-01/06, Trial Chamber I, ICC, 8 April 2009, para. 52.

[65] Pena, 'The Lubanga Case'.

[66] Decision establishing the principles and procedures to be applied to reparations, *Lubanga*, ICC-01/04-01/06, Trial Chamber I, ICC, 7 August 2012, paras. 44, 48.

[67] The TFV's northern Uganda assistance program has been administered in eighteen sub-districts within Acholi, Lango, Teso and West Nile sub-regions and through partnerships has provided services to an estimated number of 39,750 victims of crimes against humanity and war crimes ranging from survivors of sexual violence and child mothers, former abductees, former child soldiers and returnee communities, as well as acutely impacted communities ranging from widows/widowers and surviving family members, disabled persons and amputees, and disfigured and tortured persons.

[68] For details of the activities and status of these projects, see Annex 7, 'External Evaluation of the trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo', International Center for Research on Women (November 2013).

[69] *Ibid.*, 15.

psychological support, physical rehabilitation and material support for different categories of victims.[70] Since 2008 to date, the TFV's partners in eastern DRC have provided services to 72,700 victims of war according to various categories, such as survivors of sexual violence, child mothers, former child soldiers (male and female), girls formerly associated with armed groups, returnee communities, acutely impacted communities, disabled persons and amputees, disfigured and tortured persons and other vulnerable children and young people.[71] As Peter Dixon's chapter in this volume elaborates, the TFV identifies (or 'targets') its beneficiaries: It specifically identified victims within their mandate as individuals who have suffered gender-based violence including rape, forced pregnancy and sexual slavery, and has also involved the abduction and recruitment of girls, widows, orphans and vulnerable children into armed groups.[72]

As for the reparations mandate of the Trust Fund, it is likely that it will be implemented for the first time in the context of the DRC situation and the *Lubanga* conviction. With that judgment, not only are case victims expected to be awarded modest damages, but it will highlight the potential workings of a mechanism in which restorative justice can be observed alongside a judicial mandate. The challenge is that, as a result of the delays, many victims have complained that unmet expectations have produced a reality in which they fear that they have been used by the international system.

As a member of the OTP and the lawyer who represented nineteen victims from the DRC indicated in response to whether reparations should be given collectively or individually, 'Child soldiers are not a community . . . It is not like a village that has been victimized. They are very often in conflict with their own families. I cannot see my clients as a group. They are really individuals.' This focus on the need to provide individual victims with the means for rebuilding their lives articulates the centrality of the individual in the work of the Trust Fund. But the *Lubanga* conviction also shows that the Trust Fund is not necessarily a fund that will be used to offer reparations to all victims of all crimes throughout the DRC. Rather, the Trust Fund is constrained by the Rome Statute's legal mandate. The second mandate – known as the 'general assistance' mandate – is the second component of the TFV, and those working in this arena have been working in the eastern DRC (and

[70] *Ibid.*, 16. [71] *Ibid.*, 19–20.

[72] Trust Fund for Victims, 'Mobilising Resources and Supporting the Most Vulnerable Victims through Ear-marked Funding', Programme Progress Report (Winter 2012), 5.

northern Uganda) since 2008. They have been offering trauma counselling, vocational training, reconciliation workshops and reconstructive surgery to over 80,000 victims.

Unlike the seeming success of the general assistance mandate in the DRC, the Trust Fund has discontinued its work in the CAR in early 2013. This delay and the ongoing violence in the region has had implications for how victims have engaged with the ICC and their prospects for future engagement. This calls into question the encapsulation of victimhood in contemporary justice discourses in situations where the protection of the victim is limited to either the narrow judicial case designations or particular mandates that provide limited compensation and exclude the possibility for reordering structural inequalities.

Central African Republic

A series of attempted and successful coups d'états and a subsequent series of crises have marked CAR's history since obtaining independence from France in 1960.[73] Amnesty International has labelled CAR a 'volatile and unstable country', with the national security forces regularly clashing with various armed groups and factions.[74] Reported crimes have included killings, torture, sexual violence, looting and destruction of property, many of which amount to war crimes or crimes against humanity.[75] In 2002 several human rights organisations (both local and international) began to investigate the levels of violence and specific crimes committed in various regions in CAR, and relayed the evidence gathered to the ICC in February 2003.[76] On 22 December 2004, the government referred the situation in CAR (since 1 July 2002) to the ICC. Two-and-a-half years later, in May 2007, the prosecutor opened an investigation.

The prosecutor had received allegations of attacks on the civilian population including looting, killing and rape, and alleged that high levels of sexual violence had been a central and distinctive feature of

[73] P. Vinck and P. Pham, 'Outreach Evaluation: The International Criminal Court in the Central African Republic', *International Journal of Transitional Justice*, 4 (2010), 421.

[74] 'Central African Republic: Action Needed to End Decades of Abuse', Amnesty International (2011).

[75] *Ibid.*

[76] M. Glasius, '"We Ourselves, We Are Part of the Functioning": The ICC, Victims, and Civil Society in the Central African Republic', *African Affairs*, 108 (2009), 49; 'War Crimes in the Central African Republic: When the Elephants Fight, the Grass Suffers', International Federation for Human Rights (February 2003).

the conflict.[77] A record number of nearly 5,000 victims are participating in the case against Jean-Pierre Bemba Gombo, with the common legal representative team led by Edith-Marie Douzima-Lawson.[78] Victims have identified murder, theft, destruction of property and sexual violence as the key crimes committed against the population during the various conflicts in the region since 2002.[79] There are a reported 100,000 refugees from CAR in Cameroon, Chad and Sudan, and a further 100,000 internally displaced.[80]

Grave crimes falling within the jurisdiction of the ICC are seen to have been committed in CAR during 2002 and 2003 in particular. During this period, victims are alleged to have been raped and attacked by multiple assailants in public and in the presence of family members and some were subsequently killed. Ongoing violence has contributed to lengthy delays leading to questions about the viability of securing both restorative and retributive justice. In response to this problem with the delay, then prosecutor Luis Moreno-Ocampo insisted,

> The people of Central African Republic need to know the world has not forgotten them ... Our investigative activities in CAR can bring to the attention of the international community the terrible problems facing the people here and the need to address them urgently. We need comprehensive solutions for CAR and the support of all. International justice is one part of the solution.

Security concerns have stalled implementation of the Trust Fund's projects in CAR, however, whereas the bulk of the funding has gone to projects in northern Uganda and the DRC.

In comparison to the controversies surrounding other ICC investigations, some observers have argued that the CAR has been relatively receptive to the Court and that this is due to the high level of local civil society involvement in instigating the cases.[81] However, while the Trust Fund had planned to start activities in the CAR in 2013, it had to suspend all activities that year due to the political and security situation in the

[77] 'Background: Situation in the Central African Republic', Office of the Prosecutor, ICC (22 May 2007).

[78] 'Another 777 victims to participate in Bemba Trial', The Trial of Jean-Pierre Bemba Gombo, *ijmonitor.org*, 14 November 2013.

[79] P. Vinck and P. Pham, 'Building Peace, Seeking Justice: A Population-based Survey on Attitudes about Accountability and Social Reconstruction in The Central African Republic Reconstruction' (University of California, Berkeley Human Rights Center, August 2010).

[80] 'Trial Background', The Trial of Jean-Pierre Bemba Gombo, *ijmonitor.org*.

[81] Glasius, 'We Ourselves', 49.

country.[82] This delay and the ongoing violence in the region have had implications for how victims have engaged with the ICC and their prospects for future engagement. This calls into question the invocation of victim protection in contemporary justice discourses, especially in situations where the protection of those victimised by violence is limited to either the narrow judicial case designations or particular mandates that provide limited compensation and exclude the possibility for reordering structural inequalities.

In the Kenyan cases, victimhood is similarly based on clear violations against the human body. Through this conceptualisation of violence, it is the actual individual perpetrator of that violence that is the subject of the retributive mandate of the Court. In the case against Lubanga, the ICC's restorative mandate – a mandate whose reach might actually attend to the forms of structural and economic violence at the heart of various political contests – is significantly absent and not operating according to the structural needs of victims. These needs reflect a situation in which particular historical conditions of political marginalisation fostered particular types of vulnerable persons in the first place, and have become key to understanding the way that the contemporary neoliberal order has set in place the conditions for the individualisation of victimhood.

All of the foregoing examples of ICC cases under way highlight the way that the contemporary rule of law movement has worked through a particular window for parsing victimhood and a particular sentimentalism in the pursuit of justice through the defence of victims. Apart from the working of the TFV (which is operating only in select regions), this ethos of ICC justice today encapsulates the suffering of victims through a 'justice as the rule of law' discourse. This discourse motivates action through the defence of the indefensible – predominantly those victims of exceptional physical violence whose inflictions are related to those charges being pursued by the OTP against particular perpetrators. Through this constricted space of victimhood, ICC justice today has been propelled through an interest in the protection of the individual victim, and the merger of a new governance architecture with a new judicial mechanism for ensuring the institutionalisation of contemporary justice. It articulates expectations about our contemporary economy that clarify what our responsibilities are, what type of suffering is intolerable and how we can address those whose actions perpetrate violence.

[82] 'Trust Fund for Victims Suspends its Activities in the Central African Republic', Trust Fund for Victims, ICC (25 March 2013).

Ultimately, because the protection of the victim has been driven by particular economic interests tied to the protection of private property, it has necessarily individualised responsibility as well as who and what qualifies as a victim, thereby narrowing the terms for victimhood. This reality represents the new justice discourse and presumes the need for a social order by which justice can be procured through judicialisation. This chapter has outlined the way in which the development of justice as a mechanism for dealing with gross violations represents a recent phenomenon in which individual rights are attended to through the law, thereby excluding the various ways that more mundane forms of violence have been removed from spaces of protective entitlement. Those claiming to be victims of an unequal social order are not considered victims and thus are not legally deserving of those protections by the law. This reality explains why William Ruto's claim to victimhood falls short of rule-of-law sympathies and how the moral sentimentalities that emerged with the figure of the victim brutalised by the African-leader-perpetrator have gained influence through a particular interest in the management of state borders and private property. This duality is propelled through various international forms of legality that reflect the norms of the contemporary judicial order.

Juridified victimhood, juridification of justice – concluding thoughts

Over the past five years we have seen a spectacular growth of justice-related research, advocacy and funding to address the enormous gaps between the needs of post-violence victims and the provisions to meet them. Understanding how a domain of retributive justice meets the judicial and psycho-social-political and economic needs and expectations of various groups of victims is part of the challenge.[83] Much of the scholarship on transitional justice – as a pragmatic and scholarly mechanism to deal with political transitions for societies needing to address past human rights abuses – has focused on the importance of implementing particular measures for addressing such abuses. These have ranged from criminal prosecutions to reparations programs, truth commissions and various kinds of institutional reforms concerned with

[83] M. Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ: Princeton University Press, 2001).

democratic governance and rebuilding social trust, which are seen as necessary for repairing the social fabric of post-war-torn society.[84]

This literature has long been dominated by perceived dichotomies, such as that of peace versus justice, or retributive justice versus restorative justice. The debate, however, is now shifting towards an acceptance that it is not useful to ascribe either/or dichotomies to a rich, complex and, at times, seemingly contradictory reality.[85] Recent scholarship has instead sought to make the case that retribution and restoration are not mutually exclusive.[86] International courts and tribunals are not necessarily incapable of meeting the needs of victims, though there can at times be a vast difference between what victims need, expect or feel they are entitled to, and what the rigid framework of litigation can offer.[87] Recent scholarship has also suggested that it may not be the outcome of a particular judicial intervention that matters, be it punishment for the perpetrator or reparations for the victims, but rather the process and structures of power that determine what acts constitute victimhood, and how to reconcile the challenges around how victims are included and excluded. How are their views represented?[88] How are their needs met, and on what terms, based on what principles?

Today, a growing number of scholars have begun re-conceptualising the terms of justice through a broadening of the terms of victimhood by which justice may be innovatively articulated.[89] Some have pointed to ways in which the ICC could actually include more tangible

[84] Z. Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice', *International Journal of Transitional Justice*, 2 (2008), 266.

[85] W. Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence', *International Journal of Transitional Justice*, 3 (2009), 28, 47–48.

[86] K. Daly, 'Revisiting the Relationship between Retributive and Restorative Justice', in H. Strang and J. Braithwaite (eds.), *Restorative Justice: Philosophy to Practice* (Aldershot: Ashgate Dartmouth, 2000).

[87] T.M. Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice', *Stanford Journal of International Law*, 47 (2011), 279.

[88] T.G. Okimoto, M. Wenzel and N.T. Feather, 'Beyond Retribution: Conceptualizing Restorative Justice and Exploring its Determinants', *Social Justice Research*, 22 (2009), 156, 161.

[89] A. Boraine, 'Transitional Justice: A Holistic Interpretation', *Journal of International Affairs*, 60 (2006), 17, 19. See also J.N. Clark, 'The ICC, Uganda and the LRA: Re-Framing the Debate', *African Studies*, 69 (2010), 141; Secretary-General Report, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', UN Doc S/2004/616 (2004).

restorative-justice approaches, while others have shown that South Africa's Truth and Reconciliation Commission, though often seen as a model of restorative justice, included elements of retributive justice as well.[90] Such examples highlight the reality that the juridification of justice in the defence of victims is only one of many starting points for making sense of the contemporary order.

[90] J. Sarkin, 'Enhancing the Legitimacy, Status and Role of the International Criminal Court Globally by Using Transitional Justice and Restorative Justice Strategies', *Interdisciplinary Journal of Human Rights*, 6 (2011–2012), 83, 84; L. Allais, 'Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission', *Philosophy & Public Affairs*, 39 (2011), 331.